IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.323 OF 2020

Kishor Shinh Bhavsinh Rathod .. Applicant

Versus

The State of Maharashtra .. Respondent

WITH

BAIL APPLICATION NO.1200 OF 2022

Hardipsingh Indersingh Gil .. Applicant

Versus

The State of Maharashtra .. Respondent

WITH

BAIL APPLICATION NO. 2483 OF 2021

WITH

INTERIM APPLICATION ST NO. 8445 OF 2022

Bharat Shinh @ Mama Katiya Ranjitsinh Katiya .. Applicant

Versus

The State of Maharashtra .. Respondent

WITH

BAIL APPLICATION NO.2849 OF 2021

Mayur Suresh Sukhdar .. Applicant

Versus

The State of Maharashtra .. Respondent

WITH

BAIL APPLICATION NO. 3646 OF 2021

Jay Mulji Mukhi .. Applicant

Versus

The State of Maharashtra .. Respondent

WITH

BAIL APPLICATION NO. 2955 OF 2021

Sagar Suresh Powale .. Applicant

Versus

The State of Maharashtra .. Respondent

WITH

BAIL APPLICATION NO. 3449 OF 2021

Jai Mulji Mukhi .. Applicant

Versus

The State of Maharashtra .. Respondent

WITH

BAIL APPLICATION NO. 3620 OF 2021

Manoj Tejraj Jain .. Applicant

Versus

The State of Maharashtra .. Respondent

WITH

BAIL APPLICATION NO. 4224 OF 2021

Sushilkumar Aasekanna Aadidravid .. Applicant

Versus

The State of Maharashtra .. Respondent

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Mr. Anil Lalla a/w Aditya Singh i/b Rahul Arote, Tanvi Mahadik for the Applicant, in BA No. 323/2020

Mr. Taraq Sayed with Advait Tamhankar, Ashwini Ashari, Lochan Chandka for Applicant in BA No. 1200/22, BA No. 2849/21, BA 4224/21.

Mr.Vikaram Nanikani a/w Mehul Talesa, Virendra U. Pandey, Prasanna Naboodiri, Roshil Nichani for applicant in BA 3620/21.

Mr. Vivek Punjabi a/w Ms. Kinnani Mehta for applicant in BA No. 3646/21.

Mr.Hrishikesh Mundargi with Madan Gupta for applicant in BA 2483/21 & BA 2955/21.

Mr. Ankur Pahade a/w Sanjay Kokane i/b Shishir Hiray, Spl. P.P for State

Mrs. A.A. Takalkar, A.P.P. for the State/Respondent.

CORAM: BHARATI DANGRE, J.
DATED : 6th DECEMBER, 2022

P.C:-

1 Through the 8(eight) Applications, the applicants/accused charged for the offence punishable u/s.8C, 9A, 22, 23, 24, 25A, 27A, 28 and 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'NDPS Act') seek their release on bail, on the ground that there is no material in the charge-sheet to indict them and hence, their further custody on the investigation being complete, is unwarranted. Another ground which is pressed into service for securing their release is the long incarceration, the applicants/accused having been arrested prior to five years or more.

The applicants who have filed the present Bail Applications are charge-sheeted as accused nos.1, 2, 6, 7, 10, 11, 13 and 14 in FIR No.II-3056/2016.

2 The prosecution case, which has surfaced in the charge-sheet, can be briefly summarized as under :-

On 12/4/2021, secret information was received about two persons arriving in Thane at the mentioned place in one Maruti Swift Car and one Maruti Desire, carrying Ephedrine for the purpose of sale within Thane district. On receipt of the same, a raiding team was arranged and the panchas were called. A pre-trap panchnama was drawn and as per the information received, two distinct cars arrived on the spot, and two persons disembarked the same, and they were found with bags in their hands. This resulted in apprehending the two accused persons, being accused nos.1 and 2.

After carrying the necessary procedure as prescribed under the law, they were found to be in possession of Ephedrine powder. Accused Sagar gave a memorandum search which lead to 180 grams Ephedrine in his house. Name of one Dhaneshwar Swami (Accused no.4) surfaced during investigation as the main conspirator for supply of Ephedrine powder and he came to be arrested with 5.5 kgs of Ephedrine found on his person.

