

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

**BAIL APPLICATION NO. 1059 OF 2022
WITH
INTERIM APPLICATION NO. 2221 OF 2023
IN
BAIL APPLICATION NO. 1059 OF 2022**

Rahmeen Rafiq Charania

..Applicant

v/s.

The Union of India.

..Respondents

Mr. Taraq Sayyed i/b. Durgesh Jaiswal for the Applicant.
Mr. Sharan Shirsat for the Respondent.
Mr. R.M.Pethe,- APP for the State.

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : 21st JULY, 2023.**

P.C.

1. The applicant, who is facing trial in NDPS Special Case No. 31 of 2022 pending on the file of Special Court (NDPS), Gr. Bombay, seeks enlargement on bail under Section 439 Cr.P.C. The said case arises from Crime No.67 of 2021 registered at Narcotic Control Bureau (NCB), Mumbai Zonal Unit, for the offences punishable under Section 8 (c) r/w. 20(c), 27, 27-A, 28, 29, 30 and 35 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).

2. The brief facts necessary to decide this application are as under:

Pursuant to the secret information that the applicant was involved in sale of brownies laced with charas, the NCB Officials raided his residential premises and after complying with the statutory provisions, seized 10 kg of brownies, 320 grams opium, and cash of Rs.1,74,000/-. The applicant was arrested, and in the course of the investigation, the co-accused Ramzan Shaikh was also arrested, and 50 grams of charas was seized from his possession. The representative sample of brownies and opium which was forwarded to CSFL tested positive for charas and morphine. The investigation followed and upon conclusion, charge sheet came to be filed against the applicant and the co-accused for the offences as stated above.

3. The applicant filed bail application before the Id. Special Judge, which was rejected by order dated 5.3.2022, observing that the seized contraband was of commercial quantity, and having regard to the seriousness and gravity of the offence, and the bar under Section 37, the applicant is not entitled for bail. Being aggrieved by this order, the applicant has filed the present application which is under consideration.

4. Mr. Taraq Sayyed, learned Counsel appearing for the applicant claims that the quantity of charas mixed in brownies was of non commercial quantity. Learned Counsel for the applicant submits that the discrepancy of the NCB seal, as reflected in two panchanamas dated 12.7.2021 as well as the certificate under Section 52A (2), raises a doubt about seizure and sealing. He urges for bail in view of the fact that the applicant, a young boy with no criminal antecedents, is in custody since 12.07.2021, and considering the large pendency, the chances of speedy trial are bleak.

5. Learned Spl. PP contends that the material on record prima facie reveals that the applicant was taking orders and selling charas infused brownies through an online delivery platform known as Wefast App. The NCB team has recovered 10 kgs of brownies from the house of the applicant, and the sample has tested positive for charas. Relying upon the decision of the Apex Court in ***Hira Singh and Anr. vs. Union of India, (2020) 20SCC 272***, he contends that when a narcotic or psychotropic substance is mixed with one or more neutral substances, it is not the actual weight of

the offending drug, but the combined weight that has to be considered while determining whether the drug is a small, intermediate or commercial quantity. He has also relied upon the decision of the Division Bench of this Court in ***H.S. Arun Kumar vs. State of Goa [Cri. Appeal (Bail) 752 of 2021 (F)]***.

6. Learned APP submits that the discrepancy, if any, in the seal, has been explained in the additional affidavit of Harish Gangan, the Intelligence Officer. He contends that the statements of the witnesses, prima facie indicate that the applicant has targeted young vulnerable victims and subjected them to long lasting deadly impact of substance abuse. Learned Spl. PP urges that the gravity of the offence and the bar contained in Section 37 does not justify grant of bail. He has relied upon the decision of the Supreme Court in ***Union of India through Narcotics Control Bureau, Lucknow vs. Md. Nawaz Khan (2021) 10 SCC 100***.

7. I have perused the records and considered the submissions advanced by the learned Counsels for the respective parties.

