

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO. 4997 OF 2024

Tochukwu Daniel Chinedu @ Zadi

Elayee Sunday

... Applicant

Versus

The State of Maharashtra

... Respondent

Ms. Ashwini Achari a/w Taraq Sayed, Anish P. and Alisha Parekh
for the Applicant.

Mr. Babu V. Holambe-Patil, APP for Respondent-State.

**CORAM: MANISH PITALE, J.
DATE : 12th DECEMBER 2024**

P.C. :

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

2. The applicant was arrested in the present case on 11.07.2023 in connection with First Information Report No. 0714 of 2023 registered on the same date at Police Station Mumbra, District Thane, for offence under Sections 8(c) and 22(c) read with 29 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (NDPS Act).

3. In this case, it is alleged that the applicant was handing over commercial quantity of contraband i.e. mephedrone (MD) to accused No.1, when the accused persons were apprehended. Investigation was completed and charge-sheet was filed.

4. At the outset, the learned counsel for the applicant claims relief on the ground of parity, as the aforesaid co-accused No.1 was granted bail by this Court by order dated 22.08.2024 passed in Bail Application No. 2961 of 2024, on the ground of non-compliance of the mandatory requirement under Section 52A of the NDPS Act.

5. The aforesaid contention was reiterated on behalf of this applicant also and it was emphasized that the samples taken at the time of seizure, were directly sent for chemical analysis to the laboratory, without the intervening procedure of Section 52A of the NDPS Act being undertaken.

6. On the other hand, learned APP submitted that the CA report has confirmed the fact that contraband was indeed Mephedrone. But, the learned APP is unable to demonstrate as to how requirement of Section 52A of the NDPS Act, was complied with in the present case.

7. The Supreme Court in the case of ***Union of India Vs. Mohanlal and another, (2016) 3 SCC 379***, in the context of mandatory requirement under Section 52A of the NDPS Act, while discussing the aspect of sampling and certification, 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."

8. Perusal of the above quoted portion of the judgment clearly

indicates that the procedure contemplated under Section 52A of the NDPS Act, is mandatorily required to be followed. It is a procedure to ensure and safeguard the sampling, certification and transport of the alleged contraband for chemical analysis to the concerned laboratory. This procedure indeed goes to the root the prosecution case. Non-compliance thereof, therefore, indicates that the applicant in the present case has indeed made out a strong *prima facie* case in his favour. There are reasonable grounds to believe that the applicant may not be held guilty in the present case. Hence, rigors of Section 37 of the NDPS Act, are also satisfied. There is nothing to indicate that the mandatory procedure under Section 52A of the NDPS Act, was indeed complied with.

9. Hence, on this short ground the present application deserves to be allowed.

10. Accordingly, the application is allowed in the following terms:

- (i) The applicant shall be released on bail in connection with FIR No.714 of 2023 dated 11.07.2023, registered at Mumbra Police Station, Dist. Thane, on furnishing P.R. Bond of ₹50,000/- and one or two sureties in the like amount to the satisfaction of the trial court.

(ii) The applicant shall report to the Mumbra Police Station, Dist. Thane, on first Monday of every month between 10:00 a.m. and 12:00 noon, during the pendency of the trial.

(iii) Upon release, within one week, the applicant shall inform the Investigating Officer as well as the trial court about his contact number and residential address and update the same in case of any change;

(iv) The applicant shall deposit his valid passport with the Investigating Officer within one week of release on bail. It shall remain so deposited during the pendency of the trial.

(v) The applicant shall not tamper with the evidence in any manner. He shall not influence the informant, witnesses or any other persons concerned with the case.

(vi) The applicant shall attend the proceedings before the Trial Court on every date, except when exempted, for reasons to be recorded in writing.

11. Needless to say, violation of any of the aforesaid conditions may lead to cancellation of the present order.

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 stands disposed of.

MANISH PITALE, J.