

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 2000 OF 2022

Mohsin Anis Shaikh ...Applicant

vs.

The State of Maharashtra ...Respondent

Mr.Ayaz Khan a/w Mr.Dilip Mishra – Advocate for Applicant.

Mr.H.J.Dedhia – APP for Respondent-State.

Mr.R.D.Tarade – Police Constable – Thane City.

CORAM : S. M. MODAK, J.

DATED : 19TH JULY 2023

P. C. :

1. I have already heard Shri.Ayaz Khan – learned Advocate for the Applicant and Mr.Dedhia – APP for the Respondent – State on 5th July, 2023. Apart from the other contentions, the hearing was stuck up as the issue is raised that the quantity possessed by other two Accused, whether can be considered to be in possession of this Applicant. Because, if it is considered to be in possession of this Applicant, it will become a commercial quantity.

2. Mr.Ayaz Khan relied upon the observations of learned Single Judge in ***Akash J. Jariwala V/s. The State of Maharashtra and Anr.***¹.

1 Criminal Bail Application No. 3032 of 2019 : 22nd January, 2020 : Bombay High Court

3. Earlier learned APP sought time to address this Court on this aspect. Today he has restricted to the facts of this case.

4. There are in all three Accused persons who were charge-sheeted. The present Applicant is Accused No.1. All were found travelling in auto rickshaw on 21st October, 2021 near Kharegaon after post Mumbra. The contraband found is described on the pre-trap panchnama dated 21st October, 2021. More specifically on Page No.41. It is as follows :-

- (a) The present Applicant Mohsin Shaikh was found in possession of 6.300 k.g., of ganja.
- (b) Accused Laik Yunus Siddhiqui was found in possession of 6.300 k.g., of ganja.
- (c) Accused Kalim Salim Shaikh was not found in possession of ganja.
- (d) From the space below the rickshaw driver seat, ganja weighing about 12.900 k.g., was found.

5. That is why, the contention of Mr.Khan is that the ganja found in exclusive possession of the Applicant is 6.300 g.m., and it is not a commercial quantity. Whereas, according to learned APP, the quantity possessed by the co-accused and found in auto rickshaw needs also be considered.

6. It is true that learned Single Judge of this Court in case of ***Akash J. Jariwala*** (supra) while granting bail on 22nd January, 2020

has dealt with a similar issue. On prima facie enquiry, it was found, both Accused have not shared common accomplishment by joint operation. Final opinion is to be given by the trial Court. (Para No.8 – last 3 lines). In that case, two Accused were travelling in a car, whereas, drug found in possession of the Applicant was 9 grams which was not a commercial quantity. Whereas, in case of ***Amarsingh Ramjibhai Barot V/s. State of Gujarat***², the Hon'ble Supreme Court has also dealt with the issue of invocation of Section 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 ["NDPS Act"]. One Accused was found in possession of 4.275 Kgs, wherein other was found in possession of 900 grams of contraband. The Appellant and Danabhai Rabari were found together but they were individually carrying the recovered substance. There was no evidence of conspiracy (Para No.8). The quantity possessed by both of them were added and it falls within the meaning of commercial quantity. It was on the basis of provisions of Section 29 of NDPS Act. But, it was held that unless and until there is evidence of conspiracy, a person cannot be blamed for quantity possessed by co-accused. I do not find any reason not to apply these observations. The quantity possessed by

2 2005 AIR (Supreme Court) 4248

the Applicant only needs to be considered. It is below the commercial quantity.

7. Apart from that, the Police at the time of taking samples have mixed up contraband found in three bags and then taken sample (Exhibit-A1 and Exhibit-A2). Furthermore, these samples were taken not before the learned Magistrate but at the spot. So, there is a defect in the sampling. This cannot be cured even at the time of trial.

8. One more contention raised that while in Nashik, he has also committed a similar offence. He was also externed. In spite of that, he has committed present offence. It is true that it is one of the considerations under Section 37 of the NDPS Act. But, as the quantity is not of commercial quantity, bar under Section 37 of NDPS Act will not be applicable. At the most, he can be asked not to enter the Thane district.

9. These are my prima facie observations.

10. So, the Applicant is entitled to be released on bail. Hence, order :-

ORDER

- (i) Application is allowed.
- (ii) Applicant Mohsin Anis Shaikh be released on bail in connection with C.R. No. 368 of 2021 registered with

Kalwa Police Station for the offences punishable under Sections 8(c), 20(c) and 29 of NDPS Act, on furnishing personal bond and surety bond of Rs.50,000/-.

- (iii) Applicant not to enter the Thane district till completion of trial.
- (iv) Applicant to provide his alternate address to the Investigating Officer.
- (v) Applicant is permitted to enter the Thane district only for attending the trial and only when called by the Investigating Officer.
- (vi) Applicant is directed to give attendance to nearest Police Station on 1st Monday of every month from 10.00 to 12.00 noon for two years and to maintain a diary of attendance.
- (vii) Applicant not to threaten the Prosecution witnesses or to allure them in any manner.
- (viii) In case of breach of any of the conditions, the bail of the Applicant is liable to be cancelled after notice.

- 11. Application is disposed of in the aforesaid terms.
- 12. All the parties to act on an authenticated copy of this order.

[S. M. MODAK, J.]