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

CRIMINAL BAIL APPLICATION NO. 3506 OF 2022

Gaurang Jitendra Khair

.. Applicant

Vs.

Narcotics Control Bureau & Anr.

.. Respondents

.....

Mr. Shantanu Latpate a/w Pratap Nikam i/b Mr. Y.K. Chaudhari for
the applicant

Ms. Rashmi S. Tendulkar, APP for the respondent – State

Ms. Aruna S. Pai, Special P.P. for respondent no.1 - NCB

.....

CORAM : PRITHVIRAJ K. CHAVAN, J.

Closed on : 8th April, 2024

Pronounced on : 12th April, 2024

P.C.

1. This is an application for bail under Section 439 of the Cr.P.C.
2. The facts in brief are as follows.
3. Narcotic Control Bureau, Mumbai is prosecuting the applicant for the offences punishable under Section 8(c) r/w 20(b) (ii)(A), 22(b), 22(c), 27, 27A, 28 and 29 of the Narcotic Drugs and

Psychotropic Substances Act, 1985 (for short 'NDPS Act') in respect of NDPS Special Case No.567 of 2021.

4. The Junior Officer of Narcotics Control Bureau, Mumbai (NCB) received a specific information on 20.11.2020 that the applicant, residing at Room No.212, Mauli Niwas, 2nd Floor, 37A, Chakki Galli, Datta Mandir Road, Danda Khar, Khar (W), Mumbai is a drug peddler / trafficker indulging in peddling and trafficking of LSD, Ganja and other Narcotic Drugs and Psychotropic Substances, and has kept the contraband at his premises. Accordingly, the information was noted down and the superior officers were informed. A team was formed comprising the personnel of NCB. The team of NCB left for the spot as stated hereinabove. The team also comprised two panch witnesses. The team went to Room No.212 where the applicant was residing with his parents. They knocked the door. It was opened by Lata Jitendra Khair – mother of the applicant. The team introduced themselves and informed about their purpose of visit. The lady permitted the team to enter into the house. The applicant and his father were also present at that time. He was appraised about the information and the purpose of the raid.

5. The said premises comprised one room kitchen and bathroom with terrace. During search, one purple coloured wallet with Joker face marked 'DC' was found in the first drawer of a small cupboard. In the zip pocket of the wallet, 15 multi coloured LSD blots were recovered which weighed about 0.20 grams. One more transparent polythene packet containing dark leafy substance weighting about 40 grams was found and on testing the same with the help of Drug Detection Kit, it gave positive result for Ganja. On further inspection, one strip of 5 tablets and one single tablet of Nitrazepam were recovered. The raiding team thereafter took out samples as usual and were duly sealed. The team, as such, recovered the following articles :-

- a. 1 big black chillum*
- b. 2 small black chillums*
- c. 1 small silver blue color weighing machine*
- d. 1 Transcend Pendrive 4 GB red and blue color*
- e. 1 Sandisk Cruzer blade 32 GB red and blue color*
- f. 2 packets of 5 pipe screens (one packet containing 4 pipe screens and other containing 5 pipe screens)*
- g. 5 transparent polythene packets*
- h. 1 Swiggy ID card DR Id – 775638 in the name of Gaurang Khair”*

6. Accordingly, a panchanama was drawn on the spot which was concluded around 11.00 a.m. on 21.11.2020. After investigation, a charge-sheet came to be filed against the applicant.

7. The applicant failed in his first attempt to secure bail before the Special Judge for NDPS, Greater Mumbai by an order dated 20.07.2022.

8. I heard learned Counsel for the applicant and Ms. Aruna Pai, learned Special Public Prosecutor.

9. Learned Counsel for the applicant took me through the record by pointing out several anomalies in the investigation of the case by the respondent. He would invite my attention to the fact that both panch witnesses are the usual and habitual persons, who always act on behalf of the respondent and, therefore, there would be hardly any reason to believe the genuineness of the prosecution's case. On the aspect of Section 52A of the NDPS Act he would argue that seized muddemal was forwarded to the Magistrate 25 days after the alleged raid on 16.12.2020. There is no explanation tendered for such a long delay and, therefore, there is every possibility of tampering with the contraband seized by the respondent. The Counsel would also argue that the respondent had not made videography of the entire operation by placing reliance on a judgment of the Calcutta High Court. It is also submitted that the

alleged recovery of 15 blots of LSD and Nitrazepam tablets had not been tested with the help of Drug Detection Kit on the spot itself and, therefore, it also creates a doubt. Learned Counsel would further argue that confessional statement of the co-accused under Section 67 of the NDPS Act is inadmissible. He, therefore, prays for releasing the applicant on bail by adding that ever since his arrest, charge has not been framed and there is no likelihood of concluding the trial within a reasonable period.

10. Learned Special Public Prosecutor while strongly objecting the prayer for bail submitted that this is not a case in which the applicant is entitled to be released on bail in view of the fact that the applicant is a habitual drug peddler in whose possession not only LSD but the other substances such as Ganja, Nitrazepam tablets were found. The learned Special Public Prosecutor would argue that the Investigating Agency has scrupulously followed the procedure at the time of conducting the raid. She has invited my attention to the panchanama as well as the other material on record.

11. It appears that Aadil Fazal Usmani and Terrence David

Dcunha are the stock panch witnesses of the respondent, who, perhaps may have acted in several cases. The NCB should have summoned some independent witnesses of the vicinity in order to prepare a water tight case. By summoning the habitual panch witnesses, the respondent has itself weakened its case since it would be difficult to place implicit reliance on the statements of such witnesses.

