



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

CRIMINAL BAIL APPLICATION NO. 2294 OF 2024

Kamrjahan @ Gudiya Tajuddin Shaikh ...Applicant
Versus
State Of Maharashtra ...Respondent

Mr. Atul Sarpande, Mr. Kamlesh Satre i/by Mr. Vishal Khetre for the applicant.

Ms. Mahalaxmi Ganapathy, APP for the Respondent/State.

CORAM : N. J. JAMADAR, J.
RESERVED ON : 2nd JULY 2024
PRONOUNCED ON : 10th JULY 2024

PC.:

1. The applicant, who is arraigned in C.R. No. 333 of 2023 registered with Kashimira Police Station, for the offences punishable under Sections 21(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “NDPS Act”) has preferred this application to enlarge him on bail.

2. Pursuant to an intimation, on 5th May 2023 Kashimira Police conducted a surveillance near Reti Bundar. At 01:30 a.m., the applicant and Ali Azgar Bhadela (Accused No.1), whose features matched the description given by the informant, came near Reti Bundar. The applicant and the co-accused Ali Azgar Bhadela (A-1) were accosted. In conformity with the provisions contained in

Section 50 of the NDPS Act, 1985, the search was conducted. In the search of Ali Azgar Bhadela (A-1), 10 g.m. Mephedrone (MD) was found. In the search of applicant, a plastic bag with zip lock containing a white substance was found. It appeared to be MD. It weighted 95 gms. The contraband substance was seized. Samples (A4 and A5) were collected. The bulk of the contraband (91 gram) was seized and labeled as (A-6). The applicant came to be apprehended. The applicant made a disclosure that the contraband substance was provided to her by her husband Tajuddin Shaikh (A-3). Thereupon Tajuddin Shaikh (A3), came to be arrested.

3. During the course of further investigation it transpired that Tajuddin Shaikh (A-3) had, in turn, procured the contraband from Tausif Qurreshi (A-4).

4. I have heard Mr.Atul Sarpande, the learned Counsel for the Applicant, and Ms.Mahalaxmi Ganapathy, the learned APP for Respondent-State.

5. At the outset, Mr.Sarpande, the learned Counsel for the applicant submitted that, the applicant had withdrawn the first application being Bail Application No.590 of 2024 on 16th April 2024. However, subsequent thereto, co-accused Tausif Qurreshi (A-4) came to be released on bail by this Court. It was urged that

there is non-compliance of the statutory provisions in the matter of personal search of the applicant, and the seizure and sampling of the contraband substance. Section 50 of the N.D.P.S. Act, 1985 has not been complied with scrupulously. Secondly, the applicant was searched by an unauthorized person that too in the presence of a male. Therefore, the search of the applicant stood thoroughly vitiated. The provisions contained in Section 52 (A) of the N.D.P.S. Act, 1985 have also not been complied with scrupulously. Though an inventory panchnama was drawn before the learned Magistrate on 17th October 2023, yet no samples were drawn before the learned Magistrate. On the contrary, what has been sent for analysis is the samples drawn at the time of the seizure itself. A C.A. report based on such samples drawn at the time of seizure is of no evidentiary value, submitted Mr.Sarpande.

6. In opposition to this, Ms.Ganapathy, the learned APP submitted that a huge quantity of 95 grams of MD was recovered from the possession of the applicant. It was further submitted that the search was conducted by a W.P.C. on the instructions of the empowered Officer. Therefore, it cannot be said that the search was vitiated. An endeavour was made by Ms.Ganapathy to draw home the point that the aspect of the compliance of Section 52 (A) of the

NDPS Act, 1985 would be a matter for trial. Non-compliance of Section 52(A), according to Ms. Ganapathy, cannot be urged at the stage of consideration for bail.

7. I have given anxious consideration to the submissions canvassed across the bar. The submission that provisions contained in Section 50 of the N.D.P.S. Act, 1985 have not been complied with, was premised on the appraisal memo issued to the applicant (page 32). The purported notice under Section 50 of the N.D.P.S. Act, 1985 records that Bhagyashree Mane, W.P.C. was a member of the raiding party and she was legally empowered to conduct the search and she was authorized by the Investigating Officer and, yet, the applicant had the right to be searched before a Gazetted Officer or nearest Magistrate. It seems that the applicant declined to avail the said option and thereupon the search was conducted by W.P.C., Bhagyashree Mane. It was urged that such appraisal falls foul of Section 50 of the N.D.P.S. Act, 1985. Secondly, there is a breach of the provisions contained in Section 50(4) of the N.D.P.S. Act, 1985 as well, as the applicant was searched under the gaze of males. In any event, W.P.C. Bhagyashree Mane was not of the rank of Head Constable, the police officers of which rank and above are empowered by the State Government by a general order.

8. I find substance in the submission of Mr.Sarpande that, W.P.C. Bhagyashree Mane was not an empowered officer. Evidently, W.P.C. Bhagyashree Mane was not a police official of the rank of Head Constable. Search by an unauthorized officer vitiates the seizure completely.

