IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 2997 OF 2024

Abhishek Gupteshwar Mahato ...Applicant
Versus
The State Of Maharashtra ...Respondents

Mr. Rajendra Bidkar, Advocate for Applicant.

Mrs.Mahalakshmi Ganapathy, APP for Respondent-State.

ETHAPE DNYANESHWAR ASHOK
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CORAM : N. J. JAMADAR, J.
DATE : 29th AUGUST 2024

PC.:

1. Heard the learned Counsel for the Applicant and the learned APP for State.

2. The Applicant, who is arraigned in C.R. No.1112 of 2022, registered with Mumbra Police Station for the offences punishable under Sections 20, 22(c) and 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985, Sections 3, 4 and 25 of the Arms Act, 1959 and Sections 135 read with 37(1) of the Maharashtra Police At, 1961, has preferred this application to enlarge him on bail.

3. On 25 November 2022, pursuant to a secret information that Applicant and Vijay Madhe (A2) were to come near Y Junction,

Mumbra – Shilphata bypass road, Thane to sell mephedrone (MD), Thane police conducted surveillance.

4. At about 2.20 p.m., accused Nos.1 and 2, whose description matched the information, came near Y Junction. They were accosted. They were apprised of their right under Section 50 of the Act, 1985. As they declined to avail the said right, search was conducted. In the search of Applicant (A1), a plastic pouch containing white substance was found. It appeared MD and weighed 107 gms. A country made pistol and 9 live cartridges were also found in the possession of Applicant (A1). In the search of Vijay (A2), a chopper was found. Incriminating articles were seized and sealed. Samples of the contraband were collected.

5. Pursuant to the disclosure statement made by the Applicant, Moiz Shabbir Lokhandwala (A6) came to be apprehended as the main supplier of the illicit drug. Co-accused Shabbir Shaikh (A4), Shahrukh Khan (A3) and Sunny Singh (A5), were also apprehended as the members of the drug cartel. In the house search of Shabbir Shaikh (A4), articles used to weigh, pack and seal the contraband substance were allegedly found.

6. At the outset, Mr.Bidkar, the learned Counsel for the Applicant, submitted that by an order dated 28th March 2024, Moiz

Shabbir Lokhandwala (A6) has been enlarged on bail by this Court. Subsequently, by an order dated 4th April 2024, co-accused Shahrukh Khan (A3) and by another order dated 9th May 2024, co-accused Shabbir Shaikh (A4), have also been released on bail. Mr.Bidkar further submitted that while releasing co-accused Moiz Lokhandwala (A6), this Court has considered the case *qua* the Applicant and held that the seizure of the contraband substance from the Applicant cannot be sustained for non-compliance of the mandatory provision contained in Section 52-A of the NDPS Act, 1985 and, therefore, bail was granted to Moiz Lokhandwala (A6). Thus, the Applicant is also entitled to be enlarged on bail.

7. It was further submitted that there is non-compliance of the mandate contained in Section 50 of the NDPS Act. The seizure memo and the appraisal memo indicate that, at best, a half-hearted attempt was made to comply the provisions contained in Section 50 of the NDPS Act, 1985.

8. Mrs. Ganapathy, the learned APP, resisted the prayer for bail. It was submitted that, there is adequate compliance of mandate contained in Section 50 of the NDPS Act, in as much as, the Applicant was apprised that, he had a right to be searched before the nearest Magistrate or Gazetted Officer. Mrs. Ganapathy made

an endevour to draw home the point that, there is a significant difference in the role of the Applicant and the co-accused, who have been released on bail. No contraband was found in the possession of any of the co-accused, who have released on bail. The Applicant was found in possession of 107 gm. Mephedrone (M.D.). Therefore, the rigor contained in Section 37(1)(b)(ii) of the NDPS Act, 1985 operates with full force.

9. I have given anxious consideration to the rival submissions canvased across the bar. From the perusal of the seizure panchnama, it becomes evident that during the search of the Applicant, allegedly 107 grm. Mephedrone (M.D.) was found. In addition, a country made pistol and 9 live cartridges were also found. The seizure panchnama further indicates that the samples of contraband substance found in the possession of the Applicant were collected and marked Exhibit-A1 and A2 and the bulk was seized and marked Exhibit A. It further appears that on 28th November 2022, the said sample (Exhibit-A1) was sent for analysis to FSL.

10. Incontrovertibly, it is a case of drawing of the samples of the contraband substance at the time of the very seizure thereof. Nay under a couple of days of the said seizure, the sample (A1) was

sent for analysis to FSL.

11. It further appears that the Investigating Officer moved the learned Magistrate for the proceedings under Section 52-A of the NDPS Act, 1985. The certificate issued by the learned Magistrate under Section 52-A (3) of the NDPS Act, 1985, however, indicates that, out of the samples collected at the time of seizure, one sample i.e. (Exhibit A1) containing 1 gm of the contraband substance was already sent for analysis to FSL. Conversely, the certificate does not indicate that the learned Magistrate had drawn samples out of the bulk, afresh.

12. It is in the backdrop of the aforesaid facts, while releasing co-accused Moiz Lokhandwala (A6) on bail, this Court had observed, *inter alia*, as under:-

> **12.** It was sought to be urged on behalf of the Applicant that if the very seizure of the contraband article from Abhishek (A1) falls through, the Applicant cannot be roped in by invoking Section 29 of the Act. This submission was premised on the non-compliance of the mandate contained in Section 52-A of the Act. As is evident from the seizure panchanama, 107 gms MD was found in possession of Abhishek (A1). It is specifically recorded in the panchanama that two samples comprising of 1 gm of MD each, were collected at the time of the alleged seizure and marked Exhibit A1 and A2 and the bulk was marked Exhibit A.
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> **13.** The inventory carried out before the Magistrate on 6 December 2022 makes this position abundantly clear. The learned Magistrate in the Certificate issued under Section 52-A(3) had, inter alia, recorded that one sample of 1 gm (Exhibit A1) was already sent to the CA and the bulk and another sample (A2) weighing 1.4 gms was produced before the learned Magistrate. It does not appear that the samples were afresh drawn in the

presence of the learned Magistrate.

