

Ajay

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

BAIL APPLICATION NO. 911 OF 2024

Amey Sanjay Jadhav

.. Applicant

Versus

State of Maharashtra

.. Respondent

-
- Mr. Vinayak Pandit i./by Mr. Dilip Kamat, Advocates for Applicants.
 - Mr. H. J. Dedhia, APP for Respondent – State.
-

CORAM : MILIND N. JADHAV, J.

DATE : JANUARY 03, 2025.

JUDGMENT:

1. Heard Mr. Pandit, learned Advocate for Applicant and Mr. Dedhia, learned APP for Respondent – State. Perused the record.

2. Applicant seeks Bail in connection with C.R. No.14 of 2022 registered with the Wadala Police Station for offences punishable under Section 8(c), 20(c) and 29 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (for short “**NDPS Act**”). Applicant is incarcerated since 31.01.2022.

3. Briefly stated, case of prosecution is that on 31.01.2022, PSI Masalkar attached to Wadala Police Station received secret information that two persons would be carrying narcotic substance ‘charas’ on a black colour KTM Duke bike on Chembur Sewree Container Road below the Eastern Freeway at around 8:00 pm. Accordingly, the

raiding team laid a trap and at around 8:40 pm, and intercepted and searched two persons riding the motorcycle; viz; Pranit Khaire (Accused No.2) who was riding the bike and present Applicant (Accused No.1) who was the pillion rider. It is prosecution case that during search, 1300 grams of charas (commercial quantity) was found in a polythene bag carried by Applicant in his hand and 700 grams of charas carried by Accused No.2 in a carry bag on his shoulder.

4. Mr. Pandit, learned Advocate appearing for the Applicant would submit that the raid was conducted after sunset and no authorization was obtained and hence the seizure is vitiated. He would submit that there is non-compliance of provisions of Sections 42 and 50 of the NDPS Act. He would submit that statutory Notice under Section 50 of NDPS Act was not served on him. He would submit the seizure of the contraband was done at 08:40 p.m. on 31.01.2022 but only on 02.02.2022 belatedly letter was issued by Wadala Police Station to the Magistrate Court and the inventory panchnama before the Magistrate was drawn much later on 05.03.2022 and hence there has been substantial delay in drawing up of the inventory panchnama thereby resulting in non-compliance of the provisions of Sections 52 and 52-A of the NDPS Act.

4.1. He has drawn my attention to the order passed by this Court (Coram: G.A. Sanap, J.) whereby Co-Accused No.2 who was riding the

bike has been released on bail on 04.11.2023. Next, he has drawn my attention to order dated 20.02.2023 passed by this Court (Coram: M.S. Karnik, J.) whereby Co-Accused No.3 who is allegedly the supplier of the contraband has been granted bail. Hence, on the ground of parity but most importantly non-compliance of the provision of the NDPS Act he would urge this Court to grant bail to the Applicant. He would argue that charge-sheet has been filed but there is no possibility of the trial concluding in the near future as it has not commenced and Applicant is incarcerated for a period of 3 years.

4.2. In support of his submissions, Mr. Pandit has relied upon the following decisions of the Supreme Court and this Court:-

- (i) *Ankur Chaudhary Vs. State of Madhya Pradesh*¹;
- (ii) *Javed Gulam Nabi Shaikh Vs. State of Maharashtra and Anr.*²;
- (iii) *Jalaluddin Khan Vs. Union of India*³;
- (iv) *Cynthia Bandu Udanshive Vs. State of Maharashtra*⁴;
- (v) *Mohammad Jakir Nawab Ali Vs. State of Maharashtra thr. P.S.O.*⁵; and
- (vi) *Kamlesh Sakhray Gupta Vs. Union of India and Anr.*⁶

1 2024 SCC OnLine SC 2730

2 2024 SCC OnLine SC 1693

3 2024 SCC OnLine SC 1945

4 Cri. Bail Application No.823 of 2024 decided on 09.08.2024

5 2024 SCC OnLine Bom 3198

6 Cri. Bail Application No.985 of 2024 decided on 12.12.2024

4.3. Considering the aforesaid facts and circumstances, he would urge the Court to enlarge the Applicant on bail on any conditions as deemed fit by the Court.

