



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.4148 OF 2023**

Anido Tochukwu	...	Applicant
versus		
The State of Maharashtra	...	Respondent

Mr. Kamlesh Satre i/by Mr. Vikas Shinde, for Applicant.
Mrs. Supriya Kak, APP for State.

CORAM: N.J.JAMADAR, J.

**RESERVED ON : 3 APRIL 2024
PRONOUNCED ON : 18 APRIL 2024**

P.C.

1. Heard the learned Counsel for the parties.
2. The Applicant, who is arraigned in C.R.No.114 of 2023 registered with Shil Diaghar Police Station for the offences punishable under Sections 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, has preferred this application to enlarge him on bail.
3. On 21 March 2023, an information was received at Anti-Narcotic Cell, Thane that a person named Sajjad Hussain was to come near Hanuman Hotel, Shil Bypass Road, in a Honda City Car bearing Registration No.MH-04/PW-4192 to sell Mephedrone (MD). After procedural compliance, the police conducted a surveillance. At about 6.45 p.m., a person, whose features matched the description given by the informant, alighted from the Honda City Car bearing No.MH-4/PW-4192. He was accosted. He identified himself as Sajjad Hussain (A1). He was

apprised of his right under Section 50 of the Act. As he declined to avail the said right, a search was conducted. In the right side pocket of his trouser, a transparent zip pouch containing a light yellowish crystal powder was found. It appeared to be MD. It weighed 15 gms.

4. The accused No.1 made a disclosure that he had purchased the said contraband from a Nigerian national. The accused No.1 made a call to Hamid through whom he had procured the contraband and, after a while, a Nigerian national came on a Scooter near the car of accused No.1. He demanded money from the accused No.1. He was accosted. He identified himself as Aniodo Tochukwu – the applicant.

5. The applicant was also apprised of his right to be searched before the nearest Magistrate or Gazetted Officer under Section 50 of the Act. The applicant declined to avail the said right. In the left pocket of the trouser of the applicant, a black polythene bag containing five small zip pouches was found. Those five pouches contained light yellowish crystal powder. The said substance appeared to be MD. The contents of all the five pouches were mixed. It weighed 55 gms. Samples were collected and marked 'B1' and 'B2' and the bulk of the contraband article was seized and marked B. The applicant came to be arrested.

6. Mr. Satre, learned Counsel for the Applicant, submitted that the applicant came to be roped in on the basis of the statement of the co-accused, which is not admissible in evidence. There was non-compliance of the mandatory provisions

with regard to seizure and sampling. Mr. Satre would urge that the empowered officer allegedly mixed together the contents of all the five transparent zip pouches and, thereafter, weighed the substance and collected the samples. Such mixing of the substance, according to Mr. Satre, denuded the sample the representative character. Moreover, the substance was weighed along with the plastic pouch. Therefore, since the total weight was 55 gms only, it cannot be said with certainty that the applicant was found in possession of commercial quantity. Mr. Satre further submitted that the authorized officer collected the samples of two gms each in breach of the standing instruction to collect at least 5 gms of the substance as sample.

7. Lastly, Mr Satre would urge, though the inventory has been conducted by the investigating agency before the learned Magistrate under Section 52-A of the Act, yet the inventory is of no assistance to the prosecution as the samples were drawn at the time of the seizure and not before the learned Magistrate and the CA report is based on the sample so collected at the time of seizure and forwarded to the CA on 23 March 2023 itself. Therefore, no weight can be attached to the CA report.

8. As against this, Mrs. Kak, learned APP, submitted that the search and seizure has been carried out in conformity with all the procedural requirements. The Officer, who received the information, had taken down the information in writing and forwarded its copy to his immediate official superior. Likewise, there was scrupulous compliance of the provisions contained in Section 50 of the Act. The alleged

infirmities in the sampling are the matters for trial. Since there is compliance of Section 52-A of the Act, search and seizure would not be vitiated. Therefore, the interdict contained in Section 37 of the Act, comes into play with full force and vigor and the applicant cannot be enlarged on bail.

9. I have given my anxious consideration to the rival submissions. On the aspect of seizure of the contraband and drawing of the samples, the seizure panchanama records that a black polythene bag was found in the left pocket of the trouser of the applicant. The said polythene bag, in turn, contained five zip pouches with light yellowish crystal powder. It further records that as the raiding party was not carrying drug detention kit, on the basis of the colour, smell and touch, the empowered officer realized that the substance so recovered was MD. Thus, the contents of all the five pouches were mixed together and kept in a new plastic zip pouch, and, thereafter, it was weighed. The substance along with the pouch weighed 55 gms.

10. Prima facie, it does not appear that the empowered officer had tested the contents of each of the five small zip pouches, independently. Nor the seizure panchanama records that the empowered officer satisfied himself that the contents of each of the five small zip pouches were identical. In this view of the matter, the prosecution will have to meet the challenge that the collection of the sample after the contents of all the five pouches were mixed together, denuded the sample of its

representative character.

