

Santosh

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

BAIL APPLICATION NO. 3791 OF 2023

Erum Mohammad Iqbal Bashey ...Applicant

Versus

1. Union of India
2. The State of Maharashtra ...Respondents

Ms. Lochan Chandka, a/w Rounak Naik, for the Applicant.
Mr. Shreeram Shirsat, Special PP, a/w Tanvi Mate, Shekhar
Mane and Karishma Rajesh, for the UOI – Respondent
No.1.

**CORAM: N. J. JAMADAR, J.
RESERVED ON : 28th MARCH, 2024
PRONOUNCED ON: 18th APRIL, 2024**

ORDER:-

1. Heard the learned Counsel for the parties.
2. The applicant, who is arraigned in NDPS Special Case No.602 of 2023 arising out of CR No.NCB/MZU/CR No.II-48 of 2022, registered with NCB, Mumbai, for the offences punishable under Sections 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, has preferred this application to enlarge her on bail.
3. The prosecution case can be stated as under:

On 9th December, 2022, pursuant to specific information, the NCB Police accompanied by the public witnesses conducted a search at Room No.303, Simranpreet

Co-operative Housing Society, Sector 14, Koparkhairne, Navi Mumbai. In the search, seven carton boxes containing 144 bottles of cough syrup containing Codeine Phosphate (in all 920 bottles) were recovered from the possession of Sana Zahir Qureshi (A1) and Zahir Ahmed Qureshi (A2). Pursuant to the voluntary statement of A1 and A2 the complicity of Ram Singh (A3) was revealed. Ram Singh (A3) came to be arrested on 10th December, 2022. On the basis of the disclosure made by the Ram Singh (A3) a seizure of 6000 tablets (3.6 kg.) of Nitrazepam (Nitravet-10 mg) and seven bottles of Codeine Phosphate were recovered from the possession of Deepu Kaushal (A4) under the seizure panchanama dated 10th December, 2022. Deepu Kuashal (A4) was arrested on 11th December, 2022. In a further follow up action 480 bottles of Cholrpheniramine Maleate CHOCO Syrup and Codeine Phosphate PHENSIREST syrup were recovered from the possession of Kamatdev Pandey (A5) on 12th May, 2023. Shahid Usman Gadkari (A6) was also arrested.

4. During the course of investigation, it transpired that Deepu Kaushal (A4) was the henchman of the applicant. Her statement was recorded under Section 67 of the NDPS Act, 1985. It further transpired that the applicant was actively involved in the dealings of procurement, possession, transportation and sale of the psychotropic substance and primarily procured the substances from M/s. Crystal Agency, Gujarat. The applicant was the kingpin of the cartel. The applicant had employed Deepu Kaushal (A4) as her

henchman and delivery boy for trafficking in drugs. Ram Singh (A3) had received the contraband on behalf of accused Nos.1 and 2 and the contraband articles were supplied by the applicant through Deepu Kuashal (A4). There were extensive CDRs and positive evidence of transfer of money from and to the account of the applicant. No explanation was forthcoming. Thus, the applicant came to be arrested on 25th May, 2023.

5. Ms. Chandka, the learned counsel for the applicant, submitted that the applicant has been roped in solely on the basis of the statement of co-accused and CDR. None of the aforesaid circumstances indicate that the applicant was privy to the alleged conspiracy. It was submitted that CDR, in themselves, prove nothing. The fact that some amount came to be credited to the account of the applicant does not justify such an inference of conspiracy. There is no material to show that Deepu Kaushal (A4) was working with the applicant. Reliance was placed on an order passed by the Supreme Court in the case of **Kimudu Gurunad vs. State of Madhya Pradesh**¹ and a decision of this Court in the case of **Sunil Kailash Pandit vs. State of Maharashtra**²

6. Ms. Chandka laid emphasis on the fact that Sana Qureshi (A1) and Zahir Qureshi (A2) did not name the applicant as the supplier. Ram Singh (A3) allegedly disclosed the identity of the applicant and Kamatdev Pandey (A5) as

1 Criminal Appeal No.725 of 2022, dated 2/5/2022.

2 BA/2665/2023, dated 19th January, 2024.

the persons who indulged in the illegal drug trade. However, the information was not recorded in the manner ordained by law. Deepu Kaushal (A4) had allegedly revealed the identity of the applicant as the supplier and that he was working under her instructions. However, these statements are not admissible in evidence and, therefore, the prosecution cannot draw any mileage from the statements recorded under Section 67 of the NDPS Act, 1985. It was submitted that the fact that there were few transactions between the applicant and the co-accused does not necessarily connect the applicant with the alleged offences.

