

Sayali Upasani

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

BAIL APPLICATION NO. 2681 OF 2023

Nadim Shaikh

...Applicant

Versus

Union of India and Others

...Respondents

**SAYALI
DEEPAK
UPASANI**

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SAYALI DEEPAK
UPASANI
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Ms. Lochan Chandka, for Applicant.

Mr. S. R. Agarkar, APP for State/Respondent No. 2.

Mr. Shreeram Shirsat, Special Public Prosecutor with Ms.
Tanvi Mate, Mr. shekhar Mane with Ms. Karishma Rajesh, for
Respondent No. 1/NCB.

CORAM:- N. J. JAMADAR, J.

DATED:- 21st FEBRUARY, 2024.

ORDER:-

1) The applicant, who is arraigned in connection with CR No. 88 of 2021, registered with Narcotics Control Bureau, Mumbai Zonal Unit, for the offences punishable under Sections 20(b)(ii)A, 22 (c), 25, 25-A, 27-A, 28 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (“the Act, 1985”), has preferred this application to enlarge him on bail.

2) The prosecution case can be stated as under:-

(a) A specific information was received on 13th September, 2021 that a dealing in contraband (Mephedrone and Ephedrine) was to take place at the residence of Sahil Hamid Mullaji (Accused No. 2) at Flat No. 305, 3rd Floor, A1 Iqra Building, Khardi Road, Kausa, Mumbra, Thane between Sahil (A2) and Ibrahim Ismail Jahangir (A1) and Irfan Sattar Parmar (A3). It was further informed that the original supplier of Mephedrone was suspected to be in Pune. A raid was conducted at the said house at Mumbra. Sahil (A2) was found in the said house along with Ibrahim (A1) and Irfan (A3). They were apprised of their right to be searched in the presence of a Gazetted Officer or Magistrate under Section 50 of the NDPS Act, 1985. As they gave consent for being searched by the members of the raiding party, personal search was conducted.

(b) During the course of personal search of Irfan (A3), 300 grams of Mephedrone was found. In the search of Ibrahim (A1), a backpack was found which contained 1.750 kg of Mephedrone. In the house search of Sahil (A2), a bag containing 3.9 kg. Ephedrine was also found.

(c) The prosecution alleges Ibrahim (A1) revealed that the entire contraband belonged to the applicant. He was the kingpin

of the drug trafficking cartel. The applicant directed his customers to Imbrahim (A1). Likewise, Sahil(A2) used to deliver the contraband supplied by the applicant to several customers, including those based at Gujrat.

(d) Pursuant to the said disclosure a raid was conducted at the applicant's residence A-1003, Tuscan Estate Tower, Khardi, Pune on 14th September, 2021. The applicant was apprised of his right under Section 50 of the NDPS Act, 1985. During the personal search of the applicant, no contraband article was found. However, in the house search of the applicant, a solid dark black substance, kept in a zip-locked polythene pouch, was found on the applicant's bed. It appeared to be Charas. It weighed 46 grams. The applicant came to be arrested on 15th September, 2021.

(e) The prosecution alleges voluntary statements of the applicant and the co-accused, recorded under Section 67 of the NDPS Act, 1985, revealed the complicity of the applicant. It is further alleged, the applicant had been in constant touch with the co-accused in whose possession huge quantity of contraband was found.

3) I have heard Ms. Chandka, the learned Counsel for the applicant and Mr. Shreeram Shirsat, the learned Special Public Prosecutor for the respondent No. 1.

4) Ms. Chandka submitted that the applicant has been roped in on the basis of the statements of the co-accused, which are not at all admissible in evidence. Apart from the statements of the co-accused, there is no material to connect the applicant with the alleged offences. The alleged seizure of 46 grams of Charas was stated to be vitiated on account of breach of the mandatory provisions. It was further submitted that the co-accused, who were allegedly found in possession of contraband articles, have been released on bail. The applicant has been in custody since 15th September, 2021. Thus the applicant also deserves to be enlarged on bail.

5) Mr. Shirsat, the learned Special Public Prosecutor, submitted that material on record prima facie establishes that the applicant was the kingpin of the drug trafficking cartel. Since the applicant has been roped in by invoking Section 29 of the NDPS Act, 1985, the submission that a small quantity of contraband was found in the actual possession of the applicant is of no avail. Mr. Shirsat made an endeavour to draw home the point that the applicant can be said to have been found in

constructive possession of the entire contraband article, which was recovered from the co-accused. Attention of the Court was invited to the purported voluntary statements of Ibrahim(A1) and Irfan(A3). Mr. Shirsat submitted that the interdict contained in Section 37 of the NDPS Act, 1985, operates with full force and vigour and, therefore, the applicant does not deserve to be released on bail.

