

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.3830 OF 2023

VISHAL
SUBHASH
PAREKAR

Akshaybar Ramnath Kushwaha

...Applicant

vs.

The State of Maharashtra

...Respondent

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Mr. Kamlesh Satre i/b. Mr. Vikas Chavan a/w. Mr. Nilesh Bangar, for
the Applicant.

Mr. Bapu Holambe-Patil, for Respondent No.1/State.

CORAM : N. J. JAMADAR, J.

DATE : MARCH 05, 2024

P.C.:

1. Heard the learned counsel for the applicant and the learned
APP for the State.

2. The applicant, who is arraigned in CR No. 18 of 2021
registered with DCB CID, Unit 5, for the offences punishable under
Section 20 (c) read with Section 8(c) of Narcotic Drugs and
Psychotropic Substances Act, 1985 (NDPS Act, 1985), has
preferred this application to enlarge him on bail.

3. On 17th June, 2021 a specific information was received at DCB
CID that a person was to come to MMRDA – Bhandup pedestrian
bridge, to sell Charas. After complying with statutory requirements
the raiding party conducted surveillance at the said place. At about
5.35 pm., the applicant, whose description matched the features

given by the informant, came near Best Bus Stop of Eastern Express Highway. He was carrying a black sack. His movements appeared suspicious. The applicant was thus accosted.

4. The applicant was apprised of his right to be searched in the presence of a Gazetted Officer or Magistrate. As the applicant declined to avail the said right, a search of the applicant was conducted. In the sack which the applicant was carrying five rectangular slabs were found. One of the slabs was tested by a testing kit. It turned out to be Charas. Rest four slabs were also tested. Each of the slabs appeared to be Charas. The contraband substance weighed 2.5 kg. The contraband articles were seized and samples were collected. The applicant came to be arrested.

5. Mr. Satre, the learned Counsel for the applicant submitted that the search and seizure was vitiated as all the contraband substance were mixed and thereafter the samples were collected. Collection of samples after mixing the contraband articles denudes the samples' representative character. Secondly, Mr. Satre would submit that there is non-compliance of the mandate contained in Section 52A of the Act, 1985 as the samples were collected at the time of seizure, not before the Magistrate. Therefore, inventory of

the articles and the samples before the Magistrate purportedly held on 2nd February, 2024 is of no assistance to the prosecution. It was submitted that the said inventory was conducted only after the applicant raised the said ground for bail. Such belated inventory is of no significance.

6. In opposition to this, the learned APP submitted that a huge commercial quantity of Charas was found in the possession of the applicant. There has been compliance with all the statutory provisions. Before the search, the applicant was apprised of his right to be searched before the Gazetted Officer or Magistrate. Inventory has also been held on 2nd February, 2024. Therefore, it cannot be said that there is non-compliance of the provisions contained in section 52A of the Act.

7. On the aspect of mixing of the slabs and thereafter the collection of the samples, Mr. Satre placed reliance on an order passed by this Court in the case of **Sameer Rais Shaikh vs. State of Maharashtra**¹. Reliance was also placed on an order passed by the Delhi High Court in the case of **Amani Fidel Chris vs. Narcotics Control Bureau**².

1 BA. No.2108/2023 Dt.03/11/2023.

2 Cri. M.A.No. 1660/2020 Dt. 13/03/2020.

8. In the case of **Sameer Shaikh** (supra), a learned single Judge of this Court after adverting to an earlier order in the case of **Parvez Haseen Khan vs. The State of Maharashtra**³ had observed, inter alia, as under:-

5] Learned counsel for the applicant invited my attention to the order dated 19.07.2023 passed by this Court in **Parvez Haseen Khan vs. The State of Maharashtra** (through A.N.C. Bandra Unit) in Bail Application No.3486 of 2021. This Court in paragraph 4 of the order dated 19.07.2023 has observed thus :-

4. The panchanama dated 25/11/2020 records that the investigating agency had mixed together the entire contraband contained in all the three bags and thereafter drawn three samples, one of which was forwarded to CFSL for analysis. The learned Single Judge of Delhi High Court in **Amani Fidel Chris** (supra) has held that "Mixing of the contents of container/package (in one lot) and then drawing the representative samples is not permissible under the Standing Orders and rightly so since such a sample would cease to be a representative sample of the corresponding container/package." It is stated that decision in **Amani Fidel Chris** (supra) was challenged by NCB before the Apex Court and that the Special Leave Petition has been dismissed by the Hon'ble Supreme Court. Similar view is taken by this Court in **Ibrahim Khwaja Miya Sayyed and Hari Mahadu Valse** (supra) and by **Telangana High Court in Baba Sow Chandekar** (supra)."

6] In my opinion the applicant is also entitled to the benefit of the said observations in the facts and circumstances of the present case. Furthermore the applicant was arrested on 26.01.2021 and is now in custody for more than two years and nine months. Even the charge has not been framed. The trial is likely to take a long time to conclude.

9. In the case of **Venktesh Shiva Permal vs. The State of**

3 BA.No. 3486/2021 Dt.19/07/2023

Maharashtra⁴, I had an occasion to elaborately consider the ground of mixing of the contents of all the packages and the collection of the samples thereafter, in the light of the judgments of the Supreme Court in the cases of **Union of India vs. Bal Mukund and Others**⁵; **Sumit Tomar vs. State of Punjab**⁶ and Standing Instruction No.1/88 and Standing Order No. 1/89. It was, inter alia, observed as under:-

34. As noted above, sub-clause (b) and (e) of the Standing Instructions 1/88 and sub-clauses 2.5 and 2.8 of the Standing Order 1/89 envisage bunching of packets / containers in lots and thereafter, drawing of representative sample from each packet / container of that lot and mixing together to make a composite whole from which the samples are drawn for that lot. However, the principal condition is that the officer effecting the seizure must find that the packets/containers seized together are of identical size and weight bearing identical marking and contents of each packet give identical results on colour test by drug identification kit, and, thus, conclusively indicate that the packages are identical in all respects.

