

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.4047 OF 2023

Abdul Kadar Shaikh ...Applicant

vs.

Union of India
(Through Narcotic Control Bureau) ...Respondent

Mr. Kushal Mor a/w. Mr. Tanvir K. i/b. Mr. Apoorv Srivastava, for the Applicant.

Mr. Shreeram Shirsat, Special PP a/w. Ms. Tanvi Mate, for Respondent No.1- UOI.

Ms. Supriya Kak, APP, for the Respondent/State.

CORAM : **N. J. JAMADAR, J.**
RESERVED ON : **APRIL 01, 2024**
PRONOUNCED ON : **MAY 07, 2024**

P.C.:

1. Heard the learned counsel for the parties.
2. The applicant, who is arraigned in C.R. No. 94 of 2021 registered with Narcotics Control Bureau, Mumbai for the offences punishable under sections 20(b)(ii)(A), 21(b), 22(b), 22(c), 25, 27, 28, 29 and 35 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act, 1985), seeks to be enlarged on bail.
3. On 2nd October, 2021 the officers of the NCB effected seizure of narcotic substance from the co-accused at International Cruise Terminal, Green Gate, Mumbai. The co-accused made disclosures. Mohak Jaiswal, one of the co-accused, named the applicant as one of the peddlers.

4. Pursuant to an intimation, on 3rd October, 2021 at about 7.40 pm, a surveillance was mounted opposite Shoopers Stop Mall, Juhu Link Road, Mumbai. The applicant, whose features matched the description given by the informant, arrived near the bus pick up shed. The applicant was accosted. He was apprised of his legal right to be searched before the nearest Magistrate or gazetted officer under section 50 of the NDPS Act, 1985. The applicant volunteered to be searched by the NCB officials. In the search of the applicant, two transparent zip lock polythene pouches consisting of 2.5 gms tablets purported to be Ecstasy pills (MDMA) and 54.3 gms off white crystalline powder purported to be Mephedrone (MD) were found. The contraband articles were seized. The applicant came to be arrested on 4th October, 2021 at about 6.00 pm.

5. Mr. Kushal Mor, the learned counsel for the applicant, submitted that the applicant has been falsely roped in as is evident from the material on record. The alleged search of the contraband substance from the possession of the applicant is thoroughly vitiated on account of non-compliance of the mandate contained in section 50 of the NDPS Act, 1985, on two counts. First, the appraisal memo does not specifically inform the applicant that he has a legal right to be searched 'only' before the nearest Magistrate or Gazetted officer and, second, despite the applicant not availing the

right to be searched before the Magistrate or Gazetted officer, it was incumbent upon the NCB officials to conduct the search before the Gazetted officer. To lend support to the first submission, reliance was placed on the decision of this Court in the case of **Sholadoye Samuel Joy vs. The State of Maharashtra**¹ and in respect of the latter submission reliance was placed on a decision of the Supreme Court in the case of **Arif Khan @ Agha Khan vs. State of Uttarakhand**².

6. Secondly, no credence can be given to the search and seizure as Aadil Usmani, the alleged panch witness, is a stock witness of the NCB and he has acted as a panch in as many as 17 other crimes. Mr. Mor further submitted that the CCTV footages at the place of seizure indicate that the panch witness entered at the alleged spot of recovery with a bag in his hand and, subsequently, rode away on the applicant's scooter. Thirdly, there is non-compliance of the mandate contained in section 52A of the NDPS Act, 1985 as those proceedings were carried out belatedly on 4th December, 2021. The delay of almost two months in drawing the samples gives rise to the issue of safe custody of the seized substance during the intervening period. Fourthly, the CA report indicates that the sample which was received for analysis contained brown powder as against white

1 BA No.2295 of 2021 Dt. 20/01/2022.

2 (2018) 18 Supreme Court Cases 380.

powder allegedly recovered from the possession of the applicant. Lastly, it was submitted that the applicant has been incarcerated for more than 28 months. Rest of the accused have been released on bail. In the backdrop of the number of accused and the evidence which the prosecution is required to adduce at the trial it is extremely unlikely that the trial can be concluded in a reasonable period. Thus on the count of long incarceration as well, the applicant deserves to be enlarged on bail.

