

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO. 723 OF 2021**

Shaikh Ashpak s/o Shaikh Abdul .. Applicant
Versus
Union of India and Ors. .. Respondent

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Mr. Dilip Mishra a/w Mr. Ayaz Khan for the Applicant.

Mr. Shreeram Shirsat a/w Mr. Amandeep Singh Sra a/w Adv. Nishi Singhvi a/w Adv. Madhur Salkar for respondent- NCB

Ms. Rutuja Ambekar, A.P.P. for the State/Respondent.

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**CORAM: BHARATI DANGRE, J.
DATED : 19th SEPTEMBER, 2022**

P.C:-

1. Heard learned counsel for the applicant, and learned counsel Mr. Shirsat, for Union of India.

The applicant came to be arrested on 26/09/2019, pursuant to the summons received by him in connection with CR No. 18 of 2018 and he seek his release on bail.

The relief is sought on two grounds, first being in a parallel case being CR No. 17 of 2018, with similar material alleged against him, he came to be released on bail by the Special Judge, NDPS by order dated 9/2/2021. It is sought to be argued, that it is the same material, pitched against him in the present CR.

Another ground on which his liberty is sought to be restored is, that accused no. 4 in CR No. 18 of 2018, who was also accused of being supplying the contra band to accused no.1, who was found in possession of the same is also released on bail on 14/08/2020, by the Special Court, in the wake of the specific accusations, that he is main accused and conspirator and he is supplier of drugs to accused no.1.

3. The learned counsel for the applicant relying upon the said two orders, which are placed before me in form of compilation, would submit, that considering that the material available against the present applicant, as well as the co-accused no.4 in C.R. No. 18 of 2018 was the statement of the applicant himself and the statement of the co-accused recorded under section 67 of the NDPS Act and relying upon the decision of the Hon'ble Apex Court in case of *Tofan Singh vs. State of Tamil Nadu*, it has been held that the said statement by itself will not be sufficient to inculcate the accused. Apart from this the connection via telephone/mobile in form of CDR has also been held to be not a circumstance by itself establishing conspiracy and meeting of minds and therefore the liberty has been secured to the applicant as well as his co-accused Abdul Razzak Alias Rehman, who moved an application under section 439 of Cr.P.C.

4. The prosecution case as contained in the charge-sheet refer, that a secret information was received pursuant to which accused no.

1 to 3 came to be apprehended and the accused no.1 was found with a bag and the search of which led recovery of 1.8 kg of charas. Accused no.2 and 3 were alleged of recipient of the said contraband and all the three came to be apprehended on 18/10/2018. Accused no.1 in his statement revealed the name of accused no.4 Abdul Razzak Rehman as a supplier of the said contraband and he came to be arrested on 27/05/2019.

On both the occasions complaints came to be filed by the NCB.

The applicant was issued summons on 13/09/2019 in two C.Rs i.e. 18/2018, and 17/2018, pursuant to which, he reported and after recording the statement on 26/09/2019, he was shown to be arrested, and he was accused as a supplier of the contraband, to the main accused in both the cases. Pertinent to note that on completion of investigation accused no. 2, 3 and 4 are released on bail, leaving only accused no.1, who was found in possession of charas, incarcerated.

5. On hearing Mr. Shirsat and on perusing the affidavit, which is filed by NCB on 29/08/2022, there is no explanation offered as to why the applicant cannot seek benefit of the two orders on which he strenuously rely upon, first being the order passed in his favour in CR No. 17/2018 and another being the order passed in case of co-accused, who was also alleged to have supplied the contraband to accused no. 1. These two orders having been reached finality as the

orders passed by the Special Court are not taken to the higher court and there is no explanation offered in the affidavit, about how the case of the applicant is to be distinguished.

6. In the affidavit reliance is placed upon the voluntary statement of the applicant where he has admitted, about he supplying the drugs to accused no.1 through various carriers and in return was benefited by gold from Dubai and Qatar which yield him huge profits. The statement that they were in business for last 7 to 8 years is considered to be an incriminating evidence, and the NCB place reliance upon the said statement in support of its case. Apart from this it is stated in the affidavit that several calls are exchanged between the applicant and the co-accused, which clearly cull out the role attributed to him being the supplier and Mr. Shirsat would vehemently submit that even on the date the accused no.1 was apprehended, he was constantly in touch with the present applicant.

On the basis of the two circumstances it is argued that there are reasonable grounds for believing that the present applicant is guilty of the offence committed by him and by invoking the rigors of section 37 of the NDPS Act and he need not be released on bail.

When particularly asked why the prosecution has not questioned the correctness of the order passed by the by the Special Judge on 9/02/2021 and 14/08/2020 the NCB is not able to respond

except stating that the applicant is supplier.

7. The Special Judge has rightly appreciated the admissibility of the statement recorded under section 67, in the wake of the latest decision of the Hon'ble Apex Court in case of *Tofan Singh vs. State of Tamil Nadu* (Supra) and has also recorded that the calls cannot be the sole basis by itself to establish a conspiracy, particularly when it has been observed that *prima facie* that there is no material on record to show that the accused no.1 had procured the contraband directly from the applicant. The accused no.4 in CR No. 18/2018 who has been alleged to be the supplier and while arguing the application the material that was relied upon by the prosecution is the confessional statement and the court has recorded, that it is nothing but a copy paste attempt. Considering that the accused no. 4 had no antecedent, he came to be released on bail as the investigation was over.

8. In the present case when the charge-sheet is perused this is the only material available against the the present applicant being the statement recorded under section 67 and the connection through the CDR.

As far as the CDR details are concerned, which have been put to use the prosecution will have to establish that this contact amounted to a conspiracy and pursuant to which there was a supply

of the contra band by the present applicant to the accused no.1, who was found in possession of the same.

Considering the aforesaid material complied in the charge-sheet and the incarceration of the applicant since 26/09/2019, with no charge being framed and the applicant being incarcerated for last 3 years, he deserve his release on bail by the following order:-

: ORDER :

- (a) Application is allowed.
- (b) Applicant - Shaikh Ashpak s/o Shaikh Abdul shall be released on bail in connection with C.R.No. 17 of 2018 registered by NCB on furnishing P.R. Bond to the extent of Rs.25,000/- with one or more sureties in the like amount.
- (c) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing the facts to Court or any Police Officer. The applicant shall not tamper with evidence.
- (d) The applicant shall mark his attendance to NCB on first Monday of every trimester.
- (e) On being released on bail, the applicant shall give his contact number and residential address to the Investigating Officer and shall keep him updated, in case there is any change.

(SMT. BHARATI DANGRE, J.)