

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION NO.2879 OF 2024

BHALCHANDRA
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Shabbir @ Aiba Abdul Aziz Memon ...Applicant
Versus
The State of Maharashtra ...Respondent

Mr. Aniket Vagal a/w. Ms. Savvy Kolhekar, Advocates, for the Applicant.
Ms. Rajeshree V. Newton, APP, for the Respondent-State.
Mr. H.K. Nagare, API, Indira Nagar Police Station, Nashik City, present.

CORAM: MADHAV J. JAMDAR, J.
DATED : 20th August 2024

PC:-

1. Heard Mr. Vagal, learned Counsel for the Applicant and Ms. Newton, learned APP for the Respondent-State.
2. This regular Bail Application is preferred under Section 439 of the *Code of Criminal Procedure, 1973*. The relevant details are as follows:-

1.	C. R. No.	268 of 2023
2.	Date of registration of F.I.R.	05/10/2023
3.	Name of Police Station	Indira Nagar, Nashik City.

4.	Section/s invoked	8(C),20(B), 22(C) and 29 of the N.D.P.S. Act, 1985
5.	Date of incident	05/10/2023
6.	Date of arrest	27/10/2023
7.	Date of filing of Charge-sheet	30/03/2024

3. The prosecution case is set out in paragraph No.2 of the Order dated 9th May 2024 passed by the learned Additional Sessions Judge-8, Nashik. The said paragraph No.2 reads as under:

*“2. It is alleged by the informant Ranjan Punjaji Bendale that on 5.10.2023 at Sadik Nagar, Wadala Gaon, near a ground behind Mhada building inside tin shed, the police officer i.e. informant and other staff **arrested accused Wasim Rafiq Shaikh and Nasrin Imtiyaz Shaikh. Police found 54.5 gram of Mephedrone and 1.288 K.G. of Ganja from the aforesaid accused. The value of aforesaid contraband muddemal Rs.1,89,260/-.** Hence, informant brought the accused at police station and lodged the report. On that basis C.R. No. 268/23 registered against the applicant and others at Indira Nagar Police Station.”*

(Emphasis added)

4. There are total 12 Accused persons. Accused Nos. 1 to 3 and 5 are in custody and Accused Nos. 6 to 12 are absconding. The present Applicant is Accused No.5. The Accused No.4 has been

granted bail by this Court by Order dated 19th July 2024 passed in Criminal Bail Application No. 2489 of 2024.

5. As far as the role of the present Applicant is concerned, the same is set out in paragraph No.5 of the Order dated 9th May 2024 passed by the learned Additional Sessions Judge-8, Nashik. The relevant portion of said paragraph No.5 reads as under:

*“5. From the submission of both sides at length and gone through record, it appears from accused involved in C.R. No.I-268 of 2023 registered with respondent/Indira Nagar Police Station punishable under Sections 8(c), 20(b), 22(c) and 29 of N.D.P.S. Act. It appears from reply vide **Exh. 5 ground no.2** that, in investigation it is found accused No.4- Salman Sakil Phalke brought Mephedrone (MD) for sale from accused No.5 -Shabbir i.e. the present Applicant and the same handed over to accused No.3- Imtiyaz Umar Shaikh. This itself shows direct connection / participation of the applicant in the present crime.”*

(Emphasis added)

6. Mr. Vagal, learned Counsel for the Applicant submitted that the role alleged against the present Applicant is that he handed over/sold contraband articles (Mephedrone and Ganja) to Accused No.4-Salman Shakeel Ahmed Falke who in turn later on handed over the same to Accused No.3-Imtiyaz Umar Shaikh. He submitted that as per the prosecution case, there are direct links amongst co-

Accused persons for the purpose of selling contraband material. The contraband items seized is 54.5 grams of Mephedrone (MD) along with 1 kg and 288 gms. of Ganja. Certainly, the contraband item Mephedrone (MD) of 54.5 grams is of commercial quantity.

7. It is the submission of Mr. Vagal, learned Counsel appearing for the Applicant that the Applicant was arrested on 27th October 2023. The Charge-sheet was filed on 30th March 2024. He submitted that as far as the present Applicant is concerned, the only material against him is that he called Accused No.4 on his one cell phone for about 65 times and on another cell phone for about 109 times. He submitted that except these call details there is no material whatsoever against the present Applicant. He relied on a decision of this Court in *Saddam Hussain Qureshi vs. Union of India*.¹ and more particularly on paragraph Nos. 11 and 12 of the same. He also relied on the decision of Gujarat High Court in *Yash Jayeshbhai Champaklal Shah vs. State of Gujarat*² and emphasized paragraph No.5 of the same. He also relied on the decision of the Supreme Court in *Bharat Chaudhary vs. Union of India*³ and more

1 2024 SCC OnLine Bom 1096

2 2022 SCC OnLine Guj 271

3 (2021) 20 SCC 50

particularly on paragraph Nos.13 and 14 thereof. He submitted that there are no other antecedents.

