

Shailaja

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

CRIMINAL BAIL APPLICATION NO.364 OF 2022

Jitesh Vasudev Koli	]	Applicant
Vs.		
State of Maharashtra	]	Respondent

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Mr. Dilip Mishra i/b Mr. Ayaz Khan, for Applicant.

Ms. Anamika Malhotra, A.P.P, for Respondent – State.

Mr. Sawant, A.S.I, DCB, CID Unit -III.

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CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED : 18th MARCH, 2024.
PRONOUNCED ON : 22nd MARCH, 2024.

ORDER:

1. The applicant is one of the three accused arrested by the DCB CID Unit – III of Crime Branch, Mumbai in C.R. No.33 of 2019 for the offences punishable under Sections 8 (c), 20 (b), 22 (c) and 29 of the Narcotic Drugs and Psychotropic Act, 1985 (for short “N.D.P.S Act”). Accused No.1 – Nikhil Sharma and accused No.2 – Frenix John Rajiah have already been granted bail.

2. Briefly stated, prosecution story goes as under.

3. On 14th December, 2019, the complainant – Bhaskar Bhimrao Gaikwad - Buckle No.061934 attached to DCB CID Unit -III, Crime Branch, Mumbai along with his companion officers was called by In-charge Police Inspector at 10.00 a.m informing them that the whereabouts of the accused are to be searched. Accordingly, a team was formed. The team reached *Mahul* Village, *Chembur*, Mumbai. They noticed a person in a suspicious condition with a black coloured bag on his shoulder. When Police Inspector tried to inquire with him, he started running and hence, he was chased and apprehended. Upon inquiry, it was learnt that the said person was carrying *Ganja* and Mephedrone in his bag. Two *panch* witnesses were summoned. A Constable was sent to Anti Narcotic Cell *Ghatkopar* for bringing the testing kit. Another Constable was sent for bringing the brass seal and other sealing material.

4. During search of the suspect, viz. the first accused, the team recovered 1 kg 6 grams of *Ganja*. Two samples each weighing 25 grams were taken out, packed and sealed. The team also recovered 54 grams of Mephedrone. Two samples of each 5 grams were taken out, packed and sealed. During interrogation of this accused, name of the present applicant was discovered as a co-accused. Admittedly,

on the date of registration of First Information Report, the applicant was not in Mumbai. It is the contention of the applicant that he had been to Delhi on 12th December, 2019 and returned on 22nd December, 2019.

5. The applicant was traced out by the Crime Branch from the State of Goa on 10th January, 2020. Subsequently, on 11th January, 2020, a Memorandum *Panchanama* was drawn *qua* the applicant wherein he took the raiding team to a car bearing No. MH-03-CH-0670 by informing that contraband was concealed in the dickey of the said car. During search of the dickey of the car, 101 LSD papers weighing 2.03 grams and 46 ecstasy tablets weighing 26 grams were recovered. The seized contraband was sent for chemical analysis. Result of the Forensic Science Laboratory proved positive. Even during the search of the laptop of the applicant, incriminating material was noticed indicating his nexus and use of Dark Net for importing contraband from foreign countries.

6. After investigation, Investigating Agency laid a charge-sheet.

7. I heard Mr. Mishra, learned Counsel for the applicant and Ms. Malhotra, learned A.P.P, for respondent – State at a considerable length.

8. At the outset, Mr. Mishra would argue that there is no report under Section 57 or under section 57-A of the N.D.PS Act.

9. Counsel would strenuously urge to release the applicant on bail on account of alleged fake discovery under Section 27 of the Indian Evidence Act which, according to him, has not been conducted faithfully by the Investigating Agency for the simple reason that at the time of alleged memorandum statement, the applicant was not in Mumbai but was in Goa. He submits that the *panchas* are habitual and had acted in hundreds of cases in the past. There is no entry in the station diary as regards the alleged raid conducted by the Investigating Agency as well as the names of the *panch* witnesses. Signatures of the applicant were not obtained on the seized articles.

