

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

BAIL APPLICATION NO. 3514 OF 2024

Nizamuddin Ahmed Taja

...Applicant

Versus

Union of India & Anr.

...Respondents

- Ms. Ashwini Achari i/b Mr. Taraq Sayed, for Applicant.
- Mr. Madhukar Dalvi, Respondent No.1 – Union of India.
- Mr. Shrikant Yadav, APP for Respondent No.2 – State.

CORAM : MANISH PITALE, J.

DATE : 09th JANUARY, 2025.

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P. C. :

1. Heard learned counsel for the applicant and learned APP for the respondent-State.

2. This is a second bail application of the applicant before this Court. The earlier bail application bearing Criminal Bail Application No.1026 of 2022 was dismissed by an order dated 12th January, 2024 passed by this Court (*Coram : Prithviraj K. Chavan, J.*). It is to be noted that the Special Leave Petition (Cri.) No.5709 of 2024, filed by the applicant before the Supreme Court was dismissed by an order dated 29th April, 2024.

3. The learned counsel appearing for the applicant submits that there were subsequent development i.e. to the effect that a co-accused person – Shabbir Usman Shaikh was granted bail by an order dated 13th August, 2024, passed in Bail Application No.731 of 2024. In this context, reliance

was placed on an order dated 09th August, 2024, passed by this Court (*Coram : N.J. Jamadar, J.*) in Bail Application No.1480 of 2024 in the case of ***Jasar Jahangir Shaikh Vs. State of Maharashtra***, where in similar circumstances this Court not only entertained the second bail application of the applicant but also allowed the same, observing that if certain grounds were not urged when the first bail application was disposed of and a co-accused was subsequently granted bail on different grounds that were now being urged before the Court in the second bail application, such a second bail application could be considered.

4. This Court is also of the opinion that as opposed to civil proceedings, in such proceedings under criminal law concerning the liberty of an individual, the principle applied in civil cases that when a challenge is rejected, it has to be deemed that all grounds had been raised and considered, cannot be applied in the criminal cases particularly those concerning bail applications and the liberty of an individual. The subsequent event of bail being granted to a co-accused person is indeed a change in circumstance that justifies filing of the present second bail application on behalf of the applicant and therefore, this Court is proceeding to consider the same on merits.

5. The learned counsel for the applicant relies upon the aforesaid order passed in the case of co-accused person – Shabbir Usman Shaikh, on 13th August, 2024 in Bail Application No.731 of 2024. It is submitted that the

said bail application was allowed on grounds that are distinct from the grounds discussed and decided in the first bail application of the applicant, which was dismissed by the aforesaid order dated 12th January, 2024, passed in Criminal Bail Application No.1026 of 2022 of the present applicant. Reliance is placed on the reasons recorded by this Court in the order passed in favour of the co-accused person – Shabbir Usman Shaikh and it is submitted that this Court may consider granting bail to the present applicant.

6. On the other hand, the learned counsel for the contesting respondent i.e. Union of India, vehemently opposed the present application. He submitted that it was perhaps because there was no appearance on behalf of the Union of India in the bail application of the co-accused person that certain certain aspects could not be pointed out. It was further submitted that the earlier order passed by this Court rejecting the first bail application of the applicant elaborately discussed various grounds and therefore, the applicant cannot be permitted to reagitate the case on merits. It was specifically pointed out that a perusal of the *panchnama* in conjunction with the statements made in the reply affidavit in the present application would show that the arrest of the applicant could in no manner be said to be illegal and therefore, the law in that regard cannot inure to the benefit of the present applicant. It was further submitted that the existence of crime number on the summons issued in the context of the *panchnama* in the present case has been appropriately explained

in the reply affidavit and therefore, this Court may consider the same and reject the present bail application.

7. This Court is of the opinion that unnecessary complication created in the case of the present applicant could have been avoided if Union of India had appeared through counsel before this Court when the bail application of the co-accused person – Shabbir Usman Shaikh i.e. Bail Application No.731 of 2024, was allowed and disposed of on 13th August, 2024. It is to be noted that in the said order, at the outset this Court recorded the number of opportunities granted to Union of India to appear before the Court. Having given sufficient opportunity and there being no appearance on behalf of the Union of India, this Court proceeded to decide the said bail application.

