

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 1269 OF 2025

Vishal Satish Godse

Applicant

.. (Org. Accused No.2)

Versus

The State of Maharashtra

.. Respondent

WITH

BAIL APPLICATION NO.5120 OF 2024

Gautam Gunadhar Ghosh

Applicant

.. (Org. Accused No.6)

Versus

State of Maharashtra

.. Respondent

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- Mr. Amit Munde a/w Mr. Sunil Chavan, Mr. Jai Vohra and Mr. Parikshit Pawar, Advocates for Applicant in Bail Application No.1269 of 2025.
 - Mr. Taraq Sayed a/w Ms. Ashwini Achari, Advocates for Applicant in Bail Application No. 5120 of 2024.
 - Ms. Megha S. Bajoria, APP for Respondent – State in Bail Application No. 1269 of 2025.
 - Mr. Balraj B. Kulkarni, APP for Respondent – State in Bail Application No. 5120 of 2024.

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CORAM : MILIND N. JADHAV, J.

DATE : MAY 05, 2025

P.C.:

1. Heard Mr. Munde, learned Advocate for Applicant in Bail Application No. 1269 of 2025; Mr. Sayed, learned Advocate for Applicant in Bail Application No. 5120 of 2024; Ms. Bajoria, learned APP for State in Bail Application No. 1269 of 2025 and Mr. Kulkarni, learned APP for State in Bail Application No. 5120 of 2024.

2. The Applicants in both these Applications are seeking Regular Bail under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023 in connection with C.R.No. 640 of 2023 registered with Navghar Police Station for offences punishable under Sections 8 (c), 22 and 29 of Narcotic Drug and Psychotropic Substances Act, 1985 (for short 'NDPS') alongwith Sections 3 and 25 of the Arms Act, 1959.

3. There are 7 accused persons in the present crime. Accused No. 5 has been released on bail by the Sessions Court. Applicant in Bail Application No. 1269 of 2025 is arraigned as Accused No. 2. Applicant in Bail Application No. 5120 of 2024 is arraigned as Accused No. 6. Applicant – Accused No. 2 is arrested on 19.10.2023 and Applicant – Accused No. 6 is arrested on 21.10.2023 and both are incarcerated since 1 year 6 months in prison pending trial.

4. Case of prosecution is that the Prosecution Officers on 18.10.2023 at 12:50 hours received specific information that some accused persons staying in Hotel Vinyasa Residency, Bhayandar (East) were in possession of MD and were involved in selling the same from the said hotel. Two panchas were brought, appraised about the procedure of search, seizure and arrest and a pre-trap panchnama was prepared. It is prosecution case that prosecuting agency reached the incident spot and inquired about Room No. 104 which was booked in the name of Rahul Vishwakarma and Deepak Dubey (Accused No. 3).

Prosecution officers entered the said room and found 4 men seated on the bed and chair. Thereafter Applicants were appraised of their rights under Section 50 of the NDPS and were asked if they wanted to be searched before a Gazetted Officer or Magistrate and accordingly arrangement would be made to which they denied. On search, Accused No. 1 was found in possession of 65.40 grams of MD, Applicant - Accused No. 2 was found in possession of 65.30 grams of MD, Accused No. 3 was found in possession of 63.40 grams of MD and Accused No. 4 was found in possession of 57.60 grams of MD. Thereafter the contraband was sealed and marked as 'A' 'B' 'C' and 'D' and crime was registered under Sections 8 (c), 22 and 29 of the NDPS Act. During Investigation Accused No. 5 disclosed the name of Accused No. 6 and stated that the contraband recovered from Accused No.1 and him was supplied by Accused No.6. It is prosecution case that Accused No.6 led to recovery of 110 grams of MD from the lift room in his building. Thereafter the seized contraband was sealed and marked as 'B-1'and crime was registered under Sections 8 (c), 22 and 29 of the NDPS Act.

