

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.2513 OF 2016

Alpesh Hemant Gohel

Applicant

versus

Narcotic Control Bureau and another

Respondents

Mr.Ayaz Khan for Applicant.

Ms.Yasmin Katpitia with Ankeeta Appanna for Respondent no.1.

Smt.J.S.Lohokare, APP, for State.

CORAM : PRAKASH D. NAIK, JJ.

DATE : 12th July 2017

PC :

1. This is an application for bail in connection with NDPS Special Case No.106 of 2014 pending before the Court of Special Judge for NDPS at Mumbai. The Applicant was arrested along with the co-accused on 19th December 2013 for offences under Section 8(c), 20(b), 21(b), 22(c) and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short).

2. The prosecution case, in brief, is as follows :

a) On 17th December 2013, the officers of the Narcotic Control Bureau ('NCB'), received information that persons named Alpesh Gohel and Mihir Gohel, residents of Ibrahim Manzil House, Versova Bazar Lane, New Fish Market, Andheri (West) are receiving/delivering substantial quantity of Cocaine, Brown Sugar, Contrabands under the NDPS Act at round 4 to 5 a.m. on 18th December 2013 on the given address. The information was disclosed

that they possess white lancer car bearing registration number MH-02-AK-8247 which is probably stolen vehicle. It was also informed that both the persons are running a laundry namely Golden Wash and Care at Shop No.8, Sahil Queen Building, Cross Pakhadi, Versova, Andheri (West), Mumbai. It was also informed that there is possibility of concealing contraband in the car and laundry;

(b) The said information was typed on computer and was placed before superior officer who directed to conduct the raid under the supervision of intelligence officer Akshay Hurunkar. Accordingly, search warrant was issued by Zonal Director on 17th December 2013 for a period of two days. Based on the above information, the Respondents visited the residential address in the information along with the panchas. They noticed both the persons whose names figured in the information, were present in the said house. On taking search of the residential premises, the officers found two plastic pouches kept in fridge with labels on them. The officer inquired with the accused regarding the contents of the plastic bags, to which both of them informed that they were not aware where did it come from;

(c) The officer cut opened one of the plastic pouch which was scotch taped by a transparent plastic bag and inside the plastic bag, one label was affixed on which certain contents were written as mentioned in the panchanama. The plastic pouch contained white crystalline power of 70 grams. It gave positive test for Amphetamine. The two samples of 5 gms. each were prepared and marked as S-I and S-II. The bulk quantity was marked as 'A'. The same was packed and sealed with NCB seal No.3. Similarly second plastic pouch was opened having the same description as mentioned above. On opening the same, it was found with white powder of 41 gms. It gave positive test for Cocaine. The two samples of 5 gms. each were prepared, same were sealed with

NCB seal No.3 and marked as S-III and S-IV. The bulk quantity was marked as 'C' and the transparent scotch taped plastic bag was marked with label P-1;

(d) The officers then took search of premises in which certain documents were recorded. Same were seized under panchanama along with contraband articles. The panchanama commenced at 4 a.m. and was completed at 11 a.m. During the course of panchanama, one more person was present in the premises, who disclosed his name as Ravi Pravin Solanki;

(e) Subsequently the officers and panchas went to the business premises of the accused namely Golden Wash and Care at Shop No.8, Sahil Queen Building, Cross Lane, Versova, Andheri (West), Mumbai. They found the said business premises was closed and on knocking the door, one person namely Santosh Kumar Nirmal opened the premises. The said person was employee in the said business premises. The officer thereafter took search of the laundry and they found yellow colour pillow and bedding in plastic bag. The officer on handling realized that it contains some incriminating article. The same was cut opened and a plastic packet was recovered. The said plastic packet was rapped in a transparent tape with a white colour label affixed on which certain descriptions were written. The officer cut opened the plastic pouch and recovered 110 gms. of white colour crystalline power concealed in a pillow which was received for washing/dry-cleaning. On testing the same, it was found to be positive for Amphetamine. The samples were drawn;

