

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL BAIL APPLICATION NO. 1648 OF 2018

Smt Salma Suleman Shaikh	... Applicant
Versus	
The State of Maharashtra	... Respondent

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Mr. Ayaz Khan for the Applicant.
Ms R. M. Gadhani, APP for the State.
Mr. S. R. Mutkule, API, Crime Branch, Navi Mumbai, present.

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CORAM : PRAKASH D. NAIK, J.

DATE : 20th AUGUST, 2018.

P. C.:

1. This is an application for bail in connection with the N.D.P.S. case No. 31 of 2018 pending before the Special Court at Thane. The case arises out of C.R. No.10 of 2018 registered with MIDC Police Station, Turbhe.
2. The applicant was arrested on 8th January, 2018. The offences were registered under Section 8(c) read with 20 and 29 of the N.D.P.S. Act.

3. The prosecution case in brief is as follows.

- (i) On 8th January, 2018, the complainant Police HC Kasam Peerzade attached to Anti Narcotic Cell of Crime Branch, Navi Mumbai received an information at 13.00 hours from his informant that one male and female are coming to sell ganja to their customers between 16.00 to 18.30 hours at Turbhe Naka Road, in front of Nelco Company. Informant had also given description of clothes of both the suspects.
- (ii) HC Kasam Peerzade informed the same to PSI Gole and PSI Gole passed on the said information to Sr.PI Sunil Bajare. PSI Gole reduced the information into the information register. That Sr. PI Sunil Bajare conveyed the said information to ACP and DCP, Crime Branch, Navi Mumbai on phone.
- (iii) At around 13.50 hours Panchas were called in the office. The raiding material alongwith the seal of Sr.PI Property Cell and Anti Narcotic Cell, Crime Branch, Navi Mumbai was carried.

- (iv) Pre-trap Panchnama was prepared which started at 14.00 hours and completed at 14.35 hours.
- (v) The raiding party members reached alleged spot and noticed both persons mentioned in the information at around 16.45 hours. Both the persons were carrying a gunny bag each and were waiting for someone. That they were apprehended by the raiding party member and on enquiry they were identified as present Applicant and Accused No.2 Kishan Pawar.
- (vi) That Sr.PI Sunil Bajaare apprised the Applicant alongwith Co-accused about their right u/s 50 of the NDPS Act i.e. he himself is a Gazetted Officer that the Applicant and co-accused have a right to be searched in the presence of a Gazetted Officer.
- (vii) That WPN Dhangar and lady panch took the Applicant to the house of one Jayanta Aarukha and conducted her personal search. That nothing was found during the personal search of the Applicant. That thereafter

search of the white coloured bag was conducted and it was found to be containing 15 kg 876 gms of Ganja.

(viii) That on search of the bag carried by the co-accused, officers recovered 16 Kg 201 gms of Ganja.

(ix) That one sample of 26 gms each was prepared from each bag recovered from both the Accused. That the samples were marked as A-1 and B-1. That the bulk quantity was marked as A & B. That the sample and the remaining bulk quantity was packed and sealed.

(x) That the contraband was seized under the Panchnama dated 08/01/2018 which was completed at 1820 hours.

(xi) That the present Applicant and the co-accused were placed under arrest and FIR came to be lodged at Turbhe MIDC Police Station, New Mumbai on 08/01/2018.

4. The applicant and the co-accused were arrested. On completing the investigation, charge-sheet has been filed. The

applicant was found in possession of 15 Kg 876 gms ganja which is non-commercial quantity. The applicant and the co-accused preferred bail application at special Court at Thane. The learned Judge allowed the application preferred by the co-accused who was also found in possession of 16 kg 201 gms ganja. However, application preferred by the applicant was rejected on the ground that the report of the police filed by the prosecution indicates that the applicant had already indulged in similar type of offence and has committed this offence while on bail in other cases.

