

Bail Application No.611/2021

IN THE SPECIAL COURT FOR NARCOTIC DRUGS AND
PSYCHOTROPIC SUBSTANCES ACT, 1985, AT GR. BOMBAY

NDPS BAIL APPLICATION NO. 611 OF 2021

IN

NDPS REMAND APPLICATION NO. 115 OF 2021

IN

C.R. NO. 3 OF 2021

CNR NO.:- MHCC02-008541-2021

Sameer Shabbir Khan

... Applicant

Versus

NCB, Mumbai Zonal Unit, Mumbai,
(Vide C.R. No.3/2021)

... Respondent

Appearances :-

Ld. Adv. Mr. Taraq Sayed for the applicant/accused.

Ld. SPP Mr. Sarpande for NCB.

CORAM : H.H. THE SPECIAL JUDGE (NDPS)
DR. A. A. JOGLEKAR (C.R.NO.42)

DATED : 27TH SEPTEMBER, 2021

ORDER

By this application the applicant **Sameer Shabbir Khan** being accused in C.R. No. 3/2021 registered with NCB, Mumbai Zonal Unit for the offences punishable under Sections 8 (c) read with Section 20 (b) (ii) (c), 27-A, 27, 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as, "The

NDPS Act”) seeks bail under Section 439 of the Code of Criminal Procedure, 1973 (In short, “CrPC”).

THE CASE OF PROSECUTION IN SHORT ENSUES AS UNDER;

2. The sleuth of NCB received an information on 08/01/2021 that two parcel packets are lying at Universal Courier and Cargo, station Road, Bandra East in the name of Karan Sejanani for delivering it to one Vinay Sharma, Shillong. Thus the sleuth on appropriate compliances arranged for a campaign on 9th of January 2021 at around 1 a.m. on the aforesaid alleged spot at the Universal Courier and Cargo. There after three recoveries were effected.

3. Further in follow-up action at the premises search 194.600 kgs Marijuana/Ganja and 06 no. of CBD Spray under panchnama dated 09 January 2021 seized from Room No.302, Jaswant Height Road, Khar West, Mumbai. Thereafter during the search of premises at Flat No. 51, Victoria Apartment, Saint Alexious Road, Bandra West, multi-folded seizure of 6 gms dry green / brown color substance purported to be marijuana/Ganja and 20 gms of Marijuana/Ganja was seized. Wherein the said accused admitted for their role in illegal export, transportation, import, sale, purchase, financing illicit traffic and consumption of Psychotropic substance with other known and unknown persons thereby drawing up a drug cartel as such. The accused No. 3 recorded his statement and upon the revelations and information, present applicant/accused was apprehended and accordingly the applicant/accused was put under arrest.

4. The Ld. Advocate for applicant as stated that, the applicant is falsely implicated in this case, it is further stated that the statement of the co-accused recorded under section 67 of the NDPS ACT are not admissible and further no legally admissible evidence, thereby propelling the involvement of the applicant is shown by the prosecution. It is further stated that it was only upon the whatsapp chat and other material that the applicant/accused is apprehended and the applicant was under a reasonable belief that the applicant/accused was in fact dealing in tobacco products and was an entrepreneur and had proposed to introduce a new product in the market. Further the alleged contraband as stated by the prosecution falls within the ambit of Ganja. And considering the description of the alleged contraband under seizure there is no where mentioning of the flowering or fruiting tops as such. Thus on perusal of the panchnama no where it is reflected that any flowering or fruiting tops were seized. It is only when the psychoactive constituent i.e, THC i.e., Tetrahydrocannabinol is detected. And in the absence of same it cannot be termed as ganja or any other narcotic drug or psychotropic substance. Hence the Ld. Advocate for the applicant prayed for enlargement of the applicant accused on bail.

