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

CRIMINAL BAIL APPLICATION NO. 5436 OF 2024

Awaze Rashid Shaikh

.. Applicant

Versus

The State of Maharashtra

.. Respondent

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- Mr. Anish Pereira a/w. Ms. Ashwini Achari Advocates i/by Mr. Taraq Sayed for Applicant.
 - Ms. Mahalakshmi Ganapathy, APP for Respondent – State.
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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 23, 2025.

P.C.:

1. Heard Mr. Pereira, learned Advocate for Applicant and Ms. Ganapathy, learned APP for Respondent – State.

2. Applicant is a young offender who is 25 years old being incarcerated in prison since 04.02.2024 in an offence under the Narcotics Drugs and Psychotropic Substances Act, 1985 (for short “NDPS Act”). He was found in possession of the alleged contraband of 1.060 kgs. of *charas*.

3. The principal ground of the Applicant for seeking bail is transgression of the statutory procedure envisaged under the provisions of NDPS Act. *Prima facie* in so far as the date of recovery / seizure and arrest of Applicant is concerned, case of Applicant shall be governed by the provisions of the Narcotic Drugs and Psychotropic

Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 (for short “**NDPS Rules**”) and not by the standing orders 1 of 1988 and 1 of 1989. With effect from 23.12.2022 the said Rules have been enacted and have come into effect. The present recovery being made thereafter would be amenable to the said Rules. The seizure panchnama dated 03.02.2024 is appended at page No.34 of the Application and when it read at page No.35 it is *prima facie* seen that what is confiscated from the Applicant by the Prosecution Officers are 2 bundles of the alleged contraband which contained 9 strips and 2 mounds (गोळे) of the alleged contraband. It is seen that the prosecution has on the spot tested samples of the contents of the 2 mounds and found it to be *charas* i.e. alleged contraband and immediately thereafter have mixed the contents of the 9 strips and 2 mounds together to weigh them together at 1.060 kgs. *Prima facie* mixing of any confiscated or seized contraband by the Prosecution Officers on their own account is impermissible in law especially after the enactment of the NDPS Rules, 2022. Even prior thereto under the Standing Instructions 1 of 1988 and 1 of 1989 read with Standing Order 1 of 1988, the Prosecution Officer were not entitled to mix the contrabands which are seized and recovered. The Rules enacted in the year 2022 are rather more stringent and on seizure under Rule 3 the Prosecution Officer is required to specifically serially number the seized contraband which is seized and confiscated to enable the prosecution to comply with the

provisions of Rule 10, *inter alia*, pertaining to inventory and sampling in consonance with the provisions of Section 52A (2) read with (3) of the NDPS Act. On reading the seizure panchnama itself the above *prima facie* transgression is observed by the Court. Inventory panchnama is appended at page No.37 of the Application and once again it is seen that there is *prima facie* transgression of Section 52A (2) and (3) of the NDPS Act on the face of record and certificate under 8 and 18 of the NDPS Rules.

4. Ms. Ganapathy, learned APP appearing on behalf of the State would submit that when seizure panchnama is read it is not *prima facie* apparent that any mixing has taken place as there is no act attributed to the mixing of the alleged contraband. However, I defer from the submissions made by the learned prosecutor because when unnumbered paragraph No.4 on page No.35 which is in Marathi, if read cohesively, it is *prima facie* clear that 9 strips and 2 mounds of the alleged contraband are mixed by the Prosecution Officers and before doing that samples have only been drawn from the 2 mounds for the purpose of testing and confirming the identity of the seized contraband and immediately thereafter they are mixed and weighed together. If the learned Prosecutor is to be believed, then the weighing of the alleged contraband together *prima facie* goes against the submission made by her because it is *prima facie* seen that the entire alleged contraband was weighed together thereafter at 1.060 kgs. and most

importantly the identification of the alleged contraband is therefore comprehensively missing from the inventory panchnama in the present case.

5. Case of the Applicant before the Court is *prima facie* covered by the decision of this Court in the case of ***Augustin Sunderraj Nadar Vs. Union Of India and Anr.***¹

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

- (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

7. Attention is invited to findings returned by this Court in paragraph No. 7(a) of the decision in the case of ***Shabbir Usman Shaikh*** (8th *supra*) which reads thus:-

“7.

