

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 4120 OF 2023

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Alfiya Faisal Shaikh

...Applicant

Versus

1. Union of India through Intelligence
Officer, Narcotics Control Bureau, Mumbai
Zonal Unit.

2. The State of Maharashtra

...Respondents

Mr. Himanshu Kude, i/b Sherali Khan, for the Applicant.
Mr. Shreeram Shirsat, Special P.P., a/w Tanvi Mate, Tanveer
Khan, Shekhar Mane, Nishad Mokashi, Karishma
Rajesh, for Respondent No.1/UOI.
Mr. S. R. Aagarkar, APP for the State/Respondent No.2.

CORAM: N. J. JAMADAR, J.

DATED: 15th JANUARY, 2024

ORDER:-

1. By virtue of this application the applicant, who is arraigned in NDPS Special Case No.102181 of 2023 arising out of CR No.11/2023, registered with Narcotics Control Bureau, Mumbai – respondent No.1, for the offences punishable under Sections 22(c), 27A, 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (“the NDPS Act”) has preferred this application to release her on bail on medical ground as she is carrying an advanced pregnancy.

2. The indictment against the applicant is that on the basis of a specific information, NCB effected the seizure of 5 kg. of “white colour substance” purported to be Mephedrone (MD) under a panchnama dated 9th June 2023 from Room No.802 Al-Amir Apartment, A-Wing, Dongri, Mumbai, from one Shamiya Khan. It transpired that said substance was supplied by the applicant and her husband Faisal Shaikh, co-accused.

3. As a follow up action, a search operation at the house of the applicant was conducted on 9th June, 2023 in the presence of public witnesses. The applicant was found in her house Room No.103, Ansari Heights. Upon being enquired, the applicant allegedly voluntarily disclosed that anticipating action by NCB she had concealed a packet containing 15 kg. MD on the second floor of the said building behind the door, near the lift. The raiding party accompanied by the public witnesses went to the said spot and found a bag consisting of 15 packets of “white colour substance” concealed behind the door, near the lift. The applicant allegedly identified and confirmed that the said bag was concealed by her. The contraband article was seized and samples were collected from each of the packets.

4. During the house search, cash amount of Rs.1,10,24,000/- and gold ornaments were also found. The applicant disclosed that the cash amount and the ornaments were the proceeds of the drug trafficking indulged in by the applicant and her husband. Eventually, the applicant, her husband and other co-accused were arrested.

5. At the time of arrest, the applicant was carrying two months pregnancy. Now the applicant is carrying an advanced pregnancy. The applicant preferred an application before the Special Judge for bail on medical ground. The learned Special Judge declined to exercise the discretion. Hence, this application.

6. Respondent No.1. NCB resisted the prayer for bail primarily relying upon the huge cache of the contraband allegedly found in possession of the applicant and the enormous ill-gotten wealth, which the applicant and her husband generated, by indulging in drug trafficking in the form of cash amount, ornaments and immovable properties. The interdict, contained in Section 37 of the NDPS Act, operates with full rigor and, therefore, the applicant does not deserve to be released on bail. The applicant was stated to be a habitual drug trafficker and in contact with international

drug cartel and the release of the applicant on bail may cause serious repercussions on the prosecution case and there is also likelihood of the applicant making herself scarce and tampering with the witnesses.

7. I have heard Mr. Himanshu Kude, the learned Counsel for the applicant, Mr. Shirsat, the learned Counsel for respondent No.1/NCB and Mr. Aagarkar, the learned APP for the State.

8. The learned Counsel for the applicant submitted that the medical reports submitted by the Superintendent, Central Prison, Byculla, indicate that the applicant is carrying advanced pregnancy. The applicant has had three earlier births by Cesarean section. The applicant is exhibiting symptoms which are indicative of probable complication at the time of the delivery of the child. Therefore, on humanitarian ground the applicant deserves to be released on temporary bail. The learned Counsel for the applicant further submitted that the prison, where the applicant is incarcerated, is not equipped to provide the emergent medical care which the applicant imminently requires.

