



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION  
BAIL APPLICATION NO.61 OF 2024**

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| Engok Lorances Ajaha     | ... | Applicant  |
| versus                   |     |            |
| The State of Maharashtra | ... | Respondent |

Ms. Lochan Chandka, for Applicant.  
Mr. H.J.Dedhia, APP for State.  
API Pallavi Dhage-Patil, Crime Branch, Unit V, Thane, present.

**CORAM: N.J.JAMADAR, J.**

**DATE : 7 OCTOBER 2024**

**P.C.**

1. Heard the learned Counsel for the parties.
2. This is an application for bail in connection with C.R.No.90 of 2023 registered with Shreenagar Police Station, Thane, for the offences punishable under Sections 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.
3. On 31 March 2023, specific information was received that a named Nigerian national, was to come in front of Shivsena Office, Indira Nagar, Wagle Estate, Thane by autorikshaw to sell cocaine. A surveillance was mounted. At about 17.15 hrs., the applicant (A1), whose features matched the description given by the informant, came in front of Shivsena Office, in an autorikshaw. He was accosted. The applicant identified himself as Ignok Ajaha (A1). Laxman Saw (A2) was driving the said rikshaw. Laxman (A2)

was also accosted.

4. The applicant and Laxman (A2) were apprised of their right to be searched before the nearest Magistrate or Gazetted Officer under Section 50 of the Act, and, thereafter, a search was conducted. In the search of the applicant, a transparent plastic pouch containing white substance was found. It was tested with the drug detention kit. It tested positive for cocaine. It weighed 105 gms. In the search of Laxman (A2) also, 10 gms cocaine was found. The contraband articles were seized and samples were collected.

5. Ms. Chandka, learned Counsel for the Applicant, at the outset, submitted that Laxman Saw (A2) came to be released on bail by this Court by an order dated 9 May 2024. The reasons which weighed with this Court, especially the non-compliance of the mandate contained in Section 52-A of the Act, 1985, apply with equal force to the claim of the applicant for bail. It was submitted that the prosecution case rests on the samples which were allegedly drawn at the time of the seizure. Attention of the Court was invited to the seizure memo and the forwarding letter dated 1 April 2023, which records that the samples of cocaine allegedly seized from the possession of the applicant and Laxman (A2) (Exhibits A-1 and B-1, respectively) were forwarded to the FSL thereunder. Though, the investigating agency conducted the proceedings under Section 52-A of the Act subsequently, that is of no avail to the prosecution, as neither fresh samples were drawn nor

such samples were forwarded for analysis to FSL afresh. Attention of the Court was invited to the certificate issued by the jurisdictional Magistrate on 27 April 2023 (page 127).

6. Mr. Dedhia, learned APP, fairly submitted that as regards the ground of non-compliance of the provisions contained in Section 52-A of the Act, the order passed by this Court releasing Laxman (A2) on bail, may enure to the benefit of the applicant. Learned APP, however, submitted that the fact that the huge quantity of 110 gms of cocaine was found in the possession of the applicant, who was allegedly the principal offender and only 10 gms of cocaine was found on the person of Laxman (A2), who was the autorikshaw driver, also deserves to be taken into account. Therefore, the alleged infirmity in the proceedings under Section 52-A of the Act may not sustain the prayer for grant of bail.

7. While releasing Laxman Saw (A2) on bail, this Court had considered the effect of failure to scrupulously comply with the statutory mandate contained in Section 52-A of the Act, as under :

"7. The ground of non-compliance of Section 52-A of the Act, however, carries substance. The seizure panchanama records that 105 gms of cocaine was found in possession of the co-accused. The IO weighed the contraband substance and collected samples at the time of the seizure and marked those

samples as Exhibits A1 and A2. Likewise, out of the contraband of 10 gms cocaine allegedly found in possession of the applicant, samples of 1 gm each were collected and marked Exhibit B1 and B2. The forwarding letter dated 1 April 2023 (page 89) indicates that the said exhibits A1 and B1 were forwarded for analysis to the FSL.

