

Abdul Mohamed Shaikh @ Abdul Thane vs Union Of India And Anr on 5 May, 2021

Author: Prakash D. Naik

Bench: Prakash D. Naik

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION NO. 273 OF 2020

Abdul Mohammed Shaikh @
Abdul Thane

.. Applicant

Vs.

Union of India & Anr.

.. Respondents

Mr. Manoj Mohite, Shri. Dilip Mishra i/by Mr. Gorakh Limen &
S. N. Ali, Advocates for Applicant.

Mr. Shreeram Shirsat, Special P.P. for UOI/Respondent No.1.

Shri. A. R. Kapadnis, A.P.P. for the State-Respondent.

CORAM : PRAKASH D. NAIK, J.
RESERVED ON : 28th JANUARY, 2021
PRONOUNCED ON: 5THMAY, 2021

PC.

1. The applicant is arrested on 24.12.2016 in connection with C.R. No.13 of 2016 investigated by NCB. Complaint is filed for the offences punishable under Sections 29 r/w 8(c), 20(c), Section 8 (c) r/w 20 (c) and Section 29 and 28 of the Narcotics Drugs and Psychotropic Substances (for short "NDPS") Act. The applicant was arraigned as accused No.3. The case is numbered as NDPS Special Case No.39 of 2017.

2. The prosecution case is as follows: -
(a) On 15.10.2016 information was received by Narcotics Control Bureau (for short "NCB") that two persons namely Abdul Karim Yusuf Karobari @ Lala Bhai and Mohd. Ayaz Sheikh @ Walla Bhai are suspected to carry

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substantial quantity of Charas. The said persons would reach at Kalwa Naka, Thane at 17:00 hours. information was reduced into writing and was forwarded to Zonal Director of NCB, Mumbai.

- (b) The NCB officers reached the spot. Two panchas were called at about 17:30 hours. Two persons reached the spot at Mumbra Rickshaw Stand, Kalwa Naka, Thane. One of them was carrying black coloured bag. They were intercepted. Both were searched. They gave their names as Abdul Karim Yunus Karobari and Mohd. Ayaz Sheikh. Abdul Karim Yunus Karobari revealed that he was carrying Charas in the bag. They were taken to NCB Office. They were informed about the right to be searched in the presence of the nearest Magistrate or Gazetted officer. The offer was declined. They were found in possession of Charas weighing 6.5 kgs. Both of them were arrested. They were arraigned as accused Nos.1 and 2.

- (c) Statements of Abdul Karim Yunus Karobari @ Lala Bhai and Mohd. Ayaz Sheikh @ Walla Bhai were recorded under Section 67 of the NDPS Act on 16.10.2016. Abdul Karobari stated that on 15.10.2016 he received bag containing Charas from Mohd. Ayaz Sheikh @ Walla Bhai at Kalwa Naka, Thane. He further stated that he bought this Charas from Abdul Mohd. Sheikh @ Abdul Bhai

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- (d) (Applicant) and given it to Mohd. Ayaz Sheikh @ Walla Bhai and told him to bring it with him at Kalwa Naka. He has done so to avoid suspicion. On 23.12.2016 information was received by NCB that two persons named Abdul Mohd. Shaikh (Applicant) aged around 65 years and Arif Abdul Sheikh residents of Jumma Masjid Trust Road, Thane will be escaping from their residence. They are involved in Special NDPS case Nos.12/2016, 13/2016 and 17/2016. information was reduced into writing. apprehended by NCB on the same day. Their statements were recorded under Section 67 of NDPS Act. applicant was impleaded as accused No.3 whereas Aarif

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Abdul Sheikh was arraigned as accused No.4. They were shown arrested on 24.12.2016. The accused No.4 is the son of applicant. The accused were produced before the concerned Court. They were remanded to custody. Subsequently Ashok Kumar Verma (Accused No.5) was arrested on 27.12.2016. His statement was recorded under Section 67 of NDPS Act. In their statements they confessed their involvement in Narcotic transactions. On completing investigation, complaint was filed before the NDPS Court.

