

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 3419 OF 2021

Jabbar Humjekhan Mulla

... Applicant

V/s.

The Commissioner of Customs and Anr.

... Respondents

Mr. Ayaz Khan a/w Mr. Dilip B. Shinde i/b Shantanu Adkar, for the Applicant.

Mr. Jitendra Mishra a/w Ashutosh Mishra, for Respondent No.1.

Mr.H.J.Dedhia, APP for the Respondent No.2– State.

CORAM : V. G. BISHT, J.

**RESERVED ON : 17th DECEMBER, 2021.
PRONOUNCED ON : 28th JANUARY, 2022.**

P.C. :

1 The present application has been moved by the applicant under Section 439 of the Code of Criminal Procedure in Crime No. 2 of 2020 registered with the Inspector of Custom

(Narcotic Cell), Pune, for offences punishable under Section 8(c), 20(b)(ii) C, 25 and 29(1) of Narcotic Drugs and Psychotropic Substances Act (NDPS Act).

2 It is the case of the prosecution that the Office of Custom (Narcotic Cell) Pune, received information regarding Ganja trafficking and on the basis of said information the office of the Narcotic Cell, Customs Pune kept vigil and surveillance on Naldurg-Solapur road near Boramani Village, Solapur in the presence of panch witnesses. It is further case of prosecution that at the relevant time the officer noticed two vehicles which were intercepted. Upon search, it was found that the transporter had concealed Ganja in the cavity created at the roof of the vehicle and it was about 868 gms. Accordingly, the contraband came to be seized.

3 It is further case of the prosecution that the statements of occupants of the vehicle were recorded and they revealed the applicant to be a purchaser and therefore, a notice

under Section 67 of the NDPS Act was served on the applicant. His statement was also recorded under Section 67 of the NDPS Act and the applicant allegedly admitted to had purchased 50 kg of Ganja from Prakash Shelke. Accordingly, the applicant came to be arrested.

4 Mr.Ayaz Khan, learned counsel for the applicant, submits that the prosecution is relying on the statements of co-accused recorded under Section 67 of the NDPS Act, which in itself are contradictory. Even otherwise, it has been held by our High Court and as also by Hon'ble Apex Court that the statements recorded Section 67 of the NDPS Act is not admissible. There is no recovery at the instance of applicant nor he has been charged in the FIR. Its only on the basis of those inadmissible statements of co-accused recorded under Section 67 of the NDPS Act, the applicant has been arraigned as an accused. Investigation is over. There is no necessity of custody of applicant. In such circumstances, the applicant deserves to be released on bail, argued learned counsel. The learned counsel

also placed reliance in **Bharat Choudhary vs Union of India**¹, **Dheeren Kumar Jaina vs Union of India**², **Sanjeev Chandra Agarwal and Anr. Vs Union of India**³ and **Shreyansh Jhabak vs The State of Chhattisgarh**⁴

5 Mr.Dedhia, learned APP, on the other hand, opposed the submissions by pointing out the CDR record and emphasized that the applicant on the date of offence was continuously in touch with other accused. There are statements of co-accused recorded under Section 67 of the NDPS Act, which also show complicity of applicant in crime.

6 Similar submissions have been advanced by learned Counsel Mr.Jitendra Mishra for respondent No.1, by placing reliance in **Nandu Subhash Varpe vs. The State of Maharashtra**⁵

6 Perused the FIR and the investigation papers.

1 Petition for Special Leave to Appeal (Criminal) No. 5703 of 2021.

2 Criminal Appeal No. 965 of 2021 (Arising out of SLP (Cri) No. 4432 of 2021)

3 Criminal Appeal No(S).1273/2021 (@Diary No. 24622/2017)

4 Petition(s) for Special Leave to Appeal (cri) No(s). 5458/2021.

5 Bail Application No. 666 of 2021

7 There is no dispute that on the day of incident the applicant was neither found on the spot nor he was in possession of the contraband. It is clear from the record that it is only on the basis of statements of co-accused, namely, Prakash Shelke and Brahmadev Judger recorded under Section 67 of the NDPS Act and as also the statement of applicant himself, he came to be arraigned as an accused.

8 It is by now well settled by catena of decisions and more particularly the judgment of Hon'ble Apex Court **Tofan Singh vs. State of Tamil Nadu**⁶ that the statements of accused recorded under Section 67 of the NDPS Act cannot by themselves be relied upon to return an order of conviction against the concerned accused. Similar ratio is laid down by the Hon'ble Apex Court in the case of **Bharat Choudhary (Supra)**, **Dheeren Kumar Jaina (Supra)** and **Sanjeev Chandra Agarwal (Supra)**.

9 As far as the decision of this Court in **Nandu Subhash Varpe**

⁶ 2020 SCC Online SC 882.

(supra) is concerned, the Court while considering the Bail Application of the accused therein, observed that the effect of the statement recorded under Section 67 of the NDPS Act will have to be considered at a later stage by the trial Court inasmuch as the said statement was not retracted by the accused. With due respect, I am unable to persuade myself to follow the observation so made by this Court in terms of ratio laid down in the aforesaid decisions.

10 In view of above, I am inclined to allow the application. Hence, I pass the following order :

ORDER

- (i) Applicant – **Jabbar Humjekhan Mulla** shall be released on bail in Crime No. 2 of 2020 registered with the Inspector of Custom (Narcotic Cell), Pune on his executing P.R.Bond in the sum of Rs.50,000/- with one or two sureties in like amount.

- (ii) As a condition of this order, the applicant shall not tamper with the prosecution evidence.
- (iii) 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 such facts to the court or to the Police Officer.
- (iv) The applicant should cooperate the trial Court for expeditious disposal of the Special Case pending against them.
- (v) The applicant should not repeat similar crime in future. If it is found that the applicant is repeating commission of similar offence in future, the prosecution is at liberty to get the bail of the applicant cancelled.
- (vi) The applicant should surrender his passport with the Inspector of Custom (Narcotic Cell), Pune and he shall not leave India without prior permission of the trial Court.

(vii) Bail before the trial Court.

(viii) Parties to act on copy of this order duly authenticated by the Sheristedar of this Court.

(ix) It is made clear that the observations made herein are prima facie and the trial Court shall decide the case on its own merit, in accordance with law, uninfluenced by the observations made in this order.

(x) The application is allowed in the aforesaid terms and stands disposed off accordingly.

(V. G. BISHT, J.)

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