

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 560 OF 2022

Mark Floyd D'Costa

... Applicant

V/s.

The Intelligence Officer, Narcotics Control Bureau ... Respondents
and Anr.

.....
Mr. Subhash Jha a/w. Ms. Linisha Seth, Ms. Shraddha Kataria, Mr.
Ritesh Kesarwani, Ms. Praveena Venkataman and Mr. Krunal Jadhav
i/b. Law Global, Advocate for Applicant.

Mr. Shreeram Shirsat, Special P. P. a/w. Mr. Shekhar Mane, Ms. Tanvi
Mate and Mr. Tanveer Khan, Advocate for Respondent No.1- NCB

Mr. Amit A. Palkar, APP for Respondent-State.

.....
CORAM : G. A. SANAP, J.

DATE : 8th NOVEMBER, 2023

P C:-

1. The applicant/accused arrested by Narcotics Control Bureau (for short "NCB"), Mumbai in connection with FNo. NCB/MZU/CR-26/2021 (Sessions Case No.667 of 2021) has made this application for bail.

2. One Mr. Rajesh Solanki, Investigating Officer had received information of the indulgence of the accused in sale of narcotic drugs. The information was recorded. In terms of the information,

raid was conducted on 27.03.2021 at 21.30 hours. A search was conducted. In the search of dicky of his Activa Scooter 8 grams of Ecstasy pills were seized. Similarly, 0.5 gram of LSD was also seized. The samples were drawn. The panchanama was prepared. It is stated that since it was a night time, the NCB officer gave Notice under Section 67(C) of the Narcotic Drugs and Psychotropic Substances Act (for short "NDPS Act") on 27.03.2021 to the accused and directed him to remain present in the office of NCB on 28.03.2021 at 10:00 a.m. The accused accordingly appeared in the NCB office. His statement was recorded and he was arrested on 28.03.2021 at 9:00 p.m. After completion of the investigation, charge-sheet has been filed.

3. The learned Advocate for the accused advanced the arguments on two points. First point is with regard to the violation of the provisions of Section 57 of Cr.PC. and Article 22, sub-Article 2 of the Constitution of India. Learned Advocate submitted that on 27.03.2021 itself the accused was taken in custody and his movement was completely restrained. He was neither allowed to move out of Narcotics Control Bureau office at Ballard Pier, Mumbai, nor was anybody allowed to meet him. Learned Advocate submitted that there was complete restrain on his movement from 27.03.2021 itself. Learned Advocate pointed out that on 27.03.2021 itself a

news was flashed in newspapers indicating his arrest on the date of the search. Learned Advocate submitted that his arrest shown as per the Arrest Memo dated 28.03.2021 at 9:00 p.m. was an eyewash. Learned Advocate submitted that accused was not produced before the Magistrate within 24 hours from taking him in custody on 27.03.2021. Learned Advocate submitted that, therefore, this has violated his right guaranteed under the Constitution as well as under Section 57 of Cr.P.C. Learned Advocate submitted that on this ground, the accused is entitled to get bail. In order to seek support to his submission, the learned Advocate has relied upon the following three decisions viz:

- (i) *Suaibo Ibow Cassama Vs. Union of India and Anr.*¹
- (ii) *Ugochukwu Solomon Ubabuko Vs. Union of India and Anr.*²
- (iii) *Niranjan Singh and Anr. Vs. Prabhakar Rajaram Kharote and Ors.*³

Learned Advocate further submitted that after filing the charge-sheet there is no progress in the trial. The accused has been in custody for almost three years. Learned Advocate submitted that on account of delay in disposal of his case he is entitled to get bail.

1 1993 SCC OnLine Bom 254

2 2021 SCC OnLine Bom 3572

3 (1980) 2 SCC 559

4. Learned Special P.P. for NCB submitted that the submissions advanced on facts are not supported by the record. Learned Special P.P. submitted that after completion of search, sampling and on drawing of a panchnama, the accused was given a Notice on 27.03.2021 at night and he was directed to remain present on 28.03.2021 at 10:00 a.m. in the office of NCB. Learned Special P.P. submitted that raid was conducted just under the building where the applicant is residing at Thane. Learned Special P.P. submitted that from the spot after completing panchnama applicant was allowed to leave the place. Learned Special P.P. submitted that pursuant to the Notice dated 27.03.2021, the accused appeared before the Investigating Officer on 28.03.2021 at 10 a.m. Learned Special P.P. pointed out that on 28.03.2021, his statement under Section 67 of NDPS Act was recorded. Learned Special P.P. pointed out that Notice dated 27.03.2021 was acknowledged by the accused on 27.03.2021. Learned Special P.P. submitted that after preliminary enquiry on 28.03.2021 the accused was arrested by drawing Arrest Memo at 21.00 hours. Learned Special P.P. submitted that on the very next day within 24 hours from his arrest he was produced before the Magistrate. Learned Special P.P. pointed out that at the time of his arrest the accused was informed about the grounds of his arrest. He was allowed to inform his family members on mobile number

9819138495. Learned Special PP submitted that this contemporaneous documentary evidence at this stage fully supports the case of the NCB that the accused after effecting the seizure and drawing panchnama was allowed to leave and called upon to appear before the NCB Officer on the next date. Learned Special PP submitted that if the accused had been kept in custody of the NCB officer or in the office of NCB after apprehending him, then it would have been a justifiable ground for seeking the bail. Learned Special PP submitted that on facts the law laid down in the decisions relied upon by the learned Advocate for the accused is not applicable to the case of the accused. Learned Special PP submitted that on the ground of delay alone the accused in such a serious crime, where the quantity of a substance is a commercial quantity, cannot be released on bail, in view of the mandate of Section 37 of the NDPS Act.