10. The Counsel has invited my attention to the form of report used for forwarding the contraband substance to the Chemical

Analyzer. It appears that after seizure of 100 L.S.D paper and 46 Ecstasy tablets from the applicant on 11th January, 2020, the same were forwarded through Police Head Constable Goregaonkar - Buckle No.26849 on 16th December, 2019. The Counsel would question as to how even before the seizure of the contraband on 11th January, 2020, it was carried by the Carrier on 16th December, 2019 to the Forensic Science Laboratory.

11. The Forensic Science Laboratory report does indicate that it received the contraband through Head Constable Goregaonkar – Buckle No. 26849 on 14th January, 2020.

12. Learned A.P.P argued that due to inadvertence, the form of report used for forwarding the contraband to the Forensic Science Laboratory indicates date as “16th December, 2019” which has been clarified from the statement of Head Constable - Goregaonkar- Buckle No.26849 which was recorded on 14th January, 2020 i.e date on which he had carried the seized contraband to the Forensic Science Laboratory. Be that as it may.

13. According to the learned Counsel for the applicant, the applicant has been incarcerated for more than four years with no chance of trial getting concluded within near future and, therefore, even on the ground of parity, he deserves to be released on bail.

14. Learned A.P.P, on the other hand, invited my attention to several documents and material on record by contending that this is not a fit case for granting bail wherein the applicant is not only involved in manufacturing *Ganja* but had also connection internationally to import narcotic drugs via Dark Net. She invites my attention to not only the memorandum statement of the applicant recorded under Section 27 of the Evidence Act but also the material collected from his laptop as well as his chat with the co-accused and other persons. She submits that there is a delay of two years in making compliance of Section 52-A of the N.D.PS Act, nevertheless, looking to the gravity of the offence, the applicant does not deserve bail.

15. Indubitably, accused No.1 and 2 have already been released on bail by the Trial Court. It is unclear whether the prosecution has challenged those orders.

16. Admittedly, one of the *panch* witnesses – Subhash Waman Shirsat appears to have acted as *panch* witness in several cases under the N.D.P.S Act. Learned Counsel would argue that there are 100 of such cases and, therefore, entire prosecution case is shrouded with suspicion as regards it's genuineness. Learned Counsel has given following few case numbers of the *Dongari* Police Station wherein said Subhash Shirsat had acted as a *panch* witness which are as follows;

- (i) NDPS Case No.98 of 2009 (Anti Narcotic Cell);
- (ii) NDPS Case No.78 of 2015 (Dongri Police Station);
- (iii) NDPS Case No.48 of 2015 (Dongri Police Station);
- (iv) NDPS Case No.128 of 2015 (Dongri Police Station);
- (v) NDPS Case No.120 of 2016 (Dongri Police Station);
- (vi) NDPS Case No.98 of 2015 (Dongri Police Station);
- (vii) NDPS Case No.111 of 2015 (Dongri Police Station);
- (viii) NDPS Case No.187 of 2015 (J J Marg Police Station);
- (ix) NDPS Case No.120 of 2016 (Dongri Police Station);
- (x) NDPS Case No.128 of 2016 (Dongri Police Station);
- (xi) Spl Case No.942 of 2020 (NDPS) (Dongri Police Station);
- (xii) Spl Case No.4 of 2021 (NDPS) (Dongri Police Station);
- (xiii) MCOC Case No.12 of 2019 (Dongri Police Station).

17. A Division Bench of this Court in case of **Mohd. Hussain Babamiyan Ramzan Vs. State of Maharashtra**¹, while acquitting the accused who were being prosecuted for the offences punishable under Section 21 r/w 8 (c) of the N.D.P.S Act observed thus;

“Normally, it is expected that Investigating Officer will take independent panch witnesses and if knowingly he has taken pliable witnesses as panch witnesses the entire raid would become suspect and in such a case it would not be possible to hold that the evidence of police witnesses by themselves would be sufficient to base a conviction. Therefore, really speaking, on this ground itself, the conviction cannot be sustained”.