8. Be that as it may, it would be appropriate to refer to the reasons recorded in the order, wherein this Court granted bail to co-accused Shabbir Usman Shaikh. The relevant portion of the said order reads as follows :

“7. Since the respondent No.1, being the contesting respondent, is not represented by counsel, this Court considered the entire material on record, while considering the contentions raised on behalf of the applicant. The documents on record were accepted as it is, in order to test the grounds raised on behalf of the applicant. Having perused the said material and the judgments relied upon

by the learned counsel appearing for the applicant, this Court is inclined to allow the present application for the following reasons :

- (a) In the present case, the panchanama itself divulges that while 12 packets were allegedly recovered, containing contraband charas, the contents of the entire 12 packets were mixed and placed in one polythene bag. It was recorded that the total weight was 12kg. Commercial quantity being 1 kg, the applicant was proceeded against. This Court in a number of judgments has held that such mixing of contraband is impermissible and that it does raise a serious suspicion about the case against the accused persons. A number of judgments were relied upon, but suffice it to say that in the cases of **Sahil Jalauddin Ahmad v/s. The State of Maharashtra** (order dated 26th July 2023 passed in Bail Application No. 3740 of 2022) and **Venktesh Shiva Permal v/s. The State of Maharashtra** (judgment and order dated 23rd January 2024 passed in Bail Application No. 3784 of 2023), in identical circumstances, wherein the contents of separate packets containing contraband, were mixed, it was held by this Court to be a sufficient ground to raise suspicion about the veracity of the case of the prosecution.
- (b) The panchanama on the one hand and the

certificate issued by the Magistrate before whom samples were drawn for certification, shows that while 12 kg of charas was allegedly recovered, at the stage when the contraband reached the Magistrate for appropriate proceedings under Section 52A of the NDPS Act, the quantity was 11.682 kg, thereby indicating a shortfall 248 grams. This fact can be considered as a relevant circumstance, for granting the present bail application.

- (c) *It is brought to the notice of this Court that there has been an inordinate delay on the part of the respondent No.1 to carry out the mandatory procedure contemplated under Section 52A of the NDPS Act. It is, in fact, highlighted that no application appears to have been moved by the respondent No.1 before the Magistrate for sampling and certification. A perusal of the proceeding before the Magistrate shows that according to the Magistrate, on 24th September 2021 i.e. more than three months after the execution of the panchanama, an Intelligence Officer of the respondent No.1 simply came before the Magistrate with the seized contraband for certification in terms of Section 52A of the NDPS Act. There is nothing to indicate that a proper application was moved. Even if such procedure of the officer of the respondent No.1*

*directly appearing before the Magistrate with the seized contraband is to be considered, the said procedure was undertaken after a lapse of more than three months of time, thereby indicating that there was delay in carrying out such procedure. This Court in various judgments has frowned upon such delay in carrying out the mandatory procedure under Section 52A of the NDPS Act, by placing reliance on the judgment of the Supreme Court in the case of **Union of India v/s. Mohanlal & Anr., (2016) 3 SCC 379**. In paragraph 19 of the said judgment of the Supreme Court, although it is recorded that a specific timeline for moving an application before the Magistrate under Section 52A of the NDPS Act has not been prescribed, the concerned authority is expected to move the Magistrate “without any delay”. In other words, such procedure is expected to be carried out within a reasonable period of time. In the present case, the delay in carrying out the said exercise does create a ground for grant of bail. Reliance placed on a recent order of this Court dated 8th July 2024 passed in Bail Application No. 3258 of 2023 (**Kenneth Mulowa v/s. State of Maharashtra & Anr.**), is appropriate.*

- (d) *It is brought to the notice of this Court that while the panchanama was executed on 15th June 2021,*

*surprisingly in the summons issued in the context of the said panchanama, the crime number has been mentioned at the top. It is submitted that when the procedure was still underway, the crime number could not have been found on such a summons issued on the very day of execution of panchanama. Reliance is placed on orders of this Court in the case of **Zaid Zahir Rana v/s. The State of Maharashtra** (order dated 30th October 2023 passed in Bail Application No. 1486 of 2023) and **Chand Riyaz Shaikh s/o. Riyaz Shaikh v/s. The Union of India & Anr.** (order dated 13th July 2023 passed in Bail Application No. 3269 of 2022). A perusal of the said orders shows that in similar circumstances, this Court while granting bail to the accused found that the presence of the crime number on such summons did create a suspicion about the prosecution case.*

