

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.2471 OF 2021

Harsh Shailesh Shah]
R/at B-503, Sai Darshan Garden Lane,]
Next to Shreyas Cinema, Ghatkopar]
(West), Mumbai – 400 086.] ... Applicant

Versus

The State of Maharashtra]
[Through Investigating Officer,]
Igatpuri Police Station, Igatpuri.]] ... Respondent

ALONG WITH
BAIL APPLICATION NO.2565 OF 2021

Niraj @ Aarav Lalit Surana]
R/at Room No.4, Punjabi Chawl No.2,]
Golibar Road, Near Guru Dwara,]
Jawahar Nagar, Bandra (E), Mumbai.] ... Applicant

Versus

1. The State of Maharashtra]
2. The Senior Inspector of Police,]
Igatpuri Police Station.] ... Respondents

...

Mr. Aabad Ponda with Mr. Kushal Mor for the Applicant in Bail Application No.2471 of 2021.

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Mr. Anurag Gharg with Mr. Ashish Dubey, Mr. Gunjan Thakkar and Ms. Ankita Bamboli for the Applicant in Bail Application No.2565 of 2021.

Mr. A.R. Kapadnis, A.P.P. for the State.

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CORAM : SMT. BHARATI DANGRE, J.

DATED : 24TH AUGUST, 2021.

ORDER:-

1. The two Applicants are seeking their release on bail being arraigned as Accused Nos.4 and 5 in C.R. No.590 of 2021 registered with Igatpuri Police Station, District Nashik, invoking Sections 20, 21, 25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (“**NDPS Act**”). The offence is registered on 27/06/2021, when it is alleged that in a surprise raid conducted in a private bungalow located at Igatpuri, Nashik, the accused persons were found to be in possession of cocaine, ganja, charas and the supporting materials enabling its consumption during the party, which was attended by 27 persons.

The contraband came to be seized and the investigation revealed that the said bungalow was taken on rent for 3 days by Accused No.5, who had arranged the party to celebrate his birthday. Traces of cocaine were also found in the water in the swimming pool, which is within the precincts of the bungalow

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and, the blood and urine samples of the accused were also obtained. The seized contraband was forwarded for chemical analysis which confirmed that the substance seized was narcotic drugs and psychotropic substance. This is the backdrop of the case registered, in which the present Applicants are seeking their release.

2. Heard Mr. Ponda, learned senior counsel along with Mr. Rishi Bhuta. The Applications are vehemently opposed by Mr. Kapadnis, learned A.P.P. for the State.

3. Mr. Ponda, learned senior counsel for the Applicants would argue that there is no compliance of the mandatory statutory provisions being Sections 42 and 50 of the NDPS Act. It is argued that the Applicants were never apprised of their right to be searched in the presence of a gazetted officer or a Magistrate, which is imperative by Section 50 of the NDPS Act and the non compliance of statutory mandate would vitiate the entire proceedings.

As far as the Applicant - Harsh is concerned, it is submitted that even if accepting for the sake of argument that the cocaine was seized from the bag, which was in his possession, the quantity of the cocaine is 5.72 grams, which is a non-commercial quantity and, therefore, the rigors of Section 37 of the NDPS Act is not attracted while deciding the present Applications. Another submission is that the capsule was not

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separated from the white substance, while ascertaining the quantity and, assuming the case of the prosecution is true, it is submitted that the Applicant - Harsh is purely an end user and his case will have to be distinguished from that of a consumer or an end purchaser.

4. As far as Applicant - Niraj is concerned, it is argued that the only allegation against him pertains to organizing the party and there is no recovery from him on his personal search. It is argued that in any case, the purchase of contraband was for self consumption during the party and not meant for sale, trafficking, distribution, etc., which would at the most bring the case within the purview of Section 27.

On behalf of both the Applicants, learned senior counsel would request the court to adopt a reformatory approach as there are no criminal antecedents to their credit. Mr. Ponda would submit that this is a case where the Applicants, young in age, could be lured by the temptation and their curiosity about the prohibited substance has landed them in trouble. The young mob gathered in the bungalow to celebrate an occasion and, even assuming that the case of the prosecution as alleged is true, the contraband was brought in the party for the purpose of consumption being not a commercial quantity, which would not warrant their further incarceration, since their arrest on 27/06/2021 and being incarcerated for nearly two months, they have learnt a lesson of their life and, ultimately, the fate of their

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alleged involvement will be determined on conclusion of the trial, which they are ready to take. The submission is that their further incarceration would have a deleterious effect on their future prospect at this young age and, their languishing in jail in the company of hardcore criminals, awaiting their trial, would also be an important consideration.

