

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.215 OF 2022

Amjad Aslam Shaikh ...Applicant
vs.
Union of India and Another ...Respondents

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WITH
BAIL APPLICATION NO.390 OF 2024

Iqra Abdul Gaffar Qureshi ...Applicant
vs.
The State of Maharashtra ...Respondent

Mr. Ayaz Khan, for the Applicant in BA No. 215 of 2022
Mr. Rishabh Botadra, for the Applicant in BA No. 390 of 2024
Mr. Shreeram Shirsat, Special PP a/w. Mr. Nishad Mokashi and Mr.
Krishnan Rajesh, for Union of India.
Mr. S.R. Agarkar, APP for the State.

CORAM : N. J. JAMADAR, J.
RESERVED ON : MAY 10, 2024
PRONOUNCED ON : JUNE 3, 2024

ORDER

1. The applicants who are arraigned in NCB/MZU/CR-18/2021 registered with Narcotics Control Bureau, Mumbai for the offences punishable under sections 20(b), 22(c), 27, 27A, 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act, 1985) seek to be enlarged on bail.

2. On 27th February, 2021 an information was received that Amjad Shaikh (A/1), the applicant in Bail Application No. 215 of

2022, and Aijaz Supariwala (A/2) had in their possession narcotic drug/ psychotropic substance at Room No. 37, Arab Galli, Amtullah Apartment, C wing, Mumbai-8 and Room No. 27-B, Pathawadi, Piru Lane, Imam Wada, Mumbai-9 and were selling the same to their purchasers, in small quantity. After complying with the procedural requirements and obtaining authorization under section 41(2) of the NDPS Act, 1985, a team of NCB conducted raid at Room No. 37. The applicant Amjad Shaikh (A/1) was present in the said room. In the search of the said room, a black bag was found in an Alimirah. Upon opening, three small polythene pouches containing powder were found kept therein. The applicant Amjad Shaikh (A/1) claimed the said bag and stated that the substance contained in three polythene pouches was Mephedrone (MD). The substance was mixed and kept in one polythene bag. The net weight of contraband substance was 53.4 gms. Three more packets containing black substance were found in the said bag. The applicant Amjad Shaikh (A/1) disclosed that the said substance was Charas. It was tested with drug detection kit. The test turned out positive for Charas. It weighed 7 gms.

3. During the course of investigation, it transpired that the applicant Amjad Shaikh (accused No. 1) had procured the

contraband substance, from Aijaz Supariwala (A/2) and Iqra Qureshi (A/3), the applicant in Bail Application No. 390 of 2024. The complicity of the applicants and the co-accused Aijaz Supariwala (A/2) was revealed during the course of investigation and from the statements recorded under section 67 of the NDPS Act, 1985. The learned Special Judge declined to exercise the discretion in favour of the applicants. Hence, this application.

4. I have heard Mr. Ayaz Khan, the learned counsel for the applicant in BA No. 215 of 2022, Mr. Rishabh Botadra, the learned counsel for the applicant in BA No. 390 of 2024 and Mr. Shreeram Shirsat, learned special PP, for the Union of India-NCB.

5. Mr. Khan, the learned counsel for the applicant Amjad Shaikh submitted that the applicant cannot be said to have been found in actual and conscious possession of the contraband substance. Evidently, one Sarfaraz Shaikh was the occupant of the said room. He had opened the door. Sarfaraz Shaikh has not been arraigned as an accused. Thus, the applicant cannot be fastened with exclusive possession of the contraband substance. Secondly, the search and seizure stood vitiated as on the own showing of the prosecution the substance found in three pouches was mixed together and

thereafter samples were collected. There is no material to indicate that the investigating officer had found that the contraband substance in each of the pouches was identical. Therefore, the sample which came to be drawn out of the said mixture cannot be said to be a representative sample. Thirdly, there was an inordinate delay in conducting the proceedings under section 52A of the NDPS Act, 1985. Lastly, it was submitted that the applicant has been in custody since 27th February, 2021. More than three years period has elapsed and it is extremely unlikely that the trial can be concluded within a reasonable period. Thus, on the count of long incarceration as well the applicant deserves to be enlarged on bail.

