



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.3918 OF 2024**

Wahab Abdul Aziz Shaikh
versus
The State of Maharashtra

... Applicant
... Respondent

Mr. Hrishikesh Mundargi with Ms. Pravada Raut i/by Paavani Chadha, for Applicant.

Mr. P.N.Gaikwad Patil, APP for State.

PSI Shri Dhumal, Tardeo Police Station present.

CORAM: N.J.JAMADAR, J.

DATE : 10 JANUARY 2025

P.C.

1. Heard the learned Counsel for the parties.
2. The applicant, who is arraigned in C.R.No.70 of 2023 registered with Tardeo Police Station, for the offences punishable under Section 21(c) and 29 of the Narcotic Substances and Psychotropic Substances Act, 1985 (the Act, 1985) has preferred this application to enlarge him on bail.
3. On 23 May 2023 at 3.50 a.m., while Tardeo Police were on a patrolling duty, the applicant was found moving suspiciously in front of Lala College, Vatsalabai Desai Chowk, Tardeo, Mumbai. The applicant was accosted. After apprising the applicant of his right under Section 50 of the Act, 1985, a search was conducted. A pouch containing white substance was found in the trouser of the applicant. It appeared Mephedrone (MD). It weighed 50.27 gms. In addition, there were 17 small pouches containing white substance, which also

appeared to be MD. Those 17 pouches contained 17.39 gms MD. The data in the mobile phone handset, found in the possession of the applicant, contained details of incriminating chats with Mohd. Imran, co-accused. The latter was also arrested. Post completion of investigation, chargesheet has been lodged.

4. At the outset, it is necessary to note that the applicant had preferred BA No.814 of 2024. The applicant, however, withdrew the said application on 29 February 2024.

5. Mr. Mundargi, learned Counsel for the Applicant, submitted that, he is conscious of the fact that the first application for bail was withdrawn. However, the ground on which the applicant seeks bail, in the instant application, according to Mr. Mundargi, was not at all urged in the earlier bail application and the ground is such that it dismantles the very prosecution case that the applicant was found in possession of commercial quantity of contraband substance. Therefore, the bar under Section 37 of the NDPS Act, 1985 does not come into play.

6. Amplifying the aforesaid submission, Mr. Mundargi urged that on the own showing of the prosecution, 67.66 gms MD was recovered from the possession of the applicant. However, the inventory conducted before the learned Magistrate would indicate that out of 17 small pouches, sample was collected from five pouches only and the said substance weighed 5.13 gms

and marked A-1. No sample was collected from the big pouch which allegedly contained 50.27 gms MD.

7. Mr. Mundargi invited attention of the Court to the forwarding letter (page 107) which indicates that only sample marked A-1 weighing 5.13 gms. was sent for analysis to the FSL and the CA report pertains to the said sample. It is not the prosecution case that the contraband allegedly found in the big pouch recovered from the possession of the applicant, and 17 small pouches was mixed together, and, thereafter, the samples were drawn. Thus, eventually, the applicant can only be tried for having been found in possession of 5.13 gms MD recovered from the 5 pouches, as there is no CA report in respect of the balance contraband substance. Thus, the applicant deserves to be enlarged on bail.

8. In opposition to this, Mr. Gaikwad, learned APP, submitted that first and foremost, there is no change in the circumstances which warrant afresh consideration of the prayer for bail, after the applicant has withdrawn the first application for bail, as this Court had then declined to entertain the prayer for bail. Inviting attention of the Court to the observations of this Court in the order dated 5 February 2024 in BA No.3024 of 2023, whereby Mohd. Imran Mohd. Abdul Shaikh, the co-accused, was enlarged on bail, which reflect upon the complicity of the applicant, learned APP submitted that there is a very strong prima facie case against the applicant.

9. It was further urged that, at any rate, the alleged infirmity in the collection of samples cannot be said to be of such a degree as to justify an inference that the accused is not guilty of the offences for which he has been arraigned. Learned APP placed reliance on the recent judgment of the Supreme Court in the case of **Narcotics Control Bureau V/s. Kashif**¹ wherein the Supreme Court in the context of the contention of non-compliance of the mandate contained in Section 52-A of the Act, 1985 enunciated that any procedural irregularity or illegality found to have been committed in conducting the search and seizure during the course of investigation or thereafter would, by itself, not make the entire evidence collected during the course of investigation, inadmissible. The Court would have to consider all the circumstances and find out whether any serious prejudice has been caused to the accused. Any lapse or delay in compliance of Section 52-A by itself would neither vitiate the trial nor would entitle the accused to be released on bail. The Court will have to consider other circumstances and the other primary evidence collected during the course of investigation, as also the statutory presumption permissible under Section 54 of the NDPS Act.

