

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.1224 OF 2024

Chinedu Igwe ...Applicant

vs.

Union of India and Anr. ...Respondents

Mr. Dilip Mishra a/w. Mr. Ayaz Khan a/w. Ms. Zehra Charania, Ms. Mallika Sharma, for the Applicant.

Mr. Shreeram Shirsat, SPP a/w. Ms. Tanvi Mate, Ms. Karishma Rajesh, for Respondent No. 1.

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

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

RESERVED ON : **JULY 18, 2024**

PRONOUNCED ON : **JULY 23, 2024**

P.C.:

1. Heard the learned counsel for the parties.
2. The applicant, who is arraigned in Special Case No. 559 of 2022 arising out of NCB/MZU/C.R. No. 94 of 2021 registered with Narcotics Control Bureau, Mumbai for the offences punishable under sections 20(b)(ii)(A), 21(b), 22(b), 22(c), 25, 27, 28, 29 and 35 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act, 1985), seeks to be enlarged on bail.
3. On 2nd October, 2021 the officers of the NCB effected seizure of narcotic substance from the co-accused at International Cruise Terminal, Green Gate, Mumbai. Pursuant to disclosures made by the accused, a number of persons were apprehended alongwith

narcotic substance.

4. While the investigation in the said crime was underway, the Intelligence Officer, NCB received an information that one foreign national, whose features were described by the informant, was to come near Prestige Hotel, Station Road, Andheri, Mumbai to deliver the contraband substance to an unknown person. On 6th October, 2021 at 21.30 hours a surveillance was mounted by the officers of NCB in the presence of panch witnesses Adil Fazal Usmani and Saiyed Zuber Ahmed Miya, near the said hotel. It is alleged, the applicant whose features matched the description given by the informant came near the Prestige Hotel. He was accosted. He identified himself as Chinedu Igwe, a Nigerian national. The applicant was served a notice under section 50 of the NDPS Act, 1985. As the applicant, volunteered to be searched before any officer of NCB, search was conducted.

5. A transparent polythene pouch containing pink colour ecstasy (MDMA) tablets was found in possession of the applicant. The contraband substance weighed 15 gms. It was seized. The applicant came to be arrested.

6. Mr. Dilip Mishra, learned counsel for the applicant, submitted that the search and seizure is completely vitiated as there is a clear non-compliance of the mandate contained in section 50 of the NDPS

Act, 1985. Elaborating the submission, it was urged that the seizure panchanama does not record that the applicant was apprised of his right to be searched before a nearest Magistrate or gazetted officer. To suit the prosecution case, however, a notice under section 50 of the NDPS Act, 1985 (page 345) is shown to have been served on the applicant. Yet, the said notice, does not bear the signatures of the panch witnesses. Even the statements of panch witnesses recorded during the course of investigation run counter to the prosecution case of the applicant having been apprised of his statutory right.

7. Secondly, Mr. Mishra would urge that, the material on record does not indicate as to how the Intelligence Officer came to know about the alleged complicity of the applicant. It is not the case that any of the co-accused had named the applicant as the supplier or a confederate in the conspiracy to trade in illicit drugs. Nor the Intelligence Officer had recorded the information note. Thus, there is a breach of mandate contained in section 42 of the NDPS Act, 1985.

8. Thirdly, the provisions contained in section 52A of the NDPS Act, 1985 have not been scrupulously complied with. There is an inordinate delay in conducting the inventory panchnama before the Magistrate under section 52A of the NDPS Act, 1985. Mr. Mishra would urge that, this Court has already taken note of the said

infirmity in the proceedings under section 52A of the NDPS Act, 1985 and released the co-accused Abdul Shaikh on bail.

9. It was further submitted that, even otherwise, on account of long period of incarceration as an under trial prisoner without the possibility of conclusion of trial within a reasonable period, the applicant is entitled to be enlarged on bail. Mr. Mishra, would urge that while releasing Abdul Shaikh on bail, this Court had considered the grounds of long incarceration also. The applicant is also entitled to the same dispensation.

10. Mr. Shirsat, learned Special PP for respondent No. 1, submitted that the fact that the applicant was found in possession of commercial quantity of the contraband substance cannot be lost sight of. Laying emphasis on the deleterious effect of illicit trade in drugs on the health and wealth of the nation, Mr. Shirsat would urge that the applicant cannot be permitted to take advantage of the technical pleas when the twin conditions contained in section 37 of the NDPS Act, 1985 have not been fulfilled. To this end, reliance was placed on the decision of the Supreme Court in the case of **Ranjan Kumar Chadha vs. State of Himachal Pradesh**¹

11. Mr. Shirsat further submitted that the ground that there is non-compliance of the provisions contained in section 50 of the NDPS Act, 1985 is ex-facie untenable. The notice (page 345)

1 Cri.Appeal No. 2239-2240/2011 Dt. 06-10-23.

evidences the fact that the applicant was duly apprised of his right under section 50 of the NDPS Act, 1985. The absence of specific words in the seizure panchanama, according to Mr. Shirsat, does not detract materially from the prosecution version.

