



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.4243 OF 2023**

Moiz Shabbir Lokhandwala

... Applicant

versus

State of Maharashtra

... Respondent

Mr. Ayaz Khan i/by Mr. Rajendra S. Bidkar, for Applicant.

Mrs. Ranjana D. Humane, APP for State.

CORAM: N.J.JAMADAR, J.

DATE : 28 MARCH 2024

P.C.

1. Heard the learned Counsel for the parties.
2. The applicant who is arraigned in C.R.No.1112 of 2022 registered with Mumbra Police Station for the offences punishable under Sections 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, Sections 25 read with Sections 3 and 4 of the Arms Act, 1959 and Sections 135 read with 37(1) of the Maharashtra Police Act, 1951, has preferred this application to enlarge him on bail.
3. On 25 November 2022 pursuant to a secret information that Abhishekkumar Mahato (A1) and Vijay Madhe (A2) were to come near Y Junction, Mumbra – Shilphata bypass road, Thane to sell mephedrone (MD), Thane police conducted surveillance accompanied by panch witnesses. At about 2.20 p.m., accused Nos.1 and 2 whose description matched the information, came near Y Junction. They were accosted. They were apprised of their right under Section 50 of

the Act, 1985. As they declined to avail the said right, search was conducted. In the search of Abhishek (A1), a plastic pouch containing white substance was found. It appeared MD and weighed 107 gms. A country made pistol and 9 live cartridges were also found in possession of Abhishek (A1). In the search of Vijay (A2), a chopper was found. Incriminating articles were seized and sealed. Samples of the contraband were collected.

4. During the course of investigation, it transpired that the applicant was the main supplier of the drug and it was being peddled through various persons in the area of Mumbra and Thane. Abhishek (A1) made a disclosure statement implicating the applicant as the person who had supplied the drug which was seized from him. In the house search of co-accused Shabbir Shaikh (A4), who was also named as a peddler working for the applicant, bundles of small polythin bags, three bundles of transparent zip pouches, electric weighing scale and two steel spoons were recovered. Shabbir Shaikh (A4) also made disclosure statement implicating the applicant and pointing out the places where he had delivered the contraband to Abhishek (A1). The applicant came to be arrested on 9 May 2023 while he was detained in C.R.No.269 of 2023.

5. Mr. Khan, learned Counsel for the Applicant submitted that the applicant has been implicated solely on the basis of the statements of the co-accused. No contraband article was found in the possession of the applicant. There is no material to connect the applicant with the alleged recovery of the contraband articles

from Abhishek (A1). The said seizure of the contraband articles from the possession of Abhishek (A1) also stands vitiated as the panchanama indicates that the samples were collected at the time of the seizure and those very samples were sent for analysis to chemical analyser. Though the inventory was conducted on 6 December 2022, yet the said inventory is of no assistance to the prosecution as no fresh samples were drawn from the bulk in the presence of the Magistrate. Thus, eventually the fate of the prosecution case would turn on the CA report which is based on the sample collected at the time of the seizure, which is bereft of any evidentiary value.

6. Mr. Khan would further submit that though the prosecution has arrayed few antecedents against the applicant, yet in the absence of any material to connect the applicant with the offences in question, bail cannot be denied on the ground that the applicant has antecedents.

7. As against this, Mrs. Humane, learned APP submitted that the applicant is the kingpin of drug cartel. The applicant has been supplying drugs in Mumbra and Thane area through his hirelings. Apart from the statements of the witnesses, there is material to show that there were financial transactions between the applicant and the co-accused. Having regard to his antecedents, the applicant does not deserve to be enlarged on bail as the interdict contained in Section 37(1)(b)(ii) comes into play since the commercial quantity was found in possession of Abhishek (A1).

