

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.851 OF 2024

Rajendra @ Barku Maruti Pawar ...Applicant
vs.
The State of Maharashtra ...Respondent

**WITH
BAIL APPLICATION NO.2364 OF 2024**

Shamsuddin Ajijulla Shaikh ...Applicant
vs.
The State of Maharashtra and Others ...Respondents

Mr. Anil Lalla a/w. Ms. Ankita Rathod, Ms. Rithika Yerra i/b. Lalla & Lalla Advocates, for the Applicant in BA No. 851 of 2024.
Mr. Ayyaz Khan a/w. Mr. Dilip Mishra, Ms. Zehra Charania, Ms. Mallika Sharma, Mr. Sarfaraz Hasan K. and Ms. Ilsa Shaikh i/b. Mr. N.S. Gole, for the Applicant in BA No. 2364 of 2024.
Mr. A.A. Naik, APP, for the Respondent/State.

CORAM : N. J. JAMADAR, J.
DATE: OCTOBER 8, 2024

PC.

1. The applicants, who are arraigned in C.R. No. 46 of 2022 registered with CBD police station, Navi Mumbai for the offences punishable under sections 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act, 1985) seek to be enlarged on bail.

2. On 30th March, 2022, an intimation was received that two persons, description of whom was furnished, would arrive near Rayan International Bus Stop (Ekta Vihar) in a Fortuner car to sell

Mephedrone (MD). Pursuant to the said intimation, after complying with the statutory requirements, police conducted a surveillance. At about 1.20 pm, the applicants arrived in a Fortuner car bearing number MH-46-X-2714. As they alighted from the car, the police party noted that their features matched with the description furnished by the informer. Both were carrying white nylon bags. The applicants were accosted.

3. In the search of carry bag which the applicant Shamsuddin Shaikh (A1) was carrying, a white substance in crystal and powder form was found. The said substance was tested with the drug detection kit. It turned out to be Methaqualone. The said substance was seized and samples were collected. In the search of Rajendra Pawar (A2), 650 gms of Methaqualone was found. The said contraband substance was also seized and samples were collected. The applicants came to be arrested.

4. Mr. Lalla, the learned counsel for Rajendra Pawar, the applicant in BA No. 851 of 2021, submitted that there is a clear non-compliance of the mandatory statutory requirement. First, the search and seizure is completely vitiated as an unauthorized person namely police constable Mr. Waskar had conducted the search. Secondly, the provisions contained in section 50 of NDPS Act were not complied with, in letter and spirit. The applicants were not at all

apprised of their right to be searched before the gazetted officer or a nearest Magistrate. Thirdly, the prosecution case rests on the samples collected at the time of the seizure of the contraband articles and thus there is non-compliance of the provisions contained in section 52A of the NDPS Act. Therefore, the interdict contained in section 37 of the NDPS Act may not be attracted.

5. Mr. Khan, the learned counsel for Shamsuddin, the applicant in BA No. 2364 of 2024, supplemented the submissions of Mr. Lalla. In addition to the grounds which were urged by Mr. Lalla, Mr. Khan submitted that there is breach of the provisions contained in section 42(2) of the NDPS Act, 1985 as the information was not forwarded to the superior officer by the very person who had reduced the said information into writing. Attention of the Court was invited to the extract of the station diary entry No. 4 (page 233) and the communication which was addressed by Senior PI, Anti Narcotic Cell (page 152). On this count also, the applicant deserves to be enlarged on bail.

6. Mr. Naik, the learned APP, made an endeavour to counter the submissions on behalf of the applicant. It was submitted that the proceedings under section 52A of the NDPS Act were duly conducted and the samples were also drawn. Attention of the Court was invited to the certificate issued by the learned Magistrate

under section 52A(3) of the NDPS Act. Mr. Naik further submitted that having regard to the huge quantity of Cocaine, which was recovered from the applicants, the bar contained in section 37 of the NDPS Act comes into play and, therefore, the applicant do not deserve to be enlarged on bail.

7. I have carefully perused the report under section 173 of the Code of Criminal Procedure, 1973 and the documents annexed with it, especially the seizure panchanama on the aspect of the search not having been conducted by an authorized officer. The submission on behalf of the applicants appears to carry substance. In the seizure memo, it is categorically recorded that on the instructions of Senior PI. Mr. Sonavane, police constable Mr. Waskar (B.No. 1483) conducted the personal search of the applicants and in the nylon carry bag, which the applicants were carrying, the contraband substance was found.

8. Prima facie, it appears that the search of the applicant was conducted by a person who was not duly authorized under section 42 of the NDPS Act, albeit under the direction of Senior PI Mr. Sonavane, as such a search by a person who is unauthorized, even in the presence or by the direction of authorized officer, has been held to be in breach of the provisions contained in section 42 of the NDPS Act.

9. In the case of **Aarif Akram Shaikh vs. The State of Maharashtra**¹ a learned single Judge of this Court after referring to an earlier order in the case of **Hazi Mohd. Abdul Kadar Bhumedia vs. The State of Maharashtra**² observed that having regard to the language of section 42 of the NDPS Act only the officers mentioned therein are empowered to carry out the search. It may be that the PSI was authorized, but the search was also carried out by the Police Naik. The Police Naik was not authorized to carry out the search. Prima facie, the search carried out also by one of the officials (Police Naik), who was not authorized, renders the search illegal.

10. In the aforesaid case, the learned single Judge referred to a decision in the case of **Dilkush Sinai vs. State of Goa**³ where the PSI himself did not search the accused but directed the two panch witnesses to conduct the search and the question that arose was, whether search by panchas in the presence of PSI was legal. The Division Bench, in the case of **Dilkush Sinai** (supra) had held that the search was effected by a person unauthorized to effect the search under the law and that the trial of the accused was vitiated as a result of said unauthorized and illegal search.