3. The applicant preferred an application for bail before the Special Court under the NDPS Act. The application was rejected by order dated 02.02.2018. While rejecting the said

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application, it was observed that the applicant was arrested on the basis of statement of co-accused. His statement was recorded under Section 67 of the NDPS Act, corroborates the statement of the co-accused. At this stage, it cannot be said that the statement of the accused under Section 67 of the NDPS Act can be discarded and accused can be set at liberty only because he has claimed the liberty. Commercial quantity has been seized at the instance of the accused Nos.1 and 2 and they have implicated the applicant. The prosecution has applied Section 29 of the NDPS Act.

4. Mr. Mohite Senior Advocate representing the applicant urged following submissions: -

- (i) There is no recovery of contraband from the applicant.
- (ii) The applicant is in custody for more than four years.
- (iii) The applicant is arrested in three cases. In one case, he has been granted bail.
- (iv) The applicant is 70 years old person. The trial will take time to conclude.
- (v) Except the statements of the accused and co-accused recorded under Section 67 of the NDPS Act, there is no evidence against the applicant. Statement under Section 67 of the NDPS Act is not legally admissible. It cannot be used as a confession against the accused.
- (vi) The accused No.4 and 5 who were implicated on the basis of statement of accused under Section 67 of the NDPS Act has been granted bail by the Trial Court.

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The said orders has attained finality.

- (vii) Learned counsel relied upon the decision of the Apex Court in the case of Tofan Singh Vs. State of Tamil Nadu delivered in Criminal Appeal No.152 of 2013.

5. Mr. Shirsat learned counsel for the respondent No.1 submitted that there is sufficient evidence against the applicant. He is involved in three cases. The statement of the applicant and the co-accused recorded under Section 67 of NDPS Act shows his involvement in the crime. The offence is of serious nature. Section 37 of the NDPS Act create restrictions on grant of bail. The submissions that the statement under Section 67 of the NDPS Act is not admissible in evidence or it cannot be used as confession is required to be contested during trial. At the stage of bail, the statement cannot be discarded. The applicant and the co-accused had acted in connivance with each other. The charge of conspiracy has been invoked in this case. The prosecution case cannot be disbelieved at this stage. The trial would commence within short span of time. Case is due for framing of charge.

6. Learned counsel relied upon the following decisions: -

- (1) Order passed by High Court of Kerala dated 14.01.2021.
- (2) Order passed by Gauhati High Court dated 20.11.2020 in Bail Application No.1610 of 2020.
- (3) Order dated 15.12.2020 passed in Criminal Bail

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Application No.46296 of 2020.

- (4) Judgment of Supreme Court in the case of Satpal Singh Vs. State of Punjab delivered in Criminal Appeal No.462 of 2018 on 27.03.2018.
- (5) Decision dated 30.05.2018 passed by Punjab and Haryana High Court in the case of Mandeep Singh @ Naterpal Vs. State of Punjab.
- (6) Order passed by Punjab and Haryana High Court in the case of Amrik Ram Vs. State of Haryana dated 11.09.2020.

- (7) Order dated 08.11.2019 passed by Delhi High Court in the case of Anil Sharma Vs. The State.
- (8) Order dated 07.10.2020 passed by this Court in the case of Showik Chakraborty Vs. Union of India and others in Bail Application (St.) No. 2387 of 2020.

7. The applicant is in custody from 24.12.2016. The accused Nos.1 and 2 were arrested on 15.10.2016. The involvement of the applicant was disclosed allegedly through the statement of accused Nos. 1 and 2. The applicant was allegedly involved in Cr. No.12 of 2016, 13 of 2016 and 17 of 2016. He was arrested in all these cases. The accused No.4 and 5 were granted bail by the Trial Court. The application for bail preferred by the applicant was rejected by the Sessions Court, primarily on the ground that there is charge of conspiracy and statements of the accused recorded under

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Section 67 of the NDPS Act show the complicity of the applicant in the crime. It is not in dispute that there is no recovery of contraband from the applicant in the present case or in the other cases. The applicant has been directed to be released on bail in C.R. No. 17 of 2016.

