



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

BAIL APPLICATION NO. 3002/2023

KALIM RAFIQUE KHAMKAR	..APPLICANT
VS.	
THE STATE OF MAHARASHTRA	..RESPONDENT

**WITH
BAIL APPLICATION NO. 2131/2023**

JAKI AFROZ PITOO	..APPLICANT
VS.	
THE STATE OF MAHARASHTRA	..RESPONDENT

Adv. Ayaz Khan i/b Adv. Dilip Shinde for the Applicant in
BA/2131/23.

Adv. Abhishek Yende a/w Adv. R.Y. Dube for the Applicant in
BA/3002/23.

Dr. Birendra Saraf, Advocate General a/w Adv. Vilasini
Balsubramanian a/w Smt. Sangeeta D. Shinde, APP for the
State.

CORAM : M. S. KARNIK, J.

**RESERVED ON : APRIL 26, 2024
PRONOUNCED ON : MAY 02, 2024**

P.C.:

1. Heard learned counsel for the applicants and learned
Advocate General for the State.
2. These are the applications for bail in respect of the

offence punishable under Sections 8(c), 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'NDPS Act' for short) registered on 31/12/2021 vide C.R. No.371 of 2021 with New Panvel Police Station.

3. On 30/12/2021, a secret information from the informant was received by Police Naik Mr. Sanjay Fulkar attached to the Crime Branch, Unit-III that on 30/12/2021 between 18.00 hrs. and 19.00 hrs., near Shankar Temple, Panvel, Nere-Vaje Road, Taluka Panvel, District- Raigad, one person aged 35-40 years would come in his white colour car for selling narcotic substance. Police Naik Mr. Fulkar immediately informed Senior Inspector Mr. Mali who in turn informed to the concerned Assistant Commissioner of Police as well as the Deputy Commissioner of Police. A pre-trap panchnama to that effect was made. The Senior Police Inspector, Mr. Shatrughna Devidas Mali, the authorised officer under Section 42 of the NDPS Act formed a raiding team and proceeded towards the spot of the incident. At 18.50 hrs. a Maruti Swift car came to the spot. One person came out of the said car and stood near the car. He had a

blue coloured plastic bag with him. His activities were found to be suspicious. The Investigating Officer asked him his name. He disclosed his name as Kalim Rafiq Khamkar - the applicant in Bail Application No. 3002 of 2023, aged 39 years. After complying with the provisions of Section 50 of the NDPS Act, it was noticed that the blue coloured plastic bag contained white cream coloured powder. Kalim Khamkar revealed that the substance is Mephedrone (MD) powder. The said powder was examined at the spot. The substance reported was 'Methaqualone' weighing 1 Kg. It is the submission that the requisite procedure contemplated under Section 52 of the NDPS Act was followed.

4. During the course of the investigation, Kalim Khamkar was arrested on 31/12/2021. Upon interrogation of Kalim Khamkar, he revealed the name of Jaki Afroz Pitoo - the applicant in Bail Application No. 2131 of 2023. As per the statement of Kalim Khamkar, a pre-trap panchanama was made. The investigating agency went to Kalhegaon near the Mumbai-Goa highway. They apprehended the applicant- Jaki Afroz Pitoo and during panchanama what was recovered

was 'Methaqualone powder'. Applicant- Jaki Afroz Pitoo was arrested on 31/12/2021.

5. Thereafter, on the basis of further information received during the course of the investigation, the investigating agency arrested co-accused Subhash Raghupatil Patil along with other accused- Dheeraj Ashok Mhatre, Hamja Shakeel Pittu and Jagjeet Prasad Ram Prakash Prajapati. The forensic report received on 12/05/2022 revealed that the contraband was MD. The investigating agency obtained Call Details Records (CDRs) and Subscriber Details Records (SDRs) of the present applicants which according to the learned Advocate General show the tower location of the present applicants. The CDRs revealed the conversation that took place between the applicants and the co-accused. The charge-sheet came to be filed on 27/06/2022. Learned counsel for the applicants submitted that there is non-compliance of the provisions of Sections 42, 50 and 52A of the NDPS Act.