(a) *In the present case, the panchanama itself divulges that while 12 packets were allegedly recovered, containing contraband charas, the contents of the entire 12 packets were mixed and placed in one polythene bag. It was recorded that the total weight was 12kg. Commercial quantity being 1 kg, the applicant was proceeded against. This Court in a number of*

1 Cri. Bail Application No.5332 of 2024 – Decided on 15.04.2025.

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

judgments has held that such mixing of contraband is impermissible and that it does raise a serious suspicion about the case against the accused persons. A number of judgments were relied upon, but suffice it to say that in the cases of Sahil Jalauddin Ahmad v/s. The State of Maharashtra (order dated 26 th July 2023 passed in Bail Application No. 3740 of 2022) and Venktesh Shiva Permal v/s. The State of Maharashtra (judgment and order dated 23 rd January 2024 passed in Bail Application No. 3784 of 2023), in identical circumstances, wherein the contents of separate packets containing contraband, were mixed, it was held by this Court to be a sufficient ground to raise suspicion about the veracity of the case of the prosecution.

8. The Constitution Bench of Supreme Court in the case of ***State of Punjab Vs. Baldev Singh***⁷ in paragraph No. 28 on legitimacy of judicial process coming under the cloud if acts of lawlessness by the investigating agency are condoned during search operations held that if so done it may undermine the respect for law and may have the effect of unconsciously compromising the administration of justice which cannot be permitted. The Supreme Court concluded the above finding in the context of the NDPS Act and particularly the factor of widespread illiteracy among persons subject to investigation for drug offences. It categorically held that it must be borne in mind that severer the punishment, greater has to be care taken to see that all the safeguards provided in statute are scrupulously followed. There is no reason as to why the empowered Officer / Investigating Officer should shirk or derelict from affording a real opportunity to the suspect and comply with the procedural safeguards contained in Section 50 of the NDPS Act to serve a dual purpose – to protect a person against false

7 (1999) 3 SCC 977

accusation and frivolous charges as also compliance of Sections 41, 42 and 43 of the NDPS Act.

9. The Supreme Court held that in every case the end result is important but the means to achieve it must remain above board. It held that remedy cannot be worse than the disease itself. The NDPS Act provides for a stringent punishment where a statute confers such drastic powers and seeks to deprive a citizen of its liberty for not less than ten years as also makes stringent provisions for grant of bail, scrupulous compliance of the statutory provisions therefore must be insisted upon. Hence where the Act and Rules lay down procedure for taking samples the prosecution Officer cannot disregard the same and act own his own whims and fancies.

10. In the case of *Amani Fidel Chris vs. Narcotics Control Bureau*⁸ the learned Single Judge of Delhi High Court has held that mixing of the contents of different package / packets / container (in one lot) and then drawing the representative samples is impermissible since in that case such a sample would cease to be a representative sample of the corresponding package / packets / container. This decision of *Amani Fidel Chris* (13th *supra*) was challenged by the NCB in the Supreme Court and the Special Leave Petition was dismissed by the Supreme Court. The same principle is also adverted to by this Court in the case of *Ibrahim Khwaja Miya Sayyed @ Raju Vs. The State*

8 2020 SCC Online Del 2080

*of Maharashtra*⁹ and *Hari Mahadu Valse Vs. The State of Maharashtra*¹⁰ and by Telangana High Court in the case of *Baba Sow Chandekar and Anr. Vs. The State of Telangana*¹¹.

11. *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*¹² 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.

12. Needless to state that complicity of the Applicant shall be proved by the prosecution at the time of trial.

13. In view of the above *prima facie* observations and findings, 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.15,000/- with one or two sureties in the like amount;

(ii) Applicant is permitted to furnish provisional cash bail of

9 Bail Application No.1296 of 2022

10 Bail Application No.2299 of 2019

11 Criminal Petition No.4428 of 2022

12 (2004) 12 SCC 266

Rs.15,000/- for his release immediately and file undertaking that he will provide one or two sureties in the like amount of Rs.15,000/- within a period of four weeks after his release which shall be accepted by the Trial Court. Applicant shall provide sureties as directed;

- (iii) 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;
- (iv) After his release from jail, Applicant shall report to the Investigating Officer as and when called for;
- (v) 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;
- (vi) 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;
- (vii) Applicant shall not leave the State of Maharashtra

without prior permission of the Trial Court;

(viii) Applicant shall not influence any of the witnesses or tamper with the evidence in any manner; 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.

14. 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.

15. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

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