The applicant and

accused No.4 have allegedly admitted their involvement in trafficking of narcotics drug. In their statements under Section 67 of NDPS. Accused Nos. 1 and 2 has also allegedly shown involvement of applicant in their statements under Section 67 of NDPS Act. The statement of applicant and co-accused is in the nature of confession. There is no direct evidence against the applicant.

8. The contention of the applicant is that the statements of the applicant and the co-accused recorded under Section 67 of the NDPS Act have no sanctity of law. The statements are not admissible in evidence. The averments in statements which are in the nature of confession cannot be relied upon. If the statements are not admissible in evidence, the question of examining the said statement during the trial, does not arise. The decision relied upon by the learned counsel for the respondents are contrary to the recent decision of the Apex Court in the case of Tofan Singh Vs. State of Tamil Nadu (supra). There is no other corroborative evidence showing complicity of the applicant. The applicant cannot be convicted on the basis of such statements and therefore the rigor of

Section 37 of NDPS Act would not cause any impediment in

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granting bail to the applicant. He is in custody for substantial period of time and in the absence of any recovery from him, the prolonged detention would violate Article Constitution of India.

9. Section 67 of the NDPS Act reads as follows: -
"67. Power to call for information, etc. Any officer referred to in section 42 who is authorised in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provisions of this Act,
(a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder;
(b) require any person to produce or deliver any document or thing useful or relevant to the enquiry;
(c) examine any person acquainted with the facts and circumstances of the case."

The aforesaid provision would indicate that the officer referred to in Section 42 who is authorized by the Government may during the course of inquiry in connection with contravention of the provision of NDPS Act call for information from any person for the purpose of satisfying himself whether there is contravention of the provision of the Act or require any person to produce or deliver any document or thing useful in the inquiry and to examine any person acquainted with the facts and circumstances of the case.

10. Section 24 of the Evidence Act relates to confession caused by inducement, threat or promise. Section 25 states that confession to Police Officer not to be proved. Section 26

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referred to confession by accused while in custody of Police not

to be proved against him. Sections 25 and 26 can be quoted as follows:-

"25. Confession to police-officer not to be proved. No confession made to a police-officer, shall be proved as against a person accused of any offence."

"26. Confession by accused while in custody of police not to be proved against him. No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

11. The Apex Court in the case of Tofan Singh Vs. State of Tamil Nadu (supra) has adjudicated issue whether statement recorded under Section 67 of the NDPS Act can be used as confessional statement in the trial for an offence under NDPS Act. In paragraph No. 59 of the said decision, it is observed that the marginal note to Section 67 indicates that it refers only to the power to "call for information, etc.". The Court then referred to the decision in the case of K.P. Varghese Vs. Income Tax Officer, Ernakulam and Anr. (1981) 4 SCC 173, wherein it was observed that marginal note is an important internal tool for indicating the meaning and purpose of a section in a statute, as it indicates the "drift" of the provision. In paragraph 60, it was observed that it is only an officer referred to in section 42 who may use the power given under Section 67 in order to make an "enquiry" in connection with the contravention of any provision of this Act. "enquiry" has been used in Section 67 to differentiate it from

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"inquiry" as used in Section 53-A, which is during the course of investigation of offences. As a matter of fact, the notifications issued under the Act soon after the Act came into force, specifically speak of the powers conferred under section 42(1) read with Section 67 of NDPS Act. This is an important executive reading of the NDPS Act, which makes it clear that the powers to be exercised under Section 67 are to be exercised in conjunction with the powers that are delineated in Section 42(1). The Court then analysed the powers of the officer under Section 42 and interpreted Section 67(c) of NDPS Act. It was observed that Section 67 of NDPS Act is at an antecedent stage to the "investigation", which occurs after the concerned officer under Section 42 has "reason to believe", upon information gathered in an enquiry made in that behalf,

that an offence has been committed. The expression used in Section 67(c) is "examine" any person acquainted with the facts and circumstances of the case. The "examination" of such person is again only for the purpose of gathering information so as to satisfy himself that there is "reason to believe" that an offence has been committed. This can, by no stretch of imagination, be equated to a statement under Section 161 of Cr.P.C. The Apex Court examined the scope of Sections 161, 162 and 163 of Cr.P.C. It is further observed that if a Police Officer, properly so-called, were to investigate an offence under the NDPS Act, all the safeguards contained in Sections 161 to 164 of the Cr.P.C. would be available to the accused, but that if the same police officer or other designated officer under

