



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL BAIL APPLICATION NO. 2987 OF 2022**

Kiran Machhindra Kale

.....Applicant

Vs.

The Senior Inspector of Police and anr

.....Respondents

**WITH**

**CRIMINAL BAIL APPLICATION NO. 118 OF 2023**

Rishikesh Rajesh Mishra

.....Applicant

Vs.

The State of Maharashtra

.....Respondent

**WITH**

**CRIMINAL BAIL APPLICATION NO. 557 OF 2023**

Afjal Hussain Abbas Sunsara

.....Applicant

Vs.

The State of Maharashtra

.....Respondent

**WITH**

**CRIMINAL BAIL APPLICATION NO. 1653 OF 2023**

Manoj Eknath Palande

.....Applicant

Vs.

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The State of Maharashtra

.....Respondent

**WITH  
CRIMINAL BAIL APPLICATION NO. 1700 OF 2023**

Parshuram Bhalchandra Jogal

.....Applicant

Vs.

The State of Maharashtra

.....Respondent

**WITH  
CRIMINAL BAIL APPLICATION NO. 2494 OF 2022**

Ram Manoharlal Gurbani

.....Applicant

Vs.

The State of Maharashtra

.....Respondent

**WITH  
CRIMINAL BAIL APPLICATION NO. 2922 OF 2023**

Kuldeep Suresh Indalkar

.....Applicant

Vs.

The State of Maharashtra

.....Respondent

**WITH  
CRIMINAL BAIL APPLICATION NO. 3050 OF 2023**

Rakesh Shreekant Khaniwadekar

.....Applicant

Vs.

The State of Maharashtra

.....Respondent

Mr. Bhavesh Thakur Advocate for the Applicant in BA 2922/2023  
Mr. Kanishk Jayant (VC), Ms. Antara Jayant, Mr. Akkshay Mishra, Ms. Unnati Dhurandkar and Swaraja Gaikwad for the applicant in BA 118/2023  
Ms. Sana Raees Khan a/w Mr. Aditya Parmar, Ms. Juhi Kadu, Mr. Rohan Kolekar for the applicant in BA 3050/2023  
Mr. Sandeep Bali for the applicant in BA 2987/2022  
Mr. Ayaz Khan a/w Mr. Dilip Mishra, Zehra Charania, Ms. Mallika Sharma i/b for the applicant in BA 2494/2022  
Mr. Hrishikesh Mundargi i/b Ms. Swarali Joglekar for the applicant in BA 557/2023  
Mr. Raviraj Paramane a/w Mr. Vinayak Lande for the applicant in BA 1653/2023 and 1700/2023  
Mr. Shishir Hiray, Special PP a/w Mr. Sanjay Kokane, Mr. A. R. Metkari APP for the State  
Mr. Santosh Patil, PI, Mr. Swaminath Jadhav, Chakan Police Station, Pune

**CORAM : GAURI GODSE, J.**

**DATE : 14<sup>th</sup> OCTOBER 2024**

**ORDER:**

1. The regular Court recused these applications. Hence, as per the roster, the applications are listed before this Court as an alternate bench.
2. Heard learned counsels appearing for all the applicants and the learned Special Public Prosecutor (PP) for the respondents. These applications are by Kiran Kale-accused no. 6, Afjal Sunsara-accused no. 20, Manoj Palande-accused no. 19, Parshuram Jogal- accused no.

15, Ram Gurbani-accused no. 17, Kuldeep Indalkar-accused no. 9, Rishikesh Mishra-accused no. 12 and Rakesh Khaniwadekar-accused no. 14 seeking bail in connection with the C. R. No. 1089 of 2020 dated 8<sup>th</sup> October 2020, registered with Chakan Police Station. The offences are punishable under sections 8(c), 21(c), 22(c), 29, 31(A) and section 27(A) of The Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') and section 120-B of the Indian Penal Code. The chargesheet was filed on 28<sup>th</sup> September 2021, and the case is registered as Special (NDPS) Case No. 116 of 2021, pending before learned Additional District and Sessions Judge Khed. A total of 22 accused are chargesheeted. These applications are filed by eight accused, as mentioned above.

3. The main submission on behalf of the applicants is regarding the mandatory requirement of section 52-A of the NDPS Act, which is not complied with by the investigating authority. It is submitted that on 7<sup>th</sup> October 2020, certain substances were seized, and the samples drawn on the spot were sent for chemical analysis. The prosecution relied upon the report of those samples in the chargesheet, stating that it was a positive report indicating that the seized substance was Mefedrone ('MD').

