

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.4103 OF 2024

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Shahid Salim Khan ...Applicant

vs.

The State of Maharashtra ...Respondent

Mr. Kiran Gogavale, for the Applicant.

Mr. A.A. Naik, APP, for the Respondent/State.

CORAM : N. J. JAMADAR, J.

DATE : DECEMBER 17, 2024

P.C.:

1. Heard the learned counsel for the applicant and the learned APP for the State.

2. The applicant, who is arraigned in C.R. No. 13 of 2022 registered with ATS police station, Mumbai for the offences punishable under sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act, 1985) has preferred this application to enlarge him on bail.

3. The indictment against the applicant is that :

On 7th July, 2022 at 9.00 pm an intimation was received at ATS, Juhu Unit that the applicant had stored a large quantity of Charas, a contraband substance, at his house, i.e. Room No. 145, Guru Nagar, Gaondevi Dongar, Near Ajmeri Masjid, Andheri (E), Mumbai and was trading in illicit drug. After complying with the statutory requirements under section 42 of the NDPS Act, 1985, the

ATS police conducted a raid in the presence of public witnesses. The applicant was apprehended. In the house search, a huge quantity of 5465 gms. Charas was recovered. The contraband substance was seized and sealed. During the course of investigation, the co-accused Mahaveer Prasad (A2), Zunnukumar Bharti (A3), Salim Bagwan (A4) and Mohd. Akhtar Shaikh (A5) were apprehended.

4. Mr. Gogavale, the learned counsel for the applicant submitted that there are serious lacunae in the alleged search and seizure of the contraband substance from the possession of the applicant. First, the samples were drawn at the time of the seizure itself. Second, the exercise of drawing of samples was vitiated as the investigating officer has mixed the samples collected from different slabs. Third, there was delay of about 28 days in forwarding the samples to F.S.L., before the learned Magistrate. Fourth, the exercise of inventory itself was vitiated as it was in breach of the Supreme Court guidelines in the case of **Thana Singh v. Central Bureau of Narcotics**¹ wherein the Supreme Court has disapproved re-testing and re-sampling of the contraband substance. Fifth, the search and seizure was after sunset and before sunrise sans the authorization under section 42 of the NDPS Act, 1985. Therefore, the applicant deserves to be enlarged on bail.

5. Mr. Naik, the learned APP, resisted the prayer for bail. It was

¹ 2013 CRI. L. J. 1262.

submitted that a huge quantity of 5465 gms. Charas, then valued Rs. 1,09,30,000/-, was recovered from the possession of the applicant. The learned APP refuted that there was no authorization to carry out the search after sunset. Attention of the Court was invited to the endorsement of empowered officer, on the intimation forwarded under section 42 of the NDPS Act, 1985 (Exh.A, pg. 673 to the affidavit in reply). The learned APP further submitted that this Court had already dealt with the grounds of non-compliance of the provisions contained in section 52A of the NDPS Act, 1985 and declined to exercise the discretion in favour of the co-accused Mahaveer Prasad (A2) and Zunnukumar Bharti (A3), by an order dated 17th April, 2024 passed in Bail Application No. 4208 of 2023.

6. Since the applicant is the kingpin of the drug cartel and huge quantity of 5465 gms. of Charas was found in the possession of the applicant, the interdict contained in section 37 of the NDPS Act, 1985 comes into play with even greater force and rigor. Therefore, the application be rejected, urged learned APP.

7. At the outset, it is necessary to note the reasons which weighed with this Court while rejecting the Bail Application Nos. 4208 of 2023 and 4203 of 2023 of Mahaveer Prasad (A2) and Zunnukumar Bharti (A3), by an order dated 17th April, 2024, as those reasons also bear upon the entitlement of the applicant for

bail. The observations in paragraphs Nos. 22 to 28 read as under:-

22] This leads me to the challenge based on the alleged non-compliance of the provisions contained in Section 52A of the NDPS Act, 1985. A two-fold challenge was mounted. One, there was an inordinate delay in conducting the inventory. Two, there was a delay in forwarding the sample to CA post inventory. Evidently, the applicant was found in possession of the contraband article on the morning on 21st July, 2022. Inventory was conducted before the jurisdictional Magistrate on 25th August, 2022. In the case of *Union of India Vs. Mohanlal and Others*⁷, the Supreme Court after adverting to the provisions contained in Section 52A of the NDPS Act, 1985, observed that 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. The Supreme Court further observed as under:-

“....19. 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....”

23) In the case at hand, it appears that the Investigating Officer had made an application to the concerned Gazetted Officer on the very next day of the seizure i.e. on 22nd July, 2022 (pg no. 133 to 136 of the application). Thus, there was, evidently, no delay on the part of the Investigating Officer in making an application for the purpose of certification and drawing of the samples. The delay, thus, cannot be attributed to the investigating agency.

24) The aspect of delay in forwarding the sample, post inventory, may carry some substance. Inventory was conducted on 25th August, 2022. Sample was forwarded on 22nd September, 2022. That would bring in an element of safe keeping of the sample and the possibility of tampering with the sample during the intervening period. However, there are documents (at page No. 180 to 184) which prima facie evidence the safe keeping and retrieval of the bulk and sample. Therefore, in the facts of the case, whether there was a possibility of tampering with the sample, would be a matter for trial.

