

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 1765 OF 2016

Prabhakar C. Gawans	...	Applicant
Vs.		
Union of India & Anr.	...	Respondents

Mr. A.P. Mundargi, Senior Advocate i/b. Mr. Ayaz Khan, Advocate for the applicant.

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

Mr. Deepak Thakery, APP for the State/respondent no. 2.

Mr. Akshay Hunnurkar(I.O.) a/s. Mr. Rahul Saini (I.O.), NCB present.

CORAM: **MRS.MRIDULA BHATKAR, J.**

DATE: **14th February, 2017.**

P.C.:

This Application is moved by the applicant/accused for bail, as he is arrested on 11th February, 2016 by the officers of Narcotics Control Bureau in C.R. No. 3 of 2015 for violation of provisions under N.D.P.S. Act and thus is prosecuted under section 22 r/w. Section 8C of Narcotic Drugs and Psychotropic Substances Act, 1985 and 58 gms. of Tetrahydrocannabinol (THC), a psychotropic substance is recovered from his factory at Mahad.

2. It is the case of the prosecution that on 25th February, 2015 Narcotics Control Bureau Mumbai Zonal unit has received information about possession of mephedrone contraband in Flat No. 202, Building no. 8, Ostwal Orchid, Mira Road, pursuant to which, a trap was laid and 5 kgs. mephedrone was recovered from Sanjay Jain and later on three more persons were also made accused. Thereafter on 26th February, 2015 the

police seized 25 kgs. of mephedrone and apprehended 5 persons, namely, Aniket kapoor, Rakesh Kapoor, Jogabhai, Nanjiram and Parag Mehta at Andheri and N.D.P.S. Special Case No. 31 of 2015 was registered against those persons. During the investigation of the said case, it was revealed from Parag Mehta that seized mephedrone had been supplied by Rohan Gawans, son of the applicant/accused. The applicant/accused is the owner of the factory by name Rohan Chemicals, Mahad. On 28th February, 2015, NCB raided the factory of applicant/accused and collected 76 samples from laboratory, godown and a small room. Those samples were sent for chemical analysis and a positive finding of THC in respect of one sample was given in the report of the Chemical Analyzer Report dated 29th June, 2015. The report dated 29th June, 2015 was collected by NCB on 21st December, 2015. Thereafter NCB went to the factory on 5th February, 2016 and in that visit, they found a bulk quantity of THC weighing 58 gms. Thus, NCB arrested the applicant/accused on 11th February, 2016 and since then he is in prison. Hence, this Application for bail.

3. The learned senior counsel for the applicant/accused has submitted that the applicant/accused has not committed any offence. He is innocent. The learned counsel submitted that the panchnama dated 28th February, 2015 and 1st March, 2015 is faulty. He read over the relevant portion of the panchnama and pointed out on 28th February, 2015 electricity went out

at 7 p.m. and thereafter the work of panchnama had stopped and then it continued on 1st March, 2015 and it was concluded at 6.30 p.m. The learned senior counsel has submitted that when the work of panchnama was stopped on 28th February, 2015, it was necessary on the part of panchas and NCB officers to conclude it at that stage and again to open the second part of panchnama on 1st March, 2015. He further submitted that there is no mention in the panchnama that panchas have signed the samples collected by the NCB. It is further submitted that the applicant/accused was never involved in either manufacturing or was in possession of this psychotropic drug THC. He is the owner of chemical factory. The applicant/accused has specifically denied that he never manufactured any such psychotropic drug in the factory. The learned senior counsel read over the statements of the witnesses and submitted that the persons who were working in a factory have not stated that the substance was manufactured in the factory. The prosecution could not bring specific evidence as to how, when and by whom the said substance was manufactured in the factory laboratory. The learned senior counsel further submitted that the applicant/accused is 65 years old man and he is in prison since last one year only because he is the father of wanted accused Rohan Gawans. The learned senior counsel pointed out the statement of NCB personnel who arrived there to take search of the factory premises, at that time, the applicant was telephonically contacted and he willingly gave permission for search. The applicant was not

present at that time. The learned senior counsel further submitted that they have collected sample in zip lock cover and when the sample was produced, it was auto press cover but not zip lock cover. The learned senior counsel further submitted that it was necessary for the prosecution to show compliance of Section 77 of N.D.P.S. Act. He submitted that psychotropic substance was substituted in the year 1992 in the Schedule under section 83 of the Act, however, no such approval of both the Houses of Parliament was obtained. The learned counsel submitted has not invoked section 38 of N.D.P.S. Act. He submitted that commercial quantity of THC is more than 50 gms.

4. Learned counsel for respondent no. 1/NCB while opposing the Application for bail has submitted that the applicant/accused was very much involved in this offence. She produced a letter dated 16th March, 2016 of Central Forensic Science Laboratory that zip lock cover and autopress cover are one and the same. The learned counsel further submitted that all the samples were signed by the panchas along with three persons, namely, Ravindra Mohite, Machindra Bhonsle and Shyam Sitaram Hatkar, who were working in the factory, and also by the officers of NCB. She further relied on the supplementary statements of witnesses Vinod Laxman Parab, Bhaskar Prakash Thoke who was research and development person and Rahul Bhausaheb Kale who was working as Quality control and Quality Assurance Manager in Rohan Chemicals Pvt.

