

Ajay

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION NO. 1915 OF 2025

Mohd Shahrukh Mohd Shafi Shaikh .. Applicant
Versus
The State of Maharashtra .. Respondent

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- Mr. Sherali Khan Advocate for Applicant.
 - Mr. R.M. Pethe, APP for Respondent – State.
 - Mr. R.V. Londhe, PSI, ANC Ghatkopar Crime Branch.

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CORAM : MILIND N. JADHAV, J.

DATE : MAY 07, 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. 161 of 2022 registered with Anti Narcotic Cell, Ghatkopar Unit for offences punishable under Sections 8 (c) and 22 (c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short '**NDPS Act**') read with Sections 419, 420, 465, 467, 468 and 471 of the Indian Penal Code, 1860 (for short '**IPC**') and Section 12 of the Passport Act, 1950. There are 2 accused persons in the present crime. Applicant is arraigned as Accused No.1. He is arrested on 04.08.2022 and incarcerated for 2 years 9 months and 3 days.

2. It is prosecution case that while patrolling on 03.08.2022 prosecution officers reached near Mumbai Central and they found Applicant carrying a black plastic bag and behaving suspiciously.

Prosecution officers approached him and questioned him about his details and he gave evasive answers. Two panchas were brought and were appraised of the search, seizure and arrest procedure under the NDPS Act, panch witnesses conducted search of the police personnel. Applicant was appraised of his right under Section 50 of the NDPS Act. On search, 995 grams of Mephedrone (commonly known as 'MD') was found and the alleged contraband was seized, sealed and marked as 'A' and crime was registered under Sections 8 (c), 22 (c) and 29 of the NDPS Act. During Investigation recovery of bogus PAN Card, Driving License and Aadhar Card was made for issuing passport and visa hence the Sections 419, 420, 465, 467, 468 and 471 of IPC and Section 12 of Passport Act were added.

3. Mr. Khan, learned Advocate for the Applicant would submit that Applicant is falsely implicated in the present crime. He would submit that due to non availability of the field testing kit, prosecution officers presumed the substance recovered to be a narcotic drug commonly known as MD and the Inventory panchanama was prepared on 20.08.2022 that is after an unexplained delay of 16 day which casts a serious doubt on prosecution case. With regard to invocation of Sections 467, 468 and 471 of the IPC prosecution has failed to place on record any direct evidence to constitute the offence of forgery. He would submit that mere possession of forged documents does not constitute a crime under the alleged Sections. He would submit that

none of the ingredients of Section 420 of IPC are present hence prosecution case of cheating falls to the ground. He would submit that Applicant is incarcerated for the past 2 years 9 months 3 days pending trial and prosecution has only examined 7 witnesses out of the intended 41 witnesses hence completion of trial in the near foreseeable future is bleak and he would urge the Court to allow the Application.

4. Mr. Pethe, learned APP for State would vehemently oppose the submissions made by Mr. Khan. He would submit that commercial quantity of contraband was recovered from the possession of Applicant, thereby attracting rigors of Section 37 of the NDPS Act. He would submit that during further investigation bogus Government documents were recovered at the instance of Applicant. He would draw my attention to the panchanama appended at page No. 41 and when read at page No. 43 it is stated that Applicant forged / fabricated Government documents which indicates deliberate concealment of his identity at all stages. He would submit that Applicant has 13 criminal antecedents making him a hardened criminal hence if he is released on bail the possibility of he re-offending himself, tampering with evidence, influencing the witnesses cannot be ruled out. He would submit that considering record of the case Applicant is a flight risk holding forged Government documents / identities for passport / visa, hence he would urge the Court to reject the Application.

5. I have heard the submissions of the learned Advocates at the bar and perused the record of the case.

6. *Prima facie* on perusal of the Seizure panchanama appended at page No.41 it is seen that the field test was not performed with regard to the seizure of the alleged narcotic substance from the Applicant which casts a doubt whether the samples are true representative samples of the alleged contraband recovered from the Applicant which are ultimately sent for forensic analysis after 16 days. 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. Insofar as forgery under Sections 467, 468 and 471 of the IPC is concerned, no CFSL report, definitive material or incriminating evidence is placed on record to support the allegation of preparation of forged Government documents. Mere possession of the said documents does not constitute any offence under the alleged Sections. It is *prima facie* seen that there is no deception at the stage of inception hence the provisions of Section 420 of IPC do not apply to the crime in question.