5. Per contra, the Ld. APP has filed their reply vide Exh.2 and has strongly resisted the application, *inter alia* thereby contending that role played by the applicant/accused in selling of the contraband and financing the illicit business has been come out very clearly. It is further stated that there is a recovery of commercial quantity from the applicant/accused and thus the complicity of the present applicant is made out. That the chats and pictures reveal that the applicant/accused and the co-accused are in illegal business of ganja and other

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contrabands. It is further categorically stated that the CA report received from Forensic Science Laboratory, Gujarat reveal that the samples exhibits marked A1-B show positive for Ganja, sample exhibits A1A, GFS – 1, GGS – 1, G1-S1 and G3 – S1 contains active constituents of cannabis and in sample exhibit C1-S1 is detected with cannabidiol. It is further stated that the complaint/charge-sheet is already filed within stipulated limitation. The applicant/accused does not deserve to be enlarged on bail as he is enlarged on bail as the application is devoid of merits. Ld. SPP states that if applicant/accused is enlarged on bail, he might tamper the prosecution's evidence and threaten the witnesses and lastly prayed for rejection of application.

6. Heard Ld. Advocate for the applicant/accused and the Ld. SPP for the State.

7. It evinces to me that the applicant accused is apprehended on the revelation and information of the co-accused. The alleged recovery of contraband is not held directly from the applicant accused, it was only upon the search of premises which was held in the alleged place of residence which was occupied by applicant accused. It is pertinent to note that the applicant accused is a British national. Considering the quantum of contraband without stretch imagination it can be termed to be in commercial quantity in *prima-facie*. Therefore as argued by the Ld. SPP, this particular factor *ipso-facto* disentitles the applicant accused from any such relief of enlargement of bail.

8. It is well settled that while adjudicating the bail application it is expected that the Court has to locate whether the accused has a *prima-facie* case in his favour and a roving enquiry to that effect is not necessitated. While granting bail the accused has to satisfy the test as to whether there are reasonable grounds to believe that accused has not committed any offences and whether he is likely to commit any offence while on bail. In view of this particular aspect my attention is drawn to the chemical analysis report dated 05 July 2021 and the result of analysis held by the scientific officer cum assistant chemical analyzer. I have perused the chemical analyzers report at page No. 1093 onwards filed alongwith the complaint. I have minutely gone through the said report as it being conclusive while deciding the quantum of contraband and the type of contraband. The result of test analysis ensue as under :

1. In Exhibits – A1-B was identified as part of female plant of cannabis sativa (Ganja).
2. In Exhibits- A1-A, GFS-1, GGS-1, G-1S-1 and G-3S-1 Vegetative parts of cannabis plant- Trichomes were observed.
3. Vegetative material of Exhibits- GS-1, GAS-1, GBS-1, GCS-1, GDS-1, GES-1, B1S-1, B2S-2, B3S-1, B4S-1 and G-2S-1 could not be detected as cannabis.

9. It palpably evinces to myself that in all 18 samples were forwarded for analysis and apparently from the same 11 samples were found to be negative qua vegetative material being not detected as cannabis as per the result of analysis. The said result of analysis is not disputed by the parties and more especially the prosecution has not applied for re assessment/re examination of the contraband till date.

10. The Ld. SPP has drawn my attention to the factor that the alleged discrepancy in the CA report is part and parcel of the trial and at this juncture the said report cannot be termed to be under speculations and the said anomaly of the CA report can be well scrutinized during the passage of trial. Considering this argument the submission of the Ld. SPP cannot be accepted, more specially in the light of fact that the Analysis's report being conclusive speaks in quantum.

11. On meticulous examination of the Chemical Analyzers report details of the alleged contraband can be sorted out as under :

Result of Analysis Dated : 06/07/2021

Brownish Cartoons

Sr.No.	Bulk	Total Bulk	Samples drawn	Result
1.	GA	18 Kgs	GAS 1 GAS 2	Negative
2.	GB	18 Kgs	GBS 1 GBS 2	Negative
3.	GC	18 Kgs	GCS 1 GCS 2	Negative
4.	GD	7.5 Kgs	GDS 1 GDS 2	Negative
5.	GE	09 Kgs	GES 1 GES 2	Negative
6.	G	500gms	GS1	Negative
7.	G2	265gms	G2S1	Negative

