

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

BAIL APPLICATION NO. 2851 OF 2024

Sohil Shamim Momin @ Sohel Kanya ...Applicant
Versus
The State of Maharashtra ...Respondent

Mr. Bablu Shaikh, for the Applicant.
Mr. Avinash Naik, APP for the State – Respondent No.1.
Mr. Nagesh Chikane, Anti Narcotic Cell, Ghatkopar Unit,
Crime Branch, Mumbai.

CORAM: N. J. JAMADAR, J.
DATED: 19th SEPTEMBER, 2024

ORDER:-

1. Heard the learned Counsel for the parties.
2. The applicant, who is arraigned in NDPS Special Case No.875 of 2022 arising out of CR No.9 of 2022, Anti Narcotic Cell, Mumbai, for the offences punishable under Sections 20(c) 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 2nd February, 2022, an intimation was received at Anti Narcotic Cell, Ghatkopar Unit, that Wasim Nurujjama Khan was to come near Bainganwadi, Gowandi, Mumbai – 43 to deliver *charas*, a contraband substance, at 5.00 p.m. on

that day. After complying with the procedural requirements, the police mounted a surveillance. At about 5.10 p.m. a person whose features matched the description given by the informant came near Bhartiya Ekta Sangh public facilities. His movements appeared suspicious. He was accosted. He identified himself as Wasim Nurujjama Khan (A1). After apprising him of his right to be searched before the nearest Magistrate or Gazetted Officer under Section 50 of the NDPS Act, 1985, a search was conducted. In the black plastic bag which Wasim (A1) was carrying, another transparent plastic bag was found. It contained a rectangular slab. It had pungent smell. Upon testing, it turned out to be *charas*. It weighed 1 kg. 100 gms. The contraband substance was seized and labeled Exhibit-A.

4. Wasim (A1) disclosed that he had procured the contraband substance from the applicant and Juber Shaikh alias Laden (A3). The applicant was apprehended on 3rd February, 2022.

5. On 4th February, 2022, the applicant voluntarily made a disclosure statement to point out the place where he had concealed the contraband substance. The applicant allegedly led the police party to Cafe Nagori Gausiya near Hasin

Farhan Talkies, Bhiwandi. The applicant entered into the said hotel and took out a black plastic bag from the mezzanine floor of the bathroom. The said plastic bag contained a rectangular slab. It had pungent smell. Upon being tested, the said substance turned out to be *charas*. It weighed 1 kg. 200 gms. The said substance was seized and labeled Exhibit-B. Co-accused Juber (A3) was also apprehended. 200 gm. *charas* was allegedly recovered from Juber (A3). Post completion of investigation, charge-sheet has been lodged.

6. The applicant had preferred BA/2446/2023. By an order dated 18th March, 2024 the application was dismissed as withdrawn. As the applicant has been in custody since 3rd February, 2022, the learned Special Judge was requested to make an endeavour to complete the trial as expeditiously as possible.

7. Mr. Shaikh, the learned Counsel for the applicant, submitted that despite a direction for expeditious hearing, charge has yet not been framed. The applicant has been in custody for over two and half years. It is unlikely that the trial can be concluded within a reasonable period.

8. Mr. Shaikh further submitted that the prosecution case qua the applicant rests on the statement of the co-accused. No contraband substance was found on the person of the applicant. Nor the applicant was found in the company of Wasim (A1). Apart from the alleged disclosure made by Wasim (A1) there is no material to rope in the applicant alongwith Wasim (A1) by invoking Section 29 of the NDPS Act, 1985. The alleged recovery of the contraband at the instance of the applicant from Cafe Nagori Gausiya is not reliable as the applicant had no control over the said premises. There is no material to establish the nexus between the applicant and the said premises, to which a number of persons had access. Therefore, the applicant deserves to be enlarged on bail.

9. Mr. Naik, the learned APP, stoutly resisted the prayer for bail. It was submitted that a huge quantity of 1 kg. and 200 gms. *charas* was found at the instance of the applicant. The discovery under Section 27 of the Indian Evidence Act has been duly proved. In addition, there is material in the form of the CDR which indicates that the applicant was in touch with the co-accused. Therefore, the applicant having been found in possession of a commercial quantity of *charas* and criminal conspiracy having been *prima facie* made out, the

interdict contained in Section 37(1)(b)(ii) comes into play and the applicant cannot be enlarged on bail, submitted Mr. Naik.

