



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.823 OF 2024

Cynthia Bandu Udanshive

...Applicant

vs.

The State of Maharashtra

...Respondent

Ms. Ashwini Achari a/w. Mr. Taraq Sayed, Mr. Alisha Parekh, Ms. Bhumika and Mr. Devashish, for the Applicant.

Ms. Mahalaxmi Ganapathy, APP, for the Respondent/State.

CORAM : N. J. JAMADAR, J.
RESERVED ON : JULY 02, 2024
PRONOUNCED ON : AUGUST 09, 2024

P.C.:

1. Heard the learned Counsel for the parties.
2. This is an application for bail in C.R. No. 249 of 2021 registered with Dahisar Police Station (later on transferred to DCB CID, Unit-VI, Mumbai) for the offences punishable under Sections 20(b)(ii)(C) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the Act, 1985).
3. On 25th October 2021, pursuant to an intimation, Dahisar Police conducted a surveillance at Dahisar Check Post. As per information, a Santro car bearing Registration No.DL-10/CS-4332 came on the flank of the road leading to Mumbai from Gujarat. The said vehicle was intercepted. Two males, two females and a child were boarding the said car. The applicant, her father Bandu Udanshive (A/2), mother Clera Udanshive (A/4) and husband Jasar Shaikh (A/1)

identified themselves. After apprising the applicant and the co-accused of their right to be searched under section 50 of the NDPS Act, 1985, search was conducted. In the personal search of the applicant, no contraband article was found. However, during the search of the car, 16 kgs. of charas, a contraband substance was found concealed in the cavities of the door and dickey. In the personal search of the co-accused Bandu (A/2), 8 kgs charas was also found. The contraband articles were seized. Samples were collected. The applicant and co-accused were arrested. It transpired that the applicant and the co-accused had been transporting contraband articles from the State of Jammu and Kashmir, in the said fashion. Co-accused Gulzar Khan (A/6) was supplying the said contraband.

4. At the outset, Ms. Achari, learned counsel for the applicant, submitted that the applicant is entitled to be enlarged on the ground of parity as Clara Udanshive (A/4), who has been attributed an identical role, has already been enlarged on bail by an order dated 7th September, 2023. It was further submitted that this Court has released another co-accused Gulzar Khan (A/6) on bail, as there was a total non-compliance of the mandatory provisions contained in section 52A of the NDPS Act, 1985. It was further submitted that there is also non-compliance of the mandatory provisions contained in section 42(2) of the NDPS Act, 1985. The applicant has been in custody for more than two and half years. It is unlikely that the trial can be concluded within a reasonable period.

Therefore, the applicant deserves to be enlarged on bail.

5. The learned APP resisted the prayer for bail. It was submitted that the role attributed to the applicant is quite distinct from that of Clara Udanshive (A/4) who has been enlarged on bail. The learned APP further submitted that a huge quantity of charas was found concealed in the cavities of the door and dickey of the car. Having regard to the close relations between the parties, it cannot be urged that the applicant was unaware of the concealment of the contraband. Banking upon the observations of this Court in the order dated 17th January, 2024 passed in the case of Jasar Shaikh (A/1), whereby the said bail application came to be rejected, the learned APP prayed for rejection of the application.

6. I have perused the material on record and given anxious consideration to the aforesaid submissions. The applicant was found travelling in the car in which the contraband substance was found concealed in the cavities of its door and dickey. While rejecting bail application of Jasar J. Shaikh (A/1) co-accused, who was at the wheel of the said car, when it was intercepted, this Court repelled the submission on behalf of the said accused that the said accused cannot be said to have been found in conscious possession as the Court noted that the said accused was at the wheel of the car all along right from Mumbai to Jammu and the return journey. The party had stayed at Jammu for less than 12 hours. Concealment of contraband articles in the cavities of the doors of the car must have required an

effort. Whether the aforesaid consideration which weighed with this Court in rejecting the bail of Jasar Shaikh (A/1) apply with equal force to the applicant ?