6) To begin with, it may be necessary to note the treatment meted out to the co-accused in the matter of admitting them to bail. Ibrahim (A1), who was allegedly found in possession of 1.750 kg Mephedrone, was released on bail on medical grounds by this Court by an order dated 17th February, 2023 in Bail Application No. 407 of 2023. Sahil(A2), who was allegedly found in possession of 3.9 kg Ephedrine was released on bail by the learned Special Judge by an order dated 10th February, 2023, opining that the report of FSL indicated that the sample drawn from the substance allegedly seized from the said accused was Ammonium Chloride and, thus, provisions of NDPS Act, 1985, may not be attracted. Irfan (A3), who was allegedly found in possession of 300 grams of Mephedrone was also released by the learned Special Judge by an order dated 13th July, 2023, opining, inter alia, that there was a doubt as to the presence of

the said accused at the place from where he was allegedly apprehended and that there was discrepancy regarding the date and time of the arrest of Irfan(A3). It was further noted that there was a prima facie breach of the mandate contained in Section 50 of the Act, 1985 as there was a joint appraisal of the said right to the accused. Accused No. 5- Zameer Ahmed Khan was released on bail by the learned Special Judge on 4th September, 2023. Accused No. 6-Azim Abu Salim Khan @ Azim Bhau, who was found in possession of 3 grams of Mephedrone, was also released by the learned Special Judge by an order dated 10th February, 2023.

7) In the backdrop of the aforesaid position, Ms. Chandka would urge that the applicant, who has allegedly been found in possession of 46 grams of Charas only, a small quantity, also deserves the same dispensation.

8) Mr. Shirsat countered the submission on the premise that the applicant is, in fact, the leader of the drug syndicate. Two circumstances were pressed into service against the applicant. One the statements made by the co-accused when they were allegedly apprehended and the voluntary statements of the co-accused and the applicant under Section 67 of the NDPS Act, 1985. Two, the alleged conversation between the applicant and

the co-accused which indicates that the applicant was the principal confederate in the criminal conspiracy.

9) Indeed, the co-accused Ibrahim (A1) and Irfan (A3) have named the applicant as the person from whom they purchased the contraband articles, for further sale.

10) On the second count, though the prosecution refers to the alleged CDR, yet, at this stage, there is no material to prima facie substantiate the said circumstance. In the affidavit-in-reply, the Investigating Officer has affirmed that although at this stage the CDR is not annexed with the charge-sheet as they might have been misplaced yet that does not preclude the investigating agency to bring on record the said material at a later stage.

11) In view of the aforesaid stand, the prosecution case, as of now, hinges on the disclosures allegedly made by the co-accused and the voluntary statements of the accused.

12) Mr. Shirsat taking the Court through the statements of Imbrahim (A1) and Irfan (A3) as well as the suppliers of the applicant submitted that the applicant was all along in constructive possession of the contraband articles even though the contraband articles were found in possession of the co-accused for it was the applicant who wielded complete control

over the contraband articles as well as the premises where those contraband articles were concealed. To bolster up of this submission, Mr. Shirsat placed reliance on the decisions of the Supreme Court in the cases of **Madan Lal Vs. State of Himachal Pradesh¹** and **Mohan Lal Vs. State of Rajasthan²**.

13) In the case of **Madan Lal** (supra), it was, inter alia, observed as under:-

“... 25. The word 'possession' means the legal right to possession (See *Health v. Drown* (1972) (2) All ER 561. In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same (See *Sullivan V. Earl of Caithness* 1976 (1) All ER 844)...”

14) Mr. Shirsath also placed reliance on the decision in the case of **Sullivan V. Earl of Caithness³**, wherein it was observed that the concept of possession need not be restricted to “actual” possession only.

15) As a second limb of the submission, Mr. Shirsat submitted that since there is a recovery of commercial quantity from the co-accused, by virtue of the provisions contained in Section 29 of the NDPS Act, 1985, the rigour of Section 37 of the NDPS Act, 1985 applies qua the applicant as well. It was not necessary that

1 2003 (7) SCC 465

2 (2015) 6 SCC 222

3 [(1976) 1 All ER]

when a person is arraigned by virtue of Section 29 of the NDPS Act, 1985, he must be found in possession of the contraband article.

16) Attention of the Court was invited to the decisions of the Supreme Court in the cases of **State of Kerala and Others Vs. Rajesh and Others⁴**, **Narcotics Control Bureau Vs. Mohit Aggarwal⁵**, the orders passed by this Court in **Criminal Bail Application (st) No. 2184 of 2020 Abdel Basit Parihar Vs. Union of India**, **Criminal Bail Application (st) No. 2387 of 2020 Showik Chakraborty Vs. The Union of India**, dated 7th October, 2020 and **Criminal Bail Application No. 3041 of 2021 dated 15th November, 2021 Mohammed Aun Javed Hairder Sayed Vs. Union of India** and **Bail Application No. 2682 of 2021 dated 26th July, 2022 Jitendra Jain Vs. NCB and Others**.

