



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.4133 OF 2023**

Jasinski Andrzej Wieslaw

... Applicant

versus

Union of India and Anr.

... Respondents

Mr. Aseem Naphade i/by Mr. Prem Kumar R. Pandey with Mr. Pawan Kumar Pandey,
Ms. Sneha Mishra, Ms. Kajal Mishra, for Applicant.

Mr. Amit Munde, Special PP with Mr. Jai Vohra, for Respondent No.1.

CORAM: N.J.JAMADAR, J.

RESERVED ON : 10 APRIL 2024

PRONOUNCED ON : 7 MAY 2024

P.C.

1. The Applicant, who is arraigned in Special Case No.636 of 2023 arising out of R.C. 220 2022 E 0014 registered with CBI, EOW-V/EO-II, New Delhi, for the offences punishable under Section 120B of the Indian Penal Code and Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985, has preferred this application to enlarge him on bail.

2. On 5 November 2022, an information in the form of Interpol Reference regarding the possible involvement of the applicant, a Polish citizen in drug trafficking, was received. It was informed that the applicant was to depart on 6 November 2022 from Victoria Falls Airport, Zimbabwe by Flight No.ET829 and will transit to Addis Ababa (Ethiopia) and will arrive on 7 November 2022 at 7.15 hrs. at Chhatrapati Shivaji International Airport, Mumbai via Flight No.ET610. The applicant was hiding

narcotic substance in his baggage (hand baggage). A surveillance was mounted under the leadership of Yashwant, Inspector. Few Air Intelligence Unit (AIU) officials were associated with the CBI Team. Two independent panch witnesses were also summoned.

3. At about 7.30 a.m., on 7 November 2022, the applicant whose features matched the description came out from the immigration area with a black hand bag and brown trolley bag. The applicant was also carrying a pink colour trolley suitcase as check in luggage. The applicant collected the said check in baggage from Belt No.9. The applicant was accosted.

4. After apprising the applicant of his right to be searched before the nearest Magistrate or Gazetted Officer under Section 50 of the Act, a search was carried out in the presence of independent panch witnesses. Nothing incriminating was found in the black hand bag and brown trolley bag. However, when the pink trolley suitcase was checked through scanner, some material in flat shape was visible in both the inner sides of the suitcase. The said suitcase was opened in the presence of independent witnesses in the Chamber of D.C.Custom. Upper side of the suitcase contained one polythene packet covered by brown paper. The substance appeared to be Heroin. It weighed 2070 gms. It was marked 'A'. Two similar polythene packets covered by brown paper were concealed in the lower side of the suitcase. Those packets also contained Heroin. They were marked 'B' and 'C'. Packet 'B' contained

2070 gms and packet 'C' contained 1950 gms Heroin. Two representative samples of 50 gms of each were taken from each polythene packets and sealed and labelled. The applicant came to be arrested.

5. Mr. Naphade, learned Counsel for the applicant submitted that the applicant is 76 year old, highly qualified Professor of repute. The applicant has been falsely roped in. Mr. Naphade submitted that there is non-compliance of the mandate contained in Section 50 of the Act as the appraisal memo does not indicate that the applicant was apprised of his right to be searched before the nearest Magistrate or Gazetted Officer.

6. Secondly, the appraisal of the right was vitiated as the applicant was apprised that Sanjay Dube, ASP/CBI, EO, a Gazetted Officer was available with the CBI team. Such appraisal is clearly in teeth of the decision of the Supreme Court in the case of **State of Rajasthan V/s. Parmanand and Anr.**¹

7. Thirdly, the search was also vitiated as it was carried out by unauthorized persons. Taking the Court through the seizure panchanama and the statements of the panch witnesses, it was submitted that the search was carried out by the panch witnesses and not by the Authorized Officer.

8. Fourthly, there is total non-compliance of the mandatory provisions contained in Section 52-A of the Act. The IO, in fact, did not take recourse to the

1 2014 (5) SCC 345

provisions contained in Section 52-A(2) of the Act and instead a strange procedure of obtaining the permission to retain the documents, articles and samples from the jurisdictional Magistrate was followed. Therefore, the applicant deserves to be enlarged on bail.

