

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

BAIL APPLICATION NO. 1781 OF 2024

Anju Mujaali Shaikh	...	Applicant
Versus		
The State of Maharashtra	...	Respondent

Mr. Kiran Gogavale for the Applicant.
Mr. R. M. Pethe, APP for Respondent-State.

**CORAM: MANISH PITALE, J.
DATE : 20th AUGUST 2024**

P.C. :

1. The applicant is seeking bail as he was arrested on 23rd May 2023 on the basis of FIR No.0252 of 2023 registered at Byculla Police Station, Mumbai, for offences under Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). The proceeding is now pending as Special Case No. 1499 of 2023 before the Special NDPS Court, Mumbai.

2. According to the investigating authority, on the date on which the applicant was arrested, he was found carrying a bag and when his movements appeared suspicious, he was confronted and it came to light that the applicant was carrying contraband Mephedrone (MD). The applicant has remained behind bars since the date of his arrest i.e. 23rd May 2023.

3. The learned counsel for the applicant submits that even if

the entire material filed along with the charge-sheet is to be taken into consideration, there are glaring discrepancies, which make out a *prima facie* case in favour of the applicant. It is contended that while the *panchanama* records that off-white powder was recovered, the chemical examination report issued by the laboratory records brownish crystalline powder. This raises suspicion.

4. It is further submitted that while the *panchanama* dated 23rd May 2023 records that 60 gms of MD was recovered, the inventory *panchanama* dated 16th June 2023 records that the weight was 75 gms. This also creates suspicion. It is further submitted that photograph of *muddemal* envelope marked Exhibit 'A', along with *panchanama* dated 23rd May 2023, shows crime number i.e. C.R. No. 252 of 2023 on the label affixed to the envelope, which bears the signatures of the *panchas*, the applicant and PSI – Jadhav. It is submitted that presence of the crime number itself creates serious doubt because *panchanama* was executed between 18:10 hours and 19:20 hours, while the FIR or the C.R. was registered later, on the same day at 21:14 hours. This is another ground of discrepancy and hence, suspicion.

5. It is further submitted on behalf of the applicant that the chemical examination report shows the presence of two contraband substances i.e. MD and Methamphetamine. It is submitted that commercial quantity for both these contraband substances is 50 gms. The total contraband being only 60 gms in

the present case, indicates that commercial quantity of neither could be said to be present, hence this also must inure to the benefit of the applicant.

6. Mr. R. M. Pethe, learned APP appearing for respondent-Investigating Officer, submitted that the aforesaid contentions raised on behalf of the applicant cannot be accepted at this stage. All the contentions will have to be considered at the stage of the trial. It is submitted that difference between off-white and brown colours is also a matter of trial. On the aspect of existence of crime number or C.R. number on the label put on the envelope, it was submitted that such number is put for identity while sending the envelope to the godown of NCB. As regards presence of two contraband substances and the total weight of the material recovered being 60 gms, it was submitted that the position of law was clarified by the Supreme Court in the case of ***Hira Singh & Anr. v/s. Union of India & Anr., (2020) 20 SCC 272*** and a proper application of the said position of law would demonstrate that the aforesaid contention raised on behalf of the applicant cannot be accepted.

7. The applicant/accused has to satisfy the stringent twin test contemplated under Section 37 of the NDPS Act to succeed in the bail application. This Court will have to hold that there are reasonable grounds to believe that the applicant is not guilty of the offence and that he would not commit any offence upon being released on bail.

8. As regards contention pertaining to presence of two contraband substances and the recovery being of a mixture, the Supreme Court in the case of ***Hira Singh & Anr.*** (supra) has held as follows :

“10.2. Therefore, considering the Statement of Objects and Reasons and the Preamble of the NDPS Act and the relevant provisions of the NDPS Act, it seems that it was never the intention of the legislature to exclude the quantity of neutral substance and to consider only the actual content by weight of offending drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity. Right from clauses (vii-a) and (xxiii-a) of Section 2 of the NDPS Act, emphasis is on narcotic drug or psychotropic substance (Sections 21, 22, 23, 24, 27 and 43). Even in the Table attached to the Notification dated 19-10-2001, Column 2 is with respect to name of narcotic drug and psychotropic substance and Columns 5 and 6 are with respect to “small quantity and commercial quantity”. Note 2 of the Notification dated 19-10-2001 specifically provides that quantity shown against the respective drugs listed in the Table also apply to the preparations of the drug and the preparations of substances of Note 1. As per Note 1, the small quantity and commercial quantity given against the respective drugs listed in the Table apply to isomers ..., whenever existence of such substance is possible. Therefore, for the determination of “small quantity or the commercial quantity” with respect to narcotic drugs and psychotropic substance mentioned in Column 2 the quantity mentioned in Clauses 5 and 6 are required to be taken into consideration. However, in the case of mixture of the narcotic drugs/psychotropic drugs mentioned in Column 2 and any mixture or preparation that of with or without the neutral material of any of the drugs mentioned in Table, lesser of the small quantity between the quantities given against the respective narcotic drugs or psychotropic substances forming part of mixture and lesser of commercial quantity between the quantities given against the respective narcotic drugs or psychotropic substance forming part of the mixture is to be taken into consideration. As per