This led the prosecution to a Chemist working in Avon Life Sciences Ltd, Solapur, the owner of the Company being accused no.6 – Manoj Jain. The investigation reveal that Ephedrine was removed from the Company unlawfully with the permission of it's owner for the purpose of preparation of psychotropic substance, and for it's sell in International market. The prosecution allege that search of Avon Life Sciences Company godown led to 9500 kgs of Ephedrine powder. found to be illegally stored for the purpose of preparation of psychotropic substance.

The charge-sheet compile the role attributed to each of the accused with a broader background narrated as above.

3 The prosecution allege that huge quantity of Ephedrine was seized in the search and the accused persons acted as a Syndicate in illegal trafficking of the psychotropic substance, Ephedrine. Fifteen (15) accused persons came to be arrested, whereas one Vijaygiri Goswami, Mamta Kulkarni, Dr.Abdullah came to be arrested and two others are still on the run.

The charge-sheet reflect distinct recoveries from some of the accused persons and the sequence of events reveal the distinct dates of their arrest with the main accused Manoj Jain, being arrested on 27/4/2016, though there is no recovery of contraband from him in person.

The first charge-sheet came to be filed against accused nos.1 to 4 on 9/6/2016, whereas first supplementary charge-sheet came to be filed against accused nos.5 to 9 on 23/6/2016. The second supplementary charge-sheet is filed against accused no.10 on 26/7/2016, whereas third supplementary charge-sheet is filed against accused nos.11 and 12 on 17/10/2016, fourth and fifth supplementary charge-sheet are filed on 12/4/2017 and 28/9/2017, respectively against accused nos.13 to 15 and 16 & 17 in succession. Several attempts were made through distinct applicants for their release, either by filing discharge applications or by filing applications u/s.439 of Cr.P.C.

With the new ground of long incarceration, the present applicants also seek their release with the aid of Section 436A of Cr.P.C.

Heard Mr.Anil Lalla, Mr.Vikram Nankani, Sr. Counsel, Mr.Vivek Panjabi, and Advocate Madan Gupta for the applicants. Special P.P. Mr.Shishir Hirey represent the case of the prosecution.

4 The learned senior counsel Mr.Nankani, would vehemently submit that what is seized in the subject crime is the controlled substance and therefore, at the most, the accused will face the charge u/s.9A of the NDPS Act and the charges levelled against the applicants in the charge-sheet, by no stretch of imagination get attracted as Section 8(c), deals with certain

prohibitions, which prohibit cultivation of cocoa plant or cultivation of opium or any cannabis plant. Apart from this, what is prohibited is production, manufacture, possession, self consumption, purchase, transport of any Narcotic or psychotropic substance, except for medical or scientific purpose. It is submitted that, as far as accused no.6 is concerned, he possess a valid licence to manufacture, the said substance for medical use, and it is not the case of the prosecution that he has committed any breach thereof. It is submitted that the substance which is shown to be seized is not narcotic drug or psychotropic substance, but it is the controlled substance listed at Schedule A, B and C of the list of NDPS Act, and it do not include isomers, esters, ethers or salt and therefore, the punishment which would be provided on conviction u/s.25A of the Act, would be maximum imprisonment upto 10 years and even the bar of Section 37 need not be invoked while considering grant of bail.

The learned senior counsel would also submit that the material seized from the Company is D-ephedrine, which is a waste product or residue from the process of manufacture and it is not 'Ephedrine' as alleged. The submission is, the waste D-ephedrine was kept in the factory since 2007-08 to be destroyed and it was not of any use for application/manufacturing of any substance, and D-ephedrine is used for splitting ephedrine from L-ephedrine and is a non-active, non-usable material.

5 Apart from the above aspect, what is pressed into service is the long incarceration of his client, accused no.6 for more than five years, and it is his submission that the accused are charged u/s.25A of NDPS Act, which provide a maximum imprisonment of 10 years, the applicants have undergone detention for period exceeding or upto one half of the maximum period of imprisonment and with no progress in trial, their further detention is unnecessary.