6. Mr. Rishabh Botadra, the learned counsel for the applicant Iqra Qureshi (A/3), submitted that no contraband was recovered from the possession of Iqra. In fact the applicant Iqra Qureshi (A/3) was in custody of NCB in C.R. No. 32 of 2021 when she came to be arraigned in this case. There is not a shred of material apart from the alleged voluntary statement of the applicant and the co-accused recorded under section 67 of the NDPS Act, 1985 to show that Iqra Qureshi (A/3) was the confederate in the alleged conspiracy. Aijaz Supariwala (A/2), the alleged supplier of Amjad Shaikh (A/1) was released on bail by the Special Court. Therefore, the applicant also

deserves to be enlarged on bail.

7. Mr. Shreeram Shirsat, learned special PP for the Union of India-NCB, submitted that the applicant Amjad Shaikh (A/1) was found in conscious possession of the contraband substance. Emphasis was laid on the fact that the raid was conducted pursuant to specific information that the applicant Amjad Shaikh (A/1) and Aijaz Supariwala (A/2) were storing the contraband substance in the said premises and the applicant Amjad Shaikh (A/1) was, in fact, found in the very same premises. Therefore, the fact that other occupants of the said room were not made an accused, does not enure to the benefit of the applicant Amjad Shaikh (A/1).

8. The ground of mixture of the substance was also stated to be of no avail to the applicant Amjad Shaikh (A/1) in this case. Mr. Shirsat would urge that there is no drug detection test for MD. An inference that that substance is MD has to be drawn on the basis of appearance, colour and touch. In any event, according to Mr. Shirsat, since the C.A. report indicates that the substance seized from the applicant Amjad Shaikh (A/1) was MD, no prejudice as such can be said to have been caused to the accused by mixing of the substance in the three pouches. Mr. Shirsat laid stress on the

fact that the samples were not collected at the spot but before the learned Magistrate.

9. Regarding the alleged delay in conducting the proceeding before the learned Magistrate under section 52A of the NDPS Act, 1985, Mr. Shirsat submitted that the investigating officer had moved the learned Magistrate for conducting the inventory and drawing of samples on 26th April, 2021 itself. Mere delay, without anything more, according to Mr. Shirsat, does not vitiate the proceedings under section 52A of the NDPS Act, 1985 nor erodes the seizure and sampling. Reliance was placed on the decisions of the Supreme Court in the cases of **Balbir Kaur vs. State of Punjab**¹ and **Mohan Lal vs. State of Rajasthan**² wherein the submission that delay in sending the samples vitiated the prosecution was repelled.

10. Mr. Shirsat would further urge that the inventory panchanama under section 52A of the NDPS Act, 1985 indicates that the seals were intact and in that view of the matter no prejudice can be said to have been caused to the applicants.

11. As regards the complicity of the applicant Iqra Qureshi (A/3),

1 (2009) 15 SCC 795.

2 Supreme Court Cri.Appeal No. 1393 of 2010 Dt. 17/04/2015.

Mr. Shirsat made an endeavour to draw support from the joint confrontation and cross-questioning of applicant Iqra Qureshi (A/3) and Aijaz Supariwala (A/2) purportedly under section 67 of the NDPS Act, 1985 to draw home the point that applicant Iqra Qureshi (A/3) was privy to the conspiracy to procure the illicit drug. It was urged that, at any rate, the second condition of the applicant Iqra Qureshi (A/3) not indulging in identical offences, if released on bail, cannot be said to have been satisfied. It was submitted that the antecedents of the applicant Iqra Qureshi (A/3) indicate that, there is a strong propensity to indulge in identical offences, if released on bail.

12. To begin with, I deem it appropriate to consider the entitlement of the applicant Iqra Qureshi (A/3) for bail. Initially, it appears, the prosecution case was that the applicant Amjad Shaikh (A/1) had procured the contraband substance from Aijaz Supariwala (A/2). During further investigation, however, the complicity of applicant Iqra Qureshi (A/3) was revealed primarily in the voluntary statements of Amjad Shaikh (A/1) and Aijaz Supariwala (A/2). Thus, subsequently, it was alleged that the applicant Amjad Shaikh (A/1) had directly purchased the contraband substance from applicant Iqra Qureshi (A/3).

