

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 4580 OF 2024

Mohd Ibrahim Mohd. Israil Khan	.. Applicant
Versus	
The State of Maharashtra	.. Respondent

WITH
BAIL APPLICATION NO. 5193 OF 2024

Mohd. Irfan Abdul Mannan Ansari	.. Applicant
Versus	
State of Maharashtra	.. Respondent

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- Ms. Zehra Charania a/w. Mr. Ayaz Khan, Mr. Dilip Mishra and Ms. Mallika Sharma, Advocates for Applicant in Bail Application No.4580 of 2024.
 - Mr. Rushikesh M. Pethe, APP for Respondent in Bail Application No.4580 of 2024.
 - Mr. Nilesh Bangar a/w Mr. Kamlesh Satre, Advocates for Applicant in Bail Application No.5193 of 2024.
 - Mr. Hitendra J. Dedhia, APP for Respondent in Bail Application No.5193 of 2024.

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CORAM : MILIND N. JADHAV, J.
DATE : MARCH 19, 2025

P.C.:

1. Heard Ms. Charania, learned Advocate for Applicant in Bail Application No.4580 of 2024; Mr. Pethe, learned APP for Respondent in Bail Application No.4580 of 2024; Mr. Bangar, learned Advocate for Applicant in Bail Application No.5193 of 2024 and Mr. Dedhia, learned APP for Respondent in Bail Application No.5193 of 2024.

2. The Applicants in both these Applications are seeking Regular Bail under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023 in connection with C.R.No. 1113 of 2023 registered with Shivaji Nagar Police Station for offences punishable under Sections 8 (c) read with Sections 22 and 29 of Narcotic Drug and Psychotropic Substances Act, 1985 (for short 'NDPS').

3. Applicant in Bail Application No. 4580 of 2024 is arraigned as Accused No. 1 was arrested on 19.12.2023 whereas Applicant in Bail Application No. 5193 of 2024 is arraigned as Accused No. 2 was arrested on 23.01.2024.

4. The case of prosecution is that patrolling team on the intervening night of 18.12.2023 and 19.12.2023 at 01:00 hours while patrolling near Shivaji Nagar noticed Applicant- Accused who had a white colour plastic bag in his hand behaving suspiciously. The patrolling team approached him and questioned him about his details, Applicant gave evasive answers which led patrolling team to call for two panchas and raiding material. It is prosecution case that at about 02:10 hours two panchas alongwith PI Pawar reached the incident spot. Two panchas were appraised about the procedure of search seizure and arrest. Thereafter Applicant was appraised of his right under Section 50 of the NDPS and asked him if he wanted to be searched before a Gazetted Officer and Magistrate and according

arrangements would be made to which he denied. On search, 20 bottles of Codiene Phosphate and Triplolidine Hydrochloride Syrup of 100 ml each was found from the white plastic bag which was in possession of the Applicant. However on further questioning Applicant informed that he procured the alleged contraband from one Irfan i.e. Co-accused No. 2. Thereafter the seized bottles were placed in one light green colour packet and it was sealed and marked as 'A' and Applicant's mobile phone was seized and marked as 'B' and he was arrested on the same day.

5. Ms. Charania learned Advocate for the Applicant – Accused No. 1 in Bail Application No. 4580 of 2024 would submit that Applicant has been falsely implicated in the present case. She would submit that there is *prima facie* variance in the FIR as on perusal of the FIR it is appears that either one or two persons are apprehended on suspicious movements at the time of patrolling as the term used is plural at some places and singular at some places. However she would submit that panchanama appended at page no. 34 if read shows that only Applicant was apprehended during patrolling. There is a clear dichotomy on the face of the record casting a doubt on the prosecution case. She would submit that witness statements are recorded at a belated stage i.e. 3 days after the alleged incident which make the prosecution case highly questionable. She would draw my attention to the witness statement of one Vipin Shivaji Nikam appended at page

No. 68 and reference is made to Accused No. 1 on the first two pages however when read at page No. 70 arrest of two accused persons is stated. She would submit that statements of other witnesses appended at page Nos.71 and 74 record similar discrepancy on the face of it. Hence she would submit that there is clear variance while complying with Section 57 of the NDPS Act. Hence she would submit that reliability on the witness statements becomes doubtful. She would submit that Application for inventory panchanama was made on 07.05.2024, appended at page No. 38, however the inventory panchanama was drawn on 13.05.2024 appended at page No. 39 reflecting a delay of more than 4 months in complying with procedure envisaged under Section 52A which is fatal and raises doubt on the prosecution case.

