

Mukeshbhai Vrujlal Maheta vs State Of Gujarat on 9 February, 2024

Author: Bhargav D. Karia

Bench: Bhargav D. Karia

R/CR.MA/21503/2023

ORDER DATED: 09/02/2024

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL MISC.APPLICATION (FOR SUCCESSIVE REGULAR BAIL -
AFTER CHARGESHEET) NO. 21503 of 2023

=====

MUKESHBHAI VRUJLAL MAHETA

Versus

STATE OF GUJARAT

=====

Appearance:

MR. MAULIK M SONI(7249) for the Applicant(s) No. 1

MR CHINTAN DAVE, APP for the Respondent(s) No. 1

=====

CORAM:HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 09/02/2024

ORAL ORDER

1. Heard learned advocate Mr.Maulik M. Soni for the applicant and learned Additional Public Prosecutor Mr.Chintan Dave for the respondent-State.

2. By this second successive regular bail application under Section 439 of the Code of Criminal Procedure, 1973, the applicant has prayed for regular bail in connection with the F.I.R. being CR No.-III-22 of 2019 dated 30.08.2019 under Sections 8(C), 15(C) and 29 NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined of the Narcotic Drugs and Psychotropic Substance Act, 1985 (for short 'the NDPS Act') registered with Bilkha Police Station, Junagadh. The applicant was arrested on 30.08.2019. The Charge Sheet is filed and trial is in

process.

3.1. The applicant had earlier preferred regular bail application being Criminal Misc.

Application No.814 of 2019 before the Court of Principal Sessions Judge for which was rejected by order dated 15th November, 2019.

3.2 The applicant thereafter approached this Court for regular bail by preferring Criminal Misc. Application No.1011 of 2020. The applicant sought permission to withdraw the application which was permitted to be withdraw with a liberty to apply for bail if the trial is not over within reasonable time.

NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined 3.3 The applicant thereafter preferred another bail application Being Criminal Misc.

Application No.140 of 2021 before the Court of Third Additional Sessions Judge, Junagadh which was rejected by order dated 4th March, 2021.

3.4. The applicant thereafter preferred Criminal Misc. Application No.14242 of 2022 for regular bail as first successive bail application on the ground that the trial was not over within the reasonable time and the applicant was suffering from various ailments requiring medical treatment. This Court vide order dated 21.04.2023, rejected the bail application considering the rojkaam referred by the learned advocate for the applicant that the trial was likely to be over in six months and applicant was getting requisite medical NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined treatment in jail and there was no change in circumstances.

3.5. The applicant has again preferred this application on the ground that the applicant is suffering from various ailments and has been diagnosed with CAD i.e. Sever Double Vessel Disease and undergone a bypass surgery in past. It was also submitted that the applicant is suffering from hyper diabetes and is frequently admitted as an indoor patient in GMERS Hospital, Junagadh in prison ward in the last one and half years. It was submitted that the applicant is behind bar since 2019. It was pointed out that the applicant was granted temporary bail for six days for treatment of his eyes in private hospital. The applicant has produced on record the medical papers along with this application. The applicant has preferred Criminal Misc. Application No.703 of NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined 2023 before the learned 3rd Additional Sessions Judge at Junagadh which was dismissed by the order dated 06.11.2023 considering the treatment given to the applicant by the Doctors at Civil Hospital and in absence of any change in circumstances.

3.6. Being aggrieved, the applicant has preferred this application reiterating the same grounds.

3.7. Learned advocate Mr.Maulik Soni for the applicant referred to and relied upon the decision of the Hon'ble Supreme Court in case of Union of India Versus K.A.Najeeb reported in 2021 (3) SCC 713 wherein, the Hon'ble Apex Court considering the facts of the said case, upheld the order passed

by the High Court granting bail to the accused going to long period of incarceration and the unlikelihood NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined of trial being completed any time in near future.

3.8. Learned advocate Mr.Maulik Soni also placed reliance on the decision of the Hon'ble Apex Court in case of Sanjay Chandra Versus Central Bureau of Investigation reported in (2012) 1 SCC 40 as well as considering law laid down by the Hon'ble Apex Court as well as this Court about "Bail and not Jail" concept and accordingly prayed for enlarging the applicant on bail during the pendency of the trial.