6. I have heard learned Advocate General on behalf of the State. I have perused the decisions of the Supreme

Court and this Court which are relied upon by the learned counsel for the applicants as well as by the learned Advocate General in support of their submissions. Having gone through these decisions, I am *prima facie* satisfied that there is no breach of the provisions of Sections 42 and 50 of the NDPS Act so far as these applicants are concerned. Suffice it to observe that any observations made by me may influence the trial and hence I refrain from dealing with these submissions elaborately. The trial Court to decide the matter on its own merits as these observations are *prima facie*.

7. So far as the applicant - Jaki Afroz Pitoo is concerned, he was arrested on 31/12/2021 on the basis of the information provided by the applicant- Kalim Khamkar while in police custody. The applicant was found in possession of 500 gms of contraband. The testing done at the spot revealed that the contraband was Methaqualone. The samples drawn at the spot were sent to the Chemical Analyser (CA). The samples indicated that they were positive for 'MD'.

8. The submission of the learned counsel for the applicants is that though the samples were drawn before the learned Magistrate, the same were not sent to the CA. It is the submission that the samples drawn at the spot were sent to the CA and hence there is a breach of the provisions of Section 52A of the NDPS Act.

9. Countering the submissions of the learned counsel for the applicants that the substance found at the spot was different from the one reported by the CA, the learned Advocate General submitted that the properties of Methaqualone and MD are the same. According to the learned Advocate General, it will hardly make any difference as the spot test is done by way of a kit which does not have any means of disclosing whether the substance is MD. It is submitted since the molecules are similar, the spot test indicated Methaqualone. It is further submitted that this was a preliminary test. It is after following the entire procedure contemplated under the law of sealing, the forensic test established that it was MD. Learned Advocate General submitted that the requirements of Section 37 of

the NDPS Act in the present case are not fulfilled as the accused were acting in syndicate with others. It is submitted that considering the gravity of the offence the applicants are not entitled to bail as they were found in possession of contraband which is of a commercial quantity. It is further submitted that the mere fact that police have not been able to trace any antecedents of the accused does not in any manner dilute the gravity of the offence.

10. As indicated earlier, the applicants were arrested on 31/12/2021 and are now in custody for more than 2 years and 4 months. The prosecution intends to examine 48 witnesses. Even the charge has not been framed so far. The trial in any case is going to take a long time to conclude. There is substance in the contention of the learned Advocate General that long incarceration by itself cannot be a factor for grant of bail as the same has to be seen in the context of the gravity of the offence.

11. The trial Court undoubtedly will go into the question whether the contraband Methaqualone found at the spot was nothing but MD as revealed from the forensic test. The

contention is further raised that there is a breach of Section 52A of the NDPS Act. Moreover, it needs to be noted that no criminal antecedents are reported against the applicant. The applicants are incarcerated for more than 2 years and 4 months with no possibility of trial concluding any time soon. There is nothing on record to indicate that the applicants are a flight risk. In my opinion, if stringent conditions are imposed it is unlikely that applicants will commit any offence while on bail. These are the factors which prevailed upon me for overcoming the rigours of Section 37 of the NDPS Act. The applicants can be enlarged on bail. Hence, the following order :-

ORDER

(a) The applications are allowed.

(b) The applicants- Kalim Rafique Khamkar and Jaki Afroz Pitoo in connection with C.R. No.371 of 2021 registered with New Panvel Police Station shall be released on bail on their furnishing P.R. Bond of Rs.1,00,000/- each with one or more local sureties each in the like amount.

(c) The applicants shall attend the Investigating Officer of New Panvel Police Station once a week,

every Monday, between 11.00 a.m. and 1.00 p.m., till the trial concludes.

(d) The applicants 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. The applicants shall not tamper with evidence.

(e) On being released on bail, the applicants shall furnish their contact numbers and residential addresses to the Investigating Officer and shall keep him updated, in case there is any change.

(f) After being released on bail, the applicants shall not leave the State of Maharashtra without prior permission of the trial Court.

(g) The applicants shall attend the trial regularly. The applicants shall co-operate with the trial Court and shall not seek unnecessary adjournments.

(h) The applicants shall surrender their passports to the investigating officer. If the applicants do not have passports, the applicants shall file their respective affidavit before the trial Court to that effect.

12. The applications are disposed of.

(M. S. KARNIK, J.)