Poly Bag

1.	B1	30 Kgs	B1S1 B1S2	Negative
2.	B2	40 Kgs	B2S1 B2S2	Negative
3.	B3	40 Kgs	B3S1 B3S2	Negative
4.	B4	13 Kgs	B4S1 B4S2	Negative

Total	194.265 Kgs	Negative
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1.	GF	600gms	GFS 1 GFS 2	Positive
2.	GG	500gms	GGs 1 GGS 2	Positive
3.	A1A	6gms	A1A	Positive
4.	A1B	20gms	A1B	Positive
5.	G1	70gms	G1S1	Positive
6.	G3	3.5gms	G3S1	Positive
	Total	1199.5gms		Positive
7.	C	240mg	C1S1	Positive

12. Although the prosecution has ascertained the contraband to be in commercial quantity still on perusal of the Chemical Analyzers report it is translucently clear that the contraband held at serial No. 1 to 11 are shown to be negative qua vegetative material could not be detected as cannabis. Considering the quantum of alleged contraband the against the said exhibits it evinces to myself that as per the CA report and the aforesaid table it is 194.265 Kgs thereby placing the ascertainment of the alleged contraband in commercial quantity under the shadow of doubt. Apart from the same the samples exhibits marked A1-B show positive for Ganja, sample exhibits A1A, GFS – 1, GGS – 1, G1-S1 and G3 – S1 contains active constituents of cannabis and their quantum is 1199.5gms, which undoubtedly lies within intermediate quantity. It is also settled that the CA report and its credibility are part and parcel of trial, but there are no any fetter put on to consider it in *prima-facie* at this stage while adjudicating the bail application. Sample exhibit C1-S1 is detected with cannabidiol. Ld. advocate for applicant states that CBD spray do contain psychoactive element. Thus in view of the same although the prosecution has ascertained the contraband in commercial quantity it is evident that the CA report having conclusive

value propel for a different theory and thus in my opinion in *prima-facie* the rigors of section 37 are not attracted with regard to the factum of commercial quantum.

13. Another crucial fact brought to the notice of the court with regard to the panchnama being held at the Rampur, Uttar Pradesh. The complaint shows for the alleged contraband at the time of seizure to be of 194.600 kgs, but the panchnama held at Rampur, Uttar Pradesh which is not accompanied with the charge sheet mentions for the quantum of contraband to be 189 kgs. This particular aspect propagates for the conduct of the investigating machinery and the reason for not incorporating the said panchnama is till date is not answered. It is also alleged by the Ld. Advocate for the applicant/accused that, the panchnama at Rampur, Uttar Pradesh and the other panchnamas contradict each other, thereby evolving the theory of false implications. This particular aspect has to be adjudicated at the stage of trial.

14. As regards invoking of section 27A and 29 of the NDPS Act, it is evident that factum of conspiracy and abetment as alleged by the prosecution there is connivance between the either accused. The reply filed by the respondent categorically mentions for the fact that as the contraband recovered is in commercial quantity and even by virtue of section 29 the complicity of the present applicant is made out and therefore rigors of section 37 are attracted. It is pertinent that the applicant accused has already stated that he conducts such business pertaining to nicotine products. Now considering the fact that the CA report has specifically enumerated the contraband material to 11 samples to have not detected for cannabis the theory of the prosecution

with regard to the invoking of section 29 fails and apart from the said contention in the reply nothing is brought on record to show the factum of connivance with each other or that of conspiracy in *prima-facie*. Thereafter as stated by the Ld. advocate for applicant/accused it is evident that when the C.A. report relied by the prosecution is negative no charge under section 27 A can be sustained.

15. The Ld. Advocate for the applicant accused has relied on the several case laws which ensue as under,

16. In the case of **Union of India V/s. Jarooparam, 2018 (4) SCC 334**, the Hon'ble Supreme Court has observed that the statement of the accused under section 67 of the act was recorded while he was in custody and the time was not mentioned. Considering this particular facts the statement of the accused confessing crime cannot be termed to be of voluntary nature. The said view is reiterated in the case of **Sujit Tiwari V/s. State of Gujarat**.

