

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 3793 OF 2024

Rajesh Shrinivas Kuken @ Raju Anna .. Applicant

Versus

The State of Maharashtra .. Respondent

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- Mr. Sherali S. Khan a/w Nadeem Shaikh and mr. Aaqib Khatri, Advocates for Applicant.
- Ms. Mahalakshmi Ganapathy, APP for State.

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CORAM : MILIND N. JADHAV, J.

DATE : MARCH 06, 2025

P. C.:

1. Heard Mr. Khan, learned Advocate for Applicant and Ms. Ganapathy, learned APP for State.

2. This is an Application under Section 439 of the Code of Criminal Procedure, 1973 (for short “**Cr.PC.**”) seeking bail in NDPS Special Case No. 839 of 2024 arising out of C.R. No.866 of 2023 registered with D.N. Nagar Police Station, Mumbai for the offences punishable under Sections 8(c) and 22 (c) of the Narcotics and Psychotropic Substances Act, 1985 (fort short “**NDPS Act**”) and Section 142 of the Maharashtra Police Act, 1951.

3. Facts in the present case are squarely covered by decisions of this Court in the case of *Haji Mohd. Abdul Kadar Bhumedia Vs. The State of Maharashtra*¹; *Arif Akram Shaikh Vs. The*

¹ Bail Application No.378 of 2022 decided on 23.08.2022

*State of Maharashtra*²; *Sunday Eziko Ezagwu Vs. The State of Maharashtra*³ and *Dilkush Sinai Vs. State of Goa Bench*⁴. *Prima facie* from the memorandum panchanama dated 08.11.2023 which is appended at page No.29 of the Application, it is clearly discernible that Applicant was frisked and searched by Police Constable on the instructions of the Investigating Officer.

4. Once it is *prima facie* established that search and seizure is done by Police Constable (शिपाही) from the record of the prosecution and more specifically in the case of a chance raid, the provisions of NDPS Act are required to be scrupulously followed as observed by this Court in the aforementioned four cases. Reference is drawn to the provisions of Section 50 of the NDPS Act which in Sub-section (1) itself refers to the provisions of Sections 41 to 43 of the NDPS Act. The language of Section 42 of the NDPS Act is clear and unambiguous. Police Constable is unauthorized to carry out search. Search carried out by Police Constable *prima facie* renders the search illegal. This is a decision of this Court in the case of Bail Applications which are decided in the aforementioned four cases.

5. Though Ms. Ganapathy, learned APP would persuade the Court to consider the fact that Applicant was apprehended and

² Bail Application No. 3158 of 2021 decided on 07.02.2023

³ Bail Application No.3318 of 2023 decided on 29.02.2024

⁴ 1995 (2) Goa L.T.

arrested with commercial quantity of alleged contraband and rigours of Section 33 of the NDPS Act would apply and if the Applicant desires to secure bail he needs to satisfy the Court on such rigours. She would submit that once the Applicant establishes that he was not guilty in committing the said offence and the Court is of the belief that Applicant would not reoffend himself and he is in fact not committed the crime on *prima facie* consideration the Court should not allow the present Application. Ms. Ganapathy would have been right in making her submission that application of the rigours of Section 33 of the NDPS Act would apply in the present case provided that provisions under the NDPS Act are scrupulously adhered to and followed by the prosecution.

6. It is in this regard reference is also invited to a decision in the case of ***Sunday Eziko Ezagwu Vs. The State of Maharashtra (supra)***, wherein this Court has referred to the notification issued by the State Government in exercise of its power under sub Section (1) of Section 42 of the NDPS Act, *inter alia*, stating that all Police Officers of and above the rank of Head Constable in the State of Maharashtra are empowered for the purposes of sub Section (1) of Section 42 of the NDPS Act. In the case at hand *prima facie* search is done by the Police Constable who admittedly is below the rank of Head Constable. Resultantly, the validity and legality of the search and seizure

becomes suspect and it vitiates the search. Applicant is in custody since 08.11.2023.

7. In view of his long incarceration and above *prima facie* observations, I am inclined to exercise the discretion in favour of the Applicant.

8. In view of the above, the Applicant is entitled to be enlarged on bail subject to 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;
- (ii)** Applicant shall report to the Investigating Officer of concerned Police Station once every month on the third Saturday between 10:00 am to 12:00 pm for the first three months and thereafter as and when called;
- (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 cancellation of this order;
- (iv)** Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court; He shall submit his

Passport, if any, with the Investigating Officer of the concerned Police Station within a period of one week from the date of his release on bail;

(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;

(vii) Any infraction of the above conditions shall entail cancellation of this order.

9. It is clarified that the observations in this order are limited for the purpose of granting Bail only and I have not made any observations on merits of the case.

10. Bail Application is allowed and disposed.