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Section 42 were to record confessional statements under Section 67 of the NDPS Act, these safeguards would be thrown to the winds. An investigation conducted by the regular police force of a State qua a person trafficking in ganja. If the same person were to be apprehended with ganja on a subsequent occasion, this time not by the State police force but by other officers for the same or similar offence, the safeguards contained in Sections 161 to 164 of the Cr.P.C. would apply insofar as the first incident but would not apply to the subsequent incident. Since, second time, the investigation done by other officers and not by the State Police Force. This example would demonstrate manifest arbitrariness in the working of the statute, leading to a situation where, for the first incident, safeguards available under the Cr.P.C. come into play because it was investigated by the local State police, as opposed to officers other than local police, who investigated the second transaction. The Court referred to another example viz. if X and Y are part of a drug syndicate and X is apprehended in the state of Punjab by the local state police with a certain quantity of ganja, may is apprehended in the state of Maharashtra by Officers other than state police, again with certain quantity of ganja which comes from the same source, the investigation by the State police in Punjab would be subject to safeguards contained in the Cr.P.C. but the investigation into the ganja carried by Y in Maharashtra would be carried out without any such safeguards, owing to the fact that an officer other than the local police investigated into the

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offence. These anomalies are real and not imaginary, and if a statute is so read as to give rise to such anomalies, it would necessarily have to be struck down under Article 14 of the Constitution as being discriminatory and manifestly arbitrary. The Court adverted to Section 53-A of the NDPS Act which relates to relevancy of statements under certain circumstances and observed that Section 53 and 53-A of the NDPS Act, when read together, would make it clear that Section 53-A is in the nature of an exception to sections 161, 162 and 172 of the Cr.P.C. Section 53(1), invests certain officers or classes of officers with the power of officer in charge of a police station for investigation of offence under the NDPS Act, refers to Chapter XII of the Cr.P.C., of which Sections 161, 162 and 172 are a part. Under Section 162(1) of Cr.P.C. statements that are made in the course of investigation are not required to be signed by the person making them and under Section 53-A they can be signed by the person before the officer empowered under Section 53. It is only in two circumstances [under Section 53-A(1)(a) and (b)] that such statement is made relevant for the purpose of proving an offence against the accused: it is only if the person who make the statement is dead, cannot be found, is incapable of giving evidence; or is kept away by the adverse party, or whose presence cannot be obtained without delay or expense which the Court considers unreasonable, such statement becomes relevant.

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12. The Apex Court then dealt with the issue whether the designated officer under Section 53 of the NDPS Act can be said to be a Police Officer. The Court discussed ratio lead down in several decisions which are quoted therein and observed that despite the fact that the decision of Raj Kumar Karwal Vs. Union of India (1990) 2 SCC 409, notices the fact that the NDPS Act prescribes offences which are "very severe" and that Section 25 is a wholesome protection which must be understood in a broad and popular sense, yet it arrives at a conclusion that the designated officer under Section 53 of the NDPS Act cannot be said to be police officer under section 25 of the Evidence Act. The Court further observed that the Apex Court in the said decision did not properly appreciate the distinctions that arise between the investigative powers of officers who are designated in statutes primarily meant for

revenue or railway purposes, as against officers who are designated under Section 53 of the NDPS Act. Section 53 is located in a statute which contains provisions for the prevention, detection and punishment of crimes of a very serious nature. Even if the NDPS Act is to be construed as a statute which regulates and exercises control over narcotic drugs and psychotropic substances, the prevention, detection and punishment of crimes related thereto cannot be said to be ancillary to such object, but is the single most important and effective means of achieving such object. The said decision failed to notice Section 53-A of the NDPS Act and falls into error when it states that the powers conferred under the NDPS

