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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL BAIL APPLICATION NO. 5147 OF 2024

Ismail Abdul Shaikh

.. Applicant

Versus

Union of India and Anr

.. Respondents

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- Mr. Shreerat Kamath a/w Ms. Puja Yadav, Advocates for Applicant.
 - Mr. Shreeram Shirsat, APP a/w Ms. Karishma Rajesh and Mr. Shekhar Mane, Advocates for Respondent No. 1 - Union of India
 - Ms. Rajeshree V. Newton, APP for Respondent No. 2 – State.
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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 02, 2025.

P.C.:

1. This is an Application under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023 seeking Regular Bail in connection with C.R.No. 32 of 2023 registered with Anti Narcotic Cell, Ghatkopar Unit for offences punishable under Sections 8 (c), 22 (b) (ii), 22, 27, 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act'). Applicant is arrested on 08.11.2020 and he is incarcerated for 4 years 4 months 25 days.

2. It is prosecution case that on 03.11.2020 the Narcotic Control Bureau received specific information to the effect that a person was reaching near Bhim Nagar, J.P. Road, Andheri West between 8:00 to 9:00 p.m. in an Innova Car bearing No. MH 43 V 6795 for the

purpose of selling Ganja. Upon receiving the information it was reduced in writing and was forwarded to the authorities as per the provisions of NDPS Act. Two panchas were brought and were appraised of the search, seizure and arrest procedure under the NDPS Act, panch witnesses conducted a search of the police personnel and a pre-trap panchanama was prepared. At about 20:35 hours an Innova car bearing the same number arrived at the spot and four (4) persons in the car were found behaving suspiciously, raiding party intercepted them and upon questioning they failed to answer. Pursuant to which they were appraised of their rights under Section 50 of the NDPS Act. On search, 702.1 grams of Ganja, 59.1 grams of Charas and 3.1 grams of MD in total was recovered from their bags. The contraband was duly seized, sealed, marked and offence was registered under the provisions of the NDPS Act.

3. In furtherance of Accused No. 1's disclosure statement recorded on 04.11.2020, a raid was conducted on 07.11.2020 at about 17:10 hours at Applicant's house. Raiding party alongwith two panchas reached Applicant's house where an unknown individual was seen entering the premises where Applicant handed him an unidentified item for which he handed him some money. During the said exchange the raiding party entered the premises and 10 grams of MD was recovered from that unknown person and in total 79 grams of Mephedrone (commonly known as 'MD') was recovered at the instance

of the Applicant. The contraband was duly seized, sealed and marked as 'M-1' 'M-2' and 'M-3' and offence was registered under Sections 8 (c), 22 (b) (ii), 22, 27, 28 and 29 of NDPS Act.

4. Mr. Kamath, learned Advocate for the Applicant would submit that Applicant is falsely implicated in the present case. He would submit that Applicant's indictment is on the basis of Accused No. 1's statement under Section 67 of the NDPS Act which is inadmissible in law. He would submit that *prima facie* there is infraction of Rules 3 and 10 of the Narcotics Drugs & Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 as recovery is effected in respect of 1 packet weighing 63 grams of MD and other from the 11 packets weighing 16 grams in total. He would draw my attention to the seizure panchanama appended at page No. 144 wherein it is seen that 11 small packets of MD were found in separate zip-lock polythene bag. However on recovery the same have been mixed for the purpose of quantifying and weighing the same which is impermissible in law.

4.1. He would draw my attention to the glaring error in the prosecution case, from the Certification by Magistrate under Section 52A of the NDPS Act dated 23.12.2020 appended at page No. 495 it is seen that 11 small packets of MD were recovered, they were weighed 16 grams in total and were sealed and marked as 'M-3' and out of

which two samples of 5 grams each were drawn and were marked as 'HS-1' and 'HS-2', hence the samples sent for analysis raise a doubt on the prosecution case. He would submit that on perusal of the Examination Report dated 11.01.2021 appended at page No. 534 at Serial No. 8 it is seen that only one of the two samples certified by the Magistrate was used to draw 5 samples marked as HS-1-1, HS-1-2, HS-1-3, HS-1-4, and HS-1-5 which were seen to be tested making the prosecution case highly questionable.

