

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.3609 OF 2024

Mehboob Aziz Pathan .. Applicant
Versus
The State of Maharashtra .. Respondent

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- Ms. Lochan P. Chandka, Advocate for Applicant.
- Ms. Mahalakshmi Ganapathy, APP for Respondent – State of Maharashtra.

CORAM : MILIND N. JADHAV, J.

DATE : MARCH 17, 2025

P.C.:

1. Heard Ms. Chandka, learned Advocate for Applicant and Ms. Ganapathy, learned APP for Respondent.

2. This is an Application under Section 439 of Code of Criminal Procedure, 1973 (for short '**Cr.P.C.**') seeking Bail in connection with C.R. No.360 of 2023 registered with Shil Daighar Police Station for offences punishable under Section 8 (c) read with Sections 22 (c) and 29 of the Narcotics and Psychotropic Substances Act, 1985 (for short '**NDPS Act**').

3. On 13.02.2025, after hearing the learned Advocates for both sides, following order was passed:-

"1. Heard Ms. Chandka, learned Advocate for Applicant and Ms. Ganapathy, learned APP for Respondent – State of Maharashtra.

*2. This is an Application under Section 439 of Code of Criminal Procedure, 1973 (for short '**Cr.P.C.**') seeking Bail in connection with C.R. No.360 of 2023 registered with Shil Daighar Police Station for offences punishable under Section 8*

(c) read with Sections 22 (c) and 29 of the Narcotics and Psychotropic Substances Act, 1985 (for short '**NDPS Act**').

3. The Applicant is indicted for offences punishable under NDPS Act. The contraband in question is 150 grams of Mephedrone / Methamphetamine. The date of incident is 04.09.2023 and Applicant is arrested on 05.09.2023.

4. Ms. Chandka has drawn my attention to page No.37 which is intelligence information / report forwarded by Senior Inspector of Police to Assistant Police Commissioner specifically stating that Applicant could be arriving on a motorcycle on 04.09.2023 at 02:30 p.m. with the contraband namely Mephedrone.

5. As against this specific information, Ms. Chandka has drawn my attention to the police station diary appended at page No.47 and would submit that on the same date when the aforesaid information was forwarded at about 09:10 a.m and 10:00 a.m. specific information received was noted in the station house diary and if the same is perused, it is stated that one person would be arriving alongwith the alleged contraband stated in the letter and Applicant is not named therein. Ms. Chandka is right in her contention as name of Applicant is specifically stated in the letter at page No.37 when it is not so in the information noted in the station house diary.

6. The dichotomy is apparent on the face of record. In that view of the matter, there appears to be a clear transgression of Section 42 of the NDPS Act.

7. That apart, regarding procedure for seizure followed by prosecution in the present case, Ms. Chandka has drawn my attention to the trap panchanama appended at page No.29 of even date which when read categorically records that in the presence of witness Applicant was searched by the police official personnel namely Madhav Waghchoure and others on the instructions of the Investigating Officer whose name is stated therein. The statements of the two police personnel who carried out the search are appended at page Nos.65 and 71. At page No.65 is statement of Madhav Waghchoure whereas at page No.71 is the statement of Tejas Thanekar. Both the statements are in consonance with the trap panchnama which is recorded and therefore there is an apparent transgression of the provisions of Section 50 of the NDPS Act. This Court while considering a similar situation in the cases of **Zakir Sharifulla Sayyed Vs. the State of Maharashtra**¹ (Coram : Revati Mohite Dere, J.) and **Firoz Rauf Shaikh Vs. The State of Maharashtra**² has held that once there is a transgression of the statutory provisions namely Sections 42(1) and 50 as argued by Ms. Chandka, the Court will have to exercise its discretion in favour of the Applicant. Once this is seen prima facie, the Court will

1 Bail Application No.1966 of 2019 decided on 26.08.2019.

2 Bail Application No.5002 of 2024 decided on 06.02.2025.

therefore have to pass appropriate order.