17. In the case of **Surinder Kumar Khanna V/s. Intelligence Officer Directorate of Revenue Intelligence, Criminal Appeal No. 949 of 2018, (Arising out of Special Leave Petition (Criminal) No. 9816 of 2017). D/d. 31.07.2018**, it is categorically stated that unlike section 15 of the TADA Act, of 1987 which specifically makes confession of co-accused admissible against other co-accused in certain eventuality there is no such similar or identical provisions in the NDPS Act, making such confessing admissible against the co-accused.

18. In the case of **Shashikant Prabhu V/s. Rahul Saini, Intelligence Officer Narcotics Control Bureau, Mumbai and Anr., Bail Application No. 198 of 2019, decided on 21.12.2020**, the Hon'ble Bombay High Court has categorically while relying upon the judgment of Tofan Singh (infra) wherein the Hon'ble Bombay High Court vide Para No. 9 has categorically observed that the Apex court has held statement under section 67 of NDPS Act cannot be relied upon and in any case there is no corroborative evidence to substantiate the averment in the statement of the accused and therefore the embargo placed under the stringent provisions of section 37 would not caused any impediment for granting bail.

19. In the case of **Abdul Mohamed Shaikh @ Abdul Thane Vs. Union of India & Anr., Criminal Bail Application No. 273 of 2020, decided on 05.05.2021**, the Hon'ble Bombay High Court has observed that,

“Paragraph No. 17 that, in the present case, statements of accused Nos.1 and 2 were recorded under Section 67 of NDPS Act. It was observed that the applicant was not arrested with any contraband but he was implicated after arrest of accused No. 3 (Applicant) and accused No. 4, after they made statement implicating him, as supplier of contraband. However, nothing is seized from him. Thus he was arrested only on the statement of co-accused. While granting bail to him it was observed that, no contraband was recovered from him in all the three cases. He was arrested solely on the statement of the co-accused recorded under section 67 of the NDPS Act. The confessional statements of co-accused cannot be treated as incriminating piece of evidence against the applicant.”

20. In the case of **Sandip Ashok Raut V/s. The State of Maharashtra, Bail Application No. 2522 of 2014, decided on 25.03.2015**, the Hon'ble Bombay High Court has observed that,

“The articles/ material found in the tempo and what was seized under the seizure panchnama by the police has cannabis i.e. Ganja as defined under section 2(ii) (b) of the NDPS Act. Section 2(ii)(b) of the NDPS Act reads thus :

“b) Ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they known or designated : and...”

The C.A. report shows that Greenish flowering top pieces and other material were send to the C.A. and the report is positive. However, as it is rightly pointed by the Learned counsel for the applicant/accused that in the description of the seizure panchnama, nowhere the police have mentioned that the material found was with flowering or fruiting tops apart from the seeds, leaves and stalks. It is to be noted that in the definition, the legislature has specifically excluded seeds and leaves and specifically mentioned that cannabis means fruiting or flowering tops.

21. In the case of **Santosh S/o Ramchandra Khedkar V/s. The State of Maharashtra, Bail Application No. 211 of 2019, decided on 08.03.2019**, the Hon'ble Bombay High court has observed that,

“Paragraph No. 7 that, I have carefully considered the papers of the investigation. Though the offence is registered under section 20(b) and 20(c) of the NDPS Act, when admittedly no ganja was found and only

cannabis plants were found to have been cultivated, particularly when there is no separate record in respect of the quantity of the flowering tops. At this stage it is doubtful if and how the offence would come under clauses (b) and (c) of section 20 of the NDPS Act. Prima-facie the situation would be covered by clauses (a) of that section which provides for punishment upto 10 years for cultivating cannabis plants. Therefore, one cannot say that it was a commercial quantity and the provisions of section 37 of NDPS Act would not be attracted.”

22. In the case of **Laxman Shankar Ghankute V/s. The State of Maharashtra, Criminal Bail Application No. 2583 of 2019, decided on 23.06.2021**, the Hon’ble Bombay High Court has observed that,

“Paragraph No.5 that, the police have prosecuted the applicant for the offence punishable under section 20(b) of the NDPS Act. What was seized was only plants, and there is no quantification of flowering tops. In these circumstances , it is doubtful whether the quantity can be said to be a commercial one. No ganja was found even in the result report. There is no separate record/ document to show that the quantity of the flowering plants and hence, at this stage, it would be doubtful whether the offense would fall under clause (b)of section 20of NDPS Act.”