7. In so far as antecedents of Applicant are concerned, attention is drawn to the decision of the Supreme Court in the case of ***Ayub Khan Vs. The State of Rajasthan***¹ wherein the Supreme Court in paragraph No. 10 has held as under:-

¹ Criminal Appeal @ SLP (Crl.) No. 10587 of 2023 decided on 17.12.2024.

“10. The presence of the antecedents of the accused is only one of the several considerations for deciding the prayer for bail made by him. In a given case, if the accused makes out a strong prima facie case, depending upon the fact situation and period of incarceration, the presence of antecedents may not be a ground to deny bail. There may be a case where a Court can grant bail only on the grounds of long incarceration. The presence of antecedents may not be relevant in such a case. In a given case, the Court may grant default bail. Again, the antecedents of the accused are irrelevant in such a case. Thus, depending upon the peculiar facts, the Court can grant bail notwithstanding the existence of the antecedents.....”

(emphasis supplied)

8. In view of the above decision of the Supreme Court vis-a-vis facts of the present case, antecedents of Applicant would not be an impediment for grant of bail to the Applicant in the present case.

9. However what intrigues the Court is whether further incarceration of Applicant is required or justified overriding his right to liberty and speedy trial? The reason which impels me to consider the present Application is long incarceration of Applicant in prison which is for the past 2 years 9 months 3 days pending trial. Case of prosecution is based on circumstantial evidence. Needless to state that complicity of Applicant can be proved in trial.

10. 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, 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.”

11. Argued before me is a case concerning liberty of an under-trial who has been incarcerated for almost 2 years 9 months and 3 days 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.

12. In the case of *Emperor vs H.L. Hutchinson*² the Allahabad High Court, as far back as in the year 1931 held that power of granting bail conferred on High Court is entirely unfettered by any conditions. It held that legislature has given the High Court and the Court of Session discretion unfettered by any limitation other than that which controls all discretionary powers vested in a Judge, viz. that the discretion must be exercised judiciously. The Court has given primacy to the fact that accused person if granted bail will be in a much better position to defend himself. In this very case, it was delineated that grant of Bail is the Rule and refusal is an exception. This was in the famous Meerut Conspiracy case. Justice Mukherjee writing for the Bench in paragraph No.9 held as under:-

“9. Speaking for myself, I think it very unwise to make an attempt to lay down any particular rules for the guidance of the High Court, having regard to the fact that the legislature itself left the discretion of the Court entirely unfettered. The reason for this action on the part of the legislature is not far to seek. The High Court might be safely trusted in this matter and it goes without saying that it would act in the best interests of justice whether it decides in favour of the prosecution or the defence. The variety of cases that may arise from time to time cannot be safely classified and it will be dangerous to make an

2 AIR 1931 ALL 356

attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes.”

13. Thereafter the Supreme Court in a plethora of judgements have discussed the rights conferred by Article 21 qua grant of bail and that such rights cannot be taken away unless the procedure is reasonable and fair and in cases where there is unreasonable delay in trial it would undoubtedly impact the rights of an undertrial. Some of the important decisions of the Supreme Court and some of the High Courts are discussed hereinunder:-

13.1. In the landmark judgment of ***Maneka Gandhi V Union of India***³, 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.

13.2. In the case of ***Hussainara Khatoon Vs. Home Secy., State of Bihar***⁴ the Supreme Court held as under:-

“Now obviously procedure prescribed by law for depriving a person of liberty cannot be “reasonable, fair or just” unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as “reasonable, fair or just” and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied

3 1978 (1) SCC 248

4 (1980) 1 SCC 81

speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21.”