It is not the case of the learned A.P.P that Subhash Shirsat is an independent and reliable *panch* witness and, therefore, the entire exercise of alleged seizure of contraband creates a doubt.

18. It appears from the *panchanama* that the raiding party did not offer their personal search either to the *panchas* or to the applicant before conducting the raid. As a matter of fact, there is nothing on record, including CCTV footage produced by the applicant to substantiate presence of *panch* witnesses. It even does not reflect presence of the applicant. Equally, Memorandum *Panchanama* does

1 1994 Cri. L.J 1020

not reflect that the members of the raiding team carried the brass seal of the concerned Crime Branch Unit – III for the purpose of sealing. In the absence of brass seal, it becomes doubtful as to whether the contraband was sealed at the scene of occurrence itself. It is not clear whether the recovery articles were signed by the applicant in order to substantiate that those were sealed in his presence, more particularly, in view of the contention of the applicant that he was arrested from the State of Goa and that at the time of registration of First Information Report, he was not in Mumbai but had been to Delhi on 12th December, 2019? According to the applicant, he returned on 22nd December, 2019. He had annexed his travel documents at “**Exhibit D**” substantiating his contention. This is significant in light of the fact that according to the prosecution on 11th January, 2020, commercial quantity of LSD and MDMA was recovered from the dicky of the applicant’s car in his presence.

19. Learned Counsel has also invited my attention to the fact that *panchas* who were present at the time of alleged personal search and drawing arrest *panchanama* were already acted as a *Panch* for the arrest and personal search *Panchanama* of accused No.2 which

again substantiated the fact that stock *panch* witnesses were summoned for effecting search and seizure. The record also reveals that there is no compliance of Section 42 of the N.D.P.S Act.

20. Learned A.P.P submits that there is due compliance of Section 52-A of the N.D.P.S Act but it has been delayed by two years as the same was done on 3rd March, 2022. This also frustrates the very object of Section 52-A of the N.D.P.S Act as has been enunciated by the various judgments of the Supreme Court including in case of **Union of India Vs. Mohan Lal and another²** and **Simrnjit Singh Vs. State of Punjab³**

21. In a latest judgment of the Supreme Court in case **Mohammed Khalid and another Vs. The State of Telangana⁴** while hearing an appeal against concurrent judgments of the trial Court as well as the High Court of *Telangana*, the Supreme Court has observed thus;

“22. Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the Investigating Officer PW-5 for preparing an inventory and obtaining samples in presence of the Jurisdictional Magistrate. In this view of

2 (2016) 3 Supreme Court Cases 379

3 2023 SCC Online SC 906

4 Criminal Appeal No (s) 1610 of 2023 and Criminal Appeal No (S) 1611 of 2023

the matter, the FSL report (Exhibit P-11) is nothing but a waste paper and cannot be read in evidence. The accused A-3 and A-4 were not arrested at the spot. The offence under Section 20 (b) (ii) (c) deals with production, manufacture, possession, sale, purchase, transport, import or export of cannabis. It is not the case of the prosecution that the accused A-3 and A-4 were found in possession of *ganja*. The highest case of the prosecution which too is not substantiated by any admissible or tangible evidence is that these two accused had conspired sale/purchase of *ganja* with A-1 and A-2. The entire case of the prosecution as against these two accused is based on the interrogation notes of A-1 and A-2”.

It is observed by the Supreme Court that in the absence of due procedure contemplated in Section 52 - A of the NDPS Act by the Investigating Officer for preparing an inventory and obtaining samples in the presence of the jurisdictional Magistrate, the Forensic Science Laboratory report is nothing but a waste paper and cannot be read in evidence. The conviction and sentence of the appellant has been set aside and he came to be acquitted by the Supreme Court of all the charges.

22. Learned A.P.P has invited my attention to the WhatsApp chat between the applicant and the co-accused as well as seizure of his

Laptop indicating that the applicant was in constant touch with the co-accused. That itself would not be sufficient to hold that the applicant has, *prima facie*, indulged in the offence of N.D.P.S Act, especially, in the light of the report of Forensic Science Laboratory which reads as under;

“Exhibit nos. (1), (2) (3), (4) and (5) does not show presence of Cannabis Constituents”.

