

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 928 OF 2017

Mr. Ayaz Khan, for the applicant.
Ms. Rebecca Gonsalves, for respondent No.1.

DATE : 4TH MAY, 2017.

Heard Mr. Ayza Khan, learned Counsel for the applicant
and Ms. Gonsalves, learned Counsel for respondent No.1.

2. By this application under Section 439 of the Code of Criminal Procedure, 1973 (for short 'Cr. PC'), applicant-accused No.1 has prayed for enlarging him on bail in the NDPS Special Case No. 65 of 2011 pending before the learned Special Court constituted under the Narcotic Drugs and Psychotropic Substances

Act, 1985 (for short 'Act').

3. By order dated 7th February, 2012, Criminal Bail Application No. 13 of 2012 filed by the applicant was rejected by this Court. Aggrieved by this order, the applicant preferred Special Leave Petition No. 3000 of 2012. By order dated 24th September, 2012, pending the Special Leave Petition, the applicant was enlarged on bail on his furnishing personal bond of Rs. 20,000/- with one surety in the like amount to the satisfaction of the trial Court. Matter was referred to the larger Bench. By order dated 12th August, 2012, reference was answered. It was held that Act will apply to psychotropic substances mentioned in the Schedule to the Act and the decision in the case of State of Uttaranchal Vs. Rajesh Kumar Gupta, 2007 (1) SCC 355 does lay down correct law. The matters pending before the Apex Court were remitted to the concerned High Courts for passing appropriate orders in the light of the decision. By subsequent order dated 22nd July, 2016, the Apex Court clarified that the order dated 24th September, 2012 passed in Special Leave Petition No. 3000 of 2012 was only during the pendency of the SLP and directed the applicant to surrender before the High Court.

4. In pursuance of the order passed by the Apex Court, the applicant surrendered before this Court. By order dated 8th September, 2016, the applicant was taken into the custody. The applicant was handed over to the officers of Narcotics Control Bureau [for short 'NCB'] with direction to NCB to produce the applicant before the Special Court for complying with further formalities in accordance with law.

5. By order dated 27th September, 2016 the applicant was granted leave to amend the application so as to incorporate additional grounds. The matter was, thereafter, heard from time to time before this Court. In pursuance of the order dated 3rd March, 2017 passed by this Court [Coram: Smt. Sadhana S. Jadhav, J.], registry had placed the Criminal Bail Application No. 13 of 2012 before me.

6. Criminal Bail Application No. 13 of 2012 was heard by me on 20th March, 2017. In the order, it was recorded that there is common ground between the parties that order dated 7th February, 2012 rejecting the above application was not set aside by the Apex Court. As the subsequent developments took place, the applicant

was permitted to approach the Special Court by filing a fresh application for bail. Accordingly, the applicant has filed application for enlarging him on bail. By order dated 7th April, 2017, the Special Judge rejected the application.

7. In support of this application, Mr. Khan has raised three-fold contentions:

[1] He submitted that prosecution is relying upon seizure panchanama dated 30th December, 2010.

Panchanama was made between 10.30 hours and 15 hours on 30th December, 2010. Applicant was not present at the time of carrying out this panchanama, though seizure was carried out in his office. He invited my attention to evidence of P.W. 2 Rakesh Zunzunwala. In the examination-in-chief, prosecution did not conveniently ask at what time his statement was purportedly recorded on 29th December, 2010. In the cross-examination, P.W. 2 deposed that on 29th December, 2010, he had received phone call from NCB officer and he reached NCB office before 12.00 p.m. Around 12.30

p.m, he met Shri S.G. Dhole. He was in the NCB office till 6 to 7 p.m. On 30th December, 2010, again he was called in the NCB office. He reached NCB office around 10.00 a.m to 11.00 a.m.. He met Shri Dhole. He was in the office of NCB till 5.00 to 6.00 p.m. Relying on evidence of P.W. 2, Mr. Khan submitted that P.W. 2 has demolished the fabric of the prosecution's case. Whereas, Panchanama dated 30th December, 2010 records that it was commenced at 10.30 hours and was concluded at 15 hours in the office of the applicant, P.W. 2 who is an independent witness deposed that he was in the office of NCB on 30th December, 2010 from 10.00 a.m 11.00 a.m and 5.p.m 6 p.m. He submitted that Mr. S.G. Dole could not have been at two places namely in the applicant's office and NCB office at the same time. He further submitted that prosecution did not declare P.W. 2 as a hostile witness. He submitted that what is material is not quantity of the evidence but quality of the evidence.