7. Mr. Shirsat, the learned Special PP, countered the submissions on behalf of the applicant. It was urged that there is no requirement in law that a suspect be informed that he has legal right to be searched 'only' before the Magistrate or Gazetted officer. The decision of this Court in the case of **Sholadoye Joy** (supra) is per incuriam the Supreme Court judgment in the case of **State of Punjab vs. Baldev Singh**³ and **Vijaysinh Chandubha Jadeja v. State of Gujarat**⁴.

8. In the case of **Vijaysinh Jadeja** (supra), the Supreme Court nowhere enunciated that the suspect should be apprised that he has right to be searched 'only' before the Magistrate or Gazetted officer. **Vijaysinh Jadeja** (supra) further enunciates in clear and explicit terms that, "the suspect may or may not choose to exercise the

3 (1999) 6 Supreme Court Cases 172.

4 (2011) 1 Supreme Court Cases 609.

right provided to him under the provision of NDPS Act, 1985. Therefore, it can not be urged that even though the suspect declined to avail the right under section 50 of the NDPS Act, 1985, there is still an obligation on the investigating officer to have the suspect searched before the gazetted officer. Mr. Shirsat submitted that this position has been clarified by the Delhi High Court in the case of **Nabi Alam v. State (Govt. of NCT of Delhi)**⁵. In the context of the decision of the Supreme Court in the case of **Arif Khan @ Agha Khan v. State of Uttarakhand**⁶ on which reliance was placed by Mr. Mor.

9. Mr. Shirsat, further submitted that the weight to be attached to the evidence of the panch witness would be a matter for trial. At this stage, a panch witness can not be branded as a liar for having acted as a panch in other cases. To this end, Mr. Shirsat placed reliance on the Division Bench judgment of this Court in the case of **Shaukat Ali Sayyed Rashid v. State of Maharashtra**⁷ and a judgment of a learned single Judge in the case of **Sultan Ahmad Abdul Rauf v. State of Maharashtra**⁸. The challenge to the seizure, on behalf of the applicant, based on the CCTV footages was also stated to be a matter for trial.

10. Mr. Shirsat, learned Spl. PP would further urge that there is

5 2021 SCC OnLine Del 3055.

6 (2018) 18 Supreme Court Cases 380.

7 2000 (2) Mh.L.J. 175.

8 2019 SCC OnLine Bom 7584.

scrupulous compliance of the mandatory provisions contained in section 52A of the NDPS Act, 1985 and, in fact, the investigating officer has made the application before the jurisdictional Magistrate on 18th November, 2021. Thus, the applicant can not draw any mileage from the fact that there was an interval of time between the seizure and proceedings under section 52A, before the learned Magistrate.

11. In any event, there is material to show that the contraband remained in a sealed state with the custodian of the muddemal property during the interregnum. This evidence, according to Mr. Shirsat, also constitutes an answer to the ground of change in the colour of the substance of the sample which was received for analysis by CFSL. Mr. Shirsat made an endeavour to urge that by the passage of time, the colour of the contraband substance suffered a change.

12. I have given anxious consideration to the rival submissions. With the assistance of the learned counsel for the parties, I have perused the material on record.

13. Prima facie, there appears to be compliance of the provisions contained in section 50 of the NDPS Act, 1985. The appraisal memo dated 3rd October, 2021 clearly records that the suspect had a right to tender personal search before the nearest Magistrate or Gazetted

officer. It appears that the applicant volunteered to be searched by NCB officials. It is true, the word 'only' does not find mention in the appraisal memo. In the case of **Sholadoye Joy** (supra), on which reliance was placed by Mr. Mor, a learned single judge of this Court, after adverting to the decision of **Vijaysinh Jadeja** (supra), observed that it is imperative on the part of the police officer to apprise the suspect of his vested right to be searched 'only' by a Gazetted Officer or a Magistrate.

