

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

CRIMINAL BAIL APPLICATION NO. 3032 OF 2019

Akash J. Jariwala ...Applicant

Versus

1) The State of Maharashtra
2) Union of India
(Customs Narcotic Cell) Pune ...Respondents

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Mr. Ayaz Khan, Advocate for the Applicant.

Mr. Jitendra Mishra, Advocate for Respondent No.2.

Mr. M. G. Patil, APP for the State-Respondent No.1.

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CORAM : PRAKASH D. NAIK, J.

DATE : 22nd January, 2020

PC :

1. This is an application for bail in C.R. No. 3 of 2019 registered on 3rd April 2019 investigated by Customs Narcotics Cell, Pune. The offences were registered under Section 21(c), 29(2)(b) r/w Section 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for Short "N.D.P.S. Act").

2. The prosecution case is that, information was received by the investigating agency that the accused are coming to sell some drugs. The information was reduced into writing on 3rd April, 2019. The information stated that two persons namely Akash Jariwala and Azeem Khan will be coming to sell Ecstasy Pill, Mephedrone & LSD

(stamp form) to potential customer near Phoenix Mall, Viman Nagar, Pune. After recording the aforesaid information it was allegedly provided to the Superintendent Narcotics Cell. Thereafter, they proceeded for arranging Panch witnesses at around 17.20 hrs. The Investigating Officer alongwith other officers saw one Grey Colour Swift Dezire Car vehicle entering from the front side of the phoenix mall inside the parking area. The said car was intercepted by the officers. The investigating Officer along with other officers in the presence of panchas noticed two persons sitting inside the said car. The person sitting in the driver seat, revealed his name as Mohd. Azeem Khan. The person sitting next to driver disclosed his name as Akash Jariwala (applicant). Both were residents of Pune. The Investigating Officer introduced themselves. They were informed about information received by them. They were informed about their right conferred under Section 50 of the N.D.P.S. Act. Search of the vehicle was conducted. During the search of vehicle a small cardboard box with LP(Louie Phillipe) written on it, was recovered from the glove box in the said vehicle. The Investigating Officer in the presence of the Panchas and both the occupants of the vehicle opened the box and it was found to contain two silver colour pouches. The said pouches were opened by Investigating Officer in the presence of the panchas and occupants of the intercepted vehicle

and it was found to contain small stamp like perforated sheet with some colorful designs on it to which on inquiry by the officers about said stamp like article found Mohammad Azeem Khan one of the occupants of the intercepted vehicle informed that the stamp like article is “LSD” a Psychotropic narcotic drug and the second silver colour pouch containing white crystal like powder is “Mephedrone” (MD), also Psychotropic narcotic drug, which he informed before agencies that he had brought the same to Phoenix Mall, Pune to sell to potential customers. Further search of the vehicle resulted in recovery of R.C. book and Aadhar Card of Mohammad Azeem Khan. Investigating Officer then carried out personal search of applicant and during the course of personal search small metallic box with “Impact Mints strong mint sugar free” mentioned on it, was recovered. On opening it in the presence of the Panchas, it was found to contain “pink colour triangular pills”, which on inquiry the applicant, informed that the said small metallic box contain a Psychotropic narcotic drug called “Ecstasy” pill, which is used in party Circle in Pune and also stated that he had brought the said pills to Phoenix Mall, Pune to sell it to potential customers.

3. Investigation proceeded. Applicant and accused No.1 were arrested. On completing investigation, complaint was filed before the Special Judge, Under N.D.PS Act, Pune being numbered as NDPS

Special Case No. 80 of 2019.

