

Ajay

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

CRIMINAL BAIL APPLICATION NO. 2022 OF 2024

Yakub Macho Nganila @ Mashaka	.. Applicant
Versus	
The State of Maharashtra	.. Respondent

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- Mr. Dilip Mishra a/w. Mr. Ayaz Khan, Ms. Zehra Charania and Ms. Mallika Sharma, Advocates for Applicant.
 - Ms. Megha S. Bajoria, APP for Respondent – State.
 - Mr. Shrikant Karkar, API – ANC Bandra Unit present.
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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 08, 2025.

P.C.:

1. Heard Mr. Mishra, learned Advocate for Applicant and Ms. Bajoria, learned APP for Respondent – State.

2. This is an Application under Section 439 of the Code of Criminal Procedure, 1973 seeking Regular Bail in connection with C.R.No.86 of 2021 registered by Anti Narcotic Cell, Banda Unit for the offences punishable under Sections 8(c), 21(c), 27A and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short ‘NDPS Act’).

3. In the present crime, Applicant is incarcerated in prison for the past 3 years, 6 months and 11 days pending trial. Charge has not been framed.

4. Learned Advocate for Applicant fairly informs the Court that Applicant was apprehended alongwith 120 grams of the alleged contraband cocaine, but he would persuade the Court to consider the long incarceration of the Applicant and parity with the Accused No.1 who also been apprehended with 105 grams of alleged contraband cocaine, but has been enlarged on bail by this Court by order dated 29.09.2023 in Bail Application No.1595 of 2023.

5. Ms. Bajoria, learned APP appearing for the Respondent – State would persuade the Court to consider the said order in favour of Accused No.1 as having been granted on the basis of his medical condition. Though she would fairly informing the Court that the issue of long incarceration is considered by the Court even otherwise.

6. Be that as it may, considering that the charge has not been framed and Applicant is incarcerated in prison for 3 years, 6 months and 11 days, it would entitle the Applicant to seek bail.

7. It is settled law that a Court while deciding a Bail Application has to keep in mind the principal rule of bail which is to ascertain whether the Accused is likely to appear before the court for trial. There are other broad parameters also like gravity of offence, likelihood of Accused repeating the offence while on bail, whether he would influence the witnesses and tamper with the evidence, his antecedents which are required to be considered in such cases.

However the metrics of judicial decision making gets amplified or rather shuttled to another facet when dealing with offences where Section 37 of NDPS Act is attracted. In such cases one has to satisfy itself with the rigors of the twin conditions as prescribed under Section 37 of the NDPS Act. Section 37 reads thus:-

“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.”

8. From the reading of Section 37 of the NDPS Act, it becomes clear that the legislature intends to deny bail to accused alleged to be in possession of commercial quantity of contraband in absence of court subscribing to a contrary view, however therefore if seen it does not rule out the facet of discretion of Court to grant bail. Furthermore the Court must be satisfied that the accused is unlikely to re-offend. It is seen that while dealing with Bail Applications the material available

for consideration and adjudication is limited. In such cases, if we look realistically the provisions of Section 37 leave limited room for a possibility of granting bail to the accused. However employing such limitation would create a dichotomy in the current scenario where one common grievance is made before this Court repeatedly in matter after matter. It is brought to the notice of the Court that trials are taking perpetuity to be concluded and prisons are also simultaneously overcrowded in some segments. This Court regularly deals with Bail Applications of under-trials who have been in custody for long incarceration, and is also equally aware of the conditions of our prisons. To give an example in the city of Mumbai, recently in one of the cases before me, a Report dated 12.12.2024 made by the Superintendent of Mumbai Central Prison addressed to the Chief Government Pleader was placed before me by the Public Prosecutor which stated that the Mumbai Central Prison (Arthur Road Jail) is overcrowded beyond its sanctioned capacity by more than 5 – 6 times and every barrack sanctioned to house 50 inmates, as on date houses anywhere between 220 – 250 inmates. This situation is inhumane, but it also cannot be forgotten that addiction of drugs is also a serious issue qua the society at large, and therefore provisions such as Section 37 act as a deterrent to prospective wrongdoers. Such an incongruity leads us to answer the proposition: ***“How can Courts find a balance between the two polarities?”***

9. Argued before me is a case concerning liberty of an undertrial who has been incarcerated for almost 3 years 6 months 11 days, a situation impacting the rights of undertrial conferred by Article 21 of Constitution to speedy justice as also personal liberty. In so far as the power of high courts to grant bail is concerned, when the case is such that involves a question of personal liberty of an undertrial who is incarcerated for a very long period, the powers are wide and unfettered by conditions, the principle rule being that bail is the rule and refusal is the exception, allowing accused persons to better prepare their defense.