12. As regards delay in conducting proceedings under Section 52A, Mr. Shirsat would submit that in the affidavit in reply the investigating officer has furnished justifiable explanation for the delay in holding the inventory panchnama before the learned Magistrate. Whether the delay has resulted in any prejudice to the applicant would be a matter for adjudication at trial.

13. Mr. Shirsat further urged that the applicant cannot claim parity with Abdul Shaikh as while releasing him on bail this Court had adverted to a discrepancy in the sample which was allegedly recovered from Abdul Shaikh and the sample which was sent for analysis.

14. To start with, it is necessary to note that it does not appear that the applicant has been named as a co-accused or confederate in the conspiracy, by any of the co-accused. The seizure panchanama dated 6th October, 2021 records that the Intelligence Officer had apprised the panch witnesses that he had received information that a foreign national was to arrive near Prestige Hotel to deliver the contraband substance. It is not the prosecution case that the

Intelligence Officer had reduced the said information into writing. Suffice to note the prosecution does not bank upon any information note. In that view of the matter, the absence of information note cannot be said to be immaterial or inconsequential.

15. The ground that the investigating officer had not prepared the information note thus carries some substance. It does not appear to be the case of the prosecution that the identity of the applicant as one of the members of the drug cartel was revealed by any co-accused. On the contrary, the seizure memorandum indicates that the investigating officer apprised the panchas that he had received an information. Absence of the information note thus, prima facie, impairs the prosecution case. Even time at which the applicant was allegedly accosted does not find mention in the seizure panchanama as the space for mentioning the time appears blank.

16. The compliance with the mandate contained in section 50 of the NDPS Act, 1985 also appears to be far from satisfactory. The seizure panchanama simply records that, after the applicant identified himself, the investigating officer issued a notice under section 50 of the NDPS Act, 1985 to the applicant and, thereupon, the applicant voluntarily agreed to tender his personal search before any officer of NCB, available at the spot. Prima facie the

seizure panchanama, does not indicate that the applicant was informed of his right to be searched before the nearest Magistrate or gazetted officer.

17. In the case of **State of Punjab vs. Baldev Singh**² a Constitution Bench of the Supreme Court held that *“when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. Failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused. Such failure may render the recovery of the contraband suspect and conviction and sentence of an accused bad and unsustainable in law.”*

18. Another Constitution Bench in the case of **Vijaysinh Chandubha Jadeja vs. State of Gujarat**³ emphasized the mandatory nature of the provisions contained in section 50 of the NDPS Act, in the following words:-

29] In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimize the allegations of planting or foisting of false cases by the law

2 (1999) 6 SCC 172.

3 2011(1) SCC 609.

enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorized officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

(emphasis supplied)

19. Mr. Shirsat attempted to salvage the position by banking upon the copy of notice (page 345), purported to be issued under section 50 of the NDPS Act, 1985. It was submitted that the said notice evidences compliance of the mandate contained in section 50 of the Act.

20. There are concomitant circumstances which make it rather difficult to accede the aforesaid submission of Mr. Shirsat, unreservedly. Firstly, the notice does not bear the signatures of the public witnesses. Secondly, the statement of public witness Adil Usmani and Mohd Zuber Ahmad, prima facie, run counter to the statement in the notice. For Adil Usmani, the applicant was informed that, if desired by him, his search could be taken before the senior officer. Whereas, Mohd Zuber Ahmad stated that a sheet of paper was given to the applicant but the said witnesses did not

know the contents thereof.

21. It is true, it is not peremptory that the suspect must be informed of his right under section 50 of the NDPS Act, 1985 in writing. However, there must be material to indicate that the suspect was so informed. In the case at hand, the seizure panchanama coupled with the statement of the panch witnesses, throw a cloud of doubt over the compliance of the mandate contained in section 50 of the NDPS Act, 1985.

22. Reliance placed by Mr. Mishra on an order passed by this Court in the case of **Nazir Maqsum Shaikh vs. The State of Maharashtra**⁴, appears to be well founded.

