

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

CRIMINAL BAIL APPLICATION NO.2563 OF 2017

Abeda Ajij Mandekar	..Applicant
vs.	
The State of Maharashtra	...Respondent

CRIMINAL BAIL APPLICATION NO.2844 OF 2017

Asif Abdul Sayyad	..Applicant
vs.	
The State of Maharashtra	...Respondent

Mr.Dilip Mishra a/w Ms. Zehra Charania i/b Mr. Ayaz Khan for Applicant in BA 2563/2017.

Mr. Ayaz Khan for Applicant in BA 2844/2017.

Mr. S.R. Agarkar, APP for the Respondent.

Ms. Thorat, PI, Crime Branch, Pune.

CORAM : P. N. DESHMUKH, J.

DATE : 10th APRIL, 2018

P.C.:

. As both the applications arise out of C.R. No.288/2016 registered at Yerwada Police Station for the sake of convenience same are heard and decided by this common order.

2. Heard Mr.Mishra, learned counsel for applicant in BA No.2563/2017 and Mr.Ayaz Khan, learned counsel for applicant in BA No.2844/2017. Heard Mr.Agarkar, learned APP for Respondent also perused charge-sheet filed in the present crime.

3. Learned counsel for applicants had submitted that prosecution case is based on information received by PN Vitthal Khilare Bukkle No.2985 that on 11/7/2016 at about 10.00 a.m. one white colour Honda make car having number plate on its rare side only bearing registration number MH 43 N 8396 occupied by two males and one female is likely to cross Sangamwadi road, Moze Parking, Pune and was to proceed to Ahmadnagar after taking one person from this spot, having concealed in it contraband Heroin and thus submitted that mandatory provisions of section 40(1)(2) of NDPS Act are attracted in the present case. However, there is non compliance of said provision. It is further submitted that as per information contraband heroin was likely to be transported in vehicle bearing No. MH 43 N 8396 and on intercepting the same, its search was obtained in presence of witnesses where from its dash board contraband Heroin weighing 2.5 kgs came to be recovered. Learned counsel for applicants by referring to statement of witnesses recorded had also made an attempt to establish as to how vehicle which is alleged to be intercepted at Pune cannot be intercepted at that spot at that point of time and for that purpose relied upon statement of applicant's son viz., Farhan.

4. Lastly, learned counsel for applicants by referring to report of FSL had contended that as per case of prosecution two samples weighing 100 gms each came to be drawn out of which one sample was sent for analysis and as per FSL report quantity of contraband Narcotic Drug Heroin

in 100 gms sample is 0.23% and of psychotropic substance Alprazolam is 1.48%. It is therefore contended that when total quantity of 2.5 kgs of contraband drug which is involved in this crime is considered along with quantity of Narcotic Drug and Psychotropic substance as aforesaid, contraband involved in this crime is below the commercial quantity. As per Government Notification small quantity and commercial quantity of contraband Narcotic Drug Heroin is 5-250 gms and that of Psychotropic substance Alprazolam is 5-100 gms and has therefore contended that as the contraband involved in this crime is below commercial quantity no stringent provision as contemplated in the Act are attracted and even if applicants involvement is established, it would be for having in their possession contraband drug weighing lessor than commercial quantity, and it is thus prayed that application be allowed by imposing suitable conditions.

5. Mr.Ayaz Khan, Learned counsel for applicant in BA 2844/2017 by adopting submissions as aforesaid has further contended that case of prosecution with regard to drawing of samples, its storage and forwarding to FSL is also not convincing at all in as much as in the seizure panchanama it is nowhere stated that samples drawn from the bulk quantity of Drugs recovered from the car were given any identification marks but, has contended that in the requisition memo issued to the stores in-charge for withdrawal of sample packet for being forwarded for its analysis to FSL, it

was marked as “S-1”, same identification mark is also mentioned in the forwarding letter to Chemical Analyzer for which there is no explanation in the entire charge-sheet. It is further contended that though according to case of prosecution, car came to be intercepted on 11/7/2016 as per acknowledgment issued by FSL muddemal sample was received for its analysis on 2/7/2016 i.e. much prior to its seizure. Lastly, it is submitted that even from documents it can be seen that panch witnesses whose services are taken are amenable to police in view of fact that though car was intercepted on 11/7/2016 at around 4.15 p.m., services of same panchas is found utilized while effecting arrest of accused of which panchanama is drawn and concluded on that day at 8.30 p.m. It is therefore summed up submitting that for non compliance of mandatory provision of section 42(1)(2), which are admittedly attracted in the present crime and for submissions advanced as aforesaid, applications be allowed as applicants involvement is full of doubts.