(f) Thereafter the team went to the white coloured lancer bearing registration No.MH-02-AK-8247 which was parked at some distance from the laundry. The officer asked the Applicant-accused as

to who is having the key to open the said car. The search of the dickey of the vehicle resulted in recovery of two packages. First packet was in white cloth parcel bearing a label containing 10 square shaped bricks. The second pack bearing label contained 10 round and oval shaped substance was concealed in a bridgestone tyre tube. On testing the same, it was found to be Charas. On weighing the said contraband, it was found to be of 2 kgs. Two samples of 24 gms. each were drawn. They were marked as S-VII and S-VIII. The bulk was marked as 'H'. The samples were drawn by the investigating machinery;

(g) The muddemal was deposited in the godown. The intelligence officer then prepared search and seizure report and same were placed before superior officers for compliance of Section 57 of the NDPS Act. The investigating officer then recorded the statement Ravi Solanki as well as other persons. The statement of accused no.1 was recorded on 19th December 2013 by the intelligence officer and was placed under arrest on 19th December 2013. The statement of Applicant no.2 was recorded on 19th December 2013 by the intelligence officer and was placed under arrest on the same day. Thereafter again the statements of the accused no.1 were recorded on 23rd December 2013 and 25th December 2013. The second and fourth statement of the Applicant-accused were recorded on 21st December 2013 and 24th December 2013. The statement of owner of laundry premises was also recorded by the intelligence officer. The statement of Balraj Chopra, his wife Pinky Chopra and servant Kavita Kaur were also recorded on 2nd May 2014 and 3rd May 2014;

(h) The samples were sent to DYCC Mumbai on 20th December 2013. Vide reports it was indicated by DYCC that samples 'S-III' (Cocaine) and 'S-VII' (Charas) were positive, however, the samples S-1 and S-5 have stated to be the substance of nitrogen bearing

organic compound. Hence, NCB sent the second set of samples to CFSL Hyderabad on 13th February 2014. The samples were as to S-2, S-4, S-6 and S-8. CFSL Hyderabad sent a letter to NCB stating that the seal number is mismatching with the samples in the present case. The NCB again sent a letter with sample on 13th March 2014 which was accepted by CFSL Hyderabad on 14th March 2014. On completing the investigation, the prosecution filed a complaint before the Special Judge taking NDPS matters at Mumbai.

3. The Applicant and the co-accused preferred application for bail before the Special Judge, at Mumbai vide Exhibit-11 and Exhibit-10. The said applications were rejected vide order dated 31st May 2016. Thereafter the charge was framed on 20th June 2016. The Special Judge framed the charge under Section 8(c) r/w S.21(b) for sample S-3 (Cocaine), S.20(b)(ii)(C) for sample S-V (Charas), and S.29 of the NDPS Act. The Trial Court did not frame the charges for 180 gms. of Amphetamine which was recovered from the house search panchanama i.e. 70 gms. and laundry panchanama i.e. 110 gms. as the samples were sent to CFSL, Hyderabad without the permission of the Court.

4. The co-accused applied for bail once again in view of the order framing charge. The said application preferred by co-accused vide Exhibit-21 was allowed and he was granted bail by the Special Court vide order dated 15th July 2016. The Applicant also preferred an application for bail before the Trial Court vide Exhibit-28. The said application came u p for hearing before anoter Judge. It was contended that in view of framing of charge, there is change in circumstance and, therefore, the successive application can be preferred by the Applicant. The application was rejected by the Special Judge vide order dated 23rd November 2016. The Special Judge was pleased to observe that the said application cannot be considered as the earlier application was

rejected by the Trial Court and it would amount to reviewing the earlier order.

