

ORDER BELOW EXH. 35 IN SPECIAL CASE NO. 09 OF 2022
(Under NDPS Act)

The State of Maharashtra	Prosecution
<i>Versus</i>	
Shiyad A.K. etc. 3	Accused

1. The present bail application is filed u/s. 439 of Cr.P.C. by accused no. 3 viz., Mohammad Abdul Jasim, who was arrested for having committed an offence punishable u/s. 8 (c) and 21 (c) r.w. Sec. 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act, for short).

2. It is the case of the prosecution that during intervening night of 28/02/2022 and 01/03/2022, in the area falls within the jurisdiction of City police station, Ratnagiri, the informant Shri. Amol Arun Bhosale Police Naik B. No. 1399 alongwith Police Naik Shri. Ashish Bhalekar were deputed on patrolling duty for having the check on hotels, lodges, history sheeters and search of absconding accused. While discharging duty as such, on 01/03/2022 at about 4.30 a.m., they found two persons wandering in suspicious circumstances. The said persons i.e. accused nos. 1 and 2 were interrogated then and there and during that interrogation, it was transpired that both the accused were residents of Kerala State. At the relevant time, they had a stay at Hotel Nilraj of Ratnagiri and were wandering in search of cigarette. They were asked for I.D. proof on which they told that it was kept in room of Nilraj Lodge. Taking note of the suspicious attitude and behaviour of both of them, the informant furnished that much information to police inspector Shri. Manoj Bhosale and explained him about the necessity regarding search of room occupied by the accused.

In the result, Shri. Manoj Bhosale arrived there and he also interrogated with the accused. He also informed about the same fact to his superior officer and directed the informant and other staff alongwith the accused to reach and halt under the building of the said lodge.

3. It is further the case of prosecution that Shri. Bhosale alongwith two panchas and by means of Government vehicle reached there at the lodge. He made the inquiry with the accused regarding as to in which room they were staying and also asked them to point out the room. They then proceeded to the counter of second floor of that lodge where the employee of lodge viz., Shri. Vijay Santosh Devrukhkar was present. He was asked to call the owner of the lodge and accordingly the owner of the lodge Shri. Gouresh Rajendra Phalke came there. The employee Vijay was then asked to show the room occupied by the accused and he accordingly showed the room no. 505. At the relevant time, permission was obtained from the owner of lodge and accused after explaining to them the intention to search the room in the presence of panchas. The accused no. 1 opened the room. At that moment, Police Inspector Shri. Vinit Chaudhary also came at the spot. They all entered into the room. The search of their room was taken and during search the accused no. 1 had shown them the clothes by opening army colour bag. During search of full shirt, they found two plastic transparent packets in the left side pocket having chain and in the right pocket of similar type they found one small transparent packet. Thus, in all 3 packets were found containing white colour crystal like article. Upon making the inquiry with accused no. 1, in presence of panchas, he said that it was Narcotic Substance viz., Methadone (hereinafter referred to as 'MD'). A wireless message was sent to Mobile Forensic Support Unit. At the same time, the inspector of said unit through police

station was also asked to bring weighing machine. They accordingly, reached there, drew the sample from the said article for analysis and after its examination told that it was narcotic drug viz., MD, weighing about 99 grms. The same was seized and sealed in different plastic bags after labelling the same with signatures of panchas and police officers. Thereafter, both the accused came to be arrested. Upon completion of necessary procedure, Crime came to be registered against the accused, vide C.R. No. 101/2022. Thereafter, the accused nos. 1 and 2 were granted police custody and since 11/03/2022 the accused nos. 1 and 2 are in Judicial custody. In the present case, chargesheet came to be filed on 16/04/2022.

4. During interrogation with accused no. 1, it was transpired that he had purchased the Narcotic Drug MD from applicant/accused no. 3. According to the prosecution, on 23/02/2022 there was transfer of Rs. 25,000/- and Rs. 65,000/-, in the account of applicant/accused no. 3 from the account of accused no. 1 towards the purchase price of Narcotic Drug MD. The applicant/accused no. 3 was accordingly arrested on 09/05/2022 and since 21/05/2022 he is in judicial custody. Thereafter, on 11/07/2022 supplementary chargesheet against applicant/accused no. 3 came to be filed.

