

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.2309 OF 2022

Zaid Javed Petiwala] .. Applicant

vs.

Narcotics Control Bureau & Anr.] .. Respondents

ALONGWITH

BAIL APPLICATION NO.1010 OF 2022

Shaikh Faiz Nawaz @ Sonu] .. Applicant

vs.

Narcotics Control Bureau & Anr.] .. Respondents

Mr.Sudeep Pasbola a/w S.C. Mishra and Rashid Khan i/b Ayush Pasbola for the Applicant in BA No.2309/2022.

Mr.Dilip Mishra a/w Ayaz Khan for the Applicant in BA No.1010/2022.

Mr.Shreeram Shirsat a/w Amandeep Singh Sra, Nishi Singhvi, Madhur Salkar, Shekhar Mane, Anna Oommen for Respondent No.1-NCB.

Mr.S.H. Yadav, APP for State.

CORAM : BHARATI DANGRE, J

DATE : 10th NOVEMBER, 2022.

P.C.

1] Two Applicants seek their release on bail on being charged in case No.NCB/BZU/CR-35/2021 for the offence punishable under NDPS Act. Applicant Zaid Petiwala is charged for the offence punishable under Sections 20(b)(ii)A, 21, 22(c), 23(c), 27, 27A, 28 and 29 of the NDPS Act. Applicant Shaikh Faiz Nawaz is charged for the offence punishable under Sections 20(b)(ii)A, 21, 22(c), 23(c), 28 and 29 of the

NDPS Act. Applicant Zaid Petiwala came to be arrested on 10.04.2021, whereas Applicant Shaikh Faiz Nawaz came to be arrested on 09.04.2021.

2] The case of the prosecution can be summarised as under :

(a) That on 08/04/2021 a secret information was received by Investigating Officer Kiran Babu that one person namely Zaid Rana is dealing/selling of LSD, Ganja & DAB from his house at Room No. B-203, Evershine Green, Oshiwara, Andheri (W), Mumbai 400 102. The said information was reduced into writing and forwarded to Superintendent & Zonal Director. They directed to form a team and conduct raid.

(b) That thereafter panchas were arranged. That thereafter the officers alongwith panchas reached the spot at around 10.20 hours. That Accused No. 2 Zaid Rana opened the door and he was informed about the information and purpose of visit of officers alongwith the Panchas. That accordingly the raid was effected. That on enquiry Accused No. 2 Zaid Rana voluntarily removed the LSD blots from his wallet. The same were placed in a brown paper envelope, sealed and marked as "P".

(c) That on further enquiry Accused No.2 informed that some contraband is in his Honda Activa. That search of Honda resulted in recovery of 22 grams of green leafy substance purported to be Ganja, one capsule of unknown psychotropic substance and one dab of cannabis. That a Panchnama in respect of the above seizure was prepared and completed.

(d) That statement of Accused No. 2 Zaid Rana was recorded on 09.04.2021 and he was arrested at 2 p.m. on 09.04.2021. That in the said statement the name of the Accused No.4 was mentioned alongwith

his residential address.

(e) That as the name and address of the Accused No. 4 was revealed in the statement of Accused No. 2, an information note was prepared and submitted before the superior.

(f) That a team was organized under the supervision of IO Vijay Shinde. It is alleged that during the search of the Accused No. 4 officers recovered from his possession 25 grams of charas during the panchanama at Yamuna Nagar, Lokhandwala, Bank Road, Oshiwara. Andheri west, Mumbai. That the panchnama of the same was completed at 20.45 hours on 08.04.2021.

(g) That thereafter the statement of Accused No. 4 was recorded by 10 A.K.Singh on 09.04.2021 and he was arrested at 14.15 hours.

(h) That as the name of the Applicant was revealed during the statement of co-accused, hence the Applicant Shaikh Faiz was summoned and arrested after recording of his statement on 09/04/2021 by IO A. K. Singh.

(i) That the Accused No. 1 was summoned on 09.04.2021. His statement was recorded on 10.04.2021 by IO A.K. Singh. Thereafter he was arrested in the present crime.

(j) It is alleged that on 12.04.2021, the officers further received an information regarding a parcel at India Post, Vile Parle (E) booked from Tamil Nadu to Mumbai having psychotropic substance. That the officer of the Respondent went to the alleged place of the information and conducted the search of the parcel which resulted in recovery of 80 LSD blots paper weighing 1.60 gms. That the same was packed and sealed vide Panchnama dated 12.04.2021 at 13.30 hours.

3] During the course of investigation, prosecution recorded statements of various witnesses. After completion of investigation, the

prosecution has filed charge-sheet vide NDPS Special Case No.1231 of 2021).

4] Heard the learned counsel for the Applicant Mr.Sudeep Pasbola alongwith Mr.Dilip Mishra i/b Mr.Ayaz Khan. Also heard Mr.Shreeram Shirsat for NCB and Mr.S.H. Yadav, APP for the State.

