

Sayali Upasani

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

BAIL APPLICATION NO.- 2683 OF 2023

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Ramjan Laldesaab Shaikh (Mugut)

... Applicant

Vs.

Union of India and Others

...Respondents

Ms. Munira Palanpurwala, for Applicant.

Mr. Shailesh Ghag, APP for State.

Mr. Shriram Shirsat with Ms. Tanvi Mate, Mr. Shekhar Mane
and Nishad Mokshi, for UOI-Respondent No. 1.

CORAM:- N. J. JAMADAR, J.

RESERVED ON:- 15th MARCH, 2024.

PRONOUNCED ON:- 22nd MARCH, 2024

ORDER:-

1) This application is preferred for bail in connection with CR No. 67 of 2021, registered with NCB MZU for the offences punishable under Sections 20 (b) (ii) (C), 27, 27A, 28, 29 and 30 read with Section 35 of the Narcotic Drugs and Psychotropic Substances Act, 1985, ("NDPS Act").

2) On 12th July, 2021, specific information was received that one suspect namely Rahmeen Rafiq Charania (A1) was baking

and supplying brownie cakes laced with Charas. After complying with the provisions contained in Section 42 of the Act, 1985, NCB conducted a raid at Room No. 36, 5th Floor, Aminabad, Nesbit Road, Mumbai. Rahmeen - accused No. 1 was apprised of his right to be searched in the presence of a Gazetted Officer or Magistrate. Accused No. 1 declined to avail the said right. In the personal search of the accused No. 1, no contraband article was found. However, 25 packets of brownie cakes were found. The Authorised Officer tested the packets with the drug detection kits and Charas found therein. Those 25 brownie cakes containing Charas weighed 10 kg. The contraband articles were seized.

3) During the course of the voluntary statement, the accused No. 1 allegedly revealed that the seized contraband was supplied to him by the applicant. The NCB conducted surveillance near the Petrol Pump Junction on Mohammed Ali Road. The applicant came thereat. He was accosted. The applicant was apprised of his right under Section 50 of the Act, 1985. The applicant declined to avail the said right. Thereupon, in the personal search of the applicant, it was found that the applicant was carrying a transparent plastic container, containing a black

colour round shape semi-solid substance. The said substance was tested with the drug detection kit. The result was positive for Chars, a narcotic drug. It weighed 50 grams. The contraband article was seized. The applicant came to be arrested.

4) Ms. Munira Palanpurwala, the learned Counsel for the applicant, submitted that the applicant has been implicated on the basis of the statement of the co-accused recorded under Section 67 of the NDPS Act, 1985, which is not admissible in evidence as a confession. Apart from the statement of the co-accused, there is no material to connect the applicant with the alleged offences. The very seizure of the said contraband from the possession of the applicant is suspicious as there is an irreconcilable inconsistency between the time of the first seizure and the second punchanama under which the contraband article was allegedly recovered from the applicant. Even otherwise, the applicant was found in possession of 50 grams of Charas, which is an intermediate-quantity. Since the applicant was found in possession of an intermediate quantity, which entails punishment which may extend to one year and the applicant has been in custody for more than two and half years, the applicant deserves to be enlarged on bail.

5) Mr. Shirsat, the learned Special Public Prosecutor for the respondent No. 1, stoutly contested the prayer for bail. It was submitted that the mere fact that the applicant was not found in possession of the commercial quantity, by itself, is not of determinative significance. Since the co-accused was found in possession of commercial quantity and the provisions contained in Section 29 have been invoked, the rigour contained in Section 37 of the NDPS Act, 1985 is attracted.

6) Mr. Shirsat would urge that laying emphasis on the deleterious and devastating consequences of sale of Narcotic substance to youngsters, disguised as brownie cakes, this Court, as well as the Supreme Court have declined to exercise discretion in favour of the accused No. 1 to release him on bail. A fortiori the applicant, who is the supplier of the accused No. 1, does not deserve to be released on bail.

7) Mr. Shirsat submitted that apart from the statement of the co-accused, there is independent evidence, which clearly incriminates the applicant as the supplier. It was submitted that CDR reveals that the applicant and the co-accused were in regular contact, even on the day of the seizure. Mr. Shirsat submitted that at the stage of consideration of bail, the factum

of CDR and even the statement recorded under Section 67 of the NDPS Act, 1985 can be legitimately considered.