8. Evidently, the prosecution case rests on the CA report, on the basis of the analysis of the samples collected at the time of the alleged seizure. Though, the IO took steps to have an inventory of the contraband articles recovered from the applicant and the co-accused before the Magistrate in compliance with the provisions contained in Section 52-A of the Act, yet the inventory does not advance the cause of the prosecution. A perusal of the inventory panchanama dated 27 April 2023, indicates that the bulk recovered from the accused No.1 i.e. 104 gms cocaine (Exhibit A) and the reserve sample of 1 gm cocaine (Exhibit A2) and 9 gms cocaine (Exhibit B) and 9.5 gms cocaine (Exhibit B2), were produced before the learned Magistrate. The certificate of the Magistrate, however, records that the total weight of the cocaine seized from the applicant with carry bag, was 20 gms (Exhibit B) and that of sample 13.5 gms (Exhibit B2). Moreover, it does not appear that fresh samples were drawn before the learned

Magistrate and forwarded to CFL for analysis.

9. In a line of decisions, the Supreme Court has emphasized that collection of the samples of contraband article at the time of seizure itself is not envisaged by the provisions contained in NDPS Act, 1985. The provisions contained in section 52-A of the NDPS Act, 1985 have been held to be mandatory in nature. 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.**<sup>1</sup>, 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*

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1 (2016) 3 SCC 379

*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.”*

10. In the case of Yusuf @ Asif V/s. State<sup>2</sup>, 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.”*

11. In the case of Simaranjit Singh V/s. State of Punjab<sup>3</sup>, 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

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<sup>2</sup> Cri.Appeal 3191 of 2023 Dt.13/10/2023.

<sup>3</sup> 2023 SCC Online SC 906.

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.

12. In the latest pronouncement in the case of **Mohammed Khalid and another vs. The State of Telangana**<sup>4</sup>, the Supreme Court observed in emphatic terms that since no proceedings under Section 52-A 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.

13. The upshot of aforesaid consideration is that there is non-compliance of the provisions contained in Section 52-A of the Act, in letter and spirit. Eventually, the prosecution will bank on the CA report based on the analysis of the samples drawn at the time of the seizure. Thus, the prosecution will have to surmount the challenge of non-compliance of Section 52-A of the Act.

14. In these circumstances, I am impelled to hold that there is a substantial probable cause to draw an inference that eventually, the applicant

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

may not be found guilty of the offences for which he has been arraigned. The Court is not informed that the applicant has antecedents. Thus, an inference may be drawn that the applicant may not indulge in identical offences if enlarged on bail. I am, therefore, inclined to allow the application.

8. The aforesaid reasons do indicate that the samples were drawn at the time of the alleged seizure. Those very samples (A-1 and A-2) were sent for analysis to FSL under the forwarding letter dated 1 April 2023. Conversely, no fresh samples were drawn before the learned Magistrate while conducting inventory under Section 52-A of the Act. On parity of reasoning, the prayer of the applicant for bail deserves to be considered. The fact that there was difference in the quantity of the contraband substance found in possession of the applicant and Laxman Saw (A2), in the circumstances of the case, does not bear upon the challenge of non-compliance of Section 52-A of the Act, which the prosecution may be required to surmount.

9. The Court is not informed that the applicant has antecedents. Therefore, the Court may draw an inference that the applicant may not indulge in identical activity if enlarged on bail. I am, therefore, inclined to exercise discretion in favour of the applicant.

ORDER

- (i) The Application stands allowed.
- (ii) The Applicant – Engok Lorances Ajaha be released on bail in C.R.No.90 of 2023 registered with Shreenagar 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 Shreenagar Police Station on first Monday of every 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) Subject to the proceedings for deportation for overstay, the applicant shall not leave the country without prior permission of the Special Court.
- (vii) The applicant shall regularly attend the proceedings before the jurisdictional Court.
- (viii) 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. )**