

Ajay

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

CRIMINAL BAIL APPLICATION NO. 1985 OF 2024

Himanshu Dipendra Singh

.. Applicant

Versus

The State of Maharashtra

.. Respondent

-
- Mr. Taraq Sayed a/w. Ms. Achari, Advocates for Applicant.
 - Ms. Shilpa K. Gajare - Dhumal, APP for Respondent – State.
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CORAM : MILIND N. JADHAV, J.

DATE : MAY 09, 2025.

P.C.:

1. Heard Mr. Sayed, learned Advocate for Applicant and Ms. Gajare – Dhumal, learned APP for Respondent – State.

2. This is an Application under Section 439 of the Code of Criminal Procedure, 1973 seeking Regular Bail in connection with C.R. No.839 of 2023 registered with Shantinagar Police Station for offences under Section 8(c), 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “**NDPS Act**”). Applicant is arrested on 20.10.2023 and is incarcerated since 1 year, 6 months and 20 days.

3. On 15.04.2025, after hearing Ms. Achari, learned Advocate for Applicant, the following order was passed:-

“1. Ms. Achari, learned Advocate for Applicant and Ms. Gajare-Dhumal, learned APP for State.

2. Present Application is languishing on the record of the Court since 2nd May, 2024. Applicant is apprehended with conscious possession of the alleged contraband i.e. 110 grams of Mephedrone. He is having no criminal antecedents.

3. Learned Advocate for Applicant would submit that indictment and incarceration of the Applicant is under the provisions NDPS Act since October, 2022 pending trial without the charge being framed. Main defence of the Applicant is that there is transgression of provisions of Sub-section 2 of Section 42 of the NDPS Act in as much as the samples have been drawn at the spot itself and sent for forensic analysis without sampling procedure being followed as envisaged under Section 10 of the NDPS (Seizure, Storage, Sampling and Disposal) Rules, 2022 by the prosecution.

4. Ms. Gajare-Dhumal, learned APP enters appearance. She shall take appropriate instructions on the aforesaid submission made by learned Advocate for Applicant in the present case and accordingly apprise the Court on above transgression argued by the Applicant's Advocate on the next adjourned date.

5. Stand over to 22nd April, 2025."

4. Ms. Gajare – Dhumal, learned APP would vehemently oppose the Bail Application and would submit that Applicant is apprehended with 110 grams of MD which is commercial quantity. Hence she would submit that rigours of Section 37 of the NDPS Act would be applicable to Applicant's case. She would submit that there is ample material on record to establish complicity of Applicant in the crime and hence would pray for rejection of Bail Application.

5. With the able assistance of the learned Advocates at the bar, I have perused the record of the case.

6. Perusal of the trap panchnama at page No.45 read at page No.47 of the Application reveals that samples from the seized contraband were drawn during the seizure in absence of Magistrate

and the said samples were directly sent for Chemical Analysis. This is completely impermissible in law as it is trite law that sampling as contemplated under Chapter III of the Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 (for short “**NDPS Rules, 2022**”) must be done during inventory procedure before the Magistrate as envisaged under Section 52A of the NDPS Act and not otherwise. Rule 9 of the NDPS Rules, 2022 clearly provides that the Investigating Officer shall ensure that samples of the seized material are drawn in presence of the Magistrate and the same is certified by the Magistrate in accordance with provisions of Section 52A(2) of the NDPS Act. Rule 10 provides for the procedure for drawing of samples. In the present case *prima facie* non-compliance of provisions of Rules 9 and 10 of NDPS Rules, 2022 is established.

7. In this regard, attention is drawn to the decision of the Supreme Court in the case of *Union of India Vs. Mohanlal*¹ wherein the Supreme Court has issued guidelines for conducting procedure under Section 52A of the NDPS Act and it has categorically held that sampling procedure shall be done under the supervision of the Magistrate. The relevant paragraph Nos.15 to 17 and 31.1 are reproduced below for reference and read thus:-

“15. It is manifest from Section 52-A(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

¹ (2016) 3 SCC 379

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.

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31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A, as discussed by us in the body of this judgment under the heading "seizure and sampling". The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order."

(emphasis supplied)

7.1. In view of the above decision of the Supreme Court which has been followed by the Supreme Court in the case of **Simranjit Singh**

*Vs. State of Punjab*², it is clear that drawing of samples in absence of Magistrate and that too at the stage of seizure of alleged contraband is impermissible in law as the same has to be mandatorily done under supervision of the Magistrate who is the statutory officer empowered under the NDPS Act to conduct inventory proceedings under Section 52A of the NDPS Act.

8. That apart in the present case it is also seen that there is transgression of provisions of Section 42 of the NDPS Act as on 19.10.2023 when the contraband was seized. The API Mr. Chopde who was a member of the raiding party has tested a small quantity from the seized material merely by touching, smelling and from the colour of the seized material which was a white coloured crystalline powder and ascertained it to be the alleged contraband MD. Admittedly there was no field testing kit available. In the present case the alleged contraband purportedly being MD and non-performance of the field test vitiates the prosecution case as preliminary identification of the seized material is crucial at the inception stage since most of the narcotic substances are in the form of white, off-white or brown color powder or crystals.

