



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

BAIL APPLICATION NO. 2967 OF 2023

SAFI AJMAL VINCHU

..APPLICANT

VS.

UNION OF INDIA AND ANR.

..RESPONDENTS

Adv. Ayaz Khan i/b Adv. Mithilesh Mishra for the Applicant.

Adv. Manisha Jagtap for Respondent No.1 a/w Mr. P. H. Gaikwad, APP for the State.

CORAM : M. S. KARNIK, J.

DATE : DECEMBER 01, 2023

P.C. :

1. Heard learned counsel for the applicant, learned counsel for respondent No.1 and learned APP for the State.
2. This is an application for bail in respect of the offence punishable under Sections 8(c), 22(c), 27, 27(a), 28, 29 and 35 of the The Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "NDPS Act") registered vide C.R. No.73 of 2021 (F.No.- NCB/MZU/CR-73/2021) with Narcotics Control Bureau, Mumbai.
3. There are in all 8 accused. The applicant is accused No.7. So far as the present applicant is concerned, it is the

case of the prosecution that on the basis of the information received, at around 2.00 a.m. on 16/09/2021 a raid was conducted on the hotel premises of the applicant known as 'Hotel Koyla' which is situated at Bhiwandi, District Thane. On enquiry with the applicant, he handed over the substance Mephedrone (MD) weighing 58.5 gms to the raiding party which he took out from the drawer of the table which was kept in the hall of the restaurant. The applicant was arrested on 16/09/2021.

4. Learned counsel for the applicant submitted that the search was conducted between sunset and sunrise and, therefore, there should have been compliance with the provisions of Section 42 of the NDPS Act as the search was based on specific information. It is submitted that in terms of the second proviso to Section 42 of the NDPS Act, the officer concerned has not recorded the grounds of his belief if he had reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender to the offender. It is thus

submitted that there is non-compliance of the provisions of Section 42 of the NDPS Act.

5. Ms. Jagtap, learned counsel for the respondent No.1 while opposing this bail application invited my attention to the provisions of Section 43 of the NDPS Act. She submits that compliance with the provisions of Section 42 is not necessary when the seizure and arrest is from a public place. She invited my attention to the explanation of Section 43 of the NDPS Act to submit that the expression "public place" included any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public. It is, therefore, submitted that the ground of non-compliance of Section 42 is not available to the applicant for seeking enlargement on bail. It is submitted that in the present case, the proper procedure has been followed. It is further submitted that since commercial quantity has been seized, the rigours of Section 37 of the NDPS Act will apply.

6. Heard.

7. Reading of panchnama dated 16/09/2021 reveals that the contraband MD was produced by the applicant from the

drawer of the table which was kept in the hall. According to me, the decision of the Supreme Court in **Directorate of Revenue and Anr. Vs. Mohammed Nisar Holia**¹ will be relevant in the present case. In paragraph No. 14 Their Lordships observed thus:

"14. Section 43, on plain reading of the Act, may not attract the rigours of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of Section 42, need not be complied with, only because the place whereat search is to be made is a public place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely, compliance of Section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance of the said provision would not render the search a nullity. A distinction therefor must be borne in mind that a search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance. It is also possible to hold that rigours of the law need not be complied with in a case where the purpose for making search and seizure would be defeated, if strict compliance thereof is insisted upon. It is also possible to contend that where a search is required to be made at a public place which is open to the general public, Section 42 would have no application but it may be another thing to contend that search is being made on prior information and there would be enough time for compliance of reducing the information to writing, informing the same to the

1 2008(2) SCC 370

superior officer and obtain his permission as also recording the reasons therefor coupled with the fact that the place which is required to be searched is not open to public although situated in a public place as, for example, room of a hotel, whereas hotel is a public place, a room occupied by a guest may not be. He is entitled to his right of privacy. Nobody, even the staff of the hotel, can walk into his room without his permission. Subject to the ordinary activities in regard to maintenance and/or house keeping of the room, the guest is entitled to maintain his privacy. The very fact that the Act contemplated different measures to be taken in respect of search to be conducted between sunrise and sunset, between sunset and sunrise as also the private place and public place is of some significance. An authority cannot be given an untrammelled power to infringe the right of privacy of any person. Even if a statute confers such power upon an authority to make search and seizure of a person at all hours and at all places, the same may be held to be ultra vires unless the restrictions imposed are reasonable ones. What would be reasonable restrictions would depend upon the nature of the statute and the extent of the right sought to be protected. Although a statutory power to make a search and seizure by itself may not offend the right of privacy but in a case of this nature, the least that a court can do is to see that such a right is not unnecessarily infringed. Right of privacy deals with persons and not places.”

(emphasis mine)

8. The applicant is the owner of the hotel in question.

The question in the present case obviously will be whether the place from where the contraband was found is not open to the public although situated in the public place. The contraband was recovered as per the information given by

the applicant. It appears that the hotel was closed for the customers at that hour. One employee opened the door of the hotel to enable the raiding party to enter. My observations are, *prima facie*, for deciding this application, in the facts and circumstances of the present case and shall not influence the trial Court while deciding the matter on merits based on the evidence adduced. I am of the opinion that for the purpose of bail, when the applicant is already incarcerated as an undertrial for more than 2 years with no possibility of the trial concluding any time soon, the observations of the Supreme Court in the case of **Mohammed Nisar Holia** (supra) must enure to the benefit of the applicant.

9. Despite the vehement opposition of the learned counsel for the respondent No.1, having regard to the facts and circumstances of the present case, I am of the opinion that the twin conditions laid down by Section 37 of the NDPS Act are satisfied. The record does not indicate about any criminal antecedents against the applicant under the NDPS Act. Learned counsel for the applicant pointed out

that there is one antecedent against the applicant in respect of bodily offence. It is unlikely that the applicant will commit any offence during the pendency of the trial. In this view of the matter, the applicant can be enlarged on bail by imposing stringent conditions. Hence, the following order :-

ORDER

- (a) The application is allowed.
- (b) The applicant- Safi Ajmal Vinchu in connection with C.R. No.73 of 2021 (F.No.- NCB/MZU/CR-73/2021) registered with Narcotics Control Bureau, Mumbai, shall be released on bail on his furnishing P.R. Bond of Rs.1,00,000/- with one or more local sureties in the like amount.
- (c) The applicant shall attend the Investigating Officer of Narcotics Control Bureau, Mumbai, once every fortnight on the first and third Monday of every month, between 11.00 a.m. and 1.00 p.m. till trial concludes.
- (d) 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 the facts to Court or any Police Officer. The applicant shall not tamper with evidence.
- (e) On being released on bail, the applicant shall

furnish his contact number and residential address to the Investigating Officer and shall keep him updated, in case there is any change.

(f) The applicant shall not enter the jurisdiction of Nijampura Police Station after being released on bail, till the trial concludes.

(g) The applicant shall attend the trial regularly. The applicant shall co-operate with the trial Court and shall not seek unnecessary adjournments.

(h) The applicant shall surrender his passport to the Investigating Officer, if not already surrendered.

(i) The applicant shall not leave India without prior permission of the trial Court.

10. The application is disposed of.

(M. S. KARNIK, J.)