

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 1266 OF 2024

Samad Haroon Umatiya	.. Applicant
Versus	
The State of Maharashtra & Anr.	.. Respondents

WITH
BAIL APPLICATION NO. 3847 OF 2024

Danish Shaikh	.. Applicant
Versus	
The State of Maharashtra & Anr.	.. Respondents

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- Mr. Satish B. Talekar a/w Ms. Madhavi Ayyappan & Mr. Parth Rajput i/by Talekar & Associates for Applicant in BA 1266/24
 - Ms. Ilsa Shaikh for Applicant in BA 3847/24
 - Ms. Mahalakshmi Ganapathy, APP for Respondent No.1 - State
 - Ms. Megha S. Bajoria, Special PP for Respondent No.2 -UOI
 - Mr. Devendra Singh Mitharwal, IO - SIIB.

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 21, 2025

P. C.:

1. Heard Mr. Talekar, learned Advocate for Applicant in BA 1266/24; Ms. Shaikh, learned Advocate for Applicant in BA 3847/24; Ms. Ganapathy, learned APP for Respondent No.1 - State and Ms. Bajoria, learned SPP for Respondent No.2 - UOI.

2. This is a bunch of two Bail Applications filed by Applicants in connection with Crime bearing File No. CUS/SIIB/INT/266/2023-IMP-I-Mumbai for offences punishable under Sections 8(c), 21(c), 23(c),

28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "**NDPS Act**") registered by Special Intelligence and Investigation Branch (SIIB), Mumbai. There are total two Accused in the crime. Applicant - Samad Umatiya in Bail Application No.1266 of 2024 is arraigned as Accused No.1 and Applicant - Danish Shaikh in Bail Application No.3847 of 2024 is arraigned as Accused No.2. As both Applications arise from the same crime, they are disposed by this common order.

3. Briefly stated prosecution case is that on 05.06.2023 on the basis of a specific input by the Postal Appraising Section, Foreign Post Office, Ballard Estate, Mumbai a consignment to consignee bearing name and address of Shri Kamil Shaikh, B 203, Shama Manzil, Bahram Baug, Near Gandhi School, Jogeshwari West, Mumbai - 400 102 was examined by officers of Respondent No.2 and the said consignment was found to contain 245 tablets of alleged contraband MDMA weighing 120 grams and 95 grams of semi-crystal white coloured powder purported to be alleged contraband MDMA. Pursuant to testing of small quantity of the substance with drug detection kit, it was found that the test result was positive for MDMA and accordingly the same was seized by officers of Respondent No.2 under seizure memo dated 05.06.2023 under Section 42 of the NDPS Act readwith Section 110(1) of the Customs Act, 1962.

3.1. It is alleged that thereafter the said consignment was allowed for controlled delivery action under the provisions of the NDPS Act with necessary approval and controlled delivery was contemplated on 08.06.2023. It is alleged that the consignee namely Kamil Shaikh did not reside at the address mentioned on the consignment however on the basis of the phone number on the said consignment, on 08.06.2023 Applicant - Accused No.2 visited the Post Office to collect the said consignment and purportedly told the Postman that the consignment was his, however as he did not show his identity card, the Postman did not handover the consignment to him. It is thereafter alleged that Applicant - Accused No.2 made a phone call to Applicant - Accused No.1 whose phone number was mentioned in the consignee details and Accused No.1 visited the Post Office, however he refused to collect the parcel. Thereafter on the same day residences of both Accused were searched by the officers of Respondent No.2 but nothing incriminating was found pursuant to which both of them were served summons under Section 67 of the NDPS Act and their respective statements under Section 67 of the NDPS Act were recorded by the prosecution on 09.06.2023. On 09.06.2023 both Accused were arrested.

4. Mr. Talekar, learned Advocate for Applicant - Accused No.1 would submit that there is no role or involvement of the Applicant

whom he represents except for the fact that his mobile number was found on the consignment and his alleged admission to the same in his statement under Section 67 of the NDPS Act. He would submit that there is no recovery of any contraband from his conscious possession or even from his residence which was searched by the prosecution.