Reliance is placed upon decision of this Court, in case of two co-accused Rajendra Dimpri and Babasaheb Dhotre, who came to be released on bail on 24/3/2021, taking a *prima facie* view of the matter and also by referring to their long incarceration by imposing certain conditions which even the applicants are ready to abide, being imposed upon them.

6 The other counsel representing the respective applicants also press into service more or less, the same grounds by inviting my attention to the distinct roles that are attributed to their clients. Each of the counsel unequivocally refer to the unconditional release of the applicants on completing the maximum period, as specified in proviso to Section 436A of the Cr.P.C and heavily fall back on the order passed by this Court (Justice A.S. Gadkari in case of two co-accused. It is also submitted that despite the trial being expedited by order passed by this Court in Criminal Application No.1297/2016 dated 5/12/2018, directing the trial to be concluded within 9 months,

with more than 100 witnesses being cited, there is no likelihood of the trial being concluded immediately in the near future, when the maximum punishment which the accused may invite on conviction is imprisonment upto 10 years.

7 The learned Spl.P.P Mr.Hirey, however, would focus on the seriousness of the offence and he would rely upon an article released by the Department of Justice U.S. Attorney's Office, Southern District of New York, which is suggestive that Ephedrine is used for preparation of mephedrone, which is a narcotic substance as well as Metamphetamine and Methaqulone. He would submit that as per the said report, the business related to methaqulone is carried out by international organization dealing in drug trafficking and in the said article, there is a mention of Avon Life Sciences Limited, with a specific reference to Ephedrine, that was illegally produced in the said Company, in India with the help of the same, there was manufacturing of Amphetamine in Africa.

The learned Special P.P Mr.Hirey would justify the invocation of the parameters as contemplated in Section 37 of the Act, as the offence involved is serious one. Apart from this, he would submit that the accused persons are convicted for a similar offence by the Special Court, Gujarat, and hence, the applicants deserve rejection as the submission of the applicants that there is no material in the charge-sheet, to sustain their conviction in the present C.R, is not correct.

8 With the able assistance of the respective counsel, I have perused the charge-sheet placed on record which has cited 155 witnesses and charged the accused persons under Sections 8C, 9A, 22, 23, 24, 25A, 27A, 28 and 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985. There is no dispute about the fact that the substance which the C.R deals with, is ephedrine and the allegation against the accused persons in the charge-sheet, is to the effect that accused nos.6, 10 and 13 and the wanted accused conspired in the meeting held in 2016 for transporting the ephedrine powder from the Avon Life Science, a Company belonging to accused no.6 in Solapur, to Kenya for the purpose of manufacturing methamphetamine, a drug and for earning profit by selling this product, through the wanted accused Vicky Goswami and Mr.Abdullah, in rest of the world. As a part of the conspiracy, the charge-sheet specify that accused no.5 and accused no.10 removed 150 kgs of ephedrine from the Company, illegally and through accused no.13, brought the same in Gujarat for accused no.8, for the purpose of it's further processing. After processing the same, the psychotropic substance that came into existence, was transmitted to the wanted accused, Vicky Goswami in Mumbai and this product was further sent to Kenya and crores of rupees as a consideration for the same, was received by Manoj Jain through '*hawala'*. The charge-sheet in the background highlight the seriousness of the drug menace globally and

specifically the role of each of the accused in abetment as well as criminal conspiracy for committing the said offence.

9 Admittedly, the substance which is found is ephedrine, which is a controlled substance. Section 9A of the NDPS Act confer power to control and renew the controlled substance in the following manner :-

> "9A :- Power to control and regulate controlled substances :
> (1) If the Central Government is of the opinion that, having regard to the use of any controlled substance in the production or manufacture of any narcotic drug or psychotropic substance, it is necessary or expedient so to do in the public interest, it may, by order, provide for regulating or prohibiting the production, manufacture, supply and distribution thereof and trade and commerce therein.
>
> (2) Without prejudice to the generality of the power conferred by sub-section (1), an order made thereunder may provide for regulating by licences, permits or otherwise, the production, manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption, use, storage, distribution, disposal or acquisition of any controlled substance."

