

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.2970 OF 2022

Juber Lalmohammad Momin ... Applicant

Vs.

State of Maharashtra ... Respondent

ALONG WITH

BAIL APPLICATION NO.270 OF 2023

Sardar Uttam Patil ... Applicant

Vs.

State of Maharashtra ... Respondent

ALONG WITH

BAIL APPLICATION NO.991 OF 2024

Abdul Razak Kadar Shaikh ... Applicant

Vs.

State of Maharashtra ... Respondent

WITH

INTERIM APPLICATION NO.1981 OF 2024

IN

BAIL APPLICATION NO.991 OF 2024

ALONG WITH

BAIL APPLICATION NO.3173 OF 2022

Suleman Johar Shaikh ... Applicant

Vs.

State of Maharashtra ... Respondent

ALONG WITH

BAIL APPLICATION NO.2957 OF 2023

Kais Kuresh Siddiqui ... Applicant

Vs.

State of Maharashtra ... Respondent

ALONG WITH

BAIL APPLICATION NO.4182 OF 2023

Naresh Madan Maskar ... Applicant

Vs.

State of Maharashtra ... Respondent

Mr. Ashok Mundargi, Senior Advocate i/b. Ms. Swarali Joglekar for Applicant in BA/3173/2022.

Mr. Mithilesh Mishra a/w. Mr. Agastya Desai for Applicant in BA/2970/2022.

Mr. Hrishikesh Mundargi i/b. Ms. Swarali Joglekar for Applicant in BA/270/2023.

Mr. Aayush Pasbola for Applicant in BA/991/2024.

Mr. Rohan S. Sawant for Applicant in IA/1981/2024 in BA/991/2024.

Mr. Taraq Sayed a/w. Ms. Ashwini Achari, Ms. Alisha Parekh Ms. Bhumika Gada and Mr. Tamhankar for Applicants in BA/2957/2023 and BA/4182/2023.

Mr. A. M. Chimalkar, Special Public Prosecutor a/w. Ms. Aishwarya Sharma and Mr. Mayur Sonavane, APP for Respondent State.

Mr. Mote, API and Mr. More, API, ATS, Vikhroli Unit present.

CORAM : MANISH PITALE, J.

DATE : AUGUST 05, 2024

P.C. :

. Heard learned counsel for the applicants and learned special public prosecutor for the respondent-State. The arguments were led by Mr. Mundargi, learned senior counsel on behalf of the applicants and Mr. Chimalkar, learned special public prosecutor, who was heard on behalf of the State in these applications.

2. Two principal submissions have been made on behalf of the applicants. Firstly, it is submitted that the mandatory requirement of Section 52-A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) is not complied with by the investigating authority, thereby vitiating the entire investigation and prosecution. Reliance is placed on judgement of the Supreme Court in the case of *Union of India Vs. Mohanlal and another*, (2016) 3 SCC 379. Secondly, it is submitted that all the accused persons were arrested on different dates in September 2019, in pursuance of the FIR registered on 10.09.2019, thereby demonstrating that all the applicants have suffered incarceration for almost five years. It is submitted that this factor may be taken into consideration, for the reason that completion of the trial does not appear to be possible in the foreseeable future.

3. On the other hand, the learned special public prosecutor has vehemently opposed the present applications. On the first ground, concerning compliance with Section 52-A of the NDPS Act, it is submitted that investigating authority was following the procedure indicated in the Standing Orders issued by the Central Government dated 15.03.1988. Subsequently, in the light of the judgement of the Supreme Court in the case of **Union of India Vs. Mohanlal and another** (*supra*), the State of Maharashtra issued revised guidelines on 23.12.2022. On this basis, it is submitted that the procedure in vogue was being followed and no fault can be attributed to the investigating authority. On the second submission regarding long incarceration, it is submitted that the aforesaid factor, in itself, ought not to lead to any relief being granted to the applicants, for the reason that there is enough material to show the involvement of each of the applicants in the present case. This is a serious case in which the recovery is of about 146 kgs. of contraband i.e. *mephedrone*. while the commercial quantity is only 50 grams, thereby indicating the seriousness of the offence committed by the applicant. The learned APP has emphasized upon the role of each and every applicant before this Court, indicating that indulgence may not be shown in the facts and circumstances of the present case.

4. The FIR, in the present case, was registered on 10.09.2019 at ATS, Kalachowki. Offences were registered under Sections 8, 22 and 29 of the NDPS Act. The role of the accused persons, including the applicants, came to the fore as the investigation proceeded and eventually, charge-sheet was filed in March 2020. It is a matter of record that the accused No.1 (applicant in Criminal Bail Application No.991 of 2024) was arrested on 10.09.2019; accused No.3 (applicant in Criminal Bail Application No.3173 of 2023) was arrested on 10.09.2019; accused No.5 (applicant in Criminal Bail Application No.4182 of 2023) was arrested on 10.09.2019; accused No.6 (applicant in Criminal Bail

Application No.270 of 2023) was arrested on 14.09.2019; accused No.7 (applicant in Criminal Bail Application No.2970 of 2022) was arrested on 17.09.2019 and accused No.9 (applicant in Criminal Bail Application No.2957 of 2023) was arrested on 18.09.2019. Thus, all the applicants were arrested in the month of September 2019, either on the date of registration of the FIR or within a few days thereafter. They have all suffered incarceration for a period of almost five years.

