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

CRIMINAL BAIL APPLICATION NO.3538 OF 2022

Hasan Yakub Shaikh	]	Applicant
vs.		
The State of Maharashtra	]	Respondent

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Mr. Ayaz Khan, for Applicant.

Mr. A.A. Palkar, A.P.P, for Respondent – State.

Mr. S.R. Kanadkhedkar, P.S.I, Parksite Police Station present.

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CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON : 4th APRIL, 2024.
PRONOUNCED ON : 8th APRIL, 2024.

ORDER:

1. The applicant was arrested on 18th February, 2022 by the officers of the respondent in connection with C.R. No.25 of 2022 for the offences punishable under Sections 8 (c) r/w 20 (B) and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “N.D.P.S Act”).

2. Prosecution case in brief is as under.

3. Head Constable Nurulhasan Shaikh is the complainant who received an information on 18th February, 2022 around 11.30 hours that a person would be coming with Nitrazepam Tablets and *Ganja* for the purpose of selling the same to his customers at *Shikowa Galli*, near *Ajmera* Building, L.B.S Marg, *Ghatkopar* (West), Mumbai. Even description of the suspect along with colour of clothes was given. The information was reduced into writing by the concerned Police Sub Inspector. The matter was immediately informed to the Senior Inspector and thereafter to the D.CP and A.C.P Zone VII, *Vikhroli* Division.

4. Two *panch* witnesses were called. The raiding team proceeded towards the said spot along with electronic weighing scale and other necessary sealing material in a testing kit. When they reached at the spot around 14.25 hours and laid a trap around 15.00 hours, they noticed a person matching with the description carrying a black coloured bag containing some heavy material and there is one more white coloured gunny bag near his feet. He was apprehended. Upon inquiry, he identified himself as Hasan Yakub Shaikh (present applicant).

5. The applicant was made aware about his right under Section 50 of the N.D.PS Act. During search of the bag kept near his feet, 58 boxes of Nitrazepam Tablets were found. Each box contained ten strips. Two strips from the box were taken and samples were drawn under the *panchanama*.

6. During further search, the team recovered a black coloured bag which was being carried by the applicant containing 456 grams of *Ganja*, which is not a commercial quantity. Two samples of 25 grams each were taken and duly sealed and labelled.

7. An First Information Report came to be registered against the applicant. After investigation, a charge-sheet has been filed.

8. I heard Mr. Khan, learned Counsel for the applicant and Mr. Palkar, learned A.P.P at length.

9. A bare look at the notice under Section 50 (1) of the N.D.PS Act reveals that the applicant was informed about his right to be searched before a Magistrate or a Gazetted Officer. It was signed by two *panchas*. It is not clear whether the applicant understood

Marathi language and had thereafter signed the same. It seems that there is no strict compliance of Section 50 of the N.D.P.S Act. It is surprising as to how the Investigating Agency although received the secret information about transportation of the contraband being carried by the applicant had even knew his description including the clothes on his person? If the information was received at 9.00 a.m on 18th February, 2022 with all minute details and even the place where the applicant would be found, how come the applicant was at the same spot until the raid was conducted in the afternoon about 15.15 hours i.e. almost for 6 hours? It is needless to comment anything more on this aspect.

10. *Panchanama* does not bear signature of the applicant and, therefore, it becomes doubtful whether *panchanama* was genuinely drawn in the presence of the applicant by the Investigating Officer. It also reveals from the *panchanama* that when the trap was laid, the applicant was found waiting for somebody. It is again surprising as to how the applicant could wait right from the information received by the office at 9.00 a.m till 15.10 hours as already stated hereinabove. The boxes containing alleged Narcotic substance viz. Nitrazepam Tablets alleged to be kept in a gunny bag creates a

doubt whether it was in conscious possession of the applicant.

11. Learned Counsel has, therefore, rightly argued that it is not the case of the prosecution that even gunny bag was found in conscious possession of the applicant as it was only lying on the spot where the applicant was arrested by the Investigating Officer. *Panchanama* indicates that P.S.I Algur informed the purpose of his search in Hindi but the same has not been reflected in the notice under Section 50 of the N.D.PS Act. The Counsel would argue that there is non compliance of Section 42 of the N.D.PS act. However, according the Mr. Palkar, there is no requirement of compliance of Section 42 as the contraband was found in a public place.

