

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.3831 OF 2023

Wasim Akram Mohammad Mustafa Shaikh ...Applicant
vs.
The State of Maharashtra ...Respondent

Ms. Lochan Chandka a/w. Mr. Rounak Naik, for the Applicant.
Ms. Ranjana Humane, APP, for the Respondent/State.

CORAM : N. J. JAMADAR, J.
DATE : FEBRUARY 22, 2024

P.C.:

1. Heard the learned counsel for the applicant and the learned APP for the State.

2. The applicant who is arraigned in C.R. No.1272 of 2021 registered with Mumbra police station for the offences punishable under sections 22 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act) seeks to be enlarged on bail.

3. Pursuant to a specific information received on 30th December, 2021 at about 1.00 am by Senior Police Inspector, Mumbra police station that a person named Wasim was roaming near Mumbra Bypass road along with weapon, Mumbra police conducted a raid. The applicant was found near Mumbra Bypass road. He was

accosted. In the search of the applicant, no weapon or other contraband article was found. However, in the mobile phone handset carried by the applicant, photographs of a firearm and white substance were found.

4. During the course of interrogation, the applicant allegedly voluntarily made a disclosure statement to show the place where he had concealed 55 gms. Mephedrone (MD), which he had purchased from Altu, resident of Gautam Nagar, Deonar. After being apprised of the right of the applicant to be searched in the presence of a gazetted officer/ Magistrate, the applicant allegedly led the police party along with panch witnesses to a tunnel on Mumbra bypass road and took out a pouch containing a white substance from a cavity by removing a stone placed over it. The said substance appeared to be MD. It weighed 53 gms. The applicant came to be apprehended.

5. Ms. Lochan Chandka, the learned counsel for the applicant, submitted that the alleged recovery of the contraband article cannot be fastened to the applicant. Firstly, there was non-compliance of the mandate contained in section 50 of the NDPS Act as the appraisal was not in conformity with the provisions of section

50 of the NDPS Act. The police officer had disclosed his identity as a gazetted officer and thereafter the applicant was informed about his right to be searched. That vitiated the search. It was further submitted that the alleged recovery of the contraband articles was from a place open and accessible to all. Thus, the said recovery loses credence. It was further submitted the investigation agency had already forwarded the sample to the FSL on 31st December, 2021. Therefore, the provisions contained in section 52-A of the NDPS Act cannot be said to have been scrupulously complied with.

6. Ms. Chandka would urge that the prosecution has made an undisguised attempt to suppress the factum of illegal detention of the applicant. From the perusal of the FIR and the panchanama under which the contraband was allegedly recovered, it appears that the applicant was arrested in the wee hours of 30th December, 2021. However, the applicant was produced before the learned Magistrate on 31st December, 2021. In the remand report, it was shown that the applicant was arrested on 31st December, 2021 at 6.50 am.

7. Ms. Humane, learned APP countered the submissions made on behalf of the applicant. It was urged that since a commercial

quantity of the contraband article was found in possession of the applicant, the bar contained in section 37 of the NDPS Act comes into play. The applicant does not deserve to be released on bail. The learned APP submitted that none of the grounds sought to be urged on behalf of the applicant can justify an inference that the applicant may not be guilty of the offences punishable under the NDPS Act.

8. At the outset, the genesis of the alleged search and seizure deserves to be considered. According to the prosecution, the specific information was about the applicant roaming around armed with weapon. Admittedly, in the personal search of the applicant, neither any weapon nor any contraband article was found. The prosecution alleges that the mobile phone handset of the applicant contained photograph of the firearm and white substance and thereupon during the course of the interrogation, the applicant made the discovery leading to recovery of the contraband article.

9. In the aforesaid circumstances, since the contraband article was allegedly recovered pursuant to a discovery made by the applicant, during the course of interrogation, alleged non-compliance of the mandate contained in section 50 of the NDPS Act may not be of much assistance to the applicant. However, the

probabilities of the prosecution case, are required to be appraised albeit prima facie.

10. The FIR and the panchanama, unmistakably indicate that the applicant was accosted after 1.00 am of 30th December, 2021. The remand report dated 31st December, 2021 indicates that the applicant was arrested on 31st December, 2021 at about 6.55 pm. However, against column 7 which purportedly indicate the date and time of occurrence, it is mentioned that the incident occurred on 30th December, 2021 in between 01.00 to 22.15 hours. The first informant alleges in the FIR that at about 6 pm on 30th December, 2021, the applicant had made a disclosure statement.

11. Evidently, the applicant was produced before the Magistrate on 31st December, 2021. Prima facie, it appears that the applicant was shown to have been arrested at about 6.55 am on 31st December, 2021 much later the alleged recovery of the contraband article pursuant to the disclosure made by the applicant purportedly during the period 01.00 to 22.15 hours on 30th December, 2021. In this proceeding, though the Court may not delve into the aspect of alleged illegal detention, yet the aforesaid time lag bears upon the credibility of the prosecution version.

12. Prima facie, the recovery was made from a place open and accessible to all. It could be urged that the factum of concealment was exclusively within the knowledge of the applicant. The question as to whether the applicant could be fastened with the liability on the basis of the alleged discovery, can be legitimately adjudicated at the trial.

13. However, the concomitant circumstances namely, nothing was found in the personal search of the applicant, when he was allegedly apprehended pursuant to a specific information that he was carrying arms, the applicant appeared to be with the police from 1.00 am to 18.00 pm on 30th December, 2021 when the disclosure was allegedly made and the recovery of the contraband articles from a tunnel, cumulatively, create a reasonable doubt about the genuineness of the prosecution version.

14. I am, therefore, inclined to hold that the first condition envisaged by section 37(1)(b) of the NDPS Act stands satisfied. The applicant has no antecedents. An inference that the applicant may not indulge in an identical offence after release on bail may, therefore, be justifiable.

15. In any event, the applicant is in custody since 31st December, 2021. It is unlikely that the trial can be concluded within a reasonable period. Hence, I am inclined to exercise the discretion in favour of the applicant.

Hence, the following order.

ORDER

- 1] The application stands allowed.
- 2] The applicant be released on bail in C.R. No.1272 of 2021 registered with Mumbra police station, on furnishing a P.R. Bond of Rs. 1,00,000/- with one or more sureties in the like amount.
- 3] The applicant shall mark his presence at Mumbra police station on the first Monday of every month in between 11 am to 1 pm for a period of 3 years or till conclusion of the trial whichever is earlier.
- 4] The applicant shall not tamper with the prosecution evidence and give threat or inducement to first informant, any of the prosecution witnesses or any person acquainted with the facts of the case.
- 5] 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.

6] The applicant shall regularly attend the proceedings before the jurisdictional Court.

7] 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.)