5. Mr. Munde, learned Advocate for the Applicant – Accused No. 2 in Bail Application No. 1269 of 2025 would submit that Applicant is falsely implicated in the present case. He would submit that there is a clear transgression of Section 42 of the NDPS Act. He would submit that the Investigating Officer at the time of search and seizure failed to perform field testing of the narcotic substance in

question due to non-availability of field testing kit during the search and seizure process. He would submit that NDPS Act being a special law mandates strict compliance with procedural safeguards as laid down under Section 42 of the NDPS Act. He would submit that Investigating Officer presumed the alleged white powder to be a narcotic substance and registered the crime under the NDPS Act. He would draw my attention to the panchanama appended at page No. 85 of the Application which confirms the aforementioned fact as stated therein thereby casting a doubt and suspect on the prosecution case.

5.1. He would submit that in the absence of presumptive test i.e. field test, the Investigating Officer lacked 'reason to believe' that the seized substance was indeed a narcotic drug or a psychotropic substance as required under Section 42 of the NDPS Act. He would submit that the formation of such belief cannot be on the basis of mere presumption or suspicion. He would submit that failure to conduct a field test, casts a serious doubt on the identification and legitimacy of the seized substance and thereby renders the seizure arbitrary in law.

5.2. He would submit that on perusal of record of the case it is evident that mandatory requirement of Application to Magistrate under Section 52A(3) is completely omitted. He would submit that there is clear non-compliance of Form 5 which specifically lists the Application to be made and certificate to be given thereon by the

Magistrate. This mandatory procedure under Rule 8 and 18 of the Narcotics Drugs & Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 is completely vitiated in the present case making prosecution case highly questionable.

5.3. He would submit that Applicant is the sole breadwinner of his family and has deep roots in the Society. He would submit that Applicant – Accused No. 2 is arrested on 19.10.2023 and incarcerated for the past 1 year 6 months 17 days pending trial. He would submit that investigation is completed and chargesheet is filed, however charge is not framed till date. Commencement and completion of trial in the near foreseeable future is bleak and co-accused No. 5 having been released on bail, he would urge the Court to consider Applicant's case on the ground of parity also.

6. Mr. Sayed, learned Advocate for the Applicant – Accused No. 6 would submit that Applicant is falsely implicated in the present crime. He would submit that Accused No. 5 in his statement under Section 67 disclosed the name of Accused No. 6 which is inadmissible in law as it is hit by Section 25 of the Indian Evidence Act, 1872 and is not corroborated either. He would submit that there is no recovery from his conscious possession. He would submit that Applicant led the prosecution team to a lift room from where 110 grams of MD was recovered. He would submit that the said recovery is from an open

space near the lift which is a public place because every member of the Society including, watchman and labourers have access to the said lift room, and it cannot be alleged that Applicant has exclusive control over the same. Therefore *prima facie* it cannot be said that the seized contraband was in the conscious possession of Applicant at that time. He would submit that prosecution has failed to establish any direct link of Applicant with the alleged contraband.

6.1. He would submit that there is a clear transgression of Section 43 of the NDPS Act. He would submit that the Investigating Officer at the time of search and seizure failed to perform field testing of the substance in question due to non-availability of field testing kit during the search and seizure process. He would submit that NDPS Act being a special law mandates strict compliance with procedural safeguards as laid down under Section 43 of the NDPS Act. He would submit that Investigating Officer presumed the alleged white powder to be a narcotic substance and registered a crime under the NDPS Act. He would draw my attention to the memorandum panchanama appended at page No. 158 of the Application which confirms the aforementioned fact as stated therein thereby casting a doubt on the prosecution case.

6.2. He would submit that Applicant is a business man having deep roots in the Society and having no criminal antecedents to his

discredit He would submit that Applicant – Accused No. 6 is arrested on 21.10.2023 and incarcerated for the past 1 year 6 months 15 days pending trial. He would submit that investigation is completed and chargesheet is filed, however charge is not framed till date. Commencement and completion of trial in the near foreseeable future is bleak and co-accused No. 5 having been released on bail, he would urge the Court to consider Applicant's case on the ground of parity also.

