



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (BA) NO.1135 OF 2023

Karn @ Karan Kumar Das s/o Samod Das
Vs.

State of Maharashtra, Through Police Station Officer, Police Station, GRP
Railway Police, Nagpur

-Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. A. K. Bhangde, Advocate for applicant.
Ms. Sneha Dhote, APP for non-applicant/State.

CORAM : URMILA JOSHI-PHALKE, J.
RESERVED ON : 01.02.2024
PRONOUNCED ON : 14.02.2024

1. The applicant came to be arrested on 22.09.2022 in connection with Crime No.734/2022 registered under Section 20(b)(ii)(c) and 29 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (hereinafter referred to 'the NDPS Act').

2. The accusation against the present applicant is that on 21.09.2022 the Railway Protection Force, Constables Shivkumar Meena and Pawankumar Yadav boarded in the train No.22705 Tirupati Jammu Tawi Humsafar Express and were checking from Ballarshah to Nagpur. During the checking at about 4.50 p.m. in Coach No. B/1, they have found some suspected persons. Two Constables also smell the Ganja. Accordingly, they informed

their superior officers. The train was halted at Nagpur Railway Station. The team of RPF arrived at the B/1 Coach of the said train. All the four accused persons got down along with their bags namely Premkumr Bigan Sahni, Kailash Rajendra Sahni, Raja Kumar Kapil Sahni and Karnkumar Samod Das. The informant Sub-Inspector, RPF introduced himself to all the accused and also issued notices under Section 50 of NDPS Act. Thereafter, the bags of accused persons were searched and 85.570 Kg. Ganja was seized. The Raiding Officer prepared the seizure panchnama along with the individual chart of seizure memo. The applicant was arrested.

3. The learned counsel for the applicant Mr. Bhangde submitted that intermediate quantity of 16 Kg 430 Grm was seized from the present applicant. There is no compliance of Section 52-A. The definition of alleged contraband is specifically defined under Section 2(3)(b) the elementary certificate is not in consonance with the definition and Section 52 of the Act which is prepared mechanically and without application of mind. In view of the observation of the Hon'ble Apex Court in the decisions **Simarnjit Singh Vs. State of Punjab in Criminal Appeal No.1443 of 2023 (Arising out of S.L.P.(Cri.) No.1958/2023) dated 09.05.2023, Yusuf @ Asif Vs. State in Criminal Appeal No.3191 of 2023 [Arising out of SLP (Cri.) No.3010/2023] dated 13.10.2023 and Mangilal**

Vs. The State of Madhya Pradesh in Criminal Appeal No.1651/2023 dated 12.07.2023. The non compliance of Section 52-A of the NDPS Act vitiate the trial. In view of that, the applicant be released on bail.

4. The learned APP submitted that the learned trial Court has rightly rejected the application. The samples were drawn in the presence of the panchas which were immediately sent to the Forensic Science Laboratory (FSL). The examination report of the FSL reveals that the contraband has determined as a 'Ganja'. The decisions of the Hon'ble Supreme Court are not helpful to the present applicant at the stage of bail. At the stage of bail, the condition prescribed under Section 37 of the NDPS Act will have to be satisfied. There is nothing in the NDPS Act, which prohibits the drawing of samples at the time of the seizure. The veracity of drawing samples post-seizure on the spot is to be tested at the stage of the trial. The samples were drawn in the presence of the independent panchas and immediately sent to the Forensic Lab which are analyzed as 'Ganja'. In view of rigor under Section 37 of the NDPS Act, the application deserves to be rejected.

5. After hearing the learned Counsel for the applicant and after perusal of investigation papers, it reveals that during the inspection of the train, four

persons were intercepted by the Constables of RPF and during their search total 85.570 Kg Ganja was seized. The compliance of Section 50 of the NDPS Act was done by the investigating agency by introducing themselves to the accused and offering their search to them as well as they were informed that they can claim their search in presence of the Gazetted Officer. The information regarding the alleged incident was also forwarded to the superior officer. Thus, there is a compliance under Section 42 as well as Section 50 of the NDPS Act. After interception of the four persons, from the present applicant Ganja weighing of 16.430 Kg was seized in the presence of the panchas. The samples were drawn by the raiding party and the Investigating Officer in the presence of the panchas. The spot panchnama shows that from each bundle 24 grms Ganja was seized. The said samples and entire quantity of contraband was produced before the Magistrate for inventory. The inventory panchnama is also drawn in the presence of the Magistrate. The inventory panchnama shows that entire quantity was produced before the Magistrate and the samples were also produced. It further reveals from the inventory panchnama that inventory certificate was issued by the Magistrate.

6. On perusal of the inventory panchnama it shows that the Magistrate has verified each bags and its weight and mentioned in the inventory report.

