

Sayali Upasani

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

BAIL APPLICATION NO. 4208 OF 2023

Mahavir Harilal Prasad ...Applicant

Vs.

The State of Maharashtra ...Respondent

**SAYALI
DEEPAK
UPASANI**

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BAIL APPLICATION NO. 4203 OF 2023

Zunnukumar Ganesh Bharti ...Applicant

Vs.

The State of Maharashtra ...Respondent

Mr. Rajendra S. Bidkar, for Applicants.

Ms. Ranjana D. Humane, APP for State/Respondent.

Mr. Prabhat Mankar, ATS Juhu Unit, Present.

CORAM:- N. J. JAMADAR, J.

RESERVED ON:- 3rd APRIL, 2024.

PRONOUNCED ON:- 17th APRIL, 2024

ORDER:-

1) These applications are preferred for bail in connection with CR No. 13 of 2022, registered with ATS police station, Mumbai, for the offences punishable under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act, 1985).

FACTS IN BAIL APPLICATION NO.4208 OF 2023

2) On 7th July, 2022, pursuant to an intimation, co-accused Shahid Salim Khan was apprehended and a huge quantity of 5465 grams Charas was recovered from the possession of Shahid Khan (A1). While the investigation in CR No. 13 of 2022 was under way, information was received that on 21st July, 2022 between 3 to 6 am, the applicant – Mahavir Prasad (A2) was to come at Gaondevi Dongar, Andheri (W) carrying Charas. Panchas were called and surveillance was conducted. At 4.45 am., the applicant alighted from an auto-rickshaw on the road leading to Gaondevi Dongar. The applicant was carrying a blue colour sack. The applicant was accosted. He was apprised of his right to be searched before the Gazetted Officer or Magistrate. As the applicant declined to avail the said right, personal search of the applicant was conducted in the presence of panch witnesses. No contraband article was found on the person of the applicant.

However, in the search of the sack, which the applicant was carrying, three brown colour packets wrapped with cello tape were found. In two packets there were black sticks, and in one packet a black pulp substance (dkG;k jaxkpk yxnk) was found.

3) The authorised Officer scraped each substance and tested the same with the drug detection kit. It turned out to be Charas. The substance in the first packet weighed 480 grams. It was sealed and labelled as MP2. The substance in the second packet weighed 465 grams. It was sealed and labelled MP3. The substance in the third packet weighed 313 grams. It was sealed and labelled as MP4. In all 1258 gram Charas was found in the possession of the applicant.

FACTS IN BAIL APPLICATION NO. 4203 OF 2023

4) The investigation revealed that the applicant Mahavir Harilal Prasad was the kingpin of the drug cartel. Zunnukumar Ganesh Bharti, the accused No. 3 and applicant in BA No. 4203 of 2023 was working with Mahavir Prasad. Zunnukumar had allegedly illegally smuggled Charas from Nepal into India at the instance of accused No. 2- Mahavir and, thereafter, delivered the

same to Shahid -A1 and Mohommad @ Chotu – A5. Zunnukumar (A3) had received proceeds of the drug trade in his account by way of online credit. Hence, Zunnukumar (A3) came to be arrested on 29th July, 2022.

5) I have heard Mr. Rajendra Bidkar, the learned Counsel for the applicants and Ms. Ranjana Humane, the learned APP for the State-Respondent. With the assistance of the learned Counsel for the parties, I have perused the report under Section 173 of the Code and the documents annexed with it.

6) Mr. Bidkar submitted that the very search and seizure was illegal for non-compliance with the mandate contained in Section 42 of the NDPS Act, 1985. Mr. Bidkar laid emphasis on the fact that as the requisition for deputing the Panch witnesses was sent to the Rationing Officer on 20th July, 2022, indicating therein that the search and seizure was to be conducted on 21st July, 2022, apparently the search was based on prior intimation. Yet, the same was not recorded into writing nor a copy thereof was forwarded to the immediate official superior. It was further submitted that since the search was conducted before sunrise, it was incumbent upon the authorised officer to record reasons. But such reasons were not recorded.

7) Secondly, appraisal under Section 50 of the NDPS Act, 1985 was vitiated as the officer conducting the search had disclosed his position as a Gazetted Officer.

8) Thirdly, Mr. Bidkar submitted that there was an inordinate delay in conducting the inventory under Section 52A of the NDPS Act, 1985 and also in forwarding the sample to the CA post inventory.

9) Lastly, there is irreconcilable inconsistency in the weight of the contraband article allegedly recovered at the time of the search and the weight thereof found at the time of the inventory.

10) As regards Zunnukumar – A3, Mr. Bidkar submitted that there is no material to establish the nexus of the applicant with alleged offences. No contraband article was recovered from the possession of the Zunnukumar (A3). He has been implicated on the basis of the statement of the daughter of the co-accused that he used to sometimes deliver contraband articles at the instance of Mahavir Prasad. Therefore, the applicants deserve to be enlarged on bail.

