

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

BAIL APPLICATION NO. 734 OF 2024

Aashish Bharti	...	Applicant
Versus		
The Union of India	...	Respondent

Mr. Shreerat Kamath i/by Puja Yadav for the Applicant.
Mr. Siddharth Chandrashekhar for Respondent.

**CORAM: MANISH PITALE, J.
DATE : 11th OCTOBER 2024**

P.C. :

. Heard learned counsel for the applicant and learned counsel appearing for the respondent.

2. The applicant in the present case is seeking bail in connection with Special Case No. 1390 of 2022 pending before the Special NDPS, Mumbai, arising from F. No.SSG/INV-09/2022-23 registered at the instance of Inspector SIIB, APSC, Customs Authority Zonal III.

3. This is a case initiated under Section 50A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) concerning power to undertake controlled delivery. This was based on an information received that a courier package addressed to the applicant was received at the International Courier Terminal, Sahar Airport, Mumbai. As per the information received, the said

courier package was containing contraband *ganja*. In that light, appropriate authorization was taken and the exercise of controlled delivery was undertaken. A *panchanama* dated 24th April 2022 was drawn at the Sahar Airport, which reflected that two such courier packages were received, one addressed to the applicant and the other addressed to the accused John Montero. It was recorded that package addressed to the applicant was opened and found to contain “Dry Round Balls of Green Plant Product purported to be Ganja/Marijuana”. The aforesaid contraband was collected and removed for further action and a dummy package was prepared for delivery. Thereupon, the controlled delivery was carried out and controlled delivery report dated 28th April 2022 records that when the package was taken by the delivery staff of the courier service for delivery on the applicant, upon the delivery staff asking for identity card, the applicant produced the same and thereafter, the package was delivered to the applicant and his signature was taken on the delivery receipt. The applicant was accompanied by his friend Omkar Khadtare. Upon such delivery being effected, the officers of the respondent apprehended the applicant. He was shown as arrested on 29th April 2022. The investigation was completed and the case is now pending before the aforesaid NDPS Court.

4. The learned counsel for the applicant submitted that there are glaring discrepancies in the material brought on record by the respondent, during the controlled delivery operation. It is

submitted that, at the outset, three co-accused persons alleged to have been part of the conspiracy, have been already granted bail by the Sessions Court. It is further submitted that in the present case, there is no delivery run sheet at all on record to show that the said package was actually delivered to the applicant. It is also emphasized that even according to the respondent, the quantity of contraband i.e. *ganja* recovered in the present case, was 4.595 kgs without plastic pouch, which is far less than the commercial quantity of 20 kgs of *ganja*. It is further submitted that in the absence of any convincing material to show actual delivery of the said package to the applicant, the very basis of the case of the respondent is taken away.

5. Attention of this Court is further invited to the order passed by the Sessions Court, granting bail to the co-accused Ajay Gupta. It is submitted that in the said order, the Sessions Court has rendered a finding that the material on record, at worst, showed that the applicant and the co-accused John Montero, who also received such a courier package may have conspired, independently with co-accused Bhavesh Thakur and it could not be concluded that they were members of one conspiracy. Emphasis was placed on the said finding, in the backdrop of the case of the respondent that the said Bhavesh Thakur had utilized the KYC details of the applicant, as well as the said John Montero, for obtaining the delivery of the contraband.

6. Apart from this, it was submitted that in the present case, the

mandatory requirement of Section 52A of the NDPS Act was not satisfied within a reasonable period of time. While the contraband was seized on 24th April 2022, the inventory *panchanama* and certification before the Magistrate was conducted on 6th October 2022, thereby violating the position of law laid down by the Supreme Court in the case of ***Union of India v/s. Mohanlal & Anr., (2016) 3 SCC 379.***

7. It was further submitted that the respondent cannot rely upon the statement of the applicant himself, recorded under Section 67 of the NDPS Act, in the light of the position of law clarified by the Supreme Court in the case of ***Tofan Singh v/s. State of Tamil Nadu, (2021) 4 SCC 1.*** It was further submitted that since the applicant has already suffered incarceration for about 2 years and 6 months, this Court may consider enlarging him on bail, as he has no criminal antecedents and he undertakes to abide by the conditions that may be imposed by this Court.

8. It is further contended that while the *panchanama* executed on 24th April 2022, recorded that the package contained contraband in the form of dry round balls of green plant product purported to be ganja/marijuana and this was exactly the description of contraband in the inventory *panchanama* as well as the letter of forwarding the contraband for chemical analysis, the report of the laboratory recorded that the material received was a heterogeneous mixture of dried greenish flowering and fruiting tops etc. of the plant. The glaring difference in the description of

the said material further shows the deficiency in the case of the respondent against the applicant herein.

9. On the other hand, the learned counsel for the respondent submitted that the applicant cannot claim that this is a case of non-commercial quantity of contraband *ganja*, for the simple reason that the courier package sent to co-accused John Montero, containing contraband to the extent of 20.145 kgs. This is a case of conspiracy between all the accused persons for receiving delivery of contraband and Section 29 of the NDPS Act, having been invoked in the present case, the quantity of contraband *ganja* received by co-accused John Montero also needs to be taken into consideration, while considering the present application.

10. It is further submitted that the aspect of delay in compliance with Section 52A of the NDPS Act, would necessarily be a matter of trial, as the applicant would have to demonstrate as to what prejudice was caused to him and how the entire procedure can be said to have been vitiated.