14. The submission of Mr. Shirsat, the learned Special PP, that the aforesaid observation is per incuriam the decisions in **Baldev Singh** (supra) and **Vijaysinh Jadeja** (supra) need not be delved into elaborately by referring to doctrine of per incuriam. It would be suffice to note whether the proposition that the appraisal of the right to be searched, "only" before the Magistrate or a Gazetted officer flows from the decision in the case of **Vijaysinh Jadeja** (supra) from which this Court purportedly drew support in the case of **Sholadoye Joy**(supra).

15. In In the case of **Vijaysinh Jadeja** (supra), the Constitution Bench enunciated 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 authorized 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.

(emphasis supplied)

16. Evidently, the Supreme Court has not used the word, “only”. It was in paragraph 6 of the judgment in the case of **Vijaysinh Jadeja** (supra) wherein the Supreme Court noted the submission on behalf of the appellant that the suspect has a vested right to be searched, ‘only’ by the Gazetted officer or a Magistrate.

17. Thus, I find substance in the submission of Mr. Shirsat that the appraisal cannot be faulted at for the absence of the word, “only” before the nearest Magistrate or gazetted officer.

18. The matter can be looked at from another perspective. In the case of **Baldev Singh** (supra), the Supreme Court has ruled that it is not necessary to give the information to the person to be searched about his right in writing. It is sufficient if such information is communicated to the concerned person orally and as far as possible in the presence of some independent and respectable persons

witnessing the arrest and search. Therefore, the absence of the word ‘only’ does not detract materially from the appraisal memo.

19. The second limb of the submission of Mr. Mor that despite the applicant having declined to avail the right, it was incumbent upon the investigating officer to search the person of the applicant in the presence of Magistrate or a gazetted officer on the strength of the decision in the case of **Arif Khan** (supra) also does not merit countenance. In the case of **Vijaysinh Jadeja** (supra), in paragraph 29 of the judgment, the Constitution Bench has, in terms, enunciated that ‘thereafter the suspect may or may not avail the said right’.

20. This position has been recently clarified by the Supreme Court in the case of **Ranjan Kumar Chadha v. State of Himachal Pradesh**⁹ in the following words:

61] The observations made in Arif Khan (supra) are in direct conflict with the Constitution Bench decision of Baldev Singh (supra).

62] We are of the view that the decision of this Court in Arif Khan (supra) cannot be said to be an authority for the proposition that notwithstanding the person proposed to be searched has, after being duly apprised of his right to be searched before a Gazetted Officer or Magistrate, but has expressly waived this right in clear and unequivocal terms, it is still mandatory that his search be conducted only before a Gazetted Officer or Magistrate.

(emphasis supplied)

21. An endeavour on the part of the applicant to throw a cloud of

9 2023 SCC OnLine SC 1262.

doubt over the search and seizure by referring to CCTV footages, at this stage, does not commend itself. That would be a matter for evidence and trial.

22. On the aspect of Adil Usmani being a stock panch, though the applicant has placed on record documents to indicate that Adil Usmani has acted as panch witness for the NCB in as many as 17 crimes, under a year, which may give rise to an inference that Mr. Adil Usmani is at the beck and call of the police, yet, the weight to be attached to the testimony of Adil Usmani, would be a matter for trial. I do not consider it necessary to delve into the decisions cited by Mr. Mor and Mr. Shirsat in respect of the rival submissions as the issue boils down to the weight to be attached to the testimony of such a witness. Nonetheless, the Court can not simply brush aside the fact that Adil Usmani has acted as a panch witness in so many cases. If there are concomitant circumstances, the fact that a premier agency employs the same panch witness in a number of crimes may impair the search and seizure, in a given case.

