

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.516 OF 2024

Janardan Keshav Misal ...Applicant

vs.

The State of Maharashtra ...Respondent

Mr. Visshaal Khetre a/w. Ms. Rutuja Patil and Mr. Akshay, for the Applicant.

Mr. A.A. Naik, APP, for the Respondent/State.

Mr. D.Patil, API, Kashimira police station.

CORAM : N. J. JAMADAR, J.

DATE : JULY 18, 2024

P.C.:

1. Heard the learned counsel for the parties.
2. The applicant, who is arraigned in C.R. No. 675 of 2022, registered with Kashimira Police Station, Thane, for the offences punishable under Sections 21(c) and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act, 1985") and Sections 420, 465, 468, 471 and 473 read with 34 of the Indian Penal Code, 1860 ("the Penal Code"), has preferred this application to enlarge him on bail.
3. At the outset, the learned counsel for the applicant submits that all the co-accused have been released on bail. Chandan Thakur, who was allegedly driving the car in which the contraband was allegedly being transported, alongwith the tempo, bearing

registration No. MH-48-CB-4402, which was being driving by the applicant, has also been enlarged on bail. The learned counsel for the applicant submitted that the applicant is entitled to parity.

4. The learned APP opposed the prayer for bail. However, the learned APP fairly submitted that the principle of parity may apply.

5. While releasing the co-accused Chandan Thakur on bail, this Court had observed, *inter alia*, as under:-

12] The ground of non-compliance of the mandate contained in Section 52A of the NDPS Act, 1985, however, appears to be well-founded. The seizure panchnama dated 27th September, 2022 records that after 32 boxes of RECOKUF COUGH syrup were found in the car driven by the applicant, two bottles were collected by way of sample and marked Exhibits-B1 and B2 for forwarding the same to FSL for analysis. The rest of the bulk i.e. 3,598 bottles were marked Exhibit-B. The forwarding letter dated 28th September, 2022 (pages 86 to 88) *inter alia* records that the said two Exhibits containing sample bottles (Exhibits-B1 and B2), were forwarded for analysis to the FSL.

13] Evidently, the samples were collected at the time of the seizure of the contraband substance. Conversely, the learned APP, on instructions, submitted that the proceedings under Section 52A of the NDPS Act, 1985 were not at all conducted. It thus appear to be a case of total non-compliance of the provisions contained in Section 52A of the NDPS Act, 1985 and not one of delayed compliance.

14] In the aforesaid context, a reference to three recent Supreme Court judgments and orders which emphasise that the compliance of the provisions contained in Section 52A is mandatory, may be apposite. In the case of ***Yusuf @ Asif vs. State***¹, the Supreme Court after adverting to the provisions of Section 52A of the NDPS Act, 1985 and its earlier decision in the case of ***Union of India vs. Mohanlal and Anr.***² enunciated the law, *inter alia*, as under:

1 Criminal Appeal No.3191/2023.

2 (2016) 3 SCC 379.

“12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, the officer so referred to in sub section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.

13. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under sub-sections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of subsection (2) of Section 52A of the NDPS Act.

.....

15. In *Mohanlal's* case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.

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)

15] In the case of *Simarnjit Singh vs. State of Punjab*³, the Supreme Court again adverted to the decision in the case of *Mohanlal* (supra) and considering the facts in the case of *Simarnjit* (supra), observed that the act of PW-7 of drawing samples from all the packets at the time of seizure is not in conformity with the law laid down by the Supreme Court in the case of *Mohanlal* (supra). This creates a serious doubt about the prosecution’s case that substance recovered was a contraband.

16] In the latest pronouncement in the case of *Mohammed Khalid and another vs. The State of Telangana*⁴ 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 the presence of the jurisdictional Magistrate, the FSL report is nothing but a waste paper and cannot be read in evidence.

17] In the face of these pronouncements, a complete non-compliance of the mandate contained in Section 52A may result in a situation where the prosecution would be bereft of primary evidence. The omission to conduct the proceedings under Section 52A, in the light of the enunciation of law, constitutes a substantial probable cause to believe that the applicant may not eventually be found guilty of the offence for which he has been arraigned. The Court is not informed that the applicant has antecedents. Therefore, the interdict contained in Section 37 of the NDPS Act, 1985 may not operate.

18] Co-accused Nos.3 to 10 have been released on bail. The applicant has been in custody since 28th September, 2022. Having regard to the number of accused and the evidence which the prosecution may be required to adduce, it is extremely unlikely that the trial can be concluded within a reasonable period. I am, therefore, inclined to allow the application.

6. The aforesaid reasons which weighed with this Court while

3 2023 SCC OnLine SC 906.

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

releasing the co-accused Chandan Thakur on bail may apply with equal force to the claim of the applicant for bail. There is not much qualitative difference between the role attributed to Chandan Thakur and the applicant. Both were allegedly at the wheel of the vehicles, in which the contraband substance was being transported.

7. I am, therefore, inclined to hold that there are grounds to believe that eventually the applicant may not be found guilty of the offence for which he has been arraigned. The Court is not informed that the applicant has any antecedents. Therefore, the Court may draw an inference that the applicant will not indulge in identical offences, if released on bail.

8. I am, therefore, inclined to exercise discretion in favour of the applicant.

Hence, the following order.

ORDER

1] The application stands allowed.

2] The applicant be released on bail in C.R. No.675 of 2022 registered with Kashimira police station, 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 Kashimira police station on the first Monday of every alternate month between 11

am to 1 pm till conclusion of the trial.

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 co-accused and the trial Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

(N. J. JAMADAR, J.)