7. Ms. Bajoria and Mr. Kulkarni, learned APPs for State would submit that commercial quantity of contraband is found in possession of the Applicants. They would submit that the crime in question is of a serious nature. They would submit that both Applicants confirmed the alleged substance to be MD in the presence of the panchas. They would submit that samples were drawn in the presence of the panchas. The samples were then sent to the State Forensic Science Laboratory (FSL) for analysis. The examination report of the FSL reveals the contraband to be Mephedrone which falls under the NDPS Act. With regard to Accused No. 2, Ms. Bajoria would submit that Applicant was found in conscious possession of 65.30 grams of MD. However with regard to Accused No. 6, Mr. Kulkarni would submit that 110 grams of MD was discovered at the instance of Applicant which is admissible under Section 27 of the Indian Evidence Act, 1872, which also proves the *mens rea* and nexus of Applicant to the crime in question. They

would submit that as commercial quantity of contraband is recovered from Applicants, Section 29 is invoked in the chargesheet and rigours of Section 37 will hence apply to the present case. They would submit that if Applicants are released on bail there is every possibility of them re-offending, tampering with evidence and influencing witnesses, hence they would urge the Court to reject the Applications.

8. With the able assistance of the learned Advocates at the bar, I have perused the record of the case.

9. *Prima facie* on perusal of the record it is seen that there is a clear dichotomy on the face of record. *Prima facie* on perusal of the Seizure panchanama appended at page Nos. 85 and 158 it is seen that the field test was not performed with regard to the seizure of the alleged narcotic substance from the Applicants which casts a doubt whether the samples are true representative samples of the alleged contraband recovered from the Applicants which are ultimately sent for forensic analysis. In the present case the alleged contraband being MD and non-availability of field testing kit coupled with non-performance of the field test vitiates the prosecution case. In the absence of presumptive test i.e. field test the Investigating Officer lacked 'reason to believe' that the seized substance was indeed a narcotic drug or a psychotropic substance as required under Sections 42 and 43 of the NDPS Act. The formation of such belief cannot be on

the basis of mere presumption or suspicion. It is *prima facie* seen that there is a clear transgression of statutory provisions of Sections 42 and 43 of the NDPS Act.

10. It is *prima facie* seen that Applicant – Accused No. 6 was not in conscious possession of the contraband. It is seen that recovery was from an open space that is lift room of the building which is a public space as watchman, labourers and everyone residing in the building have access, thereto, indicating no exclusive control over the said lift room for establishing guilt under the NDPS Act. It is *prima facie* seen that no evidence is placed on record or no direct nexus is established to corroborate the prosecution case which is fatal at this *prima facie* stage for grant of bail. It is *prima facie* seen that Accused No. 6 was solely indicted on the basis of co-accused statement under Section 67 of the NDPS Act which is hit by Section 25 of the Indian Evidence Act, 1872.

11. In this regard attention is drawn to the decision of the Supreme Court in the case of *Tofan Singh Vs. State of Tamil Nadu*¹ Court held that statements recorded by NDPS officers 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

¹ (2021) 4 SCC 1

under the NDPS Act should be construed as 'police officers' under Section 25 of the Evidence Act 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.

12. 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.”

13. 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 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

² 2023 SCC OnLine 135

³ (2023) SCC OnLine Del 134

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 CrI. 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.”

14. Further it is *prima facie* seen that mandatory requirement of Application to Magistrate under Section 52A(3) is completely omitted in the case of Applicant – Accused No. 2. It is a clear non-compliance of Form 5 which specifically lists the Application to be made and certificate to be given thereon by the Magistrate. This mandatory procedure under Rule 8 and 18 of the Narcotics Drugs & Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 is completely vitiated in the present case which is fatal to prosecution case at the *prima facie* stage of bail.

