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

CRIMINAL BAIL APPLICATION NO. 762 OF 2025

Chukwu Ogbonna

.. Applicant

Versus

Union of India

.. Respondent

.....

- Mr. Vikas Chavan a/w Mr. Kamlesh Satre, Advocates for Applicant.
- Mr. Shreeram Shirsat, APP a/w Ms. Karishma Rajesh and Shekhar Mane, Advocates for Respondent – State.

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 15, 2025.

P.C.:

1. Heard Mr. Chavan, learned Advocate for Applicant and Mr. Shirsat, 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 C.R.No. II-90 of 2021 registered with Narcotics Control Bureau Mumbai Zonal Unit for offences punishable under Sections 8(c) read with 22(c), 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act'). Applicant is arrested on 20.09.2021 and he is incarcerated for 3 years 6 months 26 days.

3. It is prosecution case that on 19.09.2021 at 10:00 hours a specific information was received by the Narcotic Control Bureau that Applicant is arriving near HUB Mall, Goregaon East to deliver

Mephedrone (commonly known as 'MD'). The said information which was reduced in writing and put up before the Superintendent, NCB, Mumbai. Raiding party reached the spot and observed Applicant behaving suspiciously. Raiding party accosted him and informed him about his right under Section 50 of the NDPS Act. On search, 52 grams of MD in one transparent ziplock bag was recovered from his pocket. The contraband was seized, sealed and marked as 'N-1' and offences under Sections 8(c) read with 22(c), 28 and 29 was registered against the Applicant.

4. Mr. Chavan, learned Advocate for the Applicant would draw my attention to order dated 21.02.2025. The issues raised in the said order are required to be answered by the prosecution. Said order reads thus:-

"1. Heard Mr. Kotwal, learned Advocate for Applicant.

2. Applicant before me is indicted for offences punishable under provisions of the Narcotics and Psychotropic Substances Act, 1985 (for short '**NDPS Act**') for possessing 52 grams of Mephedrone.

3. Mr. Kotwal makes the following three submissions:-

(i) Firstly, he would submit that Applicant is incarcerated since 20.09.2021, hence his long incarceration may be considered by the Court;

(ii) Next he would submit that panchanama at the time of search and seizure stated at 04:00 p.m. on 19.09.2021 and concluded on 07:30 p.m. on the same day but Applicant has been arrested according to Court / arrest form at 07:30 p.m. on the following day i.e. 20.09.2021 and thereafter produced before the Magistrate. He would submit that Applicant was illegally detained for more than 24 hours in the present case which is apparent from the face of record itself;

(iii) On the issue of seizure, he would submit that none of the documents placed in the charge-sheet show the quantification or weight of the alleged contraband with or without its bag separately when seized. According to him, contraband was seized alongwith a plastic bag / pouch in which it was contained. He would submit that the 52-A certificate appended to the Application does not reveal the aforementioned exercise which is a mandatory requirement to be undertaken under the provisions of Section 52A of the NDPS Act.

4. Prosecution shall consider the aforementioned submissions and accordingly take appropriate instructions and apprise the Court on the next adjourned date.

*5. Stand over to **28th March, 2025 at 02:30 p.m.**"*

5. Mr. Shirsat, learned Special PP for Respondent would draw my attention to the detailed affidavit in reply dated 24.03.2025 filed by Mr. Kuldeep Tomar, Investigation Officer, NCB. At the outset, he would persuade me to consider that this is an offence under NDPS Act wherein Applicant has been apprehended and arrested with commercial quantity of the alleged contraband i.e. MD, hence the rigors of Section 37 of the NDPS Act would be applicable in the present case. He would submit that considering that the Applicant is a Nigerian citizen, the Court must be satisfied and should form a belief that Applicant has not committed the alleged offence and is entitled to be released on bail. He would submit that Applicant's act of providing delivery of contraband, establishes his criminal intent and clearly shows and reflects his primary role as that of a supplier. He would submit that once recovery is made from accused person and it is of commercial quantity, irrespective of the margin between the commercial quantity and intermediate quantity, provisions pertaining

to offences dealing with commercial quantity are applicable and there cannot be exoneration on bail due to criminal liability on mere long incarceration of Applicant. He would submit that Applicant is a foreign national and can be a flight risk if released on bail. Hence he would urge the Court to reject the Bail Application.

