

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 2104 OF 2023

SANTOSH
SUBHASH
KULKARNI

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Shakil Ahmed Peer Mohd. Shaikh ...Applicant

Versus

The Union of India & anr. ...Respondents

Ms. Sana Raees Khan, a/w Aditya Parmar, Ms. Ruchita
Rajpurohit, Abhijeet Singh, Ms. Juhi and Mr. Onkar,
for the Applicant.

Mr. Tanveer Khan, APP for the State/Respondent.

Mr. Amit Munde, for Custom Dept./Respondent No.1.

CORAM: N. J. JAMADAR, J.

DATED: 11th MARCH, 2024

ORDER:-

1. Heard the learned Counsel for the parties.
2. The applicant, who is arraigned in in F.No.S/6-MISC29/ 2022-23/APSO, SG/INV-26/2022-23 SIIB (APSC) (Now Special Case No.1550/2022), for the offences punishable under Sections 22(c), 23(c), 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act"), has referred this application to enlarge him on bail.
3. The gravamen of indictment against the applicant is as under:

One postal parcel having tracking No.EM020517403IN meant for export, booked in the name of Rahim Khan, a resident of Aurangabad, Maharashtra, to consignee Jafri Khan, 200, West 34 Avenue #64, Anchorage, AK, 99503, USA, was presented for export screening and the same was found suspicious. As per customs declaration, the goods packed in the said parcel were edible dry items of value Rs.1000/-. The contents of the said parcel were examined by the officers of Airport Sorting Office (APSO) in the presence of two independent witnesses under panchnama dated 6th June, 2022. The inspection resulted in recovery of 8,480 tablets (848 strips containing 10 tablets) of Tramadol Hydorchloride Tablets-OL-TRAM 100 mg. "Tramadol" was declared as psychotropic substance vide gazette notification S.O.1761(E) dated 26.04.2018. The notified commercial quantity is 250 gms. Thus, 840 gms. of Tramadol, which is in excess of the notified commercial quantity, was recovered in the said parcel.

4. Enquiry revealed that the said parcel was booked from General Post Office, Mumbai, by Mr. Dilip Pandey, the letter writer and parcel packer at GPO, Mumbai. In his voluntary statement dated 28th June, 2022 recorded under Section 67

of the NDPS Act, 1985 Mr. Dilip Pandey disclosed that the said parcel was packed at his counter by the applicant, whom he had known from before as the applicant also had a counter for packing in front of GPO, Mumbai, before the Covid outbreak. On 4th June, 2022 the applicant had come to the counter of Mr. Dilip Pandey and, at his request, Mr. Dilip Pandey and the applicant went to the parcel booking counter at GPO and Mr. Pandey booked the parcel. Thereupon, the applicant came to be summoned.

5. In his voluntary statement under Section 67 of the NDPS Act, 1985, the applicant claimed that he had booked the parcel which was delivered to him by Mr. Guddu. Thus, the applicant came to be arrested on 30th June, 2022. The CDR collected during the investigation revealed that the applicant was in touch with Mr. Guddu and had exported the parcels delivered by Mr. Guddu in the past as well. The CDR revealed that the applicant was in touch with Mr. Guddu. AADHAR Card and other credentials given by the applicant to Mr. Dilip Pandey while booking the parcel were of Mr. Rahim Khan, who had not known the applicant. The investigation thus revealed the complicity of the applicant in the export of the narcotic substance.

6. Ms. Sana Khan, the learned Counsel for the applicant, submitted that there is no material to connect the applicant with the alleged offence. The entire prosecution case rests on the statement of Mr. Dilip Pandey, the person, who had, in fact, booked the parcel. There is no independent evidence to show that the applicant had booked the parcel. The statement of the applicant purportedly recorded under Section 67 of the NDPS Act, 1985 is not admissible. Therefore, the prosecution would not be in a position to establish the very factum of possession of the narcotic substance even if the prosecution case is taken at par, submitted Ms. Khan.

7. In opposition to this, Mr. Munde, the learned Special PP for respondent No.1, stoutly submitted that, at this stage, the statement of Mr. Dilip Pandey cannot be brushed aside. There is no reason to disbelieve Mr. Dilip Pandey, who is an independent witness. In addition, the CDR indicates that the applicant was in regular contact with Mr. Guddu and had supplied the narcotic substance. In the face of this material, according to Mr. Munde, it cannot be said that the applicant had succeeded in demonstrating that the conditions envisaged by Section 37(1)(b)(ii) have been fulfilled so as to

seek release on bail. Mr. Munde invited the attention of the Court to a recent order passed by the Supreme Court in the case of *State By The Inspector of Police vs. B. Ramu* arising out of *SLP(Cri) No(s).8137 of 2022*, wherein the Supreme Court cautioned that in the case of recovery of huge quantity of narcotic substance, the Courts should be slow in granting bail to the accused.

8. I have carefully perused the compliant and the documents annexed with it, the averments in the application and the contentions in the affidavit-in-reply filed on behalf of respondent No.1. I have also given anxious consideration to the rival submissions canvassed across the bar.

9. In view of the provisions contained in Section 37(1)(b)(ii) a person accused of an offence punishable under the Act involving commercial quantity cannot be released on bail unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty and that he is not likely to commit any offence while on bail. The term “reasonable ground” has been construed to mean something more than *prima facie* grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated

in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged (*Union of India vs. Shivshankar Kesari*¹).