5.1. She would submit that Applicant is a young offender aged 19 years and has no criminal antecedents. She would submit that Applicant is arrested on 19.12.2023 and he is incarcerated since 1 year 3 months. She would submit that investigation is completed and chargesheet has been filed. Commencement and completion of trial in near foreseeable future is bleak. Hence she would urge the Court to allow the Application.

6. Mr. Pethe, learned APP for Respondent – State would oppose the present Bail Application. Affidavit dated 12.03.2025 on behalf of

the Respondent - State is taken on record. He would submit that commercial quantity of contraband is found in possession of the Applicant. He would submit that Applicant did not have receipt for the same and he himself stated that he procured the contraband from Accused No.2 and the same is corroborated by CDR details which show and reflect phone calls between the Applicant – Accused No. 1 and Accused No.2. He would submit that contention of Advocate for Applicant regarding variance in the FIR and in the panchanama that states apprehension of two accused persons even though Applicant was the only one apprehended does not hold any value at this stage as it is a mere typographical error and nothing more. He would submit that Applicant should not be given benefit of the error of plural terminology used in the FIR and panchanama. He would submit that as commercial quantity of contraband is recovered from the Applicant the provision of Section 29 is invoked in the chargesheet and also the rigours of Section 37 will apply to the present case. Hence he would urge the Court to reject the Application.

7. Mr. Bangar, learned Advocate for the Applicant – Accused No.2 in Bail Application No. 5193 would submit that Applicant was arrested on 23.01.2024 i.e. 4 days after the apprehension of Accused No.1. He would submit that Applicant has been falsely implicated in the present case. He would submit that there is no substantial evidence to show his involvement in the alleged crime as there is no conscious

recovery at the instance of the Applicant. He would submit that prosecution places reliance on the statement of co-accused No.1 recorded under Section 67 of the NDPS Act, which is inadmissible in evidence and no evidence to corroborate the same is placed on record which makes the prosecution case highly questionable. He would submit that prosecution also places reliance on CDR details, however no transcripts have been placed on record to establish a nexus between the Applicant and co-accused No.1, casting a doubt on prosecution case.

7.1. He would submit that Applicant has deep roots in the Society and has no criminal antecedents. He would submit that Applicant is arrested on 23.01.2024 and he is incarcerated since 1 year 1 months and 28 days. He would submit that investigation is completed and chargesheet has been filed. He would submit that commencement and completion of trial in near foreseeable future is bleak. Hence he would urge the Court to allow the Application.

8. Mr. Dedhia, learned APP for Respondent – State in Bail Application No. 5193 of 2024 would oppose the narrative of Mr. Bangar. He would submit that the offence is serious in nature. He would submit that involvement of Applicant – Accused No.2 is established during investigation. He would submit that Applicant was actively involved in transaction of alleged contraband in connivance

with co-accused No.1. He would submit that in his statement under Section 67 of NDPS Act recorded on 25.01.2024, Applicant has admitted that he knew co-accused No. 1 for the past 1 year which is corroborated by the CDR details placed on record. Further he has admitted that he used to sell the alleged contraband which he procured from Uttar Pradesh which shows that Applicant was directly and actively involved in the present crime. Hence he would urge the Court to reject the present Application.

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

10. *Prima facie* it is seen that Applicant – Accused No.1 in Bail Application No. 4580 of 2024 was apprehended at the time of patrolling however *prima facie* there is a clear dichotomy on the face of record. On perusal of the FIR appended at page No. 25, panchanama appended at page No. 35 and witness statements from page No.71 onwards it is seen that the narration of the incident is with regard two accused persons however only Applicant - Accused No.1 was *prima facie* apprehended on that day. However the argument advanced by Mr. Pethe that it is a mere typographical error can be a subject matter of trial.

10.1. However, the fundamental principle, upon which the whole structure of Criminal Jurisprudence is based, is that burden of proving

every essential ingredient of the offence lies upon the prosecution and the accused is presumed to be innocent till the offence is proved against him beyond all reasonable doubt. However in the present case it is seen that *prima facie* there is variance which has aided to the benefit of the Applicant. It is seen that Applicant is a young offender aged 19 years and has no criminal antecedents which persuades me to consider Applicant's case. Applicant's incarceration for more than one year, investigation being completed, chargesheet being filed and commencement and completion of trial in near foreseeable future being doubtful further persuades me to consider Applicant's case.

