



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.5188 OF 2024**

Bandu Dagadu Udanshive
versus
State of Maharashtra

... Applicant
... Respondent

Mr. Anil G. Lalla with Mr. Yash Pulekar, Ms. Rithika Yerra i/by Lalla and Lalla Advocates, for Applicant.
Mr. A.A.Naik, APP for State.

CORAM: N.J.JAMADAR, J.

DATE : 18 FEBRUARY 2025

P.C.

1. Heard the learned Counsel for the parties.
2. The applicant, who is arraigned in NDPS Special Case No.440 of 2022 arising out of Special LAC/CR No.36 of 2021 registered at DCB-CID, Unit VI, Mumbai (Dahisar Police Station Special LAC/CR No.249 of 2021) for the offences punishable under Sections 20(b)(ii)(C) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, has preferred this application to enlarge him on bail.
3. On 24 October 2021, pursuant to an intimation, Dahisar Police conducted a surveillance at Dahisar Check Post. As informed, a Santro Car bearing Registration No.DL-10/CS-4332 came on the flank of the road leading to Mumbai. The said vehicle was intercepted. The applicant (A2), his wife Clara (A4), daughter Cynthia (A3), son in law Jasar Shaikh, (A1), along with

a child, were boarding the said car. The Applicant and the other adult members were appraised of their right to be searched in the presence of a Gazetted Officer or Magistrate under Section 50 of the Act, 1985. Thereafter, a search was conducted.

4. In the personal search of the applicant, 8 kgs charas, a contraband substance, was found. During the course of the search of the car, it was found that charas was stored in the cavities of the door and dickey of the said car. It weighed 16 kgs.

5. Mr. Lala, learned Counsel for the Applicant, submitted that all the other co-accused, including Gulzar Khan (A6), the alleged supplier of the contraband substance, have been released on bail. Mr. Lala, however, fairly submitted that the other accused were released on bail giving benefit of the non-compliance of the provisions contained in Section 52-A of the NDPS Act, 1985 and in view of the recent pronouncement of the Supreme Court in the case of Narcotics Control Bureau V/s. Kashif¹ the said ground cannot be pressed into service. Yet, according to Mr. Lala, there is non-compliance of the other statutory provisions, which warrants the release of the Applicant on bail. It was urged that there was a clear non-compliance of the mandate contained in Section 42(2) of the Act, 1985 as Mr. Ravindra Salunke, I/C PI, who had allegedly received the information, had neither recorded the

1 Criminal Appeal No.5544 of 2024

information nor forwarded the same to his immediate official superior. At any rate, Mr. Lala would urge, the applicant has been in custody for three and half years. Charge has not been framed. Thus, on account of long period of incarceration, the applicant deserves to be enlarged on bail.

6. Mr. Naik, learned APP, stoutly opposed the prayer for bail. It was submitted that the applicant cannot claim parity as the principal reason for the release of the co-accused on bail was non-compliance of Section 52-A of the Act, 1985. Mr. Naik further submitted that the applicant is not entitled to bank upon the ground of non-compliance of Section 42(2) of the Act also, as the station diary entry was, in fact, made by Mr. Salunke and, in any event, the question of non-compliance of the provisions contained in Section 42(2) of the Act, 1985, is a matter for adjudication at the trial. Mr. Naik would urge that since the bar under Section 37 of the Act, 1985 operates with full force and rigour, the Applicant does not deserve to be released on bail. As the applicant has not undergone more than half of the punishment which the offences entail, even the ground of long period of incarceration cannot be urged, submitted Mr. Naik.

7. To begin with, it is necessary to note, prima facie, there is material to show that the applicant was allegedly found in possession of the commercial quantity of Charas. Charas was also found concealed in the car, which the applicant and his family members were boarding.

8. Keeping in view the aforesaid context, the submissions regarding the non-compliance of the statutory provisions are required to be appreciated. Indeed, this Court had released co-accused on bail as there appeared non-compliance of the statutory provisions contained in Section 52-A of the Act, 1985. In view of the recent decision in the case of Narcotics Control Bureau V/s. Kashif (supra), the said ground cannot be pressed into service to claim bail. The Supreme Court has enunciated in clear and explicit terms that sub-Section (2) of Section 52-A of the Act, 1985, 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. Any lapse or delay in compliance of Section 52 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 statutory presumption permissible under Section 54 of the Act, 1985.

9. That leads me to the contention based on non-compliance of the provisions contained in Section 42 of the Act, 1985. FIR indicates that on 24 October 2021 at about 5.00 p.m., Mr. Salunke, the then In-Charge PI had received the information about the illicit transportation of the contraband substance. There is, prima facie, no material to show that Ravindra Salunke

had taken down the said information in writing, and, thereafter, forwarded a copy thereof to his immediate official superior. The prosecution does not bank upon the information note prepared by Mr. Salunke and forwarded to his immediate official superior.

10. Mr. Naik, learned APP would urge that the station diary entry was made on 24 October 2021 about the receipt of the said information.

11. I have perused a copy of the said station diary entry. It records that Mr. Salunke had informed the then SHO that such information was furnished by an informer. Even if the said station diary entry is taken at par, prima facie, it does not appear to be a record of the information taken down by Mr. Salunke. In fact, the said entry, in the station diary, was made by the then SHO Bhosale.

12. A copy of the communication dated 24 October 2021, relied upon by the learned APP as an intimation to the immediate official superior, also does not advance the cause of the prosecution. Undoubtedly, a copy of the station diary entry, referred to above, was appended to the said communication. However, the said communication was addressed to the Deputy Commissioner of Police by Mr. Sachin Gawde, the then API and not by Mr. Salunke, who had received the said information.