12. Mr. Palkar would argue that the applicant is a habitual offender who has earlier been convicted by the Metropolitan Magistrate's Court, Vikhroli, Mumbai on 24th August, 2016 for having committed an offence under Section 27 of the N.D.PS Act. The applicant was found consuming narcotic drug or psychotropic substance which is prohibited under Section 8 (c) of the N.D.PS Act. It appears that the applicant pleaded guilty and, therefore, he has been sentenced to undergo simple imprisonment till rising of

the Court as well as fine of Rs.1,000/-, in default, to suffer simple imprisonment for three days.

13. It appears that the applicant was involved in the offence of consuming narcotic substance, however, from the material placed on record as well as in the light of the fact that he has been incarcerated ever since his arrest without charge being framed and the uncertainty of the trial being concluded in near future, he deserves bail. Contraband *Ganja* alleged to have been seized from the applicant is not of commercial quantity.

14. Indeed, there ought to have been compliance of section 42 of the N.D.P.S Act. There is no material to show that the Investigating Officer has made compliance under Section 57 of the N.D.P.S Act to report the matter to the immediate superior Official within forty eight hours after the arrest. There is also nothing on record to show that seized *muddemal* has been placed in the safe custody until it was sent to the Forensic Science Laboratory in the light of the fact that after it's seizure on 18th February, 2022 samples were sent to the analyzer on 20th February, 2022.

15. From the aforesaid discussion, there are reasonable grounds for believing that the applicant is not guilty of such offences by keeping in mind the ratio laid down in case of **State of Kerala and others Vs. Rajesh and others**¹ by the Supreme Court wherein the Supreme Court has discussed expression of “reasonable grounds” in paragraphs 19 to 22 of the judgment which are extracted below;

“19. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 CrPC, but is also subject to the limitation placed by Section 37 which commences with non obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

20. The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires

1 (2020) 12 Supreme Court Cases 122

existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the Cr. P.C, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

21. *We may further like to observe that the learned Single Judge has failed to record a finding mandated under Section 37 of the NDPS Act which is sine qua non for granting bail to the accused under the NDPS Act.*

22. *The submission made by learned Counsel for the respondents that in Crime No.14 of 018, the bail has been granted to the other accused persons (A-1 to A-4), and no steps have been taken by the prosecution to challenge the grant of post-arrest bail to the other accused persons, is of no consequence for the reasons that the consideration prevailed upon the Court to grant bail to the other accused persons will not absolve the act of the respondent-accused (A5) from the rigour of Section 37 of the NDPS Act”.*

16. I have recorded the findings as mandated in Section 37 of the N.D.PS Act. The findings as recorded hereinabove *qua* the applicant are not in the context of finding the applicant not guilty

of the offence or whether the applicant has in fact committed or not committed any of the offence under the N.D.PS Act but the entire exercise is only for the purpose of considering as to whether the applicant can be enlarged on bail or otherwise. Consequently, the following order is passed;

: ORDER :

- (a) The application is allowed.
- (b) The applicant – Hasan Yakub Shaikh be released on executing 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 Special Judge (N.D.PS), City Civil & Sessions Court, Greater Mumbai in N.D.PS Case No.544 of 2022 in connection with C.R. No.25 of 2022 registered with Parksite Police Station, Mumbai for the offences punishable under Sections 8 (c), 20 (b) and 22 of the N.D.PS Act.
- (c) The applicant shall report the concerned Police Station on first Saturday of every month between 10.00 a.m and 1.00 p.m till the charge is framed;

(d) After framing the charge, applicant shall attend the trial Court scrupulously, unless exempted from appearance;

(e) The applicant shall not tamper with the evidence or attempt to influence or contact any of the witnesses or persons concerned with this case;

(f) The applicant shall surrender his passport, if any, to the Investigating Officer immediately.

(g) The applicant shall furnish his residential address and contact details to the respondent and the Trial Court immediately after his release. In case of change in contact details or residential address, same shall be forthwith informed to the Trial Court and the Respondent.

(h) In case of breach of any of the conditions hereinabove, liberty to the prosecution to seek cancellation of bail of the applicant.

17. The application stands disposed of in the aforesaid terms.

[PRITHVIRAJ K. CHAVAN, J.]