5. *PER CONTRA* , Mr. Dedhia, learned APP appearing for the Respondent-State would at the outset submit that commercial quantity (1300 grams) of charas has been recovered from the present Applicant whereas co-accused No.2 has been granted bail as the quantity of charas recovered from him was only 700 grams which is less than the commercial quantity. He would submit that as commercial quantity is involved in the present case, hence rigours of Section 37 of the NDPS Act would apply to the case of the present Applicant. Hence he would urge the Court to reject the Bail Application.

6. In the present case, it is observed that admittedly the Applicant and Co-accused No.2 were apprehended on the Chembur Sewree Container Road at around 8:40 pm and Co-accused No.2 was riding the motorcycle and Applicant was the pillion rider.

7. In the present case, it is seen that according to prosecution the offence is committed by Applicant (Accused No.1) and Accused No.2. There is another Accused No.3 who is the supplier of the contraband. Both Accused no.2 and Accused No.3 are granted bail. Accused No.1 is the Applicant before me.

8. The entire prosecution case and material placed before Court does not record or show as to who was riding the subject motorcycle in question on which Accused No.1 and Accused No.2 were traveling. In the order dated 04.11.2023 granting bail to Accused No.2, it is stated that Accused No.2 was the rider of the motorcycle and Accused No.1 was the pillion rider behind him.

9. Application for seeking bail is primarily made on account of non-compliance of Sections 42(2) and 50 of the NDPS Act.

10. I have perused the record. The provisions applicable in the present case would be Sections 42, 43 read with Section 50 of the NDPS Act.

11. In the facts of the present case provisions of Sections 52(2) and 52(2)A will also apply as delineated herein under:-

“52. Disposal of persons arrested and articles seized.—

(1) Any officer arresting a person under section 41, section 42 section 43 or section 44 shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under warrant issued under sub-section (1) of section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

52A. Disposal of seized narcotic drugs and psychotropic substances.- (1)

(2) Where any ³[narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such ⁴[narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers

or such other identifying particulars of the ⁴[narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the ⁴[narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of ⁵[such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.”

12. The record *prima facie* shows that Accused No.2, the rider of the motorcycle was apprehended along with a carry bag carried on his shoulder. *(emphasis Supplied)*

13. After due search thereof the panchanama records that it contained a white colour polythene bag containing 700 grams of the contraband i.e. Charas. It is seen that the entire panchanama does not state about the ownership of the subject motorcycle. Averment in the pleading of the Application is that the subject motorcycle belong to the mother of Accused No.2 i.e. Pradeep Suryakant Khaire. It is confirmed from the R.T.O. record available from the website that this averment is correct. prosecution case is silent on this aspect.

14. In so far as Applicant – Accused No.1 is concerned prosecution case is that after the police team intercepted the Accused No.1 and 2 and the motorcycle being driven on the road, they were

immediately apprehended. The panchanama proceeds with stating that Accused No.2 was found carrying a shoulder bag containing a white polythene bag from which it was seized. The entire panchanama is absolutely silent about the shoulder bag which is material in the present case, the reason being that present Applicant has been Accused of being apprehended by the prosecution for carrying a black polythene bag in his right hand containing the contraband. Perusal of panchanama *prima facie* shows that the Accused No.2 was carrying the contraband in the shoulder bag and insofar as Accused No.1 was concerned there was no carry bag / shoulder bag.

15. The order granting bail to Accused No.2 records that they were riding the motorcycle and on interception they were found to be carrying their individual contraband substance in their bag. This is not correct. On perusal of panchanama it is unfathomable to believe that the Applicant would carry the alleged contraband in his right hand while pillion riding and specifically when the rider of the vehicle / owner namely Accused No.2 was carrying his contraband in his shoulder bag. The order dated 29.01.2024 rejecting bail also incorrectly records that the Accused were carrying the contraband in the bags and hence it was not necessary to obtain authorization under Section 42 of the NDPS Act.

16. When there is a categorical case of the prosecution that Accused No.2 was carrying the alleged contraband in his shoulder bag, then authorization and compliance of Section 42 and 50 of the NDPS Act was mandatory as this is a chance recovery made after sunset. Merely by stating that 1300 grams of contraband was found in the polythene bag with Accused No.1-Applicant in his hand raises a suspicion and doubt as to why the alleged contraband would be carried by both the Accused separately.

