

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 2915 OF 2023

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Kingsley Eze

...Applicant

Versus

1. Directorate of Revenue Intelligence,
Mumbai Zonal Unit

2. The State of Maharashtra

...Respondents

Ms. Ashwini Achari, i/b Taraq Syed, for the Applicant.

Mr. Advait Sethna, Special PP, i/b Mr. Ruju Thankker, for the
DRI/Respondent No.1.

CORAM: N. J. JAMADAR, J.

DATED: 8th APRIL, 2024

ORDER:-

1. The applicant, who is arraigned in Special Case No.872 of 2023 arising out of CR No.DRI/MZU/C/INT-120/2022 registered with Directorate of Revenue Intelligence ("DRI"), Mumbai Zonal Unit, Mumbai, for the offences punishable under Sections 21(c), 23(c), 28, 29 and 30 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act") has preferred this application to enlarge him on bail.

2. The prosecution case runs as under:

Specific intelligence was gathered by DRI, Mumbai, that two passengers named Daniel Gitau Munyi (A1) and Ms.

Djenabou Layla Diallo (A2), who were travelling from Addis Ababa to Mumbai by Flight No.ET640 were carrying some narcotic substance. A1 and A2 were intercepted by the officers of DRI MZU at CSMI Airport, Mumbai, in early hours on 3rd December, 2022. No contraband article was recovered in the personal search and baggage check of A1 and A2. However in the luggage of A1 and A2 four sling bags each were found and eight plastic pouches were found concealed in the outer and inner layer of the sling bags. When the pouches were cut open, a white/off-white powder was found. The powder was tested with the help of Drug Detection Kit and the test resulted positive for presence of cocaine, a narcotic substance. It weighed 1794 grams. The contraband article was seized under panchnama dated 3rd December, 2022.

3. Statements of accused Nos.1 and 2 were recorded under Section 67 of the NDPS Act, 1985. It, *inter alia*, transpired that A1 was carrying the contraband at the instructions of Kenyan national Iszu/Ozor. The contraband was delivered to A1 by a person named Mr. Willey at Addis Ababa. A2 also stated that the contraband article was delivered to her by Mr. Willey at Addis Ababa. Investigation further revealed that the applicant had arranged the flight tickets of A1. Statement of applicant

came to be recorded under Section 67 of the NDPS Act, 1985, which also revealed the complicity of the applicant. It further transpired that the applicant had sponsored and paid the money for flight ticket of A1. An amount of Rs.1,02,900/-, was transferred to the travel agent. The investigating agency could locate one transaction of Rs.12,900/- made by the applicant through UPI, from the mobile phone recovered from the applicant.

4. As the learned Special Judge declined to exercise the discretion, the applicant has preferred this application. An affidavit-in-reply is filed on behalf of DRI opposing the prayer for bail.

5. I have heard Ms. Achari, the learned Counsel for the applicant and Mr. Sethna, the learned Special PP for respondent – DRI, at some length. The learned Counsel took the Court through the material on record.

6. Ms. Achari, the learned Counsel for the applicant, submitted that the applicant is implicated solely on the basis of the statements of A1 and co-accused recorded under Section 67 of the NDPS Act, 1985, which are not admissible in evidence as a confessional statement. Apart from the statement of the co-accused, there is not an iota of material to establish the nexus

between the applicant and the recovery of the contraband article from the possession of the applicant, A1 and A2. The case of the prosecution that the applicant had booked the flight tickets for A1, falls flat as the travel agent categorically stated that he had never met the applicant. The evidence of the transfer of the amount to the account of the travel agent by the applicant is also fragile to bear the weight of accusation. Therefore, the applicant deserves to be enlarged on bail.

