



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO.4048 OF 2023

Lakshman Kumar s/o Anirudh Saw ... Applicant
versus
The State of Maharashtra ... Respondent

Mr. Ayaz Khan with Ms. Mallika Sharma, for Applicant.
Mr. Prashant Jadhav, APP for State.
API Pallavi Dhage Patil, Crime Branch Unit No.5, Thane, present.

CORAM: N.J.JAMADAR, J.

**RESERVED ON : 23 APRIL 2024
PRONOUNCED ON : 9 MAY 2024**

P.C.

1. This is an application for bail in connection with C.R.No.90 of 2023, registered with Shreenagar Police Station, Thane, for the offences punishable under Sections 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.
2. On 31 March 2023, specific information was received that a named Nigerian national, was to come in front of Shivsena Office, Indira Nagar, Wagle Estate, Thane by autorikshaw to sell cocaine. A surveillance was mounted. At about 17.15 p.m., Ignok Ajah (A1), whose features matched the description given by the informant, came in front of Shivsena Office, in an autorikshaw. He was accosted. The applicant was driving the said rikshaw. The applicant was also accosted. The applicant and accused No.1 were apprised of their right to be searched before the nearest Magistrate

or Gazetted Officer under Section 50 of the Act, and, thereafter, a search was conducted. In the search of accused No.1, a transparent plastic pouch containing white substance was found. It was tested with the drug detention kit. It tested positive for cocaine. It weighed 105 gms. In the search of the applicant also, 10 gms cocaine was found. The contraband articles were seized and samples were collected.

3. Mr. Khan, learned Counsel for the applicant, submitted that the search and seizure was vitiated as there was a complete non-compliance of the statutory mandate contained in Sections 50 and 52-A of the Act, 1985. Moreover, there is no material to establish a nexus between the applicant and accused No.1. The applicant has been falsely roped in for the only reason that the applicant was driving the rikshaw in which the accused No.1 had reached the spot where he was allegedly apprehended with contraband articles.

4. Mr. Khan invited attention of the Court to the seizure panchanama wherein it is recorded that the Authorized Officer informed the applicant that he can demand his search to be conducted before the nearest Magistrate or Gazetted Officer. It was urged that the applicant was not informed that he has a legal right to be searched before the nearest Magistrate or Gazetted Officer. Mr. Khan also invited attention of the Court to the appraisal memo (page 42) which records that the applicant was apprised that he can demand his personal search and that of his house before the nearest Magistrate or Gazetted Officer.

5. Mr. Jadhav, learned APP submitted that there is scrupulous compliance of the mandate contained in Section 50 of the Act. The fact that the appraisal memo refers to the house of the applicant also, does not detract materially from the said appraisal, submitted Mr. Jadhav.

6. I find substance in the submission of Mr. Jadhav. The Panchanama records that the applicant was apprised about his right under Section 50 of the Act. It is true, in the appraisal memo, apart from the person of the accused, there is a reference to the house of the applicant. However, that, by itself, does not erode the value of the appraisal of the right to the applicant under Section 50 of the Act. Appraisal memo (page 42) bears the signatures of the panch witnesses and an endorsement by the applicant that the police can conduct his search.

7. The ground of non-compliance of Section 52-A of the Act, however, carries substance. The seizure panchanama records that 105 gms of cocaine was found in possession of the co-accused. The IO weighed the contraband substance and collected samples at the time of the seizure and marked those samples as Exhibits A1 and A2. Likewise, out of the contraband of 10 gms cocaine allegedly found in possession of the applicant, samples of 1 gm each were collected and marked Exhibit B1 and B2. The forwarding letter dated 1 April 2023 (page 89) indicates that the said exhibits A1 and B1 were forwarded for analysis to the FSL.

