

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

BAIL APPLICATION NO. 4147 OF 2023

SANTOSH
SUBHASH
KULKARNI

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Mohd. Jahid Moharamali Shaikh ...Applicant

Versus

The State of Maharashtra ...Respondent

Mr. Kamlesh Satre, a/w Aryan Kotwal, for the Applicant.

Mr. Tanveer Khan, APP for the State/Respondent.

PSI Mahesh Shelar, Unit 7, DCB CID, present.

CORAM: N. J. JAMADAR, J.

DATED: 7th MARCH, 2024

ORDER:-

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

2. The applicant, who is arraigned in CR No.9 of 2023 registered with DCB, CID Unit No.7, Ghatkopar, Mumbai, (original CR No.6/2023 registered with Bhoiwada Police Station) for the offences punishable under Section 20B(ii)(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, ("the NDPS Act") has preferred this application to enlarge him on bail.

3. Pursuant to a secret intimation that four persons with described features and articles would come in front of Abstract Authentic Shop, Dadasaheb Phalke road, Dadar, on 1st February,

2023 in between 3.30 am. to 4.30 am., the police party conducted a surveillance at the spot. At about 3.50 am., four persons matching the description and carrying the bags, came thereat. They were accosted. After following the mandate of the provisions contained in Section 50 of the Act, personal search of those persons was conducted.

4. In the traveller bag which the applicant was carrying 12 packets wrapped in black pouches were found. Each of 12 packets was opened. Each packet contained *ganja*. The substance was mixed and collectively weighed. It weighed 23 kg and 600 gm. Samples were collected.

5. Likewise, co-accused Vyankatesh Permal was found in possession of 8 kg 655 gm *Ganja*, Sandeep was found in possession of 33 kg and 608 gm *ganja* and Surya Roy was found in possession of 20 kg and 520 gm of the contraband article.

6. At the outset, Mr. Satre, the learned Counsel for the applicant, submitted that co-accused Vyankatesh Permal has been released on bail by this Court by an order dated 23rd January, 2024, noting the defect in the sampling and delay in dispatch of the samples to the Forensic Science Laboratory. The said grounds apply with equal force to the applicant as

well. Moreover, co-accused Surya Roy and Sandeep Nishad have also been released on bail by the learned Judge, Special Court, by order dated 9th February, 2024. Therefore, the applicant deserves same dispensation.

7. While releasing Vyankatesh Permal on bail this Court had elaborately considered the defect in drawing of the samples manifested in mixing of the contents of all the containers/packages and, thereafter, collecting the sample, and the aspect of delay in dispatch of the samples to FSL for analysis. It was, *inter alia*, observed:

35. Evidently, the underlying object of the Instructions is to ensure that the sample which is collected represents the bulk, unmistakably. Invariably, in pursuance of the provisions of the Act, and the Drug Disposal Rules, the bulk is disposed. When a person is sought to be fastened with liability for possessing a particular quantity of contraband, in bulk, on the basis of the sample collected, the Court ought to have the assurance that the sample so collected represented the entire bulk. The insistence on collecting samples from each of the packets and containers stems from this objective.

36. In a situation of present nature, where the seizure panchanama does not indicate that the packets were identical and the contents were also identical and the officer effecting search had satisfied himself that the packets were identical in all respects, the mixing of the contents and thereafter collecting the samples from the said mixture, without anything more, erodes the sanctity of the samples so collected as representative samples of the bulk.

37. I am, therefore, impelled to hold that in the facts of the case, there has not been substantial compliance of the Standing Instructions 1/88 and Standing Order 1/89. Resultantly, the question as to whether the liability can be fastened on the applicant for the possession of the contraband, *prima facie*, enters in the realm of uncertainty.

38. On the second ground Mr. Satre would urge that there is inordinate delay in dispatching the samples to the

laboratory. Inviting attention of the Court to Clause 1.13 of the Standing Instruction No. 1/88 Mr. Satre urged that in the instant case there is a breach of mandate contained therein. Clause 1.13 reads as under:

"13. Mode and Time for dispatch of sample to laboratory:

The samples should be sent either by insured post or through special messenger duly authorized for the purpose. Dispatch of samples by registered post or ordinary mail should not be resorted to. Sample must be dispatched to the Laboratory within 72 hours of seizure to avoid any legal obligation."

39. In the case at hand, the contraband articles were seized on 31st January, 2023. Inventory was conducted before the learned Metropolitan Magistrate on 10th February, 2023 in accordance with the provisions contained in Section 52A of the Act, 1985. The samples were delivered at Forensic Science Laboratory, Kalina, Mumbai on 15th February, 2023. The chemical analysis report indicates that the samples were received on 15th February, 2023 and each of the samples was found to be 'Ganja'. If the aforesaid factor of delay in dispatch of the samples to the Forensic Science Laboratory is considered in conjunction with the non-compliance of the guidelines in the matter of collection of samples, which may vitiate the seizure, the first condition of Section 37 of the Act, 1985 can be said to have been met. The Court is not informed that there are antecedents which render it likely that the applicant would commit identical offences, if released on bail."

8. It appears, based on the aforesaid order, the learned Special Judge released the co-accused Surya Roy and Sandeep Nishad on bail by an order dated 9th February, 2024. Thus, all the three co-accused have been released on bail. As the prosecution of the applicant and co-accused arises out of the same sets of fact, the claim for parity is perfectly legitimate.

9. Mr. Khan, the learned APP for the State, made an endeavour to urge that the defect in sampling is a matter for trial. Reliance was sought to be placed on an order passed by this Court in *Salim Nasim Khan vs. Intelligence Officer Narcotic Control Bureau and anr., BA/278/2022, dated 13th September, 2022*, wherein it was *inter alia* observed that the non-adherence to the procedure prescribed for collection of sample, would be a matter for trial.

10. I am not inclined to accede to the submissions of the learned APP. As noted above, this Court after analysis of the legal position and its application to the facts of the case, granted bail to the co-accused, who is similarly circumstanced. Therefore, the applicant also deserves the same dispensation.

11. Hence the following order:

: O R D E R :

- (i) Application stands allowed.
- (ii) The applicant be released on bail in CR No.9 of 2023 registered with DCB, CID Unit No.7, Ghatkopar, Mumbai, (original CR No.6/2023 registered with Bhoiwada Police Station), on furnishing a PR Bond in the sum of Rs.50,000/- with one or two sureties in the

like amount to the satisfaction of the trial court.

- (iii) The applicant shall mark his presence at DCB, CID Unit No.7, Ghatkopar, Mumbai, on first Monday of every alternate month between 11.00 am to 1.00 pm for the period of two 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 not indulge in identical activities for which he has been arraigned in this case.
- (vii) The applicant shall regularly attend the proceedings before the jurisdictional Court.
- (viii) 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 stands disposed.

[N. J. JAMADAR, J.]