4. On the other hand, learned Additional Public Prosecutor Mr.Chintan Dave submitted that this is a second successive bail application and there is no change in circumstances vis-a-vis the fact that in case of K.A.Najeeb (Supra), the Apex Court in NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined paragraph No.20 has held that Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967 is comparatively less stringent than Section 37 of the NDPS. Meaning thereby that the applicant who is charged with the offence under NDPS Act, the competent Court needs to be satisfied that prima-facie the accused is not guilty and that he is unlikely to commit another offence while on bail which is not a precondition under UAPA. It was therefore submitted that in view of the gravity of offences alleged against the applicant, this application deserves to be rejected. With regard to the contention of the applicant about treatment of his illness, it was submitted that the applicant is getting the medical treatment in the prison and for that purpose the applicant is not required to be enlarged on bail.

NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined

5. Having heard the learned advocates for the respective parties and considering the fact that there is no change in circumstances since rejection of the bail application by this Court on 21.04.2023 wherein it is held as under, this application is also not entertained :

"3.5 The involvement of the applicant in the offences under Sections 8(C), 15(C) and 29 of the NDPS Act as per the prosecution case is as under :

3.5.1. A complaint came to be filed by one Police Sub-Inspector Shri J.M.Vala, SOG, Junagadh that the complainant was present at his branch along with some other Police Officials, they received secret information that the accused has illegally stored the poppy straw and therefore two Officials were sent to keep watch and other formalities were undertaken and as per instructions, Circle Police Inspector, Manavadar Shri P.N.Gameti was called and two Panchas were arranged, thereafter, inter-se checking was done and nothing objectionable was found and therefore NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined one constable Punjabhai was asked to keep necessary items along with laptop, printer, charger and later two Bolero Cars which were to be used for raiding were also inspected and Drivers were also searched and as nothing was found, the raiding party had left for the search and a preliminary Panchnama was drawn on

29.08.2019 from 17.45 hours to 18.15 hours and as the raiding party reached opposite the Bilkha Bus stand, they found two Police personnel who were earlier sent to keep watch and again inter-se search was carried out and nothing objectionable was found and therefore they proceeded towards the place of raid and as they reached there, they found a complex and a shop in which electricity light was on and one person was found in the shop and his details were asked for and he was informed about the secret information regarding poppy straw and then an order under Section 42 of the NDPS Act was passed for personal search and from his shop, items like betel nuts, chocolates, biscuits etc. were found and the person was to be searched, he was informed about the Gazetted Officer and about his right to be searched in presence of a different Gazetted Officer, and as he answered in negative, an order under Section 50 of the NDPS Act was passed and then four bags were found of which three were black colour and one was white colour and contents of all the bags were same and it seemed like a plant based NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined substance containing moisture in powder form and flowers of the plant and therefore he was asked about permission, to which, he answered in negative and therefore an FSL Officer was called and one grocer with weighing scales was also called and thereafter one merchant came along with a weigh scale and nothing was found on his search and thereafter as the FSL officer came, along with a kit of narcotics checking, he opined, based on primary test that there are some active ingredients of poppy straw and therefore two sample of 100 gm. each was drawn from each of the four bags as one was to be sent for FSL inspection and one was to be kept as a reserve sample.

3.5.2. The first white pouch which was given a mark "A" was weed ensuring that there is no air pressure and the gross weight came at 5.080 kg and the net weight was 5.040 kg from which, two samples of 100 grams each were drawn and one was kept as reserved sample whereas the other one was sealed in a bag for the purpose FSL examination and those two samples were given marks "A1"

and "A2" and thereafter the remaining Muddamaal was weighed which came to 4.840 kg which was sealed and considered of Rs.2,500/- per kilogram and at Rs.12,600/- in total.