10. Can the twin test be said to have been satisfied in this case?

11. Evidently, the parcel was allegedly booked at GPO, Mumbai. The receipt of booking (page 57) shows that Mr. Rahim Khan R. Pathan was the consignor and the consignee was Jafri Khan, based at USA. There is material to indicate that Rahim Khan had not booked the said parcel and his credentials were fraudulently used to book the parcel.

12. At this stage, the Court would proceed on the premise that the said parcel booked under receipt (page 57) contained the narcotic substance in excess of the commercial quantity. The pivotal question which, however, wrenches to the fore is whether there is *prima facie* material to hold that the said parcel was booked by the applicant? In substance, could it be said that the applicant was in possession of the said narcotic substance?

¹(2007) 7 SCC 798.

13. As noted above, the prosecution banks upon two circumstances. One, the statement of Dilip Pandey. Two, the statement of the applicant recorded under Section 67 of the NDPS Act, 1985 and the CDR.

14. From the perusal of the statement of Dilip Pandey, it *prima facie* appears that Mr. Dilip Pandey states that the parcel in question was packed at his counter by the applicant. Mr. Dilip Pandey and the applicant went to parcel booking counter at GPO. The applicant requested Mr. Dilip Pandey to book the parcel as there was heavy rush at the booking counter. Thereupon, he had booked the parcel.

15. *Prima facie*, it appears that apart from the statement of Mr. Dilip Pandey, there is no material to connect the applicant with the said parcel or lend support to the version of Mr. Dilip Pandey.

16. The endeavour on behalf of the prosecution was to rely upon the voluntary statement of the applicant under Section 67 of the NDPS Act, 1985 and the CDR. In view of the decision of the Supreme Court in the case of *Tofan Singh vs. State of Tamil Nadu*², a statement recorded under Section 67 of the NDPS Act, 1985 cannot be used as a confessional

²(2021) 4 Supreme Court Cases 1.

statement in the trial of an offence under the NDPS Act, 1985. Therefore, it would be impermissible for prosecution to press into service the voluntary statement of the applicant under Section 67 of the NDPS Act, 1985 to demonstrate that the applicant was in possession of the narcotic substance.

17. It is well recognised that “possession” which finds mention in Section 22 of the NDPS Act, 1985 connotes conscious possession. The expression, “possession” is a relative term and assumes different colours in different context. In the case of *Mohan Lal vs. State of Rajasthan*³, it was enunciated that the term, “possession” consists of two elements. First, it refers to the corpus or the physical control and the second, it refers to the animus or intent which has reference to exercise of the said control. The word, “possession” refers to a mental state as is noticeable from the language employed in Section 35 of the NDPS Act, 1985.

18. Reverting to the facts of the case, the situation which obtains is that apart from the statement of Mr. Dilip Pandey, there is no other material to *prima facie* connect the applicant with the factum of possession, much less the knowledge that the parcel contained the narcotic substance.

As is evident, it was Mr. Dilip Pandey, who had taken the

3(2015) 6 SCC 222.

parcel to the booking counter and booked it. Rahim Khan, the purported consignor did not claim that he had known the applicant. Nor there appears any material to show that on the day of occurrence the applicant had either packed the parcel at the counter of Mr. Dilip Pandey or accompanied Mr. Dilip Pandey to the booking counter. The accusation against the applicant thus rests on the statement of a person, who had himself booked the said parcel containing the narcotic substance. Second circumstance of the telephonic conversation between the applicant and Mr. Guddu, in the absence of the transcript, does not by itself incriminate the applicant.

19. I am, therefore, impelled to hold that the applicant has succeeded in making out a substantial probable case to believe that the applicant may not have been found in conscious possession of the narcotic substance. The Court may thus be justified in drawing an inference that the applicant may not be guilty of the offences punishable under the NDPS Act, 1985. The Court is not informed that the applicant has antecedents.

20. The applicant has been in custody since 30th June, 2022. It is unlikely that the trial can be concluded within a

reasonable period. I am, therefore, inclined to exercise the discretion in favour of the applicant.

21. Hence, the following order.

: O R D E R :

- (i) Application stands allowed.
- (ii) The applicant be released on bail in F.No.S/6-MISC29/2022-23/APSO, SG/INV-26/2022-23 SIIB (APSC) (Now Special Case No.1550/2022) registered with SIIB, APSC, Mumbai, on furnishing a P.R. Bond of Rs.1,00,000/- with one or two sureties in the like amount to the satisfaction of the learned Special Judge.
- (iii) The applicant shall mark his presence at the SIIB, APSC, Mumbai, on the first Monday of every month between 10.00 am to 12.00 noon for the period of three years or till conclusion of the Special Case, whichever is earlier.
- (iv) The applicant shall not tamper with the prosecution evidence. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing the facts to Court or any police

officer.

- (v) On being released on bail, the applicant shall furnish his contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.
- (vi) The applicant shall not indulge in identical activities for which he has been arraigned in this case.
- (vii) The applicant shall regularly attend the proceedings before the jurisdictional Court.
- (viii) 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 stands disposed.

[N. J. JAMADAR, J.]