



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (BA) NO. 1058 OF 2023

Tofik Khan Bhuru Khan V/s State of Maharashtra

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Mr. M.N. Ali, counsel for the applicant.

Mr. Joshi, APP for the non-applicant/State.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : 19/03/2024.

1. Heard learned counsel for the applicant Mr. M.N. Ali for the applicant and learned Additional Public Prosecutor for the State.

2. By this application under Section 439 of the Code of Criminal Procedure, 1973, the applicant seek regular bail, in connection with Crime No.341/2019 registered with Police Station Washim City, District Washim for the offence punishable under Sections 17, 22, 29 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (for short 'the NDPS Act'), the applicant is arrested on 10/10/2019 and since then he is behind bar.

3. As per the contention of the learned counsel for the applicant the crime is registered on the basis of report lodged by Mr. Ajaykumar Vitthalrao Wadhve, Police Official of Local Crime Branch, who received the secrete information that one person namely Taufiqkhan and one Bilalkhan are selling the Ganja and Afim to the truck drivers on the road, immediately

he along with other police officials conducted a raid and took both the persons in custody. On the basis of information received from the present applicant, it revealed that one Pratapsingh Butasingh Hundal, who is the proprietor of Nashik Calcutta Dhaba on Karanja Lad to Shelubazar Road, is in possession of the said Afim and Afu Powder for its sale and he sales to various persons. Accordingly, the police conducted the raid and apprehended the said Pratapsingh Butasingh Hundal also. The police found total 367 kg 73 grams of Opium Powder kept in 18 plastic bags and one bag containing Opium flowers, 430 grams of Opium and other articles, such as mobile handsets, mixer etc.. The total seized contraband materials is about Rs.1,85,32,000/- (Rs. One Crore Eighty-Five Lacs and Thirty Two Thousand). It is alleged that the present applicant and one co-accused were found in possession of small bottles containing opium powder. After following the due procedure, the applicants are arrested the contraband articles, seized and sealed by the raiding party members. The samples are obtained in the presence of Panchas and forwarded to the Chemical Analyser. The inventory was also conducted and after completion of the investigation, the charge-sheet is filed against the present applicant.

4. Learned counsel for the applicant submitted that the applicant is behind bar since the date of his arrest i.e. from 10/10/2019, there is no progress in the trial. He submitted that earlier bail application was rejected, and therefore, the said order was challenged by the applicant before the Hon'ble Apex Court and Hon'ble Apex Court has granted liberty to the

present applicant, considering since 2019, the applicant is behind bar and there is no progress in the trial. The rigor under Section 37 is now not attracted in view of the judgment of the Hon'ble Apex Court in the case of ***Mohd. Muslim @ Husain Vs State in Special Leave Petition (Crl.) No(s) 915 of 2023 decided on 28/03/2023***. He further submitted that as far as the merit of the matter is concerned, non-commercial quantity is seized from the present applicant. Therefore, on that ground also, the rigor under Section 37 will not come into the way of the present applicant to release him on bail. He submitted that large quantity is recovered from the co-accused. Considering all these facts, the applicant be released on bail.

5. Learned Additional Public Prosecutor strongly opposed the said application on the ground that though the Hon'ble Apex Court has granted the liberty to the present applicant, but it is specifically mentioned in the order that the application is to be considered on its own merit. He also invited my attention towards the earlier order passed by this Court in Criminal Application (BA) No. 293/2020, wherein this Court has observed that investigation has revealed that the applicant is a member of a syndicate involved in drug peddling and observing the same, the application of the applicant considering the rigor under Section 37 of the NDPS Act is rejected.

6. He submitted that there is a progress in the trial. Now, six witnesses are already examined. The seven witness is also in the talk to depose on behalf of the prosecution. Thus,

contention of the learned counsel of the applicant that, there is no progress in the trial is not correct. In view of that, the application deserves to be rejected.