13. In the aforesaid factual backdrop, the submission of Mr. Lala, that there is a clear non-compliance of Section 42 of the Act, cannot be brushed aside

lightly. Section 42 mandates that the Officer receiving information shall himself take down such information in writing and send a copy thereof, to his immediate official superior.

14. A profitable reference in this context can be made to a decision of the Supreme Court in the case of Directorate of Revenue and Anr. V/s. Mohammed Nisar Holia² wherein it was enunciated that the officer who received such information was bound to reduce the same in writing and not the person who heard thereabout. In the facts of the said case, the Supreme Court held that the statutory requirements had not been complied with as the person who received the first information did not reduce the same in writing.

15. A useful reference can also be made to the decision of the Supreme Court in the case of Sarija Banu @ Janarthani W Janani and Anr. V/s. State through Inspector of Police³ wherein it was enunciated that :

“7. It is pertinent to note that in the bail application of the appellants, it was alleged, that there was serious violation of Section 42 of the NDPS Act. In the impugned order, nothing is stated about the alleged violation of Section 42, and it is observed that it was not necessary to consider such violation at this stage. The compliance with Section 42 is mandatory and that is a relevant fact which should have engaged the attention of the Court while considering the bail application.”

16. In the case of Sanobar Shafiq Khotwal V/s. State of Maharashtra⁴ this

² (2008) 2 SCC 370

³ (2004) 12 SCC 266

⁴ BA No.3337 of 2021 dated 14 Oct. 2022

Court enunciated that one who receives the information must forward it to the superior himself and since there was clear infraction of the said provision, the Court was inclined to accept the submission of breach of Section 42(2) of the Act. In the case of Mehandi Munavar Majid V/s. State of Maharashtra⁵ in the context of the contention of the breach of the provisions contained in Section 42(2) of the Act, it was held that it was imperative to follow the statutory mandate, when the search was carried out and any lacunae therein would yield to the benefit of the accused.

17. In the backdrop of the aforesaid position in law, reverting to the facts of the case, prima facie, there is a clear non-compliance of the mandate contained in Section 42 of the Act, 1985, inasmuch as Mr. Salunke had not himself taken down the information, and, the station diary entry, even if taken at par, is not the substitute for the same as the said entry was not made by Mr. Salunke, and Mr. Salunke had not forwarded the copy of such information taken down by him to his immediate official superior.

18. The submission of Mr. Naik that the effect of non-compliance of Section 42 is a matter to be determined at the trial, in the circumstances of the case, does not deserve to be accepted, unreservedly. Prima facie, there is a non-compliance on both the fronts of taking down the information and communication of copy thereof to the immediate official superior. It is not a

5 BA No.3493 of 2021 dated 14 Oct. 2022

case of delayed compliance or infirmity in the compliance by the Officer, who had received the information. Prima facie, it is a case of non-compliance by the officer who received the information.

19. The ground of long period of incarceration also deserves to be taken into account. The applicant has been in custody since 25 October 2021. Charge has yet not been framed. Rest of the co-accused have all been enlarged on bail.

20. It is well recognized that a long period of incarceration, without a realistic prospect of conclusion of trial within a reasonable period, impairs the right of the accused to speedy trial, which is a facet of right to life guaranteed under Article 21 of the Constitution of India. By a catena of decisions, the Supreme Court has enunciated that the constitutional courts can release the accused on bail on account of long period of incarceration, despite the statutory restrictions in the matter of grant of bail. It has been held that in the face of prolonged incarceration, the statutory restrictions in the matter of grant of bail, like Section 37 of the Act, 1985, Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967 and Section 45 of the Prevention of Money Laundering Act, 2002, melt down. (Union of India V/s. K.A.Najeeb⁶)

21. In the case at hand, the applicant has been in custody for three and half years. As noted above, the charge has yet not been framed. In the light of

6 AIR 2021 SC 712

the nature of evidence which the prosecution may be required to adduce, the number of witnesses, the number of accused and the large pendency of the cases, it is extremely unlikely that the trial can be concluded within a reasonable period. The submission of Mr. Naik that the accused must undergo half of the maximum punishment which the offences entail to claim right to be enlarged on bail on the ground of long period of incarceration, cannot be accepted as an immutable rule.

22. In the totality of circumstances, prima facie, non-compliance of Section 42 of the Act, 1985, coupled with long period of incarceration, persuades the Court to exercise discretion in favour of the applicant. It must be noted that the applicant was acquitted of the offences punishable under the NDPS Act, 1985 by this Court in Criminal Appeal No.324 of 2012 by a judgment and order dated 9 April 2019. The applicant has no other antecedent. I am, therefore, inclined to release the applicant on bail.

23. Hence, the following order :

ORDER

- (i) The Application stands allowed.
- (ii) The Applicant – Bandu Dagadu Udanshive be released on bail in Special LAC/CR No.36 of 2021 registered at DCB-CID, Unit VI, Mumbai (Dahisar Police Station Special LAC/CR No.249 of 2021) on furnishing a PR bond in the sum of Rs.1,00,000/- and one or two sureties in the like amount to

the satisfaction of the Special Court.

(iii) The applicant shall mark his presence before DCB-CID Unit VI, Mumbai, on first Monday of every month between 11 am to 1 pm for a period of three years or till the conclusion of the trial, whichever is earlier.

(iv) The applicant shall not tamper with the prosecution evidence. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing the facts to Court or any police officer.

(v) On being released on bail, the applicant shall furnish his contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.

(vi) The applicant shall regularly attend the proceedings before the jurisdictional Court.

(vii) 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 trial Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

(N.J.JAMADAR, J.)