

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

BAIL APPLICATION NO. 1517 OF 2024

VISHAL
SUBHASH
PAREKAR

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Anil Devtadin Mishra

...Applicant

Versus

The State of Maharashtra

...Respondent

Mr. Ayaz Khan, for the Applicant.

Mr. A.A. Naik, APP for the State.

CORAM: N. J. JAMADAR, J.

DATED: 10th DECEMBER 2024

ORDER:-

1. Heard the learned Counsel for the parties.
2. The applicant, who is arraigned in NDPS Special Case No.997 of 2023, arising out of CR No.196 of 2022 registered with Kurla Police Station, Mumbai, for the offences punishable under Sections 22 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act, 1985"), has preferred this application to enlarge him on bail.
3. On 26th December, 2022 while Kurla police were on patrolling duty at 6.00 pm in front of Goa Wine Shop, Kurla (w), in the search of the carry bag of Shahid Retiwala (A1), the co-accused, 10 bottles of COFSON CD cough syrup were found. Each of the bottles had a label "Codeine Phosphate & Chlorpheniramine Maleate Syrup 100 ml COFSON CD 100 ml. Each 5 ml syrup

contained Codeine Phosphate I.P. 10 mg. and Chlorpheniramine Maleate I.P. 4 mg. Shahid Retiwala (A1) made a discovery leading to recovery of 100 bottles of COFSON CD 100 from Shriprakash Yadav (A2).

4. The prosecution alleges, Shriprakash Yadav (A2), in turn, made a discovery to point out the place where the applicant- Anil Mishra (A3), who was his supplier, sold and delivered the cough syrup containing the contraband substance. Pursuant to the said disclosure statement, the applicant came to be accosted while the applicant was carrying a green sack and a big polythene bag on an Aactiva Scooter bearing No. MH-03-DM-4536. 100 bottles of COFSON CD were found in the green sack. Each of the bottles had a label "Codeine Phosphate & Chlorpheniramine Maleate Syrup 100 ml COFSON CD 100 ml. "In the white polythene bag, 100 bottles of WIXCYREX cough syrup were found. Each of the bottles had a label "Chlorpheniramine Maleate & Codeine phosphate Syrup 100 ml WIXCYREX cough syrup". The contraband substance was sealed and seized in the presence of public witnesses. Post completion of investigation, charge-sheet came to be lodged.

5. Mr. Ayaz Khan, learned counsel for the applicant, submitted that this Court has enlarged Shahid Retiwala (A1) on bail by an order dated 26th September, 2024. The case of the applicant,

according to the learned counsel, stands on an even better footing. The applicant was purportedly arrested pursuant to the discovery made by co-accused Shriprakash Yadav (A2). However, the alleged search and seizure of 200 bottles containing Codeine Phosphate is fraught with multiple infirmities. Firstly, the information so received from the co-accused has not been recorded and forwarded to the superior official in conformity with the mandate contained in section 42 of the NDPS Act, 1985. Secondly, the seizure of the contraband was after the sunset sans search warrant or authorization. Thirdly, the panchanama ex facie appears to be a got up document. Fourthly, the intrinsic evidence of seizure panchanama and the inventory erodes the veracity of the prosecution case. Lastly, there was a delay of about 12 days in forwarding the sample to the Forensic Science Laboratory after the inventory before the learned Magistrate.

6. The learned APP resisted the prayer for bail. It was submitted that the seizure of the contraband substance in question, is not at all governed by the provisions contained in section 42 of the NDPS Act, 1985. In contrast, the provisions contained in section 43 of the NDPS Act, 1985 govern the facts of the case. It was further urged that recording of the information as envisaged by section 42 of the Act was not warranted as the information was received during the course of investigation.

There is scrupulous compliance of the provisions contained in section 52A of the NDPS Act, 1985. Thus having regard to the huge quantity of the contraband substance, recovered from the possession of the applicant, the bar under section 37 of the NDPS Act, 1985 applies with full force and, therefore, the applicant does not deserve to be enlarged on bail.

7. Evidently, the applicant came to be apprehended on the strength of the disclosure statement allegedly made by co-accused Shriprakash Yadav (A2). From the perusal of the disclosure statement, prima facie, it appears that the disclosure was to the effect that Shriprakash Yadav (A2) would point out the place where the applicant used to supply the contraband substance to Shriprakash Yadav (A2). The seizure panchanama, however, records that Shriprakash Yadav (A2) first pointed out the place in front of a Mall and, thereafter, upon being asked by the police officer to point out the place where the applicant would be found, took the police party to a place in front of Equinox Business Park and pointed out the applicant who was sitting on a two wheeler.