- (e) *It is specifically stated that in the present case, the applicant was actually apprehended on 15th June 2021 itself, but he was shown to be formally arrested on 16th June 2021 and produced before the Magistrate on 17th June 2021. In the interregnum, the applicant was taken to the office of the respondent No.1. It is submitted that since the freedom of the applicant was curtailed, when he was apprehended on 15th June 2021 and*

*produced beyond the period of 24 hours before the Magistrate i.e. on 17th June 2021, the fundamental right of the applicant under Articles 21 and 22(2) of the Constitution of India, stood violated. It was submitted that in similar circumstances, this Court in the case of **Mr. Ugochukwu Solomon Ubabuko v/s. Union of India (Narcotic Control Bureau) & Anr.** (Order dated 21st October 2021 passed in Criminal Misc. Application (Bail) No. 585 of 2021 (filing)), granted bail purely on the said aspect of illegal detention of the accused. This Court has perused the said judgment. It is found that in the said case, it was indeed held that the fundamental rights of the accused under Articles 21 and 22(2) of the Constitution of India are violated, which could be a sole ground for granting relief of bail. In the present case, the documents on record, including the panchanama and other material do prima facie indicate that the freedom of the applicant was curtailed on 15th June 2021 itself, although he was formally shown as arrested on 16th June 2021. The applicant being produced only on 17th June 2021 before the Magistrate does prima facie indicate that his fundamental rights were violated and this is also a ground for allowing the present application.”*

9. A perusal of the above quoted portion would show that various

grounds were considered and it was found that there was substance in such grounds raised on behalf of the co-accused person and thereafter, on an analysis of the material on record in the context of the provisions of law, the application of the co-accused person – Shabbir Usman Shaikh was allowed.

10. This Court is of the opinion that the said grounds squarely arise even in the case of the applicant herein. It is to be noted that none of the said grounds were specifically raised and considered on behalf of the applicant and consequently there was no discussion in respect of such grounds in the earlier order dated 12th January, 2024, passed in Criminal Bail Application No.1026 of 2022, and therefore, applying the position appreciated by this Court while deciding Bail Application No.1480 of 2024 (**Jasar Jahangir Shaikh Vs. State of Maharashtra**), this Court is inclined to hold that this second bail application is not only required to be considered on merits, but in the light of the principle of parity, the same deserves to be allowed.

11. The reasoning contained in the order allowing the bail application of the co-accused person, quoted hereinabove, shows that the very same grounds are available to the applicant herein to claim relief of bail. A *prima facie* case is indeed made out on behalf of the applicant that when the contents of the 12 packets allegedly containing contraband were mixed and placed in a polythene bag, the case of the prosecution can be said to be vitiated in the light of the orders passed in the cases of **Sahil Jalauddin Ahmad Vs. The**

State of Maharashtra (order dated 26th July, 2023 passed in Bail Application No.3740 of 2022) and ***Venktesh Shiva Permal Vs. The State of Maharashtra*** (judgment and order dated 23rd January, 2024 passed in Bail Application No.3784 of 2023).

12. It is also found that discrepancy and shortfall in the quantity of the contraband as noted in the above quoted portion of the order passed in favour of the co-accused person, would equally inure to the benefit of the applicant herein. Similarly the finding rendered with regard to *prima facie* delay in carrying out the mandatory exercise under Section 52A of the NDPS Act in terms of law laid down by the Supreme Court in the case of ***Union of India Vs. Mohanlal & Anr.***¹, would also inure to the benefit of the applicant.

13. As regards the other two grounds i.e. one pertaining to the presence of crime number on the summons issued in the context of the *panchanama* and the question of illegal arrest of the applicant, some discussion is warranted. This is because the learned counsel appearing for the contesting respondent – Union of India has raised specific contentions on the basis of the contents of the reply affidavit filed in the present application.