5. Learned counsel for Applicant submitted that the Applicant has been falsely implicated in this case. It is submitted that the co-accused has been granted bail by the Special Court for non-compliance of Section 42 of NDPS Act. There is violation of Section 42 in respect of the seizure from the house. It is submitted that there is no explanation as to how panchanama recorded prior to recovery of drug reflects that panchas were informed that the Applicant and co-accused residing at the address mentioned in the information are having Cocaine, Amphetamine and Charas in the said premises. The Amphetamine and Charas were not reflected in the information. The information note did not disclose the age of the accused. However, the panchanama prior to search reflects the age of the Applicant and the co-accused. The information note did not disclose the house number in which the officers are going to conduct the raid. However, the panchanama discloses that the panchas were informed about the house number prior to visiting the house of the Applicant and the co-accused. The search warrant which was issued by the Zonal Director on 17th December 2013 mentioned the house No.202. However, the information note did not reflect the house number. The information disclosed to the panchas in the panchanama is only in respect of the presence of the drugs in the house premises and not in the business premises i.e. laundry and the car as reflected in the information note. It is further submitted that the search and seizure report in respect of residential premises reflects that the officer had received specific information of Cocaine and Amphetamine being delivered/received along with the house number, floor and address i.e. Bazar Galli which is not forming part of the information. It is submitted that the quantity of Cocaine i.e. 41 gms. is alleged to have been recovered from the house, however, search

panchanama shows non-commercial quantity and rigors of Section 37 of NDPS Act are not attracted. The prosecution case also reflects that the Applicant has no knowledge of the drugs. It is submitted that as regards the 2 kgs. of Charas allegedly seized from the car in the present case, the Applicant is not the registered owner of the car. The statement of the registered owner is not recorded by the investigating machinery. The prosecution case also reflects that the Applicant had no knowledge of the drugs in the car. It is submitted that according to the information note, the Applicant possessed white lancer car bearing registration No.MH-02-AK-8247 which is probably a stolen vehicle and there is possibility of concealing contraband in the car. However, search and seizure report states that there was a specific information that contraband namely Charas is to be delivered/received in a white lancer car. It is submitted that the Applicant has been falsely implicated in the present case at the behest of one Balraj Chopra, an influential person. The panchanama and statement of the Applicant reveals that he had no knowledge regarding the contraband drugs recovered on 18th December 2013. The Applicant is victimized for having an affair with one Pinki Chopra who is the wife of Balraj Chopra. The Applicant has tendered an explanation in his statement as to why and how the Applicant is being involved in the present case. The said fact was corroborated by the photographs and letters which are also annexed to this application. It is further submitted that right from inception, it is the claim of the Applicant that he has been falsely implicated at the instance of Balraj Chopra in view of relationship of one of the Applicant with Pinky Chopra, wife of Balraj Chopra. The prosecution has recorded statement of Balraj and Pinky Chopra, who did not accept the claim of the Applicant. However, no inquiry or investigation was carried out in that regard. It is further submitted that after filing of the complaint, accused no.1 had preferred an application for de-sealing the residential premises and the same was allowed by the Trial Court vide

order dated 13th September 2014. After de-sealing the premises, the Applicant had produced several photographs and letters which were in the premises of Applicant before the Special Court to prove the claim and negate the stand of Balraj Chopra and Pinky Chopra. It is also submitted that mobile phone of Applicant was seized and further the prosecution has written to mobile companies to provide call data. Yet they have not chosen to file the call data as it would corroborate the stand of the Applicant.

6. The learned counsel for Applicant brought to the notice the search and seizure report dated 18th December 2013 which has been annexed to the application at page 202. In the said report in the introductory paragraph it has been mentioned that on the basis of specific information that contraband namely Cocaine and Amphetamine, both narcotic drugs covered under the NDPS Act are to be delivered/received at the premises of Mr.Mihir Gohel and Mr.Alpesh Gohel of 202, 2nd floor, Bazar Galli, Ibrahim House, Versova Village, Andheri (W), Mumbai. It is submitted that the document qua search and seizure report dtd.18th December 2013 submitted for favour of information in compliance of Section 57 of NDPS Act which is annexed at page 204 of the application, is contradictory to the contents of the report which is referred to hereinabove. In the subsequent report, it is stated on the basis of specific information that contraband namely Charas, a narcotic drug covered under the NDPS Act is to be delivered/received in one white lancer car belonging to the accused. It is submitted that this document is contradictory to the search and seizure report dated 18th December 2013. It is submitted that this document if read in context with the information note dated 17th December 2013, it is clear that there are contradictions and the report dated 18th December 2013 is false document. It is submitted that in any case, there is no information with regards to Charas and there is

