

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 5171 OF 2024

Sunny Ocha Iyke

.. Applicant

Versus

The Union of India & Anr.

.. Respondents

.....

- Mr. Khushal Parmar a/w Ms. Anjali More for Applicant
- Ms. Neha M. Patil, APP for Respondent No. 1
- Ms. Savita M. Yadav, APP for Respondent No. 2 - State

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CORAM : MILIND N. JADHAV, J.

DATE : MARCH 18, 2025

P. C.:

1. Heard Mr. Parmar, learned Advocate for Applicant; Ms. Patil, learned APP for Respondent No. 1 - UOI and Ms. Yadav, learned APP for Respondent No. 2 - State.

2. This is an Application under Section 439 of Code of Criminal Procedure, 1973 (for short '**Cr.PC.**') seeking Bail in connection with Special NDPS Case No. 3/2021 in C.R. No.11 of 2020 registered with Narcotics Control Bureau, Mumbai Zonal Unit, Mumbai for offences punishable under Sections 8(c), 22(c), 23(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short '**NDPS Act**').

3. Mr. Parmar has drawn my attention to the order dated 07.02.2025. The issues raised in the said order are required to be answered by the prosecution. Said order reads thus:-

"1. Mentioned out of turn at the time of rising of the Court.

2. Heard Ms. More, learned Advocate for Applicant and Ms. Yadav, learned APP for Respondent No.2 – the State of Maharashtra.

3. This is an Application under Section 439 of Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') seeking Bail in connection with C.R. No.11 of 2020 registered with Narcotics Control Bureau, Mumbai Zonal Unit, Mumbai for offences punishable under Sections 8(c), 22(c), 23(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act').

4. Ms. More has drawn my attention to the facts of the matter. She would submit that there is large scale discrepancy in seizure as well as CA Report which has been obtained. She would submit that mandatory procedural safeguard as envisaged under Section 52 of NDPS Act are not followed in the present case.

5. Applicant is a foreign national and is incarcerated for 4 years and 7 months. He was apprehended at Taloja Railway Station with a bag containing alleged contraband namely Amphetamine. She would submit that CA report infact is in respect of completely different contraband namely Methamphetamine.

6. That apart, Ms. More would submit that there is no Magistrate certificate neither the said contraband has been procedurally weighed before Magistrate and samples drawn before Magistrate. She would submit that entire procedure has been given a go-by by sending the samples recovered from Applicant directly to the Forensic Laboratory for chemical analysis. She would additionally submit that trial has been stayed. Be that as it may, considering the aforesaid submissions made by Ms. More substantial case for bail is made out.

7. *Needless to state that I will hear the prosecution on the next adjourned date. Copy of this order shall be served on Respondent. Respondent shall present its defence in the Court in respect of the aforesaid submissions made by Ms. More.*

8. *Stand over to 18th March, 2025 at 02:30 p.m."*

4. Today, Ms. Patil, learned APP appears for Respondent No. 1 - UOI. She would submit that Applicant was apprehended with commercial quantity of alleged contraband weighing 2.3 kgs. which was described as white crystalline substance along with other travelling documents. She would submit that the rigors of Section 37 of the NDPS Act would be applicable in the present case and considering that the Applicant is a Nigerian citizen, the Court must be satisfied and form a belief that the Applicant has not committed the alleged offence and is entitled to be released on bail. To support this submission, she would submit that Applicant was apprehended and arrested by RCF while travelling with his luggage which contained the alleged contraband near Taloja Railway Station. She would submit that the complicity of the Applicant in the alleged crime is established by the fact that he pulled the emergency chain of the railway compartment in which he was traveling thereby causing the train to halt midway near Taloja Railway Station. Upon disembarking from the train, the Applicant attempted to flee but was apprehended in possession of the alleged contraband with his luggage.

5. In response to the query raised by the Court about transgression in the seizure panchnama and the forensic report received of the alleged contraband in paragraph No. 5 of the above order, she would submit that the same may not be considered by the Court for grant of bail to the Applicant at this stage and it would be the matter of trial. The question raised by the Court is with respect to the identity of the alleged contraband. The contraband which has been identified pursuant to CA report in the present case is Methamphetamine. If it is different than the contraband which was seized by the prosecution as per the seizure report appended to the Application, transgression of Sections 42 and 52-A is therefore *prima facie* observed which would go to the root of the matter entitling benefit of the same to be given to the Applicant.

6. In the case of *Sarija Banu & Anr. Vs. The State of Maharashtra*¹, Supreme Court has held that compliance of Section 42 of the NDPS Act is mandatory and it is a relevant fact required to be taken into cognizance by Court while considering the Bail Application. This pronouncement of the Supreme Court has been adverted to by this Court in Bail Application No. 4252 of 2024 (Mohsin Kayyum Sayyed v. The State of Maharashtra) decided on 10.03.2020. Insofar as Section 52-A of the NDPS Act is concerned, the CA report received

¹ 2004 12 SCC 266

pursuant to the forensic examination of the alleged contraband pertains to a completely different substance than the one that was seized. *Prima facie* when the aforesaid facts are seen, Applicant is entitled to be released on bail. That apart Applicant is incarcerated since 09.07.2020 and as on date he is in detention for 4 years 8 months and 10 days which itself is a ground for releasing him on bail pending trial. Hence, Bail Application is allowed subject to the 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) Before his actual release from jail, Applicant shall furnish his address where he proposes to reside after his release from jail to the concerned Police Station and also to the trial Court;
- (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 Tuesday of every month between 11.00 a.m. and 1.00 p.m. to mark his presence. If the first Tuesday 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 and deposit his passport, if any, with the concerned Investigating Officer;
- (vii) Applicant shall not influence with 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.
- (ix) The concerned prosecuting Agency shall immediately communicate this order of grant of bail to the concerned Registration Officer appointed under Rule 3 of the Registration of Foreigners Rules, 1992 within the meaning of the Foreigners Act, 1946. This condition is added in

view of the decision of the Supreme Court in the case of
*Frank Vitus v. Narcotics Control Bureau & Ors.*²

7. 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.

8. Bail Application is allowed and disposed.

Amberkar

[MILIND N. JADHAV, J.]

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2 Criminal Appeal No. 2814-2815 of 2024 decided on 06.01.2025