4.2. He would submit that there are in all 14 accused persons in the alleged crime however one of the accused persons is absconding and the other 12 accused persons have been granted bail by the Sessions Court. Hence he would urge the Court to consider Applicant's case on the ground of parity.

4.3. He would submit that Applicant has deep roots in Society and has no criminal antecedents. He would submit that Applicant is arrested on 08.11.2020 and he is incarcerated for 4 years 4 months 25 days. Investigation being completed, chargesheet being filed, commencement and completion of trial in the near foreseeable future is doubtful as prosecution desires to examine 64 witnesses however none of the witnesses have been examined till date. Hence he would urge the Court to allow the Application.

5.*PER-CONTRA*, Mr. Shirsat, learned APP for Respondent No. 1 – Union of India would draw my attention to the Affidavit-in-reply filed by Mr. Satish Kumar, Intelligence Officer, Narcotics Control Bureau, dated 02.04.2025 appended at page No. 726 of Bail Application for opposing the bail Application. He would submit that the offence is of a serious nature as recovery of the alleged contraband is of commercial quantity. He would submit that the bar of Section 37 of the NDPS Act has to be overcome by the Applicant. He would submit that the Court while granting bail must be fully satisfied that there are reasonable grounds for believing that Applicant is not guilty of such offence and he is not likely to commit any offence while on bail. He would submit that such offences are offences against the society at large and will have to be viewed by the Court very strictly without any leniency. He would submit that as there was recovery made at the instance of the Applicant which clearly shows and reflects Applicant's linkage to the alleged crime and to corroborate the same CDR details have been placed on record. He would submit that from the record of the case the intent to sell the contraband itself raises a serious doubt regarding involvement of other individuals in the illegal drug trade. Furthermore, there exist a likelihood of Applicant tampering with evidence and influencing witnesses if released on bail. Hence he would urge the Court to reject his Bail Application.

6. Ms. Newton, learned APP for Respondent No. 2 – State would adopt the submissions advanced by Mr. Shirsat. She would submit that from the record of the case and recovery of the alleged contraband made at the instance of the Applicant, primary role and nexus of the Applicant to said crime is *prima facie* established. She would submit that the offence is of a serious nature as recovery of the alleged contraband is of commercial quantity. She would submit that rigors of Section 37 will be directly applicable to the present case. She would submit that possibility of Applicant tampering with evidence and influencing witnesses if released on bail cannot be ruled out. Hence she would urge the Court to reject his Bail Application.

7. I have heard the learned Advocates at the bar and perused the record with the able assistance of the learned Advocates.

8. *Prima facie* on perusal of record of the case it is seen that there is a clear transgression of Rules 3 and 10 of the Narcotics Drugs & Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 wherein it is seen from the Panchanama appended at page No. 144 and when read at page No. 147 that 11 zip lock polythene bags of the alleged contraband were recovered however the same have been mixed and marked as ‘M-3’ for the purpose of quantifying and weighing which is fatal to the prosecution case. *Prima facie* on perusal of the Examination report it is seen that 5 samples marked as HS-1-1,

HS-1-2, HS-1-3, HS-1-4, and HS-1-5 were tested which casts a doubt on the seizure and prosecution case. Thus, *prima facie*, there is clear violation of the mandatory provisions of Section 42 of the NDPS Act read with Rule 3 of the NDPS Rules, 2022, which casts a doubt on the seizure and prosecution case. Supreme Court in the case of ***Sarija Banu Alias Janarthani Alias Janani and Anr. Vs. State through Inspector of Police***¹ has held that while considering violation of Section 42 and relevance thereof compliance of Section 42 is mandatory and it is relevant fact required to be considered while considering a Bail Application. *Prima facie* the reliance placed on CDR details do not draw any inference of Applicant's involvement in the crime.

