

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 512 OF 2025

Shoeb Kamjad Khan .. Applicant
Versus
The State of Maharashtra .. Respondent

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- Mr. Mithilesh Mishra, Advocates for Applicant.
 - Mr. Hitendra J. Dedhia, APP for State.
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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 15, 2025

P.C.:

1. Heard Mr. Mishra, learned Advocate for Applicant and Mr. Dedhia, learned APP for Respondent - State.

2. This is an Application under Section 439 of the Code of Criminal Procedure, 1973 (for short “**Cr.P.C.**”) in connection with C.R. No.1525 of 2023 registered with Malwani Police Station for offences under Sections 8(c), 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “**NDPS Act**”). There are total three accused in the case and Applicant is arraigned as Accused No.3 and is in custody since 30.11.2023 i.e. 1 year 4 months and 17 days.

3. Briefly stated on 29.11.2023 at 19:00 hours, while on patrolling duty, prosecution raiding team accosted Accused Nos.1 and 2 with alleged contraband Mephedrone (MD) weighing 15 grams and

10 grams respectively. It is Accused No.2 who disclosed name of present Applicant – Accused No.3 as supplier of the alleged contraband MD. It is prosecution case that Accused No.2 disclosed that Accused No.3 has stored 500 grams of alleged contraband MD in his car parking and hence at 23:50 hours police raiding team went to residence of Accused No.3 and apprehended him. It is alleged that at instance of Accused No.3, 250 grams of alleged contraband MD was recovered from a shoe rack in his garage.

4. This Court has taken cognizance of the various medical ailments suffered by the present Applicant and his precarious condition in the previous orders dated 13.02.2025 and 28.02.2025. On 07.03.2025, learned APP tendered a prisoners Medical Report of Applicant submitted by the Department of Cardiology as well as Urology of the Sir J.J. Group of Hospitals. Report of Cardiology Department states that medical condition of the Applicant is consistent with prior evaluations and the Report of Urology Department states that Right Percutaneous Nephrolithotomy (PCNL) surgery is planned for Applicant which has surgical and cardiac risk.

5. In addition to medical grounds, Mr. Mishra has persuaded the Court to consider the present Application for bail on its merits. He would submit that Applicant is arraigned in the present crime on the basis of disclosure statement of co-accused. He would submit that in

continuity of the disclosure panchnama, Applicant's residential premises i.e. his bungalow was raided by prosecution. He would submit that the garage / parking space from where the alleged contraband is shown to be recovered does not exist and hence prosecution case since inception appears to be suspect. In support of this submission he has drawn my attention to affidavit dated 04.03.2025 filed by wife of Applicant wherein she has annexed the registered Agreement for assignment and sale of the residential premises of Applicant which was raided and a floor plan of the bungalow which does not mention about any garage or parking space being part of the same. Hence he would persuade the Court to draw an adverse inference *prima facie* about the recovery of the alleged contraband from the garage.

5.1. Next he would submit that there is clear non-compliance of provisions of Section 50 of Cr.P.C. as prosecution failed to inform the grounds for arrest to Applicant either orally or in writing which is violative of his fundamental right guaranteed under Article 22 of the Constitution of India as also provisions of Section 52 of the NDPS Act. He has drawn my attention to the Arrest Form of the Applicant appended at page No.64 wherein column No.8 regarding information of ground of arrest and legal rights of Accused is kept blank by prosecution. He has referred to and relied upon the decisions of the

Supreme Court in the case of *Pankaj Bansal Vs. Union of India and Ors.*¹ and *Prabir Purkayastha Vs. State (NCT of Delhi)*² as also decision of this Court in the case of *Mahesh Pandurang Naik Vs. The State of Maharashtra and Anr.*³ to support his submission regarding non-intimation of grounds of arrest to Applicant.

5.2. He would submit that Accused Nos.1 and 2 have been enlarged on bail. He would submit that trial before the Special Court has not yet commenced and even charge has not been framed. Applicant is in custody from 30.11.2023 for a period of 1 year 4 months 17 days pending trial. Hence he would submit that possibility of completion of trial in the near foreseeable future is bleak and therefore Applicant's long incarceration in such circumstances be considered as ground for grant of bail. Considering the gross non-violation of constitutional provisions coupled with medical grounds as also the fact that his indictment in the offence is solely based on the basis of disclosure statement of co-accused, he would urge the Court to release the Applicant on bail.