11. That apart with reference to Applicant - Accused No. 2 it is seen that *prima facie* no direct evidence is placed on record against the Applicant. *Prima facie* it is pertinent to note that there is no cogent evidence to establish that the Applicant had at any point of time was involved in selling or delivering the alleged contraband. *Prima facie* the reliance placed on bank transactions and CDR details do not draw any inference of Applicant's involvement in the crime. It is seen that Applicant - Accused No.2 does not have any criminal antecedents and *prima facie* no recovery of any contraband is made at the instance of Applicant- Accused No.2 which further persuades me to consider Applicant's case.

11.1. Next, *prima facie* it is seen that he is indicted solely on the basis of the statement of the co-accused No.1 recorded under Section 67 of the NDPS which are inadmissible in law as such statements are hit by Section 25 of the Indian Evidence Act, 1872.

12. In the case of *Vikramjit Singh Vs. Narcotics Control Bureau*¹ the Delhi High Court found no admissible evidence linking Applicant directly to the contraband. It noted that disclosure statement of the person from whose house the drugs were recovered did not implicate the Applicant and was thus inadmissible under law as such a confession is hit by Section 25 of Indian Evidence Act, 1872.

13. The Supreme Court in the case of *Tofan Singh Vs. State of Tamil Nadu*² Court held that statements recorded by NDPS officers could be construed as statements to police officers given their duties and responsibilities in preventing and detecting crime under the NDPS Act. It held that right against self-incrimination and right to privacy under Article 20(3) and Article 21 of the Constitution apply to confessions recorded under Section 67 of the NDPS Act. It also held that officers under the NDPS Act should be construed as 'police officers' under Section 25 of the Evidence Act to prevent coercion in recording confessions and that confessions made before such officers are inadmissible as evidence to protect fundamental rights under Articles

¹ BA No. 4268 of 2024 decided on 14.01.2025

² (2021) 4 SCC 1

20(3) and 21 of the Constitution.

14. In the case of *Phundreimayum Yas Khan Vs. State (NCT of Delhi)*³ the Delhi High Court has observed that disclosure statement of co-accused is *per se* not admissible without there being any corroboration thereof. Relevant paragraph No.24 of the said judgement reads thus:-

“24. The case of the prosecution, in so far as the applicant is concerned, is circumstantial, i.e. based solely on disclosure statement of the co-accused Sayed Javed Hussain which is per se not admissible without there being any corroboration. The prosecution has not been able to establish any connection between the subject offence and the location/CDRs of the accused persons, where the applicant is alleged to be present at the time when the contraband was collected by Sayed Javed Hussain. Merely because the applicant had been having frequent calls with the co-accused, would not be sufficient to hold that applicant is guilty of the subject offence.”

15. In the case of *Jasbir Singh Vs. Narcotics Control Bureau*⁴ the Delhi High Court in paragraph Nos.63, 67 and 68 of its judgment while interpreting Section 67 of the NDPS Act *vis-a-vis* Sections 25 and 27 of the Indian Evidence Act, 1872 held as under:-

“63. As statements recorded under Section 67 NDPS Act are inadmissible being hit by Section 25 IEA, the only way to make any part of such statements admissible, is by way of Section 27 IEA which creates an exception and allows only such part of a confessional statement, being information leading to discovery of some fact not previously in the knowledge of the police officer. In the present case, none of the statements of the Applicant lead to any discovery of a fact”, and hence, the statutory bar to their admissibility and reliability is attracted.

64. ***

3 2023 SCC OnLine 135

4 (2023) SCC OnLine Del 134

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66. ***

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67. *With regards to applicability of Section 27 IEA, the fact so discovered is admissible when accompanied by the recovery of a material object and does not include purely mental or psychological facts. It is relevant to note the observations of this Hon"ble Court in State v. Navjot Sandhu @ Afsan Guru Crl. A. No. 80/2003 wherein this Hon"ble Court, after placing reliance on Pulukuri Kottaya and Ors v. The King-Emperor 1946 SCC OnLine PC 49, and several other judgments of the Hon"ble Supreme Court and other courts, summarized the law governing Section 27 IEA as follows:*

"396. We, therefore, hold that in order that Section 27 may be brought in aid, the prosecution must establish:—

1. That consequent to the information given by the accused, it led to the discovery of some fact stated by him.

2. The fact discovered must be one which was not within the knowledge of the police and the knowledge of the fact was for the first time derived from the information given by the accused.

3. Information given by the accused must lead to the discovery of a fact which is the direct outcome of such information.

4. The discovery of the fact must be in relation to a material object and of course would then embrace within its fold the mental condition i.e. the knowledge of the accused of the place from where the object was produced and the knowledge that it was there.

