

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 266 OF 2024

Asif Kasam Rajkotwala ...Applicant
Versus
The State of Maharashtra ...Respondent

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SUBHASH
KULKARNI

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SANTOSH SUBHASH
KULKARNI
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Ms. Alisha Parekh, a/w Ashwini Achari, i/b Taraq Sayed, for
the Applicant.

Mr. S. R. Aagarkar, APP for the State/Respondent.

API Bhoys, Anti Narcotics Cell, Bandra Unit, Crime Branch,
Mumbai, present.

CORAM: N. J. JAMADAR, J.

DATED: 8th APRIL, 2024

ORDER:-

1. Heard the learned Counsel for the parties.
2. This is an application for bail in Special Case No.1398 of 2023 arising out of CR No.21 of 2023 registered with ANC, Mumbai, for the offences punishable under Sections 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, ("the NDPS Act, 1985").
3. On 10th March, 2023, while the Anti Narcotic Cell (ANC) Police were on patrolling duty at Sakhali Street, Madanpura, Byculla (W) at about 9.55 pm. Md. Shahid Md. Saeed Qureshi (A1) and Mustafa Abdul Rahim Rajkotwala (A2) were found

moving suspiciously. They were accosted. They gave evasive replies. The police suspected that accused Nos.1 and 2 might be carrying contraband substance. They were apprised of their right to be searched before the nearest Executive Magistrate or Gazetted Officer under Section 50 of the NDPS Act, 1985. As accused Nos.1 and 2 declined to avail the said right search was carried out in the presence of public witness.

4. In the personal search of Md. Shahid Md. Saeed Qureshi (A1) a white substance kept in a plastic bag was found. It turned out to be Mephedrone (MD). It weighed 100 grams. In the search of Mustafa Rajkotwala (A2) 200 grams MD was found. Contraband articles were seized and accused Nos.1 and 2 were arrested. Accused Nos.1 and 2 made a disclosure that they had procured the contraband article from the applicant.

5. As the investigation revealed the complicity of the applicant, the applicant came to be arrested on 19th June, 2023. The applicant made a disclosure statement on 21st June, 2023 and led the police party to his house wherefrom 20 gram MD was recovered from the drawer of the wooden

cupboard. The contraband was seized and sealed. Post completion of investigation charge-sheet came to be lodged.

6. Ms. Parekh, the learned Counsel for the applicant, submitted that the applicant has been arraigned on the basis of the statement of the co-accused. There is no material to connect the applicant with the recovery of the commercial quantity of MD from accused Nos.1 and 2. Only 20 grams MD has been recovered pursuant to the alleged disclosure statement made by the applicant. The interdict contained in Section 37 of the NDPS Act, 1985, therefore, does not come into play. The endeavour of the prosecution to rope in the applicant by invoking Section 29 of the NDPS Act, 1985 is not at all sustainable as there is nothing to indicate that the applicant was privy to the alleged conspiracy to procure and sell the contraband article.

7. In opposition to this, Mr. Aagarkar, the learned APP, stoutly resisted the prayer for bail. It was submitted that there are statements of witnesses which indicate that the applicant has been habitually dealing in the contraband article. The witnesses have stated that the applicant was using a mobile phone with the sim card No.9737120487 and the applicant was in regular touch with the co-accused even

in proximity to the time of the arrest of accused Nos.1 and 2, with contraband article. Mr. Aagarkar further submitted that in CR No.11 of 2021 in which the applicant has been arraigned for the offences punishable under Sections 20(b)(ii) (a), 22(c), 27, 27(a) and 29 of the NDPS Act, 1985, while releasing the applicant on bail, the Court had imposed a condition that the applicant shall not indulge in similar offences while on bail. In breach of the said express condition, the applicant indulged in identical offences. Therefore, the applicant does not deserve to be enlarged on bail as there is an imminent risk of the applicant again indulging in drug trafficking.

8. Evidently, accused Nos.1 and 2 were found in possession of commercial quantity of MD. The seizure panchnama records that accused Nos.1 and 2 named the applicant as their supplier and the aforesaid mobile number of the applicant was shared by accused Nos.1 and 2. Post the arrest of the applicant, pursuant to the discovery allegedly made by the applicant, 20 gram MD was allegedly recovered from the house of the applicant. That constitutes an intermediate quantity. However, that by itself cannot be a ground to enlarge the applicant on bail if the prosecution

succeeds albeit *prima facie* in demonstrating that there is material to implicate the applicant under Section 29 of the NDPS Act, 1985.

