

Corrected as per speaking to minutes order dated 9-1-2024

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 2293 OF 2023
IN
CRIMINAL BAIL APPLICATION NO. 2959 OF 2022

Nikhil Mahesh Malkarnekar ... Applicant
Versus
The State of Maharashtra ... Respondent

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Mr. Ghanshyam Upadhyay a/w Ms. Mubarakka Lokhandwala a/w
Mr. Ankit Upadhyay a/w Mr. Vijay Jha i/b Law Juris, for Applicant.

Ms. Anamika Malhotra, APP, for the Respondent-State.

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CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON : 2nd January, 2024.
PRONOUNCED ON : 4th January, 2024.

ORDER :

By this application, the applicant prays for an interim bail on
medical ground.

2 Briefly stated, few facts relevant for disposal of the Interim
Application are as follows;

The applicant has been arrested in connection with C.R. No.
62 of 2021 registered with Anti Narcotic Cell, Worli Unit, for the
offences punishable under Sections 8(c) r/w 22(c), 21(b) and 29 of

Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act'). He was arrested in the intervening night of 16/07/2021 and 17/07/2021 and was thereafter, remanded to the custody of the Anti Narcotic Cell from time to time. After investigation, a charge-sheet has been filed against him in the jurisdictional Court.

3 His first application for bail was rejected by the trial Court on 25/07/2022. From the papers, it appears that at the time of his arrest, the applicant had already undergone a major surgery of hip joint and was on wheelchair on account of an iron rod implanted in his hip. The said iron rod is required to be removed during a particular period, however, on account of his arrest, the same could not be removed. With the passage of time, it is submitted that the rod has melted resulting into causing serious damage to the hip of the applicant and, therefore, he moved this application for interim temporary bail of three months in order to undergo an operation and get proper treatment from a private hospital.

4 I heard Mr. Upadhyay, learned Counsel for the applicant for some time and the learned APP. Mr. Upadhyay placed reliance upon certain judgments of this Court and the Supreme Court.

5 At the outset, Mr. Upadhyay submitted that the applicant was and is always ready to undergo a surgery of his hip joint, however, if the surgery is conducted in the Government J. J. Hospital, he may not get proper postoperative care as he would be discharged and thereafter would be lodged in Mumbai Central Prison where it will be difficult to take postoperative care.

6 Learned APP, on the other hand, strongly objects release of the applicant on medical ground by contending that good postoperative treatment can be given in J.J. Hospital itself in view of the fact that the applicant has been under the treatment in the said hospital. She further submits that the argument of the Counsel for the applicant is nothing but speculations as he is anticipating several aspects which cannot be considered at this stage. She invites my attention to the report of Chief Medical Officer, Mumbai Central Prison, Mumbai, wherein it is indicated that the applicant had refused to undergo a surgery with the Government Hospital and had given an informed negative written consent.

7 Learned Counsel for the applicant has furnished medical record from a private medical institution. In the report of MRI of

the left hip and C.T Scan, following observations are made;

- . Postoperative status is noted with metallic streak artifacts limiting the optimal evaluation.
- . Minimally displaced intertrochanteric fracture noted with minimal callus formation not bridging the fracture ends.
- . Minimal fluid is seen at the postoperative site without any major collection. There is no collection noted.
- . No obvious avascular necrosis of the left femoral head noted.
- . Distance between tip of the femoral head screw and articular surface is approximately 3-4 mm. Articular cartilage is fairly intact.

8 One Dr. Shailesh K. Mishra, who is Consultant Orthopedic Surgeon of AR Multispeciality Hospital opined as under:

Advice

- 1) Avoid walking. Walking is advisable only going to washroom.
Non weight bearing walking.
- 2) Use wheel chair for mobility.
- 3) Surgery
 - Open Reduction.
 - Implant Removal.
 - Internal fixation of fracture.
 - Bone grafting.
- 4) Early surgery is suggested to avoid catastrophe.
Already surgery was advised one year ago when the

nail was intact, however, surgery could not be done due to reason best known to the patient and relative.

However, surgery is imminent and should be done as early as possible to prevent further complication. If surgery is delayed any chance to preserve natural hip joint may be lost.

9 Argument of Mr. Upadhyay that postoperative care in a Government Hospital would not be up to the mark and as good as it is taken in a private hospital, has a substance.

10 The Hon'ble Supreme Court in the latest judgment in the case of **Satyendar Kumar Jain vs. Directorate of Enforcement**¹ while dealing with a similar application for grant of interim bail on medical ground observed that a citizen has a right to take treatment of his choice, at his own expenses, in a private hospital. The Hon'ble Supreme Court has, therefore, deemed it appropriate to release the applicant on interim bail on medical grounds for a limited period of six weeks.

11 Merely because the applicant refused to give consent for his surgery at J. J. Hospital can not be and should not be the reason for refusing interim bail in order to receive proper treatment in a

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private hospital of his choice in view of the medical reports placed on record. It is made clear that the application is being considered solely on medical ground *sans* merits of the case.

12 As such, the following order is expedient.

ORDER

- i) The application for interim bail on medical ground is allowed.
- ii) The applicant be released on executing a P. R. bond in the sum of Rs.1 lakh with one or more sureties in the like amount to the satisfaction of the trial Court.
- iii) The interim bail on medical ground is limited for a period of three months from the date of actual release of the applicant from the judicial custody.
- iv) The applicant shall not influence or tamper any of the prosecution witnesses either directly or indirectly.
- v) The applicant shall not leave the jurisdiction of the Special Court.

- vi) The applicant shall surrender his passport, if any, with the concerned Court.
- vii) During interim bail, the applicant shall furnish his cell number as well as permanent address to the concerned Court and shall also inform the concerned Court about the progress of treatment and date of surgery.
- viii) After the period of interim bail, the applicant shall surrender before the Superintendent, Central Prison, Mumbai.
- ix) List the application for further orders on **1st April, 2024.**

[PRITHVIRAJ K. CHAVAN, J.]