6. Mr. Dedhia learned APP has vehemently opposed the Bail Application and would submit that Applicant is the supplier of contraband MD and commercial quantity i.e. 250 grams of MD is seized from his residence. Hence he would submit that rigours of

1 2023 SCC OnLine SC 1244

2 Cri. Appeal D. No. 42896 OF 2023 decided on 15.05.2024

3 MANU/MH/4383/2024

Section 37 of the NDPS Act would be applicable to Applicant's case. He would submit that any observation on the issue argued by Applicant would amount to a mini trial without evidence at the bail stage which ought not be done by the Court. He would submit that there is ample material on record to establish complicity of Applicant in the crime and hence would pray for rejection of Bail Application.

7. I have heard the learned Advocates for the parties and with their able assistance perused the record of the case.

8. In the present case it is seen that Applicant's indictment is on the basis of co-accused's statement and that apart there is no other material to *prima facie* establish link of the Applicant to the present crime. There are no CDR or even whatsapp chats placed on record to show nexus of Applicant with any of the co-accused. Be that as it may, it is settled law that statements of co-accused are inadmissible in evidence as per law as they are statements recorded under Section 67 of the NDPS Act and are hit by the provisions of Section 25 and 27 of the Indian Evidence Act, 1872.

9. The Supreme Court in the case of *Tofan Singh Vs. State of Tamil Nadu*⁴ Court has held that statements recorded by officer authorised under the NDPS Act could be construed as statements to police officers given their duties and responsibilities in preventing and

⁴ (2021) 4 SCC 1

detecting crime under the NDPS Act. It held that right against self-incrimination and right to privacy under Article 20(3) and Article 21 of the Constitution apply to confessions recorded under Section 67 of the NDPS Act. It also held that officers under the NDPS Act should be construed as 'police officers' under Section 25 of the Indian Evidence Act, 1872 to prevent coercion in recording confessions and that confessions made before such officers are inadmissible as evidence to protect fundamental rights under Articles 20(3) and 21 of the Constitution of India.

10. In the case of *Phundreimayum Yas Khan Vs. State (NCT of Delhi)*⁵ the Delhi High Court has observed that disclosure statement of co-accused is *per se* not admissible without there being any corroboration thereof. Relevant paragraph No.24 of the said judgement reads thus:-

“24. The case of the prosecution, in so far as the applicant is concerned, is circumstantial, i.e. based solely on disclosure statement of the co-accused Sayed Javed Hussain which is per se not admissible without there being any corroboration. The prosecution has not been able to establish any connection between the subject offence and the location/CDRs of the accused persons, where the applicant is alleged to be present at the time when the contraband was collected by Sayed Javed Hussain. Merely because the applicant had been having frequent calls with the co-accused, would not be sufficient to hold that applicant is guilty of the subject offence.”

11. In the case of *Jasbir Singh Vs. Narcotics Control Bureau*⁶ the Delhi High Court in paragraph Nos.63, 67 and 68 of its judgment while

⁵ 2023 SCC OnLine 135

⁶ (2023) SCC OnLine Del 134

interpreting Section 67 of the NDPS Act *vis-a-vis* Sections 25 and 27 of the Indian Evidence Act, 1872 has held as under:-

“63. As statements recorded under Section 67 NDPS Act are inadmissible being hit by Section 25 IEA, the only way to make any part of such statements admissible, is by way of Section 27 IEA which creates an exception and allows only such part of a confessional statement, being information leading to discovery of some fact not previously in the knowledge of the police officer. In the present case, none of the statements of the Applicant lead to any discovery of a fact”, and hence, the statutory bar to their admissibility and reliability is attracted.