14. It would be contextually relevant to note that the forwarding letter to FSL dated 28 November 2022 (page 111) clearly records that the sample (A1) comprising of 1 gm of MD out of 107 gms was forwarded thereunder to the CA. CA report would thus be based on the said sample.

15. Mr. Khan, learned Counsel for the Applicant submitted that the collection of the sample at the time of the seizure is not envisaged by the provisions of the Act, 1985. What is required to be sent to the FSL is a sample drawn before the Magistrate. Failure to do so would be in teeth of the decision of the Supreme Court in the case of **Union of India V/s. Mohanlal and Anr.**[1].

16. Mr. Khan placed reliance on a judgment of the learned Single Judge of this Court in the case of **Sunil Basant Malvi and Anr. V/s. The State of Maharashtra**[2] wherein after adverting to the decision of the Supreme Court in the cases of **Union of India V/s. Mohanlal and Anr. (supra)** and **Simarnjit Singh V/s. State of Punjab**[3] it was inter alia observed that the lapses on the part of the prosecution in not collecting the samples before the Magistrate and forwarding the very sample which was collected before the Magistrate to the FSL will be fatal to the case of the prosecution and will, thus, create serious doubt about its case that the substance recovered was the contraband article.

17. In a line of decisions, the Supreme Court has recently enunciated that the collection of samples at the time of the seizure is not envisaged by the provisions of the Act. Samples must be drawn before the Magistrate. In the case of **Union of India V/s. Mohanlal and Anr. (Supra)**, the Supreme Court inter alia observed 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

1 (2016) 3 SCC 379
2 Criminal Appeal No.270 of 2023
3 2023 (3) Crimes 168

> 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."

18. A case of complete non-compliance of Section 52-A and the one with material to indicate that there was a substantial compliance or there was still possibility of compliance of Section 52-A of the Act, in my view, stand on different footings. It is in the aforesaid context, reference to the decisions of the Supreme Court in the case of **Yusuf @ Asif V/s. State**[4] and **Simaranjit Singh V/s. State of Punjab**[5] would be advantageous.

19. In the case of **Yusuf @ Asif V/s. State (supra)**, 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."

20. In the case of **Simaranjit Singh V/s. State of Punjab (supra),** 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 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.

4 Cri. Appeal No.3191 of 2023 dt. 13 Oct. 2023
5 2023 SCC Online SC 906

> **21.** In the latest pronouncement in the case of **Mohammed Khalid and another vs. The State of Telangana**[6] the Supreme Court observed in emphatic terms that since no proceedings under Section 52A of the NDPS Act, 1985 were undertaken by the Investigating Officer for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate, the FSL report is nothing but a waste paper and cannot be read in evidence.
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> **22.** In the light of the aforesaid enunciation of law, there is substance in the submission of Mr. Khan that the prosecution will have to surmount the challenge of non-compliance of Section 52-A of the Act. If the procedure of sampling vitiates the search, then the Court may be justified in drawing an inference that the accused may not be guilty of the offences under the Act, 1985 and, thus, the interdict contained in Section 37(1)(b)(ii) may not operate."

13. The aforesaid reasons, which weighed with this Court in releasing Moiz Lokhandwala (A6), apply with equal force to the claim of the Applicant for bail. In fact, Moiz Lokhandwala (A6) who was sought to be roped in by invoking the provisions contained under Section 29 of the NDPS Act, 1985, was released on bail on the premise that, if the very seizure of the contraband article from the Applicant (A1) falls through, Moiz Lokhandwala (A6) cannot be roped in by invoking Section 29 of the NDPS Act, 1985.

14. In substance, it is a case of non compliance of the mandate contained in Section 52-A of the NDPS Act, 1985 as the samples were drawn at the time of the seizure and not in the presence of learned Magistrate and though, subsequently, the proceedings under Section 52-A of the NDPS Act were conducted before the

6 Criminal Appeal No(S).1610/2023, dtd.1/3/2024.

learned Magistrate, no fresh samples were drawn. What has been sent for analysis to FSL is the sample collected at the time of seizure. The fate of the prosecution would thus hinge on the CA report based on analysis of the samples drawn at the time of seizure. Thus, in view of above referred pronouncements, the prosecution will have to surmount the impediment of non-compliance of Section 52-A of the NDPS Act, 1985 in true spirit.

15. The learned APP submitted that the Applicant has antecedents. He has been arraigned for the offences punishable under Sections 379, 328, 376 of the Indian Penal Code, 1860. It is not the case that the Applicant has been arraigned, in the past, for the offences punishable under NDPS Act, 1985.

16. The Court is required to record a finding that the Applicant will not indulge in identical offences punishable under NDPS Act, 1985, in the event he is released on bail and not any other offence. As the Applicant does not have an antecedent of the offences punishable under NDPS Act, the Court may justifiably draw an inference that the Applicant may not indulge in identical offences, if released on bail.

17. In any event, the Applicant has been in custody since 25th November 2022. It is extremely unlikely that the trial can be

concluded within a reasonable period.

18. I am, therefore, persuaded to exercise discretion in favour of the Applicant. Hence, the following order:

ORDER

(i) The Application stands allowed.

(ii) The Applicant – Abhishek Gupteshwar Mahato be released on bail in C.R.No.1112 of 2022 registered with Mumbra Police Station 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 Mumbra Police Station on first Monday of every alternate 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.)