5. Opposing the Application, the learned A.P.P. would argue that the offence, in which the Applicants are arraigned as accused is a serious one, having an adverse impact on the society and the role of the present Applicants has clearly surfaced in the FIR, where the contraband is seized from Applicant - Harsh and, Applicant - Niraj is the organizer of the party. According to him, sufficient material being collated during investigation indict them and, their participation is clearly evident. The consumption of contraband by the accused persons, who were present in the party, is fortified when the blood and urine samples of some of the accused have tested positive with traces of ethanol alcohol being found. The submission of learned A.P.P. is to the effect that all the mandatory provisions of the NDPS Act stand complied with. Mr. Kapdanis would further submit that the water collected from the swimming pool on being forwarded, confirmed the presence of the cocaine in the colourless clear liquid forwarded in glass bottle. Further, according to learned A.P.P., the small pieces of polythene bag, which were seized from the spot, lying around the swimming pool along with

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whitish coloured ceramic saucer and saucer cup have also tested positive for cocaine. This, according to learned A.P.P., clearly establishes that in the party, the cocaine was consumed and some of the contraband was thrown in the swimming pool.

It is the case of the prosecution that Applicant - Harsh had purchased the contraband from one Nigerian citizen i.e. Accused No.7, who is already booked under the NDPS Act with Kashimira Police Station and the material collected during the investigation revealed that the Applicant - Harsh was in contact with Accused No.7 and from whom he had procured the contraband for the party. The submission of learned A.P.P. is to the effect that Applicant – Harsh is not only guilty of consumption, but also possessing the contraband and taking into account the social impact of the crime on the young generation, the offence has to be viewed with great seriousness since it establishes that the Applicant - Harsh had connection with the drug mafia. In view of the report of the Forensic Laboratory, which confirms presence of contraband in the pool water, the submission is that if the bare minimum quantity of two liters, which were drawn as sample for purpose of analysis reflects presence of cocaine, considering that the swimming pool was filled with 54,750 liters of water, the total quantum of the water in the swimming pool with presence of cocaine all over would surely amount to commercial quantity and, therefore, the rigors of Section 37 of the NDPS Act would get invoked is the submission of learned A.P.P. He, therefore, submits that both the

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Applications deserve to be rejected.

6. The C.R. invoking the relevant provisions under the NDPS Act came to be registered on a raid being conducted in a private bungalow located within the jurisdiction of the Igatpuri Police Station. The raid was arranged and with the presence of panchas the raiding team reached the identified place. When the team entered in the hall, a black and green coloured sack was found and, on its search, a packet wrapped in plastic cover containing flower, stem, fruits and seeds of ganja tree were found. It weighed around 6 grams and the substance came to be sealed after drawing samples.

The two persons, who were present there, identified themselves as Applicant - Harsh and Accused 3 - Piyush Sethia. It was informed by the accused that the packet belonged to one Naseen (Accused No.1), who had purchased the said contraband from one Saif (Accused No.2). The two accused were subjected to personal search and when search of Applicant - Harsh was taken, he was apprised of his right to be searched, ensuring compliance of Section 50 of the NDPS Act. On search of the sack in his possession, a small packet was recovered, which contained four yellow coloured capsules and, when one of the capsules was opened, it contained white coloured powder and on careful scrutiny, it was suspected to be cocaine. It was weighed on the weighing scale, which was found to be 5.72 grams worth Rs.28,600/-. When the sack in possession of the Applicant -

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Harsh was further examined, it led to charas being packed in transparent plastic cover, which was around 1 gram in weight, worth Rs.3,000/-. Apart from this, one smoking pipe and one small rectangular metal box and some brown coloured paper strips, to be used as pipe for smoking of the contraband, were also seized.

The panchanama further reveals that from the closet in the room one packet containing 40 strips of paper and one plastic pipe used for smoking of the substance also came to be recovered.

7. On being taken into custody, Accused Piyush revealed that he had taken the bungalow on hire for three days and Applicant - Niraj was assigned the task of organizing the party by Accused Piyush. The investigation further revealed that when enquiry was made with Applicant - Harsh, he revealed that he had obtained cocaine from one Nigerien citizen, whose mobile number was also disclosed by him. The owner of the bungalow is also arraigned as Accused No.6.

8. Mr. Ponda has advanced his submission about violation of Section 50 of the NDPS Act. My attention was invited to the intimation issued to Applicant - Harsh by Sub-Divisional Police Officer (“SDPO”) before his personal search. The intimation, when carefully read, reveals that the SDPO informed the Applicant that he himself is a gazetted officer and, during the

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course of raid conducted on 27/06/2021, his personal search is to be carried out in presence of panchas. He is further informed that since, the officers conducting the raid themselves are gazetted officers, he is entitled to get the search carried out through any other gazetted officer and, if he is desirous of doing so, the necessary arrangement shall be made. This intimation is signed by the Applicant by scribing that he can be searched by Mr. Bhosale and no other officer is required for carrying out the search.

