

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION  
BAIL APPLICATION NO.3424 OF 2023**

Sahil Abdul Aziz Khatri ... Applicant  
versus  
Narcotic Control Bureau and Anr ... Respondents

Mr. Ayaz Khan with Mr. Rajendra Bidkar, Mr. Dilip Mishra, for Applicant.  
Mrs. Aruna S. Pai, Special PP, for NCB.  
Mr. Shailesh Ghag, APP for State.

**CORAM: N.J.JAMADAR, J.**

**DATE : 28 MARCH 2024**

**P.C.**

1. Heard the learned Counsel for the parties.
2. The applicant who is arraigned in NCB/MZU/CR-49/2022 registered with Narcotic Control Bureau for the offences punishable under Sections 20(b)(ii)(C), 27(a), 27-A, 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, has preferred this application to enlarge him on bail.
3. On 27 December 2022, a secret information was received that a person namely Manish Kumar (A1) was coming from Muzaffarpur, Bihar to Thane Railway Station with 4 kgs Charas for delivery to Ayaz Charolia (A2). Manish Kumar (A1) would meet Ayaz Charolia (A2) and another person at Thane Railway Station and will handover contraband to them. Pursuant to the said information, a team of NCB conducted a surveillance at Thane Railway Station.
4. As informed, Manish Kumar (A1) alighted from the train. He was

carrying one plastic backpack. After some time, two persons came thereat at and had conversation with Manish Kumar (A1). While Manish Kumar (A1) was about to deliver one green colour bag pack, which he took out from the black backpack, Manish Kumar (A1), Ayaz Charolia (A2) and the applicant, who accompanied Ayaz (A2), were accosted.

4. After apprising the accused about their right to be searched before the Magistrate or Gazetted Officer under Section 50 of the Act, and upon the accused declining to avail the said right, a search of the accused was conducted. Manish Kumar (A1) handed over green colour bag pack. It contained 8 packets. The substance contained in the said packets was tested with drug detention kit. It turned out positive for Charas. It weighed 4 kgs. Contraband articles was seized and sealed. In the search of the applicant no contraband article was found.

5. Notices were given to the accused under Section 67 of the Act, 1985. Voluntary statements of the accused were recorded. In the voluntary statement, the applicant allegedly stated that he used to consume MD and charas and had given Rs.5 Lakhs to Ayaz Charolia (A2) who had informed him that he had given Rs.1.5 Lakhs to the person from whom he had ordered Charas. Investigation further revealed that there were financial transactions between the applicant and Avnisha Prem Badiya, wife of Ayaz Charolia (A2). Out of the amount of Rs.5 Lakhs paid by the applicant to Ayaz Charolia (A2), the latter had transferred Rs.1,50,000/- to Gaurav Kumar from whom

Ayaz (A2) had purchased the seized 4 kgs charas, which Manish Kumar (A1) was to deliver when they were intercepted. The applicant came to be arrested on 28 December 2022. As the learned Special Judge declined to exercise discretion in favour of the applicant, this application for bail.

6. An affidavit in reply is filed on behalf of NCB opposing the prayer for bail.

7. I have heard Mr. Ayaz Khan, learned Counsel for the Applicant, and Mrs. Aruna Pai, learned Special PP for the NCB at some length.

8. Learned Counsel for the applicant submitted that neither the applicant was named in the information note, nor the co-accused Manish (A1) and Ayaz Charolia (A2) named the applicant as their accomplice. The entire case rests on the statements recorded under Section 67 of the Act, 1985; which are inadmissible in evidence. Apart from the said statements, the prosecution relied upon the financial transaction between the applicant and Avinsha Badiya. However, till date the prosecution has made no effort to trace the said lady and record her statement. In substance, there is no nexus between the applicant and the allegedly recovered contraband substance. Therefore, the applicant deserves to be enlarged on bail.

9. As against this, Mrs. Pai, learned Special PP, submitted that the applicant was apprehended along with Ayaz Charolia (A2). They were about to accept the delivery of the contraband article from Manish Kumar (A1). Therefore, the mere

fact that no contraband was found from the possession of the applicant is not by itself sufficient to urge that the applicant is not involved in the offences. It was submitted that the very presence of the applicant along with Ayaz (A2) at Thane Railway Station on the midnight of 28 December 2022 when the applicant is the ordinary resident of Santacruz speaks volumes about the complicity of the applicant.