9. *Prima facie* on perusal of the Certification by the Magistrate under Section 52A of the NDPS Act dated 23.12.2020 appended at page No. 495 it is seen that 11 zip lock polythene bags of the alleged contraband recovered, weighed 16 grams in total were sealed and marked as 'M-3' and out of which two samples of 5 grams each were drawn and were marked as 'HS-1' and 'HS-2' which is impermissible in law. When the alleged contraband is recovered from different pouches, it is imperative on the prosecution to draw a sample each from the recovered contraband pouch. Mixing of contraband is impermissible.

10. In this regard, reference is made to the following decisions of the Supreme Court and this Court:-

¹ (2004) 12 SCC 266

- (i) *Union of India Vs. Bal Mukund and Ors.*²
- (ii) *Shabbir Usman Shaikh Vs. The Union of India and Anr*³
- (iii) *Sameer Rais Shaikh Vs. The State of Maharashtra*⁴
- (iv) *Mukesh Kumar Saha Vs. The State of Maharashtra*⁵
- (v) *Zaheer Gayasuddin Shaikh Vs. The State of Maharashtra and Anr*⁶

11. It is settled 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),--

² (2009) 12 SCC 161

³ BA No.731 of 2024 – Decided on 03.11.2023

⁴ BA No.2108 of 2023 - Decided on 03.11.2023

⁵ BA No.693 of 2023 – Decided on 30.11.2023

⁶ BA No.2742 of 2023 – Decided on 14.03.2024

(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.”

12. From the reading of Section 37 of the NDPS Act, it becomes clear that the legislature intends to deny bail to accused alleged to be in possession of commercial quantity of contraband in absence of court subscribing to a contrary view, however therefore if seen it does not rule out the facet of discretion of Court to grant bail. Furthermore the Court must be satisfied that the accused is unlikely to re-offend. It is seen that while dealing with Bail Applications the material available for consideration and adjudication is limited. In such cases, if we look realistically the provisions of Section 37 leave limited room for a possibility of granting bail to the accused. However employing such limitation would create a dichotomy in the current scenario where one common grievance is made before this Court repeatedly in matter after matter. It is brought to the notice of the Court that trials are taking perpetuity to be concluded and prisons are also simultaneously

overcrowded in some segments. This Court regularly deals with Bail Applications of under-trials who have been in custody for long incarceration, and is also equally aware of the conditions of our prisons. To give an example in the city of Mumbai, recently in one of the cases before me, a Report dated 12.12.2024 made by the Superintendent of Mumbai Central Prison addressed to the Chief Government Pleader was placed before me by the Public Prosecutor which stated that the Mumbai Central Prison (Arthur Road Jail) is overcrowded beyond its sanctioned capacity by more than 5 – 6 times and every barrack sanctioned to house 50 inmates, as on date houses anywhere between 220 – 250 inmates. This situation is inhumane, but it also cannot be forgotten that addiction of drugs is also a serious issue qua the society at large, and therefore provisions such as Section 37 act as a deterrent to prospective wrongdoers. Such an incongruity leads us to answer the proposition: ***“How can Courts find a balance between the two polarities?”***

13. Argued before me is a case concerning liberty of an under-trial who has been incarcerated for almost 4 years 4 months 25 days, a situation impacting the rights of undertrial conferred by Article 21 of Constitution to speedy justice as also personal liberty. In so far as the power of high courts to grant bail is concerned, when the case is such that involves a question of personal liberty of an undertrial who is incarcerated for a very long period, the powers are wide and

unfettered by conditions, the principle rule being that bail is the rule and refusal is the exception, allowing accused persons to better prepare their defense.