9. In opposition to this, Mr. Munde, learned Special PP, submitted that, at this stage, the prosecution case is required to be considered as a whole. Huge quantity of heroin was found in possession of the applicant. The search and seizure has been witnessed by as many as eight independent witnesses. The seizure operation was carried out pursuant to a specific information received from Interpol. In this backdrop, the bar contained in Section 37 of the Act is clearly attracted and the grounds sought to be urged on behalf of the applicant do not merit countenance.

10. Mr. Munde further submitted that, in the facts of the case, the provisions contained in Section 50 of the Act, were not at all attracted as the contraband was not found on the person of the applicant, but the trolley suitcase which the applicant was carrying. Reliance was placed on decisions of the Supreme Court in the cases of **Than Kunwar V/s. State of Haryana**² and **Dayalu Kashyap V/s. The State of Chhattisgarh**³. Mr. Munde would urge that the submission that the search has been carried out by unauthorized persons is not borne out by the record as the search was carried out by an empowered officer.

² (2020) 5 SCC 260

³ 2022 LiveLaw (SC) 100

11. On the aspect of the non-compliance of Section 52-A of the Act, Mr. Munde would urge that since the entire bulk recovered from the possession of the applicant has been stored and can be produced before the Special Court, the provisions contained in Section 52-A of the Act, are not required to be followed.

12. I have given careful consideration to the rival submissions. From the perusal of the seizure memo, it becomes abundantly clear that the contraband was allegedly found concealed in the pink trolley suitcase which was being carried by the applicant as a check-in baggage. The contraband was not recovered from the 'person' of the applicant.

13. Learned Counsel for the Applicant submitted that when the person of the applicant was searched along with the baggage allegedly carried by the applicant, scrupulous compliance of the provisions contained in Section 50 of the Act is warranted. A very strong reliance was placed on the decision of the Supreme Court in the case of **State of Rajasthan V/s. Parmanand and Anr. (supra)**, the appraisal in the form of a third option, namely search before the Superintendent, a Gazetted Officer, who was the part of the raiding party, in addition to search before the nearest Magistrate or Gazetted Officer, was held to be in breach of Section 50(1) of the Act. It was enunciated that the idea behind taking an accused to the nearest Magistrate or the nearest Gazetted Officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for IO

to inform the Respondents – suspects that a third alternative was available and that they could be searched before PW5, the Superintendent, who was part of the raiding party. A member of the raiding party cannot be called as an independent officer.

14. Secondly, in the case of **Parmanand and Anr. (supra)**, the Supreme Court had also enunciated that if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application.

15. For the aforesaid proposition, the two Judge Bench in the case **Parmanand and Anr. (supra)**, had relied upon a previous decision of the Supreme Court in the case of **Dilip and Anr. v/s. State of Madhya Pradesh**⁴. Mr. Naphade would urge that in the facts of the instant case, non-compliance of Section 50 of the Act is evident on both the counts adverted to in the case of **Parmanand and Anr. (supra)**.

16. I am afraid to accede to this submission. In the case of **State of Punjab V/s. Baljinder Singh and Anr.**⁵, a three Judge Bench of the Supreme Court in the backdrop of the law laid down in the case of **Dilip and Anr. V/s. State of Madhya Pradesh (supra)**, considered the following question :

“If a person found to be in possession of a vehicle containing contraband is subjected to personal search, which may not be in conformity with the

4 (2007) 1 SCC 450

5 (2019) 10 SCC 473

requirements under Section 50 of the Act; but the search of the vehicle results in recovery of contraband material, which stands proved independently; would the accused be entitled to benefit of acquittal on the ground of non-compliance of Section 50 of the Act even in respect of material found in the search of the vehicle ?”

17. In the case of **Baljinder Singh and Anr. (supra)**, the personal search of the accused did not result in any recovery of the contraband. Even if there was any such recovery, the Supreme Court held the same could not be relied upon for want of compliance of requirements of Section 50 of the Act. But the search of vehicle and recovery of contraband pursuant thereto having stood proved, merely because there was non-compliance of Section 50 of the Act as far as “personal search” was concerned, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle. Any such idea would be directly in the teeth of conclusion (3) recorded by the Constitution Bench in paragraph 57 of its Judgment in the case of **State of Punjab V/s. Baldev Singh**⁶. It was further observed that the decision of the Supreme Court in the case of **Dilip and Anr. (supra)**, had not adverted to the distinction and proceeded to confer advantage upon the accused even in respect of recovery from the vehicle, on the ground that the requirements of Section 50 relating to personal search were not complied with.