[2] He further submitted that Section 42 of the Act deals with power of entry, search, seizure and arrest

without warrant or authorization. Second proviso to sub-section (1) lays down that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief. In the present case, no material is produced by the prosecution to substantiate that any ground for such belief is recorded at the time of carrying out seizure etc.

- [3] He submitted that examination-in-chief of P.W. 3 commenced on 17th September, 2016 and was concluded only on 2nd May, 2017. In other words, examination-in-chief of P.W. 3 took almost eight months. Because of prosecution's failure in completing examination-in-chief of P.W.3, applicant should not suffer and is entitled to be enlarged on bail.

In support of his submissions, he relied upon

decision of Apex Court in the case of Mukhtiar Ahmed Anshari Vs. State (N.C.T. of Delhi), 2005 AIR (SC) 2804 and in particular paragraph 31 thereof.

8. On the other hand, Ms. Gonsalves submitted that no case is made out for enlarging the applicant on bail. She submitted that there is no change in the circumstances after rejection of the Criminal Bail Application No. 13 of 2012 on 7th February, 2012. She has taken me through the complaint lodged by Intelligence Officer NCB, Mumbai on 27th June, 2011 under Section 8 (c) read with Sections 22, 25 and 29 of the Act. She has also taken me through the statements of Rakesh Zunzunwala and D.D. Taparia recorded on 29th December, 2010. Ms. Gonsalves submitted that quantity of 1.900 Kg. Diazepam was recovered from the office of the applicant. Commercial quantity of the said drug under the Act is 500 gram. 1Kg. Alprazolam was recovered from the office of the applicant. Commercial quantity of the said drug is 100 grams. She submitted that applicant is owner of M/s. Countrywide Logistics. She invited my attention to the statement dated 29th December, 2010 of P.W. 2 Rakesh Zunzunwala which is marked as Exhibit 56. She has also invited my attention to the evidence of PW. 3 Mr. S.G.

Dhole, wherein he deposed that on 29th December, 2010, between 8.30 p.m and 9.00 p.m., he had recorded statement of 4 persons including P.W. 2 Rakesh Zunzunwala.

9. She submitted that at this juncture, it cannot be concluded as to whether testimony of P.W.2 Rakesh Zunzunwala is reliable or not. Evidence of the prosecution witnesses is required to be considered in its entirety. She submitted that statement of P.W. 2 Rakesh Zunzunwala was recorded on 29th December, 2016 and he deposed in the Court on 8th September, 2016 i.e after more than 5 years. One or two isolated statements made by P.W. 2 cannot be a ground to enlarge the applicant on bail. She submitted that commercial quantity of two drugs was found in the office of the client. She, therefore, submitted that no case is made out for enlarging the applicant on bail. Applicant cannot take advantage of minor discrepancies in the evidence of P.W.2. She further submitted that in pursuance of directions given by this Court on 30th December, 2016, P.W. 3 is regularly attending the Court on the dates fixed by the Special Court.

10. I have considered the rival submissions advanced by

learned Counsel appearing for the parties. I have also perused material on record. A perusal of statement of P.W. 2 Rakesh Zunzunwala at Exhibit 56 shows that it was recorded on 29th December, 2010. On that date, statement of Shri D.D. Taparia was also recorded. I have also gone through the statement at Exhibit 56 as also evidence of P.W.2. P. W. 2 was examined on 8th September, 2016. In examination-in-chief, he deposed that in the year 2010, Shri Dole had called him in the office of NCB at Ballard Estate to record statement. While his statement was being recorded, Shri D.D. Taparia was present in the NCB Office. His statement was recorded in his own handwriting which was shown to him. He stated that it is the same statement which is in his handwriting. It bears his signature. Contents thereof are correct. It was marked as Exhibit 56.