6. I have heard the learned Advocates at the bar and perused the record with the able assistance of the learned Advocates.

7. *Prima facie* there is a clear transgression of statutory provisions and procedure on perusal of the record. What the learned Prosecutor is arguing is to throw caution to the winds. This is not acceptable neither it is permissible. The dichotomy in description of the contraband can be evinced from Seizure panchanama appended at page No. 36 juxtaposed with the Chemical Analysis Examination Report appended at page No. 62 of the Application. *Prima facie* on perusal of the record it is seen that in the Seizure panchanama the alleged contraband recovered is described as ‘white colour crystalline substance’ however on *prima facie* perusal of its description in the Chemical Analysis Examination Report it is described as ‘off-white colour crystalline powder substance’, ‘white colour crystalline powder’ and ‘brown coloured powder substance’. The aforesaid *prima facie* dichotomy between colour and texture of the contraband is *prima facie noticed* from the prosecution documents. Oxford English Dictionary in its 11th Edition defines ‘white’ as colour of milk or fresh snow, due to

the reflection of all visible rays of light; 'off-white' as white with a grey or yellowish tinge and 'brown' as of a colour produced by mixing red, yellow, and blue, as of dark wood or rich soil.

8. *Prima facie* the transgression of mandatory provisions of Section 52A of the NDPS Act is noticed in the present case which would go to the root of the matter resulting in benefit of the same to be given to Applicant. Statutory provisions being transgressed cast a doubt on the seizure and prosecution case. Reliance placed on CDR details does not draw any inference of Applicant's involvement in the crime. The Supreme Court in the case of ***State Vs. Pallulabid Ahmad Arimutta***¹ held that CDR details of some of the accused or allegations of tampering of evidence by accused is an aspect that can be examined at the stage of trial.

9. I deem it appropriate to refer to the decisions of the Delhi High Court in the case of ***Vishwajeet Singh Vs. State (NCT of Delhi)***² wherein the Delhi High Court has observed that Section 37 of the NDPS Act provides for stringent conditions to be satisfied by the accused for his enlargement on bail, the same does not fetter grant of bail to the accused on the ground of undue delay in the completion of trial.

1 SLP (CRI.) No.3242/2022 dated 10.01.2022.

2 2024 DHC 1554.

10. Any dereliction or violation of the mandatory provisions will have to be viewed strictly by Court considering that if the prosecution follows the provisions, the accused person does not get benefit of any dereliction and it affects his right to speedy trial and personal liberty while being incarcerated in prison pending trial.

11. Attention is drawn to the decisions of this Court in the case of *Zadi Elayee Sande & Anr. Vs. The State of Maharashtra*³ (Coram : Bharati Dangre, J.) and *Jahangir Abdul Rehman Shaikh Vs. The State of Maharashtra*⁴ (Coram : Manish Pitale, J.) where the Court in similarly placed circumstances held in favour of the Accused considering glaring discrepancies in description of the sample / contraband.

12. *Prima facie* on perusal of the appraisal form under Section 50 of the NDPS Act it is seen that the signatures of the panchas / witnesses is missing on the appraisal form which is fatal to the prosecution case at the *prima facie* stage. Needless to state that complicity of Applicant can be proved at the stage of trial.

13. It is settled law that a Court while deciding a Bail Application has to keep in mind the principal rule of bail which is to ascertain whether the Accused is likely to appear before the court for trial. There are other broad parameters also like gravity of offence,

³ BA. 2796 of 2021, decided on 04.10.2022.

⁴ BA. 1589 of 2024, decided on 26.06.2024.

likelihood of Accused repeating the offence while on bail, whether he would influence the witnesses and tamper with the evidence, his antecedents which are required to be considered in such cases. However the metrics of judicial decision making gets amplified or rather shuttled to another facet when dealing with offences where Section 37 of NDPS Act is attracted. In such cases one has to satisfy itself with the rigors of the twin conditions as prescribed under Section 37 of the NDPS Act. Section 37 reads thus:-

“37. Offences to be cognizable and non-bailable.:- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless:-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.”