4. The applicant applied for bail before the Special Court. The said application was rejected by order dated 24th October, 2019. The primary contention of the applicant is that on personal search of the applicant he was allegedly found in possession of 9 gram. "Ecstasy" pill, which is also called as MDMA. It is submitted that in accordance with N.D.P.S. Act the said quantity is less than commercial quantity. The limit prescribed under the schedule for said drug viz. lesser than commercial quantity is 10 grams. Learned advocate Mr. Khan submitted that material on record do not shows that there was any conspiracy between accused No.1 and accused No.2 or they were acting in connivance with each other or they were to sell the drug to common purchaser. Although the information relates to both the accused and they were found in the same vehicle, there is no evidence to show that the transaction was common or that there was any concert to commit the crime jointly. Learned counsel drew my attention to the statement of the accused recorded under Section 67 of N.D.P.S. Act and submitted that the said statement do not indicate that in any manner there was consensus to sell contraband to the purchaser or they had source the contraband jointly. The supplementary statement of the accused also do not indicated that the operation was joint. It is submitted that the applicant cannot be

held responsible for the contraband which was found in the car. The evidence indicate that the said contraband was alleged to have been kept at the instance of the accused No.1. In fact the prosecution proceeds on the basis that it was in the possession of accused No.1. He was questioned with regards to the said contraband. He disclosed the nature of the said contraband. The car belongs to him which is apparent from the documents found in the car. R.C. book and Aadhar Card found in car belongs to accused No.1. It is further submitted that, assuming that both of them had travelled together in the same vehicle in absence of any evidence that they were indulging in sale of narcotic drugs together, applicant cannot be held liable for the contraband which was found in the car. Thus, the drug which was allegedly found in the possession of the applicant is 9 grams, which is lesser than the commercial quantity. Hence, the embargo laid down under Section 37 of the N.D.P.S. Act is not applicable. He further submitted that the applicant is young boy having no other criminal antecedents. He is engineering student. Although it was alleged that the contraband was to be sold to the students, there is no evidence in that regard. The statement of the Pub owners were also recorded which also do not indicate that the applicant was instrumental in selling such drug which was allegedly used in parties in Pubs. The applicant is in custody from 04th April, 2019. He may be

given chance to reform. The offence is punishable with 10 year imprisonment. He further submitted that in similar cases, this court has granted bail to the accused, on the ground that the felters imposed under Section 37 of N.D.P.S. Act are not applicable. Mr. Khan relied upon the decision by this Court in Bail Application No. 3022 of 2018 dated 7th December, 2018.

5. In support of his submission he relied upon the Judgment of the Hon'ble Supreme Court delivered in the case of ***Amarsingh Ramjibhai Barot V/s State of Gujrat***, He also relied upon the order dated 3rd August, 2006 passed by this Court in application of ***Sangita Y. Gaikwad V/s The State of Maharashtra***, (Criminal Application No. 2597 of 2006); order of this Court in the case of ***Smt. Rashida Iqbal Khan V/s State of Maharashtra*** dated 21st June, 2006, passed in Criminal Application No. 2177 of 2006; orders of this Court, in the case of ***Roshan Munan Sing V/s State of Maharashtra*** (Criminal Application No. 1227 of 2008) order dated 28th September, 2011 passed in Criminal Bail Application No. 498 of 2011, and order dated 6th May, 2014, passed in Bail Application No. 286 of 2014.

6. It is submitted that, in the aforesaid decisions, the Court considered the fact that the information with regards to two persons involved in the narcotic drugs was received and on personal search

contraband were recovered from both the persons and it was held that the contraband cannot be calculated together to hold is as commercial quantity.

7. Learned Counsel for the respondent relied upon the affidavit in reply filed by respondent No.1 opposing this application for bail. It is contented that there cannot be bifurcation of the contraband in the car and contraband recovered from the possession of the applicant. The information was received that both the accused are likely to come for sale of narcotic drugs. They travelled in the same car and during the search the said contraband was recovered. The total quantity recovered from the person of the applicant and from the car will be a commercial quantity. The prosecution has invoked Section 29 of the N.D.P.S. Act. The accused have explained in their statement as to how they have procured contraband. They had purchased the contraband online through dark-net. The source of contraband is common. It is submitted that the submissions advanced by the applicant cannot be considered at this stage. In the decisions relied upon by the applicant, the facts were different. The accused were not found together in conveyance. This case can be distinguished on the facts. He therefore submitted that the application for bail may be rejected.