7. Mr. Sethna, the learned Special PP, resisted the prayer for bail. It was submitted that a huge commercial quantity of 1794 grams of cocaine was recovered from the possession of A1 and A2. By its very nature, the said smuggling of the narcotic substance was in pursuance of a conspiracy. As commercial quantity has been recovered, the interdict contained in Section 37 of the NDPS Act, 1985 is attracted. Taking the Court through the statements of accused Nos.1 and 2 and that of the applicant recorded under Section 67 of the NDPS Act, 1985 and the material in the form of transfer of an amount of Rs.12,900/- by the applicant to the travel agent, Mr. Sethna submitted that there is direct connection between the applicant and A1 and A2.

8. Mr. Sethna further submitted that it is not an absolute proposition of law that the statement under Section 67 of the

NDPS Act, 1985 cannot be looked into even at the stage of consideration of an application for bail. Attention of the Court was invited to the decisions of the Supreme Court in the cases of *Union of India (NCB) Etc. vs. Khalil Uddin Etc.*¹ and *Narcotics Control Bureau vs. Mohit Aggarwal*².

9. I have given anxious consideration to the rival submissions. The applicant was not found in possession of any contraband substance. The applicant is sought to be roped in by invoking the provisions contained in Section 29 of the NDPS Act, 1985. When a person is sought to be arraigned by invoking Section 29 of the Act, 1985, the fact that no contraband article was found in his possession pales in significance. In such a case, it has to be seen whether there is material to establish the nexus between such person and the trafficking in drugs.

10. In the case at hand, the DRI relies upon the statements of A1 and A2 and the applicant recorded under Section 67 of the NDPS Act, 1985 to establish such nexus. In view of the pronouncement of the Supreme Court in the case of *Tofan Singh vs State of Tamil Nadu*³ a statement recorded under Section 67 of the NDPS Act, 1985 cannot be used as a

1 2022 SCC Online SC 2109.

2 2022 SCC Online SC 891.

3 (2021) 4 Supreme Court Cases 1.

confessional statement in the trial for an offence under NDPS Act.

11. In the case of *State by (NCB) Bengaluru vs. Pallulabid Ahmad Arimutta and anr.*⁴ in somewhat similar circumstances, the Supreme Court noted that from the facts in that case it emerged that except for the voluntary statement of A1 and A2 and that of the respondent themselves recorded under Section 67 of the NDPS Act *prima facie* there was no substantial material for the prosecution at the time of arrest to connect the respondents with the allegations levelled against them of indulging in drug trafficking. Referring to the decision of the Supreme Court in the case of *Tofan Singh* (supra) it was held that in the teeth of the said decision, the arrest made by the NCB on the basis of the confession – voluntary statement of the respondent or the co-accused under Section 67 of the NDPS Act, 1985 cannot form the basis for overturning the impugned order releasing the respondent on bail.

12. From the perusal of the decision in the case of *Mohit Aggarwal* (supra) on which a strong reliance was placed by Mr. Sethna, it does not appear that the legal position enunciated in *Tofan Singh* (supra) was deviated from. The observations in

⁴(2022)12 SCC 633.

paragraphs 16 and 17 make this position abundantly clear. They read as follows:

“16. Coming back to the facts of the instant case, the learned Single Judge of the High Court cannot be faulted for holding that the appellant- NCB could not have relied on the confessional statements of the respondent and the other co-accused recorded under Section 67 of the NDPS Act in the light of law laid down by a Three Judges Bench of this Court in *Tofan Singh* (supra), wherein as per the majority decision, a confessional statement recorded under Section 67 of the NDPS Act has been held to be inadmissible in the trial of an offence under the NDPS Act. Therefore, the admissions made by the respondent while in custody to the effect that he had illegally traded in narcotic drugs, will have to be kept aside. However, this was not the only material that the appellant - NCB had relied on to oppose the bail application filed by the respondent. The appellant - NCB had specifically stated that it was the disclosures made by the respondent that had led the NCB team to arrive at and raid the godown of the co-accused, Promod Jaipuria which resulted in the recovery of a large haul of different psychotropic substances in the form of tablets, injections and syrups. Counsel for the appellant - NCB had also pointed out that it was the respondent who had disclosed the address and location of the co-accused, Promod Jaipuria who was arrested later on and the CDR details of the mobile phones of all co-accused including the respondent herein showed that they were in touch with each other.