8. On the other hand, Ms. Newton, learned APP for the Respondent-State strongly opposed the Bail Application. She pointed out various contentions raised in affidavit-in-reply dated 30th July 2024 of Hemant K. Nagare, Assistant Police Inspector, NDPS Cell, Crime Branch, Nashik City. She more particularly relied on paragraph No.14 of the said affidavit-in-reply. She submitted that the material on record clearly shows that the present Applicant was in constant contact with Accused No.4. She therefore, submitted that the involvement of the Applicant in the alleged offence is made out. After taking instructions, she submitted that the Applicant has no criminal antecedents.

9. Before considering the rival contentions, as the offence is under *Narcotic Drugs and Psychotropic Substances Act, 1985* ("NDPS Act"), it is necessary to set out Section 37 of the NDPS Act, wherein conditions to be mandatorily complied before releasing an Accused on bail, are set out. Section 37 of the NDPS Act reads as under:

“37. Offences to be cognizable and non-bailable.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.”

(Emphasis added)

Thus, as per Section 37 of the NDPS Act, following requirements are mandatorily to be complied with before releasing an Accused on bail:

(i) The Public Prosecutor is to be given an opportunity to oppose the application seeking bail;

(ii) Where the Public Prosecutor opposes the application:-

(a) The court is required to record satisfaction that there are reasonable grounds for believing that the Applicant is not guilty of such offence;

(b) The Court is required to record satisfaction that the Applicant is not likely to commit any offence while on bail.

10. In the present case, Ms. Newton, learned APP has filed Affidavit-in-reply of Hemant K. Nagare, Assistant Police Inspector, NDPS Cell, Crime Branch, Nashik City, and she has opposed the Bail Application by raising several contentions. Therefore, the first requirement is complied with.

11. Thus, what is required to be considered is that whether this Court is satisfied that there are reasonable grounds for believing that the Applicant is not guilty of such offence and that he is not likely to commit any offence while on bail.

12. In the present case, the only material against the present Applicant is that he was in constant telephonic contact with co-

Accused namely Accused No.4. The relevant paragraph No.14 of the said affidavit-in-reply dated 30th July 2024 of Hemant K. Nagare, Asstt. Police Inspector, NDPS Cell, Crime Branch, Nashik City reads as under:

“14. I say that during the course of investigation, the investigating agency obtained Call Details Record (C.D.R.) of the present Applicant/Accused hereinabove. I further say that it revealed from the said CDR Report that there were frequent and repetitive calls between the present Applicant/Accused and Orig. accused No.4 i.e. Salman Shakil Ahmad Falke. I further say that it also revealed from the aforesaid C.D.R. that the present Applicant/ Accused from his mobile No.9323695610 had 65 calls with Orig. accused No.4-Salman Shakil Ahmad Falke on his mobile No.7738487400 and 109 calls with another mobile No.9594444910. Hereto annexed and marked as Exhibit F is the copy of the C.D.R. Report.”

(Emphasis added)

13. As the only material on record against the Applicant is that the Applicant was in constant contact with Accused No.4, Mr. Vagal, learned Counsel appearing for the Applicant has relied on Paragraph No.5 of the decision in *Yash Shah* (supra), which reads as under:

“5. Having heard learned advocates for the appearing parties, it emerges on record that the applicant is not found in possession of any

contraband article. Over and above that, the call data records may reveal that in an around the time of incident, he was in contact with the co-accused who were found in possession of contraband. Since there is no recording of conversation in between the accused, mere contacts with the co accused who were found in possession cannot be treated to be a corroborative material in absence of substantive material found against the accused. However, screenshot of one of the whatsapp chat in between the co-accused shown to the Court, there is hardly anything which connects the applicant with the present offence or even asserting that he ordered for the same which were to be delivered by the accused found in possession of contraband. In absence of any other material, which is still to be retrieved from the devices of the mobile phone and information thereon which is still awaited, as considered by the Supreme Court in the case of Bharat Chaudhary (Supra) said material cannot be considered to be a sufficient material to establish any live link with the co-accused who were found in the possession of contraband.”

(Emphasis added)

Thus, in the case before Gujarat High Court, the call data records revealed that the Accused was in contact with the co-accused who were found in possession of contraband in and around the time of the incident. In the said decision of Gujarat High Court, it has been held that, since there is no recording of conversation between the Accused, mere telephonic contact with the co-Accused, who were found in possession of contrabands cannot be treated as

corroborative material in absence of substantive material found against the Accused. The present case is even better than the facts as noted in the decision of the learned Single Judge of the Gujarat High Court. In this particular case, it is required to be noted that the contraband was found in the possession of Accused Nos. 1 and 2 and there is no material on record to show that the present Applicant had established contact with Accused Nos. 1 and 2 in any manner whatsoever. The material on record shows that the present Applicant had frequently contacted Accused No.4 on cell phone.