example, mixture of 100 gm is seized and the mixture is consisting of two different narcotic drugs and psychotropic substance with neutral material, one drug is heroin and another is methadone, lesser of commercial quantity between the quantities given against the aforesaid two respective narcotic drugs and psychotropic substance is required to be considered. For the purpose of determination of the “small quantity or commercial quantity”, in case of Entry 239 the entire weight of the mixture/drug by whatever named called weight of neutral material is also required to be considered subject to what is stated hereinabove. If the view taken by this Court in E. Micheal Raj [E. Micheal Raj v. Narcotics Control Bureau, (2008) 5 SCC 161 : (2008) 2 SCC (Cri) 558] is accepted, in that case, it would be adding something to the relevant provisions of the statute which is not there and/or it was never intended by the legislature.

10.3. *At this stage, it is required to be noted that illicit drugs are seldom sold in a pure form. They are almost always adulterated or cut with other substance. Caffeine is mixed with heroin, it causes that heroin to vaporise at a lower rate. That could allow users to take the drug faster and get a big punch sooner. Aspirin, crushed tablets, they could have enough powder to amend reversal doses of drugs. Take the example of heroin. It is known as powerful and illegal street drug and opiate derived from morphine. This drug can easily be “cut” with a variety of different substances. This means that drug dealer will add other drugs or non-intoxicating substances to the drug so that they can sell more of it at a lesser expense to themselves. Brown sugar/smack is usually made available in powder form. The substances is only about 20% heroin. The heroin is mixed with other substances like chalk powder, zinc oxide, because of these, impurities in the drug, brown sugar is cheaper but more dangerous. These are only few examples to show and demonstrate that even mixture of narcotic drugs or psychotropic substance is more dangerous. Therefore, what is harmful or injurious is the entire mixture/tablets with neutral substance and narcotic drugs or psychotropic substances. Therefore, if it is accepted that it is only the actual content by weight of offending drug which is relevant for the purpose of determining whether it*

would constitute small quantity or commercial quantity, in that case, the object and purpose of enactment of the NDPS Act would be frustrated. There may be few punishment for “commercial quantity”. Certainly that would not have been the intention of the legislature.

10.4. Even considering the definition of “manufacture”, “manufactured drug” and the “preparation” conjointly, the total weight of such “manufactured drug” or “preparation”, including the neutral material is required to be considered while determining small quantity or commercial quantity. If it is interpreted in such a manner, then and then only, the objects and purpose of the NDPS Act would be achieved. Any other intention to defeat the object and purpose of enactment of the NDPS Act viz. to the Act is deterrent.

10.5. The problem of drug addicts is international and the mafia is working throughout the world. It is a crime against the society and it has to be dealt with iron hands. Use of drugs by the young people in India has increased. The drugs are being used for weakening of the nation. During the British regime control was kept on the traffic of dangerous drugs by enforcing the Opium Act, 1857 the Opium Act, 1875 and the Dangerous Drugs Act, 1930. However, with the passage of time and the development in the field of illicit drug traffic and during abuse at national and international level, many deficiencies in the existing laws have come to notice. Therefore, in order to remove such deficiencies and difficulties, there was urgent need for the enactment of a comprehensive legislation on narcotic drugs and psychotropic substances, which led to enactment of the NDPS Act. As observed hereinabove, the Act is a special law and has a laudable purpose to serve and is intended to combat the menace otherwise bent upon destroying the public health and national health. The guilty must be in and the innocent ones must be out. The punishment part in drug trafficking is an important one but its preventive part is more important. Therefore, prevention of illicit traffic in the Narcotic Drugs and Psychotropic Substances Act, 1985 came to be introduced. The aim was to prevent illicit traffic rather than punish after the offence was committed. Therefore, the courts

will have to safeguard the life and liberty of the innocent persons. Therefore, the provisions of the NDPS Act are required to be interpreted keeping in mind the object and purpose of the NDPS Act; impact on the society as a whole and the Act is required to be interpreted literally and not liberally which may ultimately frustrate the object, purpose and Preamble of the Act. Therefore, the interpretation of the relevant provisions of the statute canvassed on behalf of the accused and the intervener that quantity of neutral substance(s) is not to be taken into consideration and it is only actual content of the weight of the offending drug, which is relevant for the purpose of determining whether it would constitute “small quantity or commercial quantity”, cannot be accepted.”