In order to seek support to his submissions, he has relied upon the decision of the Hon'ble Apex Court in the case of *Narcotics Control Bureau V/s. Mohit Aggarwal* in Criminal Appeal Nos. 1001-1002 of 2022 arising out of Petitions for Special Leave to Appeal (CRL.) No. 6128-29 of 2021 dated 19.07.2022.

5. At the outset, it would be necessary to consider the decisions relied upon by the learned Advocate for the accused. In

the case of *Niranjan Singh (supra)* it is held that the custody as understood by the law includes physical surrender of the accused before the Court and submission to its directions. In the case of *Suaibo Ibow Cassama (supra)* it is held that if the accused is not produced within 24 hours from the time of his arrest or on curtailment of his movement, the accused has a right to get bail. The same is the proposition laid down in the case of *Ugochukwu Solomon Ubabuko (supra)*. Before considering the applicability of last two decisions, it would be necessary to state the facts in these two cases. In the case of *Suaibo Ibow Cassama(supra)*, the accused was apprehended on 02.11.1991 at about 5.30 a.m. The accused was kept in custody of the Air Intelligence Unit of the Customs Department. The accused was produced before the Chief Metropolitan Magistrate on 04.11.1991 at about 3:00 p.m. In the case of *Ugochukwu Solomon Ubabuko (Supra)* the Narcotic Bureau detained the accused at 6.25 p.m. on 07.03.2021 and he was produced before the Magistrate on 09.03.2021 in the morning at about 10:00 a.m. In both these cases after the apprehending of the accused, the accused were in the custody of the Officers and their movements were curtailed. They were not allowed to leave the office. The accused were not produced within a period of 24 hours from the date of the actual apprehension or curtailment of their

movements. In this situation, it was found that this act was in a gross violation of the provisions of Article 22(2) and Article 21 of the Constitution of India. The accused were therefore found entitled to get bail on this ground.

6. In my view, on facts, the law laid down in the decisions relied upon by the learned Advocate for the applicant would not be applicable to the case of the applicant/accused. In this case, the accused was apprehended on 27.03.2021 at about 21.30 hours. After conducting search, seizure and drawing panchanama, he was given a Notice to attend the office of NCB, Mumbai on 28.03.2021 at 10:00 am. The Notice is a part of record. The accused had acknowledged the receipt of the said Notice. The statement of the accused was recorded on 28.03.2021 when he appeared pursuant to this notice in the office of NCB at Ballarad Pier, Mumbai. It is pertinent to mention at this stage that when the accused was produced before the learned Metropolitan Magistrate, he did not make any complaint before the Magistrate about his illegal detention. He also did not make a complaint that the false Notice was issued to him on 27.03.2021 to remain present on 28.03.2021 at 10:00 a.m. in the office of NCB. It is seen on perusal of the record that he was represented by the Advocate. It is further pertinent to mention that the accused was apprehended under the

building where he has been residing. The entire proceeding of search, seizure panchanama and panchanama was conducted on the spot. There is ample contemporaneous documentary evidence to support the contentions of NCB that he was allowed to leave the said place and was called upon to appear in the NCB office on the next day.

7. It is seen on perusal of the record that when the accused made the bail application before the learned Special Judge, he did not raised this plea. The order passed by the learned Special Judge indicates that this point was not at all raised and, therefore, it was not specifically considered and dealt with. It is seen that this application for bail was made in the year 2022 and for the first time in the year 2022 this contention was raised. In my view, this reflects upon the conduct of the applicant /accused. It is seen on perusal of the record that on 28.03.2021 at about 9:00 p.m. he was arrested by drawing the Memo of Arrest. The grounds of arrest were informed to him. He was allowed to contact his family members on the phone number mentioned in the Arrest Memo. It is not the case of the accused that he did not inform this fact on the given phone number to his family members.

8. In the above background, the submissions advanced by the learned Advocate for the accused relying upon the Press Note given

to the Times of India newspaper needs appreciation. On the basis of this Press Note, the learned Advocate submitted that in this note there was reference of the arrest of the accused by NCB, Mumbai in this crime on 27.03.2021. It is pointed out that this Press Note is dated 28.03.2021. It is to be noted that apart from authenticity of this Press Note, it is apparent on the face of record that it is contrary to the documentary evidence compiled in the charge-sheet. It is not consistent with the facts of the case of the prosecution, therefore, in my view relying upon this Press Note alone the submission cannot be accepted.

9. The next plank of submission is delay in disposal of the case. It is true that learned Judge has not proceeded with the trial expeditiously. It is seen that accused has also not made any application before the learned Judge for framing the charge in the case or for expediting the hearing of this case. Besides, the delay alone, it could not be the ground of release the accused on bail in such a serious crime. In my view, while dealing with such submissions, the Court has to bear in mind the object and intent of the legislature behind the enactment of the NDPS Act. In this case, the quantity is a commercial quantity. As such, the rigors of Section 37 would get attracted. The Hon'ble Supreme Court in the case of *Mohit Aggarwal (supra)* has observed that the length of the period

of custody or the fact that the charge-sheet has been filed and the trial has commenced are by themselves not considerations that can be treated as a persuasive grounds for granting relief to the accused under Section 37 of the NDPS Act.

10. In my view, therefore, I do not find any substance advanced by the learned Advocate. The submissions are not supported by evidence. Therefore, the application stands rejected.

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(G. A. SANAP, J.)