5. Only such portion of the information as is distinctly connected with the said discovery is admissible.

6. The discovery of the fact must relate to the commission of some offence."

68. Therefore, for any part of the alleged disclosures of the Applicant to be admissible, it was necessary that such disclosure led the Respondent to recovery of any contraband, or any other 'fact' related to the alleged offences. Given that none of the disclosures of the Applicant, except (at best for the recovery of a contraband involving quantity lesser than small quantity) led to the discovery of any object, or a "new fact" thereby, such disclosures under section 67 NDPS Act are held inadmissible in evidence."

16. In the case of *State Vs. Pallulabid Ahmad Arimutta*⁵, the Supreme Court held that CDR details of the some of the accused or allegations of tampering of evidence by accused is an aspect that can be examined at the stage of trial. Hence statement given under Section 67 of the NDPS Act, 1985 cannot be considered at the stage of bail.

17. In the following decisions of the Supreme Court and various High Courts concerning such long detention and imprisonment of undertrial prisoner / accused on being apprehended with commercial quantity of various contrabands, the Courts have in the backdrop of the aforementioned propositions exercised its unfettered jurisdiction in releasing an undertrial on bail on account of long incarceration by using its discretionary powers:-

18. In the case of *Nitish Adhikary alias Bapan Vs. State of West Bengal*⁶ the Supreme Court considering long incarceration of an undertrial-accused granted him bail to an undertrial-accused who was incarcerated for 1 year and 7 months despite being alleged to be in possession of commercial quantity of contraband.

19. In the case of *Babor Ali Mondal Vs. State of West Bengal*⁷ the Supreme Court considering the long incarceration granted bail to an undertrial-accused who was incarcerated for 1 year and 4 months.

⁵ SLP (Cri.) No. 3242 / 2022 dated 10.01.2022

⁶ 2022 SCC OnLine SC 2068

⁷ Criminal Appeal No. 3349 of 2024

20. In the case of *Sukhvinder Singh Bittu Vs. State of Punjab*⁸ the Supreme Court considering long incarceration of an undertrial-accused granted him bail who was incarcerated for 1 year despite being alleged to be in possession of commercial quantity of poppy straw.

21. In the case of *Mohd. Mobin Jahurul Hasan Manihar Vs. State of Maharashtra*⁹ - this Court on 20.01.2025 considering long incarceration of the under-trial accused granted bail to him who was incarcerated for 1 year 11 months. The contraband in question was 220 gms of MD , the commercial quantity of which is 50 gms.

22. From the above, it is apparent that inspite of the stringent test to be met by the Accused person under Section 37 of the NDPS Act for being released on bail, it has been held that the same does not fetter grant of Bail to the Accused person on the ground of undue delay in the completion of trial. It has been held that incarceration for substantial period of time generally militates against the right to life and liberty guaranteed under Article 21 of the Constitution of India and hence the conditional liberty must override the statutory embargo under Section 37 of the NDPS Act.

23. In the above *prima facie* facts and circumstances of the case the Applicants before me have made out a case for bail. In the absence of criminal antecedents, investigation being completed and

⁸ Cri. Appeal No.1204 of 2024

⁹ BA No.713 of 2024 decided on 20.01.2025

chargesheet being filed and commencement and completion of trial in near foreseeable future being doubtful entitles the Applicants for grant of bail in above terms and conditions:-

- (i) Applicants are directed to be released on bail on furnishing P.R. Bond in the sum of Rs. 25,000/- each with one or two sureties in the like amount;
- (ii) Applicants are permitted to furnish provisional cash bail of Rs.25,000/- each for their release immediately and file undertaking that they will provide one or two sureties in the like amount of Rs.25,000/- within a period of four weeks after their release which shall be accepted by the Trial Court. Applicant shall provide sureties as directed;
- (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 Monday of every month between 11.00 a.m. and 1.00 p.m. to mark their presence. If the first Monday of the said month falls on a holiday and / or non Court working day, the Applicants shall mark their 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;
- (vii) Applicants shall not influence with any of the witnesses or tamper with the evidence in any manner;
- (viii) Before their actual release from jail, Applicants shall furnish their address where they proposes to reside after their release from jail, to the concerned Police Station and also to the trial Court; and
- (ix) In case of any infraction of the above conditions and / or two consecutive defaults in marking their attendance before trial Court, it shall attract the provisions of Section 439(2) of Cr.P.C. i.e. for cancellation of bail.

24. It is clarified that the above observations in this order are limited for the purpose of granting bail only and I have not made any observations on the merits of the case and the trial shall be adjudicated on the basis of the evidence led by the parties uninfluenced by the

present order and strictly in accordance with law.

25. Bail Application No. 4580 of 2024 and Bail Application No. 5193 of 2024 are allowed and disposed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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