5. Learned Counsel for the applicant rightly submitted that the embargo of Section 37 of the N.D.P.S. Act would not be attracted in view of non commercial quantity allegedly found in possession of the applicant. The Special Court has rejected the application on the ground that there are criminal antecedents against the applicant. Mr. Khan pointed that the decision of this Court in the case of *Noor Mohammed Shaikh Vs Narcotic Control Bureau and another (Criminal Application No. 1617 of 2011)* wherein it was observed that in the absence of rigours of Section 37 the conditions stipulated in Section 437 or Section 439 of the Code of Criminal Procedure, would be applicable. It was also observed

that in accordance with Section 437, Judicial Magistrate can grant bail. However, bail cannot be granted to a person who appears to have been guilty of the offences punishable with death or imprisonment for life. It means in the offences which are not punishable with death or imprisonment for life, bail may be granted by Magistrate. It also provides that if the offence is cognizable and the accused has been previously convicted of the offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he has been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more, but not less than seven years, bail may be refused to him. It was observed that the offence under Section 25-A in respect of controlled substance is punishable with imprisonment which may extend to ten years only. In such cases, bail may be refused if the accused was previously convicted of the offence punishable with death imprisonment for life or seven years. Learned Advocate Mr. Khan submitted that there is violation of Section 50 of the N.D.P.S. Act. He pointed out the contents of the FIR wherein it is stated that the accused was addressed that one of the member of raiding party

was Gazetted Officer. It was then informed to the accused that she has right to be searched by the nearest officers or Gazetted officers. It is pointed out that personal search was carried out. Thereafter, it is alleged that she was found in possession of bag containing ganja. It is submitted that it is not clear as to how the bag has come into existence. At the initial stage, there was no reference of the bag with the applicant. It is submitted that, in any case she has been personally searched and bag was found allegedly with her, which would attract the provisions of Section 50(1) of the N.D.P.S. Act. He relied upon the decision of the Apex Court in the case of *State of Rajasthan Vs Parmanand and another* reported in (2014) 5 Supreme Court Cases 345, wherein, the Apex Court has dealt with similar issue and held that it tantamount to violation of Section 50 of the NDPS Act. He also placed on record the subsequent decision of the Apex Court, wherein, bail was granted to the accused in the case of *Gurnam Singh @ Gagan Vs State of Punjab* delivered in *Petition for Special Leave to Appeal (Crl.) No.4590 of 2015*, relying upon the earlier decision of the Supreme Court in the case of *State of Rajasthan Vs. Parmanand* (supra). He also pointed out the

decision of the coordinate bench of this Court in ***Bail Application No. 1145 of 2015 (Afaque Asif Sayyed Vs. State of Maharashtra)***, wherein bail was granted to the accused for violation of Section 50(1) of the NDPS Act, wherein the Police Inspector being member of raiding party informed the accused that he himself is a gazetted officer and whether the accused would like to have himself searched before another gazetted officer or a Magistrate.

6. Learned APP submitted that the applicant is found in possession of 16 Kg Ganja. The applicant is involved in similar cases in the past. There are three cases registered against her under the N.D.P.S. Act. She tendered the police report which refers to the pendency of cases against the applicant. It is submitted that the applicant is on bail in all those cases and while on bail, this offence was committed by the applicant. It is submitted that the application be rejected.

7. Having heard both sides, I have gone through the documents on record. I have also perused the FIR and other documents, which forms the part of charge-sheet. Admittedly, the

applicant was found in possession of non-commercial quantity of ganja. The Special Court has granted bail to the co-accused. The rigors of Section 37 are not attracted in view of the fact that non-commercial quantity was allegedly recovered from the applicant. The application preferred by the applicant was rejected by the Special Court on the ground that there are antecedents against her. In view of the decision of this Court in the case of **Noor Mohammed Shaikh (supra)** there is nothing on record to indicate that the applicant is involved in the cases which would attract the conditions stipulated under Section 437 of the Code of Criminal Procedure. It is also noted that one of the member of raiding party had informed the applicant-accused that he is gazetted officer and the accused has option of being searched by any other gazetted officer or magistrate. In view of the decision relied upon by the learned Counsel for the applicant, it amounts to violation of provision of Section 50 of the N.D.P.S. Act. In the light of aforesaid circumstances, the case for bail is made out. The application is therefore deserves to be allowed. Hence, I pass the following order.

ORDER

- (i) Criminal Bail Application No. 1648 of 2018 is allowed.
 - (ii) The applicant is directed to be released on bail in connection with N.D.P.S. Case No. 31 of 2018 pending before the Special Court at Thane arising out of C.R. No.10 of 2018 registered with MIDC Police Station, Turbhe on furnishing P.R. bond of Rs.25,000/- with one or more sureties in the like amount.
 - (iii) The applicant is directed to attend the Anti Narcotic Cell, Crime Branch, Navi Mumbai, once in a month on first Saturday between 10.00 a.m. and 12.00 noon till further orders.
8. Criminal bail application stands disposed of.

(PRAKASH D. NAIK, J.)

Shridhar
Marutirao
Sutar

Digitally signed by
Shridhar Marutirao
Sutar
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