8. First and foremost, the question that would warrant determination at the trial may be, whether the aforesaid discovery distinctly relates to the statement made by the co-accused Shriprakash Yadav (A2) ?

9. Secondly, the prosecution does not claim that the aforesaid disclosure statement made by co-accused Shriprakash Yadav (A2) was taken down and there was compliance of the provisions contained in section 42 of the NDPS Act, 1985. Mr. Naik, the learned APP urged that such compliance was not warranted as the information was received during the course of investigation.

10. In the cases of **Nabi Kasim Shaikh @ Naish vs. The State of Maharashtra¹** and **Sushant Sambhaji Rasal vs. The State of Maharashtra²**, on which reliance was placed by Mr. Khan, this Court has 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 of NDPS Act, 1985.

11. Thirdly, the submission on behalf of the applicant that there was non-compliance of the mandate contained in section 42(1) of NDPS Act, 1985 in the matter of search and seizure after sunset sans warrant or authorization appears to carry, prima facie, substance. The seizure memo indicates that the panchanama was had commenced at 7.50 pm and concluded on 10.30 pm. In a somewhat similar fact-situation, in the case of **Chand Riyaz Shaikh s/o. Riyaz Shaikh vs. The Union of India and Anr.³**, on

1 BA No. 3075 of 2021 Dt. 21/02/2023.

2 BA No. 1760 of 2021 Dt. 1/02/2023.

3 BA No. 3269 of 2022 Dt. 13/07/2023.

which reliance was placed by Mr. Khan, this Court observed as under:-

16] The records thus reveal that the alleged recovery was not a chance recovery in the normal course of investigation, but it was on the basis of specific information that the Applicant was to deliver the contraband concealed in the dicky of scooty no. MH 02 FK 7694, to an unknown person between sunset and sunrise at the specified address. The scooty wherein the contraband was allegedly concealed was a private vehicle. Consequently, the same would not fall within the purview of “public place” as explained in Section 43 of the NDPS Act. Since Section 43 is not attracted, search was to be conducted after complying with the provisions of Section 42 of the NDPS Act.

17] In this regard, it is pertinent to note that the Intelligence Officer had received the information at 16.15 hours. He was well aware that the contraband was to be delivered at 23.00 hours and that search was to be conducted after sunset. It was therefore obligatory upon the officer to obtain warrant or authorization, unless he had reason to believe that warrant or authorization could not be obtained without affording opportunity to the offender to escape or to conceal the evidence. It is not in dispute that search, seizure as well as arrest was effected without warrant or authorization. The concerned officer has not recorded reasons for his belief in terms of proviso to Section 42(1) of the NDPS Act. The search and seizure which is in contravention of mandatory provision of Section 42 of the NDPS Act, prima facie makes the recovery doubtful.

12. In addition, there are discrepancies in the seizure panchanama as regard the time at which the panchanama was commenced and concluded. In the initial part (page 37), it is recorded that panchanama was scribed at 8.30 pm whereas in the concluding part it is recorded that the panchanama commenced at 7.50 pm and concluded at 22.30 pm. Moreover, there is a delay of about 12 days in forwarding the sample post inventory before the learned Magistrate. Under Rule 13 of the Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 the samples, after being certified by the

Magistrate, shall be sent directly to the specified laboratory, without any delay. The prosecution would thus be enjoined to account for the delay of 12 days.

13. If the prosecution case is appraised in the light of the aforesaid prima facie debatable compliance of the statutory provisions and suspicious circumstances, the Court may draw an inference that the applicant may not be found guilty of the offences for which he has been arraigned. The Court is not informed that the applicant has antecedents. Therefore, the Court may draw a further inference that the applicant may not indulge in identical offences, if enlarged on bail.

14. At any rate, the applicant has been in custody for almost two years. Having regard to pendency of the cases, it is extremely unlikely that the trial can be concluded within a reasonable period. Long period of incarceration without a real prospect of conclusion of the trial within a reasonable period impairs the right of the accused to have speedy trial, which is a facet of the right to life and personal liberty guaranteed under Article 21 of the Constitution of India. I am, therefore, inclined to exercise the discretion in favour of the applicant.

Hence the following order:

: O R D E R :

- (i) The Application stands allowed.
- (ii) The Applicant be released on bail in NDPS Special Case No.997 of 2023 arising out of CR No.196 of 2022 registered with Kurla Police Station, Mumbai, on furnishing a PR bond in the sum of Rs.1,00,000/- with one or two sureties in the like amount to the satisfaction of the Special Court.
- (iii) The applicant shall mark his presence before Kurla Police Station 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) The applicant shall not indulge in an identical activity for which has has been arraigned in this case.
- (vi) 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.
- (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 the co-accused and the trial Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

[N. J. JAMADAR, J.]