9. The endeavour of Ms.Ganpathy to urge that the search was carried out by Bhagyashree Mane, W.P.C., in the presence of an empowered officer, does not advance the cause of the prosecution as that brings in question the compliance of the mandate contained in Section 50(4) of the N.D.P.S. Act, 1985. There is a clear prohibition against conducting the personal search of a female by anyone, except a female. If this submission of Ms.Ganapathy is to be accepted, it implies that *prima facie* the applicant was searched under the gaze of a male, if not in the presence of a male. The seizure panchnama does not indicate that the applicant was taken to a secluded place and thereafter the search was conducted by W.P.C. Bhagyashree Mane.

10. A useful reference in this context can be made by a Division Bench judgment of this Court in the Case of *Veneela Tilak Vs.Shahasane, Assistant Collector of Customs and Anr.*¹, wherein, the Division Bench enunciated in no uncertain terms that if a

¹ 1997 (2) MHLJ 337

woman accused has to be searched, merely calling a female officer to search her will not fulfill the legislative intent. If the search is carried out in the presence of male panchas, the very purpose of Section 50 of the N.D.P.S. Act and such similar provisions contained in other statutes would be frustrated. The observations in paragraph Nos. 15, 16 and 18 of the Judgment are are instructive and, hence, extracted below :

“15. Now if a woman accused has to be searched, merely calling a female officer to search her will not fulfill the legislative intent. The legislative intent appears to be to protect the lady accused's modesty while conducting her search. The search has to be conducted by having strict regard for decency. Therefore, the officers will necessarily have to secure the presence of lady panchas. If the search is carried out in the presence of male panchas, the very purpose of Sub-section (4) of Section 50 of the N.D.P.S. Act and such similar provisions contained in other statutes would be frustrated. What is sought to be achieved by Sub-section (4) of Section 50 of the N.D.P.S. Act, the relevant provisions of Criminal Procedure Code quoted herein above and similar provisions of the Customs Act and the F.E.R.A. would be lost if the investigating agency does not carry out the search by a female in the presence of female panchas.

16. In this regard reference may be made to the decision of the Supreme Court in *AIR 1962 SC 1189* where the Supreme Court had an occasion to comment on a search of a woman carried out in the presence of men. The Appellant in that case was tried for an offence under the Suppression of Immoral Traffic in Women and Girls Act. The charge against the Appellant was that she supplied a girl to one Manmohan Mehta, who is a witness and she kept or managed a brothel. The prosecution story was that after the information was received, a trap was laid and two persons were sent to the Appellant to ask for a girl for the purpose of prostitution. One of them was to be a panch, a witness to the fact that the appellant supplied females for prostitution. Two one-hundred rupees marked currency notes were given to Mehta with instruction that he was to pay out of that to the appellant. He accordingly paid the amount quoted by the appellant. It is not necessary to make reference to the other facts of the case except that, during the course of investigation the women panchas accompanied the police party and searched the appellant and one

hundred rupees currency note was found from her person under her blouse. It was argued that the said evidence should not be accepted, as according to law no woman can be searched except by another woman and having regard to the provisions of Sections 152 and 103 of the Criminal Procedure Code that cannot be done in the presence of men. The Supreme Court held that such a search though an irregularity was contrary to the spirit or even the letter of the Criminal Procedure Code.

18. In spite of the observations made by the Supreme Court in the judgment reported in *AIR 1962 (SC) 1189*, that the search of a lady accused conducted in the presence of a male panch is contrary to the spirit or even the letter of the Criminal Procedure Code, and the observations of this Court in case reported in *1994-1-FAC 285 (Bombay)* that ladies should be searched in secluded places, we are distressed to find that the correct procedure is still not being followed by the investigating agencies. In some cases with which we had an occasion to deal, we have noticed that the necessary care is not taken by the investigating officers while conducting search of the female accused. We find that though in some cases the investigating agencies adhere to sub-section (5) of Section 5 of the N.D.P.S. Act, they do not follow it up by bringing in lady panchas and by taking the lady accused to a secluded place.”

(emphasis supplied).

11. The aforesaid pronouncement has been followed by this Court in the case of *Hina Bharat Shah Vs. The State of Maharashtra*² wherein, in a somewhat identical fact situation, the female accused therein was searched within the gaze of males. It was observed that, *prima facie* it appeared that the accused therein was not searched in seclusion and, thus, there was a contravention of Section 50 of the N.D.P.S. Act, 1985. The observations in para Nos. 4 and 5 of the Judgment in the case of *Hina Shah* (supra) govern both the infirmities urged on behalf of the applicant, in this

² 2017 SCC Online Bombay 1396

case namely, the contravention of Section 50(4) of the NDPS Act, and the search by a person, who has not been duly empowered under Section 42 of the NDPS Act, 1985. They reads as under:

“4. In the present case the applicant Henna Shah, a female was searched, that is her person was searched within the gaze of males. Prima-facie, it appears that the applicant Henna Shah was not searched in seclusion and in the absence of any male person. That there is a contravention of Section 50(4) of NDPS Act, 1985 and the provisions in its spirit have been violated as has been laid down by the Division Bench of this Court in the case of *Mrs. Veenela Tilak* (supra). The provision envisages regard for the person and privacy of a female and the same is not honoured by the mere fact of the search being carried out by a female constable. Section 50(4) of NDPS Act additionally requires that the female accused be searched in seclusion and to the exclusion of males. It is, therefore, reasonable to believe that the applicant has not committed an offence punishable with imprisonment for more than five years as contemplated under the provisions of NDPS Act, 1985. It further prima-facie appears that there is no reasonable belief that she is likely to commit an offence punishable under the NDPS Act if released on bail.