12. Learned Counsel has invited my attention to a decision of the Calcutta High Court in case ***Kalu Sk. @ Kuran Vs. State*** and ***Kabir Sk. Vs. State*** passed in C.R.M. (NDPS) No.492 of 2022 with C.R.M. (NDPS) No.493 of 2022. The relevant part of the said order can be extracted below for the sake of convenience, which reads thus :-

“ N.D.P.S. Act vests plenary powers of search, seizure and arrest on investigating officers. The power of the court to grant bail is circumscribed by strict restrictions under Section 37 particularly in case involving commercial quantity. While a strict law is necessary to control organized crime like drug trafficking and protect the youth from the menace of drug abuse, its draconian provisions are sometimes misused by investigating agency leading to false implication and prolonged unjustified detention of individuals. Most of the cases registered under the N.D.P.S. Act revolve around recover of narcotic substance from the accused. Heart and soul of the

prosecution is the legitimacy of such recovery. Protection in such cases primarily relies on the evidence of official witnesses particularly seizing officers to prove lawful recovery of contraband. In most cases as in the present case, independent witnesses are either not examined or turn hostile. There may be myriad reasons for that ranging from false implication to winning over of such witnesses by resourceful accused.

In order to remedy the situation and ensure unvarnished truth is placed before the court during adjudication, it is imperative that the investigating agencies resort to modern technology and video graph the recovery of narcotics.”

13. It is apparent from the observations made by Calcutta High Court that heart and soul of the prosecution is the legitimacy of the recovery of the contraband. It is incumbent upon the prosecution to ensure that the contraband is seized in the presence of independent panch witnesses. It has been observed that in most of the cases, the witnesses are either not examined or turned hostile for myriad reasons. The Calcutta High Court emphasized on the fact of resorting to the modern technology and videography of the recovery of narcotics, which would make the case of the prosecution fair and impartial and it would enhance confidence in the process of investigation. The Calcutta High Court drew support from the observations made by the Supreme Court in the case of *Shafhi Mohammad Vs. State of Himachal Pradesh, (2018) 5*

SCC 311 wherein the Supreme Court observed thus :-

“9. We are in agreement with the Report of the Committee of Experts that videography of crime scene during investigation is of immense value in improving administration of criminal justice. A Constitution Bench of this Court in Kernel Singh V. State of Haryana (2009) 8 SCC 539 Para 34 noted that technology is an important part in the system of police administration. It has also been noted in the decisions quoted in the earlier part of this order that new techniques and devices have evidentiary advantages, subject to the safeguards to be adopted. Such techniques and devices are the order of the day. Technology is a great tool in investigation. By the videography, crucial evidence can be captured and presented in a credible manner.”

14. It appears that there is a confessional statement of the co-accused recorded by the respondent – NCB. Law as regards a statement in the form of confession recorded under Section 67 of the NDPS Act is inadmissible and the said issue is no more *res integra* in view of the judgment of the Supreme Court in case of ***Tofan Singh Vs. State of Tamil Nadu, AIR (2020) SC 5592***. It is held that even statement of the co-accused under Section 67 of the NDPS Act cannot form basis in rejecting the application for bail. In view of the said ratio, the statement of the co-accused in the instant case would be of no assistance to the prosecution.

15. The alleged contraband appears to have been seized and

recovered on 21.11.2020. However, an application for drawing the samples before the Court of the Metropolitan Magistrate was submitted on 16.12.2020 and thereafter the contraband was sent to the Forensic Science Laboratory on 23.12.2020. This itself creates a great suspicion since there is no explanation tendered in that respect. This has frustrated the very object of Section 52-A of the NDPS Act as has been observed in various decisions of the Supreme Court, including in the case of *Union of India Vs. Mohanlal & Anr. (2016) 3 SCC 379* and *Simrnjit Singh Vs. State of Punjab, (2023) SCC Online 906*. There is nothing on record to indicate that all the 15 blots of the alleged LSD were tested and resulted in showing presence of LSD in all the blots. Apart from the aforesaid anomalies, the applicant who is a young man of 23 years has been behind the bars for more than 2 years with no hopes of trial being commenced in the near future.

16. From the aforesaid discussion, it is quite apparent that there are reasonable grounds for believing that he is not guilty of the offence. This is not in context of finding him not guilty of the offence or whether he had in fact, committed or not committed any offence under the said Act but, this is only for the purpose of

considering whether he can be released on bail or otherwise.

17. In view of what has been observed hereinabove, I am persuaded to release the applicant on bail.

18. Hence, I pass the following order :-

ORDER

- (a) The application is allowed.
- (b) The applicant 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 Court in NDPS Special Case No.567 of 2021 for the offences punishable under Sections 8(c) r/w 20(b)(ii)(A), 22(b), 22(c), 27, 27A, 28 and 29 of the NDPS Act.
- (c) The applicant shall report the office of the NCB, Mumbai on first Monday of every month between 10.00 a.m. to 1.00 p.m. till charge is framed.
- (d) After framing the charge, the applicant shall attend each date in the trial Court scrupulously.
- (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 furnish his residential address and contact details forthwith to the respondent and the Special Court. The applicant shall inform in case of any change in his contact details or residential address to the respondent as well as the Special Court.

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

(h) In case of two consecutive defaults either in attending the respondent or the trial Court or in case of breach of any of the aforesaid conditions, the prosecution shall be at liberty to seek cancellation of his bail.

19. The application stand disposed of in the aforesaid terms.

(PRITHVIRAJ K. CHAVAN, J.)