

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.1715 OF 2024

Remond Anitw @ Ramond Antwi ...Applicant
vs.
The State of Maharashtra ...Respondent

**WITH
BAIL APPLICATION NO.1717 OF 2024**

Okapala Chigbo Benedict @ Benedith ...Applicant
vs.
The State of Maharashtra ...Respondent

Mr. Dilip Mishra a/w. Ms. Zehra Charania, Ms. Mallika Sharma and
Mr. Ayaz Khan, for the Applicants.
Mr. R.M. Pethe, APP, for the Respondent/State.
Mr. Jaybhaye, PSI, Dongri police station.

CORAM : N. J. JAMADAR, J.
DATE : APRIL 22, 2024

P.C.:

1. Heard the learned counsel for the applicants and the learned APP for the State.
2. The applicants, who are arraigned in C.R. No. 25 of 2019 registered with Dongri police station for the offences punishable under sections 22(c) read with 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act, 1985); sections 3(1)(ii), 3(2) and 3(4) of the Maharashtra Control of Organized Crime Act, 1999 and sections 3(2)(a) and 14 of the Foreigners Act, 1946 and section 5 of the Passport Act, 1920, seek to be enlarged on bail.

3. On 23rd February, 2019 at about 4.30 am, Dongari Police were on patrol on the railway track at Wadi Bundar. Three persons, who appeared to be foreign nationals, were found loitering suspiciously. After noticing the police party, the said persons attempted to flee away. They were chased and accosted. Preliminary interrogation revealed that those persons were drug peddlers.

4. After following the procedure prescribed in Section 50 of the NDPS Act, personal search of those persons was conducted in the presence of two public witnesses. The first person – the applicant in BA. No. 1717 of 2024 (accused No. 1) was found in possession of 55 grams of Mephedrone (MD). The accused No. 1 is a Nigerian national. The contraband article was seized and samples were collected. The second person was Turre Musa (accused No. 2). In the personal search of the accused No. 2, after apprising him of his right u/s. 50 of the NDPS Act, 61 grams MD was found kept in the right pocket of his trouser. The contraband article was seized and samples were collected. Likewise in the personal search of the applicant in BA No. 1715 of 2024 (accused No. 3), 57 grams of MD was found concealed in the right pocket of his trouser. The said contraband article was also seized and sealed. A search was conducted at the premises of Ique Chickweni (accused No. 4). 20 grams MD was recovered from the said premises.

5. It transpired during the course of the investigation that accused No. 4 was a habitual drug peddler. He was operating a drug syndicate. The accused No. 2 and the applicants were members of the organized crime syndicate of which the accused No. 4 was the gang leader. The investigation revealed that the Applicants and the co-accused, including the gang leader, were often seen together and there were continuous conversations between them. Hence, having found that the said syndicate indulged in continuing unlawful activities and more than two charge-sheets were lodged against the applicants/accused, the provisions contained in MCOC Act, 1999 were invoked.

6. At the outset, the learned counsel for the applicants submitted that the co-accused Turre Musa (accused No. 2) who was allegedly found in possession of the contraband substance along with the applicants has been released on bail by an order dated 23rd January, 2024. The applicants are similarly circumstanced and, therefore, entitled to the same dispensation.

7. Mr. Pethe, learned APP submitted that the material on record indicates that Ique Chickweni (accused No. 4) is habitually indulging in illicit drug trafficking, though he was arrested for offences punishable under sections of NDPS Act, 1985 and released on bail. It was submitted that the applicants and Ique Chickweni

(accused No. 4), who are all foreign nationals, have been indulging in illicit drug trafficking by overstaying in India. Therefore, they do not deserve to be released on bail.

8. While releasing the co-accused Turre Musa (accused No. 2) on bail, this Court, has observed, inter alia, as under:-

11] To begin with, Mr. Mishra has pressed into service the two grounds. The first, non-compliance of the mandatory requirement contained in Section 50 of the NDPS Act and, second, the breach of the provisions contained in Section 52-A of the NDPS Act, 1985.

12. On the first ground, the thrust of the submission of Mr. Mishra was that in the First Information Report (FIR) as well as the seizure memo, it is recorded that the Applicant and the co-accused were apprised of their right to be searched in the presence of gazetted officer only and "not the Magistrate". The failure to apprise the person his right to be searched in the presence of the Magistrate, according to Mr. Mishra, vitiates the search.

13. In the FIR as well as seizure punchanama, as regards the compliance of the appraisal of the right to be searched in the presence of the gazetted officer or the Magistrate, following endorsement finds mention "As per NDPS act 1985 sec 50 you have right, to demand for gazetted officer at the time of your personal search, we will make the arrangement".

14. Prima facie, the aforesaid appraisal of the right does not appear to be in conformity with the requirement envisaged by sub-section (1) of Section 50 of the NDPS Act, 1985, which reads as under:

"50(1). When any officer duty authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate."

15. It appears that the Applicant was apprised only of his right to be searched in the presence of nearest gazetted officer and not "the Magistrate". Since, the right to be searched before the Magistrate is a valuable right of the person designedly provided by the legislature to give an element of sanctity to the search and also rule out the

possibility of planting and false implication, failure to apprise the right to be searched before the Magistrate cannot be said to be inconsequential. Prima facie, the omission is such that it erodes the sanctity of the search considerably.

