



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.1078 OF 2024**

Kayyum Gaffor Shaikh	...	Applicant
versus		
The State of Maharashtra	...	Respondent

Mr. Dilip Mishra i/by Mr. Ayaz Khan and Zehra Charania, for Applicant.
Mr. A.A.Naik, APP for State.

CORAM: N.J.JAMADAR, J.

DATE : 2 DECEMBER 2024

P.C.

1. Heard the learned Counsel for the parties.
2. The Applicant (A3), who is arraigned in NDPS Special Case No.1 of 2023 arising out of C.R.No.12 of 2022 registered with ATS Kalachowki Unit, Mumbai, for the offences punishable under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act, 1985), has preferred this application to enlarge him on bail.
3. On 5 July 2022, while ATS Police were on patrolling duty at Sharda Talkies Lane, near Kohinoor Mill, Dadar (East), Mumbai, Umesh P. Gaikwad (A1) and Arif Shaikh (A2), were found moving suspiciously. They were accosted. In the search conducted, in the presence of public witnesses, 1800 gms charas was found in the bag which Umesh Gaikwad (A1) was carrying. Arif Shaikh (A2) was found in possession of 50 gms charas. Contraband articles were seized.

4. Umesh Gaikwad (A1) made a disclosure that on that evening at about 9.00 p.m., the applicant was to come near Hill Park Society, Jogeshwari (W), to deliver charas. Police party mounted a surveillance. At about 9.20 p.m., the applicant came thereat along with a pink polythene bag. Umesh Gaikwad (A1) pointed out the applicant. The applicant was accosted. After apprising the applicant of his right under Section 50 of the Act, 1985, a search was conducted. In the bag which the applicant was carrying, a square shaped packet wrapped with cello-tape was found. A sticky blackish substance was found therein. A part of the substance was scraped out and tested with drug detention kit and the test turned out positive for charas. It weighed 1200 gms. Contraband substance was seized and sealed. The applicant came to be arrested.

5. Mr. Mishra, learned Counsel for the Applicant, submitted that the search and seizure is completely vitiated due to non-compliance of the mandatory statutory provisions. First and foremost, there is no record to show as to what was the exact statement made by Umesh Gaikwad (A1). Secondly, the information has not been reduced into writing and forwarded to the immediate official superior as mandated by the provisions contained in Section 42 of the Act, 1985. Thirdly, there is discrepancy regarding the colour of the plastic bag which the applicant was allegedly carrying. Fourthly, there is a material variance between the panchanama under which the contraband

substance was seized and the statement of Sainath Thombre, PI, as regards the circumstances in which the applicant allegedly came near Hill Park Society, Jogeshwari (W), Mumbai. Mr. Sainath Thombre, PI, stated that it was Umesh Gaikwad (A1) who had made a call to the applicant and called him near Hill Park Society. Thus, it was a clear case of entrapment. The CDR shows that after Umesh Gaikwad (A1) came to be arrested, the said accused had made a call at about 21.00 hrs., much after the panchanama was drawn. The applicant has no antecedents. Thus, the applicant deserves to be enlarged on bail.

6. Mr. Naik, learned APP, resisted the prayer for bail. It was submitted that commercial quantity of contraband substance was recovered from the possession of the applicant. There is a scrupulous compliance of the provisions contained in Section 52-A of the Act, 1985. In the circumstances of the case, since the information was received by the IO during the course of investigation, compliance with the provisions contained in Section 42 of the Act, was not at all warranted. As this Court has already rejected bail application of Umesh Gaikwad (A1), the applicant, who is the supplier of Umesh Gaikwad (A1), does not deserve to be enlarged on bail.

7. From the perusal of the material on record, it appears that the applicant was not apprehended along with the co-accused Umesh Gaikwad (A1) and Arif Shaikh (A2) The prosecution claims that on the basis of the disclosure

made by, and at the pointing out of, Umesh Gaikwad (A1), the applicant came to be apprehended. It is not the prosecution case that co-accused Umesh Gaikwad (A1) had made any discovery under Section 27 of the Evidence Act. The alleged disclosure made by Umesh Gaikwad (A1) finds reference in the panchanama under which the applicant came to be apprehended and the contraband substance allegedly seized. Prima facie, it appears that the case qua the applicant rests on the statement of a co-accused. It is trite, the statement of a co-accused is not a legal piece of evidence.

8. To add to this, there is prima facie divergence in the manner in which Umesh Gaikwad (A1) made the alleged disclosure. The panchanama does not record the fact that Umesh Gaikwad (A1) was made to call the applicant and, thereupon, he came to be apprehended as stated by Mr. Sainath Thombre, PI. Prima facie, from the perusal of the CDR, it further appears that though the applicant and Umesh Gaikwad (A1) were in touch with each other, yet the last call was purportedly made on the day of occurrence at about 09.20 p.m. Evidently, the said call was made after the co-accused Umesh Gaikwad (A1) was arrested and his mobile phone handset seized by the police.

9. The prosecution does not claim that the Investigating Officer who received the information from Umesh Gaikwad (A1) had complied with the provisions contained in Section 42(1) of the Act, 1985. Mr. Mishra, learned

Counsel for the Applicant, was justified in placing reliance on the orders passed by this Court in the cases of **Sushant Sambhaji Rasal V/s. The State of Maharashtra**¹ and **Nabi Kasim Shaikh @ Naish V/s. The State of Maharashtra**² wherein this Court had recorded a prima facie finding that after the information was received from co-accused, the same ought to have been reduced into writing in terms of Section 42(1) of the Act, 1985.

10. Moreover, the applicant has been in custody since 5 July 2022. Having regard to the large pendency of the cases, the trial may take time. This long period of incarceration, in the backdrop of the nature of the material pressed into service against the applicant, persuades the Court to exercise discretion in favour of the Applicant. The Court is not informed that the applicant has antecedents. Thus, the Court may draw a further inference that the applicant may not indulge in identical offences if enlarged on bail.

11. Hence, the following order :

ORDER

(i) The Application stands allowed.

(ii) The Applicant – Kayyum Gaffor Shaikh be released on bail in C.R.No.12 of 2022 registered with ATS Kalachowki Unit, Mumbai, 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.

1 BA No.1760 of 2021 dated 1 February 2023

2 BA No.3075 of 2021 dated 21 February 2023

(iii) The applicant shall mark his presence before ATS Kalachowki Unit, 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 his contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.

(vi) The applicant shall not indulge in identical offences for which he has been arraigned in this case.

(vii) The applicant shall regularly attend the proceedings before the jurisdictional Court.

(viii) 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 co-accused and the trial Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

(N.J.JAMADAR, J.)