23. And lastly in the case of **Hari Mahadu Valse V/s. The State of Maharashtra, Bail Application No. 2299 of 2019, decided on 29.07.2021**, the Hon’ble Bombay High Court has observed that,

“Paragraph No.5 that, it is however to be noted that the chemical analysis report reveals that the material forwarded for analysis contained flower buds with pieces of stalks, stems, leaves and seeds, without quantifying the weight of flower tops. This facts prima-facie raises a doubt whether ganja seized from

the warehouse of the accused was of commercial quantity as to attract the provisions under section 20(c) of NDPS Act.”

24. Per contra the learned SPP has relied upon the following cases.

25. In the case of **Nousheer Mohammed S/o Mohammed Shereef V/s. Union of India, Criminal Petition No. 7690 of 2019, decided on 28.02.2020**, the Hon’ble Karnataka High Court has observed and it is categorically stated that until quantity test is completed petitioner cannot be admitted to bail. In view of this the bail therein was rejected.

26. In the case of **State of Kerala etc. V/s. Rajesh etc., Criminal Appeal No(s). 154-157 of 2020, (Arising out of SLP (Crl.) No(s). 7309-7312 of 2019, decided on 24.01.2020**, the Hon’ble Supreme Court of India has observed that,

“Paragraph No.21 that, the expression reasonable grounds means something more than prima-facie grounds. It contemplates substantial probable clauses for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provisions 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.”

27. In the case of **Julie Singh V/s. Union of India & Anr., Criminal Application (Bail) No. 48 of 2017**, decided on 13.04.2017, the Hon'ble Bombay High Court categorically stated that,

“Paragraph No.46 that, Section 37(1)(b) of the NDPS Act, which begins with non-obstante clause uses the expressions “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 offence charges and this reasonable belief contemplated in turn, points to existence of such facts and circumstance, as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.”

28. In the case of **Pramod Ganpat Wankhede V/s. The State of Maharashtra, 2002 (2) MhLJ 547**, the Hon'ble Bombay High Court has observed that,

“Paragraph no.19 that, the Judges who are specially empowered for trying the offences under the Act, have to bear in mind this legislative change in the Act and also a consequent effect of it on application for provisions under Section 37 of the Act in relation to grant of bail to the person accused of the offences under the Act. The Judges should note that the bar for granting bail in respect of the offences under the Act is made dependent on specific offences, enumerated in amended Section 37 of the Act and involvement of commercial quantity or more of the contraband article.”

29. In the case of **Intelligence Officer, Narcotics C. Bureau V/s. Sambhu Sonkar & Anr., Appeal (Civil) 137 of 2001**, decided on

02.02.2001, the Hon'ble Supreme Court of India has categorically stated that,

“Considering the legislative intent of curbing the practice of giving bail on technical ground in a crime which adversely affects a entire society including lives of number of persons and the object of making stringent provisions for control of illicit traffic in narcotics drugs and psychotropic substances, there is no reason to accept the construction of the section which its language can hardly bear.”

30. Ld. SPP also has relied on the latest judgment of **Union of India through Narcotics Control Bureau, Lucknow Vs. Md. Nawaz Khan, Criminal Appeal No. 1043 of 2021, (Arising out of SLP (Cri.) No. 1771 of 2021), decided on 22.09.2021**, the Hon'ble Supreme Court has observed that the test which are required to be applied 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. Also in the said case the accused therein had consistently remained away from the criminal trial.

31. The conspectus of the case laws cited by the either parties specifically enumerate for two factors with regard to confessional statements made under section 67 of the NDPS Act, individual possession and the quantum of contraband. Also there are no any criminal antecedents shown to the discredit of the applicant/accused and all these factors *ipso-facto* entitle the applicant/accused for relief of enlargement on bail. Undisputedly the offences under the NDPS Act have a stringent bearing and thus the same are to be dealt considering

the intention of legislature. But in the instant case the factum of reasonable belief is defused by the C.A. report although the stage being in *prima-facie*.

