

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 2465 OF 2015

Kaluram Chaudhary	...	Applicant
Vs.		
Union of India & Anr.	...	Respondents

Mr. Anil G. Lalla a/w. Ms. B.H. Bajwa, Ms. Monika Malkani and Ms. Zehra Kanji i/b. Lalla and Lalla, Advocate for the applicant.

Ms. Rebecca Gonsalvez, Advocate for respondent no. 1.

Mr. S.H. Yadav, APP for the respondent no. 2/State.

Mr. Sanjay S. Khamkar, P.S.I., Malvani Police Station present.

CORAM	:	MRS.MRIDULA BHATKAR, J.
RESERVED ON	:	4th May, 2016.
PRONOUNCED ON	:	11th May, 2016.

P.C.:

This Bail Application is filed by the applicant/accused who is prosecuted for the offences punishable under section 8(c) r/w. 22, 28 and 29 of NDPS Act of 1985. The applicant was arrested on 14th August, 2015 at 5 p.m. by respondent no. 1.

2. It is the case of the prosecution that on 13th August, 2015, the respondent no. 1 received information that one Siraj Panjwani, resident of Mira Road, District Thane was to carry or transport contraband prohibited under NDPS Act of 1985 and is going to deliver the same to one Jayantilal Kothari, who would be accompanied by one Pankaj Kothari. The team of officers of the respondents raided the said premises and they apprehended Jayantilal Kothari, Pankaj Kothari, Guddu Shaikh and Shiraj

Panjwani. In the search and seizure panchnama, 2.5 kgs of mephedrone was recovered. On disclosure by co-accused Siraj Panjwani, the officers of NCB realized that applicant/accused Kaluram Choudhary was to arrive on the night intervening 13th August and 14th August, 2015 to deliver 12 kgs. of mephedrone at flat No. 202 'B' Wing, Vishal Residency near G.C.C. Club, Mira Road. The raiding party went to that flat along with panchas and waited for arrival of the applicant. When Kaluram entered the flat, he was apprehended along with polythene bags containing mephedrone. During the panchnama, it was found that mephedrone weighed approximately 11.8 kgs. After drawing of the panchnama and further formalities of the same, the applicant/accused was shown arrested. Thereafter his Bail Application No. 253 of 2015 in NDPS Spl. R.A. No. 179/2015 was rejected by the Special Judge, NDPS on 8th December, 2015.

3. The learned counsel for the applicant/accused submitted that the order passed by the learned Special Judge is erroneous. The applicant/accused is falsely implicated in this offence. Nothing was recovered from the applicant/accused on the night intervening 13th August and 14th August, 2015 at his flat, as alleged. The learned counsel has submitted that the applicant/accused was in fact taken in custody on the evening of 13th August, 2015 from his industrial plant of H.K. Global by NCB Officers. They took him to NCB office and thereafter he was illegally

shown arrested upon recovery of 11.8 mephedrone, a psychotropic substance in the flat of co-accused Panjwani. The learned counsel submitted that at the time of hearing of Bail Application, the learned Special Judge did not consider number of photographs which was produced by the accused to show the presence of NCB officers at his H.K. Global factory on 13th August, 2015. In this Court also, the applicant/accused has produced the print outs of video shooting which was caught in the camera fixed in the premises of his factory. The respondent/officers have not denied their visit to the factory and this substantiates his defence that he is falsely implicated in the case as he was picked up illegally on 13th August, 2015 in the early evening. The learned counsel submitted that the view taken by the learned trial Judge that at this stage of bail the defence cannot be considered is contrary to the legal position. In support of his submissions, he relied on the following judgments:

- (i) Sarija Banu @ Janarthani vs. State, CDJ 2004 SC 568.
- (ii) Anvar P.V. vs. P.K. Basheer & Ors. in Civil Appeal No. 4226 of 2012 (SC).
- (iii) Shamsheer Singh Verma vs. State of Haryana, 2015 ALL MR (Cri) 4923 (SC).
- (iv) Kishan Tripathy @ Kishan Painter vs. The State in Criminal Appeal No. 108 of 2013 (Delhi High Court).
- (v) Tomaso Bruno & Anr. vs. State of UP., in Criminal Appeal No.

142 of 2015 (SC) arising out of S.L.P. (Cri.) No. 1156 of 2013.

(vi) Ranjitsing Brahmajeet Sing Sharma vs. State of Maharashtra & Anr., 2005 (2) Crimes 168 (SC).

(vii) Tofan Singh vs. State of Tamil Nadu, 2014(1) Bom. C.R. (Cri) 323.

The learned counsel relied on the order passed by the learned Judge of this Court on 31st July, 2014 in Criminal Bail Application No. 1006 of 2014 in Ramshiromani A. Pandey vs. State of Maharashtra in which case CCTV Footage produced by accused was taken into account by the learned Judge at the time of granting bail.