The photographs of the said bags are taken when it was seized. The samples obtained are forwarded to the CA and the CA report shows that the samples which are forwarded are analyzed as 'Ganja'.

7. Learned Counsel for the applicant placed reliance on the decision of the Hon'ble Apex Court in **Yusuf @ Asif Vs. State in Criminal Appeal No. 3191/2023, Mangilal Vs. The State of Madhya Pradesh in Criminal Appeal No.1651/2023 decided on 12.07.2023, Simarnjit Singh Vs. State of Punjab in Criminal Appeal No.1443/2023 decided on 09.05.2023, the order of this Court in Criminal Application(BA) No.345/2023 (Arvind s/o Suresh Bansal (Banskar) Vs. State of Maharashtra decided on 07.08.2023, Birbal Prasad @ Birbal Prasad Sah @ Birbal Prasad Sao @ Birbal Sah Vs. State of Bihar reported in 2018 All MR (Cri) 2293 (SC), The State of Himachal Pradesh Vs. Pradeep Kumar Etc. reported in 2018 ALL MR (Cri) 2294 (SC), Sangeeta Y. Gaikwad Vs. State of Maharashtra reported in 2006 ALL MR (Cri) 2405 and Amarsingh Ramjibhai Barot Vs. State of Gujarat reported in 2005 ALL MR (Cri) 229 (SC).**

8. The procedure of drawing samples on the spot is carried out and the samples were forwarded to CA. The analysis report shows that it is analyzed as 'Ganja'.

9. It is true that in case of **Simarnjit Singh Vs. State of Punjab** (supra), **Yusuf @ Asif Vs. State (supra)** and **Mangilal Vs. State of Madhya Pradesh (supra)**, the Hon'ble Supreme Court has refused to accept the evidence of drawing of samples at the spot and conviction was set aside. Learned Counsel for the applicant submitted that the Hon'ble Apex Court has observed that non-compliance of Section 52-A vitiate the trial. In paragraph No.8 in the case of **Simarnjit Singh Vs. State of Punjab** (referred supra) by referring the paragraphs 15 to 17 of the decisions of the Hon'ble Supreme Court in Mohanlal's Case it was held as:

"15. It is manifest from Section 52-A(2) include (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-sections (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."

10. In **Yusuf @ Asif Vs. State** (supra) also the Hon'ble Apex Court held that in Mohanlal's case, the Apex Court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who is

obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.

11. The Hon'ble Supreme Court has held that there is non-compliance of the provisions of Section 52A of the NDPS Act. It is pertinent to mention that the seizure or obtaining of the samples at the spot itself is nowhere prohibited by the provisions of NDPS Act. In the present case, the samples were taken and sent for chemical analysis and analysis shows that the samples were analyzed as 'Ganja'. Chapter V of the NDPS Act dealt with the procedure Section 51 in the said Chapter states that the provisions of the Code of Criminal Procedure ('Cr.P.C.' for short) shall apply, in so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under the NDPS Act. Thus, unless there is anything contrary provided in the NDPS Act, in relation to all the words issued an arrest, search and seizure carried out by the investigating agency during the course of investigation, the provisions of the Cr.P.C. would apply.

12. Section 52 of the NDPS Act deals with the disposal of persons arrested and articles seized. Sub-section 2 of Section 52 provides that every person arrested and article seized under warrant issued under sub-section (1) of section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued. Sub-section 3 of Section 52 states that every person arrested and article seized under sub-section (2) of section 41, section 42, section 43 or section 44 shall be forwarded without unnecessary delay to— (a) the officer-in-charge of the nearest police station, or (b) the officer empowered under section 53. Sub-section 4 of Section 52 provides that the authority or officer to whom any person or article is forwarded under sub-section (2) or sub-section (3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article.

13. In the above context Section 52 comes into play. Section 52-A pertains to Disposal of seized narcotic drugs and psychotropic substances. Sub-section (1) of Section 51-A provides that the Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect to the narcotic drugs, psychotropic substances, specify substances which shall, as soon as may be after the seizure, be

disposed of by such officer and in such manner as the Government may, from time to time, determine after following the procedure hereinafter specified. Sub-section (2) of Section 52-A prescribed the procedure for preparation of inventory, of the seized substance and enables to the competent officer to apply to the Magistrate for the purpose of the certificate certifying the correctness of inventory or taking in the presence of Magistrate, photographs of such substances and certifying such photographs as true; or allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of the samples drawn. Sub-section (3) of Section 52-A provides that when an application is made under sub-section (2), the Magistrate shall, as soon as may allow the application. Sub-Section (4) of Section 52-A provides that notwithstanding anything contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973, every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence. Thus, the provisions under Section 52-A would show that the provisions contained therein are in connection with the disposal of seized narcotic drugs and psychotropic substances etc. considering its hazardous nature, possibility of

the theft of substitution or constraint of proper storage, in the light of in sufficient space for such substances. For doing so an application is required to be made to the Magistrate who has to grant the certificate of inventory. The provision further in view of Sub-section (4) states that the inventory photographs of the substances and conveyances and any list of samples drawn and certified by the Magistrate shall be treated as primary evidence.

