

Ajay

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

CRIMINAL BAIL APPLICATION NO. 641 OF 2025

Nasir Umar Shaikh @ Chacha

.. Applicant

Versus

The State of Maharashtra

.. Respondent

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- Mr. Anil G. Lalla a/w. Ms. Rithika Yerra, Mr. Yash Pulekar and Ms. Ankita Rahod, Advocates for Applicant.
 - Mr. R.M. Pethe, APP for Respondent – State.
 - Mr. Sopan B. Wadkar, PSI Pairavi, Sakinaka Police Station present.
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CORAM : MILIND N. JADHAV, J.

DATE : MAY 09, 2025.

P.C.:

1. Heard Mr. Lalla, learned Advocate for Applicant and Mr. Pethe, learned APP for Respondent - State.

2. This is an Application under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023 seeking Regular Bail in connection with Special LAC / C.R. No.787 of 2023 registered with Sakinaka Police Station for offences under Section 8(c), 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “**NDPS Act**”). There are total 20 Accused persons in the crime and Applicant before me is arraigned as Accused No.9. He is arrested on 20.08.2023 and is incarcerated since 1 year, 8 months and 20 days pending trial.

3. Applicant is a senior citizen aged 65 years. In order dated 24.04.2025, this Court has already taken cognizance of the medical ailment suffered by the present Applicant namely Buschke-Löwenstein tumor (BLT) which is a rare, locally aggressive and potentially malignant neoplasm that arises from pre-existing condylomatous lesions caused by the human papillomavirus (HPV) which is supported by the medical report issued by the Chief Medical Officer dated 23.04.2025.

4. On merits of the matter, Mr. Lalla, learned Advocate for Applicant would submit that indictment of present Applicant by prosecution is solely on the basis of confessional statement given by co-accused No.8 and nothing more. He would submit that there is non-compliance of Section 42 of the NDPS Act as the information leading to arrest of Applicant has not been reduced in writing nor it is forwarded to the superior by the empowered officer. He would submit that there is further non-compliance of the provisions of Section 50 of NDPS Act and has drawn my attention to page No.197 of the Application to submit that the empowered officer has only obtained signature of Applicant on the appraisal letter and there is no endorsement of his purported refusal to exercise his right under Section 50 of the NDPS Act.

4.1. He would submit that out of the 20 accused persons in the crime, 6 have been enlarged on bail and hence would persuade the Court to consider the ground of parity. He would submit that Applicant has no criminal antecedents. He would submit that Applicant is incarcerated since 1 year, 8 months and 20 days and trial has not yet commenced. He would submit that prosecution has enlisted 37 probable witnesses which they desire to examine in trial which would not be completed in the near foreseeable future. Considering the above transgressions of statutory provisions coupled with indictment of Applicant solely on the basis of confessional statement of co-accused and his medical condition, he would urge the Court to allow the Bail Application.

5. Mr. Pethe, learned APP for State has strongly resisted the Bail Application. He would submit that the contraband seized from the conscious possession of Applicant in question is in commercial quantity i.e. 1 kg 250 grams and hence Applicant will have to meet the rigours of the provisions under Section 37 of NDPS Act. He would submit that there is sufficient material on record to establish complicity of Applicant in the crime as supplier of the contraband MD. He would submit that present Applicant arraigned as Accused No.9 has further led to disclosure of other co-accused and he is a part of drug-trafficking chain. He would submit that if Applicant is released on bail, there are chances of he tampering evidence or influencing witnesses and hence

considering the overall material on record, he would urge the Court to reject the Bail Application.

6. With the able assistance of the learned Advocates, I have perused the record of the case.

7. In the present case it is seen that there is no *prima facie* incriminating material placed on record by prosecution to carve out the precise role of Applicant who is indicted as Accused No.9 nor there is any incriminating material placed on record or money trail in the form of bank statements to establish a live link between Applicant and other co-accused persons in the crime to substantiate charge of 'conspiracy' under Section 29 of the NDPS Act.

8. Indictment of Applicant in the crime is solely based on confessional statement given by co-accused No.8. The Supreme Court in the case of *Tofan Singh Vs. State of Tamil Nadu*¹ 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 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

¹ (2021) 4 SCC 1

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.

9. In the case of *Phundreimayum Yas Khan Vs. State (NCT of Delhi)*² 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.”

10. In the case of *Jasbir Singh Vs. Narcotics Control Bureau*³ the Delhi High Court in paragraph Nos.63, 67 and 68 of its judgment while 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

² 2023 SCC OnLine 135

³ (2023) SCC OnLine Del 134

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.”