16. In case of Beckondan Abdul Rahiman (supra), on which reliance was placed on behalf of the Applicant, the Supreme Court held that failure to apprise the Accused of his right to be searched in the presence of Magistrate impairs the search. After following the constitution bench judgment in case of State of Punjab vs. Baldev Singh [1999(6) SCC 1721] the Supreme Court enunciated the law as under:

"5. In this case the violation of the mandatory provisions is writ large as is evident from the statement of K.R. Premchandran (PW 1). After recording the information, the witnesses are not shown to have complied with the mandate of sub- section (2) of Section 42 of the Act. Similarly the provisions of Section 50 have not been complied with as the accused has not been given any option as to whether he wanted to be searched in the presence of a gazetted officer or the Magistrate. The compliance with Section 50 is held to have been fulfilled on his (PW 1) asking the accused "whether I should search him in the presence of senior officers or a gazetted officer". The accused was required to be apprised of his right conferred under Section 50 giving him the option to search being made in the presence of a gazetted officer or the Magistrate. The accused is not shown to have been apprised of his right nor any option offered to him for search being conducted in the presence of the Magistrate.

6. We are of the firm opinion that the provisions of sub-section (2) of Section 42 and the mandate of Section 50 were not complied with by the prosecution, which rendered the case as not established. In view of the violation of the mandatory provisions of the Act, the appellant was entitled to be acquitted. Both the trial court as well as the High Court have failed to consider this aspect of the matter which warrants the setting aside of the impugned judgment."

17. On the aforesaid touchstone, reverting to the facts of the case, the non-compliance of the mandate of the Section 50 of the NDPS Act. 1985 is writ large.

18. On the aspect of invocation of the provisions contained in MCOC Act, I find substance in the submission of Mr. Mishra that the applicability of bar contained in Section 21 of the MCOC Act is required to be decided in the light of the

material, which prima facie does not indicate that the Applicant is a member of the alleged organized crime syndicate led by the Accused No. 4.

19. No crime has been registered against the Applicant apart from the subject crime. Secondly, the prosecution's claim does not seem to be based on continuing unlawful activity engaged by the syndicate on the basis of filing of charge-sheets but on the basis of the statement of witnesses that they had seen the Accused No. 4 and the Applicant together and the CDR. It is suffice to note the following contentions in the Affidavit-in-Reply.

16. I say that there is nexus between the present Applicant/Accused with co-accused wherein the Applicant/Accused is a member of "Organized Crime Syndicate" these accused persons were seen together by witnesses below the Wadi Bandar Bridge, on railway Track while selling drugs to drug addicts. There are witnesses who had seen these accused staying and moving together. The photographs of accused persons Remond Anitw @ Ramond Antwi and Applicant/Accused Okpala Benedict @ Benedith were found in the mobile phone of accused Remond Anitw @ Remond Antwi. Same has been extracted from said mobile phone under the panchnama and with the help of mobile phone expert. All the accused persons found in possession of ban Mephedrone (MD) drug at the time of their arrest and same was seized under the panchnama."

20. It would be relevant to note that the Applicant is not shown as Accused in the Special LAC No. 171 of 2015 and CR No. 79 of 2016 in which the charge-sheets have been lodged against the Accused No. 4-Ique Chickweni Emanuel, the gang leader. In the chart (Exhibit-B) annexed to the Affidavit-in-Reply, apart from subject crime, there is no antecedent to the discredit of the Applicant. Thus, the submissions of behalf of the Applicant that invocation of the provision contained in MCOC Act appears to be debatable, prima facie, carries substance.

21. Lastly, the aspect of long incarceration. The Applicant is in custody for almost 5 years. The first witness is in the witness box The prosecution proposes to examine 58 witnesses. It is realistically not possible to conclude the Trial in near future. This long period of incarceration impinges upon the right to life guaranteed under the Constitution and renders the further detention of the Applicant as an under-

trial prisoner unsustainable.

22. The conspectus of the aforesaid consideration is that prima facie there appears a fundamental defect in search as the mandate contained in Section 50 of the Act, 1985 cannot be said to have been scrupulously adhered to. It also does not appear that the investigating agency has complied with the provisions contained u/s. 52-A of the NDPS Act, 1985. The invocation of the provisions of MCOC Act on the ground that the Applicant is a member of the organized crime syndicate also seems to be debatable. To add to this, the prolonged period of incarceration renders further detention of the Applicant as an undertrial prisoner unsustainable.

23. I am therefore inclined to hold that the interdicts contained in section 37 of the NDPS Act and Section 21 of the MCOC Act do not come into play. There are no criminal antecedents. It is unlikely that the Applicant would indulge in the identical offences for which he has been arraigned in this case. The apprehension on the part of the prosecution can be taken care of by imposing stringent conditions.

9. The aforesaid reasons apply with equal force to the claim of the applicants for bail and thus on parity of reasons they deserve to be enlarged on bail.

Hence, the following order.

ORDER

1] The applications stands allowed.

2] The applicants be released on bail in C.R. No. 25 of 2019 registered with Dongri police station, on furnishing a P.R. Bond of Rs. 1,00,000/- each with one or more sureties in the like amount, each.

3] The applicants shall mark their presence at Dongri police station on the first Monday of every month between 11 am to

1 pm for a period of three years or till conclusion of the trial, whichever is earlier.

4] The applicants shall not tamper with the prosecution evidence and give threat or inducement to first informant, any of the prosecution witnesses or any person acquainted with the facts of the case.

5] The applicants shall furnish their contact numbers and residential addresses to the investigating officer and shall keep him updated, in case there is any change.

6] The applicants shall regularly attend the proceedings before the jurisdictional Court.

7] 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 disposed.

(N. J. JAMADAR, J.)