10. As the applicant had withdrawn the first bail application, this Court would not have normally entertained the second application for bail. However, the fact that charge has yet not been framed though the applicant has been in custody since two and half years, warrants consideration of the prayer of the applicant for bail afresh. Long period of incarceration, without a prospect of completion of the trial within a reasonable period, impairs the right of an accused to have speedy trial, a facet of the right to life under Article 21 of the Constitution of India. By a series of judgments, it has been held that even the statutory restrictions in the matter of grant of bail like the one contained in Section 37 of the NDPS Act, 1985 melt down where the accused has undergone a long period of incarceration without a realistic prospect of expeditious conclusion of the trial.

11. Keeping the aforesaid principle in view, I deem it appropriate to delve into the merits of the matter. Evidently, the applicant came to be apprehended pursuant to disclosure made by Wasim (A1). It does not appear that the said disclosure was in the form of a discovery under Section 27 of

the Indian Evidence Act. On the contrary, it appears that the said disclosure was during the process of alleged search and seizure qua Wasim (A1). Thus, the admissibility of the said disclosure qua a co-accused, as a legal piece of evidence, appears debatable.

12. Secondly, it is not a case of seizure of the contraband substance from the possession of the applicant when he was allegedly arrested pursuant to the disclosure made by Wasim (A1). The prosecution case hinges upon the discovery allegedly made by the applicant leading to the recovery of the contraband substance from Cafe Nagori Gausiya at Bhiwandi. The question as to whether the applicant can be fastened with the said discovery leading to recovery of 1 kg. and 200 gms. *charas*, warrants adjudication at the trial. If the discovery is not established, the prosecution case qua the applicant would fall through.

13. At this juncture, it is necessary to note that *prima facie* the alleged recovery of contraband substance was effected from the mezzanine floor of the bathroom of Cafe Nagori Gausiya at Bhiwandi. The prosecution alleges the applicant led the police party to the said place and took out the bag containing the contraband substance from the bathroom of

the inner room of the said Cafe. Firstly, the said place does not find mention in the preceding disclosure statement allegedly made by the applicant and recorded in the memorandum. Secondly, whether the applicant had the domain over the said place so as to fasten the discovery would warrant determination at the trial.

14. In the seizure-memo it is recorded that one Mohammed Junaid Rauf Shah was present at the said Cafe and informed the police that the applicant used to frequently visit the said Cafe. *Prima facie* it appears that a number of persons had access to the said premises wherefrom the contraband substance was allegedly recovered. Secondly, it does not appear that the Investigating Officer has recorded the statement of Mohammed Junaid Rauf Shah or any other witnesses to establish the necessary nexus between the applicant and the place wherefrom the said contraband substance was recovered. Can the applicant be fastened with the liability on the premise that it was the applicant alone who had stored the contraband substance at the said place would be the pivotal question for adjudication at the trial? *Prima facie*, the discovery appears to be fraught with infirmities.

15. The prosecution has alleged that the applicant was in touch with Wasim (A1) and has pressed into service the CDR, yet, it is imperative to note that the sim cards stood in the names of the witnesses who have stated that they had permitted use of the sim cards by the applicant and co-accused. That would be again a matter for trial.

16. Furthermore, it appears that the applicant has no antecedents of an offence punishable under NDPS Act, 1985, though two crimes have been registered against the applicant for theft in the year 2011 and 2015. Thus, the Court may justifiably draw an inference that the accused may not indulge in the offences punishable under NDPS Act, 1985, if released on bail.

17. The aforesaid factors coupled with the period of incarceration and bleak possibility of conclusion of trial within a reasonable period persuade the Court to exercise the discretion in favour of the applicant.

18. Hence, the following order:

: O R D E R :

- (i) Sohil Shamim Momin @ Sohel Kanya, the applicant, be released on bail in NDPS Special Case No.875 of 2022 arising out of CR No.9 of 2022, Anti Narcotic

Cell, Mumbai, on furnishing a P.R. Bond of Rs.1,00,000/- with one or more sureties in the like amount to the satisfaction of the learned Special Judge.

- (ii) The applicant shall mark his presence at the Anti Narcotic Cell, Mumbai, on the first Monday of every month between 10.00 a.m. to 12.00 noon for the period of two years or till conclusion of the trial, whichever is earlier.
- (iii) 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.
- (iv) On being released on bail, the applicant shall furnish his contact number(s) and residential address to the investigating officer and shall keep him updated, in case there is any change.
- (v) The applicant shall not indulge in identical activities for which he has been arraigned in this case.
- (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 co-accused and the trial Court shall not be influenced by any of the observations made hereinabove.

Application stands disposed.

[N. J. JAMADAR, J.]