14. As regards the question of presence of crime number on summons issued in the context of the *panchanama*, the learned counsel appearing for the respondent – Union of India has placed reliance on

1 (2016) 3 SCC 379

paragraph No.4(vii) of the reply affidavit. A perusal of the contents thereof show that the explanation sought to be given therein is similar to the explanation that was given before this Court in the case of ***Zaid Zahir Rana Vs. The State of Maharashtra***, (order dated 30th October, 2023, passed in Criminal Bail Application No.1486 of 2023). This Court (Coram : Bharati Dangre, J.), while considering such an explanation held as follows :

“14. *A somehow similar situation has surfaced in this case as the FIR number is to be found in the panchnama itself, as it cannot be contemplated that the trap is going to be successful and no Investigating Officer will proceed from the police station by carrying a CR number, as this may pose a problem. It is quite possible that if some other raiding team is also simultaneously carrying a search in some other place, then, without consulting as to which panchnama commenced first, and which ended later, it is difficult to fathom the appropriate C.R number. I cannot accept the version of Ms.Pai that raiding team, start on their venture, on being armed with seizure kit, seals and also the C.R. number.*

The explanation offered by Mr.Ashish Ranjan, the Intelligence Officer, is that he made a call to the office, after the procedure was over, he asked the crime number, as the test result of the recovered drug was shown ‘positive’ and suspect was present on the spot.

This course adopted, create a suspicion as the normal procedure followed is, after the conduct of the

trap/search and seizure, the accused is taken to the NCB office and there, the C.R is registered and the crime number is allotted.

At this stage, whether the procedure followed is right or wrong, and what would be its consequence, is not for me to determine, but this definitely make the prosecution case, doubtful, as it proceeds on a footing that the information received is bound to result into a positive seizure and though Ms.Pai had argued that it is possible for the Officer to proceed with the tentative number of the C.R, Mr.Ashish Ranjan has submitted that he made a phone call and thereafter, had put the number of the C.R on the panchnama.”

15. This Court is inclined to follow the said position and this completely answers the contention raised on behalf of the respondent – Union of India.

16. As regards the question of arrest of the applicant being rendered illegal, this Court in the above quoted portion of the order passed in favour of the co-accused – Shabbir Usman Shaikh, has elaborately discussed the same and recorded certain reasons. Although the learned counsel appearing for the contesting respondent – Union of India sought to read the *panchnama* and explained that there was no question of the arrest being rendered illegal, this Court is of the opinion that the said aspect could perhaps be argued at the stage of trial, but for the purpose of this application, this Court is not inclined

to take a different view. In any case, as noted hereinabove, the aforesaid situation has arisen in the context of the said ground because of the fact that the Union of India chose not to appear before this Court when the application of the co-accused – Shabbir Usman Shaikh was being decided on 13th August, 2024.

17. In any case, apart from the said specific ground pertaining to illegality of arrest of the applicant, this Court finds that on all the other grounds on the basis of which co-accused – Shabbir Usman Shaikh was granted bail, the applicant herein has also made out a case on his favour. It is to be noted that none of the said grounds were agitated before this Court when the first bail application was disposed of.

18. In view of the above, the application is allowed in the following terms:

- (A) The applicant shall be released on bail in connection with FIR No.58 of 2021, registered with Narcotic Control Bureau, Mumbai, on furnishing P.R. Bond of ₹ 50,000/- and one or two sureties in the like amount to the satisfaction of the Trial Court.
- (B) The applicant shall cooperate with expeditious disposal of trial. He shall attend the Trial Court proceedings on each and every date, unless specifically exempted by the Trial

Court, for reasons to be recorded in writing.

(C) The applicant shall not tamper with the evidence of the prosecution and he shall not influence the informant, witnesses or any other person concerned with the case.

(D) The applicant, upon being released on bail, shall place on record of the Trial Court the details of his Contact Numbers and residential address with updates in case of any change.

19. Needless to say, in case of violation of any of the aforesaid conditions, the bail granted to the applicant shall be liable to be cancelled.

20. It is also clarified that the observations made in this order are limited to the disposal of the present bail application. The concerned Court shall proceed further in the matter without being influenced by the observations made hereinabove.

21. The application is disposed of.

(MANISH PITALE, J.)