8. *Ms. Ganapathy, learned APP would persuade the Court to allow her to take appropriate instructions from the concerned Investigating Officer and make her submissions on the next date.*

9. *At the request of Ms. Ganapathy, stand over to 18th February, 2025 at 02:30 p.m.. To be treated as 'Part-Heard'."*

4. Today, I have heard the learned Prosecutor and the submissions made *qua* the indictment of Applicant.

5. *Prima facie* it is seen that in the case of a chance recovery as contemplated under the provisions of the NDPS Act, search and seizure carried out by the Police Havaladar / Police Constable and Police Naik would be deemed to be unauthorised unless he is the authorised officer under Section 42(1) of the NDPS Act. In the present case admittedly as delineated in the above order, the police personnel who has carried out the search namely Madhav Waghchoure has carried out the search on the instructions of the Investigating Officer who is a lady Police Officer. There are other two Police Constables who have also carried out the search.

6. Ms. Ganapathy, learned APP has filed a detailed Affidavit dated 06.03.2025 of the Investigating Officer stating that the Investigating Officer herself instructed the Police Head Constable and others who were assisting her to conduct personal search of the accused person upon her authorization. What is argued by the

prosecution is that assuming without admitting that there is an error in compliance of the procedure provided under the NDPS Act regarding search by an unauthorised officer, still it would not entail the Applicant to plead for grant of bail as the alleged non-compliance is on account of fair investigating principles.

7. Learned APP has vehemently argued that error in compliance of the procedural aspect cannot be the sole ground for granting bail when prosecution has strong evidence to indict the accused person i.e. Applicant herein. She would stress on rigours of Section 37 of the NDPS Act being applicable in the present case and hence would urge for rejection of Bail Application.

8. I have considered the Affidavit dated 06.03.2025 filed by the Investigating Officer and the submissions made by the learned APP. The transgression of statutory provisions under Sections 42(1) and 50 of the NDPS Act is pleaded by the Applicant in the present case. It is seen that in the present case search was actually carried out by the Police Head Constable. The language of Section 42 specifically relates to the officers mentioned therein who are empowered to carry out the search. *Prima facie* it is seen that once there is transgression of the statutory provisions as contemplated under the NDPS Act, the benefit of doubt will have to be extended to the Applicant and the Court will have to exercise its discretion in that regard.

9. In the present case, in the pre-trap panchnama appended at page No.30 of the Application it is seen that Madhav Waghchoure the Police Head Constable has admittedly carried out the search alongwith other police personnel present at the spot on the instructions of the Investigating Officer. This transgression is duly considered by this Court in the following decisions:-

- (i) *Zakir Sharifulla Sayyed Vs. The State of Maharashtra*³
(Coram : Revati Mohite Dere, J.);
- (ii) *Firoz Rauf Shaikh Vs. The State of Maharashtra*⁴ (passed by this Court);
- (iii) *Manish Kumar Boricha Vs. The State of Maharashtra*⁵
(Coram: M. S. Karnik, J.) and
- (iv) *Aarif Akram Shaikh Vs. The State of Maharashtra*⁶
(Coram: M. S. Karnik, J.).

10. Once that is the position in law, the Applicant will have to be given the benefit of being released on bail since transgression of Section 42 of the NDPS Act *prima facie* as seen in the present case is evident. Applicant is therefore released on bail on the following terms and conditions:-

- (i) Applicant is directed to be released on bail on
furnishing P.R. Bond in the sum of Rs.50,000/- with
one or two sureties in the like amount;

3 Bail Application No.1966 of 2019 decided on 26.08.2019.

4 Bail Application No.5002 of 2024 decided on 06.02.2025.

5 Bail Application No.1163 of 2022 decided on 02.01.2023

6 Bail Application No.3158 of 2021 decided on 07.02.2023

- (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 Applicant shall attend the Investigating Officer on third Saturday of every month between 10.00 a.m. and 12.00 noon to mark his presence for the first six months and thereafter as and when called for. If the third Saturday of the said month falls on a holiday, the Applicant shall mark presence on the next working day;
- (iv) 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;
- (v) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;
- (vi) Applicant shall not influence with any of the witnesses or tamper with the evidence in any manner; and
- (vii) 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.

11. 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.

12. Bail Application No. 3609 of 2024 is allowed and disposed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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