

Ajay

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

CRIMINAL BAIL APPLICATION NO. 5189 OF 2024

Mohd. Iqbal Abdul Hamid Memon @ Iqbal
Ticket .. Applicant
Versus
The State of Maharashtra .. Respondent

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- Mr. Sherali Khan, Advocate for Applicant.
 - Mr. Hitendra J. Dedhia, APP for Respondent – State.
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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 25, 2025.

P.C.:

1. Heard Mr. Khan, learned Advocate for Applicant and Mr. Dedhia, learned APP for Respondent – State.

2. Present Bail Application is filed under Section 439 of the Code of Criminal Procedure, 1973 (for short “**Cr.P.C.**”) seeking Regular Bail in connection with C.R. No.24 of 2022 registered with Anti-Narcotic Cell, Bandra Unit, Mumbai for offences punishable under Sections 8(c) and 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “**NDPS Act**”).

3. In the present crime, Applicant is arrested on 29.03.2022 with alleged contraband i.e. 150 grams of Mephedrone (for short “**MD**”) and is incarceration since then pending trial. Investigation is

completed and charge-sheet is filed.

4. Mr. Khan, learned Advocate for Applicant would persuade the Court to consider the case of Applicant for grant of bail on account of his long incarceration pending trial for more than 3 years and on *prima facie* statutory transgressions observed in the prosecution case on the face of record.

5. *Prima facie* it is observed that there is an apparent transgression of the provisions of Section 42 of the NDPS Act. The seizure panchnama is appended at page No.28 of the Application. Perusal of the said panchnama reveals that none of the raiding party members who were the prosecution officers who apprehended and arrested the Applicant are / were gazetted officers. In that view of the matter, case of prosecution stands vitiated at the threshold itself. The names of the raiding party members are stated in the seizure panchnama appended at page No.28 of the Application and it is *prima facie* seen that the raid was conducted under the direction of Assistant Police Inspector Mr. Bhoje who is admittedly not a gazetted officer as contemplated under the provisions of the NDPS Act which entitles the prosecution to conduct raid, carry out search and seizure as envisaged under Section 42 of the NDPS Act. The said fact has been duly endorsed by the witnesses who have appended their signatures to the said panchnama. The second transgression observed is with respect to

non-compliance of the statutory provisions of Section 52A(2), *inter alia*, pertaining to sampling and inventory. The inventory panchnama is appended at page No.54 of the Application. In unnumbered paragraph No.2 thereof it is stated that Applicant has appended his signature on the seizure panchnama. However if the seizure panchnama appended at page No.28 is seen it reveals that Applicant has not appended his signature but his thumb impression has been taken. This dichotomy is *prima facie* noted.

6. This is a case of chance recovery and therefore as observed by the Supreme Court in the case of ***Mohinder Kumar Vs. The State, Panaji, Goa***¹, the provisions of Sections 42 and 50 of the NDPS Act in a case of chance recovery are to be followed scrupulously from the stage when the officer has reasons to believe that Accused person is in possession of narcotic drug and therefore provisions and mandate of Section 42 of the NDPS Act are required to be scrupulously adhered to. The provisions of Section 42 itself state that prosecution officers entrusted with the task of carrying out the raid, apprehension, search and seizure have to be authorized officer as contemplated under the said provisions. Investigation officers in the present case is API Mr. Bhoje and API Karkar who carried out the raid and admittedly as accepted by the learned prosecutor they both are not Gazetted Officers and therefore could not be authorised to act under Section 42 of the

¹ 1995 AIR (SC) 1175

said act.

7. Another decision of the Supreme Court in the case of *Arif Khan @ Agha Khan Vs. State of Uttarkhand*² would be of assistance in the facts of the present case wherein it was observed that none of the police officials of the raiding party who recovered the contraband were gazetted officers and therefore they were not empowered to take the search and effect recovery from the accused persons except in the presence of either a Magistrate or a gazetted officer as contemplated under the NDPS Act.

8. Mr. Dedhia, learned APP appearing for the State has objected for grant bail to Applicant on the ground that he has been found in possession of commercial quantity of alleged contraband MD and in that view of the matter, rigours of Section 37 of the NDPS Act would apply to his case. He would submit that even if there are apparent transgressions the fact that Applicant was apprehended with commercial quantity of alleged contraband stands *prima facie* proved on the basis of seizure panchnama and therefore prosecution can overcome the alleged transgressions at the time of trial as they are to be construed as mere technicalities.

8.1. Mr. Dedhia has referred to and relied upon the decision of the Supreme Court in the case of *State of Punjab Vs. Baljinder Singh*

² 2018 AIR (SC) 2123

and Anr.³ to contend that non-compliance of Section 50 in the present case would not come in the way of prosecution for effecting arrest of the Applicant since the alleged contraband has been recovered from the bag belonging to the Applicant and not from his person. However, if the prosecution case is seen as per the seizure panchnama it is stated therein that the contraband was kept in the plastic bag which was in the hand of Accused. However, in the FIR it is stated that Accused was found to be moving suspiciously and after he was apprehended nothing was found in his hand, but the alleged contraband was found in his bag. There is discrepancy on this issue in the statements of the witnesses and the FIR that is lodged.

9. I have heard Mr. Khan, learned Advocate for Applicant and Mr. Dedhia, learned APP for the State with their able assistance perused the record of the case.

10. I am inclined to accept the submissions advanced by Mr. Khan on the transgression which are *prima facie* observed from the prosecution case which deserves consideration at the bail stage.

11. In view of the above *prima facie* observations, findings and facet of long incarceration pending trial for the past more than 3 years and no possibility of the trial commencing and for that matter completing in the near foreseeable future, I am inclined to allow the

³ Criminal Appeal Nos.1565-66 of 2019 – Decided on 15.10.2019

present Application.

12. 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.25,000/- 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;

(vii) Applicant shall not influence 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.

13. 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.

14. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

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