18. Mr. Naphade attempted to salvage the position by canvassing a

6 (1999) 6 SCC 172

submission that the decision in the case of Parmanand and Anr., (supra) was approved by another three Judge Bench in the case of SK Raju @ Abdul Haque @ Jagga V/s. State of West Bengal⁷. Therefore, Parmanand and Anr. (supra), still holds the field.

19. I am unable to agree with this submission. This position was clarified by the two Judge Bench in the case of Than Kunwar V/s. State of Haryana (supra), on which reliance was placed by Mr. Munde. The observations in paragraph 22 in the said case read as under :

“22. Having regard to the judgment by the three-Judge Bench, which directly dealt with this issue viz. the correctness of the view in Dilip (supra), reliance placed by the appellant on para 16 may not be available. As already noticed, we are not oblivious of the observation which has been made in the other three-judge Bench judgment of this Court in Raju (supra), which it appears, was not brought to the notice of the Bench which decided the case later in Baljinder Singh (supra). We notice however, that the later decision draws inspiration from the Constitution Bench decision in Baldev Singh (supra). We also notice that this is not a case where anything was recovered on the alleged personal search. The recovery was effected from the bag for which it is settled law that compliance with Section 50 of the Act is not required.”

20. In view of the aforesaid enunciation, in the facts of the case, the ground of non-compliance of Section 50 of the Act, prima facie, does not seem to be available to the applicant.

⁷ (2018) 9 SCC 708

21. The second count of the search having been carried out by the unauthorized person hinges upon the contents of the seizure memo and the statements of independent panch witnesses – Vishal Patil and Ashish Gawas. The seizure memo records that in the office of DC-Custom, upper side of the suitcase was opened by the independent witnesses in the presence of the CBI Team. It went on to record that the lower side of the suitcase was opened by independent witnesses. The seizure memo further records that even the search of black hand bag and brown trolley bag was conducted through independent witnesses. The statements of the witnesses, namely, Vishal Patil and Ashish Gawas, indicate that the personal search as well as the search of the trollies being carried by the applicant was conducted through independent witnesses and they opened pink colour trolley suitcase in which the contraband was found.

22. Mr. Munde, learned Special PP, submitted that the search was carried out in the presence of an empowered officer. The mere fact that in the panchanama, it is recorded that the trolley bag was opened by the independent panch witnesses does not imply that the search was not carried out by the empowered officer.

23. Indeed, the seizure memo as well as the statements of the panch witnesses record that the search was carried out and suitcases were opened by independent witnesses in the presence of the CBI team. However, the aspect as to whether the search was carried out by the empowered officer appears to be prima facie

debatable. The seizure memo and the statements of the witnesses do not indicate that the search was carried out by the empowered officer in the presence of independent witnesses. Conversely, it is recorded that the search was carried out through or by the independent witnesses in the presence of the CBI team. Prima facie, there is substance in the submission on behalf of the applicant that from the material on record, an inference becomes deducible that the search was carried out by an unauthorized persons.

24. In this context, reliance was placed by Mr. Naphade on an order passed by this Court in the case of **Manish Kumar Boricha V/s. The State of Maharashtra**⁸, wherein the Court was persuaded to grant bail as from the panchanama, prima facie, it appeared that the search was carried out by the panchas and the police personnel and the panchas were not authorized to carry out search.

25. In the case of **Sunday Eziko Ezabgwu V/s. The State of Maharashtra**⁹ I had an occasion to consider the ground of search being carried out by an unauthorized person. It was, inter alia, observed as under :

“8. The second ground of search having not been carried out by a person who was authorized under section 42 of the NDPS Act also prima facie carries conviction. In the FIR as well as in the seizure panchanama, it is categorically recorded that the search of the person of the applicant was conducted by the panch witness and other police personnel on the directions of Mr. Shewale, PI, the authorized officer. Such a search by the

8 BA No.1163 of 2022 dt. 2 January 2023

9 BA No.3318 of 2023 dt. 29 February 2024

persons who are not authorized even in the presence, or by the direction, of authorized officer has been held to be in breach of the provisions contained in sections 50 and 42 of the NDPS Act.