4. Learned counsels for the applicants submitted that the legal principles regarding the mandatory requirement of the procedure to be followed under section 52-A of the NDPS Act are settled by the Hon'ble Apex Court in the case of *Union of India Vs. Mohanlal and anr*<sup>1</sup>. Learned counsels for the applicants relied upon paragraphs 13 to 17 of the decision in the case of *Mohanlal*. Learned counsels submitted that since, admittedly, the chemical analysis report that is relied upon is not from the samples drawn under section 52-A of the NDPS Act, the complete base of the prosecution is suspicious. It is submitted that it is a settled principle of law, as held in the decision of *Mohanlal*, that the procedure to be followed under section 52-A is a mandatory procedure. It is thus submitted that the chargesheet is based only on circumstantial evidence, which would not be relevant to attribute any offence committed by these applicants based on the chemical analysis report pertaining to the samples drawn on the spot. It is thus submitted that primary evidence that could have been relied upon in the trial is not available in the present case in view of the non-compliance of the mandatory procedure under section 52-A of the NDPS Act.

5. Learned counsels for the applicants relied upon the subsequent

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<sup>1</sup> (2016) 3 Supreme Court Cases 379

decision of the Apex Court in the case of ***Bothilal Vs. The Intelligence Officer Narcotics Control Bureau***<sup>2</sup>. It is submitted that the legal principles regarding the mandatory procedure required to be followed under section 52-A, as interpreted in the decision of ***Mohanlal***, are subsequently followed in all the decisions. It is thus submitted that once the seizure and the chemical analysis report based on the seizure are not in conformity with what is laid down by the Apex Court in the case of ***Mohanlal***, and further followed and explained in the decision of ***Bothilal***, serious doubt is created about the prosecution's case that the substance that was recovered is a contraband. It is thus submitted that the circumstantial evidence, as referred to in the chargesheet, would be of no relevance and cannot be held against these applicants for the offences alleged against them.

6. Subsequent decisions of this Court in the case of ***Juber Lalmohammad Momin Vs State of Maharashtra***<sup>3</sup> and connected matters, ***Aniodo Tochukwu Vs. The State of Maharashtra***<sup>4</sup> and ***Sunil Basant Malvi and another Vs. The State of Maharashtra***<sup>5</sup> are relied upon for the same propositions. Learned counsels for the applicants

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<sup>2</sup> 2023 SCC Online SC 498

<sup>3</sup> Bail Application No. 2970 of 2022 dated 5<sup>th</sup> August 2024

<sup>4</sup> Bail Application No. 4148 of 2023 dated 18<sup>th</sup> April 2024

<sup>5</sup> Criminal Appeal No. 270 of 2023 dated 6<sup>th</sup> November 2023

submitted that the mandatory requirement under section 52-A of the NDPS Act, as held by the Apex Court in the case of *Mohanlal*, has been consistently followed by this Court. It is thus submitted that for want of compliance with the mandatory procedure under section 52-A, this Court, in various cases, consistently held that it would create serious doubt on the prosecution's case and thus, the applicants in the said decisions were released on bail.

7. So far as individual allegations against these accused are concerned, learned counsels referred to various statements relied upon in the chargesheet, which, according to the prosecution, indicates that all these accused were involved either in manufacturing some prohibited narcotic substance, involved in training for manufacturing contraband and sale of contraband. Regarding individual statements referred to by the learned counsels are as follows:

I. In the case of Ram Gurbani-accused no. 17, learned counsel for the applicant pointed out that the allegations made against this accused were with regard to 55 Kg of substance, which was never seized. He was not named in the FIR and was subsequently arrested on 25<sup>th</sup> November 2020.

It is submitted that there is no material reflected against this accused in the chargesheet, and there are no allegations against this accused regarding 20 Kg material seized on 7<sup>th</sup> October 2020.

II. In the application of Kuldeep Indalkar-accused no. 9, it was argued that even this applicant was not named in the FIR and was arrested on 12<sup>th</sup> October 2020. It is further submitted that he was not present at the spot. It is further submitted that allegations against this applicant are regarding involvement in manufacturing contraband at a factory called Sanyog Biotech. According to the learned counsel for the applicant, three statements are relied upon against this applicant. According to the learned counsel for the applicant, all the statements only indicate that the applicant was seen at the said factory, and the witnesses claim to have been working in the factory where this applicant was seen. Learned counsel for the applicant submitted that all these statements were recorded after this applicant was arrested. It is further submitted that the witnesses whose statements are relied upon have not identified this applicant. Regarding the seizure



of a laptop and car, relied upon in the chargesheet against this applicant, it is submitted that nothing incriminating was found, and the same cannot be connected against the applicant with reference to the alleged crime. It is further submitted that CDR relied upon to link this applicant with other accused would also not attribute any role against this applicant as the applicant's mobile was never seized.