15. That apart with regard to Section 29 of the NDPS Act it is seen that *prima facie* no direct evidence or no cogent evidence is placed on record to establish that the Applicants at any point of time were involved in selling or delivering the alleged contraband.

16. However, the fundamental principle, upon which the whole structure of Criminal Jurisprudence is based, is that burden of proving every essential ingredient of the offence lies upon the prosecution and the accused is presumed to be innocent till the offence is proved against him beyond all reasonable doubt. However in the present case it is seen that *prima facie* there is variance which has aided to the benefit of the Applicants. It is seen that Applicants are incarcerated for

the past 1 year 6 months pending trial, investigation is completed, chargesheet is filed, commencement and completion of trial in the near foreseeable future being doubtful and Accused No. 5 having been released on bail further persuades me to consider Applicants' case on the ground of parity also. Insofar as the statement which led to recovery under Section 27 of the IEA is concerned the same can be proved and adjudicated in trial. Needless to state that complicity of the Applicants in the present crime shall be determined by the prosecution at the time of trial.

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 contraband, 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:-

18. In the case of *Nitish Adhikary alias Bapan Vs. State of West Bengal*⁴ the Supreme Court considering long incarceration of an undertrial-accused granted him bail who was incarcerated for 1 year and 7 months despite being alleged to be in possession of commercial quantity of contraband.

4 2022 SCC OnLine SC 2068

19. In the case of *Babor Ali Mondal Vs. State of West Bengal*⁵ the Supreme Court considering the incarceration of an undertrial-accused granted him bail who was incarcerated for 1 year and 4 months.

20. In the case of *Sukhvinder Singh Bittu Vs. State of Punjab*⁶ 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.

21. In the case of *Mohd. Mobin Jahurul Hasan Manihar Vs. State of Maharashtra*⁷ - 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.

22. In all the above cases the right to speedy justice flowing from Article 21 of the Constitution of India and the foreseeable delay in completion of trial were considered as imminent grounds for grant of bail apart from the rigours of Section 37 of the NDPS Act in the facts of the said case.

23. From the above, it is apparent that inspite of the stringent test to be met by the Accused persons under Section 37 of the NDPS

5 Criminal Appeal No. 3349 of 2024

6 Cri. Appeal No.1204 of 2024

7 BA No.713 of 2024 decided on 20.01.2025

Act for being released on bail, it has been held that the same does not fetter grant of Bail to Accused persons 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.

24. Considering the above *prima facie* observations and in view of the above judicial pronouncements coupled with the transgression of statutory provisions of the NDPS Act, Co-accused No. 5 having been released on bail further persuades me to consider Applicants' case on the ground of parity also. Considering the ignominy of Applicants being incarcerated further and no hope of trial commencing or concluding in the near foreseeable future, I am of the opinion that both Applicants can be released on bail.

25. Hence, both Bail Applications are allowed subject to the following terms and conditions:-

- (i) Both Applicants are directed to be released on bail on furnishing P.R. Bond in the sum of Rs. 25,000/- each with one or two sureties in the like amount;
- (ii) After their release from jail, Applicants shall report to the Investigating Officer as and when called for;

- (iii) Applicants shall attend the trial Court on first Wednesday of every month between 11.00 a.m. and 1.00 p.m. to mark their presence. If the first Wednesday 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) Applicants 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 they do so, it will entitle the prosecution to apply for cancellation of this order;
- (v) Applicants shall not leave the State of Maharashtra without prior permission of the Trial Court;
- (vi) Applicants shall not influence with any of the witnesses or tamper with the evidence in any manner;
- (vii) Before their actual release from jail, Applicants shall furnish their address where they proposes to reside after their release from jail, to the concerned Police Station and also to the trial Court; and
- (vii) In case of any infraction of the above conditions and / or two consecutive defaults in marking their attendance

before trial Court, it shall attract the provisions of Section 439(2) of Cr.P.C. i.e. for cancellation of bail.

26. 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.

27. Both Bail Applications are allowed and disposed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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by HARSHADA
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