14. In case of **Simarnjit Singh** (supra) after referring to the decision in the case of Mohanlal the Hon'ble Apex Court observed that the fact that seizure was not in conformity with the law laid down by the Court in the said case creates a serious doubt about the prosecution's case that substance recovered was a contraband. In the case of **Mangilal** (supra) the Hon'ble Supreme Court observed that when there is non-compliance of Section 52-A of the NDPS Act, where a certification of a Magistrate is lacking any inventory, photograph or list of samples would not constitute primary evidence. Once again these observations will in relations to the provisions contained in Sub-section (4) of Section 52-A of the NDPS Act. Thereafter, based on the assistance of evidence on record the Court was pleased acquit the accused persons.

15. While dealing with the question whether this judgment completely take away the discretion of

the Court while considering the question of grant or refusal of the bail to an accused under the NDPS Act. This Court at Principal Bench **Mukesh Rajaram Chaudhary Vs. State of Maharashtra** reported in **2023 SCC OnLine Bom 2096** observed that it is undoubtedly true that when the investigating agency has not followed the procedure under Section 52-A of the NDPS Act, the deeming fiction of photographs, samples etc., being treated as primary evidence as provided under Sub-section (4) of Section 52-A would not be available. However, the question is this the only mode in which the prosecution can establish the charge against the accused? In this context, two scenarios are likely to arise. In both cases, let us assume that the prosecution has not followed the provisions of Section 52-A and taken aid of the Magistrate in drawing the samples and sending for forensic analysis. In the first scenario, if the seized substance is still not destroyed and is available in the custody of the investigating agency, there is nothing to stop the said agency from following the full gamut of the procedure provided under Section 52-A before destroying or disposing off the goods and then relying on the deeming fiction contained in Sub-section (4) of Section 52-A of the NDPS Act. The only question in such a scenario would be why were such steps taken at a belated stage. Second scenario would be that the samples have been drawn, not in the presence of Magistrate and the goods have been destroyed with the permission of the Magistrate. In

such a situation also, all that can happen is with the prosecution cannot avail of the deeming fiction provided in Sub-section (4) of Section 52-A of the NDPS Act. This, however, does not mean that the prosecution cannot establish the charges against the accused through the means of other evidence available with it. For example, if the process of taking samples may not be in the presence of the Magistrate, but is shown to be properly followed with the aid of the support of the panch witnesses which the court finds believable and reliable, I do not see how the prosecution case would be destroyed totally. In either of the scenarios noted above, it would be eventually a question of what evidence is brought on record and how such evidence is to be evaluated. Both the aspects are in relation to conduct of trial.

16. In view of the observations, at the stage when the Court is concerned with the question of granting or refusing bail, this cannot be the sole consideration. It can be one of the considerations but cannot be the sole consideration on the basis of which it is shown that the procedure under Section 52-A of the NDPS Act is not followed, the accused automatically becomes entitled to bail as a matter of right. The rigors of Section 37 of the NDPS Act would come into play. In view of Section 37 which reads as under:

“Offences to be cognizable and non-bailable.— (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27-A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.]”

17. The expression “reasonable grounds” has discussed by the Hon’ble Apex Court in various judgments including the decision in **Collector of Customs, New Delhi Vs. Ahmadalieva Nodira** reported in **(2004) 3 SCC 549** wherein it is held that

the limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are: the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than *prima facie* grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence.

18. Thus, satisfaction contemplated in Section 37 regarding accused being not guilty has to be based on reasonable grounds. Though expression reasonable grounds has not been defined it requires something more than a *prima facie* ground. It connotes substantial probable causes for believing that accused is not guilty of offence. He is charged with the reasonable belief on the existence of such fact and circumstances, as sufficient in themselves to justify satisfaction that accused is not guilty of alleged crime. Thus, recording of satisfaction on this aspects is *sine qua non* for grant of bail. Thus, to

grant bail to the accused the Court has to come to the conclusion that accused is not guilty of the offence on the basis of reasonable grounds.

19. The rigor of Section 37 of the NDPS Act would apply and only when the Court is satisfied that reasonable grounds of believing the accused is not guilty of the offence and that he is not likely to commit any offence while on bail, the bail would be granted.

20. I, therefore, do not find any merit in the submission of the learned Counsel for the applicant that in the present case, non-compliance of Section 52-A would entitled the applicant to bail.

21. In view of that, application is rejected.

(URMILA JOSHI-PHALKE, J.)