9. Section 50 of the NDPS Act, which contemplates that the person, whose search is to be carried out shall be taken to the nearest gazetted officer of any of the Department mentioned in Section 42 or to the nearest Magistrate. The settled position of law is that the person to be searched under the NDPS Act is required to be apprised about his right under Section 50 of the NDPS Act before he is searched and that is a mandatory requirement. It is also well settled that in case of personal search of the accused, Section 50 of the NDPS Act comes into play and not when search is carried out in respect of some bag, article, vehicle, or container, etc., which the accused at the relevant time was carrying. Where searching officer fails to communicate the same to the suspect, who was subjected to search, that he has a right to be searched in presence of a gazetted officer or Magistrate, there will be non compliance of requirement of Section 50 of the NDPS Act. The requirement of compliance of

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Section 50 of the NDPS Act also arises even if the search is going to be made by an empowered officer, who happened to be a gazetted officer. True, there is no specific form prescribed or intended for conveying the information required to be given under Section 50 of the NDPS Act, but what is necessary is that the accused should be made aware of existence of his right to be searched in presence of one of the officers named in the section i.e. gazetted officer or the Magistrate. Since there is no specific mode prescribed, the substance and not the form of intimation would determine whether there is compliance of mandate of Section 50 of the NDPS Act.

10. The Constitution Bench of the Apex Court in **Vijaysinh Chandubha Jadeja v. State of Gujarat** reported in **(2011) 1 SCC 609** has clarified the position in the following words:

“The mandate of Section 50 is precise and clear, viz. if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so ... In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under Sub-section (1) of Section 50 of the

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NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision ... We are of the opinion that the concept of “substantial compliance” with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of Sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra).”

11. This position has been reiterated by the Apex Court in the case of **S.K. Raju v. State of West Bengal** reported in **(2018) 9 SCC 708**, which affirmed the view in **Vijaysinh Jadeja (supra)** by holding that the ‘substantial compliance’ with requirement of Section 50 of the NDPS Act is neither in accordance with law laid down in Baldev Singh nor can it be construed from its language and, therefore, strict compliance with Section 50(1) of the NDPS Act by the empowered officer is mandatory.

12. True it is, that Section 50 of the NDPS Act applies only in case of search of a person. Merely if a bag carried by a person is searched without there being a search of his person, Section 50 of the NDPS Act will have no application, but if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will come into play.

In the present case, the notice issued to the Applicant –

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Harsh was specifically issued for carrying his personal search and the bag/sack came to be searched and search was carried out of his person also and, therefore, compliance of Section 50 of the NDPS Act was imperative. Pertinent to note that the intimation does not apprise the Applicant – Harsh about his right of being searched in presence of a gazetted officer or the Magistrate, which is a mandatory requirement, but what is sought to be impressed upon him is that the searching officer himself is a gazetted officer and whether the Applicant is desirous of being searched by another gazetted officer. There is no mention of another authority being the Magistrate, before whom he could prefer to be searched. The search before the Magistrate is different than the search before the gazetted officer as the former would inspire more confidence in a particular person knowing well that he is a judicial functionary and, that is why, he may impose faith in the Magistrate in comparison with another gazetted officer, but this choice is not left to the Applicant, in the intimation nor he is apprised that to be searched in the presence of a gazetted officer is his right. *Prima facie*, the intimation thus does not meet the requirement of Section 50 of the NDPS Act.

13. The suspect may or may not exercise his right under Section 50 of the NDPS Act of being searched by the Magistrate, but an obligation is cast upon the raiding party to apprise him of such a right. There is no strict compliance of Section 50 of the NDPS Act as the section does not permit any ambiguity in

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appraisal of the said provision. The suspect has to be clearly informed that he has a right to be searched before either of the authorities and, if he demands, he can be searched before them. The present intimation, however, fails to meet the requirement of Section 50 of the NDPS Act.

14. As far as the quantity of the contraband, which has been seized during the raid is clearly reflected in the panchanama, which includes 5.72 grams of cocaine, and 1 gram of charas. There is also seizure of a bag from the spot, which is alleged to be belonging to Accused No.1 from which 6 grams of ganja is also seized. The quantity of ganja and charas, which is seized is small quantity whereas, the quantity of cocaine seized is intermediate quantity. Based on the said seizure, the submission advanced on behalf of the Applicant is that the rigors of Section 37 of the NDPS Act are not liable to be invoked and the Sessions Judge has rightly recorded that since the accused are not booked for any offence under Sections 19, 24 and 24A of the NDPS Act and the quantity involved is not a commercial quantity, the hindrance created by Section 37 of the NDPS Act cannot be invoked.