13. It appears that applicant Iqra Qureshi (A/3) was sought to be roped in primarily on the basis of the alleged voluntary statements of Amjad Shaikh (A/1) and Aijaz Supariwala (A/2). Apart from these statements, there does not appear credible material to show the complicity of the applicant Iqra Qureshi (A/3). In view of the decision of the Supreme Court in the case of **Tofan Singh vs. State of Tamil Nadu**³, the reliance on the statement of the accused recorded under section 67 of NDPS Act, 1985 cannot be countenanced. The Supreme Court has in terms held that the statement recorded under section 67 of the NDPS Act, 1985 can not be used as a confessional statement in the trial for an offence under NDPS Act, 1985.

14. Evidently, applicant Iqra Qureshi (A/3) is sought to be roped in as a confederate in the conspiracy. However, apart from the statement under section 67 of the NDPS Act, 1985, there is prima facie no credible material to establish the nexus between the applicant Iqra (A/3) and the co-accused and the contraband articles allegedly recovered from them. In a given case, even in the absence of recovery of contraband substance from the possession of a person, who is roped in by invoking the provisions contained in section 29 of the NDPS Act, 1985, such person can be legitimately

3 (2021) 4 Supreme Court Cases 1

arrayed if there in independent material to show his complicity. In the case at hand, however, there is prima facie no such material. Therefore, in my considered view, the interdict contained in section 37 of the NDPS Act, 1985 does not operate qua the applicant Iqra Qureshi (A/3).

15. This leads me to the case of the applicant Amjad Shaikh (A/1). Mr. Khan, forcefully canvassed a submission that the applicant Amjad Shaikh (A/1) cannot be said to have been found in actual conscious possession of the contraband substance. On the one hand, there is no material to show that the applicant Amjad Shaikh (A/1) was in possession of the said room, and, on the other hand, two other persons were found in the said room, wherefrom the contraband was allegedly recovered. It was urged with a degree of vehemence that necessary nexus between the applicant and the contraband substance is missing. A very strong reliance was placed on the decisions of the Supreme Court in cases of **State of Punjab vs. Malkiat Singh**⁴ and **Om Prakash @ Baba vs. State of Rajasthan**⁵.

16. In opposition to this, Mr. Shirsat would urge that the material on record would indicate that the applicant Amjad Shaikh (A/1)

4 2009 (12) SCC 303.

5 2009 (10) SCC 632.

was in conscious possession of the contraband substance as he exercised control over the contraband article. Reliance was placed on the observations in the case of **Balbir Kaur** (supra).

17. In the facts of the case, at this stage, a definitive finding on the aspect of the conscious possession of the contraband substance by the applicant Amjad Shaikh (A/1) is neither warranted nor permissible. There is material to show that the applicant Amjad Shaikh (A/1) was found in the room wherefrom the contraband substance was recovered. There are statements of public witnesses who witnessed the search and seizure that the applicant Amjad Shaikh (A/1) had claimed control over the said contraband substance.

18. It is true the seizure panchanama indicates that Sarfaraz Shaikh was present in the said room. Likewise, the owner of the said room has not been arraigned as an accused. However, the fact that specific information was received, and the applicant was found in the said room along with the contraband substance, prima facie, lends credence to the prosecution version.

19. On the aspect of the mixture of the substance allegedly found

in three plastic pouches, there does not seem much controversy on facts. The panchanama clearly records that the substance allegedly found in three pouches was mixed and kept in another polythene bag. Mr. Khan placed reliance on the orders passed by this Court, in the cases of **Chand Riyaz Shaikh s/o. Riyaz Shaikh vs. The Union of India and Anr.**⁶; **Anido Tochukwu vs. The State of Maharashtra**⁷ and **Venktesh Shiva Permal vs. The State of Maharashtra**⁸ wherein this Court was persuaded to grant bail as the contents of different packets were mixed together and thereafter samples were drawn from the said mixture.

