

Shailaja

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

CRIMINAL BAIL APPLICATION NO.1916 OF 2022

Usman Anwar Ali Shaikh	]	Applicant
Vs.		
The State of Maharashtra	]	Respondent

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Mr. Ayaz Khan, for Applicant.

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

Mr. Tawade, P.S.I, DCB, CID Unit – 9 present.

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CORAM : PRITHVIRAJ K. CHAVAN, J.

RESERVED ON : 24th APRIL, 2024.

PRONOUNCED ON: 26th APRIL, 2024.

ORDER:

1. The applicant is one of the four accused being prosecuted by DCB CID Unit IX, Mumbai vide C.R. No.68 of 2020 (The said crime was transferred to DCB, CID Unit IX vide C.R. No.26 of 2020) for having found in possession of 139 gms Mephedrone for the offences punishable under sections 8 (c), 22 (c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short

“N.D.PS Act”). Admittedly, rest of the three accused have already been granted bail.

2. Brief facts are as follows.

3. Pursuant to an information, a raid was conducted on 24th September, 2020 when the applicant was proceeding on a Motorbike. When the said vehicle was searched, Investigating team found 139 gms. Mephedrone. Investigating officer collected two samples of five grams and placed the same in two small transparent polythene pouches. Their mouths were sealed with cello tape. The applicant was arrested on 25th September, 2020 itself. *Panchanama* was drawn. Statements of the witnesses were recorded and seized *muddemal* was sent for chemical analysis to the Forensic Science Laboratory. After the investigation, a charge-sheet came to be filed.

4. The Trial Court rejected first bail application of the applicant on 5th August, 2021 as well as second bail application on 29th April, 2022 and, therefore, the applicant has approached this Court.

5. I heard Mr. Khan, learned Counsel for the applicant and the learned A.P.P.

6. Mr. Khan took me through the record. He contends that the Investigating Agency has not ascertained the ownership of the motorbike alleged to have been driven by the applicant when he was intercepted and the contraband alleged to have been found in his possession. The second glaring aspect brought to my notice is that *panchas* viz: Ayub Mehboob Khan and Mohammed Hanif Moiddeen Shaikh are habitual *panch* witnesses, who had, in the past acted as *panch* witnesses for respondent in several cases which renders the prosecution story unbelievable. Apart from that, there is non compliance of Section 52A of the N.D.P.S Act.

7. Mr. Khan would invite my attention to the seizure *panchanama* wherein the alleged contraband came to be sealed in two different polythene packets and it's mouths were sealed with cello tape. Subsequently, those packets were placed in two different brown coloured envelopes which were sealed by means of gum. The Forensic Science Laboratory report at page No.67 indicates something different than what is stated in the *panchanama*.

8. Learned Counsel, therefore, prays for release of the applicant on the ground of parity as well as his long incarceration for about four years.

9. Learned A.P.P submits that none of the *panchas* are habitual, however, she is fair enough to admit non compliance of Section 52A of the N.D.PS Act.

10. At the outset, there is non compliance of Section 52A of the N.D.PS Act. This frustrates very object of the said Act as has been enunciated by the various pronouncements of the Supreme Court including the decision in the case of **Union of India Vs. Mohan Lal and another**¹ and **Simrnjit Singh Vs. State of Punjab**². In the latest pronouncement of the Supreme Court in case of **Mohammed Khalid and another Vs. The State of Telangana**³ 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

1 (2016) 3 Supreme Court Cases 379

2 2023 SCC Online SC 906

3 Criminal Appeal No (s) 1610 of 2023 and Criminal Appeal No (s) 1611 of 2023

obtaining samples in presence of the Jurisdictional Magistrate. In this view of 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”.

11. Undisputedly, *panch* witnesses are habitual and, therefore, even on that count, the applicant can be enlarged on bail.

12. A Division Bench of this Court in case of **Mohd. Hussain Babamiyan Ramzan Vs. State of Maharashtra**⁴, while acquitting the accused who were being prosecuted for the offences punishable under Section 21 r/w 8 (c) of the N.D.PS Act observed thus;

4 1994 Cri. L.J 1020

“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”.

13. It is not the case of the learned A.P.P that Ayub Mehboob Khan and Mohammed Hanif Moiddeen Shaikh have acted as *panch* witnesses for the first time in this case. This aspect also gives a substantial jolt to the prosecution story.

14. The manner in which the samples were seized at the time of *panchanama* and the Forensic Science Laboratory which received the samples indicates a vast difference in the manner the contraband was seized. I have already stated as to how the samples were alleged to have been drawn during *panchanama*. However, Forensic Science Laboratory's Report reveals that off white coloured crystalline powder, put in a zip lock polythene bag wrapped in paper Label was received from *Oshiwara* Police Station. There is no

mention of zip lock polythene packet in the *panchanama* nor there is mention in the Forensic Science Laboratory report that the samples were placed in brown coloured envelope. This mismatch also speaks volumes.

15. Apart from the fact that the trial would not be commenced in near future and having offered an opportunity to oppose the bail, there are reasonable grounds for believing that the applicant is not guilty. These findings are not in context with finding him not guilty of the offences or whether the applicant has, in fact, committed or not committed any offence under the N.D.PS Act. Suffice it to say that the applicant can be admitted to bail by imposing suitable conditions. Now, to the order.

: ORDER :

(a) The application is allowed.

(b) The applicant – Usman Anwar Ali Shaikh be released on executing a PR bond in the sum of Rs.30,000/- with one or two sureties in the like amount to the satisfaction of the Special Judge (NDPS), City Civil & Sessions Court,

Greater Bombay in Special Case No.376 of 2021 arising out of C.R. No.26 of 2020 for the offences punishable under Sections 8 (c), 22 (c) and 29 of the N.D.P.S Act.

(c) The applicant shall report the office of the DCB CID Unit IX, 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 Respondent and the Trial Court.

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

16. Application stands disposed of.

[PRITHVIRAJ K. CHAVAN, J.]