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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION NO. 597 OF 2024**

Abdul Wahid Abdul Razzak Memon

.. Applicant

Versus

The State of Maharashtra

.. Respondent

-
- Mr. Sherali Khan, Advocate for Applicant.
 - Ms. Shilpa K. Gajare – Dhumal, APP for State.
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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 02, 2024.

P.C.:

1. This Bail Application is filed under Section 439 of CrPC¹ seeking regular bail in connection with C.R. No. 183 of 2022 registered with Worli Unit of ANC for offences under Section 8(c), 22(c) and 29 of NDPS Act².

2. Prosecution case is that Applicant was intercepted near Nair Hospital, Agripada upon being observed behaving in a suspicious manner by Police Officials. Upon interception, he was found to be carrying a bag containing 267 grams of M.D. Applicant was arrested on 25.11.2022, he is incarcerated since 2 years and 4 months.

3. Learned Advocate Mr. Khan appears on behalf of Applicant. His arguments are based on three limbs.

3.1. He would submit that prosecution has not followed the

¹ The Code of Criminal Procedure, 1973.

² The Narcotic Drug and Psychotropic Substances Act, 1985.

procedure prescribed under Section 43 and Section 50 of the NDPS Act. He would elaborate on the point and would submit that appraisal letter given to Applicant under Section 50 does not bear the word 'Legal Right' and thus he asserts that Applicant was not apprised of his legal right to be searched before the nearest magistrate or gazetted officer as a matter of right. In support of this submission he would refer to and rely on the decision of *Dayalu Kashyap v. The State of Chattisgarh*³.

3.2. Next he would submit that mandatory procedure prescribed under Section 52A read with Rule 8 and 18(1) of NDPS (Seizure, Storage, Sampling and Disposal) Rules, 2022 has not been complied with by the prosecution during sampling and drawing of inventory. He would submit that Certificate issued by the Magistrate under Sub-section (3) of Section 52A of NDPS Act is not in the statutory format and in conformity with Form No. 5 as prescribed in the 2022 NDPS Rules.

3.3. He would lastly submit on the point of long incarceration of Applicant pending trial since he is in custody for a period of more than 2 years and 4 months in prison pending trial and the prohibiting of the trial commencing or even completing thereafter being a distinct impossibility . He would pray for the Application to be allowed.

3 [2022] 1 S.C.R. 1020

4. Ms. Gajare – Dhumal, learned APP would vehemently oppose grant of bail and submit that Applicant has been found to be in possession of commercial quantity of contraband and hence despite any transgression of procedure for seizure, the rigors of Section 37 would apply. She would rather submit that prosecution has complied with the statutory procedure. She would submit that even if the appraisal letter does not mention the word “legal right” it would be inconsequential to the prosecution case as it has substantially complied with the provisions of Section 43 in this case. She would submit that contraband seized being commercial quantity, provisions of Section 37 get attracted and in such a case Applicant has to satisfy the Court with regards to the twin conditions prescribed therein that he is *prima facie* not guilty of committing the offense. She would therefore pray for rejection of the Application.

4.1. Learned APP has placed on record the decision of the Supreme Court in the case of *The State of Punjab Vs. Baljinder Singh*⁴. I would like to deal with the findings and observations in this case at the outset itself. She would vehemently argue that provision of Section 50 of the NDPS Act have been *prima facie* explained by the Supreme Court in the said case but perusal of the said judgment shows that the said decision would inure to the benefit of the Applicant in the present case. The Supreme Court in the said decision in paragraph No.12 has

⁴ Criminal Appeal Nos.1565-66 of 2019 (@ out of SLP (Crl.) Nos.5659-5660/2019) decided on 15.10.2019.

held as under:-

“12. Section 50 of the Act affords protection to a person in matters concerning “personal search” and stipulates various safeguards. It is only upon fulfillment of and strict adherence to said requirements that the contraband recovered pursuant to “personal search” of a person can be relied upon as a circumstance against the person.”

4.2. From the above it is seen that Section 50 of the NDPS Act upholds protection to a person concerning personal search and stipulates various safeguards. Sub-section (1) of Section 50 of the NDPS Act states that the prosecution officer shall (emphasis supplied) if the person so requires take him to the nearest Gazetted Officer as mentioned in Section 42 of the NDPS Act or to the nearest Magistrate without any unnecessary delay. This is the reason why the appraisal form stating the legal right of the person to be searched is given in the appraisal form. It is only when such legal right is informed to the person to be searched, the statutory requirement stands fulfilled. This is what is emphasized in paragraph No.12 of the Supreme Court decision. The Supreme Court has categorically stated that it is only upon fulfillment of and strict adherence to the requirements stated in Section 50 of the NDPS Act that the contraband recovered pursuant to personal search of person can be relied upon as a circumstance against a person.