17. The photographs appended at page Nos.152 – 160 of the entire contraband which is seized, *prima facie*, do not inspire any confidence of the Court. The photographs are all relevant to the present case and what is observed are multiple packets of the alleged contraband. There are 17 photographs taken on 05.03.2022 by the official photographer in the Trial Court where the seized contraband is deposited. Next the entry in the daily diary after seizure of the alleged contraband shows that the seizure was made on 31.01.2022 at 20:40 hours (08:40 p.m.) on which date after the seized contraband was brought to the Police Station it should have been entered / registered into the daily diary. However appended at page Nos.145 and 146 is the extract of the daily diary which states that the entry made therein in the daily dairy is only on 02.02.2022 i.e. 2 days after the seizure. The entry on 02.02.2022 as recorded at 16:50 hours is in fact not of the seizure made on 31.01.2022 and it is of the seized contraband sent

to the NDPS storage cell at Azad Maidan by the Wadala Police Station on 02.02.2022. This shows that when the seizure was made on 31.01.2022 at 20:40 hours, on that day no daily diary entry of seizure of alleged contraband was made and for two days the contraband was kept as it is in the Police Station at Wadala.

18. On 31.01.2022, a letter is sent to the NDPS cell at Azad Maidan by the Investigating Officer. In this letter it is stated that the instruments and equipment used during the seizure are being returned back after completing the raid, search and seizure. This letter records that from Accused No.1 and Accused No.2, 2 kilograms of the alleged contraband has been recovered. This letter does not record the different denomination of recovery from both the Accused. In such acts like the NDPS Act, the provisions of the act have to be scrupulously followed without leaving any doubt or suspicion. Thereafter it is seen that the inventory panchanama is prepared after a delay of 33 days on 05.03.2022. That inventory panchanama is appended at page No.55.

19. Apart from the delay, the inventory panchanama is prepared in the presence of 2 witnesses named Sahibrao Bajirao Adsol aged 61 years and a retired person residing at Wadala Mumbai and Bipin Kumar Satyanarayan Mandal aged 22 years residing at Cuff Parade, Mumbai. When this inventory panchanama is prepared and a

certificate is produced by the Magistrate under Section 52A(2) dated 05.03.2022, the witnesses in whose presence it is prepared are not the same witnesses who are the pancha witnesses to the incident on 31.01.2022. The pancha witnesses to the incident are Gulam Nabi Modhammad Khan aged 28 years and Suraj Prakash R. aged 23 years, both residents of Wadala. This is a major discrepancy.

20. The above fact therefore raises a doubt about the inventory panchanama conducted after 33 days and about the length of the same. Apprehension of any tampering in between has been raised by the Applicant specifically in view of the provisions of Section 52 read with Section 52A of the NDPS Act. The provisions talk about carrying out the same without unnecessary delay and to be sent to the Magistrate concerned. The fact that recovery and seizure is made on 31.01.2022 and it is not mentioned in the daily dairy of the said date and it is thereafter sent to deposit in the NDPS storage cell on 02.02.2022 raises a doubt on the prosecution case qua the Applicant who is *prima facie* Accused of carrying the polythene bag in his right hand

21. In the present case, it is seen that once the Applicant, according to prosecution refuses to be searched before the Magistrate / Gazetted Officer after being informed, it was the duty of the investigating officer after conducting the search to have recorded the

grounds for his belief under the proviso to 42(1) since the search was between sunset and sunrise and send the report to his immediate official superior. This is primarily because the seizure has been done from the person i.e. Accused No.1 and Accused No.2 in different circumstances as delineated herein above. Applicant – Accused No.1 has been indicted on the ground that he is alleged to carry 1300 grams of contraband in his right hand in the polythene bag which is more than the commercial quantity. At the same time, Accused No.2, the owner of subject motorcycle was carrying 700 grams of the alleged contraband separately in a bag carried on his shoulder.

22. The Applicant is a graduate and has no Criminal antecedents. He has been incarcerated for 2 years 11 months and 5 days and the trial has not begun.

23. In view of the above *prima facie* observation, the twin conditions in Section 37(1)(b) of the NDPS Act can be applied in the present case. The first condition stands complied with as the Learned prosecutor is heard by this Court.

24. In so far as the second condition is concerned, there is a reasonable ground to believe at the *prima facie*, stage that considering that the subject vehicle used i.e. motorcycle belonged to Accused No.2 and he was the rider of the motorcycle and carrying his contraband on his shoulder in a carry bag which was duly opened and inside that

carry bag, the alleged contraband was found in another polythene bag, there is no such allegation of present applicant carrying a carry bag on his shoulder and further that he is not likely to commit any offence while on bail considering that he has no antecedents and that he having spent 2 years 11 months 5 days in custody, his prolonged incarceration militates against his most precious fundamental right guaranteed under Article 21 of the Constitution of India.