3.5.3. Similarly, the other black pouch was given a mark "B" and the same was NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined weighed 25.710 Kg and the net weight of which was 25.520 Kg and similarly two samples were drawn and were given marks "B1" and "B2". Similarly, another black pouch was given a mark "C" and net weight of the same was recorded as 19.580 Kg out of which also, two samples were drawn and were given marks "C1" and "C2". Similarly, another black pouch was given a mark "D" and the same weighed at 14.700 Kg. out of which also, two samples of 100 grams each were drawn and were similarly given marks "D1" and "D2". The total weight of the above referred muddamaal came to 64.840 Kg valued at Rs.1,62,100/-.

3.5.4. Thereafter, the accused was asked if he had kept the contraband at any other place, to which, he informed that there is some in the godown situated opposite to his shop and therefore the same

was also searched and in the godown, two other black plastic bags were found and the accused informed that the same also contained contraband in alike manner. Upon examination, 12 white bags were found and again since it seemed like the prohibited contraband poppy straw, an examination using narcotics testing kit was carried out by the FSL Officer who was present there and he opined that the same contained the active properties of poppy straw. Accordingly, the white pouch was given a mark "E" and the same weighed at 19.712 Kg out of which also two samples were drawn NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined and were given marks "E1" and "E2". Yet another white pouch was given a mark "F" and the same weighed at 20.630 Kg and the two samples which are drawn from this pouch were given marks "F1" and "F2". Similarly, the next batch which weighed 20.340 was given mark "G" and samples were given marks "G1" and "G2", and similarly next batch which weighed 20.220 Kg was given Mark "H" and the two samples were given marks "H1" and "H2". The next batch which weighed 20.660 Kg was given mark "I" and two samples were similarly given marks "I-1" and "I-2". Similarly, next pouch was given mark "J" which weighed 20.560 KG and the two samples were given marks "J1" and "J2". The next batch which weighed 19.350 Kg was given mark "K" and two samples of 100 grams each were given marks "K1" and "K2". The next pouch was given Mark "L" and the same weighed 20.330 Kg and two samples were given max "L1" and "L2". The next White pouch was given Mark "M" and the same weighed 20.830 Kg and the samples were given marks "M1" and "M2". The next batch was similarly given mark "N" which weighed at 20.460 Kg and the two samples were given marks "N1" and "N2". The next batch was marked "O" and weighed 20.470 Kg in the two samples were given marks "O1" and "O2". Similarly, the next pouch which weighed 20.122 Kg was given mark "P" and the samples were given marks "P1" and "P2". Next, the other pouch which was given a mark "Q" and the same weighed at 20.500 NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined Kg and the two samples which a drawn, were given marks "Q1" and "Q2". The next batch was given mark "R" and the same with 26.898 Kg in the sample is drawn out of it were given marks "R1" and "R2". The next pouch was given a mark "S" and it weighed 20.820 Kg in the samples were given marks "S1" and "S2".

3.5.5. The above mentioned Muddamaal in total weight of 310.214 Kg. valued at Rs.7,75,535/- and thereafter the accused was personally searched, and one black coloured mobile phone was found and upon further inquiry, revealed that he had got the said contraband from one Bhikho Gadhvi. The seizure memo was prepared in duplicate, one was given to the accused and his signature was obtained on another. Upon inquiry regarding the shop and the godown, the accused said that he had purchased the godown from one Mansukhbhai Haribhai Malviya and since then it is in his possession and the papers of sale were prepared but light bill was still in the name of Mansukhbhai Haribhai Malviya. Thereafter, the FIR was filed at recording the above details and the applicant was arrested.

4. Learned advocate Mr. Apurva Jani for the applicant submitted at the outset that as this Court has granted a liberty to apply for bail in case the trial is not over within reasonable NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined time, the applicant is entitled to prefer this successive bail application mainly on the ground that applicant is in incarceration for more than three years and eight months and trial is not likely to over in short time.

4.2. It was submitted that in similar case, the Apex Court in Criminal Appeal No.1293 of 2022 when the appellants before the Apex Court were found in possession of 414 Kg of Ganja were ordered to be enlarged on bail as the period of incarceration was almost four years and first witness of the prosecution was yet to be examined.

4.3. It was submitted that the applicant in the facts of the present case is involved for the offences punishable under NDPS Act for alleged possession of 375.054 Kgs of poppy straw. It was therefore submitted that the applicant is claiming parity with the similarly situated persons before the Apex Court to get the bail.