8. Evidently, the prosecution case rests on the CA report, on the basis of

the analysis of the samples collected at the time of the alleged seizure. Though, the IO took steps to have an inventory of the contraband articles recovered from the applicant and the co-accused before the Magistrate in compliance with the provisions contained in Section 52-A of the Act, yet the inventory does not advance the cause of the prosecution. A perusal of the inventory panchanama dated 27 April 2023, indicates that the bulk recovered from the accused No.1 i.e. 104 gms cocaine (Exhibit A) and the reserve sample of 1 gm cocaine (Exhibit A2) and 9 gms cocaine (Exhibit B) and 9.5 gms cocaine (Exhibit B2), were produced before the learned Magistrate. The certificate of the Magistrate, however, records that the total weight of the cocaine seized from the applicant with carry bag, was 20 gms (Exhibit B) and that of sample 13.5 gms (Exhibit B2). Moreover, it does not appear that fresh samples were drawn before the learned Magistrate and forwarded to CFL for analysis.

9. In a line of decisions, the Supreme Court has emphasized that collection of the samples of contraband article at the time of seizure itself is not envisaged by the provisions contained in NDPS Act, 1985. The provisions contained in section 52A of the NDPS Act, 1985 have been held to be mandatory in nature. A profitable reference in this context can be made to the decision of the Supreme Court in the case of **Union of India V/s. Mohanlal and Anr.**¹, wherein the Supreme Court held that the procedure prescribed in Section 52-A is of mandatory nature and it was obligatory to

1 (2016) 3 SCC 379

prepare an inventory of seized contraband and then make an application to the Magistrate for the purpose of getting its correctness certified. The observations in paragraphs 15 to 17 read as under :

“15.It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

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 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.”

10. In the case of Yusuf @ Asif V/s. State², the Supreme Court after following the decision in the case of Union of India V/s. Mohanlal (supra), enunciated, as under:

“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.”

11. In the case of Simaranjit Singh V/s. State of Punjab³, the Supreme Court after extracting the observations in paragraphs 15 to 17 (extracted above) in the case of Union of India V/s. Mohanlal (supra), observed that the act of the officer drawing samples from all the packets at the time of seizure is not in conformity with the law laid down by Supreme Court Court in the case of Mohanlal (supra). That creates a serious doubt about the prosecution case that substance recovered was a contraband, and the Supreme Court, thus, set aside the judgment of conviction and sentence.

2 Cri.Appeal 3191 of 2023 Dt.13/10/2023.

3 2023 SCC Online SC 906.

12. In the latest pronouncement in the case of **Mohammed Khalid and another vs. The State of Telangana**⁴, the Supreme Court observed in emphatic terms that since no proceedings under Section 52-A 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 is nothing but a waste paper and cannot be read in evidence.

13. The upshot of aforesaid consideration is that there is non-compliance of the provisions contained in Section 52-A of the Act, in letter and spirit. Eventually, the prosecution will bank on the CA report based on the analysis of the samples drawn at the time of the seizure. Thus, the prosecution will have to surmount the challenge of non-compliance of Section 52-A of the Act.

14. In these circumstances, I am impelled to hold that there is a substantial probable cause to draw an inference that eventually, the applicant may not be found guilty of the offences for which he has been arraigned. The Court is not informed that the applicant has antecedents. Thus, an inference may be drawn that the applicant may not indulge in identical offences if enlarged on bail. I am, therefore, inclined to allow the application.

15. Hence, the following order :

4 Criminal Appeal No(S).1610/2023, dtd.1/3/2024.

ORDER

- (i) The Application stands allowed.
- (ii) The Applicant – Lakshman Kumar s/o Anirudh Saw be released on bail in C.R.No.90 of 2023 registered with Shreenagar Police Station on furnishing a PR bond in the sum of Rs.1,00,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.
- (iii) The applicant shall mark his presence before Shreenagar Police Station on first Monday of every month between 11 am to 1 pm for a period of three years or till the conclusion of the trial, whichever is earlier.
- (iv) The applicant shall not tamper with the prosecution evidence. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing the facts to Court or any police officer.
- (v) On being released on bail, 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.
- (vi) The applicant shall regularly attend the proceedings before the jurisdictional Court.
- (vii) 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.)