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67. With regards to applicability of Section 27 IEA, the fact so discovered is admissible when accompanied by the recovery of a material object and does not include purely mental or psychological facts. It is relevant to note the observations of this Hon^{ble} Court in State v. Navjot Sandhu @ Afsan Guru Crl. A. No. 80/2003 wherein this Hon^{ble} Court, after placing reliance on Pulukuri Kottaya and Ors v. The King-Emperor 1946 SCC OnLine PC 49, and several other judgments of the Hon^{ble} Supreme Court and other courts, summarized the law governing Section 27 IEA as follows:

“396. We, therefore, hold that in order that Section 27 may be brought in aid, the prosecution must establish:—

- 1. That consequent to the information given by the accused, it led to the discovery of some fact stated by him.*
- 2. The fact discovered must be one which was not within the knowledge of the police and the knowledge of the fact was for the first time derived from the information given by the accused.*
- 3. Information given by the accused must lead to the discovery of a fact which is the direct outcome of such information.*
- 4. The discovery of the fact must be in relation to a material object and of course would then embrace within its fold the mental condition i.e. the knowledge of the accused of the place from where the object was produced and the knowledge that it was there.*
- 5. Only such portion of the information as is distinctly connected with the said discovery is admissible.*

6. The discovery of the fact must relate to the commission of some offence.

68. Therefore, for any part of the alleged disclosures of the Applicant to be admissible, it was necessary that such disclosure led the Respondent to recovery of any contraband, or any other 'fact' related to the alleged offences. Given that none of the disclosures of the Applicant, except (at best for the recovery of a contraband involving quantity lesser than small quantity) led to the discovery of any object, or a "new fact" thereby, such disclosures under section 67 NDPS Act are held inadmissible in evidence."

12. Furthermore there is also blatant non-compliance of the provisions of Section 50 of Cr.P.C. which is *prima facie* evident from the Arrest Form at page No.64. There is no plausible justification or explanation provided by the prosecution for such dereliction on part of the police. Such non-action on part of prosecution *prima facie* amounts to violation of fundamental right of the Applicant emanating from Article 22(1) of the Constitution of India. The said position of law is settled by the Supreme Court in its recent decision in the case of ***Vihaan Kumar Vs. State of Haryana and Anr.***⁷. The Supreme Court in the said decision has held that the requirement of informing the person arrested of the grounds of his arrest is not a formality but a mandatory constitutional requirement and that Article 22 is included in Part III of the Constitution under the heading of Fundamental Rights. Thus it is the fundamental right of every person arrested and detained in custody to be informed of the grounds of his/her arrest as soon as possible and violation of the same would amount to curtailing liberty of the arrested

7 2025 INSC 162

person.

13. This brings us to the issue of fact raised by Applicant about recovery of the alleged contraband from the garage / parking space of the residence of Applicant, which according to him did not exist. *Prima facie* perusal of the document i.e floor plan of the bungalow appended to the registered Agreement annexed to the Affidavit filed by wife of Applicant shows that there is no garage and parking space shown therein. Prosecution case is that the contraband was recovered from a shoe rack kept in the garage. I would restrain myself from opining on the said issue at this interim juncture since *prima facie* apart from the word of prosecution there is nothing placed on record to show that the recovery was made from the garage vis-a-vis the documentary evidence of the floor plan produced by Applicant to show that there was no garage built in the said bungalow. The fact whether the garage exists today cannot be proved since the bungalow is demolished for the purpose of redevelopment. Hence the only *prima facie* material available on record is considered. Prosecution can undoubtedly prove its case and complicity of Applicant in the crime at trial.

14. As the present case involves contraband in commercial quantity, I deem it appropriate to refer to the decision of the Delhi High Court in the case of *Vishwajeet Singh Vs. State (NCT of Delhi)*⁸ wherein the Delhi High Court has observed that Section 37 of the

⁸ 2024 DHC 1554

NDPS Act provides for stringent conditions to be satisfied by the accused for his enlargement on bail however the same does not fetter grant of bail to the accused on the ground of undue delay in the completion of trial. *Prima facie*, in view of the above observations and considering the other issues discussed hereinabove, I am of the opinion that the Applicant can be released on bail.

15. In view of my aforesaid *prima facie* observations, Applicant has made out a case for grant of bail. Application is 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. 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; Applicant shall deposit his passport, if any with the Trial Court within a period of two weeks after his release;
- (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.

16. 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.

17. Bail Application is allowed and disposed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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