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Act can be assimilated with powers conferred on customs officers under the Customs Act. When Sections 53 and 53A are seen together in the context of a statute which deals with prevention and detection of crimes of a very serious nature, it becomes clear that these sections cannot be construed in the same manner as sections contained in revenue statutes and railway protection statutes. The language of Section 53(1) is crystal clear, and invests the officers mentioned therein with the powers of "an officer-in-charge of a police station for the investigation of the offences under this Act". The Apex Court then referred to the expression 'officer-in-charge of a police station' defined under Sections 2(o) and 2 (r) of the Cr.P.C. The Court also refers to Section 173(2) of the Cr.P.C. and Section 36-A of the NDPS Act. On detailed analysis of several provisions of NDPS Act and Cr.P.C., provision of Customs Act, POTA and TADA Act, the Apex Court held that arrive to at the conclusion that a confessional statement made before an officer designated under Section 42 or Section 53 can be the basis to convict a person under the NDPS Act, without any non-obstante clause doing away with section 25 of the Evidence Act, and without any safeguards, would be a direct infringement of the constitutional guarantees contained in Articles 14, 20(3) and 21 of the Constitution of India. previous decision in the case of Kanhailala Vs. Union of India (2008) 4 SCC 668 and Raj Kumar Karwal (supra) do not state the law correctly, and are thus overruled. that expressly refer to and relied upon by the aforesaid

Other judgments

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judgments or upon the principles laid down therein also stand overruled. It was further observed the Court further gave finding that the judgments of Noor Aga Vs. State of Punjab (2008) 16 SCC 417 and Nirmal Singh Pehlwan Inspector, Customs (2011) 12 SCC 298 are correct in law.

13. The Court then answered the reference by stating as follows:-

- "(i) That the officers who are invested with powers under Section 53 of the NDPS Act are "police officers" within the meaning of section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.
- (ii) That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."

14. The respondents have contended that the validity of the statement under Section 67 of the NDPS Act has to be considered during the trial. The Apex Court on detailed analysis has held that the officers who are invested with powers under Section 53 of the NDPS Act are police officers and any confessional statement made to them would be barred

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under Section 25 of the Evidence Act and cannot be taken into account in order to convict the person. The statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act. If the statement under Section 67 cannot be relied upon as confessional statement in the trial, the question of determining the validity at the trial does not arise. It is true that there may be evidence against the person other than the version reflected in the statement recorded under Section 67 of the NDPS Act. However, in the absence of any other evidence showing involvement of the accused, he need not be subjected to custody.

15. It is pertinent to note that statement of accused No.4 was also recorded under Section 67 of the NDPS Act. He was also shown to be involved in all the three cases in which applicant has been impleaded as accused. He has been granted bail by the Sessions Court. The prosecution had also relied upon the similar circumstances, as also the statements under Section 67 of the NDPS Act against accused No.5 Ashok Kumar Verma in the present case who has been granted bail by the Trial Court. The case of the applicant cannot be discriminated. It is also pertinent to note that applicant has been granted bail in NDPS Special Case No.54 of 2017.