8. From the perusal of the material on record, it appears that pursuant to a

secret information, initially Abhishek (A1) and Vijay (A2) were apprehended. In the search of Abhishek (A1), 107 gms MD was found. In addition, firmarm along with live cartridges were also found in the possession of Abhishek (A1) and a chopper was found in possession of Vijay (A2). Based on the disclosures made by Abhishek (A1) and Vijay (A2), co-accused Shahrukh Khan, Shabbir Shaikh and Sunny Singh came to be arrested. In the house search of Shabbir Shaikh (A4), articles used to weigh, pack and seal the contraband articles were allegedly found. No contraband article as such seems to have been recovered from any of the co-accused or the applicant.

9. It is true, where a person is arraigned for an offence under Section 29 of the Act, it is not necessary that such person must be found in possession of the contraband article. However, there should be prima facie material to establish the nexus between the person who is sought to be roped in by invoking Section 29 and the persons who were found in possession of the contraband article, as either as an abettor or a confederate in the criminal conspiracy. It is also well recognized that the conspiracies are hatched in secrecy and rarely there would be direct evidence of the conspiracy. It is, therefore, required to be appreciated as to whether there is prima facie material to connect the applicant with the offences arrayed against him.

10. Co-accused Abhishek (A1) has made a disclosure that the contraband was supplied to him by the applicant through Shabbir Shaikh (A4). Abhishek (A1) volunteered to show the places where Shabbir Shaikh (A4) had delivered the

contraband articles sent by the applicant. Shabbir Shaikh (A4) also made a disclosure statement to show the places where he had handed over contraband articles to Abhishek (A1), which was allegedly supplied by the applicant.

11. The aforesaid disclosures, as is evident, are in the nature of statements of the co-accused. Firstly, it appears the disclosure statements attributed to the co-accused Abhishek (A1) and Shabbir Shaikh (A4), qua the role of the applicant, do not appear to be distinctly related to the fact thereby discovered, namely the places where the contraband articles were handed over by Shabbir Shaikh (A4) to Abhishek (A1). Secondly, it is trite, the disclosure statement made by one accused is not a legal piece of evidence qua the non-maker co-accused.

12. It was sought to be urged on behalf of the applicant that if the very seizure of the contraband article from Abhishek (A1) falls through, the applicant cannot be roped in by invoking Section 29 of the Act. This submission was premised on the non-compliance of the mandate contained in Section 52-A of the Act. As is evident from the seizure panchanama, 107 gms MD was found in possession of Abhishek (A1). It is specifically recorded in the panchanama that two samples comprising of 1 gm of MD each, were collected at the time of the alleged seizure and marked Exhibit A1 and A2 and the bulk was marked Exhibit A.

13. The inventory carried out before the Magistrate on 6 December 2022 makes this position abundantly clear. The learned Magistrate in the Certificate issued

under Section 52-A(3) had, inter alia, recorded that one sample of 1 gm (Exhibit A1) was already sent to the CA and the bulk and another sample (A2) weighing 1.4 gms was produced before the learned Magistrate. It does not appear that the samples were afresh drawn in the presence of the learned Magistrate.

14. It would be contextually relevant to note that the forwarding letter to FSL dated 28 November 2022 (page 111) clearly records that the sample (A1) comprising of 1 gm of MD out of 107 gms was forwarded thereunder to the CA. CA report would thus be based on the said sample.

15. Mr. Khan, learned Counsel for the Applicant submitted that the collection of the sample at the time of the seizure is not envisaged by the provisions of the Act, 1985. What is required to be sent to the FSL is a sample drawn before the Magistrate. Failure to do so would be in teeth of the decision of the Supreme Court in the case of **Union of India V/s. Mohanlal and Anr.**¹.

16. Mr. Khan placed reliance on a judgment of the learned Single Judge of this Court in the case of **Sunil Basant Malvi and Anr. V/s. The State of Maharashtra**² wherein after adverting to the decision of the Supreme Court in the cases of **Union of India V/s. Mohanlal and Anr. (supra)** and **Simarnjit Singh V/s. State of Punjab**³ it was inter alia observed that the lapses on the part of the prosecution in not collecting the samples before the Magistrate and forwarding the

1 (2016) 3 SCC 379

2 Criminal Appeal No.270 of 2023

3 2023 (3) Crimes 168

very sample which was collected before the Magistrate to the FSL will be fatal to the case of the prosecution and will, thus, create serious doubt about its case that the substance recovered was the contraband article.

