

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.2293 OF 2023

VISHAL
SUBHASH
PAREKAR

Altaf Ahmed Shah

...Applicant

vs.

The State of Maharashtra

...Respondent

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Mr. Ayaz Khan i/b. Mr. Nilesh Nawade, for the Applicant.

Mrs. G.P. Mulekar, APP, for the Respondent/State.

CORAM : N. J. JAMADAR, J.

DATE : FEBRUARY 6, 2024

P.C.:

1. Heard the learned counsel for the applicant and the learned APP for the State.

2. The applicant who is arraigned in C.R. No. 705 of 2022 registered with Naya Nagar police station for the offences punishable under sections 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act, 1985) seeks to be enlarged on bail.

3. On 26th September, 2022, pursuant to a secret information Anti Narcotic Cell conducted a surveillance near Shivar Garden Signal, Miraroad (E). At about 8.10 pm, a person whose features matched with the description given by the informer came thereat. His movements appeared suspicious. Police party accosted Mohd Ovesh Ansari (accused No. 2). He was apprised of the right to be searched in the presence of a gazetted officer/Magistrate under

section 50 of NDPS Act, 1985. In the personal search, Mohd Ovesh Ansari (accused No.2) 20 gms Mephedrone (MD) was found. He was arrested. Contraband article was seized and samples were collected.

4. During the course of interrogation, it transpired that the said person Mohd Ovesh Ansari (accused No.2) procured the contraband from Mohd Shakil Shaikh (accused No.1). In the house search of Mohd Shakil Shaikh (accused No.1), 481.50 MD was seized. Likewise, Anis Abdul Shaikh (accused No. 3) was apprehended and 5 gm MD was found in his possession. All these contrabands were seized in the course of a search operation evidenced by a common seizure panchanama.

5. The first informant lodged report alleging inter alia that the contraband article was supplied to Mohd Shakil Shaikh (accused No.1) by one Kayyum (accused No. 5) and his associates. The applicant Altaf Shah (accused No. 4) came to be arrested pursuant to the disclosure made by the co-accused. A mobile phone handset was seized in the search of the applicant. The inspection of the data in the mobile phone handset of the applicant revealed that there was conversation between the applicant and the co-accused which established that the applicant was a member of the drug syndicate.

6. Mr. Khan, the learned counsel for the applicant, submitted that the applicant Nos. 2 and 3 were found in possession of the

intermediate quantity of the contraband article. Mohd. Anis Shaikh (accused No. 3) was released on bail by this Court by order dated 31st August, 2023. Oves Fhaim Ansari (accused No. 2) was also released on bail by the Special Judge (NDPS), Thane by an order dated on 7th November, 2023. Mohd. Shakil Shaikh (accused No. 1) who was allegedly found in possession of 481.50 has since expired. No contraband was recovered from the possession of the applicant. There is no material to connect the applicant with the seizure of the contraband article. The endeavour of the prosecution to rely upon the alleged transcript of the conversation is of little assistance to the prosecution as the said conversation is not with respect to the contraband allegedly recovered from the possession of the co-accused Nos. 1 to 3. Therefore, the applicant deserves to be enlarged on bail.

7. Mr. Khan, learned counsel for the applicant further submitted that there are other infirmities in the seizure which otherwise impair the prosecution case. There is non-compliance of the mandatory provision contained in section 52-A of the NDPS Act, 1985 though a panchanama is prepared on 28th September, 2022 yet it does not appear that the samples were collected in the presence of the learned Magistrate.

8. The learned APP resisted the prayer for bail. It was submitted

that the material on record indicates that the applicant was in touch with Mohd. Shakil Shaikh (accused No. 1) and the transcript of the conversation between the applicant and Mohd Shakil Shaikh (accused No. 1) establishes the complicity of the accused. The applicant had conversation with Mohd. Ovesh Ansari (accused No. 2) during the period 7th September, 2022 to 19th September, 2022. It was further submitted that in the event the applicant is released on bail, he would not be available for trial. Therefore, the applicant does not deserve to be released on bail.

