

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO. 3727 OF 2024**

Sanam Tarik Sayyed	...	Applicant
vs.		
The State of Maharashtra	...	Respondent

Ms. Zehra Charania a/w. Mr. Ayaz Khan, Mr. Dilip Mishra and Ms. Mallika Sharma for applicant.

Mr. Tanveer G. Khan, APP for respondent-State.

Mr. Phalke, PSI, Anti-Narcotics Cell, Bandra Unit.

**CORAM : MANISH PITALE, J.
DATE : 05th SEPTEMBER, 2024**

P.C. :

. Heard learned counsel for the applicant and the learned APP for the respondent-State.

2. The applicant was arrested on 11.12.2020 in connection with FIR No.40 of 2020 dated 11.12.2020 registered at Anti-Narcotics Cell, Bandra, Mumbai for offences under Sections 8(c) and 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). The applicant has remained behind bars since the date of her arrest i.e. for a period of 3 years and 9 months.

3. The allegation against the applicant is that upon secret information being received, when the applicant was confronted, commercial quantity of contraband mephedrone (MD) was recovered from her. The contraband was sent for chemical analysis and the report received from the laboratory confirmed the fact that it was MD.

4. The principal contention raised on behalf of the applicant in support of the present application is that the mandatory procedure of sampling and certification under Section 52A of the NDPS Act was not followed, thereby completely vitiating the prosecution case. It is submitted that the samples drawn at the time of seizure were directly sent to the laboratory and the chemical analysis report is based on such samples. Reliance is placed on the judgment of the Supreme Court in the case of *Union of India Vs. Mohanlal and another* [(2016) 3 SCC 379], to contend that the applicant has a strong case on merits in her favour, thereby showing that she has satisfied the first limb of the stringent twin test, contemplated under Section 37 of the NDPS Act. It is submitted that the applicant has no criminal antecedents and therefore, the second limb of the stringent twin test is also satisfied. On this basis, it is submitted that the present application may be allowed.

5. The learned APP is unable to demonstrate from the documents that the mandatory procedure under Section 52A of the NDPS Act, was carried out in the present case. On the instructions of the officer present in Court, the learned APP submitted that although no document is presently available, such an exercise was subsequently carried out. It is not even clear whether such an exercise was attempted to be carried out before the laboratory report was received.

6. The Supreme Court, in the case of **Union of India Vs. Mohanlal and another** (*supra*), in paragraph Nos.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. In paragraph No.18, the Supreme Court has considered the question of conflict between the mandatory statutory procedure, contemplated under Section 52A of the NDPS Act on the one hand and executive directions in the form of Standing Order issued by the Central Government, on the other. It has been categorically held that if such conflict arises, it has to be resolved in favour of the mandatory statutory provision. Thus, the law is clear that the mandatory procedure of sampling and certification, contemplated under Section 52A of the NDPS Act, has to be scrupulously followed.

8. The material on record in the present case, shows that no such procedure was followed and the samples drawn at the time of seizure itself were directly sent for analysis to the laboratory. This aspect goes to the root of the matter and *prima facie*, vitiates the prosecution case.

9. This leads to the conclusion that on broad probabilities, the applicant has indeed satisfied the first limb of the stringent twin test, contemplated under Section 37 of the NDPS Act. There is nothing to show that there are any criminal antecedents against the applicant, who is a woman and therefore, even the second limb of the stringent twin test is duly satisfied.

10. In view of the above, the application is allowed in the following terms:

- (i) The applicant shall be released on bail in connection with FIR No.40 of 2020 dated 11.12.2020 registered at Anti-Narcotics Cell, Bandra, Mumbai, on furnishing PR Bond of ₹ 50,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.
- (ii) Upon release, within one week, the applicant shall inform the Investigating Officer as well as the trial court about her contact number and residential address and update the same in case of any change.

- (iii) The applicant shall co-operate with the trial Court in completing the proceedings expeditiously and attend the proceedings before the trial Court on each and every date, unless specifically exempted.
- (iv) The applicant shall not tamper with the evidence of the prosecution in any manner. She shall not undertake any action that may influence the informant, witnesses and other persons concerned with the case.

11. The applicant shall be liable to face proceedings for cancellation of bail, in the event any of the aforesaid conditions are violated.

12. It is also clarified that the observations made in this order are limited to the disposal of the present bail application and the trial court shall proceed further in the matter without being influenced by the observations made hereinabove.

13. The application is disposed of.

(MANISH PITALE, J)

Priya Kambli