5. It is the contention of the applicant/accused no. 3 he is innocent and has not committed any crime. He is falsely implicated in the present case. The applicant/accused no. 3 has nothing to do with the alleged drugs seized from accused no. 1. It is further contended that the accused no. 1 has never purchased any kind of drugs from applicant/accused no. 3 nor accused no. 2 sold any drug to accused no. 1 or any other person. It is next contended that on 23/02/2022 the applicant/accused no. 3 was never paid by accused no. 1 Rs. 65,000/-

and Rs. 25,000/- total Rs. 90,000/-, for sale of drugs. It is next contended that the alleged value of drugs is shown as Rs. 5,16,050/- by the Investigating Officer and, therefore, the prosecution story seems to be a lie that applicant/accused no. 3 sold drugs to accused no. 1. The applicant/accused no. 3 was not found in possession of any drugs, there is nothing in chargesheet to show there was any nexus of him. It is further contended that according to the case of prosecution the applicant/accused no. 3 gave drugs to accused no. 1 at Blue Metro Station, Gurgaon, Haryana, however, none of the CCTV footages to that effect is produced on record. The applicant/accused no. 3 has no criminal antecedents. The applicant/accused no. 3 had preferred bail application at the time of remand vide Exh. 8, however, the same was rejected holding that the investigation was in progress.

6. The prosecution filed its say at Exh. 41. It is contended that the offence is serious in nature as narcotic drug viz., MD weighing 99 Grms which is more than commercial quantity has been seized from the applicant/accused no. 1, sold by applicant/accused no. 3. The applicant/accused no. 3 hails from State of Kerala and none of his blood relative is residing at Ratnagiri. Therefore, in case of grant of bail, the applicant/accused no. 3 would not be available for trial. It is further contended that if the applicant/accused no. 3 is released on bail, he would indulge in same business of selling drug like MD. Further, it is transpired in the present case that the accused no. 3 has accepted from applicant no. 1 an amount of Rs. 90,000/- via Google pay and he transferred the same on the account of Aighe Imuetinyan Noguese through NEFT. Hence, the learned A.P.P. prayed to reject the bail application of applicant/accused no. 3.

7. Heard learned Advocate Shri. M.L.Dingankar for applicant/accused no. 3. He argued that the applicant/accused no. 3 is falsely implicated in this crime. No narcotic substance like MD has ever been recovered from conscious possession of the applicant/accused no. 3. He further argued that the mandatory compliance of Section 41 to 57 of NDPS Act has not been followed by the prosecution. The applicant/accused no. 3 has nothing to do with the drugs seized from accused no. 1. No personal search of the applicant/accused no. 3 was ever effected. No prima facie case is made out against applicant/accused no. 3. There is no material produced on record against applicant/accused no. 3. The applicant/accused no. 3 had previously filed application for bail, however, it was rejected on the ground that the investigation was at initial stage. Now the investigation is completed and chargesheet is filed, therefore, there is no question of tampering with the prosecution evidence. Therefore, he prayed to allow the application. In support of his submissions, he relied on the following rulings :

1)	<u>Sholadoye Samuel Joy Vs. State of Maharashtra (AIRONLINE 2022 BOM 179)</u>
2)	<u>UlShashikant Prabhu Vs. Rahul Saini (AIRONLINE 2020 BOM 3270)</u>
3)	<u>Raju Bhavlal Pawar Vs. State of Maharashtra (AIRONLINE 2021 BOM 5193)</u>
4)	<u>Bharat Chaudhary Vs. Union of India (AIRONLINE 2021 SC 1186)</u>

5)	<u>Directorate of Revenue and Anr. Vs. Mohammed Nisar Holia (2007 AIR SCW 7864)</u>
6)	<u>Adam Pasha Vs. Union of India (AIR ONLINE 2021 KAR 261)</u>
7)	<u>State of Punjab Vs. Balbir Singh (AIR SCW 18o2)</u>
8)	<u>State of Rajasthan Vs. Parmanand & Anr. (2014 Cri.L.J. 1756)</u>
9)	<u>State of Punjab Vs. Baldev Singh etc. (AIR 1999 Supreme Court 2378)</u>
10)	<u>State of Rajasthan Vs. Jag Raj Singh alias Hansa (AIR 2016 Supreme Court 3041)</u>

8. Per contra, learned A.P.P. Shri. A.A.Phansekar for the prosecution argued that the bail application of accused no. 3 has been rejected. There is no change in the circumstances. The accused nos. 1 and 2 were found in possession of 99 Grms. i.e. MD drug which is more than the commercial quantity. He further argued that the accused no. 3 has abetted the crime. There was a criminal conspiracy among the accused persons as the narcotic drug MD was purchased by accused no. 1 from accused no. 3. The investigation prima facie shows that the applicant/accused nos. 1 and 2 were found in possession of the narcotic drug sold by accused no. 3. In support of his submissions, he relied on the following rulings :