11. Rule 10 of the Narcotic Drugs And Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 (Rules 2022) reads as under :-

Drawing the samples :-

(1) One sample, in duplicate, shall be drawn from each package and container seized.

(2) When the packages and containers seized together are of identical size and weight bearing identical marking and the contents of each package give identical results on colour test by the drugs identification kit, conclusively indicating that the packages are identical in all respects, the packages and containers may carefully be bunched in lots of not more than ten packages or containers, and for each such lot of packages and containers, one sample, in duplicate, shall be drawn:

Provided that in the case of ganja, poppy straw and hashish (charas) it may be bunched in lots of not more than fourty packages or containers.

(3) In case of drawing sample from a particular lot, it shall be ensured that representative sample in equal quantity is taken from each package or container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

12. In the case at hand, it does not appear that the satisfaction as envisaged by Rule 10 has been recorded by the empowered officer. Since the weight of the contraband allegedly found in possession of the applicant, alongwith the plastic zip pouch, was 55 gms only, which marginally exceeds the commercial quantity of MD, this aspect of mixture of the contents of all the pouches, in the facts of the case, assumes significance.

13. The second limb of the submission of Mr. Satre that though the inventory was conducted before the learned Magistrate under Section 52-A of the Act,

1985, yet it does not advance the case of the prosecution, also appears to carry some substance. The material on record indicates that the contraband articles were seized on 21 March 2023. The requisition for inventory was sent on 3 April 2023 and the learned Magistrate certified the Inventory on 3 April 2023. However, what is conspicuous by its absence is the drawing of the samples before the learned Magistrate.

15. The legal position is crystalized to the effect that the collection of the samples at the time of seizure itself is not envisaged by the provisions of the NDPS Act, 1985 and that the samples should be drawn before the jurisdictional Magistrate. 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 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

1 (2016) 3 SCC 379

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.”

16. 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

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

primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.”

17. In the case of **Simaranjit Singh V/s. State of Punjab**³, 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.

18. In a recent pronouncement in the case of **Mohammed Khalid and another vs. The State of Telangana**⁴ the Supreme Court has enunciated in no uncertain terms that a CA report based on the analysis of the samples, not drawn in the presence of the jurisdictional Magistrate, is bereft of any evidentiary value. The observations of the Supreme Court read, as under :

“22] Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the Investigating Officer PW-5 for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate. In this view of the matter, the FSL report(Exhibit P-11) is nothing but a waste paper and cannot be read in evidence. The accused A-3 and A-4 were not arrested at the spot. The offence under Section 20(b)(ii)(c) deals with production,

3 2023 SCC Online SC 906.

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

manufacture, possession, sale, purchase, transport, import or export of cannabis. It is not the case of the prosecution that the accused A-3 and A-4 were found in possession of ganja. The highest case of the prosecution which too is not substantiated by any admissible or tangible evidence is that these two accused had conspired sale/purchase of ganja with A-1 and A-2. The entire case of the prosecution as against these two accused is based on the interrogation notes of A-1 and A-2.” (emphasis supplied)

19. Reverting to the facts of the case, from a conjoint reading of the forwarding letter dated 23 March 2023 and the CA report dated 7 September 2023, it becomes abundantly clear that the sample (B-1) along with the samples (A-1) allegedly drawn from the contraband seized from the possession of accused No.1, was sent for analysis on 23 March 2023 itself. Even in the requisition for inventory dated 3 April 2023, it is recorded that the samples drawn at the time of seizure (A1) and (B1) were forwarded for analysis to FSL. The learned Magistrate has also certified that the first sample (B1) had already been sent for analysis to FSL. The prosecution case would thus rests on the CA report based on analysis of the sample drawn at the time of seizure i.e. A1 and B1.

20. In the aforesaid view of the matter, the prosecution will have to surmount the hurdle of non-compliance of the provisions contained in Section 52-A of the Act, in the true spirit, in the sense that the samples were not drawn before, and certified by, the Magistrate. Resultantly, the Court may be justified in drawing an inference that the applicant may not be guilty of the offences under Section 22(c) and

29 of the Act.

21. The prosecution alleges that the applicant has been arraigned in C.R.No.322 of 2013 for an offence punishable under Section 21 of the Act, 1985. The time lag assumes significance. As a period of 10 years has elapsed, the said antecedent does not constitute an impediment in releasing the applicant on bail. I am, therefore, inclined to exercise discretion in favour of the applicant.

22. Hence, the following order :

ORDER

(i) The Application stands allowed.

(ii) The Applicant – Anido Tochukwu be released on bail in C.R.No.114 of 2023 registered with Shil Diaghar 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 ANC Crime, Thane City on first Monday of every alternate 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.)