17) I have perused the aforesaid judgments. It is trite where a person is sought to be roped in as conspirator, nay the kingpin of a drug syndicate, the mere fact that nothing has been recovered from such person may not by itself be sufficient to absolve him from the charge of alleged conspiracy. It is well-recognised that conspiracies are hatched in secrecy and direct

4 (2020) 12 SCC 122

5 AIR 2022 SC 3444

evidence is rarely forthcoming. In the above referred judgments, the Courts have found that dehors the statements of the co-accused and/or purported voluntary statements under Section 67 of the NDPS Act, 1985, there were other circumstances which indicated the complicity of the applicants in the respective cases.

18) In the instant case, as noted above, apart from the statements of the co-accused, prima facie there is no credible material to indicate the complicity of the applicant. Reliance on the statements under Section 67 of the NDPS Act, 1985 cannot be countenanced in view of the decision of the Supreme Court in the case of **Tofan Singh vs The State Of Tamil Nadu**⁶. The Supreme Court has in terms held that the statement recorded under Section 67 of the NDPS Act, 1985 cannot be used as a confessional statement in the trial for an offence under NDPS Act.

19) If the opposition to the prayer of bail solely rests on the alleged complicity, borne out by the statements of the co-accused, different considerations come into play. If there is independent material, which points to the complicity of the accused who seeks bail, apart from the statements of the co-accused, the entitlement for bail can be assessed in the

6 (2021) 4 SCC 1

backdrop of such material. However, in a case where no other material can be, prima facie, arrayed against an accused, apart from the statements under Section 67 of the NDPS Act, 1985, the claim of the accused for bail deserves consideration.

20) A useful reference, in the context can be made to a three Judge Bench decision of the Supreme Court in the case of **Bharat Chaudhary Vs. Union of India**⁷, wherein following its earlier decision in the case of **Tofan Singh** (supra), the Supreme Court held that reliance on the statement made by the co-accused under Section 67 of the NDPS Act, 1985 was too tenuous a ground to sustain the order of the High Court of reversal of bail granted by the learned Special Judge. It was, inter alia, observed as under:-

“...In the absence of any psychotropic substance found in the conscious possession of A-4, we are of the opinion that mere reliance on the statement made by A-1 to A-3 under Section 67 of the NDPS Act is too tenuous a ground to sustain the impugned order dated 15th July, 2021. This is all the more so when such a reliance runs contrary to the ruling in **Tofan Singh** (supra). The impugned order qua A-4 is, accordingly, quashed and set aside and the order dated 2nd November, 2020 passed by the learned Special Judge, EC & NDPS Cases, is restored. As for **Raja Chandrasekharan [A-1]**, since the charge sheet has already been filed and by now the said accused has remained in custody for over a period of two years, it is deemed appropriate to release him on bail, subject to the satisfaction of the trial Court....”

21) In any event, as noted above, the co-accused who allegedly purchased the contraband from the applicant as well as who allegedly supplied the contraband have all been released on bail. While releasing one of the co-accused on bail, the learned Special Judge has doubted the presence of the said co-accused at the time of the alleged raid at Mumbra and the arrest of the said co-accused on the given date. In addition, a prima facie view that there was no scrupulous compliance of Section 50 of the NDPS Act, 1985 has been recorded. Moreover, the substance allegedly found in the possession of Sahil (A2) did not appear a contraband article.

22) In any event, what was allegedly found in possession of the applicant was a small quantity of Charas. In the aforesaid view of the matter, the Court may be justified in recording a finding that the applicant may not be guilty of the offences with which he has been charged. The Court is not informed that the antecedents of the applicant are such that it would dis-entitle the applicant from bail.

23) The applicant is in custody since 15th September, 2021. It is unlikely that the trial can be concluded within a reasonable period. Thus having regard to the period of incarceration also, I am impelled to exercise discretion in favour of the applicant.

24) Hence, the following order:

: O R D E R :

- (i) The application stands allowed.
- (ii) The applicant Nadim Shaikh be released on bail in NCB/MZU/ CR No. 88 of 2021, registered with Narcotics Control Bureau, Mumbai Zonal Unit, for the offences punishable under Sections 20(b)(ii)A, 22 (c), 25, 25-A, 27-A, 28 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985, on furnishing a P.R. Bond in the sum of Rs.1,00,000/- with one or two sureties in the like amount, to the satisfaction of the trial Court.
- (iii) The applicant shall mark his presence at the Narcotics Control Bureau, Mumbai Zonal Unit on the first Monday of every month between 10.00 am to 12.00 noon for a period of three years or till conclusion of trial, whichever is earlier.
- (iv) The applicant shall not tamper with the prosecution evidence and/or give threat or inducement to the first informant and any of the persons acquainted with the facts of the case.
- (v) The applicant shall not indulge in the identical activity for which he has been arraigned in this case.

(vi) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of 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.

[N. J. JAMADAR, J.]