III. In the application of Manoj Palande-accused no. 19, it was submitted that the allegation against this applicant is that he had trained some of the accused to manufacture MD drug in the factory called Nimbus Pharma belonging to other accused and that Tushar Kale, who was also one of the accused was trained at the said factory. With reference to the reliance on the statement recorded under section 27 of the Evidence Act against this applicant, learned counsel submitted that the statement of Tushar Kale recorded under section 27 indicates that he showed the place of training. However, out of a total of 14 articles that were seized, only 7 articles were sent for chemical analysis without recording any panchanama. It is thus submitted that the submissions and

the material relied on against this applicant would not indicate the applicant's involvement in the crime that is alleged against this applicant. It is thus submitted that all the statements that are relied upon are based on vague investigation only with an intention to implicate this applicant. It is submitted that in the CDR relied upon by the prosecution, no calls have been made between this applicant and Tushar Kale, whose statements are relied upon against this applicant.

IV. In the application filed by Parshuram Jogal-accused no. 15, learned counsel for the applicant submitted that he was arrested on 24<sup>th</sup> November 2020. He was working as a manager in the factory of Alkemi. Reliance placed by the prosecution is based on the panchanama recorded under section 27 on the statement of Tushar Kale, who shows this factory, and the allegations against this applicant are that he was involved in training for the purpose of manufacturing contrabands. However, nothing was seized from this factory. The statement of the witness who was working in this factory only indicates that he had seen this applicant working as a

manager. Learned counsel submitted that there is no material against this applicant, and he is unnecessarily trapped without any material against this applicant. According to the learned counsel for the applicant, even in the CDR, there are no calls seen of this applicant with other accused. He submits that other accused are unknown to him, and thus, none of the material relied upon in the chargesheet indicates the applicant's involvement in the crime.

V. In the application filed by Afjal Sunsara-accused no. 14, learned counsel for the applicant submits that he was arrested on 5<sup>th</sup> December 2020. Learned counsel submitted that the applicant is alleged to have helped in training the other co-accused in manufacturing contraband and that this applicant was involved in selling 55 Kg of contraband from the factory called Alkemi. However, no recovery has been made from the said factory. Only the applicant's phone was seized. Further allegation against this applicant is that he has provided finance regarding training and manufacturing the contraband. Learned counsel pointed out the panchanama recorded under section 27 of the Evidence Act of Akshay

Kale, which the prosecution relied upon. Learned counsel submitted that the statements were recorded after the applicant's arrest, and none of the statements indicated that the applicant was involved in the crime. The statements only refer to this applicant being seen with other accused, and thus, allegations against this applicant are based only on inferences. None of the witnesses except one Prasanna Sapkal is shown to have identified this applicant. However, the learned counsel submits that Prasanna Sapkal only says that he was shown the applicant's photograph, and thus, the identification of this applicant cannot be relied upon. The allegation against this applicant regarding panchanama of recovery of the amount from Lalit Patil is concerned; learned counsel submits that recovery of Rs. 25 Lakhs, which is relied upon based on the recovery made under section 27 of the Evidence Act, would also not indicate applicant's role as the amount that was brought by Lalit Patil's driver in front of the panchas and thereafter Lalit Patil was arrested on 10<sup>th</sup> December 2020. Learned counsel submits that the panchanama says that this applicant paid Rs. 50 Lakhs to

Lalit Patil; however, panchanama is regarding recovery of money from Lalit Patil. Thus, learned counsel for the applicant states that said panchanama would also not attribute any role to the applicant in the alleged crime.

VI. Learned counsel further submits that even the statement of Lalit Patil, who has not identified this applicant, was subsequently recorded and reflects on earlier statements recorded under section 27 of the Evidence Act. With reference to the CDR relied upon by the prosecution, learned counsel submits that there are no calls from this applicant or other accused that would show the applicant's involvement. Learned counsel submits that one case is registered against this applicant under the NDPS Act; however, the applicant has been released on bail. Learned counsel further submits that a similar offence was registered when the applicant was in custody with reference to the present case. He further submits that in any case, the applicant is released on bail so far as other cases registered against him are concerned.

