



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.4271 OF 2023**

Monish Ashok Khamesra

... Applicant

versus

The State of Maharashtra

... Respondent

Mr. Tohid Shaikh i/by Ms. Anjali Patil, for Applicant.

Ms. Supriya Kak, APP for State.

API Khandagale, ANC Kandivali present.

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.35 of 2021 registered with ANC, Mumbai, for an offence punishable under Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 has preferred this application to enlarge him on bail.
3. On 21 April 2021, ANC Police were on a patrolling duty. When they reached in front of Ryan International School, Evershine Nagar, Malad, Mumbai, a person was found waiting in a bewildered state near Jeep bearing No.MH-47/AB-4446. He was accosted. He gave evasive answers about the black bag which he had thrown in the jeep after noticing the police party. 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 presence of panch witnesses.

4. In the personal search of the applicant, a transparent plastic pouch containing three strips with 43 paper dots, 42 papers dots and 88 paper dots were found. In all 173 paper dots were found. They weighed 3.3 gms. A dot in each of the strips was tested with drug detection kit and turned out to be that of Lysergide i.e. LSD. Contraband articles were seized and samples of each of the strips were collected. In addition, in the black polythene bag which the applicant had kept in the jeep, 75 tablets of methylene dioxy methamphetamine (MDMA) were found. Those tablets weighed 37.5 gms. Samples of MDMA tablets were also collected. The applicant was arrested on 21 April 2021.

5. Mr. Tohid Shaikh, learned Counsel for the Applicant, submitted that apart from the non-compliance of the mandatory provisions contained in Section 42 and 50 of the Act, 1985, there is a serious infirmity in the prosecution case. It was submitted that the samples which were allegedly received and analyzed by the CA were not the same which were forwarded by the authorized officer. Firstly, there was a discrepancy in the colour of the tablets which were recovered and forwarded to the CA. Secondly, what the CA had received was a substance in the powder form and not the tablet, which was allegedly recovered from the possession of the applicant. Attention of the Court was invited to the CA report dated 8 October 2021.

6. In any event, according to Mr. Tohid Shaikh, CA report is of no assistance to the prosecution as there was non-compliance of the mandatory

provisions contained in Section 52-A of the Act. To salvage the position, the prosecution appears to have conducted an inventory on 12 January 2023, after about 19 months of the alleged recovery. Such inventory does not advance the cause of the prosecution.

7. Ms. Kak, learned APP for the State, countered the submissions on behalf of the applicant. It was urged that the provisions of Section 50 have been scrupulously complied with. Since commercial quantity of contraband was found in the possession of the applicant, the bar contained in Section 37 of the Act operates. It was urged that since the inventory was carried out on 12 January 2023, though belatedly, the applicant cannot be permitted to urge that there is non-compliance of Section 52-A of the Act.

8. I have carefully considered the submissions canvassed across the bar. Prima facie, 173 square paper dots contained in three strips and 75 MDMA tablets were allegedly recovered from the possession of the applicant. Evidently, there appears compliance of the provisions contained in Section 50 of the Act. The legality and validity of the seizure was assailed on the ground that there is discrepancy in the samples which were forwarded to and analyzed by the CA.

9. As regards the sample of MDMA tablets (Exhibits D1 and D2) which were collected at the time of the seizure, it appears that vide forwarding letter dated 22 April 2021, the sample (Exhibit D1) was forwarded to CA on 22 April 2021 itself.

However, the CA report records that the sample (D1 – Exhibit Exhibit 7) contained greenish blue powder stated to be of tablet in a stapled polythene bag. Prima facie, there is a discrepancy in the samples of MDMA which were forwarded to and received by the CA. CA report further indicates that the samples of square paper dots (Exhibit A1, B1 and C1) which were collected at the time of the seizure from the three strips, were used samples and, hence, unsuitable for analysis. CA however, opined that the bulk (consisting of three strips) contained lysergide. In effect, three samples could not be tested as they were found unsuitable for analysis and the fourth sample of MDMA tablet was found to contain greenish blue powder.

10. In the circumstances, the submission on behalf of the applicant cannot be said to be unfounded. In any event, samples were collected at the time of the alleged seizure. The inventory which was carried out after 20 months of the alleged seizure does not advance the cause of the prosecution. Reliance placed by Mr. Shaikh on an order passed by a learned Single Judge of this Court in the case of **Jabir Nader Ali V/s. The State of Maharashtra**¹ appears to be well founded. In the said case, after advertng to the pronouncement of the Supreme Court in the case of **Union of India V/s. Mohanlal and Anr.**² this Court, inter alia, observed as under :

“11.....My attention is invited to an Inventory Panchnama dated 3/3/2022 drawn more than two years after the contraband was seized, and it is nothing but an attempt to fill up the lacunae by non-adhering to the

1 BA 303 of 2023 dt. 4 December 2023

2 (2016) 3 SCC 379

procedure prescribed u/s.52A and what is worth to note is the utter casual approach in carrying out the process, as in the Inventory Panchnama, what is put to test is Exhibit-B i.e. Ecstasy tablets which have been weighed and this procedure is not adopted in respect of Exhibit-A, the alleged seized contain the LSD blots. The Metropolitan Magistrate has issued a certification but which is restricted only on the production of Ecstasy tablet contained in Exhibit-B and not as regards the LSD, and therefore, even this process, in an attempt to fill up the lacunae by the prosecution is not faithful and beyond doubt.

11. In a line of decisions, the Supreme Court has 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.”

12. In the case of Yusuf @ Asif V/s. State³, 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.”
(emphasis supplied)

13. In the case of Simaranjit Singh V/s. State of Punjab⁴, the Supreme

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

4 2023 SCC Online SC 906

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.

14. In the latest pronouncement, in the case of Mohammed Khalid and another vs. The State of Telangana,⁵ 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.

15. The aforesaid being the position in law, the prosecution, which rests on the CA report based on the samples which were collected at the time of the alleged seizure, will have to surmount the challenge of non-compliance of Section 52-A of the Act. In that event, the Court may be justified in drawing an inference that the accused may not be guilty of the offences under the NDPS Act, 1985. In the case at hand, in addition, as noted above, there are inherent infirmities in the sampling and analysis.

⁵ Criminal Appeal No(S).1610/2023, dtd.1/3/2024.

Thus, the interdict contained in Section 37(1)(b)(ii) of the Act may not operate with full force. Secondly, the applicant has no antecedents. The Court may thus draw an inference that the applicant may not indulge in identical offences, if released on bail. I am, therefore, inclined to exercise discretion in favour of the applicant.

14. Hence, the following order :

ORDER

(i) The Application stands allowed.

(ii) The Applicant – Monish Ashok Khamesra be released on bail in C.R.No.35 of 2021 registered with ANC, Kandivali Unit 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, Kandivali Unit 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.)