

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPLICATION (ABA) NO.732 OF 2020

(Ashish s/o Sureshrao Gayaki Vs. State of Maharashtra thr. PSO PS Gittikhadan,
Nagpur)

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.*

Court's or Judge's orders.

Mr. C.B. Dharmadhikari, Advocate for Applicant.
Mrs. K.R. Deshpande, APP for Respondent/State.

CORAM: ROHIT B. DEO, J.

DATE: 18th DECEMBER, 2020.

Heard.

2. The applicant is apprehending arrest in Crime 507/2020 registered with Police Station Gittikhadan, Nagpur for offence punishable under section 21(k) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act).

3. Before I advert to the prosecution case and the submissions canvassed by the learned counsel for the applicant Mr. Charuhas Dharmadhikari, it would be necessary to note the provisions of section 37 of the NDPS Act, which read thus:

37. Offences to be cognizable and non-bailable.—
(1) Notwithstanding anything contained in the
Code of Criminal Procedure, 1973 (2 of 1974),—

(a) every offence punishable under this Act

shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27-A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.]

4. The mandate of the legislature is that no person accused of an offence punishable under section 19 or section 24 or section 27-A or for offences involving commercial quantity shall be released on bail unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

The expression 'bail' in section 37 of the NDPS Act would encompass not only regular bail, but also pre-arrest protection which is commonly referred to as anticipatory bail. Indeed to assume otherwise, would not only be illogical, such assumption would militate against the intendment of the legislature. In *Muraleedharan v. State of*

Kerala (2001) 4 SCC 638 the legality of grant of anticipatory bail for offence punishable under section 8 of Kerala Abkari Act fell for consideration. In the said enactment, section 41-A is *pari materia* with section 37 of the NDPS Act and considering the said provision the Apex Court has observed thus:

The above provision is in pari materia with Section 37 of the Narcotic Drugs and Psychotropic Substances Act. This Court has held, time and again, that no person who is involved in an offence under that Act shall be released on bail in contravention of the conditions laid down in the said section (vide Union of India v. Ram Samujh). If the position is thus in regard to an accused even after arrest, it is incomprehensible how the position would be less when he approaches the court for pre-arrest bail knowing that he would also be implicated as an accused. Custodial interrogation of such an accused is indispensably necessary for the investigating agency to unearth all the links involved in the criminal conspiracies committed by the persons which ultimately led to the capital tragedy. We express our reprobation at the supercilious manner in which the Sessions Judge decided to think that “no material could be collected by the investigating agency to connect the petitioner with the crime except the confessional statement of the co-accused”. Such a wayward thinking emanating from a Sessions Judge deserves judicial condemnation. No court can afford to presume that the investigating agency would fail to trace out more materials to prove the accusation against an accused. We are at a loss to understand what would have prompted the Sessions Judge to conclude, at this early stage, that the investigating agency would not be able to collect any material to connect the appellants

with the crime. The order of the Sessions Judge, blessing the appellant with a pre-arrest bail order, would have remained a bugbear of how the discretion conferred on Sessions Judges under Section 438 of the CrPC would have been misused. It is heartening that the High Court of Kerala did not allow such an order to remain in force for long. By the impugned order passed by the learned Single Judge of High Court an unwholesome benefit wangled by the appellant was rightly reversed.

5. The case of the prosecution is that on 18.08.2020, on receipt of secret information, 182 grams and 26 mg Mephedrone (MD) drug was seized from co-accused Vikas @ Sunny, Barkat Ali, Siraj Abdul Sattar Khan and Sk. Akbar Shoukat Ali from an Ertiga car. Co-accused Vikas disclosed that the contraband was owned by the applicant Ashish and himself.

6. Perusal of the pre-arrest protection application moved before the Special Judge reveals that the applicant contended that he is a police informer, that he gave information to NDPS Cell in respect of known drug peddler Madhu Agrawal, the source of the information was leaked, and the applicant suffered an assault. The applicant specifically contended that the present crime is also detected on the basis of information supplied by the applicant. Mr. Charuhas Dharmadhikari strenuously argues, extending the submission made before the learned Special Judge, that the applicant is framed.

7. Mr. Charuhas Dharmadhikari would submit that a day prior to the raid, there was a conference call between the applicant and the main accused Heena, who is a supplier of drugs and Police Constable Nitin Mishra was privy to the conversation. Mr. Charuhas Dharmadhikari invites my attention to the papers pertaining to a distinct crime to substantiate the contention that the applicant is a police informer.

8. It does not appear to be seriously disputed, at least at this stage, that the applicant has indeed worked as a police informer. However, the learned APP Mrs. Deshpande would submit that the applicant has donned a different hat and his complicity in the present crime is crystal clear. Mrs. Deshpande would submit, and produces a chart for my convenience to substantiate the submission, that the applicant made more than 400 calls in the preceding month to the kingpin Heena, without giving any information whatsoever pertaining to the present crime, and there is no conceivable reason for the frequent contact. Mrs. Deshpande further points out that there is ample material on record to show that the applicant stayed with the co-accused in a hotel for two days in near proximity to the raid.

9. Mr. Charuhas Dharmadhikari attempts to give some explanation for the applicant contacting Heena. According to the learned counsel the applicant gave some

information which led to the arrest of one Sharukh who is an accused in a separate crime. I am afraid, while considering pre-arrest protection, particularly when the investigation is ongoing and is at a critical and crucial stage, it would be next to impossible to ascertain or assess the correctness of the rival claims. At this stage, I have no reason to doubt the *bona fides* of the investigating agency or the credibility of the investigation.

10. The settled position is that even regular bail cannot be granted even if the applicant/accused demonstrates a *prima facie* case. A case which is a stronger than *prima faice* case, albeit which may not be proof of innocence, is required to be demonstrated. Reasonable grounds for believing that the accused has not committed the offence would mean that from material on record the court must believe in the existence of sufficient cause to hold that in every probability the accused shall be acquitted. Needless to add, that at the stage of deciding the pre-arrest protection, in a live and ongoing investigation, there cannot possibly be, and indeed if possible there would rarely be, material as would impel the court to record a finding that there are reasonable grounds to believe that the accused is not guilty.

12. While parting with the order, in view of the vehement, and at times passionate, submission that the applicant is framed, I requested the learned APP

Mrs. Deshpande to personally interact with the DCP (Crime), Nagpur. The relevant portion of the order dated 11.12.2020 reads thus:

Since the issue involves the liberty of a citizen, it is expected that the DCP will give due thought to the submission, verify the material on record personally which would include, but not be limited to, the phone calls exchanged between the applicant and the police personnel.

The learned APP Mrs. Deshpande has made a responsible statement, which I accept, that she has interacting not only with the DCP (Crime), with every member of the investigating team including the police constable who is named by the applicant, in the presence of the DCP (Crime) and that as an officer of the Court she personally, and the DCP (Crime), are *prima facie* satisfied that there is no attempt to frame the applicant and that his complicity in the crime is discernible from the material collected in investigation. I may hasten to submit, that this slightly unusual exercise was undertaken only to satisfy the conscious of the court that the fervent submission of Mr. Charuhas Dharmadhikari is bestowed due attention and consideration, and that the input provided has not influenced my take on the entitlement or otherwise of the applicant to pre-arrest protection, which I am denying on the basis of material in the case diary.

13. The application is dismissed.

JUDGE

NSN