

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.4197 OF 2023

Mehboob Mohammad Shafat Mansoori ...Applicant

vs.

The State of Maharashtra ...Respondent

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Ms. Ashwini Achari i/b. Mr. Taraq Sayed, for the Applicant.

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

Mr. Balasaheb Vhatkar, H.C., DCB CID, Unit-4.

CORAM : N. J. JAMADAR, J.

RESERVED ON : MARCH 26, 2024

PRONOUNCED ON : APRIL 08, 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. 1227 of 2023 arising out of C.R. No. 12 of 2023 registered with DCB CID, Unit-IV, Mumbai (Kalachowki police station, Mumbai) for the offences punishable under sections 20(b), 22(c), 27(a) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act, 1985) seeks to be enlarged on bail.

3. On 11th February, 2023, a secret information was received that two persons, whose features were described, were to come near old cement godown to sell Charas. A surveillance was conducted. At

about 8.50 pm the applicant and Khalil Shaikh (accused No. 1), whose features matched with the description furnished by the informant, came thereat carrying plastic bags. As their movements appeared suspicious, they were accosted.

4. In the search of accused No. 1, eight bags were found concealed in the carry bag. The said substance appeared to be Charas. It weighed 1190 gms. In the personal search of the applicant, a bag was found in the pocket of his trouser. It contained a greenish substance with pungent smell. It was tested. The test resulted positive for Charas. It weighed 108 gms. The contraband articles were seized.

5. Investigation revealed that the contraband articles were supplied to Khalil Shaikh (accused No. 1) and the applicant, by Ganesh Hani @ Anna (accused No. 3), Salim Shaikh (accused No. 4). They were apprehended. Further investigation revealed that Irshad Khan @ Charsibaba (accused No. 5) was the main supplier. He was arrested. Pursuant to the discovery made by him 156 gm Charas was recovered from the tin shed at the said place.

6. The prosecution alleged that Irshad Khan (accused No. 5)

along with his associates Jalal and absconding accused Kallu, Rashid Bhai were running a drug cartel and the applicant and Khalil Shaikh (accused No. 1), were in turn, supplying the drug to the purchasers.

7. Ms. Ashwini Achari, learned counsel for the applicant submitted that the applicant was found in possession of a intermediate quantity of Charas. Thus, the bar contained in section 37 of the NDPS Act, 1985 is not attracted. The endeavour of the prosecution to implicate the applicant by invoking the provisions contained in section 29 of the NDPS Act, 1985 was not sustainable as there was no material to establish any nexus between the applicant and the alleged drug suppliers including Charasibaba (accused No. 5). At any rate, the said accusation rests on the statement of the co-accused which are not admissible in evidence. Moreover, Irshad Khan @ Charsibaba (accused No. 5) alleged to be the main supplier, who was also found in possession of intermediate quantity of Charas, has been released on bail by the Court of Session, by an order dated 9th February, 2024. Therefore, the applicant is entitled to the same dispensation.

8. Ms. Achari further submitted that the seizure of intermediate

quantity of Charas is vitiated as the applicant was not apprised of his right under section 50 of the NDPS Act, 1985. Inviting attention of the Court to the appraisal memo (page 63), Ms. Achari would urge that it was informed to the applicant that he may demand search before the gazetted officer or Magistrate and not that the applicant had a “right” to be searched before the Magistrate or gazetted officer.

9. Ms. Humane, learned APP strongly opposed the prayer for bail. It was submitted that the applicant was found in possession of 108 gms Charas and Khalil Shaikh (accused No. 1) who was found in possession of 1190 gms Charas, a commercial quantity. Therefore, it can not be said that the applicant was not found in possession of commercial quantity of the contraband substance. It was further submitted that there is material to show that the applicant was involved in drug trafficking with the co-accused. As the interdict contained in section 37 of the NDPS Act, 1985 comes into play, the applicant does not deserve to be released on bail.

10. To begin with, the alleged non-compliance of the mandate contained in section 50 of the NDPS Act, 1985. In the case of **State of Punjab vs. Baldev Singh**¹ the Constitution Bench of the Supreme

1 (1999) 6 Supreme Court Cases 172.

Court held that there was unanimity in judicial pronouncements to the effect that it is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in the presence of a Gazetted Officer or a Magistrate and that the failure to so inform the suspect of his right, would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50.

11. In the case at hand, the appraisal memo indicates that the applicant was informed that he can demand to be searched before the nearest gazetted officer or Magistrate and if he make such demand, investigating agency would makes such arrangement. Ms. Achari would urge that the said appraisal falls foul of the mandate contained in section 50 of the NDPS Act, 1985. Attention of the Court was invited to the decision in the case of **Mohsin Mohammed Khan vs. State of Maharashtra**² wherein the following observations were made.