14. The Supreme Court in the case of ***Shaheen Welfare Association vs Union Of India***⁵ dealing with a Public Interest Litigation seeking relief for undertrial prisoners charged under the Terrorist and Disruptive Activities (Prevention) Act, 1987 due to gross delay in disposal of cases qua Article 21 of the Constitution of India held as under:-

“10. Bearing in mind the nature of the crime and the need to protect the society and the nation, TADA has prescribed in Section 20(8) stringent provisions for granting bail. Such stringent provisions can be justified looking to the nature of the crime, as was held in Kartar Singh’s case (supra), on the presumption that the trial of the accused will take place without undue delay. No one can justify gross delay in disposal of cases when undertrials perforce remain in jail, giving rise to possible situations that may justify invocation of Article 21.”

15. The Supreme Court in the case of ***Union of India v. K. A. Najeer***⁶ while commenting upon the possibility of early completion of trial and extended incarceration held as under:-

“12. Even in the case of special legislations like the Terrorist and Disruptive Activities (Prevention) Act, 1987 or the Narcotic Drugs and Psychotropic Substances Act, 1985 (“the NDPS Act”) which too have somewhat rigorous conditions for grant of bail, this Court in Paramjit Singh v. State (NCT of Delhi), Babba v. State of Maharashtra and Umarmia v. State of Gujarat enlarged the accused on bail when they had been in jail for an extended period of time with little possibility of early completion of trial. The constitutionality of harsh conditions for bail in such special enactments, has thus been primarily justified on the touchstone of speedy trials to ensure the protection of innocent civilians.”

16. Applicant in present case has been in custody for almost 2 years 9 months and 3 days. There is no possibility of the trial

⁵ 1996 SCC (2) 616

⁶ Criminal Appeal No. 98 of 2021

commencing in near future. Detaining an under-trial prisoner for such an extended period further violates his fundamental right to speedy trial flowing from Article 21 of the Constitution. 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.*⁷ 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 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.”

7 1992 (1) SCC 225

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

17. The Supreme Court has also held in a series of judgments and orders that in situations where the under-trial prisoner / accused persons have suffered incarceration rather long incarceration for considerable period of time and there is no possibility of the trial being completed within the foreseeable future, Constitutional Courts can exercise power to release the accused under-trial on bail, as bail is the rule and jail is the exception.

18. In the case of ***Supreme Court Legal Aid Committee (Representing undertrial prisoners) Vs. Union of India***⁸ the Supreme Court has held that:-

“17. We are conscious of the fact that the menace of drug trafficking has to be controlled by providing stringent punishments and those who indulge in such nefarious activities do not deserve any sympathy. But at the same time we cannot be oblivious to the fact that many innocent persons may also be languishing in jails if we recall to mind the percentage of acquittals. Since harsh punishments have been provided for under the Act, the percentage of disposals on plea of guilt is bound to be small; the State Government should, therefore, have realised the need for setting up sufficient number of Special Courts immediately after the amendment of the Act by Amendment Act 2 of 1989. Even after the Division Bench of the Bombay High Court refused to grant en bloc enlargement on bail on 1-2-1993 in Criminal Application No. 3480 of 1992 and B.D. Criminal No. 565 of 1992, no substantial improvement in the pendency is shown since new cases continue to pour in, and, therefore, a one-time exercise has become imperative to place the system on an even keel. We also recommend to the State Government to set up Review Committees headed by a Judicial Officer, preferably a retired High Court Judge, with one or two other members to review the cases of undertrials who have been in jail for long including those released under this order and to recommend to the State Government which of the cases deserve withdrawal. The State Government can then advise the Public Prosecutor to move the court for withdrawal of such cases. This

8 (1995) 4 SCC 695

will not only. help reduce the pendency but will also increase the credibility of the prosecuting agency. After giving effect to this order the Special Court may consider giving priority to cases of those undertrials who continue in jail despite this order on account of their inability to furnish bail.”

19. 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:-

19.1. In the case of ***Dheeraj Kumar Vs. State of Uttar Pradesh***⁹ 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 forceable delay in trial granted bail to the Accused.

