

HIGH COURT OF UTTARAKHAND AT NAINITAL

Bench: Manoj Kumar Tiwari, J. and Pankaj Purohit, J.

Date of Decision: June 27, 2024

Case No.:

Bail Application (IA No.1/2022)

In Criminal Appeal No. 383 of 2022

APPELLANT(S): Mohammad KhurshidAppellant

VERSUS

RESPONDENT(S): State of UttarakhandRespondent

Legislation:

Section 8(C) read with 21(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act)

Section 52A of the NDPS Act

Subject:

Bail application in a criminal appeal against conviction for possession of contraband (610 gms of smack) under the NDPS Act. The appeal challenges the conviction based on procedural lapses, particularly non-compliance with Section 52A(2) of the NDPS Act regarding the sampling and certification of seized contraband.

Headnotes:

NDPS Act – Compliance with Section 52A(2) – Bail Application – Appellant convicted for possession of 610 gms of smack under Section 8(C) read with 21(c) of the NDPS Act. Bail application based on alleged non-compliance with mandatory procedures under Section 52A(2) of the Act, which requires the presence of a Magistrate during the sampling and certification of seized contraband – Appellant argued that non-compliance vitiated the trial, making conviction unsustainable – Respondent claimed compliance with procedural requirements – Court

found prima facie non-compliance with Section 52A(2), warranting bail [Paras 1-13].

Judicial Custody and Sentence – Non-compliance Impact –Appellant in judicial custody since the date of conviction (30.08.2022) and sentenced to 15 years RI with a fine of Rs. 1,00,000 – Appellant argued that almost three years in custody and procedural lapses in the trial justified bail – Court granted bail without expressing final opinion on appeal’s merits, emphasizing that bail decisions do not affect the final outcome of the appeal [Paras 4-15].

Decision – Bail Granted –Bail application allowed – Appellant to be released on executing personal bond and two sureties – Observations made are for bail application disposal only, without affecting the criminal appeal’s merits – Listed for final hearing in due course [Paras 13-16].

Referred Cases:

Yusuf @ Asif vs. State, AIR 2023 SC 5041

Union of India vs. Mohan Lal & another, (2016) 3 SCC 379

Representing Advocates:

Mr. Vinod Sharma, learned counsel for the appellant

Mr. J.S. Virk, learned Deputy Advocate General for the State

ORDER

Per: Hon’ble Pankaj Purohit, J.

The appellant-Mohammand Khurshid, S/o Sri Saffudin is in judicial custody on his conviction under Section 8(c) r/w 21(c) of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “the Act”) vide judgment and order dated 30.08.2022, passed by Special Judge, NDPS, Dehradun in Special Sessions Trial No.192 of 2020, whereby the appellant was sentenced to undergo 15 years’ R.I. with a fine of Rs.1,00,000/- with default stipulation of six months’ R.I.

2. As per the case of the prosecution, on information, received by the police party on 04.09.2019, S.I.-Sri Navneet Bhandari along with other police personnel intercepted a bus of Himachal Roadways bearing Registration No.HP06A 5221 at Nanda ki Chowki Bridge in Dehradun and one person sitting on the back side of the bus wearing a yellow shirt was interrogated, who tried to run from the place, but he was checked by the police party. On asking, he disclosed his name as Khurshid, S/o Saffuddin, R/o Village Raiya Nagla, P.S. MirGanj, District Bareilly, aged about 40 years and told the police that he was going to Ponta Sahib to deliver the contraband; he was informed by S.I.-Navneet Bhandari about his right to be searched in the presence of a Gazetted Officer and on his consent having been given at about 01:15 a.m., the CO City-Shekhar Chand Suyal was called on the spot and in his presence 610 gms. smack was recovered from him, which was kept in a pink plastic bag (Panni). The recovered contraband was sealed and kept in white clothes and a consent letter was also taken from the appellant by C.O. City-Shekhar Chand Suyal. The recovery memo was prepared; the recovered contraband and other articles i.e. mobile phone and a sum of Rs.1,800/- were recovered from the appellant and accordingly, the first information report was lodged against the appellant.

3. Learned counsel for the appellant would press the bail application today as the objection, called upon from the State is already on record.

4. Learned counsel for the appellant submits that the provisions which are mandatory keeping in view the draconian nature of the NDPS Act have not been complied with by the prosecution, therefore, the conviction and sentence imposed upon the appellant is bad and he is entitled to be released on bail.

5. The main thrust of the argument of the learned counsel for the appellant is about non-compliance of Section 52A (2) of the Act. He further submits that since the samples have not been taken in the manner as prescribed under Section 52A (2) of the Act; when the very process of taking the sample is in violation of the expressed provisions of Section 52A (2) of the Act, therefore, the benefit would go in favour of the appellant and he is entitled to be released on bail. He further submits that the appellant has already undergone almost three years out of the sentence imposed upon him and is in custody since the date of judgment and order i.e. 30.08.2022 continuously.

6. Per contra, learned Deputy Advocate General tried to convince the Court that the provisions of Section 52A (2) of the Act have been complied with.

7. Both the learned counsel for the appellant as well as the learned State Counsel relied upon the various judgments of the Hon'ble Apex Court to substantiate their respective arguments.

8. In order to appreciate the arguments and submissions made by learned counsel for the parties, a deeper scrutiny of Section 52A of the Act is required, which is quoted hereinbelow: -

“[52A. Disposal of seized narcotic drugs and psychotropic substances.-](1) 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 of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.]

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of--

- (a) certifying the correctness of the inventory so prepared; or
- (b) taking, in the presence of such magistrate, photographs of [such drugs, substances or conveyances] and certifying such photographs as true; or
- (c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), 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.]”

9. Learned counsel for the appellant relied upon the judgment rendered by the Hon’ble Apex Court in the case of Yusuf @ Asif vs. State; reported in AIR 2023 Supreme Court 5041 and placed reliance in para 14 & 15 of the said judgment to substantiate his argument that if a sample of the seized contraband was not drawn in the presence of a Magistrate and the inventory of the seized contraband not duly certified by the Magistrate, the whole trial stand vitiated.

10. Learned counsel for the appellant further relied upon the judgment rendered by the Hon’ble Apex Court in the case of Union of India vs. Mohan Lal & another; reported in (2016) 3 SCC 379 and a strong reliance is placed in para 19 of the said judgment to substantiate his argument that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. If this procedure under the scheme of the Act is not followed that will result into the entire trial to vitiate. In para 19 of the Mohan Lal’s case (supra), the Hon’ble Apex Court criticize the practice of non-compliance of the provisions of Section 52A (2) of the Act saying that ineffective and lackadaisical enforcement of the law by the law enforcement agency.

10. Para 19 of the said judgment is quoted herein below:-

“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 52- A (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.”

11. Having perusal of the recovery memo; consent letter and other relevant documents available on record and going through the provisions of Section 52A (2) of the Act, which have further been explained by the Hon'ble Apex Court in the aforesaid judgments, we are prima facie satisfied that provisions of Section 52A (2) of the Act were not complied in the present matter.

12. We do not find any force in the submission made by learned State Counsel that the compliance has already been made in the present case.

13. Without expressing our opinion on the final merits of the appeal, we are inclined to release the appellant on bail at this stage.

14. Accordingly, the bail application is allowed. Let the appellant-Mohammad Khurshid be released on bail on his executing personal bond and two reliable sureties, each of the like amount to the satisfaction of the court concerned.

15. Observations made hereinabove are only for the disposal of bail application and shall not have any bearing on the hearing of this criminal appeal.

16. List for final hearing in due course.

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