

(2024) 03 GUJ CK 0025

In the Gujarat High Court

Case No : R/Criminal Misc.Application (For Regular Bail - After Chargesheet) No. 4232 Of 2024

Saiyad Tausif Ahmed Mustufa

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 07-03-2024

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 439
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 8(c), 2(c), 29, 37, 52A(2), 52A(3), 52A(4), 53

Citation : (2024) 03 GUJ CK 0025

Hon'ble Judges : Divyesh A. Joshi, J

Bench : Single Bench

Advocate : ?Amit D Shah, Ronak Raval

Final Decision : Dismissed

Judgement

Divyesh A. Joshi, J

1. Rule returnable forthwith. Learned APP waives service of notice of rule for and on behalf of the respondent-State.

2. The present application is filed under Section 439 of the Code of Criminal Procedure, 1973, for regular bail in connection with the FIR being C.R. No.I-11210050231267 of 2023 registered at Rander Police Station, Surat of the offence punishable under Sections 8(c), 2(c) and 29 of the NDPS Act.

3. In nutshell, the case of the prosecution is as under;

3.1 The complaint came to be registered by Shri M.D. Mahida, Police Sub-Inspector, D.C.B. Police Station, Surat City stating that on 20.09.2023, Police Constable Chandradipsinh Mahendrasinh, Buckle No.2214 received a tip-off that one Tausif Saiyed, residing at Flat No.501, 5th Floor, Peace Point Apartment, Rander has been secretly indulged in selling of the contraband drug since long who has hidden the contraband substance in the drover of the wooden made

cupboard in the last room of his flat. The said information was then reduced into writing and forwarded to the Deputy Police Commissioner, Surat City.

3.2 Thereafter, for the purpose of carrying out raid, Panchas were also called for and after following the due procedure of raid, all the members of the raiding party reached at the given address at around 19:25 hours. On knocking the door of the flat, one person came out and identified himself as Tausif S/o. Mohammed Mustufa. The police then got acquainted the said person with the secret information received by them and entered into the house.

3.3 Thereafter, personal search of Tausif was carried out, however, nothing objectionable was found upon his personal search. After that, the police went to the last room of the flat and made a search of the cupboard from where one plastic zip bag was found lying in the drawer containing suspicious powder having pungent smell. Upon being asked about the said powder, the applicant-accused admitted it to be the contraband psychotropic substance. Thereafter, samples were taken and upon testing with the drug detection kit, the samples tested positive for Mephedrone. Hence, the present FIR.

4. Learned advocate Mr. Brijesh Trivedi for learned advocate Mr. P.S. Tolia appearing for the applicant has submitted that the applicant-accused is an innocent young man, aged about 36 years languishing in the judicial custody since 25.09.2023. It is further submitted that the investigation has already been completed and charge-sheet has also been filed. Learned advocate Mr. Trivedi submits that the contraband substance is alleged to have been found from the cupboard of the flat and not from the physical and conscious possession of the applicant-accused and, therefore, rigors of Section 37 of the NDPS Act would not be attracted in the present case. It is moreso submitted that the contraband substance was weighed with the weighing scale machine and a Panchnama also came to be drawn in this regard, and from the contents of the said Panchnama it appears that the narcotic substance recovered from the house of the applicant-accused does not fall under the category of commercial quantity. It is submitted that as per the notification issued by the Government of India, commercial quantity of Mephedrone is 50 grams. Admittedly, the narcotic substance recovered from the house of the applicant when weighed along with the plastic zip bag, it was found to be 52.550 grams. It is submitted that total 168 other empty plastic zip bags were also found during the raid, from which, one empty plastic bag was taken for weighment, and on being weighed, the same was found to be of 1.570 grams. Thereafter, the contraband substance was emptied from the original plastic zip bag and filled in the said new plastic zip bag and when weighed along with the new plastic zip bag, the contraband substance was found to be 52.030 grams which after deducing the weight of the plastic bag, i.e., 1.570 grams, found to be 50.460 grams of net quantity. After that, the plastic zip bag from which the contraband drug was recovered also came to be weighed, upon which, the said plastic bag was found to be of 2.090 grams. Therefore, if the weight of the said plastic bag, i.e, 2.090 is deducted from the weight of the

contraband substance, the same would then come under the category of intermediate quantity and, therefore, rigors of Section 37 of the NDPS Act would not come into play. Learned advocate Mr. Trivedi further submits that applicant-accused is a married man having no criminal history. To fortify his submissions, learned advocate Mr. Trivedi relies upon one non-reported judgment of the Hon'ble Apex Court in the case of Yusuf @ Asif vs. State, Criminal Appeal No.3191 of 2023, decided on 13.10.2023, more particularly, the observations made in paras-12,13 and 15 which read thus;

"12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, the officer so referred to in sub-section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.

13. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under sub-sections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of sub-section (2) of Section 52A of the NDPS Act.