32. The prosecution also has alleged that the applicant is a part of the drug syndicate and is involved in *inter alia*, the dealing, paddling, consumption, with respect to Narcotic Drugs and Psychotropic Substances and in view of this the *prima-facie* role and involvement of the accused has been set out. Considering the factum of connivance, it evinces to me that, nothing except the statement of the applicant/accused and the co-accused could be relied to show the recovery of contraband and the involvement of the applicant/accused. Apart from this there is no any material to specifically contribute the role of the applicant / accused placed on record by the prosecution more especially in the light of the fact that the recovered contraband in *prima-facie* as per CA report cannot be held under the ambit of commercial quantity. Moreover, in order to presume culpable mental stage the very ingredients of the criminal act i.e. intention, preparation, attempt and commission are difficult to be located in *prima-facie* as the applicant/accused himself has admitted for the business activity in nicotine. In view of this the purpose of possession is explained. Undoubtedly the certain contraband is shown to be cannabis or its offshoot, but considering its quantum in intermediate form rigors of section 37 are not attracted.

33. All the statutory compliances which have been discussed *ibid* are mandatory in nature. The very purpose of these compliances is to ensure that a person is not falsely implicated and he has a fair

opportunity in order to defend himself. And non-compliance with the mandatory provisions for search, seizure and arrest in the manner as envisaged in the Act result in vitiation of such search. Since considering the case in hand it is evident that apart from the factum of non commercial quantity, and in *prima-facie* no any connivance with the co accused could be located. Apart from the aforesaid considerations, the fact remains that there are no similar criminal antecedents against the applicant. It appears that the substantial investigation has been completed and the complaint is filed. The apprehension of the prosecution can be taken care of by saddling stringent conditions upon the applicant/accused. Hence, I hold that, the application deserves to be allowed Ergo order infra :-

ORDER

1. NDPS Bail Application No. 611 of 2021 is allowed.
2. The applicant **Sameer Shabbir Khan** who is the accused in C.R. No. 3 of 2021 registered with NCB, Mumbai Zonal Unit for the offences punishable under Sections 8 (c) read with Sections 20 (b) (ii) (c), 27-A, 27, 28 and 29 of the NDPS Act, be released on furnishing P. R. bond of Rs.50,000/- (Rupees Fifty Thousand Only) with one or two solvent sureties in the like amount.
3. The applicant **Sameer Shabbir Khan** and his sureties shall provide their respective residential addresses, mobile numbers and email addresses, if any.
4. The applicant **Sameer Shabbir Khan** shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the present case to dissuade him from disclosing such facts to the Court.

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5. The applicant **Sameer Shabbir Khan** shall not tamper with the prosecution evidence in any manner.
6. The applicant **Sameer Shabbir Khan** shall attend this Court on each and every date in this case.
7. The applicant **Sameer Shabbir Khan** shall surrender his passport if any with the investigating officer. If the applicant doesn't have passport, he will furnish an affidavit to that effect.
8. The applicant **Sameer Shabbir Khan** shall not leave Mumbai without permission of this Court.
9. NDPS Bail Application No. 611 of 2021 stands disposed of accordingly.

(DR. A. A. JOGLEKAR)
Special Judge, N.D.P. S.
City Civil & Sessions Court,
Gr. Bombay (C.R.42)

Date : 27.09.2021

Dictated on : 27.09.2021
Transcribed on : 28.09.2021
HHJ signed on : 12.10.2021

“CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER.”		
Upload Date	Upload Time	Name of Stenographer
12.10.2021	05.03 p.m.	Mahendrasing D. Patil (Stenographer Grade-I)

Name of the Judge (With Court Room No.)	HHJ DR. A. A. JOGLEKAR (Court Room No. 42)
Date of Pronouncement of JUDGMENT /ORDER	27.09.2021
JUDGMENT /ORDER signed by P.O. on	12.10.2021
JUDGMENT /ORDER uploaded on	12.10.2021