8. The records reveal that the Intelligence Officer, NCB Mumbai

Zonal Unit had received specific information that the applicant was involved in baking and selling cakes with charas. The NCB team raided the apartment of the applicant and seized 10 kgs of brownies allegedly laced with charas, 320 gms of opium and cash of Rs.1,72,000/- under panchanama dt. 12.07.2021 and arrested the applicant. The search, seizure and arrest was effected after complying with the mandatory statutory provisions under Sections 42 and 50 of the NDPS Act.

9. The records prima facie reveal that the representative sample in respect of the brownies was forwarded to CFSL for analysis and the same has tested positive for Charas. The statements of the witnesses and the other material placed on record prima facie reveal that the applicant used to procure Charas and bake brownies infused with charas. He used to take online orders for sale of such brownies and the same were delivered through online delivery platform known as Wefast App.

10. It is to be noted that the applicant had raised an issue of discrepancy of seal, as described in panchanama dated 12.7.2021 and the certificate under Section 52-A(2) of the NDPS Act, even

though no such ground was raised either before the Special Court or in the application filed before this Court. It is to be noted that the seizure panchanama dated 12.07.2021, indicate that the samples of contraband recovered from the applicant was marked as B1 to B4 and sealed with NCB seal No.3, whereas the sample taken from the contraband recovered from the co-accused under panchanama of the same date, was marked P1 and sealed with NCB seal No.2. The certificate dt. 15.7.2021, under Section 52A(2) issued by the Addl. Chief Metropolitan Magistrate, indicates that the samples marked as item nos.B1 to B4 were sealed with NCB seal No.2. Hence, this Court, by order dated 6.10.2022, directed the Investigating Officer to explain the discrepancy.

11. Pursuant to the said order, the Intelligence Officer has filed an additional affidavit, wherein he has explained that as per the panchanama dt. 12.7.2021 the brownies recovered from the applicant were put in four separate carton boxes which were marked as B1 to B4 and the same were sealed with seal no.3. Similarly, the opium was put in a transparent poly bag, marked as A and sealed with seal no.3. It is stated that the said carton boxes at item nos.B1 to B4 and a plastic packet marked as A were handed over to

godown custodian/ Superintendent. The receipt issued by the officer-in-charge also reveals that the said carton boxes and the transparent poly bag were sealed with NCB seal no.3. It is stated that the muddemal as received from godown incharge was produced before learned Metropolitan Magistrate for drawing representative samples for analysis. The court had drawn two representative samples of 24 grams each from the whole quantity, and the same were separately marked and sealed with NCB seal no.2. He has stated that due to a typographical error it is stated that four carton boxes marked as B1 to B4, which were produced before the Magistrate were sealed with seal no.2.

12. It is pertinent to note that the panchanama dt.12.7.2021 as well as the godown receipt issued by the incharge officer indicates that the item nos.B1 to B4 and A were sealed with seal no.3. In the proceedings of certification of the seized goods under Section 52A, it has been categorically stated that the seized muddemal was in sealed condition. There appears to be a typographical error in the first column of certificate under Section 52A(2), which states that the carton boxes at B1 to B4 were sealed with seal no.2. Be that as it may, the factual issue relating to the discrepancy in seal number

needs a decision on merits upon consideration of evidence. As noted above, the contraband seized from the applicant was sealed in presence of panchas, it was deposited in the godown in sealed condition and produced before the Magistrate in sealed condition. Hence, the discrepancy, if any, is not relevant for deciding the bail application.

13. The contention that only the quantity of the substance needs to be considered while deciding whether the contraband is of commercial, intermediate or small quantity is misconceived in view of the decision of the Apex Court in Hira Singh (supra), wherein a three judge Bench of the Hon'ble Supreme Court has held that in case of seizure of mixture of narcotic drugs or psychotropic substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and is to be taken into consideration along with actual content by weight of the offending drug while determining the small or commercial quantity of the narcotic drug or psychotropic substance. Similar view has been taken by the Division Bench of this Court in H.S. Arun Kumar (supra).