9. Although, primarily, in the facts of the said case, the Supreme Court was considering the question of mixture of contraband substance with neutral material and the manner in which commercial quantity was to be determined, applying the position of law to the facts of the present case, it becomes clear even when two contraband substances are mixed, the said position of law would apply. A perusal of entry 239 in the table forming part of notification issued by the competent authority on 19th October 2001, under the provisions of the NDPS Act, shows that it pertains to mixture of contraband substances and in the context of commercial quantity, the following note is appended :

“lesser of commercial quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of mixture.”

10. A proper application of the said entry and the note, as also the position of law clarified by the Supreme Court in the case of ***Hira Singh & Anr.*** (supra) would show that in the present case,

since the total mixture recovered is 60gms and the commercial quantity for both the contraband is 50 gms, the contention raised on behalf of the applicant cannot be accepted.

11. But, this Court finds substance in the other contentions raised on behalf of the applicant. Any discrepancy in such cases giving rise to suspicion must inure to the benefit of the accused.

12. In this context, presence of C.R. number on the label pasted to the envelope, in which the seized contraband was collected, *prima facie* does raise suspicion in the present case. The seizure *panchanama* was executed on 23rd May 2023 between 18:10 hours and 19:20 hours. The FIR i.e. C.R. No. 0252 of 2023 was registered on 23rd May 2023 at 21:14 hours. Therefore, there was no question of the C.R. number being mentioned on the label pasted on the envelope, when the *panchanama* was executed, prior in point of time, when the *panchas*, the applicant and PSI – Jadhav signed. This Court while granting bail to the accused in the case of ***Zaid Zahir Rana v/s. The State of Maharashtra*** (order dated 30th October 2023 passed in Criminal Bail Application No. 1486 of 2023), did take into consideration such discrepancy, while granting bail to the accused. Thus, the said contention raised on behalf of the applicant does have merit.

13. A perusal of the seizure *panchanama* dated 23rd May 2023 shows that 60 gms of contraband was recovered and seized. But, inventory *panchanama* dated 16th June 2023, executed before the

Magistrate during the certification procedure under Section 52A of the NDPS Act, records that 75 gms of the contraband was found. This discrepancy also creates suspicion about the nature and extent of the contraband recovered and sent for analysis to the laboratory.

14. The seizure *panchanama* dated 23rd May 2023 records that off-white powder believed to be MD was recovered. The inventory *panchanama* does not record the colour of the contraband substance. But, the chemical examination report of the laboratory records that brownish crystalline powder was received and it was tested. *Prima facie*, there appears to be discrepancy in such material on the aspect as to how off-white powder seized during execution of seizure *panchanama* dated 23rd May 2023 became brown in colour. Suspicion is also created on the basis that seized powder became crystalline powder, by the time it reached the laboratory.

15. This Court is of the opinion that considering the aforementioned discrepancies pointed out on behalf of the applicant, on the basis of the very material upon which the prosecution is placing reliance, sufficient grounds are made out to show a *prima facie* case in favour of the applicant, as regards the first limb of the stringent twin test contemplated under Section 37 of the NDPS Act being satisfied. There is no material to show as to why the second limb is also not satisfied by the applicant. Thus, the applicant having cross the two hurdles under the said

provision, a case is made out for granting bail.

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 Special Case No. 1499 of 2023 pending before the Special NDPS Court, Mumbai, arising from FIR No.0252 of 2023 registered at Byculla Police Station, Mumbai, on furnishing P.R. Bond of ₹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 Narcotic Control Burea, Mumbai, on first Monday of each month between 10:00 a.m. and 12:00 noon, till the pendency of the trial.
- (c) The applicant shall attend the trial Court on each and every date, unless specifically exempted by the trial Court.
- (d) 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.
- (e) 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.

17. 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.

18. The application is disposed of.

MANISH PITALE, J.