

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION NO. 810 OF 2024

Hussain Abu Khan	.. Applicant
Versus	
State of Maharashtra	.. Respondent

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Mr. Ayaz Khan for the applicant.
Ms. Mahalaxmi Ganpathy, APP for the State.
API Deepali Wagh from Bazarpet police station, Kalyan present.

CORAM: BHARATI DANGRE, J.
DATED : 18th MARCH, 2024

P.C:-

1 Heard learned counsel Mr. Khan for the applicant and Ms. Mahalaxmi Ganpathi, learned APP for the State.

2 The present application is filed under Section 439 of the Code of Criminal Procedure, for the second time; the first having been rejected by me on 19/11/2022. On considering the material in the charge-sheet, when I expressed my disinclination, the application was sought to be withdrawn. Another factor which weighed with me, was the antecedents of the applicant, with an inference, being drawn that it reflected his involvement in similar type of offences.

However, considering the long period of incarceration, a request was made to the Special Court to expedite the NDPS Special Case No.243/2021.

3 On passage of almost two years, the second Bail Application is filed on 14/2/2024 and Mr.Khan has placed before me the roznama from the Court of the Additional Sessions Judge, Kalyan, and unfortunately, on its perusal, it is noted that from the year 2021, the case is pending, for framing of charge and there are almost 15 dates allocated, when it was so fixed.

From 26/10/2023 upto 28/3/2024, atleast for 12 dates, the case is now listed before the learned Judge for production of the accused.

With the Court not able to frame the charge from 18/11/2021, which was the first hearing date before the concerned Court, with the applicant having been arrested in September 2021, I do not expect any expeditious progress, and long incarceration itself has to be considered, as one of the ground for releasing the applicant.

4 Though the learned APP would once again press into service his criminal antecedents, Mr.Khan assertively submit that in five cases registered against him, he has secured an acquittal, and three cases are presently pending.

5 With the incarceration of more than three years, in my considered opinion, he cannot be detained further, as till date,

even charge is not framed.

Mr.Khan has placed reliance upon the decision of the Apex Court in somehow identical facts in case of *Chet Ram @ Ram Veer Vs. Union of India*, dated 15/3/2023, when the antecedents were pressed into service and this is what the Apex Court has observed :-

“Learned counsel for the State opposed the grant of bail submitting that the petitioner has criminal antecedents and was charged with committing an offence under Section 307 IPC and has also been charged with committing offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 in another FIR.

Apparently, the petitioner was acquitted in the case where he was charged with committing the offence under Section 307 IPC. As far as the other FIR alleging offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 is concerned, he has been enlarged on bail.

Considering the circumstances especially that he has undergone detention for 3 and a half years and the conclusion of trial is most likely in the distant future, he is enlarged on bail subject to such conditions as the trial court deems appropriate to impose on him.”

Apart from this, Mr.Khan has also placed on record various order passed by the Apex Court, where the incarceration for more than two years has been considered, to be a sufficient ground for releasing the applicant's facing NDPS case, on bail.

6 In the present case, the applicant face accusation under section 8(c) r/w Section 20(b)(ii) of the NDPS Act for an offence registered with Bazaarpeth police station, as he is alleged to be in possession of 120 gms of *charas*, which admittedly, is the non-commercial quantity.

7 Mr.Khan has also pressed into service the non-compliance of Section 52A of the NDPS Act and he has invited my attention to something strange, which prima facie establishes the violation of a provision, which is held to be mandatory, and ultimately affect the prosecution case.

The panchnama dated 6/9/2021, states that the search of the applicant lead to seizure of some currency notes and a packet containing Narcotics, which was identified to be *charas*. The panchnama reveal that two samples were drawn from the bulk, measuring five grams each, and it was packed into a green colour envelope which was numbered as 'A1' and 'A2', whereas bulk quantity was also packed and sealed as Exhibit-A.

The communication from the API, Bazarpeth police station dated 7/9/2021 addressed to the Magistrate reflect that packet 'A1' is already forwarded to Forensic Analysis and what was forwarded to the Magistrate was Exhibit A and A2. Pursuant thereto, the Magistrate, who has carried out the procedure under Section 52(A)(3) of The Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') in respect of the inventory and what is important to note is, this is only restricted to the bulk i.e. Exhibit A, Envelope weighing 139 Grams and Exhibit A2 - Envelope weighing 22 Grams.

8 The Magistrate thereafter, opened the envelopes,

weighed it and again wrapped in the same packing paper, without drawing any samples, and what is significant to note is, the sample which was forwarded for analysis, was not drawn before the Magistrate from packets-Exhibit A and A-2, but admittedly, what is forwarded for analysis is packet Exhibit A1.

9 The Narcotics Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal Rules, 2022 has now set out the procedure for disposal of the seized Narcotics Drugs and Substances and the manner in which sampling has to be carried out as enumerated in Chapter III.

In the present case, there is no adherence to Rule 8 to Rule 11, which will ultimately, have impact upon the case of the prosecution, as prima facie, it can be seen that the entire process adopted, is in utter violation of Section 52A of the Act as well as Rules 8 to 11 of the NDPS Rules.

10 However, considering that the previous offences were registered against the applicant with Bazarpeth police station in Kalyan, I deem it appropriate to impose a condition that the applicant shall not reside in District Kalyan and except for marking his attendance in Bazarpeth police station, as well as for attending the trial, he shall not step in within the jurisdiction of Kalyan District.

Hence, the following order is passed :-

ORDER

- (a) Bail Application No. 810/2024 is allowed.
- (b) The applicant Hussain Abu Khan shall be released on bail in Special Case No. 243/2021 (pending in Kalyan Court) registered with Bazarpeth police station, on furnishing P.R. Bond to the extent of Rs.25,000/- each with one or two sureties in the like amount.
- (c) The applicant shall report to Bazarpeth police station on every Saturday between 3.00 p.m to 5.00 p.m.
- (d) The applicant shall not reside in District Kalyan and except for marking his attendance in Bazarpeth police station, as well as for attending the trial, he shall not step in the jurisdiction of Kalyan District.
- (e) The applicant shall keep the Investigating Officer informed of his current address and mobile contact number and/or change of residence or mobile details, if any, from time to time.
- (f) The applicant shall not interfere with the prosecution witnesses and shall not tamper with the evidence or attempt to influence or contact the complainant, witnesses or any person concerned with the case in any manner;
- (g) The applicant shall co-operate in the conduct of the trial and attend the trial Court on all dates, from time to time.

(SMT. BHARATI DANGRE, J.)