

Sayali Upasani

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 3780 OF 2023

Abdul Samad @ Shmmu Iqbal Shaikh ...Applicant

Vs.

The State of Maharashtra ...Respondent

SAYALI
DEEPAK
UPASANI

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Ms. Lochan Chandka, for Applicant.

Mr. Prashant Jadhav, APP for State-Respondent No. 1.

Mr. Bhosale, PSI, Mumbra Police Station, Present.

CORAM:- N. J. JAMADAR, J.

DATED:- 27th MARCH, 2024

PC:-

- 1) Heard the learned Counsel for the parties.
- 2) This application is preferred for bail in CR No. 307 of 2022 registered with Mumbra Police Station for the offences punishable under Sections 20 and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act, 1985).
- 3) On 5th April, 2022, specific information was received at Mumbra Police Station that a person was to come at Amrut Nagar, Mumbra to sell Mephedrone (MD). The police conducted surveillance. At about 3.55 pm, the applicant came near Rupsangam Jewelers, Amrut Nagar, Mumbra. His movements

appeared suspicious. He was accosted. The applicant was apprised of his right to be searched in the presence of a gazetted officer or Magistrate under section 50 of the NDPS Act, 1985. The applicant declined to avail the said right. His search was conducted in the presence of pancha witnesses. A transparent plastic pouch containing a white substance was found in the right pocket trouser of the applicant. It appeared Mephedrone (MD). It weighed 55 grams. The contraband article was seized and samples were collected. The applicant came to be arrested.

4) The learned Counsel for the applicant submitted that the provisions of Section 50 of the NDPS Act, 1985 have not been scrupulously complied with. Nor there is compliance with the mandatory provisions contained in Section 52 A of the NDPS Act, 1985. Samples were collected at the time of alleged seizure and the prosecution case would thus rest on the CA report based on the samples collected at the time of seizure. The learned Counsel further submitted that since the recovered substance along with the plastic pouch weighed 55 grams, it would be debatable whether commercial quantity was found in possession of the applicant.

5) The learned APP resisted the prayer for bail. It was submitted that there is substantial compliance of the statutory

provisions. Inviting the attention of the Court to the seizure panchanama, it was submitted that the contraband substance recovered from the possession of the applicant, weighed 55 grams and, therefore, the interdict contained in Section 37 of the NDPS Act, 1985, would come into play.

6) I have perused the material on record. Prima facie, it appears that the provisions contained in Section 50 of the NDPS Act, 1985 have not been scrupulously complied with. In the panchanama, it is recorded that the authorised officer disclosed to the applicant that he was a Gazetted Officer and had a right to conduct the search of the applicant. Thereafter, the applicant was further apprised that he had a right to be searched in the presence of a Magistrate or other Officer. In the appraisal memo, however, it is mentioned that the applicant was apprised that he has a right to be searched before the nearest Magistrate or Gazetted Officer.

7) Evidently, the authorised Officer had disclosed that he was the Gazetted Officer and was entitled in law to carry out the search. Such appraisal can not be said to be in complete conformity with the statutory mandate contained in Section 50 of the NDPS Act, 1985. Such appraisal has the propensity to give an impression that the suspect is being searched by Gazetted

Officer and, thereby dissuade the suspect from availing the right to be searched before the Gazetted Officer or Magistrate. In the case of **Vijaysinh Chandubha Jadeja Vs. State of Gujrat**¹, the Supreme Court observed, *inter alia*, as under:-

“...29. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

.....

31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor

1 2011 (1) SCC 609.

feasible to lay down any absolute formula in that behalf...”

8) Secondly, there appears to be total non compliance of the provisions contained in Section 52A of the NDPS Act, 1985. Neither inventory of the contraband seized from the applicant seems to have been conducted before the Magistrate, nor were the samples drawn before the Magistrate.

9) The samples of the contraband which were collected at the time of seizure appear to have been forwarded to the CA vide forwarding letter (pg. 65) dated 21st April, 2022.

10) By a series of decisions, the Supreme Court has emphasized that the compliance of the provisions of Section 52A of the NDPS Act, 1985 is mandatory and in the absence thereof there would be no primary evidence at the trial. (**Union of India V/s. Mohanlal and Anr**)². In a recent pronouncement in the case of **Mohd. Kalid and Others Vs. State of Telangana** **Crl. Appeal No. 1010 of 2023 dated 1st March, 2024**, the Supreme Court observed that CA report based on the samples collected at the time of the seizure and not in the presence of the Magistrate is bereft of any evidentiary value.

11) In view of the aforesaid infirmities, the interdict contained in Section 37(1)(b)(ii) may not operate. The Court is not informed

2 (2016) 3 SCC 379

that the applicant has antecedents. That would justify an inference that the applicant, if released on bail, will not indulge in identical offences. Resultantly, the twin test stands satisfied.

12) I am, therefore, inclined to exercise discretion in favour of the applicant.

13) Hence, the following order.

: O R D E R :

(i) The application stands allowed.

(ii) The applicant be released on bail in CR No. 307 of 2022 registered with Mumbra Police Station for the offences punishable under Sections 20 and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985, on furnishing a P.R. Bond in the sum of Rs.50,000/- with one or two sureties in the like amount, to the satisfaction of the trial Court.

(iii) The applicant shall mark his presence at the Mumbra Police Station, on the first Monday of every month between 10.00 am to 12.00 noon for a period of three years or till conclusion of trial, whichever is earlier.

(iv) The applicant shall not tamper with the prosecution evidence and/or give threat or inducement to the first

informant and any of the persons acquainted with the facts of the case.

(v) The applicant shall regularly attend the proceedings before the jurisdictional Court.

(vi) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the trial court shall not be influenced by any of the observations made hereinabove.

[N. J. JAMADAR, J.]