10. In the case of *Emperor vs H.L. Hutchinson*¹ the Allahabad High Court, as far back as in the year 1931 held that power of granting bail conferred on High Court is entirely unfettered by any conditions. It held that legislature has given the High Court and the Court of Session discretion unfettered by any limitation other than that which controls all discretionary powers vested in a Judge, viz. that the discretion must be exercised judiciously. The Court has given primacy to the fact that accused person if granted bail will be in a much better position to defend himself. In this very case, it was delineated that grant of Bail is the Rule and refusal is an exception. This was in the famous Meerut Conspiracy case. Justice Mukherjee writing for the Bench in paragraph

¹ AIR 1931 ALL 356

No.9 held as under:-

“9. Speaking for myself, I think it very unwise to make an attempt to lay down any particular rules for the guidance of the High Court, having regard to the fact that the legislature itself left the discretion of the Court entirely unfettered. The reason for this action on the part of the legislature is not far to seek. The High Court might be safely trusted in this matter and it goes without saying that it would act in the best interests of justice whether it decides in favour of the prosecution or the defence. The variety of cases that may arise from time to time cannot be safely classified and it will be dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes.”

11. In the following decisions of the Supreme Court and various High Courts concerning such long detention and imprisonment of undertrial prisoner / accused on being apprehended with commercial quantity of various contrabands, the Courts have in the backdrop of the aforementioned propositions exercised its unfettered jurisdiction in releasing an undertrial on bail on account of long incarceration by using its discretionary powers:-

11.1. In the case of *Vijay Singh Vs. Union of India*² the Supreme Court granted bail to an undertrial-accused who was incarcerated for a period of 4 years and 1 Month holding that Article 21 of the Constitution overrides Section 37 of NDPS Act if there is undue delay in completion of trial on the part of prosecution.

11.2. In the case of *Rabi Prakash Vs. State of Odisha*³ the Supreme Court, considering the long incarceration of an undertrial accused who

² Special Leave Petition (Criminal) Diary No. 43071/2024

³ 2023 SCC OnLine SC 1109

was incarcerated for 3 years and 6 months granted him bail. The contraband in question was Ganja, the commercial quantity of which is 20 Kilograms. In this case recovery of 247 Kilograms was allegedly made from the accused despite which the court invoking the right to speedy justice flowing from Article 21 and foreseeable delay in trial granted bail to the accused.

11.3. In the case of *Dheeraj Kumar Vs. State of Uttar Pradesh*⁴ the Supreme Court considering long incarceration granted bail to an undertrial-accused who was incarcerated for 2 years and 6 months granted him bail. The contraband in question was Ganja the commercial quantity of which is 20 Kilograms. In this case recovery of 65 Kilograms was allegedly made from the accused despite which, the Court invoking the right to speedy justice flowing from Article 21 and foreseeable delay in trial granted bail to the Accused.

11.4. In the case of *Balkishan Vs. State of Madhya Pradesh*⁵ the Supreme Court considering long incarceration of an undertrial-accused who was incarcerated for 2 years and 5 months granted him bail. The contraband in question was Poppy Straw, the commercial quantity of which is 50 kilograms when recovery of 80 kilograms was allegedly made from the accused.

4 2023 SCC OnLine 918

5 Petition for Special Leave to Appeal (Cri) No. 8415 of 2024

11.5. In the case of *Badsha Sk. Vs. State of West Bengal*⁶ the Supreme Court considering long incarceration of an undertrial-accused who was incarcerated for 2 years and 4 months granted him bail. The 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.

11.6. In the case of *Man Mandal and Anr. Vs. State of West Bengal*⁷ 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.

11.7. In the case of *Ankur Chaudhary Vs. State of Madhya Pradesh*⁸ the Supreme Court considering long incarceration of an undertrial-accused granted him bail to an undertrial-accused who was incarcerated for about 2 years.