14. Argued before me is a case concerning liberty of an under-trial who has been incarcerated for almost 3 years 6 months 26 days, pending trial, a situation impacting the rights of undertrial conferred by Article 21 of Constitution to speedy justice as also personal liberty. In so far as the power of high Courts to grant bail is concerned, when

the case is such that involves a question of personal liberty of an undertrial who is incarcerated for a very long period, the powers are wide and unfettered by conditions, the principle rule being that bail is the rule and refusal is the exception, allowing accused persons to better prepare their defense.

15. In the landmark judgement of *Maneka Gandhi Vs. Union of India*⁵, the Supreme Court held that the right to life and personal liberty under Article 21 is not limited to mere physical existence but includes the right to live with dignity. The court emphasized that the procedure established by law must be fair, just, and reasonable, and it cannot be arbitrary, oppressive, or unreasonable.

16. At this juncture I deem it appropriate to list certain observations of the Supreme Court shedding light on concerns underlying the “Right to speedy trial” from the point of view of an accused in custody whose liberty is affected. In the case of *Abdul Rehman Antulay & Ors. Vs. R.S. Nayak & Anr.*⁶ the Supreme Court held as under:-

“86. In view of the above discussion, the following propositions emerge, meant to serve as guidelines. We must forewarn that these propositions are not exhaustive. It is difficult to foresee all situations. Nor is it possible to lay down any hard and fast rules. These propositions are:

(1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves

5 1978 (1) SCC 248

6 1992 (1) SCC 225

the societal interest also, does not make it any-the-less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

(2) Right to Speedy Trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial. That is how, this Court has understood this right and there is no reason to take a restricted view.

(3) The concerns underlying the Right to speedy trial from the point of view of the accused are:

(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.

(4) – (11) -----X-----” (emphasis supplied)

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

17.1. In the case of *Rabi Prakash Vs. State of Odisha*⁷ the Supreme Court, considering the long incarceration of an undertrial accused who was incarcerated for 3 years and 6 months granted him bail. The contraband in question was Ganja, the commercial quantity of which is

⁷ 2023 SCC OnLine SC 1109

20 kilograms. In this case recovery of 247 kilograms was allegedly made from the accused despite which the court invoking the right to speedy justice flowing from Article 21 and foreseeable delay in trial granted bail to the accused.

17.2. In the case of *Dheeraj Kumar Vs. State of Uttar Pradesh*⁸ the Supreme Court considering long incarceration granted bail to an undertrial-accused who was incarcerated for 2 years and 6 months granted him bail. The contraband in question was Ganja the commercial quantity of which is 20 Kilograms. In this case recovery of 65 Kilograms was allegedly made from the accused despite which, the Court invoking the right to speedy justice flowing from Article 21 and foreseeable delay in trial granted bail to the Accused.

18. 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 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.

8 2023 SCC OnLine 918

19. In view of the aforesaid *prima facie* observations, absence of criminal antecedents, Applicant's incarceration for for 3 years 6 months 26 days pending trial further persuades me to consider the Applicant's case, commencement and completion of trial in the near foreseeable being doubtful also persuades me to consider Applicant's case for bail. Hence, I am of the opinion that Applicant can be released on bail.

20. The Bail Application stands allowed on the following terms and conditions:-

- (i) Applicant is directed to be released on bail on furnishing PR. 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.
- (xi) The concerned prosecuting Agency shall immediately communicate this order of grant of bail to the concerned Registration Officer appointed under Rule 3 of the Registration of Foreigners Rules, 1992 within the meaning of the Foreigners Act, 1946. This condition is added in view of the decision of the Supreme Court in the case of *Frank Vitus v. Narcotics Control Bureau & Ors.*⁹

21. 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

⁹ Criminal Appeal No. 2814-2815 of 2024 decided on 06.01.2025

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.

22. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

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