11. That apart, non-compliance of provisions of Section 50 of the NDPS Act is also *prima facie* evident on the face of record. The Supreme Court as well as this Court in a plethora of decisions have held that the procedure laid down under Section 50 of the NDPS Act is a procedural safeguard which has been inserted so as to check the misuse of power by the prosecuting agencies and avoid indictment of innocent persons which needs to be followed scrupulously. In this regard, it would be helpful to refer to the decision of the Supreme Court in the case of ***Ranjan Kumar Chadha Vs. The State of Himachal Pradesh***⁴ wherein the Supreme Court has considered all the past decisions and summarized the requirements of Section 50 of the NDPS Act. The relevant paragraph Nos. 65 and 66 are reproduced below:-

“65. However, we propose to put an end to all speculations and debate on this issue of the suspect being apprised by the empowered officer of his right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or Magistrate. We are of the view that even in cases wherein the suspect waives such right by electing to be searched by the empowered officer, such waiver on the part of the suspect should be reduced into writing by the empowered officer. To put it in other words, even if the suspect says that he would not like to be searched before a Gazetted Officer or Magistrate and he would be fine if his search is undertaken by the empowered officer, the matter should not rest with just an oral statement of the suspect. The suspect should be asked to give it in writing duly signed by him in presence of the empowered officer as well as the other officials of the squad that “I was apprised of my right to be searched before a Gazetted Officer or Magistrate in accordance with Section 50 of the NDPS Act, however, I declare on my own free will and volition that I

4 2023 SCC OnLine SC 1262

would not like to exercise my right of being searched before a Gazetted Officer or Magistrate and I may be searched by the empowered officer.” This would lend more credence to the compliance of Section 50 of the NDPS Act. In other words, it would impart authenticity, transparency and credit worthiness to the entire proceedings. We clarify that this compliance shall henceforth apply prospectively.

66. From the aforesaid discussion, the requirements envisaged by Section 50 can be summarised as follows:—

- (i) Section 50 provides both a right as well as an obligation. The person about to be searched has the right to have his search conducted in the presence of a Gazetted Officer or Magistrate if he so desires, and it is the obligation of the police officer to inform such person of this right before proceeding to search the person of the suspect.
- (ii) **Where, the person to be searched declines to exercise this right, the police officer shall be free to proceed with the search. However, if the suspect declines to exercise his right of being searched before a Gazetted Officer or Magistrate, the empowered officer should take it in writing from the suspect that he would not like to exercise his right of being searched before a Gazetted Officer or Magistrate and he may be searched by the empowered officer.**
- (iii) Before conducting a search, it must be communicated in clear terms though it need not be in writing and is permissible to convey orally, that the suspect has a right of being searched by a Gazetted Officer or Magistrate.
- (iv) While informing the right, only two options of either being searched in presence of a Gazetted Officer or Magistrate must be given, who also must be independent and in no way connected to the raiding party.
- (v) In case of multiple persons to be searched, each of them has to be individually communicated of their right, and each must exercise or waive the same in their own capacity. Any joint or common communication of this right would be in violation of Section 50.
- (vi) Where the right under Section 50 has been exercised, it is the choice of the police officer to decide whether to take the suspect before a Gazetted Officer or Magistrate but an endeavour should be made to take him before the nearest Magistrate.
- (vii) Section 50 is applicable only in case of search of person of the suspect under the provisions of the NDPS Act, and would have no application where a search was conducted under any other statute in respect of any offence.
- (viii) Where during a search under any statute other than the NDPS Act, a contraband under the NDPS Act also happens to

be recovered, the provisions relating to the NDPS Act shall forthwith start applying, although in such a situation Section 50 may not be required to be complied for the reason that search had already been conducted.

(ix) The burden is on the prosecution to establish that the obligation imposed by Section 50 was duly complied with before the search was conducted.

(x) Any incriminating contraband, possession of which is punishable under the NDPS Act and recovered in violation of Section 50 would be inadmissible and cannot be relied upon in the trial by the prosecution, however, it will not vitiate the trial in respect of the same. Any other article that has been recovered may be relied upon in any other independent proceedings.”

(emphasis supplied)

12. In the present case it is clear that the prosecution has failed to follow guideline no.(ii) which mandates prosecution to take down the refusal of exercise of right under Section 50 of NDPS Act in own handwriting of the suspect. Moreover in the present case there is no endorsement of refusal by the suspect. The burden of proving compliance of Section 50 of NDPS Act is on the prosecution, however at this *prima facie* stage prosecution has failed to give any plausible explanation for the non-compliance. Hence *prima facie* there is clear non-compliance of Section 50 of the NDPS Act.

13. Applicant is a senior citizen suffering from a precarious medical ailment namely Buschke-Löwenstein tumor (BLT). He is incarcerated since 1 year, 8 months and 20 without trial reaching its logical end. Commencement and for that matter conclusion of the trial in the near foreseeable future is a distinct impossibility as it has not even commenced coupled with the above transgressions and non-

compliance of mandatory statutory provisions of the NDPS Act delineated hereinabove in my opinion, the bar of Section 37 of the NDPS Act would not be applicable in the present case.

14. Needless to state that complicity of Applicant can be proved by prosecution at trial.

15. In view of my above *prima facie* observations, 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.25,000/- with one or two sureties in the like amount;
- (ii) Applicant is permitted to furnish provisional cash bail of Rs.25,000/- for his release immediately and file undertaking that he will provide one or two sureties in the like amount of Rs.25,000/- 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.

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.

[MILIND N. JADHAV, J.]

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by AJAY
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