8. I have perused the documents on record. The information was received by the officer that two persons are likely to come for selling narcotic drugs at Phoenix Mall, Pune and that they were allegedly found in the vehicle. It is pertinent to note that the statements of the accused were recorded under Section 67 of N.D.P.S. Act. The prosecution relies upon statements. On perusal of the said statements it cannot be inferred in any manner that both the accused were conducting the joint operation and that they were acting in connivance with each other. On the ground that they were found together, it cannot be inferred in the absence of any cogent evidence that there was conspiracy. In fact in the statement of accused No.1 recorded under Section 67 of N.D.P.S. Act, he has not even referred to accused No.2 (applicant). He has not stated that they were together for carrying out the transaction of sale of drug. The applicant No.2 however stated that he had travelled along with accused No.1 in the car. There is no admission whatsoever nature that applicant aiding or abetting accused No.1. The car belongs to the father of the accused No.1. The documents such as R.C. Book and Aadhar Card were found in the car. The Investigating Officer had questioned accused No.1 about contraband which was found in the glove box of the car which indicates that he was responsible for the said contraband. The applicant was questioned with regards to the

possession of the drugs which was found on his person. The statement nowhere indicates accused were not even questioned about their connivance in dealing in narcotic drugs. The complaint filed by the respondent refers to call details, conspiracy etc. That there is no evidence to infer that there was conspiracy between both the accused. There is no admission that both were acting jointly. It is also pertinent to note that drugs were different. The prosecution alleges that the source was common. Learned Advocate Mr. Khan pointed out that the source of the drugs viz. “darknet” is the website on which any person who is interested can buy drugs. There is no evidence on record to show that they had jointly purchased the drug from the said website. The role of the accused No.1 and the applicant mentioned in the complaint. The documents which are part of the complaint, in no manner disclose that they were conspirators to purchase and sell the contraband. There is no element of conspiracy to apply Section 29 of N.D.P.S. Act. The elements of conspiracy are plan or scheme embodying means to accomplish object an agreement or understanding between two or more accused etc. which is prima facie lacking. This is not the stage to give finding on that issue, but prima facie the evidence does not disclose that both the accused had common accomplishment by joint operation.

9. The Hon’ble Supreme Court In the case of *Amarsingh*

Ramjibhai Barot V/s State of Gujrat, (SC) the facts indicate that information was received with regards to two persons likely to indulge in narcotic drugs. They were apprehended and on their individual search, contraband were recovered. The Hon'ble Supreme Court in Paragraph 7 & 8 of the said decision has observed that, there was no warrant for the conclusion that there was criminal conspiracy between the accused. There is no evidence to suggest that there was any such abetment/criminal conspiracy within the meaning of Section 29 of N.D.P.S. Act. This Court while granting bail in the decisions referred herein above, more particularly in the case of ***Sangita Y. Gaikwad V/s The State of Maharashtra*** had considered similar issue. In the said decision it was observed that, merely from the fact that drug has been purchased from the same person may not constitute independent evidence of criminal conspiracy. In the other decisions also this Court has considered similar issue and granted bail. The applicant was found to be in possession of 9 grams of MDMA which is less than commercial quantity. The felters under Section 37 of the N.D.P.S. Act would not be applicable. In several decisions on such ground bail has been granted. The applicant is student. There are no criminal antecedents against him. Considering the aforesaid circumstances, case for grant of bail is made out.

10. Hence, I pass the following order :

ORDER

- i) Bail Application No.3032 of 2019 is allowed;
- ii) The applicant is directed to be released on bail in connection with NDPS Sessions Case No. 80 of 2019 pending before the Special Court, Under N.D.P.S. Act, Pune, on furnishing PR. bond in the sum of Rs. 25,000/- with one or more sureties in the like amount;
- iii) It is clarified that the observations made in this order are prima facie for considering the application for bail and the trial Court shall not be influenced by the same during the trial.
- iv) The applicant shall attend Office of Customs Narcotic Cell, Pune Once in a month on every first Monday between 10.00 am. to 12.00 noon till further order.
- v) Bail Application stands disposed of accordingly.

(PRAKASH D. NAIK, J.)