

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.1077 OF 2024

Mohd Wasim Abdul Rehman Shaikh ... Applicant

Vs.

State of Maharashtra ... Respondent

Mr. Ayaz Khan a/w. Mr. Dilip Mishra, Ms. Zehra Charania and Ms. Mallika Sharma for Applicant.

Mr. Mayur S. Sonavane, APP for Respondent-State.

Mr. Jaysing Jaybhaye, PSI, Dongri Police Station, Mumbai.

CORAM : MANISH PITALE, J.

Reserved on : 20TH AUGUST, 2024

Pronounced on: 29TH AUGUST, 2024

ORDER:

1. The applicant is seeking bail in connection with FIR No.20 of 2023 registered with Dongri Police Station, Mumbai on 04.03.2023, now pending as Special Case No.1366 of 2023 (NDPS) before the Special Judge for NDPS matters at Mumbai, for offences under Sections 8(c) read with 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act).

2. According to the investigating authority, on 04.03.2023, the informant, who was a member of the raiding party of the respondent, while performing duty, found the applicant in possession of contraband *Mephedrone* (MD). The contraband being of commercial quantity, the applicant was arrested and further steps under the NDPS Act were taken. Eventually, charge-sheet was filed and the applicant has remained behind bars since the date of his arrest i.e. 04.03.2023.

3. Mr. Khan, learned counsel appearing for the applicant raised three contentions in support of the present application, in order to indicate that

the applicant satisfies the stringent test contemplated under Section 37 of the NDPS Act for grant of bail.

4. Firstly, it was submitted that even according to the *panchanama* executed while conducting raid, it was recorded that the contraband MD was 52 gms. along with the plastic packet, thereby indicating that if the weight of the plastic packet is reduced, the contraband would be less than the commercial quantity; as per the NDPS Act, the commercial quantity being 50 gms. Secondly, it was submitted that in the present case, the *panchanama* was executed between 5:00 a.m. and 6:20 a.m. and the FIR was registered at 7:02 a.m. Yet, the labels pasted on the packets in which the contraband was stored during execution of the *panchanama* bears C.R.No.20 of 2023, which is in typed form. This indicates that C.R. number was placed even before the FIR came to be registered, thereby raising serious doubt about the manner in which *panchanama* was executed and contraband was allegedly seized.

5. In support of the said contention, reliance was placed on orders passed by this Court in the case of *Zaid Zahir Rana Vs. State of Maharashtra* (order dated **30.10.2023** passed in **Criminal Bail Application No.1486 of 2023**), as also in the case of *Chand Riyaz Shaikh s/o. Riyaz Shaikh Vs. Union of India and another* (order dated **13.07.2023** passed in **Bail Application No.3269 of 2022**). Thirdly, it was submitted that the certificate issued in the present case under Section 52A of the NDPS Act is defective, for the reason that the certificate pertains to inventory *panchanama* and it does not certify sampling for the sample of the contraband to be sent to the laboratory for chemical analysis. Reference was made to the relevant Rules framed under the NDPS Act in the context of the aforesaid certification.

6. On the basis of the aforesaid contentions, it was submitted that the applicant deserves to be enlarged on bail.

7. On the other hand, Mr. Sonavane, learned APP submitted that the contentions raised on behalf of the applicant are a matter for trial. The procedure was followed as per the NDPS Act and the Rules framed thereunder. In the present case, it was indeed recorded at every stage that the weight of the contraband was above commercial quantity. The procedure adopted under Section 52-A of the NDPS Act could be said to be in substantial compliance of the mandatory requirements and the applicant does not deserve to be enlarged on bail.

8. This Court has considered the rival submissions in the light of the material on record. The applicant claims that since the seizure *panchanama* itself records that the contraband was weighed along with the plastic packet and the weight was found to be 52 gms, thereby indicating that if the weight of the plastic packet is taken into account, the weight of the contraband could be said to be less than 50 gms. and hence not commercial quantity. There can be no presumption that the weight of the plastic packet is more than 2 gms. Nonetheless, 52 gms is marginally above commercial quantity of 50 gms of MD. This Court is of the opinion that at least a doubt is created in the light of material on record that the quantity of contraband MD could be less than commercial quantity.

