

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.2138 OF 2017

Sunil Bhagwandas Dhutiya ... **Applicants**

V/s.

The State of Maharashtra ... **Respondent**

.....

Mr.Subodh Desai i/b. Patil Associates, Advocate for the Applicants.

Ms.Veera Shinde, APP for the Respondent/State.

....

CORAM : A.M.BADAR J.

DATED : 14th NOVEMBER 2017.

P.C. :

1 The applicant/accused in NDPS Special Case No.99 of 2017 arising out of Crime No.5 of 2017 registered with Anti Narcotic Cell, Azad Maidan Unit, Mumbai for offences punishable under Sections 8(c) 22(b),(c) and 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “NDPS Act” for the sake of brevity), by this application, is seeking his release on bail.

2 Heard the learned Advocate appearing for the applicant. He drew my attention to the provisions of Section 41(2) as well as Section 42 of the NDPS Act and argued that the charge-sheet does not show that the empowered Gazetted Officer

had authorized the subordinate officer to effect arrest and search of the accused. The learned advocate further argued that when the arrest and search was effected at 9.45 p.m. of 10/02/2017, there is no compliance of further proviso to Section 42 of the NDPS Act as the officer effecting search and arrest had not recorded his reason to believe that search warrant cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender. Therefore, due to non-compliance of mandatory and stringent provisions of the NDPS Act, there cannot be a reasonable ground for believing that the applicant is guilty of the offence and as such he is entitled for bail.

3 The learned Additional Public Prosecutor opposed the application by pointing out proviso to Section 41(2) of the NDPS Act. She drew my attention to the information transmitted in writing to the Assistant Commissioner of Police and argued that this amount to sufficient compliance of proviso to Section 41(2) of the NDPS Act as the station diary Entry No.13 recorded at the station diary of Anti Narcotic Cell Unit at 5.00 p.m. of 10/02/2017 shows that superior officer had orally directed Police Inspector Bhalekar to verify the information and to effect the raid. The learned Additional Public Prosecutor further argued that statement of Nikhil Desai shows that in the bag in the vehicle of the present applicant a summons dated 16/09/2016 sent by Narcotics Control Bureau was found and, therefore, the applicant is not entitled for bail.

4 I have carefully considered the rival submissions and also perused the entire charge-sheet.

5 The applicant is facing trial for the offences punishable under NDPS Act. In such case, as per provisions of Section 37 of the said Act, the applicant claiming bail can be released only when there are reasonable ground for believing that he is not guilty of the alleged offence and that he is not likely to commit any offence while on bail.

6 Let us, now examine the prosecution case against the present applicant. The charge-sheet shows that at 16.25 hours (i.e. 4.25 p.m.) of 10/02/2017, while on duty, API Prashant More of Anti-Narcotic Cell had received a categorical information regarding the psychotropic substance – Mephedrone (hereinafter referred to as 'MD' for the sake of brevity). The charge-sheet shows that the information was to the effect that a person named Sunil aged about 40 years with his associates is coming by a Mahindra XUV Car No.MH-01-BF-505 at the premise of the Infinity Mall for selling MD to the customers between 9.30 p.m. to 10.00 p.m. of that day. At about 4.35 p.m. of that day, this information was recorded in the Information Book. It was informed to Police Inspector Bhalekar and Senior Police Inspector Vernekar. At 4.45 p.m.. station diary entry regarding the information was taken by API Bodhe. Then, at 5.00 p.m., Senior PI – Vernekar telephonically

informed the Senior Officer from the office of the Deputy Commissioner and Joint Commissioner of Police about the information received. The report in writing was then sent to the senior officer through Police Head Constable Sawant and it has addressed to the Assistant Police Commissioner. According to the prosecution case, then seniors from the Police Department ordered that let the Police Inspector Bhalekar and his team verify the information and to take necessary action in pursuant thereto. This is reflected in the station diary entry taken at 5.00 p.m. of 10/02/2017. The letter addressed to the Assistant Commissioner of Police and this consequent entry, according to the learned Additional Public Prosecutor, constitute compliance of Section 41(2), which deals with authorization to the empowered officer to effect arrest and seizure.

7 The charge-sheet further shows that then the police team left the police station and vehicles were parked at the City Mall. By walking, they went to the Infinity mall and took the position. At 9.45 p.m. of 10/02/2017, Mahindra XUV four wheeler vehicle bearing registration No.MH-01-BF-505 came on the spot. One person alighted therefrom. Another person came near him. According to the prosecution case, the person alighted from the four wheeler vehicle is applicant Sunil Dhutiya, whereas the another person is co-accused Viki Nadar. Both were apprehended by encircling them. They were informed of their

right as envisaged by Section 50 of the NDPS Act and necessary communication in writing was served on both of them. They both declined to avail that right.

8 According to the prosecution case, applicant Sunil Dhutiya was found in possession of 75 grams of MD in a black plastic bag whereas co-accused Viki Nadar was found in possession of 25 grams of MD. After drawing the samples, the said material came to be seized. Thereafter, the vehicle by which applicant Sunil Dhutiya came on the spot came to be searched and it was found to be containing 900 grams of the MD. Two samples weighing 5 grams were drawn and seized. The seized substance was also sealed. In the search of the vehicle of the applicant Sunil Dhutiya a summons under Section 67 of the NDPS Act dated 16/06/1996 was also found.