16. In the light of the observation of the Apex Court in the case of Tofan Singh (supra) the submissions of learned

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counsel for the respondent cannot be accepted. In the case of Muhammed Asarudheen Vs. State of Kerala decided by High Court of Kerala vide order dated 14.01.2021, it was observed that the accused had made repeated applications for bail. The contention was raised that Section 50 was not complied and the statement under Section 67 is not admissible in evidence. The Kerala High Court has observed that the confessional statement can be used as corroborative piece of evidence, provided that there are other materials available. The facts of this case indicate that there was recovery of contraband. There is no other cogent material to corroborate statement under Section 67 of NDPS Act in the present case. observation that confession statement can be used as corroborative piece of evidence is contrary to ratio of the aforesaid decision and well established principles of law. the decision of the Gauhati High Court in the case of Senaul Sekh Vs. Union of India it was observed that investigation prima facie established the involvement of the accused in hatching of conspiracy and commission of trafficking drugs and presumption can be drawn against the accused and rigor of Section 37 of NDPS Act will come into play. The NCB had contended that case is not solely based on statement of other accused under Section 67 of NDPS Act. The order in the case of Shahjad Vs. State of Uttar Pradesh in Misc. Bail Application No.46296 of 2020 refers to the recovery from joint possession of the accused. On the facts it cannot be relied upon. Although, the decision in the case of Tofan Singh was

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relied upon, Court observed that the said decision relates to statement under Section 67 of the NDPS Act which cannot be used as confessional statement during trial. In Satpal Singh Vs. State of Punjab the Apex Court has observed that the High Court has not taken into consideration the effect of Section 37 of NDPS Act. In the case of Mandeep Singh Vs. State of Punjab (supra) decided by High Court of Punjab and Haryana it was observed that, although there was no recovery from accused, his name cropped up during investigation being part of international gang getting contraband from smugglers across the border and distributing it in India. The decision are relating to nature of evidence, charge of conspiracy and embargo of Section 37 of NDPS Act.

17. In the present case, statements of accused Nos.1 and 2 were recorded under Section 67 of NDPS Act. On that basis applicant and his son Arif Shaikh were arrested. Statements of applicant and Arif Shaikh were recorded under Section 67 of NDPS Act. Statement of Ashok Kumar Verma was recorded under Section 67 of NDPS Act. Ashok Kumar Verma and Arif Shaikh had confessed about their involvement in narcotic transactions. Charge of conspiracy was applied to all the arrested accused. Ashok Kumar Verma was granted bail by trial Court, vide order dated 28.01.2020. While granting bail to him it was observed that, he 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

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implicating him, as supplier of contraband. However, nothing is seized from him. Thus, he was arrested only on the statement of co-accused. Arif Abdul Shaikh (Accused No.4), applicant's son was granted bail by trial Court by order dated 09.05.2018. While granting bail to him, it was observed that statement of accused No.4 refers to other cases. It is pertinent to note that Arif Shaikh has been granted bail in NDPS Special Case No. 54 of 2017 vide order dated 09.05.2018. granted bail in C.R. No.12 of 2016 by this Court by order dated 14.06.2019. 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 applicant was granted bail by trial Court by order dated 15.12.2018 in NDPS Special Case No.57 of 2017. The Court had observed that, accused Nos. 1 to 3 were granted bail and recording of statement of applicant under Section 67 of the Act was not proper. The confessional statements of co-accused cannot be treated as incriminating piece of evidence against applicant.

18. The statements recorded under Section 67 of NDPS Act cannot be used as confessional statements. There is no other cogent evidence against the applicant. Accused Nos.4 and 5 are granted bail. The applicant is senior citizen. custody for more than four years. In the light of facts of this case the embargo under Section 37 of the Act would not cause any impediment in granting bail to the applicant.

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ORDER

- (i) Bail Application No.273 of 2020 is allowed.
- (ii) The applicant is directed to be released on bail in connection with NDPS Special Case No. 13 of 2016 investigated by Narcotics Control Bureau, Mumbai on executing P.R. bond in the sum of Rs. 50,000/- with one or more sureties in the like amount;
- (iii) The applicant shall report to Narcotics Control Bureau, Mumbai, once in three months on first Saturday of the month between 11.00 am. to 1.00 pm. till further orders;
- (iv) The applicant shall appear before the Trial Court regularly on the date of the hearing unless exempted by the Court.
- (v) Application stands disposed of accordingly.
- (vi) At this stage learned counsel for the respondent makes a request for stay of the order. Since the prosecution intend to challenge the order before Higher Court. The request for stay is strongly opposed by learned Advocate for applicant. The applicant is aged about 70 years. He is in custody for more than 4 years. The request for stay is rejected.

(PRAKASH D. NAIK J.)