

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 4120 OF 2024

Salim Iqbal Shaikh

.. Applicant

Versus

The State of Maharashtra

.. Respondent

.....

- Mr. Kamlesh Satre a/w Mr. Nilesh Bangar, Advocate for Applicant.
- Mr. Hitendra J. Dedhia, APP for State.
- PSI – N.B. Chavan, ANC, Azad Maidan Unit.

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 01, 2025

P. C.:

1. Heard Mr. Satre, learned Advocate for Applicant and Mr. Dedhia, learned APP for State.

2. Applicant - accused has filed the present application for regular bail in connection with Crime No. 193 of 2022 registered with ANC Azad Maidan Unit, Mumbai for the offence punishable under Sections 8(c) r/w 20(c), 29 of the Narcotic Drugs And Psychotropic Substances Act, 1985.

3. Applicant is indicted and is in incarceration on being apprehended with possession of 80 grams of the alleged contraband which is admittedly commercial quantity. On hearing Mr. Satre and Mr. Dedhia on 6th March, 2025, following order was passed:-

“1. Mentioned out of turn at the time of rising of the Court.

2. Heard Mr. Satre, learned Advocate for Applicant and Mr. Dedhia, learned APP for Respondent – State.
3. Applicant is arrested in offences punishable under the provisions of the Narcotics Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act'). He was found in possession of 80 grams of the alleged contraband MD which is a commercial quantity.
4. However, Mr. Satre would persuade the Court to consider two specific grounds; firstly he would submit that there is no endorsement of the Applicant obtained on the Application given to the Application under Section 50 of the NDPS Act which is appended at page No.29 of the Application and secondly he would submit that the inventory panchanama appended at page No.65 of the Application encloses certificate issued by the Magistrate which is not in Form 5 as prescribed by the Narcotics Drugs & Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022. The date of the inventory panchnama is 10.05.2023 and hence he would submit that considering the enactment and coming into force of the above Rules in the month of November 2022, the prescribed procedure has not been followed by the prosecution.
5. The aforesaid case is clearly covered by the recent decision of this Court in the case of **Chandrabhan Janardhan Yadav Vs. State of Maharashtra** passed in Criminal Bail Application No.2254 of 2024 and companion Applications dated 04.03.2025.
6. Mr. Dedhia, learned APP is directed to take appropriate instructions on the aforesaid submissions made by Mr. Satre and apprise the Court on the next adjourned date.
7. Stand over to **01st April, 2025**. To be placed on the '**Supplementary Board**'."

4. Today, Mr. Dedhia on instructions submits that on *prima facie* reading the appraisal letter dated 22.12.2022 appended at page No.29 of the Application, it is *prima facie* seen that the appraisal letter does not bear the appropriate endorsement of Applicant having been informed about his right to be searched in accordance with the provisions of Section 50 of the NDPS Act.

5. *Prima facie* when said appraisal letter is seen there is no endorsement and therefore it casts a doubt on the case of the

prosecution *qua* the arrest of the Applicant with the alleged contraband and compliance of the procedure envisaged under Section 50. Even in the case of co-accused persons the appraisal letter which is appended at page Nos.30 and 31 of the Application also does not bear the requisite endorsement. That apart there is also grievance made by the Advocate for Applicant with respect to compliance of the mandatory provisions under Sections 52(2) of NDPS Act and Rules 8 and 18 of the NDPS Rules, 2022 regarding Inventory and sampling. The certificate issued by the Magistrate when seen appended at page No.54 shows that the said certificate is undated. *Prima facie* it is seen that the certificate is not issued in the statutory Form 5 as required so as to identify the seized contraband.

6. Hence, *prima facie* there is transgression of the provisions of Section 52A as also Section 50 of the NDPS Act which is seen from the record of the case. Submissions made by the learned Advocate for Applicant in view thereof would amount to transgression of the statutory provisions and vitiate the prosecution case. Applicant is having no criminal antecedents and has been incarcerated for more than 2 years and 2 months pending trial.

7. The provisions of Section 50 of the NDPS Act are mandatory in nature and must be strictly complied with. It is categorically held in the recent judgment of the Supreme Court in the

case of *State of NCT of Delhi Vs. Mohd. Jabir*¹ that intent behind the said provision of Section 50 of NDPS Act is to ensure that the person about to be searched is made aware of the option to be taken before a third person other than the one who is conducting the search. For reference the relevant unnumbered paragraph Nos. 4 and 5 of the said judgment read as under:-

“It is obvious that the intent behind the provision is to ensure that the person about to be searched is made aware of the option to be taken before a third person other than the one who is conducting the search. Use of the expression “nearest” refers to the convenience as the suspect is to be searched. Delay should be avoided, as is reflected from the use of the word “unnecessary delay” and the exception carved in sub-section (5) to Section 50 of the NDPS Act. Nothing more is articulated and meant by the words used, or the intent behind the provision.