4.1. He would submit that there is clear violation of the provisions of Section 42(1) of the NDPS Act as perusal of the entire record shows that information received from the Postal Appraising Section of Foreign Post Office was not taken down in writing and furthermore a copy of such information, if any, was not even sent to the immediate official supervisor. He would submit that Section 42(1) of the NDPS Act mandates that seizure can be effected only by an officer who is authorised in that behalf and the second proviso to Section 42 provides that if such officer has to effect seizure without warrant or authorisation shall be required to record the reasons in writing which is not done in the present case. In support of this submission, he has referred to and relied upon the decisions of the Supreme Court in the case of *Karnail Singh Vs. State of Haryana*¹ and *Najmunisha Vs. State of Gujarat*² and the decisions passed by this Court in the case of *Mohsin Kayyum Sayyed Vs. The State of Maharashtra*³; *Faisal Bin Saber Vs. Dharmendra Kumar Rajput, Senior Intelligence Officer &*

1 (2009) 8 SCC 539

2 2024 SCC OnLine SC 520

3 BA No.4252/2024 decided on 10.03.2025

*Anr*⁴; *Mohammad Sultan Mohammad Munavar Khan Vs. The State of Maharashtra*⁵; *Sajid Husan Khan Vs. State of Maharashtra*⁶ and *Arbaz Ahmedchand Shaikh Vs. The State of Maharashtra*⁷.

4.2. He would submit that there is also non-compliance of provisions of Section 51 of the NDPS Act as the prosecution has not drawn any panchnama while effecting seizure of the mobile phone of the Applicant - Accused No.1. In support of this submission, he has referred to and relied upon the decision of the Supreme Court in the case of *Dharamveer Prasad Vs. State of Bihar*⁸ to contend non-compliance of statutory provisions of Section 42 readwith Section 51 of the NDPS Act.

4.3. He would submit that in addition to the above, there is transgression of provisions of Sections 52 as well as 52A of the NDPS Act. He would submit that the seized contraband was not forwarded by the prosecution for safe custody as contemplated under Section 52 but was deposited in the Foreign Post Office. Next he would submit that there is non-compliance of Section 52A(3) readwith Rules 9 and 10 of the NDPS (Seizure, Storage, Sampling and Disposal) Rule, 2022 (for short “**the NDPS Rules, 2022**”) and that the certification done by

4 BA No.4439/2024 decided on 10.03.2025

5 BA No.5036/2024 decided on 10.03.2025

6 BA No.4390/2024 decided on 12.03.2025

7 BA No.885/2025 decided on 19.03.2025

8 (2020) 12 SCC 492

Magistrate during inventory panchnama is not in accordance with Rules 8 and 18 of the NDPS Rules, 2022. In support of this submission, he would refer to and rely upon the decision of the Supreme Court in the case of *Mohammed Khalid and Anr. Vs. State of Telangana*⁹.

4.4. He would submit that there is non-compliance of Rule 11 of the NDPS Rules, 2022 as the prosecution is completely silent about the quantity drawn from the seized contraband for sampling and that there is nothing on record to show if adequate quantity as mandated by the NDPS Rules, 2022 was drawn to prove the prosecution case and the same goes against the prosecution case.

4.5. Next he would submit that there is also an inordinate delay in conducting the inventory proceedings before the Magistrate as the consignment was seized on 05.06.2023 / 12.06.2023 however the Application to the Magistrate for inventory proceedings and certification was made only on 11.09.2023 when the inventory panchnama was conducted on the same day itself. He would submit that the delay of 97 days in conducting the inventory panchanama being enormous is fatal to the prosecution case and would vitiate the inventory procedure. In support of this submission, he has referred to and relied upon the decisions of the Supreme Court in the case of

9 (2024) 5 SCC 393

*Tamir Ali vs. Narcotics Control Bureau*¹⁰ and *Hikmatullah Hikmati Vs. Narcotics Control Bureau*¹¹.