7. At this juncture, the fact that Clara Udanshive (A/4), mother of the applicant, came to be enlarged on bail bears significance. While releasing Clara Udanshive (A/4), this Court noted that though, undoubtedly, the said accused was travelling in the car, there was nothing on record to indicate that Clara Udanshive (A/4) had knowledge about the concealment of the contraband. The Court went on to note that Clara (A/4) a woman and had been in custody for more than one year and 10 months.

8. Prima facie, the aforesaid reasons govern the claim of the applicant for bail. Conversely, the circumstances which were arrayed against Jasar Shaikh (A/1) may not apply with full force.

9. One circumstance which is pressed into service against the applicant is that, the photographs of the contraband substance were allegedly extracted from the mobile phone of the applicant, under Extract Panchanama (page 75). The aforesaid circumstance was also pressed into service against Gulzar Khan (A/6). While releasing Gulzar Khan (A/6) on bail, this Court after adverting to the aforesaid circumstance, and the evidence of alleged discovery and money transactions between the co-accused, recorded a prima facie view that, whether the applicant therein could be roped in by invoking the provisions contained in Section 29 of the Act, appeared debatable.

10. In addition, the ground of non-compliance with the provisions contained in Section 52-A of the Act, primarily weighed with this Court in releasing Gulzar Khan (A/6) on bail. The observations in paragraph Nos.12 to 14 of the said order, read as under :

“12. On the aspect of non-compliance of the provisions contained in Section 52-A of the Act, the learned Counsel for the applicant placed reliance on the decision in the case of **Union of India vs. Mohanlal and Another**¹. On an analysis of the provisions contained in section 52-A, the Supreme Court enunciated the legal position as under:-

“15] It is manifest from Section 52A (2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16] Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is

1 (2016) 3 Supreme Court Cases 379.

effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17] The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.”

13. The Supreme Court has emphasized that the question of drawing of samples at the time of seizure, in the absence of the Magistrate, is not envisaged in the scheme of section 52-A of the NDPS Act, 1985. There is no provision in the Act that mandates taking of samples at the time of seizure. The process of drawing of samples has to

be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by the Magistrate, to be correct. The aforesaid pronouncement, in the case of **Mohanlal** (supra) has been followed in recent judgments the cases of **Yusuf @ Asif vs. State**²; **Simaranjit Singh vs. State of Punjab**³ and **Mohammed Khalid and Anr. vs. The State of Telangana**⁴.

14. In the case of **Yusuf** (supra) after referring to the decision of the Supreme Court in the case of **Mohanlal** (supra), the Supreme Court observed as under :-

“15] In Mohanlal’s case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.

16] In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the

2 Cri. Appeal No. 3191 of 2023 Dt.13/10/2023.

3 2023 SCC OnLine SC 906.

4 Cri.Appeal No, 1610/2023 Dt.01/03/2024.

inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.”

11. The situation which thus obtains is that the applicant appears to be, by and large, similarly circumstanced like Clara, who has been released on bail. The additional material in the nature of the extraction of the photographs of the contraband substance from the mobile phone handset of the applicant, was also pressed into service against Gulzar Khan (A/6) and yet, upon consideration of the said circumstance and the non-compliance of the mandatory provisions contained in Section 52-A of the Act, this Court was persuaded to enlarge Gulzar Khan (A/6) on bail. The claim of the applicant for parity thus appears justifiable.

12. In any event, the applicant has been in custody for almost two years and 10 months. Having regard to the large pendency of the cases, it is extremely unlikely that the trial can be concluded within a reasonable period. The statutory restrictions in the matter of grant of bail melt down in the face of long period of incarceration without a prospect of expeditious conclusion of trial.

13. For the foregoing reasons, I am inclined to exercise discretion in favour of the applicant.

14. Hence, the following order :

ORDER

- (i) The Application stands allowed.
- (ii) The Applicant – Cynthia Bandu Udanshive be released on bail in C.R.No.249 of 2021 registered with DCB CID, Unit VI, Mumbai on furnishing a PR bond in the sum of Rs.1,00,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.
- (iii) The applicant shall mark her presence before DCB CID, Unit VI, Mumbai on 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.
- (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 her contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.
- (vi) The applicant shall regularly attend the proceedings before the jurisdictional Court.
- (vii) 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 disposed.

(N.J.JAMADAR, J.)