11.8. In the case of *Nitish Adhikary alias Bapan Vs. State of West Bengal*⁹ the Supreme Court considering long incarceration of an undertrial-accused granted him bail to an undertrial-accused who was incarcerated for 1 year and 7 months despite being alleged to be in possession of commercial quantity of contraband.

6 2023 SCC OnLine SC 1867

7 2023 SCC OnLine SC 1868

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

9 2022 SCC OnLine SC 2068

11.9. In the case of *Babor Ali Mondal Vs. State of West Bengal*¹⁰ the Supreme Court considering the long incarceration granted bail to an undertrial-accused who was incarcerated for 1 year and 4 months.

11.10. In the case of *Sukhvinder Singh Bittu Vs. State of Punjab*¹¹ the Supreme Court considering long incarceration of an under trial-accused granted him bail who was incarcerated for 1 year despite being alleged to be in possession of commercial quantity of poppy straw.

11.11. In the case of *Tinku Vs. State (NCT of Delhi)*¹² the Delhi High Court considering the long incarceration of an under trial-accused granted him bail who was incarcerated for 2 years and 5 months. The contraband in question was Heroin, the commercial quantity of which is 250 grams. In this case recovery of 945 grams was allegedly made from the accused despite which the High Court invoking the right to speedy justice flowing from Article 21 of the Constitution and foreseeable delay in trial granted bail to the accused.

11.12. In the case of *Kulwinder Singh Vs. State of Punjab*¹³ the Punjab and Haryana High Court considering long incarceration of an undertrial-accused granted him bail who was incarcerated for 2 years and 8 months. The contraband in question was Etizolam Salt, the

10 Criminal Appeal No. 3349 of 2024

11 Cri. Appeal No.1204 of 2024

12 2024 SCC OnLine Del 9132

13 CRM-M-26704 of 2024

commercial quantity of which is 2.5 grams. In this case recovery of 99.876 grams was allegedly made from accused despite which the High Court invoking the right to speedy justice flowing from Article 21 of the Constitution and delay in trial granted bail to the accused.

11.13. In the case of *Amey Sanjay Jadhav Vs. State of Maharashtra*¹⁴ this Court on 03.01.2025 considering long incarceration of the under trial-accused has granted bail to the under-trial accused who was incarcerated for 2 years and 11 months. The contraband in question was 1.3 kilograms of Charas, the commercial quantity of which is 1000 grams.

11.14. In the case of *Mohd. Mobin Jahurul Hasan Manihar Vs. State of Maharashtra*¹⁵ - this Court on 20.01.2025 considering long incarceration of the under-trial accused granted bail to him who was incarcerated for 1 year 11 months. The contraband in question was 220 gms of MD, the commercial quantity of which is 50 gms.

12. From the above, it is apparent that inspite of the stringent test to be met by the Accused person under Section 37 of the NDPS Act for being released on bail, it has been held that the same does not fetter grant of Bail to the Accused person on the ground of undue delay in completion of trial. It has been held that incarceration for substantial period of time generally militates against the right to

¹⁴ BA No.911 of 2024 decided on 03.01.2025

¹⁵ BA No.713 of 2024 decided on 20.01.2025

speedy justice and right to life and liberty guaranteed under Article 21 of the Constitution of India and hence conditional liberty must override the statutory embargo under Section 37 of the NDPS Act.

13. In the above *prima facie* facts and circumstances of the present case the Applicant before me has made out a case for bail.

14. The Bail Application stands allowed on the following terms and conditions:-

- (i) Applicant is directed to be released on bail on furnishing PR. Bond in the sum of 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 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) 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 Monday of every month between 11.00 a.m. and 1.00 p.m. to mark his presence. If the first Monday 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;
- (vii) Applicant shall not influence any of the witnesses or tamper with the evidence in any manner;
- (viii) Before his actual release from jail, Applicant shall furnish their address where he proposes to reside after his release from jail, to the concerned Police Station and also to the trial Court; 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.

15. It is clarified that the above observations in this order are limited for the purpose of granting bail only and I have not made any

observations on the merits of the case and the trial shall be adjudicated on the basis of the evidence led by the parties uninfluenced by the present order and strictly in accordance with law.

16. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

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