7. It was urged that since the applicant has been in custody since 25th May 2023 and report of the Superintendent of the Prison indicates that the applicant suffers from chronic kidney disease and hypertension, the applicant deserves to be enlarged on bail.

8. Mr. Shirsat, the learned Special PP for the NCB – respondent, resisted the prayer for bail. It was submitted that huge quantity of psychotropic substance was recovered from the possession of the co-accused. There is overwhelming material to show that the applicant was indulging in illicit trafficking in drugs. Deepu Kaushal (A4) was found in possession of the contraband article alongwith the vehicle which belongs to the father of the applicant. The CDR which records numerous calls between the applicant and the co-accused and bank transactions with almost all of the

accused indicate that the applicant has been indulging in trafficking of drugs habitually.

9. Mr. Shirsat submitted that since the applicant has been roped in by invoking the provisions contained in Section 29 of the NDPS Act, 1985, the fact that no contraband article was recovered from the possession of the applicant is not of significance. Reliance was placed on an order passed by this Court in the case of **Mr. Mohammed Aun Javed Haider Sayed vs. Union of India**³.

10. Mr. Shirsat stoutly submitted that the material on record indicates that the applicant was the prime character in the illicit drug trade. Attention of the Court was invited to the statements of witnesses, especially the father of the applicant, which indicates that the Scooty, which was seized from Deepu Kaushal (A4), who was found in possession of the contraband article, belonged to the father of the applicant, the extensive CDRs between the applicant and all other co-accused, incriminating chats and call records between the applicant and M/s. Crystal Agency as well as the bank transactions of the applicant with the co-accused, to draw home the point that the applicant was the principal confederate in the conspiracy to commit the offences punishable under NDPS Act, 1985. It was submitted that since the investigation is still underway the applicant cannot be released on bail as there is an imminent possibility of tampering with evidence.

3 Criminal BA/3041/2021, dtd.15/11/2021.

11. Evidently, commercial quantity of psychotropic substances was recovered from the possession of Sana (A1), Zahir (A2), Ram Singh (A3) and Deepu (A4). The interdict contained in Section 37 of the NDPS Act, 1985 comes into play as the co-accused were found in possession of the commercial quantity and the applicant and the co-accused have been arraigned for the offences involving commercial quantity. The fact that the applicant was not found in possession of the contraband substance by itself is, therefore, not of decisive significance.

12. It is trite, in view of the decision of the Supreme Court in the case of ***State of Tamil Nadu vs. Tofan Singh***⁴, the statements of the accused recorded under Section 67 of the NDPS Act, 1985 cannot be pressed into service as confessions as those statements are inadmissible in evidence. It is also trite that a statement of an accused is not a legal evidence against another co-accused. Therefore, the proper course would be to appraise the material on record to find out whether there is independent material, apart from the statements recorded under Section 67 of the NDPS Act, 1985, in support of the complicity of the applicant.

13. Two incriminating circumstances pressed into service on behalf of the prosecution deserve consideration. First, the financial transactions between the applicant, on the one part, and the co-accused, on the other part. The statement of

⁴ (2021) 4 SCC 1.

account of the applicant maintained with Model Cooperative Bank Ltd. (page Nos.909 to 922) indicates that the applicant had multiple transactions with Sana (A1) during the period 10th November, 2022 to 21st December, 2022 aggregating to Rs.2,25,000/-. Likewise, the applicant had multiple transactions with Zahir (A2) during the period 11th November, 2022 to 5th December, 2022 aggregating to Rs.89,000/-. During the period 3rd October, 2022 to 8th December, 2022, the transactions with Deepu Kaushal (A4), who was also found in possession of psychotropic substances, were 14 in number aggregating to Rs.42,000/-. In addition, the applicant had financial transactions with M/s. Crystal Agency during the period 9th November, 2022 to 23rd November, 2022, aggregating to Rs.72,000/-. These entries in the statement of account of the applicant indicate that the applicant had financial transactions with Sana (A1), Zahir (A2) and Deepu (A4), who were allegedly found in possession of the psychotropic substances as well as M/s. Crystal Agency from whom the applicant allegedly procured contraband articles.