5] As the investigation progressed, notice was issued to the arrested accused and their statements under Section 67 of the NDPS Act came to be recorded. The prosecution rely upon the call data analysis reflecting telephone calls exchanged between co-accused and same are compiled in the charge-sheet after obtaining certificate under Section 65B of the Indian Evidence Act. Apart from accused, the independent statements of several witnesses have been filed alongwith the charge-sheet to demonstrate the case of the prosecution that all the four accused persons entered into a conspiracy to procure, purchase and sell, possess, transport, finance and thus committed offence under NDPS Act, 1985.

6] Applicant Zaid Petiwala is charged for financing, whereas Accused Zaid Rana was found in possession of 70 blots of LSD commercial quantity. There is no recovery effected from Applicant Shaikh Faiz, whereas, from accused No.4 there is recovery of 25 Gram Charas and it is informed that he has already been released on bail.

7] With the able assistance of the respective counsels, I have perused the material compiled in the charge-sheet. While considering the case of the present Applicants, one of whom is alleged to be a financier/supplier and one is alleged to be a trader, it can be seen that

the complaint makes reference to the notice issued under Section 67 of the NDPS Act and Applicant Zaid Petiwala recorded his statement on 08.04.2021 on the basis of Panchanama dated 08.04.2021 voluntary statement of accused No.1, he was placed under arrest on 10.04.2021 for his alleged involvement in the conspiracy for procurement/possession, transportation, sale and purchase, in an attempt to commit offence under the NDPS Act with other known and unknown persons in connection with seizure of 1.32 Grams LSD 70 blots from accused No.1 and 22 Grams of green leafy substance purported to be Ganja.

8] Apart from this, based on the call data analysis, it is alleged that Mobile No. 9619532744 was issued to one Sana Javed, which was used by Applicant Zaid Petiwala and Mobile No.9594518707 issued to one Khalid was used by Accused No.2 Rana. The CDR between two, forms basis of accusation that they were in constant touch with each other at the time of offence.

9] My attention is invited to the statement of accused No.1 where it is alleged that he has admitted his complicity in the subject crime and specifically incriminating statement reads thus :

“On being asked I want to state that 1, Arbaaz Ukanni, Zaid Rana and Sonu are doing the drugs business since one year. We have also received the first consignment since four to five month back. This is our second consignment. About a week ago 1 was placed an order for purchase of 200 numbers blots of LSD through Wickr Me Network. The payment of 200 numbers blots has also been made by me through PaxfulApp. As per my knowledge amount of payment was approximate 50 to 52 thousand in Indian currency.

On hearing about the raid of NCB at various places in near vicinity of my area, we took the decision that we may hold the delivery of 100 blots for some time. One week back,

the delivery of 100 blots of LSD has been received by Zaid Rana at his residence building namely Ever shine where he is residing with his family. Out of 100 blots, 30 blots of LSD have been sold by us at various places of Mumbai. The remaining 70 blots are balance to us which was recovered from Zaid Rana on 08.04.2021 by NCB team.”

10] However, it is also stated that there is an account on WICKR ME Network and he has produced photo of same which is compiled in the charge-sheet. He has admitted that there are many vendors on the said network and even dark net is used for purchasing drugs. A specific statement is made that the ID was also used some time by Arbaaz Ukani for purchase of some psychotropic substances. The mobile number of Arbaaz Ukani is also given. Admittedly, Arbaaz Ukani is not impleaded as an accused.

11] The learned counsel for the Applicant is extremely critical of the approach of the NCB in being choosing to arraign the accused persons and I am in agreement with the said submission.

It can be apparently seen that in the statement of the Applicant recorded under Section 67 of the NDPS Act, he has specifically named Arbaaz Ukani and has assigned specific role to him by alleging that ID created by him was used by this person for purchase of some psychotropic substances. But for the reasons best known, he is not arraigned as an accused.

When Mr.Shirsat, the learned counsel for the NCB is asked to explain the above lapse, he states that he was not available for investigation.

12] The learned counsel for the Applicant has placed on record distinct Panchanamas to establish that Arbaaz Ukani has acted as

Panch witness on behalf of NCB and this approach of the NCB speaks volume. I refrain myself from commenting any further.

13] The NCB has relied upon the statements of Applicants recorded under Section 67 of the NDPS Act. As in the case of Applicant Zaid Petiwala I have already reproduced the incriminatory statement made by him.

14] I have specifically asked Mr. Shirsat as to whether NCB has investigated about the account details which was supplied by the said Applicant and whether it has been able to trace any transaction/dealing through the said account. The response of the NCB is in the negative. When asked whether the payment has been ascertained through PaxfulApp as indicated by the Applicant Zaid Petiwala, the NCB states that they have not carried out any investigation on the said aspect since the Applicant himself has admitted of dealing with psychotropic substance through the said APP and account.

15] The position in law as regards statement recorded under Section 67 is no more in dispute as the Hon'ble Apex Court in the case of **Toofan Singh vs. State of Tamilnadu (2021) 4 SCC 1** has settled the position to the effect that any confessional statement recorded under Section 67 of the NDPS Act is inadmissible in trial of an offence under the Act.