11. It is no doubt true that in the cross-examination, P.W. 2 deposed that after receiving call in the morning on 29th December, 2010, he reached NCB office before 12.00 p.m along with Shri D.D. Taparia. He met P.W. 3 Shri Dole at around 12.30 p.m. He was in the NCB office till 6 p.m to 7 p.m. On 30th December, 2010, he was again called in the NCB office. He reached NCB office at

around 10 a.m to 11.00 a.m. He met Shri Dole on that date. He was in NCB office till 5 p.m to 6 p.m. Dole was making inquiry with him. Shri D.D. Taparia was also present on that date. He was in the NCB office. Shri Dole made inquiry with Shri D.D. Taparia also. He denied that statement at Exhibit 56 is fabricated. A minute perusal of cross-examination of P.W. 2 Rakesh Zunzunwala prima facie does not indicate that he deposed about recording his statement on 30th December, 2010. In fact, he denied suggestion given during the cross-examination that statement at Exhibit 56 is fabricated. As noted earlier, quantity of 1.900 gram Diazepam and quantity of 1 Kg. Alprazolam was recovered from the office of the applicant. In so far as Diazepam drug is concerned, commercial quantity of the said drug is 500 grams. As far as Alprazolam drug is concerned, commercial quantity of the said drug is 100 gram. Mr. Khan relied upon seizure panchanama and evidence of P.W.2 Rakesh Zunzunwala. After considering the material on record and more particularly, statement of P.W. 2 recorded on 29th December, 2010, as also examination-in-chief of P.W. 3, prima facie at this stage, submission of Mr. Khan cannot be accepted. In my opinion, it is a matter of appreciation of evidence and is a matter of trial. It

is for the trial Court to consider these aspects.

12. Mr. Khan relied upon the decision of the Apex Court in the case of Mukhtiar Ahmed (supra). In that case, the appellant had challenged an order of conviction and sentence passed by the Designated Court, New Delhi on 4/5 February, 2003 in Sessions Case No. 49 of 2001. The said case was registered against the appellant under Section 5 of Terrorist and Disruptive Activities (Prevention) Act, 1987 [for short 'TADA'] as also under the Arms Act, 1959[for short 'Arms Act']. For the offence under the Arms Act, appellant was sentenced to undergo rigorous imprisonment for three years and a fine of Rs. 50,000/-, in default to undergo R.I for one year more. For the offence under TADA, he was ordered to undergo rigorous imprisonment for ten years and a fine of 5,00,000, in default to undergo R.I for one year more. Both the sentences were to run concurrently. He was given benefit under Section 428 of Code of Criminal Procedure, 1973 for the period already undergone by him as set off. Case of the prosecution was that one Ved Prakash Goel was kidnapped on 7th December, 1993 from the residence of one Doctor Mittra. On 8th December, 1993, at 7.30 a.m., a call was received by Mrs. Goel. She was informed that

Mr. Goel was kidnapped and ransom of Rs. 1 Crore should be arranged if he was wanted alive. F.I.R was lodged on 8th December, 1993. The Apex Court noted in para 6 that the appellant and two others were charged in kidnapping case (Sessions Case No. 93 of 1997) which resulted into acquittal on 16th July, 1997 by Additional Sessions Judge, New Delhi. The Designated Court found appellant guilty of possessing fire arms and ammunition without licence and thereby, he had committed offence punishable under Section 25 (1-B) of the Arms Act. He was also held guilty for consciously possessing fire arms and ammunitions without licence in the 'notified area" punishable under Section 5 of TADA Act and accordingly he was convicted.