17. Even dehors the confessional statement of the respondent and the other co-accused recorded under Section 67 of the NDPS Act, which were subsequently retracted by them, the other circumstantial evidence brought on record by the appellant - NCB ought to have dissuaded the High Court from exercising its discretion in favour of the respondent and concluding that there were reasonable grounds to justify that he was not guilty of such an offence under the NDPS Act. We are not persuaded by the submission made by learned counsel for the respondent and the observation made in the impugned order that since nothing was found from the possession of the respondent, he is not guilty of the offence for which he has been charged. Such an assumption would be premature at this stage.”

13. It becomes abundantly clear that the Supreme Court found independent material to connect the accused therein with

the drug trafficking, even *de hors* the confessional statement of the accused and co-accused recorded under Section 67 of the NDPS Act.

14. It is true, in the case of ***Khalil Uddin*** (supra) on which reliance was placed by Mr. Sethna, the Supreme Court adverted to the statement of the co-accused recorded under Section 67 of the NDPS Act and in the circumstances of the case found that the interdict contained in Section 37 of the NDPS Act was attracted. It is necessary to note that even in the case of ***Khalil Uddin*** (supra) the Supreme Court adverted to the decisions in the cases of ***Tofan Singh*** (supra) and ***Pallulabid Ahmad*** (supra). Since the decision of the Supreme Court in the case of ***Tofan Singh*** (supra) has been rendered by a three-Judge Bench and has since been consistently followed, the correct course would be to consider as whether there is independent material apart from the statements of the applicant and co-accused under Section 67 of the NDPS Act, 1985.

15. The sole circumstance which is pressed into service against the applicant is that the applicant had allegedly booked the flight ticket of A1. Reliance on the statement of Mr. Adarsh Jaiswal, the travel agent, does not, *prima facie*, advance the cause of the prosecution to the extent desired by Mr. Sethna.

Mr. Jaiswal states that an African person had booked the flight ticket for A1 on 30th November, 2022. Part of the price of the ticket was paid through UPI and some part was transferred in tranches from an account maintained with Bank of Baroda. Mr. Jaiswal, however, stated that he had never met the applicant, when the photograph of the applicant was shown to him.

16. An endeavour was made by Mr. Sethna to draw home the point that the screenshot of the UPI payment of Rs.12,900/- was recovered from the mobile phone of the applicant. It is pertinent to note that based on the statement of the applicant, it is the prosecution case that the said account stands in the name of one Kamugisha Francis and the applicant was, in fact, operating the said account. To this end, there is no other material except the statement of the applicant. To draw support to its contention that the applicant was operating the said account standing in the name of Kamugisha Francis, the prosecution will have to fall back on the statement of the applicant, which is inadmissible in evidence.

17. The aforesaid being the nature of the material pressed into service against the applicant, I find substance in the submission of Ms. Achari that there is no material to *prima facie* connect the applicant with the alleged recovery of the

contraband substance from A1 and A2. I am, therefore, impelled to hold that there is a substantial probable cause to believe that the applicant may not be guilty of the offences for which he has been arraigned in this case. It is not the prosecution case that the applicant has antecedents. A further inference thus become justifiable that the applicant may not indulge in identical offences, if released on bail. Twin test thus stand satisfied. The applicant, therefore, deserves to be enlarged on bail.

18. Hence, the following order.

: O R D E R :

- (i) Application stands allowed.
- (ii) The applicant - Kingsley Eze be released on bail Special Case No.872 of 2023 arising out of CR No.DRI/MZU/C/INT-120/2022 registered with Directorate of Revenue Intelligence ("DRI"), Mumbai Zonal Unit, Mumbai, on furnishing a P.R. Bond in the sum of Rs.1,00,000/- with one or more sureties in the like amount to the satisfaction of the learned Special Judge.
- (iii) The applicant shall mark his presence at Directorate of Revenue Intelligence ("DRI"), Mumbai Zonal Unit, Mumbai 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 the trial, 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.]