23. Since the Forensic Science Laboratory report itself is “Nil”, in the sense, it does not show presence of Cannabis Constituents, it is needless to make further observations in that regard at the stage of considering an application for bail.

24. Admittedly, the applicant has been incarcerated nearly for four years. The charge has not yet been framed and, therefore, it is difficult to ascertain as to how much time the trial Court would take to conclude the case.

25. In so far as rigours of Section 37 of the N.D.P.S Act are concerned, certain restrictions have been placed on the powers of this Court while granting bail to a person accused of having

committed an offence under the N.D.P.S Act. The limitations on granting of bail specified in clause (b) of sub-section (1) are, of course, in addition to the limitations of the Code of Criminal Procedure.

26. Having granted an opportunity to the learned A.P.P to oppose the application, I am satisfied that there are reasonable grounds for believing that the applicant is not guilty of such offence and that he is not likely to commit an offence while on bail for the reasons stated hereinabove, more particularly, it is doubtful whether memorandum *panchanama* was drawn in the presence of the applicant, that too, when one of the *panch* witness had already acted in several matters under the N.D.P.S Act as a *Panch*. Co-accused have already been released on bail who are on the same pedestal to that of the applicant which, it seems has not been further carried forward by the respondent to the Supreme Court. There was a delay in due compliance of Section 52-A of the N.D.P.S Act.

27. There was seizure of *Ganja* from the premises of the applicant's family at the instance of accused No.1. However,

memorandum *panchanama* dated 11th January, 22020 is in respect of alleged commercial quantity of 100 LSD Dots Papers and 46 MDMA tablets from the dickey of the car of the applicant. This is an independent recovery/seizure under the *panchanama* dated 11th January, 2020 which could not have been considered as a part and parcel of recovery of *Ganja* which was made from the premises of the applicant's family at the instance of co-accused No.1. This is, especially, in light of the fact that the charge-sheet nowhere reflects that the contraband recovered at the instance of the applicant on 11th January, 2020 is the part of the contraband which was recovered from the Accused No.1 or any other material that the same was handed over by either accused No.1 or 2 to the present applicant.

28. As such, there are reasonable grounds for believing the applicant not guilty of the said offence. Of course, findings recorded hereinabove *qua* the applicant are not in the context of finding the applicant not guilty of the offence or whether the applicant has, in fact, committed or not committed any offence under the N.D.PS Act. Entire exercise is only for the purpose of considering whether he can be enlarged on bail or otherwise.

29. Corollary of the aforesaid discussion is that this is a fit case to admit the applicant to bail. Hence, the following order.

: ORDER :

(a) The application is allowed.

(b) The applicant – Jitesh Vasudev Koli be released on bail on executing a P.R bond in the sum of Rs.30,000/- with one or two sureties in the like amount to the satisfaction of the Special Judge (N.D.P.S), City Civil and Sessions Court, Greater Mumbai, in Special Case No.568 of 2020 for the offences punishable under Sections 8 (c), 20 (b), 22 (c) and 29 of the N.D.P.S Act.

(c) The applicant shall report the Office of DCB CID Unit – III of Crime Branch, Mumbai on first Saturday of every month between 10.00 a.m and 1.00 p.m till the charge is framed;

(d) After framing the charge, applicant shall attend the trial Court scrupulously, unless exempted from appearance;

(e) The applicant shall not tamper with the evidence or attempt to influence or contact any of the witnesses or persons concerned with this case;

(f) The applicant shall surrender his passport, if any, to the Investigating Officer immediately.

(g) The applicant shall furnish his residential address and contact details to the respondent and the Trial Court immediately after his release. In case of change in contact details or residential address, same shall be forthwith informed to the Trial Court and the Respondent.

(h) In case of breach of any of the conditions hereinabove, liberty to the prosecution to seek cancellation of bail of the applicant.

30. The application stands disposed of in the aforesaid terms.

[PRITHVIRAJ K. CHAVAN, J.]