13. One of the contentions advanced on behalf the appellant was that there was no prior approval as required by Section (1) of Section 20-A of TADA Act. In paragraph 25, the Apex Court considered deposition of Deputy Commissioner of Police who was examined as P.W.4. After considering order dated 5th April, 1994 of Deputy Commissioner of Police, the Apex Court observed that Deputy Commissioner of Police granted sanction only

in respect of offence punishable under the Arms Act and not under TADA Act. The Apex Court, therefore, held that as the prior approval as required by Section 20-A(1) of TADA Act was not accorded by the Competent Authority, all proceedings, therefore, vitiated and the conviction under TADA Act must be set aside.

14. In paragraph 27, the Apex Court noted the submission advanced on behalf of the appellant that kidnapping case of Ved Prakash Goel resulted into acquittal of appellant by a competent Court and the said decision had attained finality. In paragraph 30, the Apex Court accepted the submission by observing that once appellant-accused was acquitted in kidnapping case the doctrine of “autrefois acquit” gets attracted. In para 31, the Apex Court noted that it was the case of the prosecution that the Police had requisitioned a Maruti car from Ved Prakash Goel. Ved Prakash Goel had been examined as a prosecution witness as P.W.1. He, however, did not support the prosecution. The prosecution never declared PW-1 “hostile”. His evidence did not support the prosecution. Instead, it supported the defence. The accused hence can rely on that evidence. In my opinion, this decision is not

applicable to the facts of the present case. It may be noted that the said decision is rendered after a full-fledged trial before the designated Court and Designated Court had convicted the appellant. As noted earlier, in the present case, evidence of prosecution witnesses is being recorded.

15. Mr. Khan also relied on Section 42 of the Act. In my opinion, submission based on Section 42 is also misconceived and it is a matter of trial, whether any reasons are recorded in terms of second proviso to Section 42.

16. Application was rejected by the learned Special Judge. Before the learned Special Judge, similar submission was advanced. In paragraph 6, it was observed that:

“I have carefully gone through the examination-in-chief as well as cross-examination of said PW No.2. Truly the said witness during his cross-examination has stated that around 2.30 p.m., he met with another witness Shri. Shriram Gajanan Dole. The Ld. Advocate of applicant/accused has attempted to point out that Shri Shriram Dole deposed as “PW No.3” and he claimed that on 29/12/2010, he was at NCB Office, Mumbai. According to the Ld. Advocate of applicant/accused, the witness Shri Shriram Dole could not have been present on two points at the same time. In the light of the said point of argument, I would like

to explain that the prosecution has examined in all three witnesses. The examination-in-chief and cross-examination of said witness are already on record. Undoubtedly the cross-examination of all the three witnesses had been conducted at length. Moreover, it is also material to point out that PW Nos. 1 & 3 had given extensive account of entire prosecution case. At this juncture, it is not possible to conclude as to whether the testimony of PW No.2 is wholly reliable or not. The evidence is required to be considered on its entirety. One or two isolated statements made by the prosecution witnesses, cannot be a ground to conclude that the entire prosecution case is required to be rejected. Moreover, one or two stray admissions can not be taken as a conclusive evidence to hold that the entire prosecution case is demolished”.

17. After considering entire material on record as also, having regard to the fact that recording evidence is in progress, in my opinion, no case is made out for enlarging the applicant on bail. As noted earlier statement of P.W. 2 Rakesh Zunzunwala was recorded in December, 2010 and he deposed in the Court on 8th September, 2016. At this stage, it cannot be concluded as to whether testimony of P.W. 2 Rakesh Zunzunwala is reliable or not. Evidence of prosecution witnesses is required to be considered in its entirety. One or two isolated statements made by P.W. 2 cannot be a ground to enlarge the applicant on bail. In the light of the above discussion, I am satisfied that there are reasonable grounds

for believing that the applicant is guilty of the offence he is charged with and he is likely to commit similar offence if enlarged on bail. Hence, application is rejected. It is expected that NCB will record the evidence or examine their witnesses on the date fixed. Liberty is granted to apply for expeditious trial.

[R.G. KETKAR, J.]