8.1. In the absence of presumptive test i.e. field test, the Investigating Officer lacked 'reason to believe' that the seized substance was indeed a narcotic drug or a psychotropic substance as required under Section 42 of the NDPS Act. The formation of such

² Criminal Appeal No.1443 of 2023 decided on 09.05.2023

belief cannot be on the basis of mere presumption or suspicion by touching, smelling or seeing the colour and form of the seized material. Hence it is *prima facie* seen that there is a transgression of the statutory provisions of Section 42 of the NDPS Act.

9. There is also non-compliance of provisions of Section 50 of the NDPS Act as the appraisal letter has not been served on the Applicant which is a statutory procedural safeguard inserted by the legislature to prevent abuse and misuse of power at the instance of prosecuting agencies and is the *sine qua non* for effecting search of a suspected accused person under the NDPS Act. That apart, the note addressed by API Mr. Chopde forwarding the intelligence input to the Senior Police Inspector under Section 42 of the NDPS Act does not reflect the date and time of the alleged suspicious movement of the suspected person i.e. Applicant herein purportedly carrying the contraband and therefore the said note *prima facie* raises a doubt on the prosecution case itself.

10. In this regard attention is drawn to the decision of the Constitution Bench of Supreme Court in the case of ***State of Punjab Vs. Baldev Singh***³. In paragraph No. 28, on legitimacy of judicial process coming under the cloud if acts of lawlessness by the investigating agency are condoned during search operations, the Supreme Court held that if so done, it may undermine the respect for law and may

³ (1999) 3 SCC 977

have the effect of unconsciously compromising the administration of justice which cannot be permitted. The Supreme Court concluded the above finding in the context of the NDPS Act and particularly the factor of widespread illiteracy among persons subject to investigation for drug offences.

10.1. It categorically held that it must be borne in mind that the severe the punishment, greater has to be the care taken to see that all the safeguards provided in the statute are scrupulously followed. There is no reason as to why the empowered Officer / Investigating Officer should shirk or derelict from affording a real opportunity to the suspect and not comply with the procedural safeguards contained in Section 50 of the NDPS Act which serves a dual purpose – to protect a person against false accusation and frivolous charges as also compliance of Sections 41, 42 and 43 of the NDPS Act.

10.2. The Supreme Court held that in every case the end result is important but the means to achieve it must remain overboard. It held that remedy cannot be worse than the disease itself. The NDPS Act provides for a stringent punishment where a statute confers such drastic powers and seeks to deprive a citizen of liberty for not less than ten years as also makes stringent provisions for grant of bail and hence scrupulous compliance of the statutory provisions must be insisted upon. Hence where the Act and Rules lay down procedure for taking

samples the prosecution Officer cannot disregard the same and act on his own whims and fancies and conduct his own procedure.

11. Applicant is incarcerated since 1 year, 6 months and 20 days without trial reaching its logical end. Conclusion of the trial in the near foreseeable future is a distinct impossibility as it has not even commenced coupled with the above transgressions and non-compliance of mandatory statutory provisions of the NDPS Act readwith NDPS Rules delineated hereinabove, the interdict of Section 37 of the NDPS Act would not be applicable in the present case.

12. Needless to state that complicity of Applicant can be proved by prosecution during trial.

13. In view of my above *prima facie* observations, Bail Application is allowed on the following terms and conditions:-

- (i) Applicant is directed to be released on bail on furnishing P.R. Bond in the sum of Rs.25,000/- with one or two sureties in the like amount;
- (ii) Applicant is permitted to furnish provisional cash bail of Rs.25,000/- for his release immediately and file undertaking that he will provide one or two sureties in the like amount of Rs.25,000/- within a period of four weeks after his release which shall be accepted by the Trial Court. Applicant shall provide sureties as directed;

- (iii) Before his actual release from jail, Applicant shall furnish his address where he proposes to reside after his release from jail to the concerned Police Station and also to the trial Court;
- (iv) After his release from jail, Applicant shall report to the Investigating Officer as and when called for;
- (v) Applicant shall attend the trial Court on first Tuesday of every month between 11.00 a.m. and 1.00 p.m. to mark his presence. If the first Tuesday of the said month falls on a holiday and / or non Court working day, the Applicant shall mark presence on the next working day;
- (vi) Applicant shall co-operate with the conduct of trial and attend the trial Court on all dates unless specifically exempted and will not take any unnecessary adjournments, if he does so, it will entitle the prosecution to apply for cancellation of this order;
- (vii) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;
- (viii) Applicant shall not influence any of the witnesses or tamper with the evidence in any manner; and

(ix) In case of any infraction of the above conditions and / or two consecutive defaults in marking his attendance before trial Court, it shall attract the provisions of Section 439(2) of Cr.P.C. i.e. for cancellation of bail.

14. It is clarified that the observations made in this order are limited for the purpose of granting bail only and I have not made any observations on merits of the case. The trial shall be adjudicated on the strength of the evidence led and strictly on its own merits being uninfluenced with any of the *prima facie* observations made herein above in this order.

15. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

Ajay

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