VII. In the application of Rakesh Khaniwadekar-accused no. 14, learned counsel for the applicant submits that he was

arrested on 16<sup>th</sup> October 2020 as recorded in the chargesheet. However, learned counsel for the applicant submits that, according to the applicant, he was taken into custody on 15<sup>th</sup> October 2020. Learned counsel submits that the allegation against this applicant is regarding manufacturing contraband in a company called Sanyog Biotech, however, applicant was not named in the FIR. Learned counsel submits that the amount of Rs. 25 Lakhs recovered from the applicant's residence was on 17<sup>th</sup> October 2020, i.e. after his arrest. She thus submits that same cannot be relied upon to attribute any role against this applicant. Learned counsel submits that the allegation against this applicant is that he has taken training at the factory of Alkemi and Nimbus Pharma and paid Rs. 35 Lakhs for the training purpose along with other accused. However, she submits that the allegations are vague and not supported by any cogent evidence. The statements relied on refer to vague allegations that this applicant has visited the said factories. The statements relied upon are of persons working at Sanyog Biotech; however, the statements do not name the present

applicant. Regarding CDR relied upon by the prosecution, the learned counsel submits that CDR does not show any call or any link between this applicant and other co-accused. Statements relied upon by the prosecution do not indicate any involvement of this applicant in the alleged crime. So far as statements relied upon by the prosecution, the applicant is not identified by those witnesses in the test identification parade ('TIP'). Learned counsel further submits that he is accused in two other cases for the offences under NDPS. However, he is granted bail in both cases. She submits that one case was registered after his arrest in the present case. Learned counsel for the applicant also submitted that the applicant has three year old daughter who is suffering from cancer, and his family is solely dependent on the applicant.

VIII. In the application filed by Kiran Kale-accused no. 6, learned counsel submitted that the applicant is alleged to have conspired with other accused in the production of MD drug at the factory called Sanyog Biotech. Learned counsel submits that the prosecution has relied upon statements of 5 witnesses who have named him, stating that he was seen at

the factory called Sanyog Biotech. He submits that all the witnesses are workers from Sanyog Biotech. He submits that none of the statements attribute any role against the applicant that could be connected with the alleged crime. He further submits that CDR relied upon against this applicant indicates calls with some of the co-accused, and those accused belong to the same place as the applicant, and thus, there is nothing unusual in the said calls. He further submits that another call relied upon in the CDR is that of the brother of the director of the applicant's company and one of the workers working in his own company. He thus submits that even the CDR would not attribute any role against the applicant that could be connected with the alleged crime.

IX. In the application filed by Rishikesh Mishra-accused no. 12, learned counsel submitted that the allegation against the applicant is that he had conspired along with other accused in the production of MD at Sanyog Biotech factory. He submits that the applicant was arrested on 16<sup>th</sup> October 2020. He submits that FIR does not assign any role to this applicant in the entire chain of events recorded in the FIR. He



submits that vague allegations are made against this applicant. He further submits that the chargesheet refers to certain items recovered from this accused; however, the applicant's name is not reflected in the record. He further submits that another allegation regarding the involvement of this applicant in the process of training and selling of the alleged substance is concerned; there are vague allegations that this applicant was involved in the process of training. Learned counsel for the applicant submits that he is falsely implicated in the crime, though there is no material against this applicant. He submits that the applicant was taken for the purpose of a job in the company whose promoters are Kuldeep Indalkar and Tushar Kale, who are friends of his brother. He submits that the applicant was nowhere concerned with the alleged crime, and no role is attributed against the applicant. He submits that the applicant was forced to sign a written agreement for a flat and was informed by Tushar Kale and Kuldeep Indalkar that the applicant would be required to stay in the said flat. Learned counsel further submits that the applicant quit his job in the month of

February 2020. Learned counsel thus submits that without any material against the applicant, he is unnecessarily implicated in the present case.

8. So far as the individual allegations against the applicants are concerned, learned special PP pointed out the statements relied upon by the prosecution. He submits that with regard to all these applicants, the statement of Rakesh Khaniwadekar recorded under section 27 of the Evidence Act reveals that these applicants, along with other co-accused, were involved in manufacturing MD drugs, which were sold to another accused, Zuby Udoka. He submits that the statement further reveals that the amount of Rs. 25 lakhs was recovered from Rakesh Khaniwadekar. Learned special PP relied upon Panchanama drawn under section 27 of the Evidence Act on the statement of another accused, Tushar Kale, which, according to the learned special PP, reveals that these applicants were involved in manufacturing and selling of MD drugs to the accused Zuby Udoka. Learned special PP further submits that said panchanama also reveals that Rs. 60 lakhs was seized from Tushar Kale.