25. Hence, as held by the Supreme Court in the case of *Rabi Prakash Vs. The State of Odisha*,⁷ wherein in a much more grievous situation, the Accused under trial was facing prosecution under the NDPS act for being apprehended while peddling and transporting 247 kilograms of Ganja and had suffered incarceration for 3 and half years, the Supreme Court, while recognising the right of the under trial held that he deserves to be release on bail recognising a right to a speedy trial as a facet of right to life under Article 21 of the Constitution of India even in the case of the stringent requirement under Section 37 of the NDPS Act. In a somewhat identical and similar case, this Court (Coram Manish Pitale, J.) in Bail Application No.985 of 2024 on 12.12.2024 wherein the contraband seized was in the form of 2 Kilograms of Charas and in the facts of that case due to prolonged incarceration and discrepancies noted therein, applied the position of law as held by the Supreme Court in the case of *Rabi Prakash (supra)*

⁷ 2023 SCC OnLine SC 1109

to the benefit of Applicant therein and released him on bail on conditions.

26. It is seen that in the present case, charge-sheet records that Accused No.2 was the rider and owner of the motorcycle. The said motorcycle is registered in the name of his mother. It is a high-end motorcycle. Prosecution case is that it was Accused No.2 who was carrying the alleged contraband in a carry bag placed on his shoulder while driving the motorcycle. Case against present Applicant – Accused No.1 is that he was the pillion rider carrying the alleged contraband in his right hand. Prosecution has then stated that after intercepting the motorcycle, it was halted by Accused No.2 and they attempted to run away, but they were immediately apprehended. Charge is that several passersby gathered at the spot to inquire what happen and the police claimed to have requested 3 – 4 passersby to join the investigation, but all of them immediately left. Hence, admittedly there are no independent witnesses to the incident of search and seizure. The aforesaid action of Accused No.2 clearly defies logic of he carrying the alleged contraband in his carry bag placed on his shoulder, but according to prosecution, Applicant is alleged to be carrying the alleged contraband in a polythene bag in his right hand. The alleged contraband as can be seen from the record according to prosecution is worth more than 26 lakhs which is alleged to have been carried in a polythene bag and held in the right hand of the Applicant.

27. Next, if the prosecution case as per the charge-sheet is held to be true *prima facie*, then on seeing the police party intercepting the motorcycle, first informant of Applicant would be to throw away the polythene bag from his right hand. Hence the case of the prosecution appears to be doubtful. The charge-sheet also does not indicate as to where the Accused intended to deliver the contraband or whether anybody in the said area was present to receive it. There is complete silence on the above aspect in so far as the investigation is concerned. Charge-sheet is already filed without any such investigation being made.

28. The aforementioned mechanical and implausible significance and details in the charge-sheet coupled with the absence of corroborative evidence of independent witnesses, *prima facie*, clearly undermines the credibility of the prosecution case. In such a case of chance recovery, absence of independent witnesses and alleged circumvention of procedural safeguards as can be seen from the record lead to significant short comings in the prosecution case.

29. Attention is invited to the decision of the Single Bench of the Delhi High Court in the case of *Tinku Vs. State (NCT of Delhi)*⁸. In that case, Applicant was arrested and 945 grams of *heroin* (above commercial quantity) was seized from his bag. Applicant therein was incarcerated for 2 years and 5 months. There were certain

⁸ 2024 SCC OnLine Del 9132, decided on 24.12.2024

discrepancies found in the prosecution case *prima facie* from the record and panchnama which was discussed by the Court. Court relied upon several decisions of the Supreme Court and the High Courts in support of the fact that there would be a possible delay in a trial and therefore the supervening right of Article 21 of the Constitution of India would have to be considered. Observing that conclusion of the trial is nowhere in sight, the Court relied on several decisions which are referred to in paragraph Nos.50 and 51 of the said decision. For convenience, paragraph Nos.50 and 51 are reproduced hereinbelow:-

“50. Applicant has been incarcerated for two and a half years and only two out of twenty-five witnesses have been examined. The next date of hearing will be 18th February 2025. Clearly the conclusion of the trial is nowhere in sight.