19.2. In the case of ***Balkishan Vs. State of Madhya Pradesh***¹⁰ the Supreme Court considering long incarceration of an undertrial-accused who was incarcerated for 2 years and 5 months granted him bail. The contraband in question was Poppy Straw, the commercial

9 2023 SCC OnLine 918

10 Petition for Special Leave to Appeal (Cri) No. 8415 of 2024

quantity of which is 50 kilograms when recovery of 80 kilograms was allegedly made from the accused.

19.3. In the case of *Badsha Sk. Vs. State of West Bengal*¹¹ the Supreme Court considering long incarceration of an undertrial-accused who was incarcerated for 2 years and 4 months granted him bail. The contraband in question was Codeine Phosphate, the commercial quantity of which is 1 kilograms when recovery of 100 bottles each of 100 ml. was allegedly made from the accused.

19.4. In the case of *Man Mandal and Anr. Vs. State of West Bengal*¹² the Supreme Court considering long incarceration of an undertrial-accused who was incarcerated for 2 years granted him bail despite being alleged to be in possession of commercial quantity of contraband.

19.5. In the case of *Ankur Chaudhary Vs. State of Madhya Pradesh*¹³ the Supreme Court considering long incarceration of an undertrial-accused granted him bail to an undertrial-accused who was incarcerated for about 2 years.

19.6. In the case of *Tinku Vs. State (NCT of Delhi)*¹⁴ the Delhi High Court considering the long incarceration of an undertrial-accused granted him bail who was incarcerated for 2 years and 5 months. The contraband in question was Heroin, the commercial quantity of which

11 2023 SCC OnLine SC 1867

12 2023 SCC OnLine SC 1868

13 Petition for Special Leave to Appeal (Cri) No. 4648 of 2024

14 2024 SCC OnLine Del 9132

is 250 grams. In this case recovery of 945 grams was allegedly made from the accused despite which the High Court invoking the right to speedy justice flowing from Article 21 of the Constitution and forceable delay in trial granted bail to the accused.

19.7. In the case of *Kulwinder Singh Vs. State of Punjab*¹⁵ the Punjab and Haryana High Court considering long incarceration of an undertrial-accused granted him bail who was incarcerated for 2 years and 8 months. The contraband in question was Etizolam Salt, the commercial quantity of which is 2.5 grams. In this case recovery of 99.876 grams was allegedly made from accused despite which the High Court invoking the right to speedy justice flowing from Article 21 of the Constitution and delay in trial granted bail to the accused.

19.8. In the case of *Amey Sanjay Jadhav Vs. State of Maharashtra*¹⁶ this Court on 03.01.2025 considering long incarceration of the undertrial-accused has granted bail to the undertrial accused who was incarcerated for 2 years and 11 months. The contraband in question was 1.3 kilograms of Charas, the commercial quantity of which is 1000 grams.

19.9. In the case of *Mohd. Mobin Jahurul Hasan Manihar Vs. State of Maharashtra*¹⁷ - this Court on 20.01.2025 considering long incarceration of the under-trial accused granted bail to him who was incarcerated for 1 year 11 months. The contraband in question was

¹⁵ CRM-M-26704 of 2024

¹⁶ BA No.911 of 2024 decided on 03.01.2025

¹⁷ BA No.713 of 2024 decided on 20.01.2025

220 gms of MD , the commercial quantity of which is 50 gms.

20. In all the above cases the right to speedy justice flowing from Article 21 of the Constitution of India and the foreseeable delay 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.

21. Considering the aforesaid *prima facie* observations, above judicial pronouncements, long incarceration of Applicant for 2 years 9 months and 3 days pending trial and prosecution having examined 7 witnesses out of the intended 41 witnesses, completion of trial in the near foreseeable future being bleak, I am of the opinion that Applicant can be released on bail.

22. Hence, 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) 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) 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 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;

(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;

(vii) Applicant shall not influence any of the witnesses or tamper with the evidence in any manner;

(viii) 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

(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.

23. 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.

24. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

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