4.6. He would submit that the indictment of the Applicant – Accused based on his confessional statement recorded under Section 67 of the NDPS Act is itself inadmissible in law as it is hit by the bar of Section 25 of the Indian Evidence Act, 1872. In support of this submission, he has referred to and relied upon the decisions of the Supreme Court in the case of *Ajay Kumar Gupta Vs. Union of India*¹² and *Mohammed Khalid (supra)* as well as decisions of this Court in the case of *Ravi Manoj Rai Vs. Union of India and Anr.*¹³ and *Deepak Ashok Pawar Vs. The State of Maharashtra*¹⁴.

4.7. He has referred to and relied upon the decision of the Supreme Court in the case of *Bharat Chaudhary Vs. Union of India*¹⁵ to contend that the reliance of prosecution on the Whatsapp chats between the accused persons cannot be taken into consideration at the stage of bail. He has also referred to the decision of this Court in the case of *Vigin K. Varghese Vs. Union of India*¹⁶ to submit that in the present case the alleged contraband was not seized from the conscious possession of the Applicant / Accused as observed by this Court in the

10 2023 SCC OnLine Del 3015

11 2024 SCC OnLine Del 1094

12 (2024) 9 SCC 455

13 BA No.3846/2024 & BA No.4731/2024 decided on 11.02.2025

14 BA No.1753/2024 decided on 11.03.2025

15 (2021) 20 SCC 50

16 BA No.1540/2024 decided on 12.03.2025

case of *Vigin K. Varghese* (*supra*) which may be considered by this Court. He would submit that prosecution has not even paced on record any document to show any money trail to establish live link of any transactions between the accused.

4.8. He would submit that the seizure memo dated 05.06.2023 bears the subject Crime Number which is registered subsequent to the seizure under the NDPS Act and the same casts a shadow of doubt on the prosecution case. He would submit that such discrepancies in the prosecution case would vitiate the prosecution case.

4.9. In addition to the above grounds, he would submit that the long incarceration of the Applicant of more than 22 months in prison, pending trial may also be taken into account by this Court as though charge-sheet has been filed before the Special Court, the charges have not been framed till date thus violating Applicant's fundamental right to speedy trial and personal liberty. He would submit that Applicant has no criminal antecedents to his discredit. In view of his above submissions, he would urge the Court to allow his Application for bail.

5. Ms. Shaikh, learned Advocate for Applicant – Accused No.2 would submit that indictment of the Applicant – Accused No.2 is solely due to he having visited the Foreign Post Office for collecting the said consignment on instructions of Accused No.1 and nothing more. She

would adopt the submissions made by Mr. Talekar, which for brevity are not reiterated herein. She would submit that Accused No. 2 is neither the sender or recipient of the said consignment nor his contact details were mentioned on the parcel to establish his nexus with the said consignment. She would submit that he was not even aware about the contents of the said consignment. On the legal aspect of the case on non-compliance of statutory provisions of the NDPS Act she would support the submissions advanced by Mr. Talekar. Additionally in support of her submissions, she has referred to and relied upon the decisions of the Supreme Court in the case of *Karnail Singh (supra)*; *Tofan Singh Vs. State of Tamil Nadu*¹⁷ and *Mohan Lal Vs. State of Rajasthan*¹⁸ as also decision of this Court in the case of *Zaid Zahir Rana Vs. State of Maharashtra*¹⁹. In view of her above submissions, she would urge the Court to enlarge the Applicant on bail.