11) As against this, Ms. Humane, the learned APP strongly resisted the prayer for bail. It was submitted that the raid had been conducted in compliance with the statutory requirements

and applicant – Mahavir Prasad (A2) was found in possession of a huge quantity of Charas. The grounds of non-compliance of statutory provisions, sought to be urged on behalf of the applicant – Mahavir Prasad are devoid of any substance. In contrast, there is material in the form of statements of the daughter and wife of co-accused Shahid (A1), which squarely incriminate both the applicants. Moreover, there is overwhelming evidence to show financial transactions amongst the co-accused, who were members of the drug syndicate run by accused-Mahavir (A2). Attention of the Court was invited to the documents evidencing the financial transactions and the CDR, which indicate that the applicant and the co-accused were in regular touch.

12) I have carefully considered the material on record and the submissions canvassed across the bar. To begin with, the claim of Mahavir Prasad for bail. Since Mahavir Prasad (A2) was allegedly found in possession of a commercial quantity of Charas, the interdict contained in Section 37 (1)(b)(ii) of the NDPS Act, 1985, is attracted. It has to be seen whether there is a reasonable ground to believe that the applicants Mahavir Prasad (A2) and Zunnukumar (A3) are not guilty of the offences, for

which they have been arraigned. Whether there is a substantial probable cause to sustain such belief ?

13) First, the ground of non-compliance of the provisions contained in Section 42 of the NDPS Act, 1985, forcefully canvassed on behalf of the applicants. The learned Special Judge was persuaded to repel the said challenge opining, *inter alia*, that the provisions contained in Section 42 of the NDPS Act, 1985 were not attracted as the recovery of the contraband from the possession of Mahavir (A2) was from a public place i.e. a road and not from any building, conveyance or enclosed place. The approach of the learned Special Judge appears to be justifiable.

14) A profitable reference in this context can be made to a three-judge Bench decision of the Supreme Court in the case of **Sk. Raju @ Abdul Haque @ Jagga vs The State Of West Bengal**¹, wherein the Supreme Court dealt with a challenge about non-compliance of the provisions contained in Section 42 of the NDPS Act, 1985 in the context of the recovery of the contraband from the accused therein while he was moving along Picnic Garden Road. The Supreme Court, after analyzing the provisions contained in Section 42 and 43 of the NDPS Act, 1985 and the

¹ (2018) 9 SCC 708

decisions in the cases of **State of Punjab Vs. Baldev Singh²** and **Narayanswamy Ravishankar V. Directorate of Revenue Intelligence³** and **Krishna Kanwar Vs. State of Rajasthan⁴** enunciated the law as under:-

“...12. An empowered officer under Section 42(1) is obligated to reduce to writing the information received by him, only when an offence punishable under the Act has been committed in any building, conveyance or an enclosed place, or when a document or an article is concealed in a building, conveyance or an enclosed place. Compliance with Section 42, including recording of information received by the empowered officer, is not mandatory, when an offence punishable under the Act was not committed in a building, conveyance or an enclosed place. Section 43 is attracted in situations where the seizure and arrest are conducted in a public place, which includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

13. The appellant was walking along the Picnic Garden Road. He was intercepted and detained immediately by the raiding party in front of Falguni Club, which was not a building, conveyance or an enclosed place. The place of occurrence was accessible to the public and fell within the ambit of the phrase “public place” in the explanation to Section 43. Section 42 had no application.... ”

(emphasis

supplied)

² (1999) 6 SCC 172

³ (2002) 8 SCC 7

⁴ (2004) 2 SCC 608

15) A profitable reference, can also be made to the Constitution Bench Judgment of the Supreme Court in the case of **Karnail Singh Vs. State of Haryana**⁵, wherein the following observations were made.

26. The material difference between the provisions of Sections 42 and 43 of the NDPS Act is that Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful.

(emphasis
supplied)

16) In the light of the aforesaid enunciation of law, reverting to the facts of the case, from the perusal of the seizure panchanama, it becomes evident that the applicant was accosted by the police after he alighted from an auto-rickshaw on the road leading to Gaondevi Dongar. The contraband article was thus recovered from the applicant while the applicant was moving along a public street. Prima facie, the provisions

⁵ (2009) 8 SCC 539

contained in Section 43 of the NDPS Act, 1985 would govern the situation at hand.

17) I am, therefore, not inclined to accede to the submission on behalf of the applicants that the search and seizure was vitiated on account of the non-compliance of the provisions contained in Section 42 of the NDPS Act, 1985.

18) The ground of non-compliance with the provisions contained in Section 50 of the NDPS Act, 1985, also does not merit countenance. In the appraisal memo, which was served on the applicant- Mahavir Prasad (A2), the suspect was clearly apprised of his right to be searched before the Gazetted Officer or Magistrate.

19) Mr. Bidkar attempted to draw mileage from the fact that in the panchanama, it was recorded that P.I Nayak disclosed that he was a Gazetted Officer and whether the applicant – Mahavir had any objection to his search in the presence of P.I. Nayak. Such an appraisal, according to Mr. Bidkar, is not in conformity with the provisions contained in Section 50 of the NDPS Act, 1985.