9. With reference to applicants Kiran Kale, Kuldeep Indalkar and Rishikesh Mishra, learned special PP relied upon statements of

Shrikant Ubale, Laxman Padmere and Laxman Jadhav, who were working in the factory of Sanjay Balgude. He submits that all three statements indicate the active role of these applicants in manufacturing MD drugs. Learned special PP further submits that the contraband that was seized on 7<sup>th</sup> October 2020, samples were immediately drawn and sent for chemical analysis, which reveals that the seized material contained MD drugs. He submits that on 26<sup>th</sup> October 2020, equipments were seized from Nimbus Pharma owned by Manoj Palande. He submits that the chemical analysis report indicates that residues contained MD drugs, which clearly demonstrates that these applicants were involved in manufacturing MD drugs and the sale of the same.

10. Learned special PP further relied upon the panchama recorded in the presence of two independent witnesses at Sanyog Biotech and a chemical analysis report regarding the utensils that were seized. He submits that seized material from Sanyog Biotech reveals residues containing MD drugs. Learned special PP further refers to the seizure of a car and laptop from Kuldeep Indalkar, which, according to the prosecution, were used in the alleged crime. The CDR reports were also relied upon by the special PP to indicate that all the applicants

were in contact with other co-accused, which attributes roles to all these applicants in the alleged crime and that the vehicles seized were used in the commission of the offence.

11. Learned special PP relied upon statements of all the workers who were working in Alkemi industries, which indicates that applicant Ram Gurbani was seen doing certain activities at Nimbus Pharma, and he was also identified by witnesses. Learned special PP relied upon the statement of one witness, Prasanna Sapkal, to argue the role against Parashuram Jogal. He submitted that the statement of Sapkal indicates that Parshuram Jogal used to visit Nimbus Pharma and would also attend meetings with other accused, which indicates involvement in the crime. According to the learned special PP, the accused was also identified by the witnesses whose statements are recorded by the prosecution.

12. With reference to the application of Rakesh Khaniwadekar, learned special PP submitted that he is a history-sheeter, and he was also identified in the test identification parade by the witnesses. He submits that the memorandum of the statement recorded under section 27 of the Evidence Act of Rakesh Khaniwadekar reveals that other co-accused were involved in manufacturing MD drugs, as he

disclosed the names of other accused and payments made for manufacturing MD drugs. With reference to the application of Rishikesh Mishra, learned special PP relied upon the statement of witness Sandesh Poshte, which, according to the prosecution, discloses that for purchasing land for another accused, Tushar Kale, Rishikesh Mishra, had visited land locations at two places. He submits that this accused was also identified by the witnesses in the TIP. Thus, learned special PP submitted that all the statements that are part of the chargesheet clearly indicate the involvement of these applicants in the alleged crime.

13. Learned special PP submitted that huge amounts have been seized in the investigation, which reveals that these applicants are involved in the manufacturing of MD drugs, training for the purpose of manufacturing MD drugs and sale of MD drugs and payments made for the training purpose. He submits that except for one accused, Kuldeep Indalkar, all other applicants have been identified in the TIP. He thus submits that strong circumstantial evidence reveals that these applicants are involved in the crime.

14. In response to the submissions made regarding the mandatory procedure to be followed under section 52-A, the learned special PP

submits that at the relevant time, there were no rules that mandated the drawing of samples before the learned Magistrate or sending samples drawn before the learned Magistrate for chemical analysis. He submits that at the relevant time, in the absence of any rules, the standing orders were followed, which permitted the seizure of the material, drawing of the samples on the spot, and sending the same for chemical analysis. He submits that by following the procedure, which was applicable at the relevant time, the prosecution seized the material on the spot on 7<sup>th</sup> October 2020, and the samples were immediately drawn and sent for chemical analysis. He submits that chemical analysis of the samples drawn at the spot clearly indicates that the same contains MD drugs. He submits that samples drawn on the spot and the chemical analysis report is a strong material that indicates the commission of the offence.

15. In reference to the legal principles settled by the Apex Court in the case of *Mohanlal*, the learned special PP submitted that immediately application was made before the learned Magistrate for drawing samples as required under section 52-A. He submits that said samples are drawn by way of representative samples, which are required to be certified by the learned Magistrate. He submits that

there is no law that says that these representative samples are to be mandatorily sent for any chemical analysis. He further submitted that this procedure for sending the samples drawn before the learned Magistrate for chemical analysis is contemplated only by the Rules framed in the year 2022, i.e. Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022.