23. The aspect of delay in conducting the proceedings under section 52A of the NDPS Act, 1985 is required to be appreciated in the light of the obligation of the empowered officer under section 52A(2) of the NDPS Act, 1985 and the duty cast on the Magistrate under sub section (3) of Section 52A. In the case of **Union of India v.**

Mohanlal and Another¹⁰, the Supreme Court has enunciated that,

“There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52A.

(emphasis supplied)

24. In the case at hand, the seizure was effected on 3rd October, 2021. The investigating officer, it appears, made an application before the jurisdictional Magistrate on 18th November, 2021. The proceedings before the learned Magistrate were conducted on 4th December, 2021. There is element of delay on the part of investigating officer, in seeking the certification of the inventory of the contraband and drawing of samples thereof.

25. In the case at hand, this interval of time between the seizure and inventory assumes significance in the context of the fact that the examination report issued by CFSL dated 21st February, 2022, indicates, inter alia, that the Exhibit M1, a transparent zip lock bag containing brown colour powder, stated to be 5 gm MD, was

10 (2016) 3 Supreme Court Cases 379.

received for analysis, though the sample which was drawn from the contraband allegedly recovered from the person of the applicant was allegedly a white colour powder substance as recorded in the seizure panchanama. Prima facie, there is discrepancy in the description of the contraband which was allegedly seized from the applicant and sample collected therefrom, and the sample which was received for analysis by the CFSL.

26. Mr. Shirsat, the learned Special PP, attempted to salvage the position by canvassing a submission that colour of the sample could change as it was exposed to air during the process of inventory and sampling. Though the submission appears alluring at the first blush, yet, it would require evidence to bolster up the submission that there was possibility of such change in colour by the passage of time. It is in this context, the aspect of delay in conducting the inventory of the seized substance and drawing of samples before the Magistrate and the analysis of the sample by the CFSL assumes critical salience.

27. As the identity of the sample is in the corridor of uncertainty, and the complicity of the applicant is primarily based on the seizure of the contraband from the applicant, a prima facie case to hold that eventually the applicant may not be found guilty of the offences can be said to have been made out.

28. In any event, the applicant has been in custody since 4th October, 2021. The applicant has been incarcerated for 2 and half years. I find substance in the submission of Mr. Mor that having regard to the number of accused arraigned in the crime, and the evidence which the prosecution may be required to be adduce to bring home the charge against the accused, it is extremely unlikely that the trial can be concluded within a reasonable period.

29. It is well neigh settled that a long period of incarceration without a realistic prospect of expeditious conclusion of the trial renders the detention of the accused as an undertrial prisoner foul of the right to speedy trial; a facet of right to life and personal liberty guaranteed under Article 21 of the Constitution of India. It has been held that the statutory restrictions in the matter of granting bail, like the one under section 37 of the NDPS Act, 1985, melt down in the face of such prolonged period of incarceration without the prospect of expeditious conclusion of the trial. (**Union of India vs. K.A. Najeeb**¹¹).

30. A useful reference in this context can also be made to a decision of the Supreme Court in the case of **Rabi Prakash v. The State of Odisha**¹², wherein the Supreme Court observed that,

“The prolonged incarceration, generally militates against the most precious fundamental right

11 (2021) 3 SCC 713.

12 Spl. Leave to Appeal (Cri.) No. 4169 of 2023

guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under section 37(1)(b) (ii) of the Act.

31. The Court is not informed that the applicant has antecedents.

Thus, the Court may be justified in drawing an inference that the applicant may not indulge in identical activities if enlarged on bail.

32. For the foregoing reasons, I am persuaded to hold that the applicant deserves to be enlarged on bail.

Hence, the following order.

ORDER

1] The application stands allowed.

2] The applicant be released on bail in C.R. No. 94 of 2021 registered with Narcotics Control Bureau, Mumbai 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 NCB, Mumbai on the first Monday of every month 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.)