35. Evidently, the underlying object of the Instructions is to ensure that the sample which is collected represents the bulk, unmistakably. Invariably, in pursuance of the provisions of the Act, and the Drug Disposal Rules, the bulk is disposed. When a person is sought to be fastened with liability for possessing a particular quantity of contraband, in bulk, on the basis of the sample collected, the Court ought to have the assurance that the sample so collected represented the entire bulk. The insistence on collecting samples from each of the packets and containers stems from this objective.

36. In a situation of present nature, where the seizure panchanama does not indicate that the packets were identical and the contents were also identical and the officer effecting search had satisfied

4 BA No. 3784 of 2023 Dt.23/01/2024.

5 Cri. Appeal No. 1397 of 2007 Dt. 31/03/2009.

6 (2013) 1 SCC 395.

himself that the packets were identical in all respects, the mixing of the contents and thereafter collecting the samples from the said mixture, without anything more, erodes the sanctity of the samples so collected as representative samples of the bulk.

10. In the case at hand, the seizure panchanama records that all five slabs allegedly containing Charas were mixed together and weighed. Indeed the seizure panchanama records that the seized contraband appeared to be similar. It further records that the authorized officer had scraped the slabs and collected the samples of each of the five slabs and thereafter two samples weighing 25 gms each were collected.

11. Evidently, the samples so collected were mixed together. It does not appear to be the prosecution case that the samples of each of the slabs were separately collected. Therefore, the submission on behalf of the applicant that the samples so collected do not represent the bulk recovered from the applicant, cannot be brushed aside lightly. The question whether the samples so collected would cease to be the representative sample of all five slabs allegedly recovered from the applicant would be in the realm of controversy.

12. The second ground of non-compliance of the provisions contained in section 52A of the NDPS Act, 1985 stands on an even

better foundation. As submitted by the learned APP, the inventory was held on 2nd February, 2024. It implies that the prosecution of the applicant hinges upon the report of the chemical analyst, qua the samples which were collected at the time of alleged seizure and forwarded to the chemical analyst. The report of C.A. dated 20th September, 2021 indicates that the sample which was collected at the time of seizure was forwarded to C.A vide letter dated 18th June, 2021 and the said sample marked (Exh-A1) was analyzed by C.A.

13. It would be contextually relevant to note that the learned Magistrate while issuing certificate under section 52A(3) of the NDPS Act, 1985 has categorically recorded that it appears that the investigating officer had already drawn a sample and forwarded the same to C.A. and out of the remaining contraband article, the investigating officer proposed to draw one reserve sample under the said inventory. Thus, the inventory of remaining contraband article was prepared in the presence of the learned Magistrate.

14. In the case of **Union of India vs. Mohanlal and Another**⁷ the Supreme Court, inter alia, observed as under:-

17] The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above

7 (2016) 3 Supreme Court Cases 379.

scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

15. Following the aforesaid pronouncement, in the recent decisions, the Supreme Court has emphasized that the compliance of the provision contained in section 52A is mandatory and the C.A report in respect of the samples drawn otherwise than before the Magistrate as mandated by section 52A may not command probative value.

16. In the case of **Yusuf @ Asif vs. State**⁸ following the aforesaid judgment in the case of **Mohanlal** (supra) the Supreme Court held as under:-

15] In Mohanlal's case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.

8 Cri. Appeal No. 3191 of 2023 Dt.13/10/2023.

16] In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.

17. In the latest judgment dated 1st March, 2024 in the case of **Mohammed Khalid and Anr. vs. The State of Telangana**⁹ the Supreme Court observed that since no proceedings under section 52A of the NDPS Act, 1985 were undertaken by the Investigating Officer for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate, the FSL report was nothing but a waste paper and cannot be read in evidence.

18. Evidently, in the case at hand, the provisions contained in section 52A were not complied with immediately after the seizure of the contraband articles. The endeavour of the prosecution to have an inventory of the contraband substance allegedly recovered from the applicant after more than two and half years of the seizure of the contraband substance does not salvage the position.

19. The submission of Mr. Satre that the prosecution would be

9 Cri.Appeal No, 1610/2023 Dt.01/03/2024.

required to bank upon C.A report, issued by the C.A on the basis of analysis of the samples which were allegedly collected on 17th June, 2021 appears to carry conviction. In any event, the applicant has been in custody since 17th June, 2021. A period of 2 years and 8 months has elapsed. The trial will take considerable time. The Court is informed that the applicant has no antecedents. In the light of the aforesaid grounds and in the facts of the case, in my view, the interdict contained in section 37(1)(b)(ii) does not constitute an impediment in releasing the applicable on bail.

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

Hence, the following order.

ORDER

1] The application stands allowed.

2] The applicant Akshaybar Ramnath Kushwaha be released on bail in C.R. No.18 of 2021 registered with DCB CID, Unit 5, on furnishing a P.R. Bond of Rs. 1,00,000/- with one or more sureties in the like amount.

3] The applicant shall mark his presence at DCB CID, Unit 5 on the first Monday of every month in between 11 am to 1 pm for a period of three years or till conclusion of the trial

whichever is earlier.

4] The applicant shall not tamper with the prosecution evidence and give threat or inducement to first informant, any of the prosecution witnesses or any person acquainted with the facts of the case.

5] The applicant shall furnish his contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.

6] The applicant shall regularly attend the proceedings before the jurisdictional Court.

7] By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the 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.

Application disposed.

(N. J. JAMADAR, J.)