16. Learned special PP further submitted that sections 42 and 43 of the NDPS Act permit seizure of the material, and the same is followed in the present case for the purpose of seizure of the material on the spot as well as from the factories of Sanyog Biotech and Nimbus Pharma. He submits that the samples which were seized under sections 42 and 43 of the NDPS Act were sent for chemical analysis, and the positive report is part of the chargesheet. Learned special PP further submits that only if there is any discrepancy or the accused applies for sending samples drawn before the learned Magistrate is the same to be sent for chemical analysis. He thus submits that section 52-A must be understood from the correct perspective and that in the present case, the chemical analysis report of the samples drawn on the spot is sufficient material to proceed with the trial against the applicants and other accused.

17. Learned special PP relied upon section 37 of the NDPS Act and submitted that the twin test must be satisfied by these applicants for seeking bail. To support his submissions, learned special PP relied upon the decision of the Apex Court in the case of ***State of Punjab Vs. Balbir Singh***<sup>6</sup>, decision of this court in the case of ***Kuldeep Indalkar Vs. The State of Maharashtra***<sup>7</sup> with connected applications, the decision of the Apex Court in the case of ***Narcotics Control Bureau Vs. Mohit Aggarwal***<sup>8</sup>, decision of the Apex Court in the case of ***Union of India Vs. Ram Samujh and another***<sup>9</sup>. Learned special PP thus submits that the precedent for the grant of bail as postulated under section 37(1)(b) is held to be mandatory. He thus submits that the aforesaid decisions clearly lay down the principles that in the absence of satisfaction of the said conditions, the court cannot grant bail to the accused charged with offences under the NDPS Act.

18. Learned special PP further relied upon the observations in paragraphs 6 to 9 in the case of ***Ram Samujh*** and submitted that in a serious case as the present case involving activities of the intoxicants, which is a menace of dangerous drugs in the market, the persons

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<sup>6</sup> SLP (Cri.) No. 1698 of 1990

<sup>7</sup> Criminal Application (APL) 489 of 2021

<sup>8</sup> Criminal Appeal Nos. 1001-1002 of 2022

<sup>9</sup> (1999) 9 Supreme Court Cases 429



accused of such offences under the NDPS Act should not be released on bail during the trial unless mandatory conditions provided in section 37(1)(b) are satisfied. Learned special PP also relied upon similar orders passed by the Apex Court regarding the satisfaction of the twin conditions. Since there cannot be a debate on the said propositions, I do not find it necessary to point out all the similar decisions relied upon by the learned special PP.

19. Learned special PP further relied upon the decision of the Apex Court in the case of *State of MP Vs. Kajad*<sup>10</sup>. He submits that the Court held that the liberal approach of the Court is unwarranted in the offences alleged under the NDPS Act. He submits that the Apex Court, in the said decision, held that in the cases involving offences under the NDPS Act, the negation of bail is the rule, and its grant is an exception under sub-clause (ii) of clause (b) of section 37(1) of the NDPS Act. Learned special PP submits that in the present case, there is sufficient material by way of circumstantial evidence to indicate the involvement of these applicants in the crime. He submits that in view of the applicable rules at the relevant time, a chemical analysis report of the samples drawn on the spot would be sufficient material to proceed against these applicants for their conviction for the offences as alleged

<sup>10</sup> (2001) 7 Supreme Court Cases 673

in the present case.

20. So far as the mandatory procedure under section 52-A of the NDPS Act as held by the Apex Court in the case of *Mohanlal* is concerned, learned special PP submits that same has been followed, and the samples are drawn before the Magistrate, which is part of the record. He submits that in the absence of satisfaction of the twin conditions, there is no ground for believing that these applicants are not guilty of the offences with which they are charged and are not likely to commit any such offence while on bail. He thus submits that a liberal approach in these cases is not called for in view of sufficient circumstantial evidence against these applicants. He submits that in the absence of satisfaction of the twin conditions, there is no ground for believing that these applicants are not guilty of the offences with which they are charged and that they are not likely to commit any such offence while on bail. He thus submits that a liberal approach in these cases is not called for in view of sufficient circumstantial evidence against these applicants.

21. I have considered the submissions made on behalf of the applicants and the learned special PP. There is no dispute that the samples that were drawn before the learned Magistrate, as required

under section 52-A of the NDPS Act, were not sent for chemical analysis. The ground argued by the learned special PP that in view of the relevant laws applicable at the relevant time, the samples drawn on the spot were sent for analysis and a positive report is part of the record is completely contrary to the principles laid down by the Apex Court in the case of *Mohanlal* and consistently followed by the Apex Court as well as High Court where accused are acquitted for non-compliance of the mandatory requirement under section 52-A of the NDPS Act.