15. Learned A.P.P., however, has submitted that today, it is not a case, where commercial quantity is involved, but there is a likelihood of the same since traces of cocaine is found in the swimming pool in which the accused persons are allegedly

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thrown cocaine powder at the time of raid. The report of the Chemical Analyzer records positive result for detection of cocaine in the two samples (1 liter each) drawn from the water from the swimming pool. However, the quantity of cocaine in the water present in the swimming pool is not ascertained. Moreover, the panchanama does not record that the cocaine has been thrown by any of the Applicant in the swimming pool and another moot question would be, even if it is so done, whether the Applicant could be attributed with the charge of 'possession'. At this stage, when the samples collected from the pool, which were sent for analysis and which records presence of cocaine can, by no stretch of imagination, lead to a conclusion that the contraband seized is of commercial quantity as learned A.P.P. is trying to submit that since a letter is addressed to the Director of Forensic on 16/07/2021 to find out the percentage of cocaine in the entire swimming pool and the submission that the percentage found in one liter of water to be multiplied by the number of liters of water in the entire swimming pool, is an obscure and outlandish submission, which is just referred to be rejected. At this stage, there is no material with the prosecution to reflect that the quantity of contraband seized is commercial quantity and, therefore, the rigors of Section 37 of the NDPS Act does not get attracted while considering the Applications for bail filed by the present Applicants.

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16. The prosecution relied upon another circumstance, being contact established by the Applicant – Harsh with Accused No.7 and the CDRs collated during the investigation to establish that the contraband was purchased by him from Accused No.7. However, as regards, the said connection between the Applicant - Harsh and Accused No.7, *prima facie* would lead to purchase of the drug for the purpose of its consumption in the party and, at this stage, there is no material to indicate that the operation was a part of a crime syndicate, where drugs are sold and purchased and that the Applicant - Harsh, who has brought the substance and offered the same to other accused present in the party, by no stretch of imagination, would assign him the role of a drug peddler.

17. The material placed in the form of papers of investigation, no doubt, reflects a group of young, well to do and affluent boys and girls coming together and lavishly celebrating an occasion and, no doubt, it is true that the youth of today leads a lifestyle, where he believes in a cheerful present limiting to “NOW OR NEVER” without thinking of consequences to follow. Adolescence and youth are the phases of lifetime, where making of irrational and impulsive decisions may be favoured by some. The challenge of today mainly focuses on the issue of drug addiction in youth and how to tackle it. Experimentation with alcohol and drugs is common. Unfortunately, the youths do not

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foresee the link between their action today and its consequences tomorrow. It is crucial to uncover the root of youths and young adults, which necessarily would involve posing questions, understanding the problems at hand and having an insight into if and how badly this problem would be eradicated and its progress stalled. It indeed is a harrowing reality.

18. The NDPS Act imposes deterrent sentences upon those who traffic in significant quantities of drugs and addicts, who are addicted to its consumption. However, in the present case, the Applicants are not attributed with any antecedents of being involved previously in consumption or use of drugs and psychotropic substance and considering their young age where they are in a stage of reformation, they deserve one opportunity by restoring their freedom, nevertheless with a forewarning that if they indulge in such activity in future, the law will not spare them and, in any case, at the outcome of the trial, if they are found guilty, they shall undergo the prescribed penalty for indulging in narcotic drugs and psychotropic substance as prescribed under the NDPS Act.

19. The Applicants are, therefore, entitled to be released on bail subject to a condition that their involvement in drugs in any manner in future would entail cancellation of the bail, on an application being moved by the prosecution to that effect. Needless to say that the observations made herein are *prima*

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facie in nature and limited for the purpose of adjudication of the application and will have no bearing on the trial by the Special Court. Hence, the following order:

ORDER

- (a) The Applicants - **Harsh Shailesh Shah** and **Niraj @ Aarav Lalit Surana** shall be released on bail in C.R. No.590 of 2021 registered with the Igatpuri Police Station, District Nashik, on furnishing P.R. bond to the extent of Rs.50,000/- each with one or two sureties of the like amount.
- (b) The Applicants shall not directly or indirectly make any inducement, threat or promise to any person acquainted with facts of case so as to dissuade him from disclosing the facts to Court or any Police Officer and the Applicants should not tamper with evidence.
- (c) The Applicants shall attend to the Igatpuri Police Station, District Nashik on every Monday and Friday between 10.00 a.m. and 01.00 p.m. for a

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period of six weeks and, thereafter, as and when called by the Investigating Officer.

- (d) The Applicants shall not leave the country without prior permission of the Special Court under the NDPS Act, where their case is pending.

20. The Application is allowed in the aforestated terms.

[SMT. BHARATI DANGRE, J.]

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