

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

BAIL APPLICATION NO. 731 OF 2024

Shabbir Usman Shaikh ... Applicant
Versus
The Union of India & Anr. ... Respondents

Mr. Ayaz Khan a/w Dilip Mishra, Zehra Charania and Mallika Sharma i/by Ajay Bhise for the Applicant.

None for Respondent No.1.

Mr. Babu V. Holambe-Patil, APP for Respondent No.2-State.

**CORAM: MANISH PITALE, J.
DATE : 13th AUGUST 2024**

P.C. :

- . Heard learned counsel for the applicant.
2. There is no appearance on behalf of the contesting respondent No.1 i.e. the Union of India through the Narcotic Control Bureau, Mumbai.
3. On 8th August 2024, this Court passed the following order :

“1. This is the second date on which this application is listed, the learned counsel for the application is pressing for hearing and disposal of the application in the light of the fact that the applicant is 67 years old. It is submitted that the applicant himself has undergone angioplasty and that his mother, who is aged about 85 years old, is admitted in a hospital and she is in the ICU.

2. The learned counsel for the applicant submits that the applicant has a good case on merits also.

3. Even today, there is no appearance on behalf of the contesting respondent i.e. Narcotic Control Bureau, despite notice being given by the learned counsel for the applicant.

4. In view of the above, list this application for further consideration on 13th August, 2024, to be included in the "Supplementary List".

5. It is made clear that this Court will proceed to hear the learned counsel for the applicant and dispose of this application even if there is no appearance on behalf of the contesting respondent."

4. As noted herein above, despite the above quoted order, the respondent No.1 is not represented by counsel.

5. In such circumstances, the learned counsel for the applicant submitted that on the basis of the material brought on record by the contesting respondent No.1, it can be demonstrated that case for enlarging the applicant on bail is made out on merits and that the stringent twin test contemplated under Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) is satisfied by the applicant. He referred to the documents filed along with the application, including the complaint, the *panchanama*, the proceeding of certification by the Magistrate under Section 52A of the NDPS Act and such other material to raise specific grounds.

6. The learned counsel for the applicant relied upon various judgments in support of each of the grounds raised on behalf of the applicant for being enlarged on bail. It is emphasized that the applicant was shown as arrested on 16th June 2021, although his

freedom was curtailed as he was apprehended on 15th June 2021 itself, and he was before the Magistrate on 17th June 2021, thereby indicating that the applicant has remained behind bars for more than three years. As noted in the above quoted order, the applicant is a senior citizen aged about 67 years, whose mother, aged about 85 years old, is admitted in hospital in the ICU. It is submitted that there was only one antecedent against the applicant and the said case is also disposed of.

7. Since the respondent No.1, being the contesting respondent, is not represented by counsel, this Court considered the entire material on record, while considering the contentions raised on behalf of the applicant. The documents on record were accepted as it is, in order to test the grounds raised on behalf of the applicant. Having perused the said material and the judgments relied upon by the learned counsel appearing for the applicant, this Court is inclined to allow the present application for the following reasons :

- (a) In the present case, the *panchanama* itself divulges that while 12 packets were allegedly recovered, containing contraband *charas*, the contents of the entire 12 packets were mixed and placed in one polythene bag. It was recorded that the total weight was 12kg. Commercial quantity being 1 kg, the applicant was proceeded against. This Court in a number of judgments has held that such mixing of contraband is impermissible and that it does raise

a serious suspicion about the case against the accused persons. A number of judgments were relied upon, but suffice it to say that in the cases of ***Sahil Jalauddin Ahmad v/s. The State of Maharashtra*** (order dated 26th July 2023 passed in Bail Application No. 3740 of 2022) and ***Venktesh Shiva Permal v/s. The State of Maharashtra*** (judgment and order dated 23rd January 2024 passed in Bail Application No. 3784 of 2023), in identical circumstances, wherein the contents of separate packets containing contraband, were mixed, it was held by this Court to be a sufficient ground to raise suspicion about the veracity of the case of the prosecution.

- (b) The *panchanama* on the one hand and the certificate issued by the Magistrate before whom samples were drawn for certification, shows that while 12 kg of *charas* was allegedly recovered, at the stage when the contraband reached the Magistrate for appropriate proceedings under Section 52A of the NDPS Act, the quantity was 11.682 kg, thereby indicating a shortfall 248 grams. This fact can be considered as a relevant circumstance, for granting the present bail application.
- (c) It is brought to the notice of this Court that there has been an inordinate delay on the part of the respondent No.1 to carry out the mandatory procedure contemplated under Section 52A of the NDPS Act. It is, in fact, highlighted that

