

Ajay

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

CRIMINAL BAIL APPLICATION NO. 498 OF 2025

Afsar Jalal Khan

.. Applicant

Versus

The State of Maharashtra

.. Respondent

-
- Ms. Ashwini Achari a/w Mr. Taraq Sayed, Advocates for Applicant.
 - Ms. Shilpa Gajare - Dhumal , APP for Respondent – State.
 - Mr. Dipesh Kini, PSI, Anti- Narcotics Cell, Thanesh
-

CORAM : MILIND N. JADHAV, J.

DATE : MARCH 24, 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. 218 of 2023 registered with Badlapur West Police Station for offenses punishable under Section 8 (c), 20(b), ii (c), and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act'). Applicant is arraigned as Accused No. 1. Applicant is arrested on 25.08.2023 and he is incarcerated for 1 year and 7 months.

2. It is prosecution case that on 25.08.2023 Badlapur Police Station received a specific information that three (3) persons were arriving near Barvi Dam road leading to Ambernath, Badlapur (West)

at about 13:00 hours in a Silver Innova car bearing No. MH 06 AF 1298 carrying 90-100 kgs of Ganja for the purpose of selling the contraband. Upon receiving the information it was reduced in writing and was further 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. The officers of the raiding party reached the aforementioned spot at 12:54 hours in order to conduct a raid and at about 13:30 hours a Silver colour Innova car bearing the same number arrived at the spot and three (3) 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. However on personal search nothing incriminating was found.

3. However upon conducting the search of the car, it is prosecution case that from the bumper, right and left tyre of the car 24 bundles in total were recovered. 9 bundles were recovered from the door panel. Further 13 bundles were recovered from the door panels on the left side of the car. 1 bundle from the dashboard and 12 bundles from the back right tyre of the car. It is prosecution case that in total 59 packets of Ganja were recovered weighing 89 kgs 490

grams. The contraband was duly seized, sealed in an envelope and marked as 'A' 'B' 'C' and 'D' and offence was registered under Sections 8 (c), 20 (b), ii (c) and 29 of NDPS Act

4. Ms. Achari, learned Advocate for the Applicant would submit that Applicant is falsely implicated in the present crime. She 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 59 packets of the alleged contraband which have been mixed by the prosecution officers for the purpose of quantifying and weighing the same which is impermissible in law. She would draw my attention to the glaring error in the prosecution case, the certification by the Magistrate under Section 52A (2) of the NDPS Act dated 29.08.2023 appended at page No. 85 wherein it is seen that the samples produced before the Magistrate are bearing Nos. 'Old P1', 'Old P2', 'Old P3', 'Old P4' and 'Old P5' however during Seizure it was marked as 'A', 'B', 'C', 'D' and 'E' which renders the prosecution case unsustainable on the face of record. She would submit that on perusal of the Certificate by the Magistrate it is seen that two samples for testing were drawn from 'New P1', 'New P2' and 'New P3' hence the samples sent for analysis raises a doubt on the prosecution case.

5. She would submit that Applicant is a driver having deep

roots in Society and has no criminal antecedents. She would submit that he is not the owner of the car. She would submit that Applicant is arrested on 25.08.2023 and he is incarcerated for 1 year and 7 months. Investigation being completed, chargesheet being filed, commencement and completion of trial in the near foreseeable future is doubtful. Hence she would urge the Court to allow the Application.

6. PER CONTRA, Ms. Gajare-Dhumal, learned APP would vehemently oppose the present Application. 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 the bar of Section 37 has to be overcome by the Applicant. She 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. She 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. She would submit that the fact that Accused persons arrived at the spot with 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 she would urge the Court to reject his Bail Application.

7. *Prima facie* on perusal of the 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 that the samples produced before the Magistrate are bearing Nos. 'Old P1', 'Old P2', 'Old P3', 'Old P4' and 'Old P5' however during Seizure it was marked as 'A', 'B', 'C', 'D' and 'E' which renders the prosecution case unsustainable on the face of record. 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.

8. *Prima facie* on perusal of the Certificate by the Magistrate it is seen that two samples for testing were drawn from 'New P1', 'New P2' and 'New P3' *prima facie* rendering the C.A. Report unsustainable. On perusal of the Certificate by the Magistrate it is seen that there is a clear dichotomy in the Exhibit Numbers stated on the contraband while seizure and weighing process as compared to that stated in the Certificate by the Magistrate, which is fatal to the prosecution case.

1 (2004) 12 SCC 266

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.

9. 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 Gaysuddin Shaikh Vs. The State of Maharashtra and Anr*⁶

10. In the following decisions of the Supreme Court and various High Courts concerning such 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 and discretion in releasing an undertrial on bail on account of long incarceration by using its discretionary powers.

11. In the case of *Nitish Adhikary alias Bapan Vs. State of West Bengal*⁷ the Supreme Court considering long incarceration of an undertrial-accused granted him bail who was incarcerated for 1 year

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

⁷ 2022 SCC OnLine SC 2068

and 7 months despite being alleged to be in possession of commercial quantity of contraband.

12. In the case of *Babor Ali Mondal Vs. State of West Bengal*⁸ the Supreme Court considering the incarceration of an undertrial-accused granted him bail who was incarcerated for 1 year and 4 months.

13. In the case of *Sukhvinder Singh Bittu Vs. State of Punjab*⁹ the Supreme Court considering long incarceration of an undertrial-accused granted him bail who was incarcerated for 1 year despite being alleged to be in possession of commercial quantity of the alleged contraband poppy straw.

14. In the case of *Mohd. Mobin Jahurul Hasan Manihar Vs. State of Maharashtra*¹⁰ - this Court on 20.01.2025 considering long incarceration of the under-trial accused granted him bail 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.

15. 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

⁸ Criminal Appeal No. 3349 of 2024

⁹ Cri. Appeal No.1204 of 2024

¹⁰ BA No.713 of 2024 decided on 20.01.2025

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.

16. 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 and Applicant being incarcerated for 1 year and 7 months, investigation being completed and chargesheet being filed and commencement and completion of trial in the near foreseeable future being doubtful, it entitles the Applicant for grant of bail.

17. 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) After his release from jail, Applicant shall report to the Investigating Officer as and when called for;
- (iii) 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;

- (iv) 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;
- (v) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;
- (vi) Applicant shall not influence any of the witnesses or tamper with the evidence in any manner;
- (vii) 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
- (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.

18. 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.

19. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

Ajay

AIAY
TRAMBAK
UGALMUGALE

Digitally signed
by AIAY
TRAMBAK
UGALMUGALE
Date: 2025.03.26
10:37:08 +0530