However, the position has been strengthened in the case of **State by (NCB) Bengaluru vs. Pallulabid Ahmad Arimutta & Anr. in 2022(1)SCJ 454** with regard to the law laid down in Toofan Singh is even applicable at the stage of grant of bail. If the material collected during investigation is not admissible at the stage of trial and cannot be

considered as admissible evidence, the said evidence cannot be used for detaining the Applicant/Accused and incarcerate him till the stage of trial when ultimately the evidence will not held to be admissible.

16] Apart from the statement under Section 67 of the NDPS Act, there is no independent evidence available with the NCB to exhibit involvement of the Applicant in the subject CR. Accused No.1 is accused of offence under Section 27A of the NDPS Act, which prescribe punishment for financial illicit traffic. Barring statement under Section 67 of the NDPS Act, prima-facie there is no material in the charge-sheet to demonstrate his role as financing the activities of illicit trade.

17] Applicant Zaid Petiwala is charged as purchaser of various drugs from Darknet from other vendors and also charge of involving in financing through different APPs and alleged to have involved in selling of the drugs.

Similarly, the material in the complaint falls short of making out offence under Section 29 of the NDPS Act.

18] In the wake of above, there do not exist any reasonable ground for believing that the Applicants are guilty of the offence with which they accused of as contemplated under Section 37 of the NDPS Act. In any case, while considering the application for bail with reference of Section 37 of the Act, the Court is not expected to pronounce finding of not guilty, but it is merely finding to the extent of releasing the accused on bail on being satisfied that there are reasonable grounds for believing that he is not guilty.

19] Mere CDR to which reference has been made in the complaint by itself is not sufficient to infer the involvement of the Applicant with the other co accused as an attempt is made to establish that Accused No.1 was in touch with accused No.2.

The learned counsel Mr.Shirsat placed heavy reliance upon the decision of the Hon'ble Apex Court in the case of **NCB vs. Mohit Aggarwal in Criminal Appeal Nos.1001-1002 of 2022**, passed on 19.07.2022. But in my considered opinion, in the said decision, there was other circumstantial evidence brought on record by the NCB, which their Lordships of the Hon'ble Apex Court held ought to have dissuaded the High Court from exercising its discretion in concluding that there were reasonable grounds to justify that he was not guilty of the offence under the NDPS Act.

20] Reliance is also placed by Mr.Shirsat on recent order of the Hon'ble Apex Court in the case of Union of India (NCB) etc. vs. Khalil Uddin Etc., where again attention of the Hon'ble Apex Court was invited to the peculiar circumstances on record.

In the present case, no such independent incriminating circumstance is compiled in the charge-sheet connecting the present Applicants to the recovery of commercial quantity of contraband from accused No.2.

I have already refused to entertain the Application of accused No.2 seeking his release on bail.

21] As far as Applicant/accused No.4 is concerned, he came to be arrested on the statement of co-accused and CDR. Even against him the material on which reliance is placed is statement recorded under Section 67 of the NDPS Act, which would make same fate as in the

case of co-accused. Apart from this, the CDRs are much prior to the date of commission of offence and there is no description of the call details filed alongwith the charge-sheet and hence this persuade me to believe that there is reasonable ground believing that the Applicant is not guilty of commission of offence. Admittedly, there are certain messages which are exchanged between the parties, but Mr.Shirsat fairly states that they discussed Marijuana and Ganja and there is no reference of LSD which is recovered from accused No.2 and for which accused persons are charged of hatching a criminal conspiracy by dealing with commercial quantity of the contraband in the form of LSD.

22] The investigation being complete and entire material compiled in the charge-sheet, and no antecedents attributed to the Applicants or apprehension expressed by the NCB that the Applicants are flight risk, they deserve to be released on bail.

23] In the wake of above, since the material in the form of complaint, prima facie is not sufficient to detain the Applicants while they await their trial, I deem it appropriate to secure their liberty, which shall be subject to certain conditions.

24] The observations made above are prima facie in nature and limited for the purpose of determination of the present Application and the learned Judge trying the Applicant for the offences, with which he is charged, shall not in any manner be influenced by the above order.

Hence, the following order :

ORDER

- (a) Applications are allowed.
- (b) Applicants – Zaid Javed Petiwala and Shaikh Faiz

Nawaz @ Sonu shall be released on bail in connection with F. No.NCB/BZU/CR-35/2021 pending as NDPS Special Case No.1231/2021, on furnishing P.R. bond to the extent of Rs.50,000/- with one or more sureties of the like amount.

The Applicants shall be released on cash bail of Rs.50,000/- for a period of six weeks in lieu of sureties. During the said period the applicants shall arrange for the sureties.

(c) The Applicants shall surrender their Passports, if they possess, before the Investigating Officer.

(d) The applicants shall report to the NCB on first Monday of every month between 03.00 p.m. to 05.00 p.m.

(e) 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 and should not tamper with evidence.

(f) The Applicants shall regularly attend trial, on every date, unless exempted.

(g) Upon release, the Applicants shall furnish their contact numbers and permanent residential addresses to the Investigating Officer and shall keep him updated in case of change in the same.

[BHARATI DANGRE, J]