15. In Mohanlal's case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial."

5. In such circumstances, referred to above, learned advocate Mr. Trivedi prays that there being merit in his application, the same be allowed and the applicant-accused be released on bail.

6. On the other hand, this application has been vehemently opposed by the learned APP Mr. Ronak Raval appearing on behalf of the respondent-State looking to the nature and gravity of the offence. He has submitted that on the basis of

the specific inputs received by the members of the raiding party, they raided the residence of the applicant-accused and during the raid, a commercial quantity of contraband substance was recovered from the drawer of the cupboard lying in the flat owned by the applicant-accused. It is more so submitted that the applicant-accused was also very much available at the house when the raid was carried out. The other documents collected by the investigator indicate that the house from which the contraband substance was found is of the ownership of the applicant-accused. In short, the narcotic substance Mephedrone was found from the conscious possession of the applicant-accused and that too in a commercial quantity and, therefore, rigors of Section 37 of the NDPS Act would also come into play. Learned APP Mr. Raval has further submitted that the statements of certain persons have also been recorded by the Investigating Officer wherein they have very categorically stated that before the date of the incident, they also purchased the narcotic substance Mephedrone from the applicant-accused which is indicative of the fact that the applicant-accused has been doing such an illegal activity since long. Therefore, considering the role attributed to the applicant-accused, this is a fit case wherein discretionary power of this Court is not required to be exercised in favour of the applicant-accused.

7. I have heard the learned counsel for the applicant, learned APP for the State and perused the records of this case.

8. In the present case, there is recovery of 52.550 grams of Mephedrone from the house owned by the applicant-accused. He has been indulged in selling of the psychotropic substance Mephedrone since long which is apparent from the statement of the witnesses recorded by the investigator wherein they have stated that before the incident in question, they purchased the Mephedrone from the applicant-accused. It is pertinent to note that the total quantity of contraband recovered in this case is 52.550 grams which falls under the commercial quantity and thus the embargo of Section 37 of the NDPS Act is applicable.

9. The scheme of Section 37 NDPS Act reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the Cr.P.C., 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.

10. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantially 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.

11. The learned advocate for the applicant-accused while making a defense has given much weightage to the method of weighing of the psychotropic substance. However, the same does not come to the rescue of the applicant as in the case on hand, as required under the law, the contraband substance has been weighed separately from the plastic bag in which it was kept which hardly makes any difference in the quantity of the contraband recovered from the conscious possession of the applicant as even if the weight of the plastic bag is deducted from it, the same would still be found under the category of commercial quantity considering that a plastic bag will be weighing very little. It is pertinent to note here that when the contraband substance was first weighed along with the plastic zip bag in which it was originally kept, it weighed 52.550 grams. Thereafter, the contraband substance was emptied from that plastic bag and filled in another plastic bag of the same dimension which was also recovered from the spot, the weight of which was found to be of 1.570 grams. Then, when again the contraband substance was weighed along with the new plastic bag, it was found to be of 52.030. After that, the original plastic bag from which the contraband substance was found, was also weighed upon which it was found to be of 2.090 grams. Thus, there appears to be a little bit distinction between the two plastic bags of the same dimension while weighing. As the contraband substance was in the powder form, it might be that little bit of power remained stuck at the inner side layer of the plastic bag for which the weight of the original plastic bag got little bit increased. Therefore, let me first determine the weight of the drug remained stuck at the inner side layer of the plastic bag by deducting the weight of one bag, i.e, 1.570 grams from the weight of another bag, i.e, 2.090 grams, which ultimately comes to 0.52 grams ($2.090 - 1.570 = 0.52$). Now, let's determine the actual weight of the contraband substance. It is apparent from the Panchnama that when the contraband substance was weighed along with the new plastic bag, the same was found to be 52.030 grams and after deducting the weight of the new plastic bag, i.e., 1.570, the same came to 50.460 grams. Now if we include the quantity of 0.52 grams of the power expected to be remained stuck inside the plastic bag, the quantity of the contraband substance would come to 50.980 grams which is above 50 grams and, therefore, falls under the category of commercial quantity. That apart, let us consider that the quantity of the contraband substance was 52.550 and the weight of the plastic bag was 2.090 grams. Even then after deducting the weight of the plastic bag of 2.090 grams from the total weight of the contraband substance of 52.550, it would come to 50.460 grams which is still in commercial quantity. This Court does not want to go into much detail as the same does not cut much ice as these are issues which do not go to the root of the matter warranting grant of bail and can be looked into at the time of trial as one doesn't know as to how and in what condition the contraband was weighed in both situations.

12. Therefore, looking into the entire circumstances of the present case and the fact that the contraband substance recovered in the present case is commercial in nature, there are no reasonable grounds for believing that the applicant is not guilty of the offence. That being the case, the limitations prescribed for the grant of bail under Section 37 NDPS Act are not satisfied and thus, no benefit can be given to him at this stage. The bail application is, therefore, dismissed. Rule is discharged.

13. Nothing stated herein above shall tantamount to the expression of any opinion on the merits of this case.