14. In the case of *Emperor vs H.L. Hutchinson*⁷ the Allahabad High Court, as far back as in the year 1931 held that power of granting bail conferred on High Court is entirely unfettered by any conditions. It held that legislature has given the High Court and the Court of Session discretion unfettered by any limitation other than that which controls all discretionary powers vested in a Judge, viz. that the discretion must be exercised judiciously. The Court has given primacy to the fact that accused person if granted bail will be in a much better position to defend himself. In this very case, it was delineated that grant of Bail is the Rule and refusal is an exception. This was in the famous Meerut Conspiracy case. Justice Mukherjee writing for the Bench in paragraph No.9 held as under:-

“9. Speaking for myself, I think it very unwise to make an attempt to lay down any particular rules for the guidance of the High Court, having regard to the fact that the legislature itself left the discretion of the Court entirely unfettered. The reason for this action on the part of the legislature is not far to seek. The High Court might be safely trusted in this matter and it goes without saying that it would act in the best interests of justice whether it decides in favour of the prosecution or the defence. The variety of cases that may arise from time to time cannot be safely classified and it will be dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes.”

7 AIR 1931 ALL 356

15. 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:-

15.1. In the case of *Vijay Singh Vs. Union of India*⁸ the Supreme Court granted bail to an undertrial-accused who was incarcerated for a period of 4 years and 1 Month holding that Article 21 of the Constitution overrides Section 37 of NDPS Act if there is undue delay in completion of trial on the part of prosecution.

15.2. In the case of *Rabi Prakash Vs. State of Odisha*⁹ the Supreme Court, considering the long incarceration of an undertrial accused who was incarcerated for 3 years and 6 months granted him bail. The contraband in question was Ganja, the commercial quantity of which is 20 Kilograms. In this case recovery of 247 Kilograms was allegedly made from the accused despite which the court invoking the right to speedy justice flowing from Article 21 and foreseeable delay in trial granted bail to the accused.

⁸ Special Leave Petition (Criminal) Diary No. 43071/2024

⁹ 2023 SCC OnLine SC 1109

15.3. In the case of *Dheeraj Kumar Vs. State of Uttar Pradesh*¹⁰ the Supreme Court considering long incarceration granted bail to an undertrial-accused who was incarcerated for 2 years and 6 months granted him bail. The contraband in question was Ganja the commercial quantity of which is 20 Kilograms. In this case recovery of 65 Kilograms was allegedly made from the accused despite which, the Court invoking the right to speedy justice flowing from Article 21 and foreseeable delay in trial granted bail to the Accused.

15.4. In the case of *Balkishan Vs. State of Madhya Pradesh*¹¹ the Supreme Court considering long incarceration of an undertrial-accused who was incarcerated for 2 years and 5 months granted him bail. The contraband in question was Poppy Straw, the commercial quantity of which is 50 kilograms when recovery of 80 kilograms was allegedly made from the accused.

15.5. In the case of *Badsha Sk. Vs. State of West Bengal*¹² the Supreme Court considering long incarceration of an undertrial-accused who was incarcerated for 2 years and 4 months granted him bail. The contraband in question was Codeine Phosphate, the commercial quantity of which is 1 kilograms when recovery of 100 bottles each of 100 ml. was allegedly made from the accused.

¹⁰ 2023 SCC OnLine 918

¹¹ Petition for Special Leave to Appeal (Cri) No. 8415 of 2024

¹² 2023 SCC OnLine SC 1867

15.6. In the case of *Man Mandal and Anr. Vs. State of West Bengal*¹³ the Supreme Court considering long incarceration of an undertrial-accused who was incarcerated for 2 years granted him bail despite being alleged to be in possession of commercial quantity of contraband.

15.7. In the case of *Ankur Chaudhary Vs. State of Madhya Pradesh*¹⁴ the Supreme Court considering long incarceration of an undertrial-accused granted him bail to an undertrial-accused who was incarcerated for about 2 years.

15.8. In the case of *Nitish Adhikary alias Bapan Vs. State of West Bengal*¹⁵ 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.

15.9. In the case of *Babor Ali Mondal Vs. State of West Bengal*¹⁶ the Supreme Court considering the long incarceration granted bail to an undertrial-accused who was incarcerated for 1 year and 4 months.

