

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.3776 OF 2023

Abdulla Mohiddin Shaikh ... Applicant
Vs.
State of Maharashtra ... Respondent
AND

BAIL APPLICATION NO.3712 OF 2024

Sharuq Abdul Rashid Shaikh ... Applicant
Vs.
State of Maharashtra ... Respondent

Mr. Shreerat Kamath a/w. Ms. Puja Yadav for Applicants in both the Applications.
Mr. Kiran C. Shinde, APP for Respondent-State.
Mr. Nagesh Chikane, PSI, Anti-Narcotics Cell, Ghatkopar Unit, Crime Branch, Mumbai.

CORAM : MANISH PITALE, J.
DATE : SEPTEMBER 10, 2024

P.C. :

1. Heard Mr. Kamath, learned counsel for the applicants and Mr. Shinde, learned APP for the respondent State in both the applications.

2. The applicants have approached this Court seeking bail as they were arrested on 19.12.2020 in connection with FIR No.43 of 2020 registered by the Anti Narcotics Cell, Ghatkopar Unit, Mumbai for offences under Sections 8(c), 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). The applicants have remained incarcerated as under-trials from the date of their arrest.

3. In the present case, it is alleged that as a matter of chance recovery, the applicants were found in possession of commercial

quantity of contraband *Nitrazepam* tablets IP and *Nitravet-10*. The samples were drawn at the time of seizure in terms of the seizure *panchanama* dated 19.12.2020 and the samples were sent for chemical analysis to the concerned laboratory on 21.12.2020. The chemical analysis report dated 31.05.2021 shows that the samples indeed contained the contraband *Nitrazepam*.

4. Although the applicants have raised various grounds in support of these applications, the primary ground pressed on behalf of the applicants is total non-compliance of Section 52-A of the NDPS Act. It is submitted that this vitiates the entire prosecution case and therefore, this Court may consider enlarging the applicants on bail. It is further submitted that the applicant (accused No.2) in Criminal Bail Application No.3776 of 2023 has no criminal antecedents, while the applicant (accused No.1) in Criminal Bail Application No.3712 of 2024 has offences registered against him as a consumer of narcotic substances.

5. The learned APP submits that the documents filed along with the charge-sheet indeed do not show compliance with Section 52-A of the NDPS Act. But, on instructions of officer present in Court, it is submitted that subsequently in the year 2023, the exercise contemplated under Section 52-A of the NDPS Act was undertaken.

6. This Court is of the opinion that the present bail applications deserve to be allowed on the short ground of non-compliance with mandatory requirement of Section 52-A of the NDPS Act. In the case of *Union of India Vs. Mohan Lal and another*, (2016) 3 SCC 379, the Supreme Court in paragraphs 15 to 19 held as follows:-

“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.

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the Standing Order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

19. Mr. Sinha, learned Amicus Curiae, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be

done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. 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 (*supra*). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions.”

7. The above-quoted portion of the said judgement of the Supreme Court pertaining to Section 52-A of the NDPS Act, concerning sampling and certification, lays down that compliance with the aforesaid provision is mandatory.

8. In the present case, the samples of the contraband were sent directly to the laboratory for chemical analysis within three days of the seizure *panchanama*. The CA report itself came on 31.05.2021. The documents filed with the charge-sheet do not show compliance with the

aforesaid mandatory provision.

9. Even if the statement made by the learned APP, on instructions, that the procedure under Section 52-A of the NDPS Act was complied with in the year 2023 is taken into consideration, the same cannot be said to be in compliance with the mandatory requirement under Section 52-A of the NDPS Act. The whole purpose of the mandatory requirement is to ensure the purity of the process of sampling and certification before the contraband reaches the concerned laboratory for chemical analysis. In this case, *prima facie*, there is total non-compliance of the said requirement. This aspect, *prima facie*, vitiates the prosecution case, thereby indicating that the applicants have satisfied the first limb of the stringent twin test contemplated under Section 37 of the NDPS Act. The second limb also can be said to be satisfied in the facts and circumstances of the present case. In any case, both the applicants have suffered incarceration for almost four years, having been arrested on 19.12.2020. Hence, these applications deserve to be allowed.

10. In view of the above, the applications are allowed in the following terms:-

(A) The applicants shall be released on bail in connection with FIR No.43 of 2020 registered by the Anti Narcotics Cell, Ghatkopar Unit, Mumbai on furnishing P.R. Bond of Rs.50,000/- each with one or two sureties in the like amount to the satisfaction of the trial Court;

(B) The applicants shall cooperate with the trial Court for expeditious trial and they shall attend each and every date, unless exempted for reasons to be recorded in writing;

(C) The applicants shall attend the office of the Anti Narcotics Cell, Ghatkopar Unit on the first Monday of every month between

10 a.m. and 12 noon, during the pendency of trial;

(D) The applicants shall not tamper with the evidence of the prosecution. They shall not influence the informant, witnesses or any other person concerned with the case;

(E) Upon being released on bail, the applicants shall immediately, and in any case within a week, furnish the details of their active mobile numbers and residential addresses to the trial Court and update about the same, if there is any change.

11. Needless to say, violation of any of the aforesaid conditions would make the applicants liable to face proceedings for cancellation of bail. It is also clarified that the observations made in this order are limited to the question of grant of bail to the applicants in the present application and that the trial Court shall proceed further, without being influenced by the observations made in this order.

12. The bail applications stand disposed of accordingly.

(MANISH PITALE, J.)

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