4. The learned counsel Ms. Gonsalves for respondent no.1 submitted that this Bail Application is to be rejected. There is evidence against the applicant/accused that he was caught red-handed with 11.8 kg. mephedrone psychotropic substance at flat no. 202, Vishal Residency, Mira Road. Panchnama to that effect is drawn. She relied on the judgment and order passed by the Division Bench of this Court on 4th April, 2016 in Criminal Writ Petition No. 282 of 2016 filed by the present applicant/accused, i.e., Kaluram Chaudhary vs. Union of India & Ors. She submitted that in the said order, the application was moved under section 482 of Cr. P.C. for transfer of investigation and the Division Bench dismissed both the Applications. The learned counsel submitted that before the Division bench also the accused made submissions that he was

arrested on the earlier date and so relied on CCTV Footage and at that time, the Division Bench has observed that it was not something that this Court would do at this stage. It was observed that the material is not self-evident and will have to be strictly proved in accordance with law. The learned counsel has submitted that this observations should be taken into account and the material of CCTV footage is not to be considered at all at the stage of bail. She relied on the affidavit-in-reply filed by Kumar Sanjay Jha, Zonal Director, NCB, Mumbai filed on 26th April, 2016 whereby Mr. Jha has placed certain facts on record, as this Court has called for the explanation in respect of CCTV footage. The learned counsel submitted that on the basis of tip off, NCB officers have visited the factory H.K. Global on 13th August, 2015 in order to verify the tip off. She further submitted that he was arrested on the night intervening 13th August and 14th August, 2015 when he arrived in Flat No. 202 to deliver contraband at about 2 a.m. She further relied on the judgment of Aurangabad Bench of Bombay High Court in the case of Satish Mahipatirao Kendre vs. State of Maharashtra & Ors., (2012) ALL M.R. Cri. 3130 wherein she has stated that at the time of granting bail, the probable defence of the accused cannot be considered. She submitted that when the applicant/accused was produced before the Magistrate Court, he did not mention anything to the learned Judge about his arrest on the previous night though he had an opportunity to say so before the learned Judge. She relied on the remand report and submitted that when he was produced first on 15th August, 2015

and thereafter on 17th August, 2015, but he did not make any complaint about illegal arrest by the police. The submissions of the learned counsel for the applicant that the accused was arrested on the earlier date are false.

5. Learned APP adopted the submissions of learned counsel for respondent no. 1.

6. Perused the documents produced by both the parties. The panchnama of raid and seizure dated 13th August and 14th August, 2015 disclosed that on the information, the police have raided the impugned flat and at 2 a.m. the applicant/accused visited and 11.8 kgs of mephedrone, a psychotropic substance was found with him. The main contention raised by the learned counsel for the applicant/accused is that the applicant was not arrested in the manner in which the prosecution claimed but it was an illegal apprehension and custody from the evening of 13th August, 2015 from his factory. Though it may be considered as defence, the applicant/accused cannot be stopped at this stage also from producing the material which may prima facie falsify the case of the prosecution. Therefore after going through those print outs, I directed NCB to file their reply on affidavit about their visit to plant of the applicant/accused. I have perused the affidavit-in-reply filed by the officer of NCB. The print outs disclosed that there were officers from NCB present on 13th August, 2015.

The officer in his reply also accepted this fact. However, it is further stated that NCB had received very raw tip off about the contraband at the factory. It is mentioned that the applicant/accused was questioned, however, nothing was found at that time, so he was not arrested and not detained. It is to be noted that the applicant/accused has brought this fact of visit of NCB officers at his factory on record, but it is explained by the prosecution. At the stage of bail when evidence is not tendered, the evidence cannot be scrutinized. However, the fact that there was visit of NCB officers on the earlier date at the factory is to be believed. Two documents which are produced by the prosecution have to be taken into account along with this print outs. The photocopy of handwritten retraction of confession of the accused is placed before the Special Court of NDPS, Mumbai on 17th August, 2015 in R.A. No. 179 of 2015 when the accused was produced before the learned Magistrate first time. It is to be noted that the accused was produced before the Magistrate on 15th August, 2015. The photocopy of the roznama dated 17th August, 2015 and 19th August, 2015 are produced. In both the rozنامas, there is specific mention that no complaint of ill-treatment at the hands of the police officer was made. In the application for retraction of confession, the accused has stated that NCB officers had hit him and forcibly obtained his signature on the confession and he had not voluntarily signed the confession. Thus, it shows that the submissions of learned counsel for respondent no. 1 are correct that when the applicant/accused was produced before the Court on

17th August and 19th August, he did not say a word about his illegal arrest by the NCB officer from his factory on 13th August, 2015. It is true that the applicant/accused when was produced before the Magistrate first time, could have disclosed immediately about his illegal arrest from his factory on 13th August, 2015 and he could have stated about fake certificate and seizure on the night or on the early hours of 14th August, 2015 in the flat booking him for possession of 11.8 kgs mephedrone. At this stage, panchnama discloses that 11.8 kgs mephedrone was found with him.

7. I have perused the judgments. Most of these judgments are in appeal on conviction. In the judgment of **Sarija Banu alias Janarthani** (*supra*) , there was serious violation of mandatory provision under section 42 of the Act. In the said matter, earlier the police party had entered illegally into the house occupied by the appellants. Telegram informing about the illegal detention was sent to the Commissioner and though it was sent and received, no complaint was registered and no investigation started on that basis. Though it was accepted that something had happened on the earlier date and that factor was considered relevant one for granting bail.

8. In the case of **Shamsher Singh** Verma (*supra*), the Appeal was filed against the order rejecting the application of the accused for getting exhibited additional evidence rendered by the defence wherein the

Supreme Court held that the Courts below have erred in law in not allowing the application of the defence to get played the compact disc relating to conversation between the victims and the family members.

9. Other cases of **Anvar P.V.** (*supra*), **Kishan Tripathy** (*supra*) and **Tomaso Bruno** (*supra*) are regarding final judgment and not on bail. Hence they are not applicable in the present case.

10. The ground of illegal detention since 13th August, 2015 was the only ground which was agitated before the Court. However, considering this factual position, I hold that it is a matter of evidence and prima facie on this ground at that stage, the applicant/accused cannot be granted bail. Hence, the Application for bail is rejected.

(MRIDULA BHATKAR, J.)