In contravention of the said Section is punishable u/s.25A which reads thus :-

> "25A. Punishment for contravention of orders made under section 9A – If any person contravenes an order

> made under section 9A, he shall be punishable with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees: Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding one lakh rupees."

10 Section 37 of the NDPS Act which creates an embargo by imposing two additional conditions, apart from those contained in the Cr.P.C, while making the offences under the Act to be cognizable and non-bailable, in no case, get attracted as the said case do not fall within the ambit of 37(1)(b). As far as the controlled substance is concerned, there is no specification of the quantity being small/commercial, and it is a stand-alone provision as the substance is neither Narcotic drug nor psychotropic substance and any person indulging in the same in contravention to the licence, that has been conferred would be liable for punishment prescribed under Section 25A.

The case of the prosecution is, the manufacturing of ephedrine being carried out without a licence, but admittedly, the licence did exist with Avon Science Limited, but the submission is, it was due for renewal and in any case, the submission on behalf of Mr.Manoj Jain is to the effect that substance which is seized, is D-ephedrine which is a waste product or residue obtained from the process of manufacturing and not actual ephedrine. There is some conundrum about the C.A. reports as the submission advanced on behalf of the applicants is that the report is inconclusive. In any case, the prosecution will have to prove beyond reasonable doubt that the substance that is seized is ephedrine. and in any case, it is not something more than ephedrine.

One thing which is of great significance is, the absence of any material in the charge-sheet which would establish the charge that the said substance which was found in the precints/premises or Avon Science Laboratory, was actually transported out of the factory and as alleged, to Kenya and was converted into a psychotropic substance.

When the Special P.P is asked to show any material, he would fall back upon the report of Justice U.S Attorney's Office, Southern District of New York, but barring this article, there is no evidence to that effect compiled in the charge-sheet. It is too far fledged conclusion to be derived at this stage, that it is this substance which the prosecution alleged to be ephedrine and the Accused no.6 contend it to be D-ephedrine, the residual/waste which was actually transported out and this very substance was used for manufacturing of a psychotropic substance in Kenya/South Africa. There is no material compiled in the charge-sheet, indicting of the above exercise, nor there is any proof of the amount being received by accused persons through *Hawala* as consideration towards the same.

In any case, these are my prima facie observations based upon the aspect of the charge-sheet and should not be construed as conclusive comments upon the prosecution case.

11 In case of accused no.3 and 9 in the charge-sheet, the whole prosecution case was considered, threadbare in the order dated 25/3/2021, when they sought their release on bail with the following submissions being advanced :-

> "5 Mr.Mundargi, learned counsel appearing for the applicant Babasaheb Dhotre submitted that, in the house search of Mr.Dhotre, no contraband was found. He submitted that, M/s.Avon Organics Ltd i.e. the company owned by Mr.Manoj Jain (A-6) was granted permission by the Ministry of Health and Family Welfare, Central Drugs Standard Control Organization, Government of India for manufacturing and packing, Psuedoephedrine HCI (BP/USP/EP) and Ephedrine HCI (BP/EP) by its Certificate dated 31/7/2013 and the said permission was valid till 2nd July 2016. Therefore manufacture of Ephedrine by Mr. Manoj Jain (A-6) in his company i.e. Avon Life Sciences Limited cannot be termed as an illegal act per se. He submitted that, various statements of witnesses who are mainly the employees of Avon Life Sciences Company have ascribed role to applicant Babasaheb Dhotre as, aiding in transporting the Ephedrine powder under the guidance of Mr.Dimpri and nothing more. He submitted that, the applicant Babasaheb Dhotre bonafide transported the said goods and has

raised a bill for his transportation charges with the Avon Company which is still outstanding. He submitted that, it can at the most be alleged against the applicant Babasaheb Dhotre that, he provided vehicle and driver for transporting the said Ephedrine from Avon Life Science Company to other places under the directions of co-accused. He submitted that, at the most an offence under Section 25-A read with Section 9-A of the NDPS Act, can be alleged against the applicant Babasaheb Dhotre. He submitted that Section 25-A prescribes maximum rigorous imprisonment for 10 years for an offence punishable under Section 25-A and the applicant Babasaheb Dhotre as of today has approximately undergone five years in incarceration as an under trial prisoner. He therefore, prayed that, the applicant Babasaheb Dhotre may be released on bail".