5. As regards mandatory requirement of Section 52-A of the NDPS Act being satisfied by the investigating authority, the question came up for consideration before the Supreme Court in the case of **Union of India Vs. Mohanlal and another** (*supra*). While discussing the aspect of seizure and sampling, the Supreme Court in the aforesaid judgement held as follows:-

“15. It is manifest from Section 52A(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. 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 52A (*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.”

6. A perusal of the above-quoted portion of the judgment shows that compliance with Section 52-A of the NDPS Act has been held to be mandatory for the investigating authority. In paragraph 18 of the said judgement, quoted hereinabove, the Supreme Court has clarified that even if there was a Standing Order of the Central Government in vogue, since it was in conflict with the statutory provision, the conflict would have to be resolved in favour of the statute on first principles of interpretation. Thus, the mandatory nature of compliance with Section 52-A of the NDPS Act was emphasized upon by the Supreme Court in the said judgement.

7. Apart from this, in paragraph 19 of the above-quoted judgement, the Supreme Court indicated that while there was no room for prescribing or reading a time frame into Section 52-A of the NDPS Act, inasmuch as the time taken by the investigating officer to apply to the competent Magistrate under Section 52-A of the NDPS Act, such an application for sampling and certification was necessarily required to be made without undue delay and the Magistrate was also expected to act upon the application within a reasonable period of time.

8. In the present case, it is undisputed that upon seizure of the contraband, the samples were sent directly for chemical analysis to the concerned laboratory. The intervening mandatory stage of Section 52-A

of the NDPS Act *prima facie* does not appear to have been satisfied immediately upon seizure of the contraband. The record shows that the first occasion on which the application was moved was in June 2021 and that too, before the *Naib Tahsildar*. The application before the competent Magistrate under Section 52-A of the NDPS Act was actually moved on 22.12.2022, which was more than three years after the date of the incident.

9. The only justification that could be offered on behalf of the investigating authority was that, at the relevant time, the directions issued by the State of Maharashtra, in tune with the Standing Order of the Central Government dated 15.03.1988, were in vogue. It was emphasized that subsequent guidelines were issued much later i.e. on 23.12.2022. This Court is unable to accept the aforesaid contention raised on behalf of the investigating authority, as either the Standing Order of the Central Government or the guidelines issued by the State of Maharashtra cannot override the mandatory statutory requirement of Section 52-A of the NDPS Act, as recognized by the Supreme Court in the aforesaid judgement in the case of **Union of India Vs. Mohanlal and another** (*supra*).

10. Even otherwise, this Court has already noted that inordinate delay in moving the application under Section 52-A of the NDPS Act for sampling and certification before the competent Magistrate clearly violates the mandate of the above-quoted paragraph 19 of the judgement in the case of **Union of India Vs. Mohanlal and another** (*supra*). Therefore, the applicants have made out a strong *prima facie* case in their favour, indicating that the first limb of the stringent twin test contemplated under Section 37 of the NDPS Act is satisfied by the applicants.

11. Even otherwise, all the applicants were arrested in September

2019 after registration of the FIR on 10.09.2019 and they have suffered incarceration for almost five years. There is nothing to indicate that the trial would be completed in a reasonable period of time and this is also a factor to be taken into consideration in the present application. This Court finds that second limb of the twin test under Section 37 of the NDPS Act is also satisfied.

12. In view of the above, the applications are allowed in the following terms:-

- (A) The applicants shall be released on bail in connection with NDPS Case No.374 of 2020 arising from FIR No.6 of 2019 registered at ATS Kalachowki, Mumbai dated 10.09.2019, Mumbai, on furnishing P.R. Bond of Rs.50,000/- [Rupees Fifty Thousand only] each with one or two sureties in the like amount to the satisfaction of the trial Court;
- (B) The applicants shall cooperate with the trial Court for expeditious trial and they shall attend each and every date, unless exempted for reasons to be recorded in writing;
- (C) The applicants shall report to ATS, Kalachowki on the first Monday of every month between 10 a.m. and 12 noon and as and when called;
- (D) The applicants shall not tamper with the evidence of the prosecution. They shall not influence the informant, witnesses or any other person concerned with the case;
- (E) The applicants shall surrender their passports, if any, with the trial Court;
- (F) Upon being released on bail, the applicants shall immediately, and in any case within a week, furnish the details of their active mobile numbers and residential

addresses to the trial Court and update about the same, if there is any change.

13. Needless to say, violation of any of the aforesaid conditions would make the applicants liable to face proceedings for cancellation of bail. It is also clarified that the observations made in this order are limited to the question of grant of bail to the applicants in the present application and that the trial Court shall proceed further, without being influenced by the observations made in this order.

14. All applications, including Interim Application No.1981 of 2024, are disposed of accordingly.

(MANISH PITALE, J.)

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