10. Mr. Mundargi submitted that the applicant does not seek bail on the ground of the alleged delay and infirmity in conducting proceedings under

1 Criminal Appeal No.5544 of 2024

Section 52-A of the Act. The absence of material to show that rest of the substance seized from the possession of the applicant was contraband, entitles the applicant to bail, urged Mr. Mundargi.

11. To start with the interdict contained in Section 37 of the NDPS Act, 1985 in the matter of grant of bail. As the applicant was allegedly found in possession of the commercial quantity of MD, the twin conditions need to be satisfied. First, there are reasonable ground for believing that the applicant is not guilty of the alleged offence and, second, the applicant is not likely to commit any offence while on bail. The expression 'reasonable ground' has been construed to mean something more than prima facie ground. The said expression contemplates substantial probable ground for believing that the accused is not guilty of the alleged offence. Such cause ought to emerge from the circumstances of the case which may justify an inference that the accused is not guilty of the alleged offence.

12. A profitable reference in this context can be made to the decision of the Supreme Court in the case of **State of Kerala and Ors. V/s. Rajesh and Ors.**² wherein the import of the term 'reasonable ground' was expounded as under :

“20. The express 'reasonable grounds' means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the

2 (2020) 12 SCC 122

provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act, is indeed uncalled for”

(emphassis supplied)

13. On the aforesaid touchstone, reverting to the facts of the case, prima facie, there is material to show that the applicant was found in possession of 67.66 gms MD. The contraband substance was seized and sealed at the spot, and, thereafter, inventory was conducted before the learned Magistrate on 15 June 2023. In addition to the recovery of the contraband substance from the possession of the applicant, data retrieved from the mobile phone handset of the applicant, containing whatsapp chats, prima facie, incriminates the applicant, and, shows the involvement of the applicant in the illicit trade in drugs. The element of conscious possession is, prima facie, reinforced by the said whatsapp chats.

14. The thrust of the submission of Mr. Mundargi was that notwithstanding the aforesaid material, the infirmity in the collection of samples during the course of the inventory panchanama conducted before the learned Magistrate, justifies an inference that the applicant may not be eventually found guilty of the offences for which he has been arraigned.

15. I have perused the inventory panchanama. It records that out of the seized contraband material, the substance in five small pouches weighed 5.13 gms; it was labelled A-1 and the said samples were sent for analysis. At this juncture, it is necessary to note that under Rule 11(1) of the Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022, except in cases of opium, ganja and charas (hashish), where a quantity of not less than twenty-four grams shall be drawn for each sample, in all other cases not less than five grams shall be drawn for each sample and the same quantity shall be taken for the duplicate sample. In cases where the seized quantity is less than that required for the sampling, the whole of the seized quantity may be sent.

16. In the case at hand, it is necessary to note that apart from the big pouch which allegedly contained 50.27 gms MD, the applicant was allegedly found in possession of 17 small pouches. The total substance contained in those 17 pouches weighed less than 17.39 gms. It appears, each of the small pouches contained, on an average, 1 gm of MD. Thus, during the course of inventory panchanama, five small pouches which weighed 5.13 gms, were collected by way of sample and sent for analysis. If the submission of Mr. Mundargi is to be accepted, then the entire bulk of all 17 small pouches and the big pouch, which allegedly contained 50.27 gms MD, was required to be sent for analysis.

17. In the aforesaid view of the matter, whether the failure to mix the contents of all 18 pouches, and, thereafter, draw the sample caused such prejudice to the applicant as would vitiate his prosecution, would be a matter for adjudication at the trial.

18. At any rate, the alleged defect was at the stage of collection of the samples during the course of inventory under Section 52-A of the NDPS Act, 1985. As noted above, in the recent pronouncement in the case of **Narcotics Control Bureau V/s. Kashif (supra)**, the Supreme Court has in terms enunciated that sub-Section (2) of Section 52-A lays down the procedure as contemplated in sub-section (1) thereof, and any lapse or delayed compliance thereof would be merely a procedural irregularity which would neither entitle the accused to be released on bail nor would vitiate the trial on that ground alone. The totality of the circumstances would be required to be taken into account.

19. If considered in the light of the material which prima facie indicates that the applicant was found in possession of commercial quantity of MD and was also instrumental in the illicit trade in drugs, in my considered view, the interdict contained in Section 37 of the NDPS Act, 1985, comes into play with full force and rigour. Defect in sampling, pressed into service on behalf of the applicant, does not appear to be of such a nature as to constitute a substantial probable cause to believe that the applicant may not be guilty of

the offences.

20. I am, therefore, inclined to reject the application.

21. Hence, the following order :

ORDER

(i) The Application stands rejected.

(ii) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the co-accused. and the trial Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

(N.J.JAMADAR, J.)