5. As far as applicant Shahid Choudhary is concerned, witness Mahadeo Chabukswar, a police constable attached to Anti Narcotics Cell, Crime Branch, Thane in his statement dated 30th July 2015 has stated that under the instructions of police sub-inspector Mr. Walzade, he took search of the person of the applicant. Section 42 of the NDPS Act envisages that any such officer (being an officer superior in the rank of peon, sepoy, constable) apart from the other department, the police department of the State Government is empowered to take search of a person as contemplated under the said Act. The Government of Maharashtra has issued a circular dated 14.11.1985 in exercise of powers conferred by sub-section 1 of Section 42 of NDPS Act, whereby prescribing that all the officers of and above the rank of head-constable in the State of Maharashtra are permitted to take search as contemplated under Section 42 of the NDPS Act. In view of the categorical admission given by Mr. Mahadeo Chabukswar in his statement dated 30 July 2015, in view of this Court, there is a clear breach of Section 42 of the NDPS Act. It is, therefore, reasonable to believe that the applicant Shahid Choudhary has not committed an offence punishable with imprisonment for more than five years under the NDPS Act. Taking into consideration the available record, there is reason to believe that the applicant is not likely to commit an offence punishable under the NDPS Act, if released on bail.”

12. The ground of non-compliance of the provisions contained in Section 52(A) of the NDPS Act, 1985, also appears to carry substance. As noted above, the samples of contraband (A-4 and A-5) were collected at the time of seizure itself. The forwarding letter to the F.S.L. (Page 121) indicates that the very sample (A-5) collected at the time of seizure was forwarded for analysis. The Inventory Panchnama (A-6) (page 130) indicates that samples were also collected from the bulk (A-6). However, it appears that the prosecution is banking upon the analysis of the samples collected at the time of seizure (A-2 and A-5) as is evident from the reminder issued to F.S.L.

13. The legal position is crystalized to the effect that the collection of the samples at the time of seizure itself is not envisaged by the provisions of the NDPS Act, 1985 and that the samples should be drawn before the jurisdictional Magistrate. A profitable reference in this context can be made to the decision of the Supreme Court in the case of *Union of India V/s. Mohanlal and Anr.*³, wherein the Supreme Court held that the procedure prescribed in Section 52-A is of mandatory nature and it was obligatory to prepare an inventory of seized contraband and then

³ (2016) 3 SCC 379

make an application to the Magistrate for the purpose of getting its correctness certified. The observations in paragraphs 15 to 17 read as under :

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

14. In the case of Yusuf @ Asif V/s. State⁴, the Supreme Court, after following the decision in the case of Union of India V/s. Mohanlal (supra), enunciated, as under:

4 Cri. Appeal 3191 of 2023 dt.13/10/2023.

“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.”

15. In the case of *Simaranjit Singh V/s. State of Punjab*⁵, the Supreme court after extracting the observations in paragraphs 15 to 17 (extracted above) in the case of *Union of Indian V/s. Mohanlal* (supra), observed that the act of the officer drawing samples from all the packets at the time of seizure is not in conformity with the law laid down by Supreme Court in the case of *Mohanlal* (supra). That creates a serious doubt about the prosecution case that the substance recovered was a contraband, and the Supreme Court, thus, set aside the judgment of conviction and sentence.

16. In a recent pronouncement in the case of *Mohammed Khalid and another V/s. The State of Telangana*⁶, the Supreme Court has enunciated in no uncertain terms that a CA report based on the analysis of the samples, not drawn in the presence of the jurisdictional Magistrate, is bereft of any evidentiary value. The observations of the Supreme Court read, as under:

5 2023 SCC Online SC 906

6 Cri. Appeal No.(s).1610/2023 dt. 1/3/2024.

“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)

17. *Prima facie*, it appears that the prosecution case rests on the analysis of the samples, which were collected at the time of seizure and forwarded to F.S.L. on 8th May 2023. That being the case, the prosecution will have to surmount the challenge based on non-compliance of the provisions contained in section 52A of the NDPS Act, 1985.

18. The upshot of the aforesaid consideration is that on account of the prima facie infirmities in the search of the applicant by a person who does not appear to be an empowered officer and the said search having been carried out under the gaze of males, the Court would be justified in drawing an inference that the applicant may not be guilty of the offences under section 21(c) and 29 of the NDPS Act, 1985. The Court is not informed that the applicant has antecedents. Therefore, a further inference may become justifiable that the applicant may not indulge in identical offences, if released

on bail. The twin test thus stands satisfied.

19. I am, therefore, inclined to exercise the 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. 333 of 2023 registered with Kashmirira 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 her presence at Kashmirira 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 her 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 trial Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

(N. J. JAMADAR, J.)