9. To lend support to the aforesaid submissions, The learned Counsel for the applicant placed reliance on the judgment and order passed by this Court in Criminal Public Interest Litigation (St) No.46 of 2015 (*Jan Adalat and anr. vs. The State of Maharashtra and anr.*) dated 1st March, 2017, noting the conditions of the prisons, an order of the Supreme Court in the case in *Special Leave to Appeal (Cri.) No(s).2366 of 2021, (Drabhamon Phawa vs. State of NCT Delhi)* dated 17th December, 2021, an order of this Court in *BA/2706/2023, (Ruksana @ Saniya Hamid Hussain vs. The State of Maharashtra)* dated 14th September, 2023, an order of the Delhi High Court in *BA/1318/2020, (Safoora Zargar vs. State)* dated 23rd June, 2020, an order of the Karnataka High Court in *Criminal Petition No.200107/2021, (Smt. Rekha @ Siddamma w/o Sanna Pakeerappa and anr. vs. The State of Karnataka)* dated 29th January, 2021, an order of High Court of Himachal Pradesh, Simla, in *Cr.MP(MP) No.243 of 2021, (Monika vs. State of H.P.)* dated 24th July, 2021 and an order of the Punjab and Haryana High Court at Chandigarh in CRM-M-60-285-2023 (O&M) (*Amajnot Kaur vs. State of Punjab*) dated 8th December, 2023.

10. Mr. Shirsat, the learned Counsel for respondent No.1/NCB, however, stoutly resisted the prayer for interim bail. It was submitted that respondent No.1 NCB does not contest, for a moment, the necessity of medical treatment and intervention for the delivery by the applicant. However, the applicant does not deserve to be released on bail for the said purpose as the applicant can be provided the requisite medical treatment and care at a Government Hospital. Therefore, the application does not deserve to be entertained especially having regard to the fact that the applicant and her entire family has been habitually indulging in drug trafficking. The release of the applicant on bail is fraught with the risk of tampering with evidence, threatening witnesses and even absconding. There is imminent risk that the applicant, taking undue advantage of the interim bail, would indulge in drug trafficking.

11. Mr. Shirsat would urge that the fact that the applicant is a women does not by itself dilute the rigor of the provisions contained in Section 37 of the NDPS Act. Reliance was sought to be placed on the judgment of the Supreme Court in the case of *Saumya Chaurasia vs. Director of Enforcement (Criminal Appeal No.3841/2023)* wherein the Supreme Court

in the context of the bar contained in proviso to Section 45 of the Prevention of Money Laundering Act, 2002 ("the PMLA") enunciated that the benefit of the said proviso to the category of the persons mentioned therein may be extended at the discretion of the Court considering the facts of each case, and could not construed as it is mandatory or obligatory on the part of the Court to release persons of the said category on bail. Mr. Shirsat also placed reliance on the judgment of the Supreme Court in the case of *Union of India vs. Ajaykumar Singh @ Pappu in SLP (Cri) No.2351/2023*, wherein the Supreme Court emphasised the satisfaction of the twin requirements envisaged by Section 37 of the Act before releasing an accused on bail.

12. Mr. Shirsat invited the attention of the court on an order passed by this Court in the case *Shahenas Afsar Shaikh vs. The State of Maharashtra in ABA/627/2022*, wherein this Court declined to exercise the discretion though the applicant therein was carrying pregnancy.

13. I have carefully considered the submissions canvassed across the bar. The position that the applicant was allegedly found in possession of commercial quantity of MD and, therefore, the interdict contained in Section 37 of the NDPS

Act comes into play and the Court is required to satisfy itself about the twin conditions envisaged by Section 37 of the NDPS Act cannot be contested. The question that emerges for consideration is, whether the applicant, who is admittedly carrying advanced pregnancy, deserves to be released on temporary bail?

14. The following facts borne out by the material on record deserve to be noted. One, the applicant was carrying pregnancy on the date of arrest. Two, the applicant is now carrying an advanced pregnancy. Three, the previous three births were by Cesarean section. Four, the medical report indicate that the applicant is exhibiting symptoms associated with a complicated pregnancy.

15. It is true that applicant can be made to have the treatment at a Government Hospital for the said purpose. However, the impact of such course not only on the applicant but also the child cannot be lost sight of. A prisoner is entitled to the dignity which the situation demands. Giving birth to a child in the prison may have consequences not only to the mother but the child as well. Ordinarily, a situation of this nature where a lady is carrying advanced pregnancy, deserves most humane consideration.

16. A useful reference, in this context can be made to the judgment of the Supreme Court in the case R. D. Upadhyay vs. State of Andra Pradesh and others (2007) 15 SCC 337, wherein the Supreme Court was concerned with the plight of children who were in jail with their mothers. The Supreme Court gave, *inter alia*, the following directions as regards, Childbirth in prison:

“45.