11. In terms of the Notification issued by the State Government in

1 BA. No. 3158 of 2021 Dt.07/02/2023

2 BA. No. 378 of 2022

3 1995(2), Goa L.T.

the exercise of the power of Sub Section (1) of Section 42 of the NDPS Act, 1985, inter alia, all police officers of and above the rank of Head Constable in the State of Maharashtra are empowered for the purposes of Sub Section (1) of Section 42 of the NDPS Act, 1985. In the case at hand, prima facie, the search was conducted by an official who had not been empowered to carry out the search. Resultantly, the validity of the search and seizure becomes suspect.

12. Secondly, on the aspect of the compliance of the provisions contained in section 50 of the NDPS Act, the legal position stands crystallized to the effect that when an officer searches a person, the person must be informed of his right under section (1) of section 50 of the NDPS Act, to be searched before a nearest Magistrate or gazetted officer. Failure to inform such person about his right to be searched before the nearest Magistrate or a gazetted officer would cause prejudice to him. A search in breach of the mandate contained in section 50 may not vitiate the trial but would render the recovery of the illicit articles suspect and vitiate the conviction and sentence of the accused where the conviction had been recorded only on the basis of possession of the illicit articles recovered from the person during such search in violation of the provisions of section 50 of the NDPS Act.

13. In the case at hand, from the perusal of the seizure

panchanama, it appears that the fact that a notice was given to the applicants that they have a legal right under section 50 of the NDPS Act, has been recorded therein. However, the fact that the applicants were specifically apprised that the applicants had a 'right' to be searched before the nearest Magistrate or gazetted officer, does not find mention in the seizure panchanama. Undoubtedly, the question as to whether there was compliance of the provisions contained in section 50 of the NDPS Act, in its true spirit, would be a matter for trial. However, prima facie, the aspect of compliance of the said provisions, cannot be said to be free from infirmities as the seizure panchanama does not specifically record that the applicants were informed that they had a right to be searched before the nearest Magistrate or gazetted officer.

14. Though Mr. Naik, the learned APP made an endeavour to urge that there was scrupulous compliance of the provisions contained in section 52A of the NDPS Act, yet, the material on record prima facie indicates that the prosecution case rests on the samples collected at the time of search and seizure. The seizure panchanama records that the samples A1 and A2 and F1 and F2 were collected at the spot. Evidently, on the very next day of the seizure, the samples (A1 and F1) drawn at the time of the seizure were forwarded for analysis under forwarding letter (page 84).

15. The C.A report (page 271) in BA No. 2364 of 2024 indicates that those very samples were analyzed and they were found to contain cocaine. In contrast, the inventory as envisaged by section 52A of the NDPS Act was conducted before the learned Magistrate on 3rd June, 2022. Prima facie, it appears that fresh samples were not drawn before the learned Magistrate, and forwarded for analysis.

16. In the case of Union of India V/s. Mohanlal and Anr.⁴ 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 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

4 (2016) 3 SCC 379

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.”

17. In the case of Yusuf @ Asif V/s. State⁵, the Supreme Court after following the decision in the case of Union of India V/s. Mohanlal (supra), enunciated, as under:

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.

18. In the case of Simaranjit Singh V/s. State of Punjab⁶, the Supreme Court after extracting the observations in paragraphs 15 to 17 (extracted above) in the case of Union of India V/s. Mohanlal (supra), observed that the act of the officer drawing samples from

⁵ Cri.Appeal No.3191 of 2023 dt. 13 Oct. 2013

⁶ 2023 SCC Online SC 906

all the packets at the time of seizure is not in conformity with the law laid down by Supreme Court Court in the case of Mohanlal (supra). That creates a serious doubt about the prosecution case that substance recovered was a contraband, and the Supreme Court, thus, set aside the judgment of conviction and sentence.

19. The decision of the Supreme Court in the case of **Mohammed Khalid and Anr. V/s. State of Telangana**⁷ (supra) firmly settles the issue. The Supreme Court observed, inter alia, 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)

20. The upshot of aforesaid consideration is that the prosecution would be required to surmount the challenges of non-compliance of the mandatory statutory provisions with regard to search by authorized person only, appraisal of the right of the suspect to be searched in the presence of a Magistrate or gazetted officer and

⁷ Cri. Appeal No.1610 of 23 dt. 1 March 2024

52A of the NDPS Act.

21. In view of the prima facie material to show that the prosecution case is not free from infirmities on all three counts, an inference becomes justifiable that the applicants may not be eventually found guilty of the offences punishable under section 22(c) and 29 of the NDPS Act. The Court is not informed that the applicants have antecedents. Thus, the Court may draw a further inference that the applicants may not indulge in identical offences, if enlarged on bail.

22. I am, therefore, persuaded to exercise the discretion in favour of the applicants.

Hence, the following order.

ORDER

1] The applications stand allowed.

2] The applicant Rajendra @ Barku Maruti Pawar in BA No. 851 of 2024 and the applicant Shamsuddin Ajijulla Shaikh in BA No. 2364 of 2024 be released on bail in C.R. No. 46 of 2022 registered with CBD police station, Navi Mumbai on furnishing a P.R. Bond of Rs. 1,00,000/- each with one or more sureties in the like amount, each.

3] The applicants shall mark their presence at CBD police station, Navi 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 applicants 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 applicants shall furnish their contact numbers and residential address to the investigating officer and shall keep him updated, in case there is any change.

6] The applicants 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.)