20. Mr. Shirsat, the learned Special PP, without disputing the factual position attempted to wriggle out of the situation by submitting that the observations of this Court in the case of **Anido Tochukwu** (supra) and **Venktesh Permal** (supra) were based on the premise that the investigating officer had not tested the contents of each of the pouches independently and satisfied himself that the contents of different pouches were identical. It was urged that in case of MD, there is no test to determine its character. Therefore, the aforesaid decisions would not advance the cause of applicant **Amjad Shaikh (A/1)**. In the case of **Anido Tochukwu** (supra), this

6 BA No. 3269 of 2022 Dt.13/07/2023.

7 BA No. 4148 of 2023 Dt.18/04/2024.

8 BA No.3784 of 2023 Dt.23/01/2024.

Court has observed as under:-

9] I have given my anxious consideration to the rival submissions. On the aspect of seizure of the contraband and drawing of the samples, the seizure panchanama records that a black polythene bag was found in the left pocket of the trouser of the applicant. The said polythene bag, in turn, contained five zip pouches with light yellowish crystal powder. It further records that as the raiding party was not carrying drug detention kit, on the basis of the colour, smell and touch, the empowered officer realized that the substance so recovered was MD. Thus, the contents of all the five pouches were mixed together and kept in a new plastic zip pouch, and, thereafter, it was weighed. The substance along with the pouch weighed 55 gms.

10] Prima facie, it does not appear that the empowered officer had tested the contents of each of the five small zip pouches, independently. Nor the seizure panchanama records that the empowered officer satisfied himself that the contents of each of the five small zip pouches were identical. In this view of the matter, the prosecution will have to meet the challenge that the collection of the sample after the contents of all the five pouches were mixed together, denuded the sample of its representative character.

11] Rule 10 of the Narcotic Drugs And Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 (Rules 2022) reads as under :-

Drawing the samples :-

(1) One sample, in duplicate, shall be drawn from each package and container seized.

(2) When the packages and containers seized together are of identical size and weight bearing identical marking and the contents of each package give identical results on colour test by the drugs identification kit, conclusively indicating that the packages are identical in all respects, the packages and containers may carefully be bunched in lots of not more than ten packages or containers, and for each such lot of packages and containers, one sample, in duplicate, shall be drawn:

Provided that in the case of ganja, poppy straw and hashish (charas) it may be bunched in lots of not more than fourty packages or containers.

(3) In case of drawing sample from a particular lot, it shall be ensured that representative sample in equal quantity is taken from each package or container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

12] In the case at hand, it does not appear that the satisfaction as envisaged by Rule 10 has been recorded by the empowered officer. Since the weight of the contraband allegedly found in possession of the applicant, alongwith the plastic zip pouch, was 55 gms only, which marginally exceeds the commercial quantity of MD, this aspect of mixture of the contents of all the pouches, in the facts of the case, assumes significance.

21. In **Venktesh Permal** (supra) after an elaborate analysis of Standing Instructions No. 1/88 and Standing Order No. 1/89 and the judgments of the Supreme Court in the cases of **Union of India vs. Bal Mukund and Others**⁹ and **Sumit Tomar vs. State of Punjab**¹⁰, this Court had observed, inter alia, as under:-

33] Reverting to the facts of the case, it is imperative to note that in the seizure panchanama, it is recorded that Police Sub-Inspector Dhotre had opened all four packets which were allegedly found in possession of the applicant. Contents appeared to be ganja. Thereupon, all the contents were mixed in a white nylon bag, weighed and, thereafter, samples were collected.

34] As noted above, sub-clause (b) and (e) of the Standing Instructions 1/88 and sub-clauses 2.5 and 2.8 of the Standing Order 1/89 envisage bunching of packets / containers in lots and thereafter, drawing of representative sample from each packet / container of that lot and mixing together to make a composite whole from which the samples are drawn for that lot. However, the principal condition is that the officer effecting the seizure must find that the packets/containers seized together are of identical size and weight bearing identical marking and contents of each packet give identical results on colour test by drug identification kit, and, thus, conclusively indicate that the packages are identical in all respects.

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

9 Cri. Appeal No. 1397 of 2007 Dt. 31/03/2009

10 (2013) 1 SCC 395.

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] 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.

22. In the case of **Chand Riyaz Shaikh** (supra) this Court had observed as under:-

19] The record also prima facie reveal that the investigating agency had not drawn sample independently from each packet but had mixed together the entire contraband in one packet without field test and thereafter taken the sample and forwarded the sample to CSFL for analysis. In my prima facie view, the sample was not drawn in consonance with the standing orders, and hence prima facie the sample sent to CSFL was not the representative sample.