14. Ms. Chandka made an endeavour to wriggle out of the situation by asserting that Deepu (A4) had paid the money aggregating to Rs.42,000/- to the applicant for use of the Scooty by way of rental. An endeavour was also made to explain away the payment to M/s. Crystal Agency by asserting that the applicant had paid the amount for purchasing medicines. I am afraid to accede to these

submissions. The submission that Deepu (A4) paid a sum of Rs.42,000/- for use of Scooty for less than two months does not appeal to human credulity. At this stage, an inference becomes *prima facie* sustainable that the applicant had received money from the alleged confederates, who were selling the contraband and had paid money to M/s. Crystal Agency from whom the psychotropic substances were allegedly procured.

15. The second circumstance of the applicant having been in regular touch with the co-accused is also borne out by the material on record. The CDR analysis indicates that the applicant was in regular touch with co-accused Sana (A1), Zahir (A2), Ram Singh (A3), Deepu (A4) and Pandey (A5) and the concerned person of M/s. Crystal Agency, from whom the contraband substances were allegedly procured. The copies of the WhatsApp chats between the applicant and Sana (A1) and Zahir (A2) are annexed to the charge-sheet at page No.1408 to 1656. Likewise the transcript of the chat between the applicant and Deepu (A4) are annexed at page 1657 to 1658. There were numerous calls between the applicant and Deepu (A4) as is evidenced by the CDR (page 1689 to 1707).

16. In the totality, these two circumstances, *prima facie* incriminate the applicant as the person, who was privy to the illicit drug trafficking. It is not a case of one or two financial transactions and/or calls between the applicant and co-accused. *Prima facie* there is an element of system, continuity and repetition in the financial transactions as well as

contacts between the applicant, on the one part, and the co-accused, on the other part. I, therefore, find substance in the submission of Mr. Shirsat that there is a very strong *prima facie* case to show that the applicant was the principal character in illicit drug trafficking. Since the interdict contained in Section 37 of the NDPS Act comes into play and there is no substantial probable cause to believe that the applicant may not be guilty of the offences punishable under NDPS Act, 1985, I am inclined to hold that the applicant does not deserve to be enlarged on bail.

17. As regards the claim for bail on medical ground, the medical report submitted by the Medical Officer, Mumbai District Women Prison, indicates that the applicant is having hemodialysis thrice a week. The applicant has been suffering from chronic kidney diseases and has been on dialysis since six years. As of the date of the report, the applicant was having hemodialysis thrice a week and medication for hypertension and her health was satisfactory.

18. Ordinarily the Courts lean in favour of exercising discretion to grant bail where an accused is shown to be suffering from critical illness. The medical report indicates that the applicant is required to have dialysis thrice a week. The applicant can be said to be a person, who is sick. However, the gravity of the offences cannot be lost sight of. What exacerbates the situation is the fact that the applicant has been suffering from kidney disease since long and has been on hemodialysis for six years and yet allegedly indulged

in illicit drug trafficking on a large scale. Therefore, I find substance in the submission of Mr. Shirsat that despite the applicant having been suffering from chronic kidney disease the applicant continued to indulge in illicit drug trafficking as is evident from the material on record and, therefore, the applicant does not deserve bail on medical ground.

19. I am, therefore, impelled to hold that the applicant is not entitled to bail on the merits of the case. So far as the bail on medical ground, the material on record, does not indicate that the condition of the applicant is such that she deserves to be released on bail on account present health emergency. As and when, a situation warranting the release of the applicant on medical ground arises, the applicant would be at liberty to revive the prayer for bail on medical ground.

20. Hence the following order:

: O R D E R :

- (i)** Application stands rejected.
- (ii)** The applicant is at liberty to apply for bail on medical ground in the event the situation so warrants.
- (iii)** 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.

[N. J. JAMADAR, J.]