

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.3815 OF 2023

Sabat Mehtab Khan	...Applicant
vs.	
The State of Maharashtra	...Respondent

Mr. Ayaz Khan, for the Applicant.
Mr. S. R. Agarkar, APP, for the Respondent/State.
Mr. Ulhas Kholan, ANC, Kandivali, Mumbai.

CORAM : N. J. JAMADAR, J.
DATE : APRIL 23, 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 C.R. No. 5 of 2023 registered with Anti Narcotic Cell, Mumbai for the offences punishable under sections 21(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act, 1985), seeks to be enlarged on bail.
3. On 20th January, 2023 while ANC police were on patrolling duty near Vakola bridge, North Lane, Western Express highway, Santacruz (w), Mumbai the applicant was found standing in a suspicious state, alongwith a black carry bag. The applicant was accosted. After apprising the applicant of his right to be searched in presence of nearest Magistrate or Gazetted Officer, the search was

carried out. In the black carry bag which the applicant was carrying, another transparent bag containing a brownish substance was found. Said substance was tested with the assistance of drug detection kit. The test was positive for heroine. The contraband substance weighed 275 gms. It was seized and labeled 'A'.

4. The applicant made a disclosure statement and led the police party to room No. 712, Rizwi building, Mahatma Phule Nagar, Santacruz (w) which was stated to be residence of the applicant and took out a plastic carry bag from below kitchen platform. The said carry bag also contained heroine. It weighed 50.01 gms. It was seized, sealed and labeled 'C'.

5. During the investigation, Amir Hussain (accused No. 2) came to be arrested and 11 gms heroine was recovered from his possession. Amir Hussain (accused No. 2) made disclosure leading to recovery of 18.7 gm heroine from the premises allegedly owned by Parvez Mohammad, wanted accused. Post completion of investigation, charge sheet came to be lodged.

6. Mr. Ayaz Khan, the learned counsel for the applicant submitted that the very search and seizure is demonstrably false. It was submitted that the applicant had filed application before the Special Judge and the CDR record of the applicant's mobile phone was directed to be produced. It was submitted that the material on

record would indicate that at the time of alleged search and seizure i.e. 21.40 hours on 20th January, 2023, the applicant was near Kolivery Village, Kunchi Kurve Nagar, Kalina, Mumbai which is 20 kms away from the spot wherefrom the applicant was allegedly apprehended alongwith contraband substance. It was submitted that 3 sets of evidence substantiate the said fact, namely, CCTV footage, Whatsapp communication between the applicant and Mohd. Anwar Hasan and the CDR records.

7. Secondly, Mr. Ayaz Khan, the learned counsel, urged that there was non-compliance of the provisions contained in section 42 of the NDPS Act, 1985 and, thirdly, there was inordinate delay in conducting the inventory before the jurisdictional Magistrate under section 52A of the NDPS Act, 1985. Lastly, the absence of the second set of signatures of investigating officer and panchas on the label pasted on the seized articles indicates that there was no seizure, as alleged. As a corollary, the inventory which was carried out before the learned Magistrate was not in relation to the contraband which was allegedly seized under the seizure panchanama.

8. Mr. Agarkar, learned APP, resisted the prayer for bail. It was submitted that none of the grounds sought to be urged on behalf of the applicant merit countenance at this stage. The defence of alibi is

a matter for evidence and trial. At this stage, the Court cannot delve into the material sought to be produced on behalf of the applicant to demonstrate that the applicant was somewhere else. It was submitted that there is scrupulous compliance of the provisions contained in section 52A of the NDPS Act, 1985. Since the seizure was effected at a public place, the provisions contained in section 42 of NDPS Act, 1985 have no application at all.

9. The last submission of learned APP deserves consideration first. Evidently, the seizure panchanama indicates that the applicant was allegedly accosted on the Northern flank of Western Express highway. The provisions contained in section 42 of the NDPS Act, 1985 thus have no application as the seizure was effected at a public place (**Karnail Singh v. State of Haryana**¹).

10. The decision of the Supreme Court in the case of **Krishna Kanwar @ Thakuraeen v. State of Rajasthan**², on which reliance was placed by the learned counsel is of no assistance to the applicant as in that case, the Courts after evaluation of evidence had recorded finding that the provisions of section 42(2) of the NDPS Act, 1985 were not complied with as the house of the accused therein were straightaway searched and there was non-compliance of section 50 of the NDPS Act, 1985.

1 (2009) 8 Supreme Court Cases 539.