20) I am afraid to accede to this submission. The panchanama clearly records that the applicant was apprised of his right

under Section 50 of the NDPS Act, 1985, and an appraisal memo was also served on the applicant and the latter declined to avail the said right. Only thereafter, did the Investigating Officer disclosed his position as a Gazetted Officer. Thus, it is not a case where the authorised Officer had first disclosed his position as a Gazetted Officer, which dissuaded the suspect from exercising his right under Section 50 of the NDPS Act, 1985.

21) Secondly, the contraband article was not found on the person of the applicant-Mahavir (A2). Even if there was any infraction in scrupulous compliance of the provisions contained in Section 50 of the NDPS Act, 1985, since the contraband was found in the sack, which the applicant Mahavir (A2) was carrying, the provisions contained in Section 50 of the NDPS Act, 1985 are not strictly attracted and the applicant thus cannot derive any benefit of such infraction. (**State of Punjab Vs. Baljinder Singh and Anr⁶**).

22) This leads me to the challenge based on the alleged non-compliance of the provisions contained in Section 52A of the NDPS Act, 1985. A two-fold challenge was mounted. One, there was an inordinate delay in conducting the inventory. Two, there was a delay in forwarding the sample to CA post inventory.

⁶ (2019) 10 SCC 473

Evidently, the applicant was found in possession of the contraband article on the morning on 21st July, 2022. Inventory was conducted before the jurisdictional Magistrate on 25th August, 2022. In the case of **Union of India Vs. Mohanlal and Others**⁷, the Supreme Court after adverting to the provisions contained in Section 52A of the NDPS Act, 1985, observed that 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. The Supreme Court further observed as under:-

“....19. 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 (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions....”

7 (2016) 3 SCC 379

23) In the case at hand, it appears that the Investigating Officer had made an application to the concerned Gazetted Officer on the very next day of the seizure i.e. on 22nd July, 2022 (pg no. 133 to 136 of the application). Thus, there was, evidently, no delay on the part of the Investigating Officer in making an application for the purpose of certification and drawing of the samples. The delay, thus, cannot be attributed to the investigating agency.

24) The aspect of delay in forwarding the sample, post inventory, may carry some substance. Inventory was conducted on 25th August, 2022. Sample was forwarded on 22nd September, 2022. That would bring in an element of safe keeping of the sample and the possibility of tampering with the sample during the intervening period. However, there are documents (at page No. 180 to 184) which prima facie evidence the safe keeping and retrieval of the bulk and sample. Therefore, in the facts of the case, whether there was a possibility of tampering with the sample, would be a matter for trial.

25) This propels me to the submission of Mr. Bidkar as regards the alleged absence of material to show the complicity of Zunnukumar (A3), the applicant in BA 4203 of 2023. The

prosecution case that Zunnukumar (A3) used to deliver the contraband at the house of the co-accused Shahid (A1) and also received money from the said accused was sought to be substantiated by placing reliance on the statements of Reshma Shaikh and Raziya Shaikh, the daughter and wife of Shahid (A1), respectively, statement of the Managers of the Hotels where the applicant stayed whenever he visited Mumbai and the financial transactions between Shahid (A1) and the applicant. In addition, the applicant Zunnukumar (A3) was allegedly in regular touch with Shahid (A1) and the other co-accused.

26) Had the matter been restricted to the statements of Reshma and Raziya, the wife and daughter of Shahid (A1), the submission on behalf of the applicant Zunnukumar (A3) would have carried some substance. In addition to the statements of aforesaid witnesses, there is material in the form of the statement of Hotel Manager of Onyx Residency that the applicant Zunnukumar (A3) frequently visited Mumbai and stayed in the said Hotel. Likewise, there is statement of Manager of Hotel Goldan Palace in which also Zunnukumar (A3) stayed. Copies of the Hotel Registers are annexed to their statements.

27) To add to this, during the period 31st December, 2021 to 6th July, 2022 a sum of Rs.67,100/- came to be credited to the account of applicant Zunnukumar (A3) from the account of Shahid (A1). There is further material to indicate that the applicant – Zunnukumar (A3) was in regular touch with Shahid (A1) and Salim Bagwan (A4), as is evident from the CDR. If the aforesaid material is considered cumulatively, the statements of the wife and daughter of the Shahid (A1) that the applicant Zunnukumar (A3) used to frequently deliver the contraband substance and collect money from Shahid (A1), prima facie, lend support to the prosecution version.

28) I am, thus, persuaded to hold that there is sufficient material to make out a strong prima facie case against the applicant – Zunnukumar as well. Conversely, there is no substantial probable cause which would justify a reasonable belief that the applicants may not be guilty of the offences for which they have been arraigned. The bar under Section 37 (1)(b) (ii) of the NDPS Act, 1985 operates with full force. Thus, the applicants do not deserve to be released on bail.

29) Hence, the following order.

: O R D E R :

- (i) The applications stand rejected.
- (ii) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicants and co-accused and the trial court shall not be influenced by any of the observations made hereinabove.

[N. J. JAMADAR, J.]