IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 4304 OF 2021

Mohammed Salman Khan s/o Nasir Khan ..Applicant
VS.
Union of India and anr. ..Respondents

WITH
BAIL APPLICATION NO. 978 OF 2022

Mohammed Faaran Khan s/o Nasir Khan ..Applicant
VS.
Union of India and anr. ..Respondents

Mr. Kushal Mor a/w Mr. Kunal Bilaney for the Applicants.
Mr. S. H. Yadav, APP for the State.
Mr. Shreeram Shirsat a/w Mr. Amandeep Singh Sra a/w Mr. Anna Oommen for Respondent-NCB.

CORAM : M. S. KARNIK, J.

DATE : FEBRUARY 23, 2023

P.C. :

1. Heard learned counsel for the applicants and learned APP for the State. These applications are disposed by a common order.

2. These are applications for bail in respect of the offences punishable under Sections 8(c) read with 22(b), 27, 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter “NDPS Act”, for short) in connection with C.R. No.07 of 2021 registered with Narcotics Control Bureau, Mumbai Zonal Unit.

3. The applicants are real brothers. There are in all 15 accused. The applicant-Mohammed Salman Khan s/o Nasir Khan is the accused No.4. 10.5 grams of Mephedrone (MD) was recovered from the applicant No.1's house upon a search by the raiding party. This is a non-commercial quantity.

4. Learned counsel for the applicants contended that the applicants are not a part of the cartel of the drug dealers as alleged by the prosecution. They have no prior criminal antecedents. The applicants are sought to be implicated on the basis of Section 67 statements which cannot be relied upon. There is no evidence to link the applicants with the other co-accused. At the highest the MD which was recovered from the applicant was for personal consumption. There is nothing to suggest that the applicants are indulging in sale of the substance. It is contended that the confessional statements are not binding in the absence of evidence of conspiracy against the applicants.

5. Mr. Shirsat, learned counsel for the respondent No.1 on the other hand submitted that the applicants are a part of cartel of drug dealers who are involved in active sale of the substance. Learned counsel relied upon the order of this Court in the case of co-accused No.7-Mohammed Aun Javed Haider Sayed. This Court by an order dated 15/11/2021 in Criminal Bail Application No.3041 of 2021 rejected the bail application. There was no recovery from the co-accused No.7 whose bail application has been rejected. It is further submitted by Mr. Shirsat that there are adequate materials to indicate that the applicants are involved in the conspiracy.

6. Heard.

7. On receiving specific information the raid was conducted at the flat premises of the accused No.1-Parvez Naserullah Khan @ Chinku Pathan wherein the alleged quantity found and seized was 2.9 grams of Heroin and 52.2 grams of MD. A black coloured pistol, cash of Rs.12,500/- and the vehicle was also found. On the basis of voluntary statement of accused No.1 under Section 67 of the NDPS Act the accused No.2-Rahul Kumar Verma came to be arrested. The accused No.1 disclosed that 2.9 grams of Heroin was procured from one Zakir i.e. accused No.3. The accused No.3 in response to the notice issued under Section 67 of the NDPS Act stated that he knew accused No.1. Accused No.3 was arrested on 21/01/2021 on the basis of his voluntary statement. Further information was revealed that the present applicant (Mohammed Salman Khan) was procuring the substance MD from the accused No.1 and selling it to prospective customers of accused No.4. It is the case of the prosecution that the applicant has known Arif (accused No.6) and that the applicant helps Arif in his illegal trade of MD. In a surprise search that was carried out at the applicant's house, 10.5 grams of MD was recovered. The raiding party also found electricity bill, Kotak Mahindra Bank Card, Applicant's Aadhar Card, digital weight machine, empty cigarette box and empty transparent polythene. On the basis of his voluntary statement recorded under Section 67 of the NDPS Act the applicant was arrested on 23/01/2021. Other accused were also arrested.

8. So far as the applicant-Mohammed Faaran Khan s/o Nasir Khan in the connected Bail Application No.978 of 2022 is concerned, he is the accused No.9. The house of the Mohammed Faaran Khan was searched on 22/01/2021. No incriminating material was found. The accused No.9 presented himself at NCB office in response to a notice issued under Section 67 of the NDPS Act. On the basis of his statement the applicant-Mohammed Faaran Khan accused No.9 was arrested on 15/06/2021.

9. The accused No.1 in his statement under Section 67 of the NDPS Act mentions that the MD was delivered to the applicant-Mohammed Salman Khan. In the voluntary statement of the applicant-Mohammed Salman Khan it is stated by him that he purchased MD from the accused No.1-Parvez Naserullah Khan @ Chinku Pathan. In the statement he says that he was using it for personal consumption as well as for sale as he was facing cash crunch and the same was delivered to the prospective customers of accused No.1. It is further stated that he would also collect MD from the co-accused-Arif and the same would be sold to the prospective customers of Arif.

10. The applicant-Mohammed Faaran Khan's statement was recorded under Section 67 of the NDPS Act. He stated to have purchased one property which was under construction flat on 8th floor at Dongri. He stated to have paid Rs.30 lakhs from his mother's account and Rs.10 lakhs through cash. The applicant-Mohammed Faaran Khan is the brother of the applicant-Mohammed Salman Khan. In his voluntary statement he gave details about the working of the syndicate and the mobile numbers of the co-accused.

11. It is also pertinent to consider the order dated 16/07/2021 passed by the Intelligence Officer, NCB of freezing/seizure of illegally acquired property under Section 68F(1) read with Section 68E of the NDPS Act. The applicant-Mohammed Faaran Khan says that he purchased an under construction property and paid a sum of Rs.30 lakhs from her mother's account. The investigation revealed that money to purchase the property was provided by these applicants from their drug earnings. Further, it is stated that the bank account in the name of applicant-

Mohammed Salman Khan's wife shows a balance of Rs.40,240/- and the said amount is earned by illegal trafficking of MD. There is an order dated 11/08/2021 passed by the competent authority under Section 68F(2) of the NDPS Act. In the said order it is observed that there was no document/evidence to suggest that the applicants and their mother was having any other profession or business to generate licit money which could have explained the impugned investment. The competent authority has observed on the basis of the reply of the Intelligence Officer that the investigation revealed that the applicants and their mother do not have any source of income and that the applicants are involved in drug smuggling very actively and earned money through drug trafficking. It is observed that the acquisition of the said property through licit sources of income remains unexplained. The freezing order therefore was confirmed.

12. The co-accused – Arif is the head of the syndicate. No doubt the voluntary statement under Section 67 of the NDPS Act cannot be relied upon. As far as the contention of as to whether the confessional statement of the co-accused recorded under Section 67 is binding or not is concerned, the question is well settled by the Supreme Court in the matter of **Tofan Singh vs. The State of Tamil Nadu**[1]**.** Such confessional statement can be used in investigation but the prosecution of the accused cannot be based on such confessional statement. However, this Court is required to examine whether prosecution is justified in apprehending the applicant's involvement in the crime in question.

13. Taking an overall view of the matter, considering the materials on record and the alleged nature of the involvement of the applicants, I find it difficult to come to prima facie conclusion that there are reasonable grounds for believing that the applicants are not the guilty of the offence.

14. The applications are rejected.

(M. S. KARNIK, J.)

1 Criminal Appeal No.152 of 2013