

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

BAIL APPLICATION NO. 1149 OF 2024

(This order is corrected as per speaking to the minutes of the order dated 11.10.2024)
Bahauddin Nizamuddin Qadri ...Applicant

Versus

The State of Maharashtra ...Respondent

- Ms. Tanvi Tapkire a/w Ms. Syed Shabana M. Ali, for the Applicant.
- Mr. Sagar R. Agarkar, APP for Respondent.
- Mr. Amol Ambavane, API, Anti Narcotic Cell, Mira Bhayandar, Vasai-Virar

CORAM : MANISH PITALE, J.

DATE : 20th August, 2024.

P. C. :

1. Heard Ms. Tapkire, learned counsel for the applicant and Mr. Agarkar, learned APP for the respondent – State.
2. The applicant was arrested on 04.03.2023 in connection with First Information Report No.0160 of 2023 registered at Police Station Kashimira, District Mira Bhayandar, Vasai-Virar, for offences under Sections 8(c), 22(c) and 29 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (NDPS Act).
3. It is alleged that the applicant was apprehended with 130 gms of contraband mephedrone, which is commercial quantity.
4. A short ground is raised by the learned counsel appearing for the applicant that mandatory requirement of under Section 52A of the NDPS

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Act, has not been complied with, as the investigating officer did not move an appropriate application under the said provision before the Magistrate for sampling and certification. This completely vitiates the prosecution case.

5. The learned APP could not show from the papers and documents on record as to in what manner the aforesaid mandatory requirement was satisfied.

6. The Supreme Court in the case of *Union of India Vs. Mohanlal and another*¹, in paragraph Nos.15 to 19, has 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

¹ (2016) 3 SCC 379

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.”

7. It is obvious from a reading of the above quoted portion of the judgment that the Supreme Court has held compliance with Section 52A of the NDPS Act as mandatory. Non compliance thereof, obviously makes out a strong *prima facie* case in favour of the applicant. The stringent test contemplated under Section 37 of the NDPS Act is satisfied by the applicant in the present case because this Court has reasonable grounds to believe that the applicant is not guilty of the offences alleged against him.

8. 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.0160 of 2023 registered at Police Station

Kashimira, District Mira Bhayandar, Vasai-Virar, for offences under Sections 8(c), 22(c) and 29 of the Narcotic Drugs and Psychotropic Substance Act, 1985, on furnishing P.R. Bond of ₹ 50,000/- and one or two sureties in the like amount to the satisfaction of the Trial Court.

- (B) The applicant shall attend the office of the Anti Narcotic Cell, Mira Bhayandar, Vasai-Virar, on first Monday of every month between 10:00 a.m. and 12:00 noon, during the pendency of the trial.
- (C) The applicant shall not tamper with the evidence in any manner. He shall not influence the informant, witnesses or any other persons concerned with the case.
- (D) The applicant shall attend the proceedings before the Trial Court on every date, except when exempted, for reasons to be recorded in writing.

9. Needless to say, violation of any of the aforesaid conditions may lead to cancellation of the present order.

10. It is also clarified that the observations made in this order are limited to the disposal of the present bail application and the Trial Court shall

proceed further in the matter without being influenced by the observations made hereinabove.

11. The application is disposed of.

(MANISH PITALE, J.)