7. Having heard learned counsel for the applicant and learned Additional Public Prosecutor for the State, perused the investigation papers. From the investigation papers, it reveals that the local crime branch has received the secrete information that two persons are selling the Afim and Afu powder on the road to the truck owners, immediately, the raid was conducted and the present applicant was taken into custody. After complying Section 50, search was conducted and during there search, some quantity was seized. On inquiry with them, it revealed to the investigation agency that they have procured the said contraband articles from one Pratapsingh Butasingh Hundal who is proprietor of Nashik Calcutta Dhaba on Karanja Lad to Shelubazar Road. The present applicant has shown the said stock, and during search of the said Dhaba, 367 Kg. 73 grams Opium Powder kept in 18 plastic bags and one bag containing Opium flowers, 430 grams of Opium and other articles such as mobile handsets, mixer etc, were seized. The contraband articles which is seized of worth of Rs. 1,85,32,000/- (One Crore Eighty Five Lacs and Thirty Two thousand). The samples are obtained by the investigation officer in presence of the panchas. Immediately, the said samples are forwarded to the Chemical Analyser along with the forwarding letter. The contraband articles are also produced before the Magistrate for inventory. The inventory report is also before the Court, which also discloses

the same description, and after completion of the investigation, the charge-sheet is submitted against the present applicant.

8. During the investigation, the applicant preferred the appeal before the District and Additional Sessions Judge which came to be rejected and therefore, the applicant had preferred criminal application (BA) No. 293/2020. After considering the investigation papers, this Court observed that the applicant is charged under Section 29 of the NDPS Act which makes abatement and criminal conspiracy punishable provided for the offence. The investigation has revealed that the applicant is a member of the syndicate involved in the drug peddling. In this view of the matter, the alleged inconsistencies in weight of the contraband seized emphasized by the learned counsel do not take case of the applicant any further. It is further observed that there is more than ample material on record to connect the applicant with the crime. The first test envisaged under Section 37 of the NDPS Act is not satisfied and the application was rejected.

9. This order was challenged by the applicant before the Hon'ble Apex Court in petition for Special Leave to Appeal (Cri.) No. 2873/2022, the Hon'ble Apex Court observed thus-

“However, taking into consideration the fact that the petitioner is reported to be in custody since 10/10/2019, we direct the concerned trial Court to expedite the trial and conclude the same within a period of one year from the date of communication of a copy of this order.

It is further held that in case the trial is not concluded within the period as stipulated above, the petitioner would be at liberty to file a fresh bail application before learned trial Court, which would be decided on its own merit and in accordance with law”.

10. In view of the order passed by the Hon’ble Apex Court, the trial was not concluded and therefore, again application is filed by the applicant before the Sessions Court which came to be rejected. Being aggrieved with the same, present application is preferred by the applicant for grant of bail. Admittedly, liberty is granted by the Hon’ble Apex Court to the present applicant at the same time, the trial Court was directed to consider the bail application on its own merits and in accordance with law.

11. The first limb of submission of the learned counsel for the applicant is that there is no progress in the trial. Therefore, the report of the Adhoc District Judge-1 and Additional Sessions Judge, Mangrulpir, District- Washim was called, which shows that six witnesses are recorded. The deposition of P.W.7 is in progress and case is pending for further chief and cross-examination of PW-7. It also reveals from the record that recently the case was transferred to his Court on 20/02/2024. Thus, contention of the learned counsel for the applicant that there is no substantial progress in the trial is not substantiated by the report, it shows that there is substantial progress in the trial.