6. Mr. Agarkar, learned APP relied upon the affidavit in reply on record and had contended that from the documents on record being information register and from contents of seizure panchanama there is substantive compliance of section 42(1)(2) of the Act. It is further contended that even otherwise these aspects are not required to be looked into at this stage but can be duly considered on evaluation of evidence at the time of trial and has therefore submitted that since applicants are found

having in their possession 2.5 kg of heroin which is of commercial quantity they are not entitled for bail.

7. In the background of submissions advanced as aforesaid, perusal of information reduced into writing at page 62 of application 2563/2017 reveals that information was received by PN Khilare Bukkle No.2985 that on 11/7/2016 at about 10.00 a.m. one white colour Honda make car having number plate on its rear side only bearing registration number MH 43 N 8396 occupied by two males and one female is likely to cross Sangamwadi road, Moze Parking, Pune and was to proceed to Ahmadnagar after taking one person from this spot, having concealed in it contraband Heroin. Accordingly, car came to be intercepted. As the case of prosecution is based on information received by PN Khilare as aforesaid, strict compliance of section 42(1) (2) of NDPS Act is admittedly attracted in this case. However, bare perusal of information reduced into writing would reveal that same is recorded by PI, Crime branch, Pune, who has not received the same. In addition to that it is material to note that to establish compliance of section 42(2) of NDPS Act PN Khilare, Bukkle No.2985 was required to forward copy of information to his immediate superior officer as in the present case information was received by him from his informer and thus was obligatory for said officer to reduce the same into writing and forward a copy thereof to his immediate superior officer to establish compliance of section 42(1) (2) of the Act. However, in total disregard to

said mandatory provision it is found that information is not reduced into writing by officer who has received it nor copy thereof is sent by him to his immediate superior officer within 72 hours, but is forwarded to PI Crime Branch, Pune. Thus, it is found that there is total non compliance of mandatory provision of section 42 (1) (2) of the Act.

9. Apart from these glaring discrepancy from contents of seizure panchanama it is revealed that two samples of 100 gms each were drawn out of seized quantity of drug were sealed in plastic bags. Remaining bulk quantity weighing 2.300 gms. was separately seized and sealed. It is material to note that in the seizure panchanama there is no mention of muddemal samples of 100 gms each drawn from the bulk quantity having been given any identification mark in any manner. As such muddemal sample packets of 100 gms each which came to be deposited in the stores cannot have any marking. However, muddemal sample packet which was deposited with the store incharge on 11/7/2016 and was withdrawn by issuing requisition memo on 12/7/2016 weighing 100 gms and handed over to PN Sable Bukkle No.2047 for depositing it with the FSL was marked as "S-1" for which no explanation is putforth by prosecution.

10. Similarly, in the acknowledgment issued by FSL, Pune to Investigating Officer description of articles received in FSL what is stated to be one sample marked as Exhibit "A" on 2/7/2016. There is no explanation

even on this aspect as to how identification mark on sample received by FSL was referred as "S-1" and how sample was received in the office of CA on 2/7/2016 though raid is carried out on 11/7/2016. It further doubts case of prosecution. It is also the case of applicants that the information received is false and fabricated as vehicle bearing registration No.MH-43-N-8396 cannot reach to Pune on 11/7/2016 at 10.00 a.m. as from the statement of Farhan it is revealed that he is owner of above numbered car and on 11/7/2016 his mother i.e. applicant Abeda Ajij Mandekar in Bail Application No.2563/2017 along with one Seemab Shaikh of Kalyan left Kalyan in his car at 10. 00 a.m. to proceed to Ahmadnagar. In view of his statement as aforesaid interception of car at Pune at 10.00 a.m. is also not convincing.

11. Considering various above aspects and since there is total non compliance of mandatory provisions of section 42(1)(2) of the said Act, there appears no reason to keep applicants behind bar pending trial, against whom admittedly there are no criminal antecedents and even according to Chemical Analyzer's report as the quantity of contraband Drug Heroin and psychotropic substance Alprazolam found in 100 gms. sample is to the extent of 0.23% and 1.48% respectively when such quantity is considered with total quantity of 2.5 kgs of contraband Drug involved in this crime as it comes below the commercial quantity, applications are liable to be allowed on this count also.

12. In view of facts as aforesaid and for the foregoing reasons applications are allowed as per order below:

ORDER

- i) Applicants be released on bail on their executing P.R. Bond in the sum of Rs.1,00,000/- each with one surety each in the like amount;
- ii) While on bail applicants shall attend Yerwada Police station on first day of each month pending trial;
- iii) Applicants shall not tamper with witnesses. Needless to say that applicants in addition to marking presence as aforesaid shall attend Special Court on the fixed dates for trial without fail.

(P.N. DESHMUKH, J)