14. Mr. Vagal, learned Counsel appearing for the Applicant has also relied on paragraph Nos. 13 and 14 in *Bharat Chaudhary* (supra). The said paragraph Nos.13 and 14 read as under:

“13. In the absence of any clarity so far on the quantitative analysis of the samples, the prosecution cannot be heard to state at this preliminary stage that the petitioners have been found to be in possession of commercial quantity of psychotropic substances as contemplated under the NDPS Act. Further, a large number of the tablets that have been seized by DRI admittedly contain herbs/medicines meant to enhance male potency and they do not attract the provisions of the NDPS Act. Most importantly, none of the tablets were seized by the prosecution during the course of the

search conducted, either at the office or at the residence of A-4 at Jaipur, on 16-3-2020. Reliance on printouts of WhatsApp messages downloaded from the mobile phone and devices seized from the office premises of A-4 cannot be treated at this stage as sufficient material to establish a live link between him and A-1 to A-3, when even as per the prosecution, scientific reports in respect of the said devices is still awaited.

14. In the absence of any psychotropic substance found in the conscious possession of A-4, we are of the opinion that mere reliance on the statement made by A-1 to A-3 under Section 67 of the NDPS Act is too tenuous a ground to sustain the impugned order dated 15-7-2021 [Union of India v. Bharat Chaudhary, 2021 SCC OnLine Mad 6554] . This is all the more so when such a reliance runs contrary to the ruling in Tofan Singh [Tofan Singh v. State of T.N., (2021) 4 SCC 1 : (2021) 2 SCC (Cri) 246] . The impugned order [Union of India v. Bharat Chaudhary, 2021 SCC OnLine Mad 6554] qua A-4 is, accordingly, quashed and set aside and the order dated 2-11-2020 passed by the learned Special Judge, EC & NDPS cases, is restored. As for Raja Chandrasekharan (A-1), since the charge-sheet has already been filed and by now the said accused has remained in custody for over a period of two years, it is deemed appropriate to release him on bail, subject to the satisfaction of the trial court.”

(Emphasis added)

The Supreme Court has also observed that only sending some WhatsApp message which have been later downloaded from the cellular phone and devices seized from the Accused cannot be

treated as sufficient material to establish a live link between the Accused persons.

15. In this particular case, admittedly the contraband was found in possession of Accused Nos.1 and 2. There is no material to show that the Applicant was in contact with Accused Nos.1 and 2. As per the prosecution case, the said contraband material was purchased by the Accused Nos.1 and 2 from Accused No.3- Imtiaz Umar Shaikh and Accused No.3 had purchased the same from Accused No.4 – Salman Shakeel Ahmed Falke and the present Applicant - Accused No.5 has purchased the same from absconding Accused. Thus, except the material in the form of Call Details Record (C.D.R.) showing that the present Applicant i.e. Accused No.5 had called on number of occasions to Accused No. 4, there is no other material whatsoever against the present Applicant. Thus, there are reasonable grounds to believe that the Applicant was not involved in the said offence.

16. It is an admitted position that there are no other antecedents against the Applicant. Therefore, there is no material on record to

hold that the Applicant is likely to commit any offence while on bail.

17. Accordingly, the Applicant can be enlarged on bail by imposing stringent conditions.

18. In view thereof, the following order:-

ORDER

- (a) The Applicant - Shabbir @ Aiba Abdul Aziz Memon be released on bail in connection with C.R. No.268 of 2023 registered with the Indira Nagar Police Station, Nashik on his furnishing PR. bond of Rs.1,00,000/- with one or two local solvent sureties in the like amount.
- (b) On being released on bail, the Applicant shall furnish his cell phone number and residential address to the Investigating Officer and shall keep the same updated, in case of any change thereto.
- (c) The Applicant shall report to the Indira Nagar Police Station, Nashik once every week, on every Sunday

between 11.00 a.m. and 1.00 p.m. till the conclusion of the trial.

- (d) 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 such a person from disclosing the facts to the Court or to any Police personnel.
- (e) The Applicant shall not tamper with the prosecution evidence and shall not contact or influence the Complainant or any witness in any manner.
- (f) The Applicant shall attend the trial regularly. The Applicant shall co-operate with the Trial Court and shall not seek unnecessary adjournments thereat.
- (g) The Applicant shall surrender his passport, if any, to the Investigating Officer.

19. The Bail Application is disposed of accordingly.

20. It is clarified that the Trial Court shall decide the case on its merits, uninfluenced by the observations made in this order.

[MADHAV J. JAMDAR, J.]