23. In the backdrop of the aforesaid infirmities in the search and seizure, I am not persuaded to agree with the submission of Mr. Shirsat that the plea of non-compliance of section 50 of the NDPS Act, 1985 is a technical plea. If viewed in the context of the stringent punishment prescribed under NDPS Act and also the restrictions in the matter of grant of bail, the provisions contained in section 50 incorporate a valuable safeguard. The non-compliance thereof results in a definite prejudice to the suspect and, thus, cannot be brushed aside as a technical plea.

24. On the aspect of delay in the proceedings under section 52A of the NDPS Act, 1985, while dealing with an identical contention on

4 BA No.1459 of 2021 Dt. 14/10/2022.

behalf of Abdul Shaikh – the co-accused - (BA No. 4047 of 2023),
this Court had observed, inter alia, as under:-

23] The aspect of delay in conducting the proceedings under section 52A of the NDPS Act, 1985 is required to be appreciated in the light of the obligation of the empowered officer under section 52A(2) of the NDPS Act, 1985 and the duty cast on the Magistrate under sub section (3) of Section 52A. In the case of **Union of India v. Mohanlal and Another**⁵, the Supreme Court has enunciated that,

“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.

(emphasis supplied)

24] In the case at hand, the seizure was effected on 3rd October, 2021. The investigating officer, it appears, made an application before the jurisdictional Magistrate on 18th November, 2021. The proceedings before the learned Magistrate were conducted on 4th December, 2021. There is element of delay on the part of investigating officer, in seeking the certification of the inventory of the contraband and drawing of samples thereof.”

25. The explanation sought to be offered on behalf of the prosecution in the affidavit in reply to account for the delay, is a matter which is required to be appreciated at the trial. This aspect of delay, if considered in conjunction with the apparent infirmities in the search and seizure (referred to above) assumes significance and cumulatively justifies an inference that the prosecution will

5 (2016) 3 Supreme Court Cases 379.

have to surmount the challenges of non-compliance of the provisions contained in sections 50 and 52A of the NDPS Act, 1985, scrupulously.

26. On the aspect of prolonged period of incarceration, while releasing Abdul Shaikh on bail, this Court had observed, inter alia, as under:-

28] In any event, the applicant has been in custody since 4th October, 2021. The applicant has been incarcerated for 2 and half years. I find substance in the submission of Mr. Mor that having regard to the number of accused arraigned in the crime, and the evidence which the prosecution may be required to be adduce to bring home the charge against the accused, it is extremely unlikely that the trial can be concluded within a reasonable period.

29] It is well neigh settled that a long period of incarceration without a realistic prospect of expeditious conclusion of the trial renders the detention of the accused as an undertrial prisoner foul of the right to speedy trial; a facet of right to life and personal liberty guaranteed under Article 21 of the Constitution of India. It has been held that the statutory restrictions in the matter of granting bail, like the one under section 37 of the NDPS Act, 1985, melt down in the face of such prolonged period of incarceration without the prospect of expeditious conclusion of the trial. (**Union of India vs. K.A. Najeeb**⁶).

30] A useful reference in this context can also be made to a decision of the Supreme Court in the case of **Rabi Prakash v. The State of Odisha**⁷, wherein the Supreme Court observed that,

“The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under section 37(1) (b)(ii) of the Act.

6 (2021) 3 SCC 713.

7 Spl. Leave to Appeal (Cri.) No. 4169 of 2023

27. Mr. Shirsat fairly submitted that the ground of long incarceration, which weighed with this Court in releasing Abdul Kadar Shaikh on bail, may also govern the claim of the applicant for bail.

28. The applicant has been in custody since 7th October, 2021. Having regard the number of accused, and the number of witnesses, which the prosecution may be required to examine, it is extremely unlikely that the trial can be concluded within a reasonable period. I am, therefore, impelled to hold that, in the facts of the case, the statutory restrictions in the matter of grant of bail, may melt down in the face of long period of incarceration.

29. The Court is not informed that the applicant has antecedents. The Court may thus justifiably draw an inference that the applicant may not indulge in identical offences, if enlarged on bail.

30. 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. 94 of 2021 registered with Narcotics Control Bureau, Mumbai 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 NCB, Mumbai on the first Monday of every month between 11 am to 1 pm for a period of three years or till conclusion of the trial, whichever is earlier.

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] Subject to the deportation proceedings, which may be initiated against the applicant by the competent authorities, the applicant shall not leave India, without prior permission of the Special Court.

7] The applicant shall regularly attend the proceedings before the jurisdictional Court.

8] 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.)