no application appears to have been moved by the respondent No.1 before the Magistrate for sampling and certification. A perusal of the proceeding before the Magistrate shows that according to the Magistrate, on 24th September 2021 i.e. more than three months after the execution of the *panchanama*, an Intelligence Officer of the respondent No.1 simply came before the Magistrate with the seized contraband for certification in terms of Section 52A of the NDPS Act. There is nothing to indicate that a proper application was moved. Even if such procedure of the officer of the respondent No.1 directly appearing before the Magistrate with the seized contraband is to be considered, the said procedure was undertaken after a lapse of more than three months of time, thereby indicating that there was delay in carrying out such procedure. This Court in various judgments has frowned upon such delay in carrying out the mandatory procedure under Section 52A of the NDPS Act, by placing reliance on the judgment of the Supreme Court in the case of ***Union of India v/s. Mohanlal & Anr., (2016) 3 SCC 379***. In paragraph 19 of the said judgment of the Supreme Court, although it is recorded that a specific timeline for moving an application before the Magistrate under Section 52A of the NDPS Act has not been prescribed, the concerned authority is expected to move the Magistrate “without any delay”. In other words, such procedure is expected to be carried out within a reasonable

period of time. In the present case, the delay in carrying out the said exercise does create a ground for grant of bail. Reliance placed on a recent order of this Court dated 8th July 2024 passed in Bail Application No. 3258 of 2023 (*Kenneth Mulowa v/s. State of Maharashtra & Anr.*), is appropriate.

- (d) It is brought to the notice of this Court that while the *panchanama* was executed on 15th June 2021, surprisingly in the summons issued in the context of the said *panchanama*, the crime number has been mentioned at the top. It is submitted that when the procedure was still underway, the crime number could not have been found on such a summons issued on the very day of execution of *panchanama*. Reliance is placed on orders of this Court in the case of *Zaid Zahir Rana v/s. The State of Maharashtra* (order dated 30th October 2023 passed in Bail Application No. 1486 of 2023) and *Chand Riyaz Shaikh s/o. Riyaz Shaikh v/s. The Union of India & Anr.* (order dated 13th July 2023 passed in Bail Application No. 3269 of 2022). A perusal of the said orders shows that in similar circumstances, this Court while granting bail to the accused found that the presence of the crime number on such summons did create a suspicion about the prosecution case.
- (e) It is specifically stated that in the present case, the applicant was actually apprehended on 15th June 2021 itself, but he

was shown to be formally arrested on 16th June 2021 and produced before the Magistrate on 17th June 2021. In the interregnum, the applicant was taken to the office of the respondent No.1. It is submitted that since the freedom of the applicant was curtailed, when he was apprehended on 15th June 2021 and produced beyond the period of 24 hours before the Magistrate i.e. on 17th June 2021, the fundamental right of the applicant under Articles 21 and 22(2) of the Constitution of India, stood violated. It was submitted that in similar circumstances, this Court in the case of *Mr. Ugochukwu Solomon Ubabuko v/s. Union of India (Narcotic Control Bureau) & Anr. (Order dated 21st October 2021 passed in Criminal Misc. Application (Bail) No. 585 of 2021 (filing))*, granted bail purely on the said aspect of illegal detention of the accused. This Court has perused the said judgment. It is found that in the said case, it was indeed held that the fundamental rights of the accused under Articles 21 and 22(2) of the Constitution of India are violated, which could be a sole ground for granting relief of bail. In the present case, the documents on record, including the *panchanama* and other material do *prima facie* indicate that the freedom of the applicant was curtailed on 15th June 2021 itself, although he was formally shown as arrested on 16th June 2021. The applicant being produced only on 17th June 2021 before the Magistrate does *prima facie* indicate that his fundamental rights were violated and this is also a

ground for allowing the present application.

8. In view of the aforesaid reasons, this Court finds that the applicant has satisfied the first limb of the stringent test contemplated under Section 37 of the NDPS Act and it can be concluded that there are reasonable grounds for believing that the applicant is not guilty of the offences registered against him. As regards the second limb of the twin test, it is brought to the notice of this Court that the applicant did have one criminal antecedent against him for offences under NDPS Act, but the said proceeding is stated to have been disposed of. Since, there is no appearance on behalf of the respondent No.1, there is nothing on record to doubt the statement made on behalf of the applicant.

9. In any case, the applicant is a 67 years old person, himself suffering from heart ailments. The applicant has a mother aged about 85 years, who is presently admitted in the hospital in the ICU. The applicant has undergone more than three years of incarceration and hence, the application is allowed in the following terms :

- (a) The applicant shall be released on bail in connection with FIR No. 58 of 2021 registered with the Narcotic Control Bureau, Mumbai, on furnishing P.R. Bond of ₹50,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.

- (b) The applicant shall cooperate with expeditious disposal of trial. He shall attend the trial Court proceedings on each and every date, unless specifically exempted by the trial Court, for reasons to be recorded in writing.
- (c) The applicant shall not tamper with the evidence of the prosecution and he shall not influence the informant, witnesses or any other person concerned with the case.
- (d) The applicant, upon being released on bail, shall place on record of the trial Court the details of his Contact Number and residential address with updates in case of any change.

10. Needless to say, in case of violation of any of the aforesaid conditions, the bail granted to the applicant shall be liable to be cancelled. It is also clarified that the observations made in this order are limited to the disposal of the present bail application. The concerned Court shall proceed further in the matter without being influenced by the observations made hereinabove.

11. The application is disposed of.

MANISH PITALE, J.