1)	<u>Virupakshappa Gouda Vs. State of Karnataka (AIR (SCW) 1685 Supreme Court of India)</u>
2)	<u>Madan Lal and another Vs. State of H.P. (AIR 2003 Supreme Court 3642)</u>

3)	<u>M. Prabhulal Vs. The Assistant Director, Directorate of Revenue Intelligence (AIR (SC) 4311 Supreme Court of India</u>
4)	<u>Saina Devi W/o. Sh. Yog Raj Rana Vs. State of Himachal Pradesh, Through Secretary (Home) to the Government of Himachal Pradesh.</u>
5)	<u>State of Kerala Etc. Vs. Rajesh Etc. (AIR (SC) 721 Supreme Court of India)</u>
6)	<u>Mr. Floyd Lopes s/o. Pascoal Lopes Vs. Union of India (2007 0 ALL MR (Cri) 177)</u>
7)	<u>Gulam Mohammed alias Aman Vs. Union of India thr. The N.C.B. Jodhpur (2003 1 Cri.C(Raj) 445)</u>

9. I reflected over the submissions made by the learned Advocate Shri. M.L.Dingankar for applicant/accused no. 3 and the learned A.P.P. Shri. A.A.Phansekar for the prosecution. I have also gone through the entire record of the case and the rulings relied by and on behalf of both sides.

10. The main submission of the applicant/accused no. 3 is that there is no compliance of Sections 42 and Section 50 which is mandatory in the NDPS Act. The first aspect which needs to be considered is whether there was any non-compliance of Sections 42 and 50 of the Act as submitted. So far as these two provisions are concerned, they read as follows :

“42. Power of entry, search, seizure and arrest without warrant or authorisation.

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act: Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

[Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that] if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.]”

“ Section 50 in The Narcotic Drugs and Psychotropic Substances Act, 1985

50. Conditions under which search of persons shall be conducted.

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the

nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).”

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.]

11. In the case at hands, the accused nos. 1 and 2 were found on 01/03/2022 at about 4.30 a.m. wandering in suspicious condition while the informant alongwith another police personnel was on patrolling duty. The accused persons were interrogated there and during that interrogation, it was transpired that both the accused were residents of Kerala State. They, at the relevant time, were staying at

Hotel Nilraj of Ratnagiri and were wandering in search of cigarette. They were asked for I.D. proof on which they told that it was kept in the room of Nilraj Lodge. Taking the note of suspicious attitude and behaviour of both of them, the informant informed about the same facts to police inspector Shri. Manoj Bhosale and explained him about the necessity of search of their room. Shri. Manoj Bhosale arrived there and interrogated with the accused persons and accordingly informed about the same to his superior officer. He then directed the informant and other staff alongwith the accused to reach and halt under the building of said lodge.

12. It is significant to be noted here that in the present case, both the accused were found accidentally. The informant was not having any information in advance or even at the relevant time about Narcotic drug. As such, need of search warrant or authorization for the informant was not warranted. Similarly, there was no necessity of taking down the information in writing. Therefore, the question regarding compliance of Section 42 in the present crime did not arise.

13. Further, a bare reading of Section 50 shows that it applies only in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises. The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles, the conditions under which search of persons shall be conducted. In this regard, condition no. 5 of Section 50 is relevant. It says that when an officer duly authorized under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted

Officer or Magistrate. Here in the case at hands, there was no need of personal search of applicant/accused no. 1 because the Narcotic drug was found in the bag of applicant/accused no. 1. At that time, Police Inspector of Ratnagiri City Police Station Shri. Vinit Chaudhary, who was also a Gazetted officer was very much present there. Thus, above being the position, the contention regarding non-compliance of Section 50 of the Act is also without any substance and this legal position is well endorsed by the Hon'ble Supreme Court in case of **Madan Lal and another Vs. State of H.P. (AIR 2003 Supreme Court 3642)**. Therefore, the rulings relied by the learned Advocate for the applicant/accused no. 3, with due respect, are not helpful to him in the present case for want of similarity of facts.

14. In the case hands, it is the case of prosecution that during interrogation with accused no. 1, it was transpired that he had purchased the narcotic drug MD from applicant/accused no. 3. As per the prosecution case, on 23/02/2022 there is transfer of Rs. 25,000/- and Rs. 65,000/- in all Rs. 90,000/- in the account of applicant/accused no. 3 from the account of accused no. 1 and the applicant/accused no. 3 accepted the same. In onward transmission, the applicant/accused no. 3 transferred the said amount of Rs. 90,000/- via NEFT in the account of Aigbe Imuetinyan Nogueese. There is no explanation from applicant/accused no. 3 about the said transactions. Further, significantly, the transactions seem to be of the relevant period.