3. Childbirth in prison:

(a) As far as possible and provided she has a suitable option, arrangements for temporary release/parole (or suspended sentence in case of minor and casual offender) should be made to enable an expectant prisoner to have her delivery outside the prison. Only exceptional cases constituting high security risk or cases of equivalent grave descriptions can be denied this facility.

(b) Births in prison, when they occur, shall be registered in the local birth registration office. But the fact that the child has been born in the prison shall not be recorded in the certificate of birth that is issued. Only the address of the locality shall be mentioned.

(c) As far as circumstances permit, all facilities for the naming rites of children born in prison shall be extended.”

17. The Supreme Court has thus directed in clear and explicit terms that as far as possible arrangement for temporary release/parole should be made to enable an expectant prisoner to have her delivery outside the prison. Only in exceptional cases constituting high security risk or

cases of equivalent grave descriptions, the said facility can be denied to the expectant prisoner.

18. Whether the case at hand falls in such exceptional category?

19. Mr. Shirsat made a strenuous effort to draw home the point that the applicant and her entire family have been indulging in drug trafficking. Emphasis was laid on the fact that the 50 gm. of MD constitutes commercial quantity and huge quantity of MD i.e. 15 kg. was found in the possession of the applicant. In addition, there is material to indicate that 5 kg. MD seized from the possession of Shamiya Khan was also supplied by the applicant. Moreover, enormous ill-gotten wealth has been unearthed, for which the applicant could not offer any explanation. Taking the Court through the statements of the applicant and co-accused recorded under Section 67 of the NDPC Act Mr. Shirsat would urge that the applicant is the kingpin of the drug cartel.

20. I have carefully perused the material on record. I am not inclined to delve into the merits of the matter as the prayer for bail is being considered to facilitate the delivery outside the prison only. Yet, few factors need to be noted to satisfy the conscious of the Court that the release of the

applicant does not pose a high security risk and it does not have the propensity to cause grave prejudice to the investigation and the object of arresting the menace of drug trafficking.

21. First, as is evident from the prosecution case, the contraband was not found in the house of the applicant. The prosecution alleges the applicant voluntarily disclosed that she had concealed it on the second floor of the building. Second, though the prosecution alleges that the applicant has been habitually dealing in drug trafficking, there is no criminal antecedent qua the applicant. Third, the applicant's husband has allegedly been indulging in the trafficking in contraband articles and a number of cases haven been registered against him. The said fact alongwith forfeiture of the cash amount, ornaments and immovable property, which allegedly constitutes the proceeds of the drug trafficking, brings in its trail multiple possibilities ranging from the applicant being a person had knowledge that her husband indulged in those activities to the applicant herself being a privy thereto. These are the matters for evidence and trial. These factors, in my considered view, do not present the applicant as a person, who falls in the exceptional category

where the Court would be justified in declining to grant the facility of delivery outside the prison.

22. For the foregoing reasons, I am inclined to allow the application and release the applicant on temporary bail for the period of two months. To ensure that the liberty is not abused, I propose to impose stringent conditions.

23. Hence, the following order:

ORDER

- (i)** Application stands allowed.
- (ii)** The applicant Alfiya Faisal Shaikh be released on temporary bail for the period of two months from the date of her release from prison, in NDPS Special Case No.102181 of 2023 arising out of CR No.11/2023, registered with Narcotics Control Bureau, Mumbai, on furnishing a P.R. Bond of Rs.50,000/- with one or more sureties in the like amount to the satisfaction of the Special Judge.
- (iii)** Considering the fact that the applicant is carrying an advanced pregnancy, the applicant is permitted to furnish cash security of Rs.50,000/- in lieu of surety for the period of three weeks.
- (iv)** The applicant shall not contact any of the co-accused,

any witness or any person acquainted with the facts of the case.

- (v) 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.
- (vi) The applicant shall not indulge in any activity which she is being prosecuted which may infract the law.
- (vi) The applicant shall establish telephonic contact with the Investigating Officer, at least once in a fortnight.
- (vii) The applicant shall not leave the jurisdiction of the Special Court without the prior permission of the Special Court.
- (viii) All concerned to act on an authenticated copy of this order.

Application disposed.

[N. J. JAMADAR, J.]