While considering the case of Rajendra Dimpri, a Manager of Avon Life Science, whose submission was specifically recorded in para 6 of the order that there was a licence to manufacture ephedrine granted by the concerned authority of Government of India and it was his duty to supervise manufacturing of ephedrine, a similar submission, of the Special P.P is found to be recorded in para 7 to the following effect :-

"7. He submitted that, from the Ephedrine powder Methamphetamine was to be manufactured by the accused persons. He submitted that, as per the prosecution case, from the Ephedrine powder supplied by the applicants, co-accused Felix Osita (A-12) and Okaya Chinnasa (A-15) manufactured Methamphetamine. He submitted that, apart from the recovery at the instance of applicant Rajendra Dimpri, the prosecuting agency has seized approximately 18 tons of Ephedrine which includes the quantity transported to United States by other accused persons. He submitted that, at the instance of applicant Rajendra dimpri, applicant Babasaheb Dhotre transported Ephedrine powder from Avon Company and delivered it to co-accused Sushirkumar Asekannan Adidraived (A-11) and Hardeepsing Gill (A-7). He submitted that, statement of co-accused Jay Mulji Mukhi (A-10) has been recorded by the learned Judicial Magistrate under Section 164 of Cr.P.C. which unfolds the entire conspiracy hatched by the accused persons herein. He therefore prayed that, the present applications may be dismissed"

12 After dealing with the said submission and on perusal of the material in the charge-sheet, the learned Single Judge, has recorded as under :-

"10 Serial No.4 of Schedule-A of The Narcotics Drugs and Psychotropic Substances (Regulation of Controlled Substances) Order, 2013 mentions 'Ephedrine and its salts'. Section 25-A of NDPS Act provides that, if any person contravenes an order made under section 9-A, he shall be punishable with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees. It is to be noted here that, however, no minimum sentence is prescribed under Section 25-A of

NDPS Act.

It is held by this Court in a catena of decisions that, the controlled substance is neither a narcotic drug nor a psychotropic substance and therefore, no commercial quantity or otherwise is provided for the controlled substance. It is also held that, as far as controlled substance is concerned, there is no categorization of small or commercial quantity. It is further held in the case of *Rafael Palafox Garcia Vs. The Union of India & Anr (Criminal Application No.2015/2008)* dated 25th September 2008, that a controlled substance is not necessary to be used only to make narcotic or psychotropic substance but it is a versatile substance which can be used in manufacturing of various things including innocuous medicines by the pharmaceutical industry.

It further prima facie appears from the material on record that, there is no connecting link that, that Metamphetamine found in possession of co-accused Felix Osita (A-12) was manufactured from the Ephedrine removed by the applicant Rajendra Dimpri from the factory premises of Avon Life Sciences Company, Solapur. There is no material on record to show that, the Ephedrine which was allegedly removed from the factory premises by the applicant Rajendra Dimpri was in fact converted into Metamphetaminc and the same was found in the possession of co-accused Felix Osita and Okaya Chinnasa is an independent recovery of the said contraband from them."

Apart from this, the Court recorded that the applicants before it, are in custody for more than five years and the prosecution has not taken steps to frame the charge, and therefore, was pleased to release them on bail.

16 My attention is also invited to an important fact that, as early as on 5/12/2018, when Accused no.6 Manoj Jain moved this Court, the Sessions Judge was directed to expedite the trial of the applicant and directed it to be concluded within nine months. The said order came to be passed in the wake of the fact that an application was moved by Mr.Manoj Jain, questioning the report of Chemical Analysis and requesting for carrying out Specific Optical Rotation Test (SORT) in order to ascertain the correct component of the substance that was seized, as the submission advanced on behalf of accused no.6, even at that time, was that the substance that is seized, is d-ephedrine, which is even not a controlled substance. The Court, however, recorded that the accused will get an opportunity to adduce his own evidence at the time of trial and this exercise will not be carried at this stage.