patent violation of Section 42 of the NDPS Act qua the said contraband. The investigating machinery has not produced any document stating that there was information with regards to Charas in the light of Section 42 of the NDPS Act. It is further submitted that the statement of the Applicant recorded vide Section 67 of the NDPS Act was subsequently retracted by the Applicant by preferring an application before the Special Court on 10th March 2014. The learned counsel for Applicant placed reliance upon the decision of Supreme Court delivered in Criminal Appeal No.1233 of 2006 in the case of **State of Rajasthan Vs. Jaj Raj Singh @ Hansa**. It is submitted that in the said decision, the Supreme Court has considered the issue of non-compliance of Section 42 on account of discrepancy in the information recorded by the officers. It is submitted that the present case is similar to the case decided by the Supreme Court. It is further submitted that the Supreme Court in another decision has also considered the issue of non compliance of Section 42 of the said Act, can be considered at the stage of grant of bail. It is, therefore, submitted that considering the aforesaid circumstances and by looking into the fact that there is violation of Section 42 of the NDPS Act, the Applicant may be released on bail.

7. Learned counsel for NCB strongly opposed the application for bail. It is submitted that there is sufficient compliance of Section 42 of NDPS Act. It is submitted that the prosecution has made out a prima facie case which involves the Applicant in the said crime. It is submitted that the co-accused has been granted bail by the Special Court by misinterpreting the provisions of law. It is submitted that earlier application preferred by the Applicant as well as the co-accused was rejected by the Special Court and only on the ground that the charge was framed against the said accused was considered as a change in circumstance for granting bail to the said co-accused. The prosecution has established that there is recovery of contraband at the

instance of the Applicant and therefore, he is not entitled for bail. It is submitted that there is no violation of Section 42 of the said Act. The information was received by the officer and the same was recorded and put up before the superior officer and therefore, there is sufficient compliance of provisions of law. The discrepancies as pointed out by the learned advocate for the Applicant with regards to the alleged variations in the information, cannot be considered as a ground for bail. It has to be tested in the evidence during the course of trial. It is submitted that after the charge was framed, the evidence of the first witness is being recorded and the prosecution has proceeded with the trial. The prosecution must be given an opportunity to lead the evidence and to prove the charges against Applicant-accused. It is submitted that since the trial has already commenced, the prosecution cannot be compelled to open up its case at the stage of grant of bail. The learned counsel pointed out the information which was recorded on 17th December 2013. It is submitted that there was no necessity of recording any information that Charas is likely to be delivered or is in possession of the accused persons. The information categorically mentions that a specific information is received telephonically indicating that two persons namely Alpesh Gohel and Mihir Gohel are receiving/delivering substantial quantity of Cocaine, Brown Sugar, Contrabands under NDPS Act at around 4 to 5 a.m. on 18th December 2013 on the given address. It is further stated that the information was received that the said persons possessed white coloured Lancer motor vehicle bearing registration No.MH-02-AK- 8247 which is probably a stolen vehicle and it was also informed by the informant that Alpesh Gohel and Mihir Gohel are running a laundry namely Golden Wash and Care at Shop No.8, Sahil Queen Building, Cross Pakhadi, Versova, Andheri (West), Mumbai. It was also informed that there is a possibility of concealing contraband in the said car and laundry. It was therefore submitted that the information which was received by the