4] The appraisal as contemplated under Section 50 of the NDPS Act and as given to the applicant in writing by the Investigating Agency which is annexed at Page 38 to the present application is an incomplete and improper appraisal. The applicant was not apprised of

2 2018 SCC OnLine Bom 12898

his legal right that, he was also having right to be searched before the Magistrate. The word right is absent in the written appraisal given to the applicant by the investigating agency.

5] In view thereof, it prima facie appears that, the right of applicant as contemplated under Section 50 of the NDPS Act has been violated and the recovery of the alleged contraband made at the instance of the applicant becomes doubtful. In view of the decisions of the Supreme Court in the case of State of Punjab vs. Baldev Singh reported in (1999) SCC 172 followed in the case of State of Rajasthan vs. Parmanand and anr. Reported in (2014) 2 SCC (Cri.) 563 the applicant is entitled to be released on bail.

12. Semantics apart at the heart of the matter is the question as to whether the applicant was apprised of his right to be searched before the nearest Magistrate or gazetted officer under section 50 of the NDPS Act, 1985 which is of mandatory nature and warrants scrupulous compliance. Appraisal memo, ex facie, does not indicate that the applicant was informed of his right. It could be urged that the communication that he can demand such search, implies that he had right to demand the search before a gazetted officer or Magistrate. However, the element of positive assertion of “right’ to be searched before the gazetted officer or Magistrate is missing in appraisal memo.

13. In **Baldev Singh** (supra) the Supreme Court emphasized that in so far as the obligation of the authorized officer under sub-

section (1) of Section 50 of the NDPS Act is concerned it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article with the person of the accused during such search.

14. It would be advantageous to make a reference to the Constitution Bench judgment of the Supreme Court in the case of **Vijaysinh Chandubha Jadeja vs. State of Gujarat**³, wherein the Supreme Court enunciated that the concept of “substantial compliance” with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in **Joseph Fernandes vs. State of Goa**⁴ and **Prabha Shankar Dubey vs. State of Madhya Pradesh**⁵, **Krishna Kanwar vs. State of Rajasthan**⁶ is neither borne out from the language of sub-section (1) of Section 50, nor it is in consonance with the dictum laid down in **Baldev Singh** (supra).

15. In the facts of the case, however, a definitive finding on the

3 2011(1) SCC 609.

4 (2000) 1 SCC 707.

5 (2004) 2 SCC 56.

6 (2004) 2 SCC 608.

question of compliance of section 50 of the NDPS Act, 1985 is not warranted for considering the prayer for bail.

16. On the aspect of the applicant having been found in possession of commercial quantity of Charas, prima facie, the prosecution case rests on the simultaneous arrest of the applicant and accused No. 1 and the discovery of the drug cartel pursuant to the statement made by the co-accused. Prima facie, it appears that the identity of the Ganesh Harijan (accused No. 3) and Saleem Shaikh (accused No. 4) as the members of the cartel was revealed in the statement of the applicant and the co-accused. However, it is imperative to note that there does not seem to be any material to show that the applicant had allegedly acquired the contraband substance from Charsibaba (accused No. 5). It is this missing link that persuaded the learned Special Judge to release Irshad Khan @ Charsibaba (accused No. 5) on bail.

17. In the aforesaid view of the matter, the implication of the applicant for the offence punishable under section 29 of the NDPS Act, 1985 appears to be debatable. Since the co-accused Irshad Khan (accused No. 5), who was also allegedly found in possession of intermediate quantity of contraband substance has been released

on bail, the principle of parity also applies.

18. Resultantly, the interdict contained in section 37(1)(b)(ii) of the NDPS Act, 1985 may not attract. I am, therefore, inclined to allow the application.

Hence, the following order.

ORDER

- 1] The application stands allowed.
- 2] The applicant Mehboob Mohammad Shafat Mansoori be released on bail in C.R. No. 12 of 2023 registered with DCB CID, Unit-IV, Mumbai, on furnishing a P.R. Bond of Rs. 1,00,000/- with one or more sureties in the like amount.
- 3] The applicant shall mark his presence at DCB CID, Unit-IV, Mumbai on the first Monday of every month between 11 am to 1 pm for a period of three years or till conclusion of the trial, whichever is earlier
- 4] The applicant shall not tamper with the prosecution evidence and give threat or inducement to first informant, any of the prosecution witnesses or any person acquainted with the facts of the case.
- 5] 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.

6] The applicant shall regularly attend the proceedings before the jurisdictional Court.

7] 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.)