

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.1480 OF 2024

Jasar Jahangir Shaikh	...	Applicant
versus		
State of Maharashtra	...	Respondent

Mr. Anil G. Lalla with Mr. Aryan K. Kotwal i/by Lalla and Lalla for Applicant.
Mrs. Mahalaxmi Ganapathy, APP for State.

CORAM:	N.J.JAMADAR, J.
RESERVED ON	: 2 JULY 2024
PRONOUNCED ON	: 9 AUGUST 2024

P.C.

1. The applicant, who has been arraigned in C.R.No.249 of 2021 registered with Dahisar Police Station (later on transferred to DCB CID, Unit VI, Mumbai), for the offences punishable under Sections 20(b)(ii)(C) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the Act, 1985) has preferred this application to enlarge him on bail.

2. This is a second application for bail. First bail Application No.1679 of 2023 was rejected by this Court by an order dated 17 January 2024.

3. The indictment against the applicant and co-accused runs as under:-

3.1 On 25 October 2021, pursuant to an intimation, Dahisar Police conducted a surveillance at Dahisar Check Post. As intimated, a Santro car bearing

Registration No.DL-10/CS-4332 came on the flank of the road leading to Mumbai from Gujarat. The said vehicle was intercepted. Two males, two females and a child were boarding the said car. The applicant was at the wheel of the said car.

3.2 The applicant(A1), co-accused Bandu Udanshive (A2), his wife Clera (A4) and Daughter Cynthia (A/3), the wife of the applicant, identified themselves. They were informed about their right to be searched in the presence of the Gazetted Officer or a Magistrate. In the personal search of the applicant, no contraband article was found. However, during the search of the car, it was found that, in the cavities of the doors and dickey, 16 kgs of charas, a contraband substance, was concealed. In the personal search of the co-accused Bandu (A/2) 8 kgs charas was also found. The contraband articles were seized. Samples were collected. The applicant and co-accused were arrested. It transpired that the applicant and co-accused had been transporting contraband articles from Jammu and Kashmir, in the said fashion. Guljar Khan (A/6) was the supplier of the contraband substance.

4. Mr. Lalla, learned Counsel for the Applicant submitted that there is a significant change in the circumstances which warrants consideration of the

prayer of the applicant for bail afresh. Mr. Lalla submitted that earlier application for bail was principally premised on the two grounds. One, parity with Clara (A4) who was released by an order dated 7 September 2023 in BA No.185 of 2023. Two, the applicant was not found in conscious possession of the contraband substance.

5. Mr. Lala would submit that the grounds of non-compliance of the mandatory provisions contained in Section 42(2) and Section 52A of the NDPS Act, 1985 were neither urged before this Court nor in the Special Leave Petition, which was preferred against the order passed by this Court on 17th January, 2024. Since this Court has subsequently released Guljar Khan (A6), a co-accused, on bail, for the reason of non-compliance of the provisions contained in Section 52A of the NDPS Act, 1985 by an order dated 13th March, 2024, the applicant is entitled to be enlarged on bail, submitted Mr. Lala.

6. Mrs. Ganapathy, the learned APP, resisted the prayer for bail. Emphasise was laid on the fact that the Special Leave Petition preferred by the applicant against the order dated 17th January, 2024 in first Bail Application No.1679/2023, was dismissed by the Supreme Court. Thus, the applicant cannot be permitted to re-agitate the prayer for bail. The learned APP made an endeavour to urge that the release of Guljar Khan (A6) subsequently does not

constitute such a change in circumstances as to warrant a fresh consideration of the prayer for bail. It was urged that Guljar Khan (A6) has been arraigned as the supplier and was not found in actual possession of the contraband substance. In contrast, the applicant was found in possession of the contraband substance. Thus, the applicant does not deserve to be released on bail.

7. While rejecting the first application for bail, this Court found that the applicant was not entitled to claim parity with Clara (A4). It is true that in the first bail application, the ground of the applicant not having been found in conscious possession of the contraband substance was forcefully canvassed. This Court after adverting to the governing precedents repelled the said submission on behalf of the applicant. It was *inter alia* observed as under :

“18. In the light of the aforesaid exposition of law, reverting to the facts of the case, the thrust of the submission of Ms. Awasthi was that nothing was found in the personal search of the applicant, and, therefore, he stands at par with Clara, co-accused, who has been released on bail.

19. I find it difficult to accede to this submission unreservedly. The distinction in the capacity of the applicant and co-accused Clara cannot be lost sight of. The applicant was at the wheel of the vehicle purportedly from Jammu to Mumbai. There is material to indicate that the family stayed at Jammu for less than 12 hours. The concealment of the contraband articles in the cavities of the doors of the car must have required an effort. The applicant

claimed that the principal accused Bandu was his father in law. The entire family, as alleged, travelled together.

20. In this backdrop, the propositions which govern the ascertainment of conscious possession of the persons who were found in public transport vehicle, along with the unknown co-passengers, cannot be applied. The fact that the applicant was at the wheel of the car all along, right from Mumbai to Jammu and return journey, in the context of the statement of the co-accused based at Srinagar that the said car was provided to facilitate transport of the contraband articles, cannot be brushed aside lightly, at this stage, as an innocuous presence.

21. In the facts of the case, the interdict contained in Section 37 of the Act, against grant of bail, operates with full rigour. The fact that the applicant was not the owner of the car, or for that matter, nothing was found in possession of the applicant cannot be said to be a substantially probable cause to believe that the accused is not guilty of the offences charged.”

8. It is also true that when the first bail application was considered, the ground of non-compliance of the statutory provisions, especially 52A of the NDPS Act, 1985, was not urged. Nor this Court had delved into the aspect of non-compliance of Section 52A of the NDPS Act, 1985.