officers of NCB was recorded and it was forwarded to the superior officer. In the said information itself, it has been categorically stated that there is possibility of concealing contraband in the said car and laundry. In pursuant to the said information, the contrabands which are subject matter, as stated above, have been recovered. It is therefore submitted that there is sufficient compliance of Section 42 of the NDPS Act. The argument advanced by the advocate for the Applicant that there is no information recorded under Section 42 of the NDPS Act qua the contraband of Charas is devoid of any merit. The aforesaid information is sufficient compliance of Section 42 and in pursuant to recording of the said information that there is a recovery of the Charas and the other contraband, as stated above. It is submitted that the embargo enshrined under Section 37 of NDPS Act will be attracted and in view of that the Applicant is not entitled for bail. It is further submitted that as per Section 35 of the NDPS Act, in any prosecution for an offence under the Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state. The accused can prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. The stage is yet to come and it will be open for the accused to lay down his defence during the course of trial. It is further submitted that the statement of the Applicant-accused was recorded under Section 67 of NDPS Act. It is submitted that the Applicant-accused has admitted the fact that there was recovery of the said contraband. However, he has not accepted the fact that he had a knowledge of the contraband which were found in the car and the other premises as stated by the prosecution. The learned counsel further pointed out that the Applicant-accused had submitted an application before the Special Court on 10th March 2014 retracting his statement. It is submitted that in the said retraction application, it is stated that the Applicant and the co-accused were taken to NCB office at Ballard Pier, where they were

tortured mentally as well as physically. The officer identified as Mr.Dhole who compelled the Applicant and the co-accused to sign about seven blank papers on which the Applicant rightfully assumed the so called confession statement was duly typed/written. On the basis of the said averments, it is submitted that there was no denial about statement being recorded by the NCB officers. In the same application, it was stated that the confession statement signed and filed by the Applicants in the Court, is obtained by investigating authorities from the Applicant by application of coercion and force and the Applicant hereby withdraws the same on valid ground. This shows that the statement was recorded by the investigating officers. As stated above, in the earlier paragraph, however, the Applicant had stated that some blank papers were taken by one of the officer who identified as Mr.Dhole. It is submitted that in the light of the aforesaid evidence, which is collected against the Applicant, the prosecution has made out a case to prove the charges against the Applicant and therefore, the Court should not grant bail to the Applicant. It is further submitted that the decision of the Supreme Court in the case of State of Rajasthan Vs. Jug Raj Singh @ Hansa (supra) which is relied upon by the learned counsel for Applicant, was delivered after recording of the evidence. The accused in the said case were tried before the NDPS Special Court and they were convicted by the Trial Court. They preferred an appeal in the High Court which was allowed.

8. The appeal preferred against the judgment of Rajasthan High Court was dismissed by the Supreme Court by confirming the decision of the High Court in the aforesaid case. The High Court while allowing the appeal, had observed that the secret information which was recorded in the Roznama, it was not mentioned that two persons will come from Jhunjhunu who were carrying powder of Opium, whereas in the information sent to the Circle Officer, which was also received by

the Circle Officer, the above fact was mentioned which was missing in the earlier document. In view of that, Section 42(2) was not complied with. It was also observed that the proviso to sub-section (1) of Section 42 provides that if such officer has reason to believe, he may carry the search after recording the grounds of beliefs, whereas no ground of belief as contemplated by the proviso was recorded in the said case and the search took place after sun set which violates the provisions of Section 42(2) proviso. It was also observed that the jeep was of one of the person and it cannot be treated as public transport vehicle and no evidence was brought on record that there was any permit for public transport vehicle. It is also observed that the secret information from the informer was received and recorded and search was conducted thereafter. It was not a case of conducting the search at public place suddenly. The sealing of material sample was not proper nor the sample of seal was deposited in the stock house. The seal by which material has been sealed had not been kept safe any where. It remained in the possession of the officer who conducted the search and independent witnesses have not supported the case of prosecution at all. The said observations of the High Court were confirmed by the Apex Court. It is therefore submitted by the learned counsel for Respondent that the said observations were made by the High Court in an appeal against conviction. The evidence was laid by the prosecution and while appreciating the evidence, the appellate authority has made the above observations and acquitted the accused. The facts of the present case also cannot be said to be identical with that case which is decided by the Apex Court in the case of State of Rajasthan Vs. Jag Raj Singh (supra). The appeal preferred by the State of Rajasthan challenging the High Court decision was dismissed and the decision of the High Court was upheld by the Supreme Court. It is submitted that the said decision cannot be made applicable in the present case as this is the stage of grant of bail and the trial is yet to be concluded. It is

submitted that the variance in the information note, seizure memo and search & seizure report can well be explained at the time of trial.