2 2004 (2) SCC 608.

11. Mr. Ayaz Khan made an endeavour to draw home the point that the CCTV footages and the CDR, which indicate that at the time of the alleged seizure the applicant was far away at Kolivery Village, can be looked into at this stage also. It was submitted that the CDR record has been produced by Telecom services provider pursuant to the order passed by the Court. Thus, the said material can be legitimately considered even at the stage of grant of bail. A strong reliance was placed on an order passed by this Court in the case of **Santosh Ramnaresh Prasad v. State of Maharashtra**³ wherein, according to Mr. Ayaz Khan, this Court had considered the CDR which indicated that the accused therein was at a place different than the one alleged by the prosecution.

12. I have perused the order passed in **Santosh Prasad** (supra). In that case, a submission was made on behalf of the prosecution that the tower location of the accused therein was shown at Chembur as, after arrest, the investigating officer had gone to the said place at Chembur along with the applicant and the latter's mobile phone. This Court found that the said stand of the prosecution was not borne out by the material compiled by the prosecution during the course of investigation. Thus, the Court opined that the absence of such material created a doubt as to whether the applicant was really arrested at Thane.

3 BA.No.1253 of 2022 Dt. 16/06/2023.

13. I am afraid the aforesaid order is of no assistance to the applicant. In the said case, the discrepancy about the presence of the accused therein arose from the prosecution case itself. In the case at hand, the applicant wants the Court to evaluate the material which is in the nature of defence evidence and draw an inference that the alleged search and seizure did not take effect. The course, the applicant desires the Court to take, is simply impermissible at this stage. It would be the matter for evidence and trial as to whether on the basis of the material which the applicant presses into service, an inference can be drawn that the applicant was not apprehended at the place which the prosecution alleges.

14. This takes me to the aspect of delay in the proceedings under section 52-A of the NDPS Act.

15. The seizure was effected on 20th January, 2023. It appears that the inventory before the jurisdictional Magistrate was conducted on 4th May, 2023. Prima facie, there was an interval of time between the seizure and the proceedings before the learned Magistrate under section 52-A of the NDPS Act, 1985. However, the matter is required to be appreciated from the perspective of the steps taken by the investigating officer post seizure.

16. Under the provisions of section 52-A of the NDPS Act, 1985, the empowered officer is enjoined to prepare an inventory of the

contraband substance and make an application to the Magistrate for the purpose of certifying correctness of the inventory so prepared and also to allow to draw sample of such drug or substance in the presence of Magistrate and certify the correctness of any list or sample so drawn. Sub section (3) of section 52-A of the NDPS Act, 1985 provides that where an application is made under sub-section(2), the Magistrate shall as soon as may be, allow the application.

17. It has to be seen whether the investigating officer took steps to comply with the mandate contained in section 52A of the Act promptly. The search was effected on 20th January, 2023. It appears that on the very next day i.e. on 21st January, 2023 itself, the investigating officer applied to the jurisdictional Magistrate to conduct the proceedings under section 52A of the NDPS Act, 1985 (page 135). It seems the said application was followed by another requisition on 27th January, 2023 (page 137). Evidently, the delay is not attributable to the investigating agency.

18. In the case of **Union of India v. Mohanlal and Another**⁴, the Supreme Court while emphasizing necessity of expeditious proceedings under section 52A of the NDPS Act, 1985, refrained from prescribing the time limit for conducting the proceedings by jurisdictional Magistrate under section 52A of the NDPS Act, 1985.

4 (2016) 2 Supreme Court Cases 379.

19. In any event, in the case at hand, there is prima facie material to indicate that the contraband article was kept in, and retrieved from, safe custody. Therefore, I am not inclined to accede to the submission that the delay in conducting the proceedings under section 52A of the NDPS Act, 1985, in the circumstances of the case, is such that the applicant deserves bail.

20. The last ground of the labels not bearing second set of signatures of panch witnesses and investigating officer, after the applicant had put signatures on the labels, as indicated in the panchanama, is again a matter for evidence. The discrepancy, if any, cannot be said to be as such to sustain a finding that there is a substantial probable cause to believe that the applicant may not be guilty of the offences for which he has been arraigned.

21. In my view, in the facts of the case, the interdict contained in section 37 of the NDPS Act, 1985 applies with full force and vigor. Therefore, the applicant does not deserve to be enlarged on bail.

Hence, the following order.

ORDER

1] The application stands rejected.

2] 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.

(N. J. JAMADAR, J.)