9. I am conscious that the mere fact that one or more grounds were not urged, or for that matter not considered by the Court, in the first bail application, may not justify consideration of a second bail application, for that reason, if the first bail application was rejected on merit. However, the fact that the co-

accused in the same crime has been granted bail on a ground which was not considered while rejecting the first bail application, may have some bearing, as the element of parity comes into play. Secondly, the nature of the ground on which the co-accused has been enlarged on bail, (which was not urged in the first round) also assumes significance.

10. Evidently, it is a case of total non-compliance of the provisions contained in Section 52A of the NDPS Act. The seizure panchnama records in no uncertain terms that the contraband substance was seized and samples drawn therefrom at the spot were marked Exhibits-B1 and B2 and E1 and E2. Those samples were forwarded for analysis to the FSL vide forwarding letter dated 26th October, 2021. The FSL report dated 17th April, 2022 indicates those very samples were analysed and the results of analysis were positive for *charas*. It thus becomes *prima facie* evident that the FSL report is based on the analysis of the samples collected at the time of the seizure. Conversely, the samples were not drawn before the learned Magistrate as mandated by the provisions contained in Section 52A of the NDPS Act, 1985.

11. It is in the aforesaid context, while releasing Guljar Khan (A6), in the order dated 13th March, 2024, this Court had observed *inter alia* as under :

“12. On the aspect of non-compliance of the provisions contained in Section 52-A of the Act, the learned Counsel for the applicant placed reliance on the decision in the case of *Union of India vs. Mohanlal and Another (2016) 3 Sureme Court Cases, SCC 379*. On an analysis of the provisions contained in section 52-A, the Supreme Court enunciated the legal position as under:-

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.

13. The Supreme Court has emphasized that the question of drawing of samples at the time of seizure, in the absence of the Magistrate, is not envisaged in the scheme of section 52-A of the NDPS Act, 1985. There is no provision in the Act that mandates taking of samples at the time of seizure. 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 the Magistrate, to be correct. The aforesaid pronouncement, in the case of **Mohanlal (supra)** has been followed in recent judgments the cases of *Yusuf @ Asif vs. State (Cri Appeal No.3191 of 2023)*; *Simaranjit Singh vs. State of Punjab (2023 SCC OnLine SC 906)* and *Mohammed Khalid and Anr. vs. The State of Telangana (CriAppeal No.1610/2023)*.

14. In the case of Yusuf (supra) after referring to the decision of the Supreme Court in the case of **Mohanlal (supra)**, the Supreme 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.”

12. At this juncture, it may be apposite to note that in the judgment of *Mohammed Khalid*, (supra), delivered on 1st March, 2024, the Supreme Court observed as under :

22. Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the Investigating Officer PW-5 for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate. In this view of the matter, the FSL report(Exhibit P-11) is nothing but a waste paper and cannot be read in evidence. The accused A-3 and A-4 were not arrested at the spot. The offence under Section 20(b)(ii)(c) deals with production, manufacture, possession, sale, purchase, transport, import or export of cannabis. It is not the case of the prosecution that the accused A-3 and A-4 were found in possession of ganja. The highest case of the prosecution which too is not substantiated by any admissible or tangible evidence is that these two accused had conspired sale/purchase of ganja with A-1 and A-2. The

entire case of the prosecution as against these two accused is based on the interrogation notes of A-1 and A-2.”

(emphasis supplied)

13. In my considered view, the ground of non-compliance of the provisions contained in Section 52A of the NDPS Act, 1985, in the light of the series of recent decisions, referred to above, cannot be brushed aside lightly. The Supreme Court has emphasised that the question of drawing of samples at the time of seizure itself is not envisaged in the scheme of Section 52A of the NDPS Act, 1985. Sans compliance with Section 52A the samples drawn at the time of the seizure itself would not be a valid piece of primary evidence at the trial. The FSL report, based on the analysis of the samples not drawn in the presence of the Magistrate, is bereft of evidentiary value.

14. For the foregoing reasons, I find substance in the submission of Mr. Lala that the applicant is entitled to the same dispensation as has been extended to Guljar Khan (A6), notwithstanding rejection of the first bail application on merit as the non-compliance of the provisions contained in Section 52A of the NDPS Act, 1985 bears upon the question of the guilt of the applicant. In such a situation, the interdict contained in Section 37(1)(b)(ii) may not be attracted.

15. The applicant has been in custody for almost two years and ten months. Having regard to the large pendency of the cases, it is extremely unlikely that the trial can be concluded within a reasonable period. In a line of decisions, it has been also held that the statutory restrictions in the matter of grant of bail, like Sec.37 of the NDPS Act, 1985, melt down in the face of such long period of incarceration without a real prospect of expeditious conclusion of the trial.
16. I am, therefore, inclined to exercise discretion in favour of the applicant.
17. Hence, the following order.

ORDER

- (i) The Application stands allowed.
- (ii) The Applicant – Jasar Jahangir Shaikh be released on bail in C.R.No.249 of 2021 registered with DCB CID, Unit VI, Mumbai on furnishing a PR bond in the sum of Rs.1,00,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.
- (iii) The applicant shall mark his presence before DCB CID, Unit VI, Mumbai on first Monday of every month between 11 am to 1 pm for a period of three years or till the conclusion of the trial, whichever is earlier.
- (iv) The applicant shall not tamper with the prosecution evidence. The

applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing the facts to Court or any police officer.

(v) On being released on bail, 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.

(vi) The applicant shall regularly attend the proceedings before the jurisdictional Court.

(vii) 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.)