51. The reliance of the applicant on various decisions of the Courts is therefore relevant. Aside from what has been cited, the following decisions of the Supreme Court in recent years have also highlighted rights under Article 21 of the Constitution of India are paramount and will not be subservient to the Section 37 rigours under the NDPS Act. Relevant paragraphs of the same have been extracted as under:

i. Rabi Prakash v. State of Odisha, 2023 SCC OnLine SC 1109 where a recovery of 247 kgs of ganja was made and the applicant had been in custody for more than three and a half years, with no criminal antecedents, the Court held as under:-

“4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent – State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re : formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo

created under Section 37(1)(b)(ii) of the NDPS Act.”

ii. *Dheeraj Kumar Shukla v. State of U.P., 2023 SCC OnLine SC 918* where there was a seizure of about 65 kgs of ganja from the car driven by applicant therein (and 92 kgs ganja recovered from the car of the co-accused) the applicant was in custody for about two and a half years, the Supreme Court while granting bail, stated as under:

“3. It appears that some of the occupants of the ‘Honda City’ Car including Praveen Maurya @ Puneet Maurya have since been released on regular bail. It is true that the quantity recovered from the petitioner is commercial in nature and the provisions of Section 37 of the Act may ordinarily be attracted. However, in the absence of criminal antecedents and the fact that the petitioner is in custody for the last two and a half years, we are satisfied that the conditions of Section 37 of the Act can be dispensed with at this stage, more so when the trial is yet to commence though the charges have been framed.”

iii. *In Man Mandal v. State of West Bengal, 2023 SCC OnLine SC 1868* where the seizure was commercial in nature and the applicant had been incarcerated for about two years and there was no hope of the trial concluding soon, the Supreme Court while granting bail stated as under:

“6. Taking into consideration the fact that the petitioners have been incarcerated for a period of almost two years and the trial is not likely to be taken up for hearing in the immediate near future, we are inclined to grant bail to the petitioners.”

iv. *In Badsha Sk. v. State of West Bengal, 2023 SCC OnLine SC 1867* where the seizure was of 100 bottles of Phensedyl Cough Syrup (100 ml. each), containing Codeine Phosphate, the applicant had been in custody for about 2 years 4 months and the trial was yet to commence, the Supreme Court while granting bail noted as under:

“5. The above would show that the trial is yet to commence in the matter(s) and in the meantime, petitioners have been in custody for long. The State counsel submits that there are no known criminal antecedents against the two accused.”

30. Thus, in the peculiar facts and circumstances of the present case, where there is reasonable doubt in the circumstances related to the recovery as per the sequence of events as narrated in the FIR and then the charge-sheet and the *prima facie* corroborative evidence in

the form of independent witnesses nor any CDR connectivity related to the Applicant place before me or in the charge-sheet nor any financial trail having been unearthed during investigation involving the Applicant, the case of the Applicant deserves to be considered for grant of bail.

31. It is however clarified that this is a *prima facie* assessment only since evidence will be weighed during the trial. It would therefore not be prudent to keep the Applicant behind bars for an indefinite period. This Court finds it to be a fit case for grant of bail to the Applicant in the peculiar facts of this case.

32. Hence, the following order:-

- (i) Applicant – Amey Sanjay Jadhav, who is facing trial in NDPS Special Case No.541 of 2022 pending on the file of Special Judge under NDPS Act, City Civil and Sessions Court, Greater Bombay, is ordered to be released on bail on furnishing P.B. and S.B. in the sum of Rs.25,000/- (Rs. Twenty Five Thousand only) with one surety of the like amount;
- (ii) Applicant shall report to the Investigating Officer at Wadala Police Station, once every month on the first Monday of the month between 10:00 a.m. to 12:00 p.m.;

- (iii) 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 revocation of this order;
- (iv) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;
- (v) Applicant shall not influence with any of the witnesses or tamper with the evidence in any manner;
- (vi) Applicant shall keep the Investigating Officer informed of his current address and mobile contact number and/or change of residence or mobile details, if any, from time to time, as applicable; and
- (vii) Any infraction of the conditions shall entail cancellation of bail granted to the Applicant.

33. The aforesaid observations are *prima facie* on the basis of record of the case and is an expression of opinion by this Court only for the purpose of grant of bail to Applicant and shall not influence the trial in the present case.

34. In the above terms, Bail Application stands allowed and disposed.

[MILIND N. JADHAV, J.]

Ajay