23. In the light of aforesaid exposition of law, even if the submission of Mr. Shirsat that there is no prescribed test to determine the character of MD is taken at par, in the peculiar facts of the case, it is imperative to note that it is not the case of the prosecution that the authorized officer had satisfied himself that

the substance found in the three pouches was MD. In the seizure panchanama, it is recorded that “believing the statement of applicant Amjad Shaikh (A/1) that the content of the three pouches was MD”, the substance was mixed and kept in another polythene bag. Prima facie, there is infraction of the standing instructions as regards the seizure and sampling.

24. In a situation of this nature, where the contraband article marginally exceeds the commercial quantity of 50 gms, the mixture of the contents, assumes more significance. In the absence of the satisfaction recorded by the officer that the substance found in each of the pouches appeared to be MD, I find substance in the submission of Mr. Khan, that the sample drawn from the said mixture cannot be said to be a representative sample of the entire bulk.

25. The aspect of delay in conducting the inventory before the learned Magistrate under section 52A of the NDPS Act, 1985 is required to be appreciated in the light of the decision of the Supreme Court in the case of Union of India V/s. Mohanlal and Another¹¹

11 (2016) 3 SCC 379.

26. Though the Supreme Court refrained from stipulating a time frame for conducting the proceedings under section 52A of the NDPS Act, 1985 by the Magistrate yet, it was emphasized in no uncertain terms that the said proceedings must be conducted expeditiously and without loss of time. In the case at hand, there is delay of about two months in making an application to the learned Magistrate for conducting the proceedings under section 52A of the NDPS Act, 1985. Eventually, the proceedings under section 52A of the NDPS Act, 1985 were conducted after about five months of the alleged seizure.

27. At this stage, the Court may not delve into the aspect of prejudice on account of delay in conducting the proceedings under section 52A of the NDPS Act, 1985 and the resultant analysis of the samples drawn before the learned Magistrate by CFSL elaborately. However, the delay cannot be said to be such as to brushed aside as wholly inconsequential. At any rate, delay of two months is clearly attributable to the investigating agency, apart from the delay post the application under section 52A(2) of the NDPS Act, 1985.

28. At this stage, the fact that the applicants have been in custody for more than three years cannot lost sight of. Moreover, the

quantity of contraband allegedly recovered from the possession of the applicant Amjad Shaikh (A/1) marginally exceeded the commercial quantity.

29. In this view of the matter, long incarceration also deserves to be taken into account. Suffice to make a useful reference to the decision of the Supreme Court in the case of **Rabi Prakash V/s. State of Odisha**¹² wherein it was observed as under:-

3] We are informed that the trial has commenced but only 1 out of the 19 witnesses has been examined. The conclusion of trial will, thus, take some more time.

4] As regard to the twin conditions contained in Section 37 of the NDPS Act, learned Counsel for the Respondent – State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act.”

(emphasis supplied)

30. For the foregoing reasons, I am inclined to exercise the discretion in favour of the applicant Amjad Shaikh (A/1) as well.

Hence, the following order.

12 2023 SCC Online SC 1109.

ORDER

- 1] The applications stand allowed.
- 2] The Amjad Aslam Shaikh (accused No. 1), the applicant in Bail Application No. 215 of 2022 and Iqra Abdul Gaffar Qureshi (accused No. 3), the applicant in Bail Application No. 390 of 2024 be released on bail in C.R. No. 18 of 2021 registered with Narcotics Control Bureau, Mumbai, on furnishing a P.R. Bond of Rs. 1,00,000/- each with one or more sureties in the like amount, each.
- 3] The applicants shall mark their presence at Narcotics Control Bureau, Mumbai on the first Monday of every month between 11 am to 1 pm for a period of three years or till the conclusion of the trial, whichever is earlier
- 4] The applicants Shall not tamper with the prosecution evidence and give threat or inducement to any of the prosecution witnesses or any person acquainted with the facts of the case.
- 5] The applicants shall furnish thier contact numbers and residential address to the investigating officer and shall keep him updated, in case there is any change.
- 6] The applicants 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.

Applications disposed.

(N. J. JAMADAR, J.)