8) To lend support to these submissions, Mr. Shirsat placed reliance on the decisions of the Supreme Court in the cases of **Union of India through Narcotics Control Bureau, Lucknow Vs. Md. Nawaz Khan¹** and **Narcotics Control Bureau Vs. Mohit Aggarwal²**, the decision of Calcutta High Court in the Case of **Manik Das @ Manik Chandra Das Vs. The Narcotics Control Bureau in C.R.M. No. 6135 of 2021**, an order passed by this Court in the case of **Mohammed Salman Khan s/o Nasir Khan Vs. Union of India and Anr. in Bail Application No. 4304 of 2021** and the connected matter dated 23rd February, 2023, and an order passed by the Himachal Pradesh High Court in **Tara Chand Vs. State of Himachal Pradesh in Cr. MP (M) No. 1526 of 2020**.

9) I have considered the material on record and the submissions canvassed across the bar. Evidently, the applicant was found in possession of 50 grams of Charas, a non-commercial quantity. However, the role attributed to the applicant is that of being a supplier to accused No. 1, from

1 (2021) 10 SCC 100

2 AIR 2022 SC 3444

whose possession brownie cakes containing Charas weighing about 10 kg were recovered. Whether the applicant could have been roped in by invoking Section 29 of the NDPS Act, 1985 is the moot question ?

10) For an answer, what has to be examined is whether there is material which prima facie makes out a case for invocation of Section 29 of the NDPS Act, 1985, qua the applicant. Essentially, three circumstances are pressed into service by the prosecution against the applicant. First, the statement of accused No. 1 purportedly recorded under Section 67 of the NDPS Act, 1985 naming the applicant as the supplier. Second, the statement of a witness namely Faijan @ Ali Patel recorded under Section 67 of the NDPS Act, 1985. Third, CDR which indicates that the applicant and accused No. 1 were in touch with each other.

11) Before adverting to deal with the aforesaid circumstances, it may be apposite to note that the first seizure panchanama at the place of accused No. 1 was shown to have been concluded at 9.35 pm on 12th May, 2021. The endorsement in the concluding part of the panchanama (pg 39) records that thereafter a team comprising Satish, Investigating Officer, and the others moved from the said spot to Crawford Market, Mumbai for probable

recovery of contraband from one of the suppliers as revealed by Rehmeen (A1). Panchanama under which 50 grams of Charas was allegedly recovered from the applicant (pg 47) records that the Panchas appeared before the Investigating Officer at 8.40 pm. The said panchanama was purportedly concluded at 10 pm.

12) Ms. Palanpurwala urged that the apparent inconsistency in the timing of two panchanamas significantly erodes the genuineness of the prosecution case. Mr. Shirsat joined the issue by canvassing a submission that the time recorded in the panchanama of seizure of contraband from the applicant i.e. 8.40 pm, is the reporting time of the panchas and not the commencement of the panchanama.

13) Looking at it from any perspective, the explanation sought to be offered by Mr. Shirsat does not commend itself. It is imperative to note that in the first panchanama it is recorded at pg. 7 (pg. 39 of the application) that after the panchanama was over at 9.35 pm, NCB team moved to Crawford Market for probable recovery of contraband from one of the suppliers. It implies that the information about supplier was disclosed to the raiding team by accused No. 1 during the course of the said seizure.

14) Evidently, the said seizure was effected in the presence of two pancha witnesses, who were not the witnesses to the second seizure. The information note (pg. 46) records that the accused No. 1 informed that the applicant was to deliver Charas to the accused No. 1 at the petrol Pump on Mohammad Ali Road at about 9 pm. In these circumstances, it *prima facie* appears inconceivable that two separate set of panchas appeared before Investigating Officer at 8.40 pm as the first seizure itself was concluded on 9.35 pm. Prima facie, there appears substance in the submission of Ms. Palanpurwala that there is irreconcilable inconsistency in the timing of the two seizures.

15) Nonetheless, at this stage, for the purpose of assessing the justifiability of invocation of Section 29 of the NDPS Act, 1985, the Court would proceed on the premise that 50 grams Charas was recovered from the applicant .

16) So far as, the first circumstance of the statement of accused No. 1 recorded under Section 67 of the NDPS Act, 1985, is concerned, in view of the decision of the Supreme Court in the case of **Tofan Singh vs The State Of Tamil Nadu**³, the prosecution would not be justified in pressing the same to infer conspiracy against the applicant.

3 (2021) 4 SCC 1

17) The second circumstance of the Faizan Ameen Patel @ Ali Patel having named the applicant as the supplier, also appears to be prima facie not free from infirmities. Firstly, it is necessary to note that the information dated 17th July, 2021 records that Faizan Ameen Patel @ Ali Patel was named by Rahmeen (A1) as a peddler of Cocaine and Mephedrone and the former supplied drugs almost all over Mumbai. Evidently, Faizan Ameen Patel @ Ali Patel was initially identified as the drug supplier. It seems, subsequently, his statement came to be recorded under Section 67 of the NDPS Act, 1985. Secondly, Faizan Ameen Patel @ Ali Patel states that he was aware that accused No. 1 was taking delivery of Charas from the applicant. According to Faizan Ameen Patel @ Ali Patel the applicant was also involved in the sale of Charas, but he had never purchased Charas from the applicant. Prima facie, the statement of Faizan Ameen Patel @ Ali Patel may not command value as direct evidence as Faizan Ameen Patel @ Ali Patel claimed that he never purchased Charas from the applicant and was only aware that the applicant was dealing in Charas.