11. It was submitted that the controlled delivery report clearly records the manner in which the delivery of the courier package was effected on the applicant. It is further submitted that the same could be read with the statement recorded under Section 67 of the NDPS Act, wherein it can be discerned that the applicant himself showed some reluctance, while receiving the package and asked his friend Omkar Khadtare to receive the same, thereby

demonstrating his mental condition. Reliance is placed on Sections 35 and 54 of the NDPS Act, to contend that a *prima facie* case is indeed made out against the applicant and this Court may not show any indulgence.

12. The contention raised on behalf of the applicant regarding description of the contraband material, would also be a matter of a trial. On this basis, it is submitted that the application deserves to be allowed.

13. This Court has considered the rival submissions in the light of the material placed on record. It is to be noted that three co-accused persons have been granted bail by the Sessions Court. Although, the respondent has come up with a theory of conspiracy against all the accused persons, the case of the prosecution appears to be that co-accused Bhavesh Thakur had utilized the KYC details of the applicant and co-accused John Montero to ensure that contraband was received at their end and the same was then forwarded to him. The aforesaid co-accused persons being granted bail by the Sessions Court, is certainly a factor that will inure to the benefit of the applicant herein. The observation in the order of the Sessions Court, while granting bail to co-accused Ajay Gupta that co-accused Bhavesh Thakur may have independently conspired with the applicant on the one hand and the said John Montero on the other, is also a relevant finding. This could be an answer to the contention raised on behalf of the respondent that the entire contraband received by the said co-accused John

Montero and the applicant needs to be taken into consideration together to proceed on the basis that, in this case, commercial quantity of contraband is involved.

14. This Court is of the opinion that the applicant has made out a case in his favour to the effect that the present bail application can be considered, taking into consideration the quantity of contraband, found in the package that was allegedly delivered to the applicant i.e. 4.595 kgs. If that be so, it could be treated as non-commercial quantity.

15. In the present case, one of the specific contentions raised on behalf of the applicant pertains to absence of the delivery run sheet, insofar as the applicant is concerned. Attention of this Court was invited to a document on record, which shows such delivery run sheet in respect of the co-accused John Montero. It also shows that the said delivery run sheet was purportedly signed by the co-accused John Montero, when the courier package was delivered to him. There is no such document insofar as the applicant is concerned.

16. In this context, it is relevant to note that neither the statement of the delivery staff or delivery boy of the courier service is recorded, during the course of investigation, nor the statement of the friend of the applicant i.e. Omkar Khadtare, who is said to have been present when the package was delivered to the applicant. Considering the said aspect of the matter, there is *prima*

facie substance in the contention raised on behalf of the applicant that the delivery of the package to the applicant itself is rendered doubtful. Once such a *prima facie* finding is rendered, statutory presumptions under Sections 35 and 54 of the NDPS Act, upon which the learned counsel for the respondent has relied, do not appear to arise as against the applicant.

17. Apart from this, it is to be noted that while the Supreme Court in the case of ***Union of India v/s. Mohanlal & Anr.*** (supra), particularly in paragraph 19, has laid down that even though specific timeline is not provided under Section 52A of the NDPS Act for carrying out the exercise contemplated therein, it is supposed to be completed within “reasonable time” or “without any loss of time”.

18. But, in the present case, the document clearly shows that while the contraband was seized on 24th April 2022, the inventory *panchanama* was executed on 6th October 2022 and the Magistrate issued the certificate on the said date. The laboratory received the said sample on 6th October 2022. The time gap between seizure of the contraband and its sampling and forwarding to the laboratory, *prima facie*, can be said to be beyond the concept of reasonable time, as laid down by the Supreme Court in the aforementioned judgment.

19. The documents on record also show that the contraband found in the courier package addressed to the applicant, was

described as “Dry Round Balls of Green Plant Product purported to be Ganja/Marijuana” at every stage, from the date of execution of the *panchanama* on 24th April 2022 till the sample containing the said material being forwarded to the laboratory on 6th October 2022. But, the test report from the laboratory records that the samples contained “heterogeneous mixture of dried greenish flowering and fruiting tops etc. of the plant”. There is indeed some substance in the contention raised on behalf of the applicant that the aforementioned discrepancy in the description of the contraband material itself raises a doubt about the veracity of the test report. It is a factor that can be additionally taken into consideration along with the aforementioned factors found to be in favour of the applicant.

20. As regards reliance placed on the statement of the applicant recorded under Section 67 of the NDPS Act, suffice it to say that the position of law laid down by the Supreme Court in the case of *Tofan Singh v/s. State of Tamil Nadu* (supra), shows that such statements are not admissible evidence. Hence, the respondent cannot place reliance upon the same while opposing the bail application. In any case, even the contents of the statement, in the form of answers given by the applicant to various questions put to him, does not show that the applicant conceded about any knowledge of the contents of the courier package that was addressed to him.

21. As noted hereinabove, the applicant does not have any

criminal antecedents and he has suffered incarceration for about 2 years and 6 months. The charge is yet to be framed, thereby indicating that the trial may not be completed within a reasonable period of time. In view of the above, this Court is inclined to allow the application.

22. Accordingly, the application is allowed in the following terms:

- (a) The applicant shall be released on bail in connection with FIR No. Special Case No. 1390 of 2022 pending before the Special NDPS, Mumbai, arising from F. No.SSG/INV-09/2022-23, registered at the instance of Inspector SIIB, APSC, Customs Authority Zonal III, on furnishing P.R. Bond of Rs. 50,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.
- (b) The applicant shall report to the office of SIIB, APSC, Customs Authority Zonal III, on first Monday of every month between 10:00 a.m. and 12:00 noon, during the pendency of the trial. The applicant shall attend the trial Court on each and every date, unless specifically exempted by the trial Court.
- (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.

23. 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.

24. The application is disposed of.

MANISH PITALE, J.