10. Laying emphasis on the fact that the applicant had financial transactions with Avinsha Badiya aggregating to the tune of Rs.1,79,000/-, during the period 17 October 2022 to 10 November 2022, and there is no explanation for the same, and that Avinsha Badiya had further transferred amounts to other members of the syndicate, it was urged that these financial transactions singularly incriminate the applicant. As a huge commercial quantity of Charas was found in possession of Manish Kumar (A1), while the said substance was about to be delivered to Ayaz Charolia (A2) and the applicant, the applicant can also be said to be found in conscious possession of the contraband substance and, therefore, the rigour contained in Section 37(1)(ii)(b) of the Act is fully attracted, urged Ms. Pai.

11. I have given anxious consideration to the rival submissions. The material pressed into service against the applicant can be classified in three parts. One, the presence of the applicant along with Ayaz Charolia (A2), in respect of whom specific information was received that he would come with another person at Thane Railway Station to collect the contraband from Manish Kumar (A1). Second, the

voluntary statements of the applicant and the co-accused. Third, the financial transactions between the applicant and Avinsha Badiya.

12. Out of the aforesaid circumstances, in view of the pronouncement of the Supreme Court in the case of **Tofan Singh V/s. State of Tamil Nadu**<sup>1</sup> the voluntary statements of the applicant and the co-accused recorded under Section 67 of the Act, cannot be taken into account. In the said case, the Supreme Court has, in terms, ruled that the statement recorded under Section 67 of the Act cannot be used as a confessional statement in the trial for the offences under the NDPS Act, 1985. This position was reiterated by the Supreme Court in the case of **Rajkumar Hariram Gameti V/s. State of Gujarat and Anr.**<sup>2</sup> on which reliance was placed by Mr. Khan.

13. Even the statement of one co-accused, recorded under Section 67 of the Act, cannot constitute a substantive evidence against another co-accused. In the case of **Abdul Rashid V/s. State of Bihar**<sup>3</sup> the Supreme Court enunciated that if the confessional statement is taken out from the purview of consideration then on the residue of material, namely, that the appellant was found coming together with the co-accused and on the statement of co-accused, a conviction under the provisions of NDPS Act, cannot be sustained.

14. In the case at hand, if the statements under Section 67 of the Act, are eschewed from consideration, the other two circumstances, prima facie, appear to be

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1 (2021) 4 SCC 1

2 Cri. Appeal No.1714 of 2009 dated 22 Feb. 2024

3 (2001) 9 SCC 578

nebulous in character. The mere fact that the applicant was found in the company of Ajay Charolia (A2) without anything more, may not be sufficient to fasten the liability for the alleged conscious possession of the contraband substance. In the absence of any material to show that the applicant was also the person who was tipped to take delivery of the contraband substance, mere presence at the spot where the contraband substance was recovered from Manish Kumar (A1) may not incriminate the applicant.

15. That leaves the aspect of the financial transactions between the applicant and Avinsha Badiya. It is alleged, during the period 17 October 2022 to 10 November 2022, the applicant transferred a sum of Rs.1,79,000/- to Avinsha Badiya, wife of Ayaz Charolia (A2). Prima facie, it appears that the prosecution has not carried out further investigation to establish the nexus of Avinsha Badiya with the subject crime.

16. Mr. Khan, learned Counsel for the Applicant submitted that, in fact, in his voluntary statement, Ayaz Charolia (A2) claimed that he is unmarried. There is no material to indicate that Avinsha Badiya is the wife Ayaz Charolia (A2). Nor any effort has been made by the investigating agency to trace her out and record the statement of Avinsha Badiya.

17. Mrs Pai attempted to salvage the position by asserting that despite notice having been sent to Avinsha Badiya under Section 67 of the Act, she has not appeared before the Investigating Officer.

18. In this proceeding and at this stage, the Court may not delve into this

aspect of the matter. The fact remains that, prima facie, there is no material to establish the nexus between the financial transactions between the applicant and Avinsha Badiya (A2) and the recovery of the contraband substance on 28 December 2022 from Manish Kumar (A1).

19. In the aforesaid view of the matter, the Court may be justified in recording a tentative finding that the accused may not be guilty of the offences for which he has been arraigned. The applicant has no antecedents. Therefore, further inference that the applicant may not indulge in the activities for which he has been arraigned in this case, may also become sustainable.

### **ORDER**

(i) The Application stands allowed.

(ii) The Applicant – Sahil Abdul Aziz Khatri be released on bail in C.R.No.49 of 2022 registered with Narcotic Control Bureau on furnishing a PR bond in the sum of Rs.1,00,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.

(iii) The applicant shall mark his presence before Narcotic Control Bureau on first Monday of every alternate month in between 11 am to 1 pm 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. 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 regularly attend the proceedings before the jurisdictional Court.

(vii) 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 disposed.

**( N.J.JAMADAR, J. )**