9. To this end, the prosecution banks upon the statements of the co-accused and discovery made by Mustafa Rajkotwala (A2) to point out the places where the applicant had allegedly delivered the contraband, which was recovered from accused Nos.1 and 2 and CDR, which, according to the prosecution, establishes the nexus between the applicant and accused Nos.1 and 2. To meet the challenge that the cell phone No.9737120487 does not stand in the name of the applicant and he was not using the said phone number, the prosecution banks on the statements of Smt. Renu Mishra. To bolster up the case of Md. Shahid Md. Saeed Qureshi (A1) was using cell phone No.8691832766 the prosecution relies upon the statement of the brother of accused No.1 namely Md. Mujahid Qureshi. Thus, by placing reliance upon the CDR, the prosecution professes to demonstrate that the applicant and co-accused were in regular touch.

10. To start with, it is trite law that a statement made by one co-accused is not legal evidence against another co-accused. Even the disclosure statement made by an accused

under Section 27 of the Evidence Act is not a substantive evidence qua the non-maker co-accused. In view of the decision of the Supreme Court in the case of *Tofan Singh vs. State of Tamil Nadu*¹, the statements made by the accused under Section 67 of the NDPS Act, 1985 cannot be used as confession qua the accused, who makes such statement at the trial for the offences punishable under NDPS Act, 1985. The aforesaid being the position in law, the endeavour of the prosecution to bank upon the statements of accused Nos.1 and 2 and the applicant does not merit countenance.

11. The discovery made by Mustafa Rajkotkar (A2) also does not seem to be much assistance to the prosecution as nothing can be said to have been discovered pursuant to the discovery made by the said accused. In substance, the disclosure statement of Mustafa Rajkotwala (A2) does not distinctly relate to the fact thereby discovered.

12. At this stage, even if the Court proceeds on the premise that 20 gram MD was recovered from the possession of the applicant, that, by itself, may not be sufficient to bring the acts of the applicant within the dragnet of Section 29 of the NDPS Act, 1985.

¹(2021) 4 SCC 1.

13. The reliance placed by the prosecution on the CDR is required to be appreciated in the light to the fact that it is not the case of the prosecution that the cell phone No.9737120487 stands in the name of the applicant. The prosecution alleges that the applicant was using the said mobile number and had contacted persons including Smt. Renu Mishra. The latter states that in the past she worked as a sex worker. She had known the applicant as one of her customers. In the months of March, 2023, the applicant had contacted her by making a call from the said mobile No.9737120487. The statement of Smt. Renu Mishra, *prima facie*, appears to be fragile to bear the weight of the accusation. In the absence of a positive material to show that the applicant was using the said number, the weight to be attached to the said circumstance of the applicant having allegedly used mobile phone No.9737120487 to contact accused Nos.1 and 2, appears to be a matter which warrants consideration at the trial. Even otherwise, CDR, by itself, without knowing more in the nature of the transcript of the conversation, does not constitute an incriminating circumstance.

14. The conspectus of aforesaid consideration is that *prima facie* there does not appear to be material to invoke the provisions contained in Section 29 of the NDPS Act, 1985 qua the applicant. The Court can thus draw an inference that the applicant may not be guilty of an offence punishable under Section 29 of the NDPS Act, 1985. Thus, the interdict contained in Section 37 of the Act, 1985 may not be attracted.

15. It is true the applicant has antecedents. The bail order in CR No.11 of 2021 indicates that the applicant was granted default bail. One of the conditions was that the applicant shall not commit similar offence while on bail. Ms. Parekh submitted that in the said case also the applicant was found in possession of a small quantity of 10 gram of *charas/hashish*.

16. I have perused the papers in NDPS Special Case No.1016 of 2021 arising out of CR No.11 of 2021. The seizure panchnama indicates that 10 gram of *charas/hashish* was found in possession of the applicant. 100 gram constitutes the small quantity of *charas/hashish*. In this view of the matter, I find substance in the submission of Ms. Parekh that

the antecedent of the applicant is not such as to dis-entitle the applicant from release on bail.

17. Hence the following order:

: O R D E R :

- (i) Application stands allowed.
- (ii) The applicant be released on bail in Special Case No.1398 of 2023 arising out of CR No.21 of 2023 registered with ANC, Mumbai, on furnishing a P.R. Bond of Rs.1,00,000/- with one or more sureties in the like amount.
- (iii) The applicant shall mark his presence at ANC, Mumbai, on the first Monday of every alternate month between 10.00 am. to 1.00 pm. for the period of three years or till conclusion of the trial, whichever is earlier.
- (iv) The applicant shall not tamper with the prosecution evidence. 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.
- (v) 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.

(vi) The applicant shall not indulge in identical activities for which he has been arraigned in this case.

(vii) The applicant shall regularly attend the proceedings before the jurisdictional Court.

(viii) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the trial Court shall not be influenced by any of the observations made hereinabove.

Application stands disposed.

[N. J. JAMADAR, J.]