4.4. Learned advocate Mr.Apurva Jani thereafter invited the attention of the Court to the rojkam of the NDPS Case No.3 of 2019 which is in progress in the Court of 3rd Additional Sessions Judge, Junagadh to submit that for almost three years no progress was made in the trial and charge was framed first on 12th July, 2022 and thereafter, recently in the month of April, first witness is examined and the next date NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined is fixed by the Trial Court on 4th May, 2023.

4.5. Learned advocate Mr.Apurva Jani in support of his submissions relied upon the decisions of the Apex Court in case of Mohd Muslim @ Hussain versus State (NCT of Delhi) dated March 28, 2023 in (Special Leave Petition) Criminal Appeal No(s).915 of 2023 wherein the Apex Court after considering that the custody of the appellants over seven years and four months and after noting the fact that the progress of the trial has been at snail's pace and out of 64 witnesses only 30 witnesses were examined, granted bail to the appellants before the Apex Court considering right of speedy trial under Article 21 of the Constitution of India.

4.6. It was also submitted by learned advocate Mr.Apurva Jani that the petitioner is suffering from various ailments and has been diagnosed with CAD i.e. Sever Double Vessels Disease and undergone a bypass surgery in past. It was submitted that the petitioner is also suffering from hyper diabetes and is in precarious condition and frequently admitted as an indoor patient in GMERS Hospital, Junagadh in prison ward in the last one and half years.

4.7. It was therefore submitted that the petitioner may be enlarged on NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined regular bail during the pendency of the trial.

5.1. On the other hand, learned Additional Public Prosecutor Mr.Dhawan Jayswal has tendered the affidavit of the I.O. in compliance of the order dated 24th March, 2023 on behalf of the respondent wherein it is stated as under:

"3. I say and submit that as far as the latest medical papers showing condition of the applicant is concerned as the applicant as per the averment suffering from various ailments such as he was diagnosed with CAD: Severe double vessel disease and undergone a bypass surgery as well as suffering from hyper diabetes, in that regards, the detail report was short from the Medical Officer, District Jail, Junagadh, wherein

vide certificate dated 08.04.2023, the Medical Officer had categorically specified that all the necessary treatments were given and provided to the applicant by the on duty medical officer as well as in the case where treatment from specialist requires, the treatment was provided through Specialist from Civil Hospital Junagadh and Ahmedabad. The relevant medical papers were also supplied along with the certificate dated 08.04.2023 by the Jail Authority. I crave leave to annex herewith the NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined copy of the Certificate dated 08.04.2023 along with necessary medical papers of the applicant as Annexure-R1 to this affidavit.

4. I further say and submit that as far as progress report of the Trial is concerned, I say and submit that the Trial is in progressive stage and Ld. 3rd Additional Sessions Judge, Junagadh had completed the examination of the complainant on 03.04.2023 and the stage of cross examination of the complainant was over on 11.04.2023 and to examine further witnesses, the next date of hearing of trial is kept on 20.04.2023. I say and submitted that now further 9 police officers, 2 punchas, weighing machine person and FSL officer are required to be examined and looking to the progress of the Trial and as the Ld. Sessions Court providing short dates, I say and submit that the trial of NDPS case no. 3 of 2019 pending before the Ld. 3rd Additional Sessions Judge, Junagadh is likely to be over within six months.

5. In view of the aforementioned facts and circumstances of the case, the answering respondent respectfully submit that it is the case where Commercial Quantity of poppy straw of 375.054 kgs was found in possession of the applicant and NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined looking to the short dates provided by the Ld. Trial Court, it is likely to be over within six months and therefore looking to the progressive stage of the Trial, the present successive regular bail application is required to be rejected in the interest of justice."

5.2. Relying upon the aforesaid averments, it was submitted that the petitioner is given medical treatment by the Jail authority and therefore, the petitioner cannot seek bail on ground on health ground.

5.3. It was further submitted that the trial is now in progress and is likely to be over within a short period of time as the witnesses are being examined and complainant is already examined and the trial is fixed for cross-examination of the complainant on 4th May, 2023.