Ltd. She pointed out from the statements that the witnesses have stated that unlabelled drums containing chemicals were brought in the factory premises. Rahul Kale and Vinod Parab have specifically stated that when they asked about it to the applicant/accused, he told them not to enter in the said matter. She further pointed out that the drums containing 250 litres chemicals were transported inside. She further relied on two statements of Prabhakar Gawans recorded on 7th May, 2015 and 10th February, 2016. She pointed out that in the statement dated 10th February, 2016 the applicant/accused has recognized the seized white powder has been procured by him. The substance in Research and Development were procured from bulk quantities of chemical based upon the requirement. She submitted that applicant/accused has accepted that the said powder was procured by him and it is sufficient evidence against the applicant/accused. She further submitted that the applicant/accused has not denied that he is the owner of chemical factory as per the statement of Parag Mehta from where mephedrone was supplied.

5. Perused the complaint, statements of the witnesses and panchnama. In the panchnama, the fact that panchas have signed the samples is not mentioned. However, as submitted by learned counsel for respondent no. 1/NCB that the panchas along with three employees of the factory and Investigating officers have signed on the samples, is accepted and it is not a very material fact going against the prosecution. As per the

submissions of learned senior counsel for the applicant/accused, though the work of panchnama stopped at 7 p.m. on 28th February, 2016, the panchas did not conclude it on that day and they did not sign below it and NCB officers ought to have started a fresh panchnama as Part 2 can be considered at the stage of trial, as there is mentioned in the panchnama that NCB officers could not proceed that panchnama on 28th February, 2015 after 7 p.m. as electricity went out. The complaint of Mr. Akshay Hunurkar, Intelligence Officer, NCB, Mumbai discloses that Section 38 of N.D.P.S. Act is not applied. Moreover it gives a history of the earlier seizure of mephedrone at Mira Road and Andheri and there was disclosure by one Parag Mehta that seized mephedrone was supplied by Rohan Gawans, who is the son of applicant/accused. It is mentioned that for the purpose of search of factory owned by applicant/Prabhakar Gawans, he was telephonically contacted and the search was conducted without any resistance and they have collected 76 samples. When NCB received positive report of THC from one of the samples, they again went to the factory. It is to be noted that the godown and laboratory was closed. They seized 58 gms of THC, psychotropic substance. After going through the complaint and the statements of employees of the factory, it appears that access to the godown and laboratory was open to some of the employees. The applicant/accused was not staying at Mahad but he is the resident of Mumbai. His son Rohan, who is facing allegations as a supplier of mephedrone which was seized, was also having access in the

factory. On perusal of the statements of Vinod Parab, Bhaskar Thoke and Rahul Kale, though they have mentioned that unlabelled drums containing chemicals were brought in the factory, there is no specific mention as to what was that chemical and whether out of that chemical, this THC was prepared. The learned counsel for respondent no. 1/NCB relied on the statement of Prabhakar dated 7th May, 2015 wherein he has stated that he had full knowledge of the chemicals that are brought into the factory. This statement is not going against him. She also relied on the statement of Prabhakar Gawans dated 10th February, 2016 wherein he has stated that he recognized the seized white powder has been procured by him and he has further stated that the substance in research and development were procured from bulk quantities on the basis of requirement. This statement at this stage is not to be just read in isolation but also to be read along with his statement dated 11th February, 2016 where he has denied that he did not prepare THC and it might be due to contamination or any other person might have brought THC in the factory. I rely on the statement of Parag Mehta in which he has specifically mentioned that it was Rohan, son of applicant/accused, who offered him the supply of mephedrone and he had supplied him from time to time.

6. In the course of argument, learned Senior counsel has pointed out that the compliance under section 77 of N.D.P.S. Act is not done by the prosecution. He submitted that approval of both the Houses of the

Parliament in respect of substitution of THC at Sr. No. 13 in the Schedule under section 83 of the Act is not produced by the prosecution. Learned counsel for NCB has relied on section 3 of N.D.P.S. Act where the Parliament has power to omit and add any psychotropic substance in the Schedule. She submitted that as the Parliament is empowered under the Act, then Sr. No. 13 was substituted. She produced the Schedule of the old Act and submitted that THC was already mentioned at Sr. No. 13 from the beginning of the Act and therefore, it does not require any approval of both the Houses of the Parliament.

7. It is the stage of deciding the Bail Application and, therefore, this issue is not discussed and decided at this stage, as much deliberation is required on it, which can be raised and decided at the time of trial. However, it is to be noted that the prosecution has discussed 17 documents along with complaint on which they are relying. However, at the time of submissions, the learned counsel for NCB has relied on 3 more statements of witnesses, namely, Vinod Parab, Rahul Kale and Bhaskar Thoke and one more statement of applicant/accused dated 7th May, 2015. In Criminal trial, it is a must for the prosecution to supply the documents to the accused on which they are relying except wherever secrecy is allowed. Thus, considering the evidence, I am inclined to grant bail to the applicant/accused on the following terms and conditions:

ORDER

- (i) Application is allowed.
- (ii) The applicant/accused be enlarged on bail on furnishing P.R. Bond in a sum of Rs.1,00,000/- with one or two solvent sureties in the like amount;
- (iii) The applicant shall not tamper with the evidence;
- (iv) The applicant shall attend all the Court dates;
- (v) The applicant shall not commit any offence under N.D.P.S. Act;
- (vi) The applicant shall not abscond or leave India without prior permission of the trial Court and furnish his permanent address to the Investigating Officer alongwith documentary proof of his address;
- (vii) In the event of breach of any of the above conditions, the prosecution will be at liberty to move the Court for cancellation of bail.

8. The Application for bail stands disposed of on above terms.

(MRIDULA BHATKAR, J.)