12. Second limb of the submission of the learned counsel for the applicant is that, in view of the observation of the Hon'ble Apex Court in the case of **Mohd. Muslim @ Hussain Vs State (NCT of Delhi)** (referred supra), wherein the Hon'ble Apex Court has considered the Section 37 and held that -

“On account of the strict language of the said provision very few persons accused of certain offences under the Act could secure bail. Now to refuse bail on the one hand and to delay trial of cases on the other hand is clearly unfair and unreasonable and contrary to the spirit of Section 36(1) of the Act, Section 309 of the Code and Articles 14, 19 and 21 of the Constitution. We are conscious of the statutory provision finding place in Section 37 of the Act prescribing the conditions which have to be satisfied before a person accused of an offence under the Act can be released. Indeed we have adverted to this section in the earlier part of the judgment. We have also kept in mind the interpretation placed on a similar provision in Section 20 of the TADA Act by the Constitution Bench in **Kartar Singh v. State of Punjab [(1994) 3 SCC 569]**. Despite this provision, we have directed as above mainly at the call of Article 21 as the right to speedy trial may even require in some cases quashing of a criminal proceeding altogether, as held by a Constitution Bench of this Court in **A.R. Antulay v. R.S. Nayak [(1992) 1 SCC 225]**, release on bail, which can be taken to be embedded in the right of

speedy trial, may, in some cases be the demand of Article 21. As we have not felt inclined to accept the extreme submission of quashing the proceedings and setting free the accused whose trials have been delayed beyond reasonable time for reasons already alluded to, we have felt that deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21. Of course, some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21, which has to be telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness in procedural matters.”

13. In view of the observations, if the facts of the cited case are taken into consideration it shows that in the said case, the then the applicant was arrested on 28/09/2015, on the basis of secrete information, the facts further shows that the recovery of Ganja was made on 28/09/2015 from the other four co-accused. The applicant was arrested at the behest of one of the co-accused, and the prosecution has relied the

statement as well as the confessional statement of the applicant.

14. The observation of the Hon'ble Apex Court for specifically shows that- "as we have not felt inclined to accept the extreme submission of quashing the proceedings and setting free the accused whose trials have been delayed beyond reasonable time for reasons already alluded to, we have felt that deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21. Of course, some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt."

15. Considering these observations, admittedly if the trial is delayed for unduly long period in the light of the same, this observation is by the Hon'ble Apex Court. In the present case, it is not that the trial is not proceed or there is no progress in the trial, but the report of the learned trial court shows that in view of the order passed by the Hon'ble Apex court there is some progress in the trial and in all six witnesses are already examined in between the case is transferred from one Court to other, and therefore, the trial could not be concluded. As observed earlier by this Court, that the involvement of the present applicant reveals in the abatement, moreover, the contraband articles are recovered from him. The investigation has revealed that the applicant is member of the syndicate involved in a drug peddling and therefore, the rigor

under Section 37 come into way. The requirement which requires to be satisfied for grant of bail, is the satisfaction contemplated regarding the accused being not guilty has to be placed on reasonable ground. Admittedly, the aspect of non-compliance of any provision can be considered at the time of trial. At this stage, when the court is concerned with question of granting or refusing bail, the same cannot be the sole consideration. However, consideration should be viewed in the light of rigor of Section 37 of the NDPS Act. In view of Section 37 of the NDPS Act, the bail can be granted if court is satisfied that reasonable grounds of believing that accused is guilty of offence that is likely to commit while on bail, the bail should be granted.

16. Thus, satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. Thus, recording of satisfaction on these aspect is sine quo non for grant of bail.

17. The Hon'ble Apex Court in the case of ***State of Kerla vs Rajesh [AIR 2020 SC 721]*** held that while exercising power under Section 37 of the NDPS Act, liberal

approach in the matter of bail under the NDPS Act is indeed uncalled for.

18. In the light of the well settled legal position, at this stage, there is a sufficient material on record to hold that applicant is involved in the crime, in view of rigor under Section 37 of the NDPS Act, I do not find any merits in the application, as far as the progress in the trial is concerned, the directions can be given to the trial to conclude the trial within three months. Accordingly, I proceed to pass the following order:

- a] In this view of the above, the application deserve to be rejected and the same is rejected.
- B] The trial Court in view of the directions given by the Hon'ble Apex Court shall expedite the trial and shall dispose of the trial within three months.

[URMILA JOSHI-PHALKE, J.]