4.3. The submissions of learned APP that if there is any technical fault or inadequacy in the appraisal letter, the same can be ignored by

the Court as a mere technicality is unacceptable. It is repeatedly observed that the prosecutors in such NDPS matters are making similar submissions across the bar. There is a fallacy in such submissions. Reference is made in this regard to the decision of the Constitution Bench in the case of *State of Punjab Vs. Baldev Singh*⁵. In that decision Supreme Court in the context in which protection has been incorporated in Section 50 of the NDPS Act for the benefit of the person intended to be searched held that failure to inform the person concerned of his right as emanating from Sub-Section (1) of Section 50 of the NDPS Act may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

5. *Prima facie* perusal of record of the case before me shows that the Magistrate's Certificate appended at page No. 89 of the Application is not issued in the statutory Form No. 5 as prescribed under the NDPS Rules, 2022. Form 5 specifically lists the Application to be made by the Investigation Officer under Rules 8 and 18(1) of NDPS (Seizure, Storage, Sampling and Disposal) Rules, 2022 read with Section 52A(2) of the NDPS Act and the Certificate to be issued certifying the sampling and inventory done by the Magistrate. In the present case no such Application is even seen to be made to the Magistrate either. The Magistrate has appended his Certificate to the

⁵ (1999) 6 SCC 172.

Inventory Panchanama itself which is not in accordance with the provisions of the NDPS Rules, 2022.

6. The various Forms and proformas in the NDPS Act act as an excellent safeguard against oversight. A reading of the aforesaid NDPS Rules, 2022 make it clear that purpose of its enactment is to certify the correctness of the sampling and inventory of the seized contraband so prepared. However, if the mandatory requirements prescribed under the NDPS Rules, 2022 and the Act are not complied with and left to the NDPS Officers to prepare their own Certificate and Inventory, it would *prima facie* vitiate the prosecution case. It may also render the alleged document infructuous. In the present case non-compliance of the statutorily prescribed procedure leaves a lacuna which, *inter alia*, forms a reason for grant of bail. This is because of the application of the stringent rigors of Section 37 and if they are to be applied, then the prosecution case has to be in compliance with the Act and Rules. This Court fails to understand the argument of the prosecutors that this is a technical glitch and should be ignored and which the prosecution will prove appropriately in trial .

7. In addition to the aforementioned considerations it is also pertinent to note that Applicant has been in custody for over 2 years and 4 months pending trial. While special legislation such as NDPS Act rightly imposes a heightened burden on the Accused such as additional

conditions for grant of bail and higher term of imprisonment, it simultaneously implicitly obliges the prosecution and other concerned Authorities to justify the additional constraints on an Accused. Establishment of Special Courts under the NDPS Act is one of the provisions in the legislation itself which justifies the aforesaid constraints. It was with the intention that such special courts would hear and dispose matters emanating from offences under the NDPS Act expeditiously. Similarly the legislators, have constantly evolved the law and its supplementary rules with varied objectives. It is only fair on the part of the prosecution and authorities to understand the gravity and stakes of their allegations and back it with an investigation to the best of their abilities according to the prescribed procedure and Rules. Rigors of Section 37 cannot be argued in a lighter sense which I find is been done by all prosecutors at the bar in NDPS matters in a mechanical manner. Arguments of the learned APP in the present case are therefore in a vacuum. On one hand procedural lapse is *prima facie* evident, but prosecution wants to oppose the bail despite that. Nothing prevented the prosecution from following the Statute and Rules and the prescribed procedure under Sections 50 and 52A of the Act . Once Section 50 of the NDPS Act states that the person to be apprehended has to be apprised of his legal right, it must be done in that manner only. Prosecution cannot choose its own procedure and format of appraisal. Section 50 of the NDPS Act is the *sine qua non* of

the prosecution procedure when it apprehends a suspicious person and whom it desires to search on such suspicion and then arrest him. That apart, prosecution has absolutely no justification for the delay in trial. This issue is not addressed at all. All that is argued is that commercial quantity is recovered and enlarging the Accused person on bail would be a menace to the Society as there is every chance of him reoffending . It is true that the drug menace is to be curbed and every effort should be directed towards it, but can it be done by transgressing the right to speedy trial and the personal liberty of the under trial accused. Prosecution cannot blow hot and cold at the same time. Hence submissions made by Ms. Gajare are outrightly rejected.

8. In the landmark judgment of *Maneka Gandhi V Union of India*⁶, Supreme Court emphasized that the procedure established by law must be fair, just, and reasonable, and it cannot be arbitrary, oppressive, or unreasonable.

9. In the case of *Hussainara Khatoon Vs. Home Secy., State of Bihar*⁷ the Supreme Court held as under:-

“Now obviously procedure prescribed by law for depriving a person of liberty cannot be “reasonable, fair or just” unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as “reasonable, fair or just” and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of

6 1978 (1) SCC 248

7 (1980) 1 SCC 81

the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21.”

