

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 513 OF 2024

Taufiq Ayinde Oriyomi	.. Applicant
Versus	
State of Maharashtra	.. Respondent

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- Mr. Tabish Mooman a/w Mr. Shreerat Kamat & Ms. Puja Jadhav for Applicant
 - Ms. Mahalakshmi Ganapathy, APP for State
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CORAM : MILIND N. JADHAV, J.

DATE : MARCH 19, 2025

P. C.:

1. Heard Mr. Mooman, learned Advocate for Applicant and Ms. Ganapathy, learned APP for State.

2. Applicant - accused has filed the present Application for regular bail under Section 439 of the Code of Criminal Procedure, 1973 (for short, "**Cr.P.C.**") in connection with Crime No. 2/2023 registered with DCB CID, Unit VI Chembur for offences punishable under Sections 8(c) r/w Section 22(c) and 29 of the Narcotics and Psychotropic Substances Act, 1985 (for short "**NDPS Act**"). Applicant is a Nigerian citizen.

3. While dealing with the Bail Application No. 1269/2024 filed by the co-accused in the same crime, on 18.03.2025 this Court granted bail to the said co-accused. I deem it necessary to reproduce

paragraph Nos. 3, 4 and 5 of the said order hereinunder for considering the present Bail Application of Applicant who is also one of the co-accused in the same crime. Paragraph Nos. 3, 4 and 5 of the said order reads thus:-

"4 *Considering aforesaid dichotomy the benefit of doubt as also suspect as to the validation of the alleged contraband is required to be given to the Applicant. There are other grounds also which are mentioned in the Application which need not be gone into in view of the above transgression which is prima facie noticed by the Court.*

5. *Though it is argued by the prosecution that this is not a serious violation and not necessary to be considered at this prima facie stage, such submission however cannot be countenanced. Provision under Section 37 of the NDPS Act are stringent therefore there cannot be any dereliction, deviation much less prima facie contradiction in complying with the mandatory provisions by prosecution while search, seizure, confiscation, sampling, inventory, storage, forensic analysis, certification by Magistrate as contemplated by the provisions of Section 42 and 52A of the NDPS Act. The Supreme Court in the case of **Sarija Banu Alias Janarthani Alias Janani and Anr. vs. State through Inspector of Police**¹ while considering the violation of Section 42 and relevance thereof has held that compliance of Section 42 is mandatory and it is a relevant fact required to be considered while considering a Bail Application. In the present case, alleged contraband seized u/s 42 is in complete contradiction to the contraband sent for C.A. testing. Hence, Applicant deserves enlargement on bail.*

6. *Bail Application is allowed subject to the following terms and conditions:-*

- (i) *Applicant is directed to be released on bail on furnishing P.R. Bond in the sum of Rs.25,000/- with one or two sureties in the like amount;*
- (ii) *Before his actual release from jail, Applicant shall furnish his address where he proposes to reside after his release from jail to the concerned Police Station and also to the trial Court;*
- (iii) *After his release from jail, Applicant shall report to the Investigating Officer as and when called for;*
- (iv) *Applicant shall attend the trial Court on first Tuesday of every month between 11.00 a.m. and 01.00 p.m. to mark his presence. If the first Tuesday of the said month falls on a holiday and / or non Court working*

1 (2004) 12 SCC 266

day, the Applicant shall mark presence on the next working day;

- (v) Applicant shall co-operate with the conduct of trial and attend the trial Court on all dates unless specifically exempted and will not take any unnecessary adjournments, if he does so, it will entitle the prosecution to apply for cancellation of this order;*
- (vi) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;*
- (vii) Applicant shall not influence with any of the witnesses or tamper with the evidence in any manner; and*
- (viii) In case of any infraction of the above conditions and / or two consecutive defaults in marking his attendance before trial Court, it shall attract the provisions of Section 439(2) of Cr.PC. i.e. for cancellation of bail."*

4. Mr. Mooman would persuade the Court to consider the aforesaid grounds going to the root of the matter at the *prima facie* stage for grant of bail and pass an order on the ground of parity with other co-accused.