9 This is how the crime in question came to be registered against the present applicant and the charge-sheet is filed against him.

10 The prosecution case itself reflects that prior to five hours of actual arrest and seizure of the contraband, the Anti-Narcotic Cell has received the specific information at 4.25 p.m. of 10/02/2017 itself that the applicant/accused is coming in the Infinity Mall by a vehicle for selling the contraband in between 9.30 p.m. to 10.00 p.m.

11 The officers of the Anti-Narcotic Cell, as such, were alive to the fact that they had to effect the arrest and seizure of contraband if the information is found to be true, five hours before effecting the raid. As such, there was sufficient time with the prosecuting agency to seek authorization for effecting the arrest and seizure, if required in the event the trap is found to be successful.

12 The learned Advocate for the applicant placed reliance on paragraph 7 of the Judgment in the matter of **Louis Obioha v. Narcotic Control Bureau** reported in **1997(1) Mh.L.J. 442**, which reads thus :

“7. It is clear from the reading of Section 41(2) of the said Act that when the officer empowered under the said Section decides to exercise powers under the said Section, he must have reason to believe that an offence under Chapter IV of the said Act has been committed, and in order to have such reason to believe, he must either have personal knowledge about the alleged commission of offence or information given by somebody and taken down in writing regarding the same. In other words, it is not sufficient merely to say that the information was given to the officer by somebody but it is necessary to reduce the same in writing in order to make good his belief about the commission of offence under

Chapter IV of the said Act. If the Officer proceeds to act under Section 41(2) without any reason to have such belief then his action would be contrary to the provisions of the said Act. In the absence of any reason to have such belief, if the officer, who under the purported action under Section 41(2) of the said Act, authorises his subordinate to search and/or arrest the accused, he does so, in violation of specific provisions in respect of his powers to act under Section 41(2) of the said Act.”

13 The learned Advocate further placed reliance on paragraph 15 of the Judgment of the Honourable Apex Court in the matter of **Roy V.D. v. State of Kerala** reported in **(2000) 8 Supreme Court Cases 590**, which reads thus :

“15. It is thus seen that for exercising powers enumerated under sub-section (1) of Section 42 at any time whether by day or by night a warrant of arrest or search issued by a Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class who has been specially empowered by the State Government in that behalf or an authorisation under sub-section (2) of Section 41 by an empowered officer is necessary. Without such a warrant or an authorisation, an empowered officer can exercise those powers only between sunrise and sunset. However, the proviso

permits such an empowered or authorised officer to exercise the said powers at any time between sunset and sunrise if he has reason to believe that such a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender and he records the grounds of his belief.”

14 Bare perusal of provisions of Section 41(2) of the NDPS Act makes it clear that if the arrest and seizure is to be effected between sunset and sunrise, the empowered officer of the gazetted rank if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any person has committed an offence punishable under the provisions of NDPS Act, he may authorize the subordinate officer to arrest such person and search a conveyance. Further proviso to Section 42 deals with the eventuality when such compliance cannot be done probably for want of time. It provides that if the 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 the escape of an offender, the officer may enter and search such conveyance at the time between sunset and sunrise after recording grounds of his belief.

15 In the case in hand, though time of five hours was available with the Anti-Narcotic Cell for getting compliance of Section 41(2), the same does not appear to have been done, from

the charge-sheet. Though the officer was aware at 4.25 p.m. itself that the arrest and seizure was to be effected after sunset i.e. in between 9.30 p.m. to 10.00 p.m. of that day, he has also not recorded the grounds of his belief as contemplated by further proviso to Section 42 of the NDPS Act.

16 In this view of the matter, bar of Section 37(1)(2) of the NDPS Act is not applicable to the case in hand and *prima facie*, it is revealed that because of non-compliance of the mandatory provisions of the NDPS Act, there are reasonable ground for believing that the present applicant is not guilty of the alleged offence.

17 The entire charge-sheet does not reflect any criminal antecedent against the present applicant. Finding of a summons dated 16/09/2016 issued under Section 67 of the NDPS Act in the vehicle by which the applicant allegedly came on the spot cannot be construed as his criminal antecedent. Therefore, it cannot be said that if the applicant is released on bail, he may commit similar offence in future.

18 In this view of the matter, the following Order :

- (i) The application is allowed.
- (ii) The applicant/accused in NDPS Special Case No.99 of

2017 arising out of Crime No.5 of 2017 registered with Anti Narcotic Cell, Azad Maidan Unit, Mumbai for offences punishable under Sections 8(c) 22(b),(c) and 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985, is directed to be released on bail on his executing P.R. Bond in the sum of Rs.50,000/- and on furnishing one or two surety in the like amount.

(iii) As a condition of this Order, the applicant shall not tamper with the prosecution evidence.

(iii) The applicant/accused shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case, so as to dissuade him from disclosing such facts to the court or to the Police Officer.

(iv) The applicant should cooperate the trial Court for expeditious disposal of the Special Case pending against them.

(v) The applicant/accused should not repeat similar crime in future. If it is found that the applicant is repeating commission of similar offence in future, the prosecution is at liberty to get the bail of the applicant cancelled.

(vii) The applicant/accused should surrender his passport to the Anti-Narcotic Cell, Azad Maidan Unit, Mumbai and he shall not leave India without prior permission of the trial Court.

(A.M.BADAR J.)