

AGK

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO.964 OF 2023

Shivam Vipin Shrivastav Alias Yogi ... Applicant

V/s.

The Union Territory of DNH

Daman and Diu & Anr. ... Respondent

WITH

BAIL APPLICATION NO.1284 OF 2023

Umesh Alias Kanu Dinesh Patel ... Applicant

V/s.

The Union Territory of DNH

Daman and Diu & Anr. ... Respondent

Mr. Ghanasham Jadhav for the applicant in
BA/964/2023.

Mr. Chaitanya Pendse with Mr. RB. Ade i/by Mr.
Vinayak Patil for the applicant in BA/1284/2023.

Mr. H.S. Venegaonkar for the respondent/Union
Territory.

Mr. Amit A. Palkar, APP for the respondent/State.

CORAM : AMIT BORKAR, J.

DATED : AUGUST 1, 2023

RC.:

1. These are applications under Section 439 of the Criminal Procedure Code, 1973 seeking bail in connection with C.R. No.56 of 2022 registered with Nani Daman Police Station for offences punishable under Sections 21 and 22 of the Narcotic Drugs and

Psychotropic Substances Act, 1984 and Section 34 of the Indian Penal Code, 1860.

2. Prosecution's story as narrated in the report is that the complainant, Dhanaji Dubariya, working in Police Department of UT of DNH and Daman & Diu on 25 June 2022 while on duty received secret information stating that two persons namely Yogi and Kanu would come to Hanumanji Temple, near to Kings Bar, Dabhel to sell some Narcotics and Psychotropic substance. As per guidance of SHO, Nani Daman PS, Daman complainant called two Panch/witnesses and explained them the facts. On reaching the spot, complainant found three persons on one moped. One Police Constable Ankush Singh was sent as customer to decoy with money to purchase the contraband. Remaining team was stationed at distance with Panch/witnesses. On receiving signal the complainant rushed to the spot. Mr. Ankush Singh stated that suspects were having contraband material with them and he has given money to suspect Shivam Shrivastav Alias Yogi. Police team revealed identity to the suspect persons and stated their personal search was necessary. They denied to get searched in presence of Gazetted Officers and stated that they have no contraband in their possession. On personal search of Shivam Vipin Shrivastava Alias Yogi, two transparent small size plastic bag with zip which contained white color powder and brown color stone like object were found. Upon inquiry with the suspect, it was revealed that it is MDMA Drug (Mythylenedioxy-methamphetamine). Further two mobile phone were recovered. On search by the police and panch of Umesh Dinesh Patel Alias Kanu, Shivam Vipin Shrivastav Alias

Yogi and Umesh Haresh Solanki, nothing adverse was found. On personal search , two packets of some suspicious material was found in the pocket of Umesh Dinesh Patel Alias Kanu which was identified Mythylenedioxy methamphetamine i.e MDMA. One packet of MD weighed 0.84 grams and second packet was weighed as 29.38 grams. Two mobile phones were also seized from Umesh Patel. This contraband material was found weighing in tune of 6.04 grams and 4.98 grams respectively and 1.04 grams and 0.98 grams of contract material i.e. MDMA Drug (Mythylenedioxy-methamphetamine) was taken out as Sample for forensic examination. Accordingly, first information report came to be lodged.

3. The investigating officer conducted investigation, recorded statements and filed charge-sheet before the Special Judge under the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter “the Act”, for short).

4. The applicants filed applications under Section 439 of the Criminal Procedure Code, 1973 before the Sessions Judge which came to be rejected by order dated 9 January 2023.

5. Learned advocate for the applicants submitted that there is non compliance of Section 42 of the Act inasmuch as the panch took part in personal search. According to him, there is non-compliance of Section 50 of the Act as accused were not made aware of their right or presence of the Magistrate. There is also non-compliance of Section 52-A of the Act as mandated procedure is not followed. Accordingly to him, the quantity seized is non-

commercial and, therefore, rigours of Section 37 of the Act are not attracted.

6. Per contra, learned advocate for the investigating agency submitted that by virtue of Notification dated 18 January 2015 manner of disposal of substances is prescribed. According to him, period of 30 days is provided for filing application before the Magistrate. He submitted that notice issued under Section 50-A of the Act complies with the prescriptions provided. He submitted that though the panchanama indicates participation of panchas; however, the statement of witnesses do not indicate participation of panch.

7. On perusal of the material on record, it appears that the FSL report indicates presence of Nephedrole Hydrochloric and Methamphetamine Chloride. The commercial quantity of the said substance is 50 grams. The substance recovered from Shivam is 11.2 grams and from Umesh Patel is 34.20 grams. Therefore, at this stage the seized quantity cannot be termed as commercial quantity. However, the Trial Court need to adjudicate on this issue at the time of trial.

8. Learned Advocate for the respondent is right in submitting that though at this stage rigours of Section 37 of the Act are not applicable, still the applicant need to satisfy the test of Sections 437 and 439 of the Criminal Procedure Code, 1973. In that context, I have considered the submissions.

9. In so far as non-compliance of Sections 50-A and 52-A is concerned, it will have to be decided at the time of trial. According

to the applicants, the panchanama placed on record indicates that the panch participated in the personal search of the applicants. The effect of statement of witness to the contrary needs to be decided by the Trial Court at the time of trial. Therefore, applicability of Section 42 of the Act needs to be adjudicated during trial.

10. On overall consideration of the aforesaid factors, the applicants have made out a case for release on bail. Hence, following order:

- a) Both the bail applications are allowed;
- b) The applicants be released on bail in connection with C.R. No.56 of 2022 registered with Nani Daman Police Station for offences punishable under Sections 21 and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1984 and Section 34 of the Indian Penal Code, 1860 on furnishing PR. Bond in the amount of Rs.25,000/- each along with one or two sureties in the like amount;
- c) The applicants shall mark his presence before the concerned police station on first Saturday of every month between 11.00 a.m. to 2.00 p.m.;
- d) The applicants shall remain present before the Trial Court on each and every date unless specifically exempted by the Court;
- e) The applicants shall not directly or indirectly make any inducement, threat or promise to any witness acquainted with the facts of the case so as to dissuade him from disclosing such facts to

the court;

f) The applicants shall not obstruct or hamper the police investigation and not to play mischief with the evidence collected or yet to be collected by the police;

g) The applicants shall, at the time of execution of the bond, furnish his address and mobile number to the investigating officer, and the court concerned, and shall not change the residence till the final disposal of the case;

11. The bail applications stand disposed of in above terms. No costs.

(AMIT BORKAR, J.)