

(This order is corrected as per speaking to minutes order dated 20th September 2024.)

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

BAIL APPLICATION NO. 435 OF 2024

Gadadhar Nityanand Panda ... Applicant
Versus
The State of Maharashtra ... Respondent

Mithilesh Mishra a/w Hrituraj Singh for the Applicant.
Mr. Bapu V. Holambe-Patil, APP for Respondent-State.
Mr. Khandagale, API, Anti Narcotics Cell, Kandivali Unit.

**CORAM: MANISH PITALE, J.
DATE : 6th SEPTEMBER 2024**

P.C. :

. Heard learned counsel for the applicant and learned APP for the respondent-State.

2. In the present case, the applicant was arrested on 5th February 2021 in connection with FIR of the same date, bearing No. 15 of 2021 registered at Anti Narcotics Cell, Kandivali Unit, Mumbai, for offences under Sections 8(c) and 20(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). The samples of the contraband seized in terms of the *panchanama* dated 5th February 2021 were sent directly to the concerned laboratory for chemical analysis. The report of the laboratory dated 18th June 2021 shows that the contraband seized from the applicant was *Ganja*. This is a case of alleged commercial quantity of *Ganja* being recovered from the applicant.

3. The learned counsel for the applicant submitted that in the present case, the contents of the four packets allegedly recovered from the applicant were mixed and then the samples were drawn and sent for chemical analysis. This act on the part of the Investigating Officer vitiated the procedure. It was further submitted that in the present case, there is total non-compliance of the Section 52A of the NDPS Act and therefore, a strong case on merits is made by the applicant in his favour.

4. The learned APP submitted that the seizure *panchanama* itself records that the four packets of contraband seized from the applicant contained identical material and thereupon, the same was mixed, indicating that in terms of law laid down by this Court in various judgments, including judgment in the case of ***Venktesh Shiva Permal v/s. The State of Maharashtra*** (judgment and order dated 23rd January 2024 passed in Bail Application No. 3784 of 2023), was not violated. The mixing of the contents of the packets before drawing samples cannot inure to the benefit of the applicant. As regards non-compliance of Section 52A of the NDPS Act, although the charge-sheet does not contain any document in that regard, a photocopy of inventory *panchanama* dated 17th November 2022 was tendered across the bar. It is submitted that the inventory *panchanama* was executed before the Magistrate and the concerned Magistrate did issue certificate in terms of Section 52A of the NDPS Act on 17th November 2022. It is submitted that this Court may treat this as substantial compliance with the said

requirement and therefore, it could be said to be only a matter for trial.

5. This Court has perused the material on record. The seizure *panchanama* indeed records that the contents of the four packets of contraband seized from the applicant contain identical material and thereupon, contents of the packets were mixed. This Court in the case of ***Venktesh Shiva Permal*** (supra) after extensively discussing the position of law in this regard, found that it could be an extreme view to take if it was to be held that on every occasion that the contents of such packets were mixed, it could be said that the prosecution case stood vitiated. It was held that this could be termed as an irregularity and only in cases where the packets and their contents are not found to be identical and then there is mixing of contents, can it be said that the aforesaid aspect can inure to the benefit of the accused. To that extent, the learned APP is justified in contending that the applicant cannot claim that he has a strong case on merits, merely because the contents of the packets containing contraband were mixed before samples were drawn.

6. But, the second ground raised on behalf of the applicant deserves consideration. In the case of ***Union of India v/s. Mohanlal & Anr., (2016) 3 SCC 379***, the Supreme Court in paragraphs 15 to 19 has held as follows :

“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-sections (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. Be that as it may, a conflict between the statutory provision governing taking of samples and the Standing Order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the

statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

19. Mr Sinha, learned Amicus Curiae, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification, etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. 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. 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 52-A (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. In paragraph 19 of the above quoted judgment, the Supreme has indeed taken note of the fact that no specific timeline is specified in Section 52A of the NDPS Act, but, at the same time, it has been observed that the Investigating Authority is expected to act “without any delay” and in any case, “within reasonable time” to move an appropriate application under Section 52A of the NDPS Act, so as to comply with the mandatory requirement.

8. In the present case, the record shows that the samples drawn at the time of seizure were directly sent for chemical analysis to the concerned laboratory in terms of forwarding letter dated 8th February 2021 and the report of the concerned laboratory also came on 18th June 2021. Along with the charge-sheet no document was placed on record to demonstrate as to whether the mandatory requirement under Section 52A of the NDPS Act was at all complied with. Today, for the first time a copy of an inventory *panchanama* dated 17th November 2022 is tendered, which shows that such a *panchanama* was executed and certificate was issued by the concerned Magistrate on 17th November 2022. This was after the concerned laboratory submitted its chemical analysis report dated 18th June 2021.

9. The aforementioned material shows that the inventory *panchanama* was executed after about 20 months from the date of

the registration of the FIR and in any case, 1 year and 5 months after even the report of the concerned laboratory was generated.

10. This Court is of the opinion that a strong *prima facie* case is made by the applicant in his favour regarding violation of the mandatory requirement under Section 52A of the NDPS Act. This satisfies the first limb of the stringent twin test contemplated under Section 52A of the NDPS Act. It is submitted that the applicant does not have any criminal antecedents and therefore, the second limb of the stringent twin test is also satisfied.

11. In view of the above, the application is allowed in the following terms:

- (a) The applicant shall be released on bail in connection with FIR No.15 of 2021 registered at Anti Narcotics Cell, Kandivali Unit, Mumbai, on furnishing P.R. Bond of Rs. 50,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.
- (b) The applicant shall report to the office of Anti Narcotics Cell, Kandivali Unit, Mumbai, on first Monday of alternate month between 10:00 a.m. and 12:00 noon.
- (c) The applicant shall cooperate with the trial Court for expeditious trial and he shall attend each and every date, unless exempted by the trial Court, for reasons to be recorded in writing.

- (d) The applicant shall not tamper with the evidence of the prosecution and he shall not influence the informant, witnesses or any other person concerned with the case.
- (e) The applicant, upon being released on bail, shall place on record of the trial Court the details of his Contact Number and residential address with updates in case of any change.

12. Needless to say, in case of violation of any of the aforesaid conditions, the bail granted to the applicant shall be liable to be cancelled. It is also clarified that the observations made in this order are limited to the disposal of the present bail application. The concerned Court shall proceed further in the matter without being influenced by the observations made hereinabove.

13. At this stage, the learned counsel for the applicant prays for cash security till the surety is furnished.

14. The applicant is permitted to furnish cash security of Rs.50,000/- for a period of two weeks.

15. The application is disposed of accordingly.

MANISH PITALE, J.