25) This propels me to the submission of Mr. Bidkar as regards the alleged absence of material to show the complicity of Zunnukumar (A3), the applicant in BA 4203 of 2023. The prosecution case that Zunnukumar (A3) used to deliver the contraband at the house of the co-accused Shahid (A1) and also received money from the said accused was sought to be substantiated by placing reliance on the statements of Reshma Shaikh and Raziya Shaikh, the daughter and wife of Shahid (A1), respectively, statement of the Managers of the Hotels where the applicant stayed whenever he visited Mumbai and the financial transactions between Shahid (A1) and the applicant. In addition, the applicant Zunnukumar (A3) was allegedly in regular touch with Shahid (A1) and the other co-accused.

26) Had the matter been restricted to the statements of Reshma and Raziya, the wife and daughter of Shahid (A1), the submission on behalf of the applicant Zunnukumar (A3) would have carried some substance. In addition to the statements of aforesaid witnesses, there is material in the form of the statement of Hotel Manager of Onyx Residency that the applicant Zunnukumar (A3) frequently visited Mumbai and stayed in the said Hotel. Likewise, there is statement of Manager of Hotel Goldan Palace in which also Zunnukumar (A3) stayed. Copies of the Hotel Registers are annexed to their statements 27) To add to this, during the period 31st December, 2021 to 6th July, 2022 a sum of Rs.67,100/- came to be credited to the account of applicant Zunnukumar (A3) from the account of Shahid (A1). There is further material to indicate that the applicant – Zunnukumar (A3) was in regular touch with Shahid (A1) and Salim Bagwan (A4), as is evident from the CDR. If the aforesaid material is considered cumulatively, the statements of the wife and daughter of the Shahid (A1) that the applicant Zunnukumar (A3) used to frequently deliver the contraband substance and collect money from Shahid (A1), prima facie, lend support to the prosecution version.

28) I am, thus, persuaded to hold that there is sufficient material to make out a strong prima facie case against 27) To add to this, during the period 31st December, 2021 to 6th July, 2022 a sum of Rs.67,100/- came to be credited to the account of applicant Zunnukumar (A3) from the account of Shahid (A1). There is further material to indicate that the applicant – Zunnukumar (A3) was in regular touch with Shahid (A1) and Salim Bagwan (A4), as is evident from the CDR. If the aforesaid material is considered cumulatively, the statements of the wife and daughter of the Shahid (A1) that the applicant Zunnukumar (A3) used to frequently deliver the contraband substance and collect money from Shahid (A1), prima facie, lend support to the prosecution version.

28) I am, thus, persuaded to hold that there is sufficient material to make out a strong prima facie case against the applicant – Zunnukumar as well. Conversely, there is no substantial probable cause which would justify a reasonable belief that the applicants may not be guilty of the offences for which they have been arraigned. The bar under Section 37 (1)(b) (ii) of the NDPS Act, 1985 operates with full force. Thus, the applicants do not deserve to be released on bail the applicant – Zunnukumar as well. Conversely, there is no substantial probable cause which

would justify a reasonable belief that the applicants may not be guilty of the offences for which they have been arraigned. The bar under Section 37 (1)(b) (ii) of the NDPS Act, 1985 operates with full force. Thus, the applicants do not deserve to be released on bail.

8. In the backdrop of the aforesaid order, first the ground of non-compliance of the mandate contained in section 42 of the NDPS Act, 1985 deserves to be appreciated. Prima facie, it appears that Dnyaneshwar Wagh, the then Senior PI, ATS, Juhu Unit had taken down the information and forwarded the same to Assistant Commissioner of Police vide letter OE No. 731/2022 on the very day and had also sought permission for the house search. A.C.P. had authorized, Police Inspector, ATS, Juhu to take necessary action as per the provisions of NDPS Act, 1985. In the backdrop of the facts of the case, in my view, the said authorization (Exhibit A, page 673 to the affidavit in reply) constitutes a sufficient authorization to the investigating officer to conduct the search and seizure between sunset and sunrise.

9. As regards the ground of mixture of the samples, it appears that the bulk was again produced before the jurisdictional Magistrate and the inventory was conducted on 25th August, 2022. In the presence of the learned Magistrate, the samples were drawn and those samples were forwarded to F.S.L. under the covering letter dated 22nd September, 2022. The aspect of delay in forwarding the samples has already been dealt with by this Court in

the order extracted above.

10. If viewed, in the light of the aforesaid reasons, the submission of Mr. Gogavale, on both the counts i.e. the defect in sampling on account of mixture and the re-sampling does not carry much substance. Prima facie, the inventory conducted before the learned Magistrate, in compliance of the provisions contained in section 52A of the Act, 1985, renders necessary assurance. As noted above, there is adequate material to demonstrate the safe keeping of the samples during the intervening period. Resultantly, the submissions premised on the defect in the sampling, sealing and forwarding of the samples to F.S.L. do not appear to carry such substance as to draw an inference that eventually the applicant may not be found guilty of the offences for which he has been arraigned in this case.

11. Moreover, in addition to possession of the contraband substance, as noted in the aforesaid order, there is other evidence in the form of the statements of the witnesses as well as the financial transactions and CDR which squarely incriminate the applicant. Therefore, I am not inclined to exercise the discretion in favour of the applicant.

Hence, the following order.

ORDER

1] The application stands rejected.

2] 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.

(N. J. JAMADAR, J.)