9. Apart from this, a perusal of the inventory *panchanama* dated 29.03.2023, which was produced before the Magistrate, shows that the weight of the packet containing contraband on the electronic weighing scale was found to be 63.80 gms. In the same document, it is recorded that the contraband i.e. white powder was weighing 52.50 gms along with the plastic packet. The varying figures found in the seizure *panchanama* and the inventory *panchanama*, with two different figures mentioned in the inventory *panchanama* itself, *prima facie*, creates doubt about the quantity of contraband actually recovered in the present

case.

10. If the contraband is found to be below 50 gms, it does not qualify as commercial quantity and this is crucial because punishment for the offence of possession of non-commercial contraband MD is imprisonment upto ten years, as opposed to minimum sentence of imprisonment of ten years for possession of commercial quantity and maximum sentence of imprisonment of twenty years. To this extent, the applicant has been able to create some doubt about whether the contraband recovered in the present case could be said to be commercial quantity or not.

11. A perusal of the photographs of the envelopes at page 38, containing the contraband with labels affixed thereon, shows that such labels carried crime number in typed form. These labels were said to have been affixed when the *panchanama* was executed on 04.03.2023 before registration of the FIR. The document shows that the *panchanama* was executed between 5:00 a.m. and 6:20 a.m., while the FIR was registered at 7:02 a.m. The existence of the crime number i.e. FIR No.20/2023 in typed form on the labels affixed when the seizure *panchanama* was executed, which was completed prior to registration of the FIR, does create doubt. This goes to the root of the matter because the contraband contained in such envelopes, carrying such labels is claimed to be the very contraband, that was recovered in the present case and sent for chemical analysis. Anything that creates doubt about the seizure of the contraband and the very contraband being sent for chemical analysis must accrue to the benefit of the accused.

12. In the cases of **Zaid Zahir Rana Vs. State of Maharashtra** (*supra*) and **Chand Riyaz Shaikh s/o. Riyaz Shaikh Vs. Union of India and another** (*supra*), this Court did grant benefit to the accused on the aforesaid aspect of the matter, while allowing the bail applications

of the accused persons.

13. As regards the submission made on behalf of the applicant pertaining to the certificate issued by the Magistrate under Section 52-A of the NDPS Act, considering the fact that this Court is inclined to grant benefit to the applicant in respect of the first two aforementioned contentions raised on behalf of the applicant, it would not be necessary to deal with the submission pertaining to certificate under Section 52-A of the NDPS Act. More so when the contraband, being of commercial quantity, could be said to be doubtful and particularly when the very sanctity of the contraband being stored properly under the seizure *panchanama* is found to be *prima facie* doubtful because of existence of crime number on the envelope although the FIR was registered later on. Therefore, it would not be necessary to delve into the aforesaid last submission made on behalf of the applicant.

14. Even otherwise, the material on record shows that the proceedings before the Magistrate were undertaken on 29.03.2023, which was within reasonable time of the seizure on 04.03.2023. The further aspects of the matter could be argued at the time of trial.

15. This Court has taken note of the fact that the applicant has remained behind bars since 04.03.2023 i.e. for a period of about one year and five months.

16. In view of the above, the application is allowed in the following terms:-

- (A) The applicant shall be released on bail in connection with FIR No.20 of 2023 registered with Dongri Police Station, Mumbai on 04.03.2023, now pending as Special Case No.1366 of 2023 (NDPS) before the Special Judge for NDPS matters at Mumbai, on furnishing P.R. Bond of

Rs.50,000/- [Rupees Fifty Thousand only] with one or two sureties in the like amount to the satisfaction of the trial Court;

- (B) The applicant shall report before the Dongri Police Station on the first Monday of every month between 10:00 a.m. and 12:00 noon, during the pendency of the trial;
- (C) The applicant shall cooperate with the trial Court for expeditious trial and he shall attend each and every date, unless exempted for reasons to be recorded in writing;
- (D) The applicant shall not tamper with the evidence of the prosecution. He shall not influence the informant, witnesses or any other person concerned with the case;
- (E) The applicant shall surrender his passport, if any, with the trial Court;
- (F) Upon being released on bail, the applicant shall immediately, and in any case within a week, furnish the details of his active mobile number and residential address to the trial Court and update the same in case of any change.

17. Needless to say, violation of any of the aforesaid conditions would make the applicant liable to face proceedings for cancellation of bail. It is also clarified that the observations made in this order are limited to the question of grant of bail to the applicant in the present application and that the trial Court shall proceed further, without being influenced by the observations made in this order.

18. The application is disposed of.

(MANISH PITALE, J.)