22. The material relied upon against these applicants is only in the form of circumstantial evidence to indicate the role of these applicants in the crime, which is with reference to contraband that was seized on 7<sup>th</sup> October 2020. However, no material is on record to relate this circumstantial evidence to contraband seized on 7<sup>th</sup> October 2020. The real question to be ascertained is whether what was seized on 7<sup>th</sup> October 2020 is contraband. There is nothing shown to relate the seized money, utensils or the residue substance with the contraband that was seized on 7<sup>th</sup> October 2020. Thus, the material relied upon by the prosecution is based on the samples drawn on the spot without following the mandatory requirement prescribed under section 52-A of

the NDPS Act. Hence, the absence of compliance with the mandatory procedure under section 52-A creates a serious suspicion about the veracity of the prosecution case. The chemical analysis report relied upon by the prosecution is not of the samples drawn before the learned Magistrate under section 52-A of the NDPS Act. For the reasons best known to the prosecution, samples drawn before the learned Magistrate are not sent for chemical analysis. Hence, an adverse inference must be drawn against the prosecution for not sending the samples drawn before the Magistrate for chemical analysis.

23. Reliance placed on sections 42 and 43 cannot be read independently of section 52-A. Sub-section (4) of section 52-A requires that every Court trying an offence under the NDPS Act shall treat the inventory psychotropic substance and any list of samples drawn under section sub-section (2) and certified by the Magistrate as primary evidence in respect of such offence. Thus, only relying upon sections 42 and 43, which empower officers under the said act to enter, search, seize, and arrest, would not amount to compliance with the mandatory requirement under section 52-A. The submissions made on behalf of the prosecution that procedure under section 52-A is followed, and the

samples drawn before the learned Magistrate are only for representative purposes cannot be accepted in view of well-settled legal principles laid down by the Apex Court in the case of ***Mohanlal*** and consistently followed thereafter.

24. In view of the law laid down by the Apex Court in the case of ***Mohanlal***, it is clear that there is no other provision to draw samples on the spot that can be treated as primary evidence. Once section 52-A is mandatory, samples taken on the spot cannot be treated as primary evidence. In view of the submissions made on behalf of the prosecution, it is necessary to refer to paragraphs 15 to 19 of the decision by the Apex Court in the case of ***Mohanlal***, which read as under:

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

*18. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing*

*order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.*

*19. Mr. Sinha, learned Amicus, 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 the Court saw 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.”*

*Emphasis applied*

25. The principle laid down by the Apex Court in the case of **Mohanlal** is further explained by the Apex Court in the case of **Bothilal**. The Apex Court, in the case of **Bothilal** held that the act of drawing samples or packets at the time of seizure, which is not in conformity



with what is held in the case of ***Mohanlal***, creates serious doubt about the prosecution case that the substance recovered was a contraband. Thus, the Apex Court held that the prosecution case was not free from suspicion as the prosecution failed to prove beyond a reasonable doubt that applicants before the Apex Court were in possession of the contraband or that they were involved in the alleged crime. Thus, for want of following the mandatory procedure under section 52-A, the Apex Court acquitted the accused from the offences alleged against them under the NDPS Act.

26. Learned counsels for the applicants have rightly relied upon the decisions of this Court as referred to above, where the accused were released on bail on the ground of non-compliance with mandatory procedure under section 52-A. This court, in the case of ***Aniodo Tochukwu*** held that when the chemical analysis report of the sample collected at the time of seizure without following the procedure under section 52-A, the prosecution will have to surmount the hurdle of non-compliance with the provisions of section 52-A of the Act in true spirit in the sense that samples were not drawn before, and certified by, the Magistrate. Thus, this Court held that the Court would be justified in drawing the inference that the applicant in the said case may not be

guilty of the alleged offences under the NDPS Act. Thus, without any chemical analysis report of the samples drawn before the learned Magistrate as required under section 52-A, this Court allowed the application for bail in the said case.

27. This court took a similar view in the case of ***Sunil Malvi***, as the samples drawn before the learned Magistrate were not sent for chemical analysis. This Court, relying upon the law laid down in ***Mohanlal's*** case and subsequently followed in the case of ***Simranjit Singh Vs. State of Punjab***<sup>11</sup>, acquitted the appellant in the said case of the offences alleged under the NDPS Act.