6. Ms. Bajoria, learned SPP for Respondent No.2 – SIIB has vehemently opposed grant of bail to the Applicants in the present matter. She has drawn my attention to the twin Affidavits-in-Reply both dated 25.03.2025 filed by the SIIB to resist the Bail Applications and would submit that Accused No.2 in his statement recorded under Section 67 of the NDPS Act has admitted that 10-15 days prior to his arrest he received another parcel on instructions of Accused No.1 and

17 (2021) 4 SCC 1

18 (2015) 6 SCC 222

19 BA No.1486/2023 decided on 30.10.2023

also received payment of Rs.25,000/- to Rs.30,000/- towards the same which has been corroborated by the statement of Accused No.1 recorded under Section 67 of the NDPS Act. She would submit that Accused No.1 has also disclosed that he will receive another parcel in 1 or 2 days containing 1000 tablets of MDMA which he ordered from the same person from Netherland and in furtherance of the same the prosecuting agency seized the said parcel which had 1010 tablets of MDMA weighing 400 grams from the Foreign Post Office which bears the residential address of Accused No.1 but name of another person. On the aspect of non-compliance of provisions of Section 42 of the NDPS Act, she has drawn my attention to the E-Office notes of communication (internal notes) between the officers of the prosecuting agency which are appended to the said Affidavits-in-Reply which confirm compliance of provisions of Section 42 of the NDPS Act.

6.1. She would submit that there is ample material on record to establish and corroborate the complicity of Applicants in the crime in the form of their confessional statements and Whatsapp chats which has led to further seizure at their instance. She would submit that drug trafficking not only eats into the vitals of the economy of a country but the illicit money generated by drug trafficking is often used for illicit activities. She would persuade the Court not to consider the technical issues argued by the Advocates for Applicants and that any

observation on the issues argued by Applicants would amount to a mini trial at the bail stage and it should not be done by the Court. She would submit that the overall contraband seized from Accused persons in the crime is commercial quantity and would therefore submit that rigours of Section 37 of the NDPS Act would be applicable to the case of Applicants which requires them to *prima facie* show that there are reasonable grounds to believe that they are not guilty of the alleged offence and in the present case Applicants have not overcome that hurdle. Hence she would urge the Court to reject the Bail Applications.

7. Ms. Ganapathy, learned APP for Respondent No.1- State would adopt and support the submissions of Ms. Bajoria and would urge the Court to dismiss the Bail Applications.

8. With the able assistance of the learned Advocates at the bar, I have perused the record of the case.

9. In so far as non-compliance of provisions of Section 42 of the NDPS Act is concerned, first argument of Applicants regarding IO not having reduced the information received in writing and not having forwarded such information to his superior, Ms. Bajoria has placed on record the E-Office Notes which clarify that such information was reduced in writing and also informed to the superior officer by the IO in the present matter. However no authorisation or warrant in favour

of the IO is placed on record to show that he had the authority to conduct the seizure of the alleged contraband as contemplated under Section 42 of the NDPS Act. The only authorisation letter placed in the chargesheet is with respect to authorising controlled delivery of the consignment under Section 50-A of the NDPS Act. Hence non – compliance of Section 42 of the NDPS Act is *prima facie* established in the present case. The Supreme Court in the case of ***Sarija Banu Alias Janarthani Alias Janani and Anr. Vs. State through Inspector of Police***²⁰ has held that while dealing with provisions of Section 42 and relevance of its compliance thereof, compliance of Section 42 is mandatory and it is a relevant fact required to be considered while considering a Bail Application.

10. Next, perusal of the seizure memo reveals that it bears printed CR Number prior to its registration which *prima facie* vitiates the prosecution case. The said issue pertaining to printing of FIR number prior to its registration at the stage of seizure has been dealt with by this Court in the case of ***Sarfaraj Abdul Majid Ahmed Vs. The State of Maharashtra***²¹. Filing of an FIR in NDPS cases must occur promptly following the detection of the crime to maintain its integrity and reliability. In the context of NDPS Act, the timing of the FIR in relation to detection of a crime is crucial. FIR serves as the initial document

²⁰ (2004) 12 SCC 266

²¹ BA No.4954/2024 a/w. connected matters decided on 24.03.2025

that sets the criminal law in motion, providing the earliest version of events concerning the commission of a cognizable offence. In NDPS cases, FIR must be filed as soon as possible after the detection of the crime. Delays can lead to questions about the authenticity of the Report and may suggest fabrication or embellishment. One cannot obtain the FIR Number before filing the FIR. FIR Number is assigned by the Police Station after the FIR is registered and recorded. It is a unique number. Police Officer must record the FIR in writing, read it back to the informant to ensure accuracy and have the informant sign it.