9. I have perused the documents on record. The prosecution case is that on 17th December 2013 Mr.Dhole, the officer of NCB, received information that persons named Alpesh Gohel and Mihir Gohel, residents of Ibrahim Manzil House, Versova Bazar, New Fish Market, Andheri (W), were receiving/delivering substantial quantity of Cocaine and Brown Sugar in between 4 to 5 p.m. on 18th December 2013. It was also informed that they possessed white lancer car and are running a laundry by name Golden Wash and Care. There was possibility of concealing contraband in the said car and laundry. The said information was recorded and passed on to the superior officers who directed to conduct raid under the supervision of intelligence officer Mr.Akshay Hurunkar who obtained such warrant issued by Zonal Director on 17th December 2013. On the basis of the said information, the trap was led and house of the accused came to be searched. At that time the accused were found present in the house. Two plastic bags found in their house, out of which one was containing 70 gmns. of Amphetamine contraband and another was containing 41 gms. of Cocaine. The laundry was searched and 110 gms. of Amphetamine came to be seized from the laundry of the Applicant-accused. Subsequently the car was searched and 2 kgs. of Charas came to be seized from the car. Necessary samples were separated and seized. The report u/s 57 of the NDPS Act came to be sent to superior officers. The statements of witnesses were recorded and thereafter the complaint is filed before the concerned Court. The NCB has collected sufficient evidence against the Applicant-accused. The second application preferred by the Applicant before the Special Court was rightly rejected by the said Court, as the earlier application preferred by the Applicant was rejected by the Court. The contention of the advocate for the

Applicant that there is variation in the information received and other documents and the infirmities in the said documents including the information supports the submission that Section 42 is not complied, is devoid of any merit. The argument about the discrepancies/infirmities are variation, is a matter of evidence which can be agitated during the course of trial. The decision of the Supreme Court was delivered in a different context and in any case after a full fledged trial was conducted and the prosecuting agency was allowed to lead the evidence. In the present case, the evidence is yet to be laid and the prosecution should be given an opportunity to lead their evidence to the charges. This is not the stage to appreciate the evidence on the basis of documents and statements, which are on record. The information was recorded by the officers of NCB and it was forwarded to the superior officer. In the information itself it was mentioned that there is likelihood of concealment of contraband in the car and the laundry. In these circumstances, it was not necessary that in the information it should have been stated that the accused are likely to receive/deliver the Charas. Therefore, there is no merit in the submission advanced by the Applicant that there is no compliance of Section 42 of NDPS Act by recording evidence in respect to contraband Charas. The submission advanced by learned advocate for Applicant that the Applicant has been falsely implicated at the instance of one Balraj Chopra as the Applicant was having an affair with his wife, cannot be considered at this stage. There is no evidence that the said persons have implicated the Applicant or have fabricated evidence against Applicant. The defence of the Applicant can be laid during the course of trial and it cannot be appreciated at the stage of grant of bail. The reliance placed on the photographs and letters showing the alleged acquittancee with one Pinky Chopra cannot be accepted at this stage. It is pertinent to note that there is an embargo laid down under Section 37 of NDPS Act which would come into play as there is recovery of commercial quantity

in the present case. For the reasons stated herein, the Applicant cannot be granted bail on the ground that co-accused has been granted bail by Special Court. In the light of the aforesaid circumstances, prima facie, the case is made out against the Applicant and the bail cannot be granted to him. Hence, I pass following order :

ORDER

- (i) Bail Application No.2513 of 2016 is rejected;
- (ii) It is clarified that the observations made in this order are for considering the application for bail and the Trial Court should not be influenced by the same during the trial;
- (iii) Application stands disposed of.

(PRAKASH D. NAIK, J.)

MST