9. While releasing Anis Abdul Shaikh (accused No. 3) on bail, this Court had, inter alia, observed that the said accused had allegedly purchased the substance from Mohd Shakil Shaikh, the deceased (accused No. 1), who was the principal accused and Anis Abdul Shaikh (accused No. 3) was found in possession of non commercial quantity.

10. Evidently, no contraband article was found in possession of the applicant. Nor the applicant was named in the FIR. The supplier was then identified as Kayyum (accused No. 5). The thrust of the prosecution case appears to be on the alleged conversation which the applicant had with the co-accused which indicates that the applicant was involved in drug trafficking.

11. Mr. Khan, the learned counsel for the applicant, submitted

that the said conversation, even if taken at par, does not pertain to contraband articles which had been recovered from the possession of the co-accused Nos. 1 to 3. Implication of the accused on the basis of such telephonic conversation for being a privy to the conspiracy is not sustainable, urged Mr. Khan.

12. To lend support to the aforesaid submission Mr. Khan placed reliance on an order of Supreme Court in the case of **Bharat Chaudhary vs. Union of India**¹ wherein with reference to the printouts of Whatsapp messages, the Supreme Court in the facts of the said case, observed that reliance on printouts of Whatsapp messages downloaded from the mobile phone and devices seized from the office premises of accused No. 4 cannot be treated at this stage as sufficient material to establish a live link between him and accused Nos. 1 to 3, when even as per the prosecution, scientific report in respect of the said devices was still awaited. Reliance on the statements made by the co-accused was too tenuous ground to sustain the order of reversal of bail passed by the High Court. Reference was made to the decision of the Supreme Court in the case of **Tofan Singh vs. State of Madras**².

13. In the case at hand, the conversation between the applicant and the co-accused, the transcript of which finds mention in the

1 SLA (Cri) No.5703 of 2021 Dt.13/12/2021.

2 (2021) 4 SCC 1.

arrest and search panchanama dated 4th October, 2022, appears to be the only material against the applicant. In a given case, the non-recovery of the contraband article cannot be pressed into service as a ground to wriggle out of an accusation of conspiracy punishable under section 29 of the NDPS Act, 1985. It is not necessary that the person who is sought to be roped in as a supplier must be found in possession of the contraband article. However, there ought to be some nexus to connect such person with the contraband article recovered from the possession of the co-accused who is alleged to be a confederate in the conspiracy. In the case at hand, prima facie, there does not appear such material.

14. Neither the persons who were found in possession of the contraband articles have named the applicant as the person who had supplied the said contraband. Nor upon the arrest and search of the applicant any contraband article was found. In contrast, the co-accused had disclosed the name of Kayyum (accused No. 5) as the supplier. Prima facie, the prosecution case hinges on the telephonic conversation between the applicant and co-accused. In the circumstances of the case, where the persons who were found in possession of the contraband articles having been released on bail, it can reasonably be inferred that the applicant, who is sought to be roped in as a conspirator also deserves to be released on bail.

15. The Court is not informed that there are antecedents to the discredit of the applicant. Thus, it may be inferred that the applicant may not indulge in identical activity, if released on bail. The applicant is in custody since 4th October, 2022. Investigation is complete. Charge-sheet has been lodged. I am, therefore, inclined to exercise the discretion in favour of the applicant.

Hence, the following order.

ORDER

- 1] The application is allowed.
- 2] The applicant Altaf Ahmed Shah be released on bail in C.R. No. 705 of 2022 registered with Naya Nagar police station, on furnishing a P.R. Bond of Rs. 50,000/- with one or more sureties in the like amount.
- 3] The applicant shall mark his presence at Naya Nagar police station on the first Monday of every month in between 11 am to 1 pm till conclusion of the trial.
- 4] The applicant 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 applicant shall furnish his contact number and

residential address to the investigating officer and shall keep him updated, in case there is any change.

6] The applicant 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.)