11. Next it is seen that there is an inordinate and unexplained delay of 97 days in making an application to the Magistrate and carrying out the inventory panchnama which *prima facie* vitiates the prosecution case as the possibility of tampering with the seized contraband cannot be ruled out at this stage.

12. Most importantly the admissibility of confessional statements of accused persons recorded under 67 of the NDPS Act was critically examined by the Supreme Court in the case of *Tofan Singh (supra)* and it concluded and laid down that such confessional statements are not admissible in evidence. It is seen that such confessional statements recorded under Section 67 of the NDPS Act are clearly hit by the bar of Section 25 of the Indian Evidence Act, 1872. There is no material

placed on record by the prosecution to show that either of the Applicants before me had knowledge or were in conscious possession of the alleged contraband in question. What is important is that there is no trail of money from the Applicants and or any banking transaction of Applicants in question with the person who booked the subject parcel containing the alleged contraband. The theory of conspiracy is therefore *prima facie* not proved on the basis of material placed before me. Provisions of Section 67 of the NDPS Act contemplate that the officer under Section 42 may during enquiry call for information, require production and examine any person. However, it is seen that if any confession is recorded then it is inadmissible without corroboration of the same.

13. In the case of *Bharat Chaudhary Vs. Union of India*²², the Supreme Court held that printouts of WhatsApp messages downloaded from the mobile phone or device seized cannot be treated as sufficient material to establish link between the accused persons under the NDPS Act at the stage of bail. It also held that statement of co-accused cannot be relied upon under Section 67 of NDPS Act.

14. It is seen that while dealing with Bail Applications the material available for consideration and adjudication is limited. It is brought to the notice of the Court that trials are taking perpetuity to conclude and

22 (2021) 20 SCC 50

prisons are also simultaneously overcrowded in some segments. It is trite 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.”

15. Though it is submitted that commercial quantity of alleged contraband are seized from Applicants and hence rigours of Section 37 of the NDPS Act would be applicable, in the facts of the present case wherein this Court is of the *prima facie* opinion that there is transgression and also non-compliance and transgression of statutory provisions of the NDPS Act, the said interdict of Section 37 of the NDPS Act can be said to be *prima facie* satisfied.

16. The pre-trial long incarceration of 22 months suffered by the Applicants without possibility of the trial commencing or for that matter even completing in the near foreseeable future is also another facet which needs to be taken into consideration by the Court. Needless to state that complicity of the Applicants in the crime and the prosecution case can be proved during the trial.

17. In view of my aforesaid *prima facie* observations, both Bail Applications are allowed subject to the following terms and conditions:-

- (i) Both Applicants are directed to be released on bail on furnishing PR. Bond in the sum of Rs. 50,000/- each with one or two sureties in the like amount;

- (ii) Before their actual release from jail, Applicants shall furnish their address where they propose to reside after their release from jail to the concerned Police Station and also to the trial Court;
- (iii) After their release from jail, Applicants shall report to the Investigating Officer as and when called for;
- (iv) Applicants shall attend the trial Court on first Tuesday of every month between 11.00 a.m. and 1.00 p.m. to mark their presence. If the first Tuesday of the said month falls on a holiday and / or non Court working day, the Applicants shall mark presence on the next working day;
- (v) Applicants 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 they do so, it will entitle the prosecution to apply for cancellation of this order;
- (vi) Applicants shall not leave the State of Maharashtra without prior permission of the trial Court; Applicants shall deposit their passport, if any, with the trial Court within a period of two weeks from their release;

(vii) Applicants shall not influence any of the witnesses or tamper with the evidence in any manner; and

(viii) 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.

18. 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.

19. Bail Application No.1266 of 2024 and Bail Application No.3847 of 2024 are allowed and disposed.

[MILIND N. JADHAV, J.]