18) In respect of the third circumstance of the CDR, Ms. Palanpurwala urged that in the absence of the transcript of the

conversation, the mere fact that there were calls between the applicant and accused No. 1, even if taken at par, by itself is not sufficient to infer conspiracy.

19) In contrast, Mr. Shirsath invited the attention of the Court to the observations of the Supreme Court in the cases of **Mohit Aggarwal** (supra) and **Md. Nawaz Khan** (supra), wherein the Supreme Court took note of the CDR details.

20) In the case of **Mohit Aggarwal** (supra), the Supreme Court found that apart from the confessional statement of the respondent therein and the other co-accused, recorded under Section 67 of the NDPS Act, 1985, other circumstances namely recovery of huge psychotropic substance from the place of the co-accused to which the respondent therein had led the police party and the CDR details of the mobile phones of the co-accused, including the respondent therein, showed that they were in touch with each other, incriminated the respondent therein.

21) In the case of **Md. Nawaz Khan** (supra), in paragraph No. 30, one of the four circumstances, taken into account by the Supreme Court, was that the CDR analysis of the mobile number used by the respondent indicated that the respondent

was in regular touch with the other accused persons, who were known to him.

22) Evidently, in both the aforesaid judgments, CDR details were taken into account as a factor along with the other factors which incriminated the respondent therein. In the case of **Mohit Aggarwal** (supra), the respondent therein had led the police party to the co-accused, from whom a huge quantity of contraband substance was recovered. In the case of **Md. Nawaz Khan** (supra), the respondent therein was travelling in the vehicle, in which commercial quantity of contraband was found, all the way from Dimapur in Nagaland to Rampur in Uttar Pradesh with the co-accused.

23) In the case at hand, as noted above, the seizure of intermediate quantity of Charas from the possession of the applicant has to surmount the challenge to the inconsistency in the timeline reflecting on the probabilities of the case. Secondly, Faizan Ameen Patel @ Ali Patel was initially named as the supplier and later his statement came to be recorded under Section 67 of the NDPS Act, 1985, which prima facie appears to be bereft of direct probative value. Thirdly, in the absence of invocation of the provisions contained in Section 29 of the NDPS

Act, 1985, the contraband found in possession of the applicant, being in intermediate quantity, the offence may entail punishment under Section 20 (b) (ii) (A), which may extend to one year only. The applicant has been in custody since 12th July, 2021.

24) In this backdrop, CDR details sans the transcript of the conversation between the applicant and the co-accused, may not prima facie sustain the weight of the accusation for an offence punishable under Section 29 of the NDPS Act, 1985.

25) For the foregoing reasons, I am persuaded to hold that the first condition under Section 37 (1)(b)(ii) can be said to have been satisfied.

26) As regards the antecedents of the applicant, it appears that the applicant was arraigned in PS/0209972/2015 for an offence punishable under Section 27 read with Section 8 (c) of the NDPS Act, 1985 and the said proceeding was stopped under Section 258 of the Code of Criminal Procedure, 1973 on 11th December, 2015.

27) Though Mr. Shirsat made an endeavour to urge that the stoppage of the proceeding under Section 258 of the Code, 1973 does not amount to an acquittal, having regard to the nature of

the accusation in the said case and the time lag of about six years, in my view, the aforesaid antecedent of the applicant does not constitute an impediment in drawing an inference that the applicant may not indulge in identical offences, if released on bail. Prima facie, the second condition also stands satisfied. Resultantly, the applicant deserves to be enlarged on bail.

28) Hence, the following order.

: O R D E R :

- (i) The application stands allowed.
- (ii) The applicant be released on bail in CR No. 67 of 2021, registered with NCB MZU for the offences punishable under Sections 20 (b) (ii) (C), 27, 27A, 28, 29 and 30 read with Section 35 of the Narcotic Drugs and Psychotropic Substances Act, 1985, on furnishing a P.R. Bond in the sum of Rs.30,000/- 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 NCB MZU on the first Monday of every month between 10.00 am to 12.00 noon for a period of three years or till the conclusion of the trial, whichever is earlier.

(iv) The applicant shall not tamper with the prosecution evidence and/or give threat or inducement to the witnesses 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.]