5. Ms. Ganapathy, learned APP has however persuaded the Court to consider certain vital and important submissions on the part of prosecution before passing any order. She would submit that the alleged contraband in the present case is Mephedrone (MD). She would submit that in the case of certain contrabands like Herion, LSD etc. the testkit is readily available with the prosecution for the purpose of testing the contraband where search and seizure operation is undertaken under the provisions of Sections 41, 42 and 43 of the NDPS Act from the accused persons. She would submit that in so far

as the present contraband is concerned, when it was confiscated and seized, it was a white powder which accused informed the prosecution was MD and it was so recorded in the seizure panchnama. She would submit that it is only on forensic analysis and after obtaining the CA report, it has been gathered that the said alleged contraband is Methamphetamine. She would fairly argue that undoubtedly the NDPS Act classifies the aforementioned two drug items under different specific entries namely Entry No. 238F and Entry No. 159 respectively but because of the exigency stated by her, the difficulty faced by the prosecution at the initial stage during the seizure in a given case sometime relates to the description and the identity of the alleged seized contraband being different from what is confiscated. She would persuade the Court to consider the fact that even otherwise, what has been confiscated is a contraband under the NDPS Act and therefore rigours of Section 37 would apply considering the commercial quantity of the alleged contraband which is seized. The difficulty expressed by the learned APP undoubtedly and *prima facie* appears to be genuine but on the flip side the provisions of NDPS Act are also required to be considered.

6. Section 37 of the NDPS Act lists down certain stringent provisions and in the case of its applicability to a given case, the prosecution is required to be heard and an opinion is required to be

formed by the Court that the Applicant is not guilty of the crime and that he will commit to the trial. The situation of the accused person when apprehended with commercial quantity of the alleged contraband under the NDPS Act becomes more difficult than in the case of an accused apprehended with intermediate quantity or smaller quantity for that matter. As far as the present case is concerned at the time of search and seizure of the alleged contraband, the testing kit for MD was not available. The procedure under the NDPS Act, *inter alia*, pertaining to seizure, confiscation, sampling, inventory, storage, forensic analysis, certification by Magistrate as contemplated by the provisions of Sections 42 and 52A of the NDPS Act read with Rules 8, 18(1) and (2) of the 2002 Rules² are *prima facie* mandatory provisions. Any dereliction or violation of the mandatory provisions will have to be viewed strictly by the Court considering that if the prosecution follows the provisions, the accused person does not get benefit of any dereliction and it affects his personal liberty while being incarcerated in prison pending trial.

7. The Supreme Court in the case of **Sarija Banu Alias Janarthani Alias Janani and Anr. vs. State through Inspector of Police (*supra*)** while considering the violation of Section 42 and relevance thereof has held that compliance of Section 42 is mandatory and it is a

2 Narcotic Drug and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2002

relevant fact required to be considered while considering a Bail Application.

8. Having adverted to the above provisions while releasing the Applicant in Bail Application No. 1269/2024 on bail by order dated 18.03.2025, the present Applicant before me who is arraigned as accused No. 3 will also have to be granted bail on parity. Needless to state that complicity of the Applicant shall be proved by the prosecution in the trial. Hence, Bail Application is allowed subject to the following terms and conditions:-

- (i) Applicant is directed to be released on bail on furnishing P.R. Bond in the sum of Rs. 25,000/- with one or two sureties in the like amount;
- (ii) Before his actual release from jail, Applicant shall furnish his address where he proposes to reside after his release from jail to the concerned Police Station and also to the trial Court;
- (iii) After his release from jail, Applicant shall report to the Investigating Officer as and when called for;
- (iv) Applicant shall attend the trial Court on first Tuesday of every month between 11.00 a.m. and 1.00 p.m. to mark his presence. If the first Tuesday of the said month falls on

a holiday and / or non Court working day, the Applicant shall mark presence on the next working day;

- (v) Applicant shall co-operate with the conduct of trial and attend the trial Court on all dates unless specifically exempted and will not take any unnecessary adjournments, if he does so, it will entitle the prosecution to apply for cancellation of this order;
- (vi) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court and deposit his passport, if any, with the concerned Investigating Officer;
- (vii) Applicant shall not influence with any of the witnesses or tamper with the evidence in any manner; and
- (viii) In case of any infraction of the above conditions and / or two consecutive defaults in marking his attendance before trial Court, it shall attract the provisions of Section 439(2) of Cr.P.C. i.e. for cancellation of bail;
- (ix) The concerned prosecuting Agency shall immediately communicate this order of grant of bail to the concerned Registration Officer appointed under Rule 3 of the Registration of Foreigners Rules, 1992 within the meaning of the Foreigners Act, 1946. This condition is added in

view of the decision of the Supreme Court in the case of
Frank Vitus v. Narcotics Control Bureau & Ors.³

9. It is clarified that the observations made in this order are limited for the purpose of granting Bail only and I have not made any observations on merits of the case. The trial shall be adjudicated on the strength of the evidence led and strictly on its own merits being uninfluenced with any of the *prima facie* observations made herein above in this order.

10. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

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3 Criminal Appeal No. 2814-2815 of 2024 decided on 06.01.2025