15.10. In the case of *Sukhvinder Singh Bittu Vs. State of Punjab*¹⁷ the Supreme Court considering long incarceration of an undertrial-accused granted him bail who was incarcerated for 1 year despite

13 2023 SCC OnLine SC 1868

14 Petition for Special Leave to Appeal (Cri) No. 4648 of 2024

15 2022 SCC OnLine SC 2068

16 Criminal Appeal No. 3349 of 2024

17 Cri. Appeal No.1204 of 2024

being alleged to be in possession of commercial quantity of poppy straw.

15.11. In the case of *Tinku Vs. State (NCT of Delhi)*¹⁸ the Delhi High Court considering the long incarceration of an undertrial-accused granted him bail who was incarcerated for 2 years and 5 months. The contraband in question was Heroin, the commercial quantity of which is 250 grams. In this case recovery of 945 grams was allegedly made from the accused despite which the High Court invoking the right to speedy justice flowing from Article 21 of the Constitution and foreseeable delay in trial granted bail to the accused.

15.12. In the case of *Kulwinder Singh Vs. State of Punjab*¹⁹ the Punjab and Haryana High Court considering long incarceration of an undertrial-accused granted him bail who was incarcerated for 2 years and 8 months. The contraband in question was Etizolam Salt, the commercial quantity of which is 2.5 grams. In this case recovery of 99.876 grams was allegedly made from accused despite which the High Court invoking the right to speedy justice flowing from Article 21 of the Constitution and delay in trial granted bail to the accused.

15.13. In the case of *Amey Sanjay Jadhav Vs. State of Maharashtra*²⁰ this Court on 03.01.2025 considering long incarceration of the undertrial-accused has granted bail to the under-trial accused who was

¹⁸ 2024 SCC OnLine Del 9132

¹⁹ CRM-M-26704 of 2024

²⁰ BA No.911 of 2024 decided on 03.01.2025

incarcerated for 2 years and 11 months. The contraband in question was 1.3 kilograms of Charas, the commercial quantity of which is 1000 grams.

15.14. In the case of *Mohd. Mobin Jahurul Hasan Manihar Vs. State of Maharashtra*²¹ - 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.

16. 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 completion of trial. It has been held that incarceration for substantial period of time generally militates against the right to speedy justice and right to life and liberty guaranteed under Article 21 of the Constitution of India and hence conditional liberty must override the statutory embargo under Section 37 of the NDPS Act.

17. In the above *prima facie* facts and circumstances of the present case the Applicant before me has made out a case for bail. In the absence of criminal antecedents, prosecution not having complied with the NDPS Rules, 2022. Applicant's long incarceration for 4 years 4

²¹ BA No.713 of 2024 decided on 20.01.2025

months 25 days pending trial, investigation being completed and chargesheet being filed and commencement and completion of trial in the near foreseeable future being doubtful and other 12 co-accused persons released on bail by the Sessions Court further persuades me to consider Applicant's case on the ground of parity also. Hence, I am of the opinion that Applicant be released on bail.

18. The Bail Application stands allowed 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. 25,000/- with one or two sureties in the like amount;
- (ii) Applicant is permitted to furnish provisional cash bail of Rs.25,000/- for his release immediately and file undertaking that he will provide one or two sureties in the like amount of Rs.25,000/- within a period of four weeks after his release which shall be accepted by the Trial Court. Applicant shall provide sureties as directed;
- (iii) After his release from jail, Applicant shall report to the Investigating Officer as and when called for;
- (iv) Applicant shall attend the trial Court on first Monday of every month between 11.00 a.m. and 1.00 p.m. to

mark his presence. If the first Monday of the said month falls on a holiday and / or non Court working day, the Applicant shall mark presence on the next working day;

- (v) 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;
- (vi) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;
- (vii) Applicant shall not influence any of the witnesses or tamper with the evidence in any manner;
- (viii) Before his actual release from jail, Applicant shall furnish their address where he proposes to reside after his 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 his attendance before trial Court, it shall attract the provisions of Section 439(2) of Cr.P.C. i.e. for cancellation of bail.

19. 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.

20. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

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