14. The witnesses, who have allegedly purchased brownies from the applicant are youngsters. The records prima facie reveal that the applicant, who has been deriving income from sale of Charas laced brownies has primarily targeted the youth. It is well known that drug abuse in adolescents and youth poses high risk of physical, psychological and emotional disorder. The long term and long lasting effects of drug abuse not only impact the user but also have devastating effects on the entire family. The NDPS Act was enacted to curb this menace. The NDPS Act not only provides stringent punishment, but limits the applicability of the provisions of the Cr.P.C. regarding bail.

15. Section 37(1)(b) regulates grant of bail for offences punishable under Section 19 or 24 or 27(A) and also for offences involving commercial quantity. Section 37(1)(b)(i), mandates that no person accused of such offence shall be granted bail unless the public prosecutor is given an opportunity to oppose the application for such release. Section 37(1)(b)(ii) provides that where the public prosecutor opposes the application, no bail shall be granted to persons accused of the aforesaid offences unless 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.

16. It would be advantageous to refer to the decision in ***State of Kerala & Ors. vs. Rajesh & Ors. (2020) 12 SCC 122*** , wherein the Apex Court has observed thus:

“18. This Court has laid down broad parameters to be followed while considering the application for bail moved by the accused involved in offences under NDPS Act. In Union of India Vs. Ram Samujh and Ors. 1999(9) SCC 429, it has been elaborated as under:

“7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting deathblow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in Durand Didier vs. Chief Secy., Union Territory of Goa [(1990) 1 SCC

95)] as under:

24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.

8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

(i) there are reasonable grounds for believing that the accused is not guilty of such offence; and

(ii) that he is not likely to commit any offence while on bail are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent accused on bail. Instead of attempting to take a holistic view of the harmful socioeconomic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended.”

19. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under

Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

20. The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. ...”

16. In *Md. Nawaz Khan (supra)* the Hon’ble Supreme Court has observed that :

“19. The standard prescribed for grant of bail is ‘reasonable ground to believe that the person is not guilty of the offence. Interpreting the standard of ‘reasonable ground to believe’, a two-judge Bench of this Court in Shiv Shanker Kesari(supra) held that:

“7. The expression used in Section 37(1)(b)(ii) is “reasonable grounds”. The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charges

and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

8. The word “reasonable” has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word “reasonable”.

“7. ...In Stroud’s Judicial Dictionary, 4th Edn. p.2258 states that it would be unreasonable to expect an exact definition of the word ‘reasonable’. Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child’s toy.”

(See Municipal Corpn. Of Delhi vs. Jagan Nath Ashok Kumar (1987) 4 SCC 497 (SCC p. 504, para 7) and Gujarat Water Supply and Sewerage Board vs. Unique Erectors (Gujarat) (P)(Ltd. [(1989) 1 SCC 532])

[...]

10. The word “reasonable” signifies “in accordance

with reason”. In the ultimate analysis it is a question of fact, whether a particular act is reasonable or not depends on the circumstances in a given situation. (See Municipal Corpn. Of Gr. Mumbai v. Kamla Mills Ltd. [(2002) 6 SCC 3150]

11. *The court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.”*

20. *Based on the above precedent, the test which the High Court and this Court are required to apply while granting bail is whether there are reasonable grounds to believe that the accused has not committed an offence and whether he is likely to commit any offence while on bail. Given the seriousness of offences punishable under the NDPS Act and in order to curb the menace of drug trafficking in the contry, stringent parameters for the grant of bail under the NDPS Act have been prescribed.”*

17. In the instant case, the applicant was prima facie in possession of commercial quantity of contraband, and there are no reasonable grounds for believing that the applicant is not guilty of the offence. Furthermore, the possibility of the applicant continuing online sale of charas laced brownies to the students, adolescents and youngsters cannot prima facie be ruled out.

18. Having considered the facts and circumstances, and the bar under Section 37 of the NDPS Act, in my considered view, the applicant is not entitled for bail. Hence the Bail Application is dismissed.

. Interim Application stands disposed of, in view dismissal of the Bail Application.

(ANUJA PRABHUDESSAI, J.)