28. Thus, in view of the law laid down by the Apex Court in the case of ***Mohanlal***, which is consistently followed by the Apex Court and the High Court, I do not find any substance in the arguments raised on behalf of the prosecution that samples drawn before the learned Magistrate under section 52-A is only for representative purpose and would amount to sufficient compliance and it is not necessary to send the samples drawn before the learned Magistrate for chemical analysis.

29. Though the rules framed under the NDPS Act came into force in 2022, the law laid down by the Apex Court in the case of ***Mohanlal*** had

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<sup>11</sup> Criminal Appeal No. 1443 of 2023

been in existence since 2016. Hence, the prosecution cannot be justified in submitting that the procedure laid down by the Apex Court in the case of *Mohanlal*, interpreting section 52-A, was not required to be followed by the prosecution. Section 52-A is a safeguard and it is mandatory, which is not followed before sending the samples for chemical analysis. Therefore, the chemical analysis reports relied upon by the prosecution regarding the samples drawn without following the mandatory procedure under section 52-A cannot be accepted as a reliable material against the applicants.

30. In view of the aforesaid, applicants have made out a strong prima facie case in their favour, indicating that the first part under section 37 of the NDPS Act is satisfied that there are no reasonable grounds for believing that these applicants are guilty of such offences and that are likely to commit any such offence while on bail. The antecedents pointed out by the learned special PP are against only two accused that is Rakesh Khaniwadekar-accused no. 14 and Afjal Sunsara-accused no. 20. Out of two offences registered against Rakesh Khaniwadekar, one is before the present case, and another is registered after the present case was registered. In the case of Afjal Sunsara, one of the cases is when he was arrested in the present

case. In both these cases, applicants are released on bail. All these applicants were arrested sometime in 2020 and have suffered incarceration for almost four years. Though the charge has been framed, nothing is pointed out to indicate that the trial would commence immediately or be completed within a reasonable time. Hence, this factor also needs to be considered in the present case. In view of the aforesaid, I find that the second part of the twin test required to be satisfied under section 37 of the NDPS Act is also satisfied.

31. Hence, for the reasons recorded above, all the applications are allowed by passing the following order:

### **ORDER**

I. Applicants shall be released on bail in connection with C. R. No. 1089 of 2020 registered with Chakan Police Station for offences punishable under sections 8(c), 21(c), 22(c), 29, 31(A) and section 27(A) of The Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') and section 120-B of the Indian Penal Code, on furnishing PR bond in the sum of Rs. 50,000/- each with one or two sureties in the like amount to the satisfaction of the Trial

Court.

II. The applicants shall cooperate with the Trial Court for an expeditious trial and attend each and every date unless exempted for reasons to be recorded in writing.

III. Applicants shall report to the Anti Narcotics Cell, Pimpri Chinchwad, on the first Monday of every month between 10 a.m. and 12 p.m. and as and when called for.

IV. Applicants shall not tamper with the evidence of the prosecution and shall not influence any witness or other person concerned with the case.

V. Applicants shall surrender their passport, if any, with the Trial Court.

VI. Applicants shall submit their addresses and mobile numbers to the Trial Court and update them in the event of any change.

VII. Needless to record that in case of violation of any of the conditions, the prosecution would be entitled to seek cancellation of bail.

VIII. Needless to further clarify that the observations in this order are limited to the question of grant of bail to these

applicants and the trial shall proceed uninfluenced by the observations made in this order.

IX. All the applications are allowed in the aforesaid terms.

32. Learned special PP requested that this order be stayed to enable the prosecution to approach the Apex Court.

33. I find it necessary to record that the applications have remained pending for a long time. These applications were heard on various dates to accommodate the learned Special PP. Hearing the applications has consumed more than two hours on each date, including the complete first session today. I also find it necessary to record the time consumed during the hearing of these applications as the learned Special PP was required to be accommodated on various dates and was heard for long hours. In bail applications, such lengthy arguments as made by the learned special PP were not required.

34. Even otherwise, once the applicants are held to be entitled to be released on bail, there is no question of staying the implementation of the bail order. Hence, the prayer for stay is rejected.

35. Learned special PP at this stage, requests that order be made immediately available.

36. I find this request completely unreasonable and unfair to the Court. Around 100 matters are called out daily before this court. Hearing of these applications has already consumed more than two hours on each date, and the complete first session today. Hence, I do not see any reason why such an unreasonable request is made on behalf of the special PP.

**[GAURI GODSE, J.]**