Having said so, we are unable to appreciate the reasoning given by the High Court in the impugned judgment, which states that use of the word ‘any’ does not satisfy the mandate of the ‘nearest’ Gazetted Officer and, hence, the respondent, Mohd. Jabir, is entitled to bail. The option given to the respondent, Mohd. Jabir, about to be searched, with reference to a Gazetted Officer or a Magistrate, does not refer to the authorized person in the raiding team itself.

8. It is settled law that a Court while deciding a Bail Application has to keep in mind the principal rule of bail which is to ascertain whether the Accused is likely to appear before the court for trial. There are other broad parameters also like gravity of offence, likelihood of Accused repeating the offence while on bail, whether he would influence the witnesses and tamper with the evidence, his antecedents which are required to be considered in such cases.

1 Cri. Appeal No. 4931 of 2024 arising out of SLP (cri.) No. 1173 of 2024 decided on 02.12.2024.

However the metrics of judicial decision making gets amplified or rather shuttled to another facet when dealing with offences where Section 37 of NDPS Act is attracted. In such cases one has to satisfy itself with the rigors of the twin conditions as prescribed under Section 37 of the NDPS Act. Section 37 reads thus:-

“37. 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.”

9. It is settled law that from the reading of Section 37 of the NDPS Act, it becomes clear that the legislature intends to deny bail to accused alleged to be in possession of commercial quantity of contraband in absence of Court subscribing to a contrary view, however therefore if seen it does not rule out the facet of discretion of Court to grant bail. Furthermore the Court must be satisfied that the accused is unlikely to re-offend. It is seen that while dealing with Bail

Applications the material available for consideration and adjudication is limited. In such cases, if we look realistically the provisions of Section 37 leave limited room for a possibility of granting bail to the accused. However employing such limitation would create a dichotomy in the current scenario where one common grievance is made before this Court repeatedly in matter after matter. It is seen that in such a case provisions of the NDPS Act regarding search and seizure are followed as per law. Any aberration in following the procedure laid down cannot be acceptable, since the conditions under Section 37 of the NDPS Act would be strictly liable in case of recovery of commercial quantity of contraband.

10. In some of the following decisions of the Supreme Court concerning detention and imprisonment of undertrial prisoner / accused on being apprehended with substantial commercial quantity of various contraband, the Court has exercised its unfettered jurisdiction in releasing an undertrial based on the facts of the said cases by using its discretionary power:-

10.1. In the case of *Nitish Adhikary alias Bapan Vs. State of West Bengal*² the Supreme Court considering long incarceration of an undertrial-accused granted him bail to an undertrial-accused who was

incarcerated for 1 year and 7 months despite being alleged to be in possession of commercial quantity of contraband.

10.2. In the case of *Babor Ali Mondal Vs. State of West Bengal*³ the Supreme Court considering the long incarceration granted bail to an undertrial-accused who was incarcerated for 1 year and 4 months.

10.3. In the case of *Sukhvinder Singh Bittu Vs. State of Punjab*⁴ the Supreme Court considering long incarceration of an undertrial-accused granted him bail who was incarcerated for 1 year despite being alleged to be in possession of commercial quantity of poppy straw.

11. In the present case as delineated hereinabove, there is an inherent flaw in carrying out the search and seizure operation by the Officers in complete violation of the mandatory provisions of Section 50 of the NDPS Act. Section 50 of the NDPS Act reads as under:-

“50. Conditions under which search of persons shall be conducted.—(1) When any officer duly authorized under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for

³ Criminal Appeal No. 3349 of 2024

⁴ Cri. Appeal No.1204 of 2024

search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974). (6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”

12. The provision vide sub-section (1) mandates that when an officer duly authorized under Section 42 is about to search a person under the provisions of Sections 41, 42 or 43, he shall, if the person about to be searched so requires, take the person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

13. It is obvious that the intent behind the provision is to ensure that the person about to be searched is made aware of the option to be taken before a third person other than the one who is conducting the search. Use of the expression “nearest” refers to the convenience as the suspect is to be searched. Delay should be avoided, as is reflected from the use of the word “unnecessary delay” and the exception carved in sub-section (5) to Section 50 of the NDPS Act. Nothing more is articulated and meant by the words used, or the

intent behind the provision. In this case the raiding party officials have themselves claimed to be Gazetted Officers and searched the Applicant. The requirements of Section 50 of the NDPS Act are mandatory and must be strictly complied with. Section 50 of the NDPS Act casts an obligation on the Police Officer to apprise the person intended to be searched that under Section 50, he is required to be searched only before a Gazetted Officer or a Magistrate. The requirement is that the authorized officer must make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate.

14. In view of the above *prima facie* observations, Bail Application is allowed subject to 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) 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;
- (iii) After his release from jail, Applicant shall report to the Investigating Officer as and when called for;

(iv) Applicant shall attend the trial Court on first Tuesday of every month between 11.00 a.m. and 01.00 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;

(v) 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;

(vi) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;

(vii) Applicant shall not influence with any of the witnesses or tamper with the evidence in any manner; and

(viii) 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.

15. 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.

16. Bail Application is allowed and disposed.

PR. Rajput

[MILIND N. JADHAV, J.]