10. The Supreme Court in the case of ***Shaheen Welfare Association vs Union Of India***⁸ dealing with a Public Interest Litigation seeking relief for undertrial prisoners charged under the Terrorist and Disruptive Activities (Prevention) Act, 1987 due to gross delay in disposal of cases qua Article 21 of the Constitution of India held as under:-

“10. Bearing in mind the nature of the crime and the need to protect the society and the nation, TADA has prescribed in Section 20(8) stringent provisions for granting bail. Such stringent provisions can be justified looking to the nature of the crime, as was held in Kartar Singh’s case (supra), on the presumption that the trial of the accused will take place without undue delay. No one can justify gross delay in disposal of cases when undertrials perforce remain in jail, giving rise to possible situations that may justify invocation of Article 21.”

11. The Supreme Court in the case of ***Union of India v. K. A. Najeer***⁹ while commenting upon the possibility of early completion of trial and extended incarceration held as under:-

“18. Adverting to the case at hand, we are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have

⁸ 1996 SCC (2) 616

⁹ Criminal Appeal No. 98 of 2021

been left with no other option except to grant bail. An attempt has been made to strike a balance between the appellant's right to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the respondent's rights guaranteed under Part III of our Constitution have been well protected."

12. In the case of ***Supreme Court Legal Aid Committee (Representing undertrial prisoners) Vs. Union of India***¹⁰ the Supreme Court has held that:-

'17.We are conscious of the fact that the menace of drug trafficking has to be controlled by providing stringent punishments and those who indulge in such nefarious activities do not deserve any sympathy. But at the same time we cannot be oblivious to the fact that many innocent persons may also be languishing in jails if we recall to mind the percentage of acquittals. Since harsh punishments have been provided for under the Act, the percentage of disposals on plea of guilt is bound to be small; the State Government should, therefore, have realised the need for setting up sufficient number of Special Courts immediately after the amendment of the Act by Amendment Act 2 of 1989. Even after the Division Bench of the Bombay High Court refused to grant en bloc enlargement on bail on 1-2-1993 in Criminal Application No. 3480 of 1992 and B.D. Criminal No. 565 of 1992, no substantial improvement in the pendency is shown since new cases continue to pour in, and, therefore, a one-time exercise has become imperative to place the system on an even keel. We also recommend to the State Government to set up Review Committees headed by a Judicial Officer, preferably a retired High Court Judge, with one or two other members to review the cases of undertrials who have been in jail for long including those released under this order and to recommend to the State Government which of the cases deserve withdrawal. The State Government can then advise the Public Prosecutor to move the court for withdrawal of such cases. This will not only help reduce the pendency but will also increase the credibility of the prosecuting agency. After giving effect to this order the Special Court may consider giving priority to cases of those undertrials who continue in jail despite this order on account of their inability to furnish bail."

13. In the case of ***Badsha Sk. Vs. State of West Bengal***¹¹ the Supreme Court considering long incarceration of an undertrial-accused who was incarcerated for 2 years and 4 months granted him bail. The

¹⁰ (1995) 4 SCC 695

¹¹ 2023 SCC OnLine SC 1867

contraband in question was Codeine Phosphate, the commercial quantity of which is 1 kilograms when recovery of 100 bottles each of 100 ml. was allegedly made from the accused.

13.1. In the case of *Man Mandal and Anr. Vs. State of West Bengal*¹² the Supreme Court considering long incarceration of an undertrial-accused who was incarcerated for 2 years granted him bail despite being alleged to be in possession of commercial quantity of contraband.

14. In the case of *Ankur Chaudhary Vs. State of Madhya Pradesh*¹³ the Supreme Court considering long incarceration of an undertrial-accused granted him bail to an undertrial-accused who was incarcerated for about 2 years.

15. Considering the aforesaid *prima facie* observations in the facts of the present case and the decisions cited hereinabove, I am inclined to consider the Application of the Applicant for grant of Bail.

16. Bail Application is allowed on the following terms and conditions:-

- (i) Applicant is directed to be released on bail in CR No. 183 of 2022 registered with Worli Unit of ANC for offences punishable under Sections 8(c), 22(c) and 29 of the NDPS Act on furnishing PR. Bond in the sum of

¹² 2023 SCC OnLine SC 1868

¹³ Petition for Special Leave to Appeal (Cri) No. 4648 of 2024

Rs.25,000/- with one or two sureties in the like amount;

- (ii) Applicant is permitted to furnish provisional cash bail of Rs.25,000/- for his release immediately and before release file undertaking that he will provide one or two sureties in the like amount of Rs.25,000/- within a period of four weeks after his release which shall be accepted by the Trial Court. Applicant shall provide sureties as directed;
- (iii) Before his actual release from jail, Applicant shall file an undertaking/ Affidavit furnishing his address where he proposes to reside after his release from jail to the concerned Police Station and also to the trial Court;
- (iv) After his release from jail, Applicant shall report to the Investigating Officer as and when called for;
- (v) 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;
- (vi) 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;

(vii) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court, Applicant shall deposit his passport , if any , with the Trial Court within 2 weeks after his release from jail on bail;

(viii) Applicant shall not influence with any of the witnesses or tamper with the evidence in any manner; and

(ix) 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.

17. 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.

18. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]