15. It was argued on behalf of applicant/accused no. 3 that his earlier bail application was rejected on the ground that the investigation of the case was at initial stage. Now the chargesheet is filed. Therefore,

there is change in the circumstances and hence applicant/accused no. 3 may be released on bail on the ground of changed circumstances. In this context, learned A.P.P. submitted that filing of chargesheet does not in any manner lessen allegations made by prosecution, on the contrary, filing of chargesheet establishes that after due investigation, investigating agency, having found materials, has placed chargesheet for trial of accused persons. Learned A.P.P. accordingly relied on a ruling of Hon'ble Apex Court in case of Virupakshappa Gouda Vs. State of Karnataka (AIR (SCW) 1685 Supreme Court of India).

16. In case of successive bail application the Hon'ble Bombay High Court while dealing with an identical issue in case of Ashok Pundalik Gavade Vs. State of Maharashtra 2019 SCC Online : dated 30/01/2019 referring to State of Maharashtra Vs. Buddhikota Shbha Rao (AIR 1989 SC 2292), was pleased to observe that “**there is an embargo on filing repeated bail applications on same facts ensure some degree of finality to the order passed and maintained judicial discipline and propriety.**” It was noted that the present application was not filed on the ground of change in circumstances. It was observed, “**the mere fact that some of the grounds which were available were not raised in the previous application or that the said grounds are not reflected in the previous order would not justify entertaining subsequent bail application.**” In such view of the matter the application was rejected. In short, the present successive bail application for want of substantial change of circumstances is not maintainable and on this count alone the instant bail application deserves to be rejected.

17. However, assuming the maintainability of the instant bail application and as regards the aspect of merit, it can be noted that in the present case, charges are levelled against the accused nos. 1 to 3 for having committed the offences punishable u/s. 8 (c), 21 (C) r.w. 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. It is the defence of applicant/accused no. 3 that the entire contraband muddemal was allegedly recovered from the luggage of accused no. 1, alone. The applicant/accused no. 3, was not concerned with such type of illegal activity on the part of accused no. 1. It, however, appears from the record of this case that the applicant/accused no. 3 is resident of Kerala State. There is no proper explanation about the transactions between applicant/accused no. 3 and accused no. 1 and onward transfer of amount to one of the foreigner. Moreover, applicant/accused no. 3 implicated in this crime as he has prima facie played the role in the form of effecting the sale of Narcotic Drug and accordingly Section 29 is incorporated in this crime. Thus, defence of accused no. 3 for not being found in conscious possession, appears to be hollow.

18. Considering the facts and circumstances of the present case, it cannot be said that the same are such so as to satisfy that there are reasonable grounds for believing that the applicant/accused no. 1 is not guilty of these offences and he is not likely to commit any offence while on bail. Therefore, the rigours of Section 37 of NDPS Act fully applies to the case in hands. This position is made more and more clear in case of Saina Devi W/o. Sh. Yog Raj Rana Vs. State of Himachal Pradesh, Through Secretary (Home) to the Government of Himachal Pradesh (2021 0 Supreme (HP) 760).

19. The applicant/accused no. 3 is resident of Kerala State. Neither the applicant/accused no. 3 nor any of his relative is residing in this District. Therefore, the possibility of his absconding and remaining absent on each hearing of the case, cannot be ruled out. Hence, I am of the considered opinion that the applicant/accused no. 3 may not be enlarged on bail.

20. In the result, I am inclined to pass the following order.

ORDER

The bail application (Exh. 35) filed by the applicant/accused no. 3 viz., Mohammad Abdul Jasim for his release on bail stands rejected.

(Pronounced in the open Court)

Ratnagiri

Date:- 02/09/2022

(M.Q.S.M.Shaikh)

Judge, Special Court, Ratnagiri.

I affirm that the contents of this Pdf file order are same words as per original order.

Special Case No. (NDPS) (O. below Exh. 35)	:-	09/2022.
Name of Stenographer	:-	V. B. Joshi.
Court Name	:-	Special Court, Ratnagiri.
Date of Decision	:-	02.09.2022
Order signed by P.O. on	:-	03.09.2022
Order Digitally signed on	:-	03.09.2022
Order uploaded on	:-	03.09.2022