

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 4142 OF 2023

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Mujibur Fajlu Rehman Khan ...Applicant
Versus
State of Maharashtra ...Respondent

Mr. Shreerat Kamath, a/w Puja Yadav, for the Applicant.
Mr. Prashant Jadhav, APP for the State/Respondent.

CORAM: N. J. JAMADAR, J.
DATED: 17th APRIL, 2024

ORDER:-

1. Heard the learned Counsel for the applicant and the learned APP for the State.
2. The applicant, who is arraigned in NDPS Special Case No.285 of 2022 arising out of CR No.87 of 2021 registered with Anti Narcotic Cell (ANC), Kandivali Unit, Mumbai, for an offence punishable under Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act"), has preferred this application to enlarge him on bail.
3. On 2nd October, 2021, while the ANC police were on patrolling duty at Goregaon (E) near Bimbisar Nagar, the applicant was found standing with a black bag in his hand, in suspicious circumstances. The applicant was accosted. He

was appraised of his right to be searched before the nearest Magistrate or Gazetted Officer under Section 50 of the NDPS Act, 1985. The applicant declined to avail the said right. Thereupon in the search of the applicant, a white packet containing a white crystalline powder was found. It appeared to be Mephedrone (MD). It weighed 100 gram. It was seized and two samples of 5 gram each were collected and labelled as 'A1' and 'A2'. The applicant came to be arrested.

4. The learned Counsel for the applicant submitted that the applicant has been in custody since 2nd October, 2021. There is clear discrepancy between contraband which was allegedly seized under seizure panchnama and the sample which was forwarded to CA for analysis. The seizure panchnama indicates that a white crystalline powder was seized whereas the CA report (page 60) indicates that a faint brownish white crystalline powder marked 'A1' was received for analysis on 4th October, 2021. Therefore, it cannot be said that the very contraband which was allegedly recovered from the applicant was forwarded for analysis to CA. There is a total non-compliance of the provisions contained in Section 52A of the NDPS Act. 1985. In view of the discrepancy in the contraband which was seized and the sample which was

forwarded for analysis to CA, the non-compliance of mandatory provisions contained in Section 52A of the NDPS Act, 1985 renders the prosecution case even more infirm.

5. Mr. Jadhav, the learned APP, countered the submissions on behalf of the applicant. It was submitted that the alleged inconsistency in the colour of the substance which was sent for analysis does not detract materially from the prosecution. It was further submitted that the ground of non-compliance of the mandatory provisions contained in Section 52A of the NDPS Act is also not factually well-grounded as the inventory was in fact conducted before the learned Magistrate on 12th January, 2023. A copy of the inventory panchnama dated 12th January, 2023 was tendered for the perusal of the Court.

6. Evidently, the applicant was apprehended alongwith 100 gram MD as commercial quantity as a result of the chance recovery which was effected on 2nd October, 2021. *Prima facie* compliance of the provisions contained in Section 50 of the NDPS Act, 1985 is evident. It, however, appears that the contraband article was seized and samples collected at the time of seizure itself as is evident from the seizure panchnama. A copy of the forwarding letter dated 4th

October, 2021 renders it beyond cavil that a 5 gram sample ('A1') allegedly collected at the time of seizure was forwarded for analysis to the FSL. The CA report (page 60) records that the said sample was received on 4th October, 2021. At this stage, the Court may not delve deep into the discrepancy in the colour of the substance as noted in the seizure panchnama and the CA report. However, the fact remains that the CA report is based on the analysis of the sample ('A1') which was drawn at the time of the alleged seizure.

7. In the aforesaid context, in the case of *Yusuf @ Asif vs. State*¹, the Supreme Court after adverting to the provisions of Section 52A of the NDPS Act, 1985 and its earlier decision in the case of *Union of India vs. Mohanlal and Anr.*² enunciated the law, *inter alia*, as under:

"12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, the officer so referred to in sub section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.

13. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure

1 Criminal Appeal No.3191/2023.

2 (2016) 3 SCC 379.

prescribed under sub-sections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of subsection (2) of Section 52A of the NDPS Act.

.....

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.

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"

(emphasis supplied)

8. In the case of *Simarnjit Singh vs. State of Punjab*³, the Supreme Court again adverted to the decision in the case of *Mohanlal* (supra) and considering the facts in the case of *Simarnjit* (supra), observed that the act of PW-7 of drawing samples from all the packets at the time of seizure is not in

3 2023 SCC OnLine SC 906.

conformity with the law laid down by the Supreme Court in the case of *Mohanlal* (supra). This creates a serious doubt about the prosecution's case that substance recovered was a contraband.

9. An endeavour made by Mr. Jadhav to salvage the position by submitting that the provisions contained in Section 52A of the NDPS Act, 1985 were complied with as the inventory and the samples were certified by the Magistrate on 12th January, 2023, does not merit acceptance. As the inventory was carried out after more than 15 months of the seizure, I am conscious that a case of total non-compliance and belated compliance of the provisions contained in Section 52A of the NDPS Act, 1985 may warrant different approaches. However, if the inventory has been carried out after a delay of about 15 months, it cannot said to be in conformity with the mandate of the provisions contained in NDPS Act, 1985. Even otherwise, the learned Magistrate, has explicitly recorded that the IO had already drawn the sample and forwarded the same to CA. No fresh sample thus seems to have been drawn before the learned Magistrate and forwarded for analysis to CA. As noted above, the CA report is based

on the analysis of the sample ('A1') collected at the time of the seizure.

10. In view of the recent pronouncement of the Supreme Court 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 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 is nothing but a waste paper and cannot be read in evidence.

11. Since *Mohanlal* (supra) constitutes the edifice of the aforesaid enunciation, it may be apposite to extract the observations of the Supreme Court in paragraph 17 of the judgment in the case of *Mohanlal* (supra), which read 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 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. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing

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

order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.”

(emphasis supplied)

12. In the face of these authoritative pronouncements, a complete non-compliance of the mandate contained in Section 52A may result in a situation where the prosecution would be bereft of primary evidence.

13. In that view of the matter, I am inclined to hold that the prosecution would be required to meet an apparently insuperable challenge of non-compliance of the provisions contained in Section 52A of the NDPS Act, 1985, in its true spirit, as it would be a case of absence of primary evidence and based on CA report which is bereft of evidentiary value. Thus, the Court may be justified in drawing an inference that the applicant may not guilty of the offence for which he has been arraigned in this case.

14. The Court is not informed that the applicant has antecedents. Therefore, a further inference that the applicant may not indulge in identical offences, if released on bail, may

become justifiable. I am, thus, inclined to hold that the interdict contained in Section 37(1)(b)(ii) of the NDPS Act, 1985 may not operate. Resultantly, the accused deserves to be enlarged on bail.

15. Hence the following order:

: O R D E R :

- (i) The application stands allowed.
- (ii) The applicant be released on bail in NDPS Special Case No.285 of 2022 arising out of CR No.87 of 2021 registered with Anti Narcotic Cell (ANC), Kandivali Unit, Mumbai, on furnishing a P.R. Bond in the sum of Rs.1,00,000/- with one or two sureties in the like amount.
- (iii) The applicant shall mark his presence at ANC, Kandivali Unit, Mumbai, on the first Monday of every alternate month between 10.00 am. to 12.00 noon 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.]