9. In the case of Aarif Akram Shaikh vs. The State of Maharashtra¹⁰ a learned single Judge of this Court after referring to an earlier order in the case of Hazi Mohd. Abdul Kadar Bhumedia vs. The State of Maharashtra¹¹ observed that having regard to the language of section 42 of the NDPS Act only the officers mentioned therein are empowered to carry out the search. It may be that the PSI was authorized, but the search was also carried out by the Police Naik. The Police Naik was not authorized to carry out the search. Prima facie, the search carried out also by one of the officials (Police Naik), who was not authorized, renders the search illegal. In the said case, the learned single Judge referred to a decision in the case of Dilkush Sinai vs. State of Goa¹² where the PSI himself did not search the accused but directed the two panch witnesses to conduct the search and the question that arose was, whether search by panchas in the presence of PSI was legal. The Division Bench, in the said case, had held that the search was effected by person unauthorized to effect the search under the law and that the trial of the accused was vitiated as a result of said unauthorized illegal search.”

26. Moreover, the ground of non-compliance of the mandatory provisions contained in Section 52-A of the Act, appears to be manifest. Mr. Munde did not make an endeavour to urge that there was compliance of the said provision. On the contrary, it was submitted that when the entire bulk is available and can be produced

¹⁰ BA No.3158 of 2021 dt. 07/02/2023

¹¹ BA No.378 of 2022

¹² 1995(2) Goa L.T.

before the Special Court, at the stage of trial, the provisions contained in Section 52-A of the Act, are not attracted.

27. From the perusal of the material on record, it appears that on 8 January 2022, an application was filed before the learned Additional Chief Metropolitan Magistrate, 37th Court, Esplanade Court, Mumbai, seeking permission for production of document and retention of seized documents/articles and samples for investigation. The Court seems to have allowed the application as prayed. An endeavour was made to urge that with the said authorization, the entire bulk has been retained and, therefore, it can be produced before the Special Court at the stage of trial.

28. I find it rather difficult to accede to the submission proposed to be canvassed by the learned Special PP. Two things are absolutely clear. First, the procedure as mandated by Section 52-A of the Act, was not at all carried out. Second, the prosecution case rests on the samples collected by the authorized officer at the time of the seizure itself.

29. 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.¹³, wherein the Supreme Court held that the procedure prescribed in Section 52-A is of mandatory nature and it was obligatory to 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

13 (2016) 3 SCC 379

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.”

30. In the case of Yusuf @ Asif V/s. State¹⁴, 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.”

31. In the case of Simaranjit Singh V/s. State of Punjab¹⁵, 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

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

15 2023 SCC Online SC 906.

contraband, and the Supreme Court, thus, set aside the judgment of conviction and sentence.

32. In the latest pronouncement in the case of **Mohammed Khalid and another vs. The State of Telangana**¹⁶ 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.

33. In view of the aforesaid enunciation of law, the submission of Mr. Munde that since bulk is available, compliance of the mandate contained in Section 52-A of the Act, is not warranted, does not merit acceptance. If the submission sought to be canvassed on behalf of CBI is accepted, the provisions contained in Section 52-A would be rendered otiose.

34. The submission of Mr. Naphade that a strange procedure of obtaining the approval of the learned Magistrate for retention of the contraband substance and the articles was adopted appears to be well founded. Such course has no legal sanctity.

35. The upshot of aforesaid consideration is that the grounds of the search having been carried out by unauthorized persons and the non-compliance of the mandatory provisions contained in Section 52-A of the Act, prima facie, appear to be

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

sustainable.

36. The applicant is 76 years of age. The applicant has been in custody since November 2022. It is unlikely that the trial can be concluded within a reasonable period. In these circumstances, I am impelled to hold that a substantial probable cause to hold that the applicant may not be guilty of the offences for which he has been arraigned, has been made out. The Court is not informed that the applicant has antecedents. The interdict contained in Section 37 of the Act, thus, may not be attracted.

37. I am, therefore, inclined to allow the application.

38. Hence, the following order :

ORDER

(i) The Application stands allowed.

(ii) The Applicant – Jasinski Andrzej Wieslaw be released on bail in R.C. 220 2022 E 0014 registered with CBI, EO – II, New Delhi, 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 CBI, EO-II, New Delhi, 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) Subject to the proceedings for deportation for overstay, the applicant shall not leave the country without prior permission of the Special Court.

(vii) The applicant shall regularly attend the proceedings before the jurisdictional Court.

(viii) 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.)