17 The case of the applicants is to the effect that there was no manufacturing of Ephedrine or its transportation, as alleged, and Manoj Jain, accused no.6, the owner of Avon Life Sciences, is specific that FDA licence and Central Excise Registration was issued initially in Avon Organics Limited which was at that time, controlled by one Agrawal. According to him, since 2005, the waste material D-ephedrine, having no commercial value, received back after job work was lying in the godown of Avon Organics which is not used in manufacturing of

Narcotics/psychotropic substance nor it is the controlled substance – Ephedrine.

Manoj Jain, accused no.6 purchased 24% shares of Avon Organics Limited and raised to 58% in 2009. Avon Organics Limited was altered to Avon Life Science Limited and even the registrations were amended as per case of accused no.6 and in this, he was one of the Director. My attention is invited to a document of 28/1/2016 which is a certificate of Good Manufacturing Practices issued by the Food and Drug Administration, Maharashtra State and a Unique Registration Certificate (URN) issued under the Narcotic Drug and Psychotropic Substances (Regulation of Controlled Substances) Order 2016 by NCB. The submission advanced is M/s.AvonLife Science was holding all requisite permissions for manufacture of controlled substance such as Pseudoephedrine hydrochloride, Ephedrine and Ephedrine Hydrochloride. This of course, need to be proved during the course of trial as the prosecution will also have to discharge it's burden to prove the charges in the charge-sheet.

13 It is not in dispute that the arrest of all the applicants is effected between April to June 2016, and they have undergone more than six years of Imprisonment on date, and they are definitely entitled for the advantage of Section 436A which has been recognized by the Apex Court in the decision of *Satender Kumar Antil Vs. CBI*, (*2022*) *10 SCC 51*, as a substantial

provision facilitating liberty, being core intendment of Act 21 of the Constitution.

14 At present, in the wake of the material in the charge-sheet, they can *prima facie* be held guilty of Section 9A and Section 25A which would, in any case, warrant a maximum penalty of 10 years imprisonment and having undergone six years of it, pending the trial, the benefit of the statutory provision necessarily must go to them, the trial do not appear to be in foresight as 150 witnesses are cited by the prosecution.

In the aforesaid circumstances, since it is not the case of the prosecution that the applicants are at flight risk or they will not make themselves available for trial, I deem it fit to release them on bail. Hence, the following order :-

O R D E R

(a) The Applicant no.1 Kishor Shinh Bhavsinh Rathod in BA 323/2020, applicant Hardipsingh Indersingh Gil in BA No.1200/2022, applicant Bharat Sinh @ Mama Katiya in BA No.2483/2021, applicant Mayur Suresh Sukhdar in BA 2849/2021, applicant Jay Mulji Mukhi in BA No.3646/2021, applicant Sagar Suresh Powale in BA no.2955/2021, applicant Jai Mulji Mukhi in BA No.3449/2021, applicant Sushilkumar Aasekanna Aadidravid in BA

No.4224/2021 in connection with FIR No.II-3056/2016 registered with Vartak Nagar Police Station shall be released on bail on furnishing P.R. bond to the extent of Rs.50,000/- each with one or more sureties of the like amount.

Applicant Manoj Tejraj Jain in BA No.3620/2021, in connection with FIR No.II-3056/2016 registered with Vartak Nagar Police Station shall be released on bail on furnishing P.R. bond to the extent of Rs.1,00,000/- each with one or more sureties of the like amount.

(b) The applicants shall not directly or indirectly make any inducement, threat or promise to any person acquainted with facts of case so as to dissuade him from disclosing the facts to Court or any Police Officer. The Applicant should not tamper with evidence.

(c) The Applicants shall mark their attendance to the concerned Police Station on first Thursday of every trimester between 11.00 am to 2.00 p.m.

(d) On being released on bail, the applicants shall furnish their contact number and residential address to the Investigating Officer and shall keep him updated, if there is any change.

(e) On their release within 7 days, the applicants shall surrender their passport to the Investigating Officer. The applicants shall not travel without permission of the concerned Magistrate.

(f) The Applicants shall attend the trial on regular basis.

(SMT. BHARATI DANGRE, J.)