17. In a line of decisions, the Supreme Court has recently enunciated that the collection of samples at the time of the seizure is not envisaged by the provisions of the Act. Samples must be drawn before the Magistrate. In the case of **Union of India V/s. Mohanlal and Anr. (Supra)**, the Supreme Court inter alia observed 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 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.”

18. A case of complete non-compliance of Section 52-A and the one with material to indicate that there was a substantial compliance or there was still possibility of compliance of Section 52-A of the Act, in my view, stand on different footings. It is in the aforesaid context, reference to the decisions of the Supreme Court in the case of Yusuf @ Asif V/s. State⁴ and Simaranjit Singh V/s. State of Punjab⁵ would be advantageous.

19. In the case of Yusuf @ Asif V/s. State (supra), 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

4 Cri. Appeal No.3191 of 2023 dt. 13 Oct. 2023

5 2023 SCC Online SC 906

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.”

20. In the case of **Simaranjit Singh V/s. State of Punjab (supra)**, 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.

21. In the latest pronouncement in the case of **Mohammed Khalid and another vs. The State of Telangana**⁶ 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.

22. In the light of the aforesaid enunciation of law, there is substance in the submission of Mr. Khan that the prosecution will have to surmount the challenge of non-compliance of Section 52-A of the Act. If the procedure of sampling vitiates the

⁶ Criminal Appeal No(S).1610/2023, dtd.1/3/2024.

search, then the Court may be justified in drawing an inference that the accused may not be guilty of the offences under the Act, 1985 and, thus, the interdict contained in Section 37(1)(b)(ii) may not operate.

23. As regards the antecedents, the prosecution asserted that three crimes i.e. C.R.No.59 of 2017, 71 of 2017 and 269 of 2023 have been registered against the applicant, and, therefore, the applicant being a habitual drug trafficker does not deserve to be enlarged on bail.

24. Learned Counsel for the Applicant joined the issue by canvassing a submission that out of the aforesaid crimes, in two of the cases, the applicant has been acquitted by the Special Court. In NDPS Special Case No.89 of 2017 arising out of C.R.No.59 of 2017, the applicant came to be acquitted by a judgment and order dated 18 April 2022. In NDPS Special Case No.82 of 2017 arising out of C.R.No.71 of 2017, the applicant came to be acquitted by a judgment and order dated 25 October 2023. Copies of the judgments were tendered in support of the said submission. It was, thus, urged that the aforesaid antecedents cannot be arrayed against the applicant.

25. So far as C.R.No.269 of 2023, learned Counsel for the Applicant submitted that in the instant crime, the applicant came to be arrested while he was in custody in C.R.No.269 of 2023. It was further urged that in the absence of complicity in the instant case, the mere fact that the applicant has antecedents, cannot be a ground to deny the bail.

26. It is true, certain crimes have been registered against the applicant. However, with the acquittal of the applicant in two out of the three crimes arrayed against him, the prosecution cannot press into service those two crimes against the applicant. Since the applicant is sought to be implicated in this crime by invoking the provisions contained in Section 29 of the Act, the aforesaid development in the crimes registered against the applicant deserves to be taken into account.

27. I am, therefore, persuaded to hold that now the antecedents of the applicant cannot be said to be of such nature as to disentitle the applicant from bail. The twin test thus stands satisfied. Therefore, I am inclined to exercise discretion in favour of the applicant.

28. Hence, the following order :

ORDER

(i) The Application stands allowed.

(ii) The Applicant - Moiz Shabbir Lokhandwala be released on bail in C.R.No.1112 of 2022 registered with Mumbra 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 Mumbra Police Station on first Monday of every alternate month in 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.)