5.4. Learned Additional Public Prosecutor Mr.Dhawan Jayswal relied upon the decision of the Apex Court in case of State of M.P. versus KAJAD reported in (2001) 7 SCC 673 to submit that the Apex Court has held that under Section 37(1)(b)(ii) of the NDPS Act, bail can be granted only under exceptional circumstances and liberal approach of the Court is unwarranted as the minimum sentence of ten years' of rigorous imprisonment is to be imposed under Section 18 of the NDPS Act. It NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined was therefore submitted that this being a successive bail application, the same should not be entertained

as there is no change of circumstances.

6. Having heard the learned advocates for the respective parties, this being a successive bail application, there is a very limited scope to entertain such application in view of the following decisions:

(1) Shyamdutt Upadhyay and Another v.

State of Gujarat reported in 1992(1) GLH 259:

"4. ... When a Court is not inclined to grant the bail, it would give some reasons rejecting the application, which might come in the way of the accused during the trial and because of that the Advocate for the accused would prefer to withdraw the application instead of getting the application rejected with reasons. In such an event the subsequent bail application of the same accused cannot be entertained, unless and until fresh circumstance or ground is made out by the accused for releasing him on bail. In this case, no new ground is made out by the petitioners for releasing them on bail. Therefore, this application is required to be rejected."

(2) State of Gujarat v. Alpeshbhai Navinbhai Patel reported in 2004(1) GLH NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined 754:

"9. ...Normally, the substantial change in the circumstances are being considered stage wise, i.e.

(i) at the stage of considering the matter for granting anticipatory bail, (ii) at the stage of considering the matter for regular bail before the charge sheet when the investigation is in progress and

(iii) after filing of charge sheet and after completion of investigation."

(3) Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and Another reported in 2005(3)GLH 601:

"18. The principles of res judicata and such analogous principles although are not applicable in a criminal proceeding, still the Courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher Court or a coordinate bench must receive serious consideration at the hands of the Court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event, the Courts must give due weight to the grounds which weighed with the former or higher Court in rejecting the bail application. Ordinarily, the issues which had been canvassed NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined earlier would not be permitted to be reargued on the same grounds, as the same would lead

to speculation and uncertainty in the administration of justice and may lead to forum hunting.

19. The decisions given by a superior forum, undoubtedly, is binding on the subordinate fora on the same issue even in bail matters unless of course, there is a material change in the fact situation calling for a different view being taken. Therefore, even though there is room for filing a subsequent bail application in cases where earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which an accused who has been denied bail earlier, can move a subsequent application. Therefore, we are not in agreement with the argument of learned Counsel for the accused that in view the guaranty conferred on a person under Article 21 of the Constitution of India, it is open to the aggrieved person to make successive bail applications even on a ground already rejected by Courts earlier including the Apex Court of the country."

NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined (4) State of Maharashtra v. Budhikota Subbarao reported in 1989 (o) GLHELSC 28635:

"7. Once that application was rejected there was no question of granting a similar prayer. That is virtually overruling the earlier decision without there being a change in the fact situation. And when we speak of change, we mean a substantial one which has a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence. ... For the above reasons we are of the view that there was no justification for passing the impugned order in the absence of a substantial change in the fact-situation. That is what prompted Shetty, J. to describe the impugned order as 'a bit out of the ordinary'. Judicial restraint! demands that we say no more."

6. In addition to the above, the submissions made by learned advocate Mr.Maulik Soni for the applicant relying upon the decision of the Apex Court in case of K.A.Najeeb is also considered. The Apex Court in the said case held as under :

NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined "19. Adverting to the case at hand, we are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer.

However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail. An attempt has been made to strike a balance between the appellant's right to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the respondent's rights guaranteed under Part III of our Constitution have been well protected.

20. Yet another reason which persuades us to enlarge the Respondent on bail is that Section 43D(5) of the UAPA is comparatively less stringent than Section 37 of the NDPS. Unlike the NDPS where the competent Court needs to be satisfied that prima facie the accused is not guilty and that he is unlikely to commit another offence while on bail; there is no such precondition under the UAPA. Instead, Section 43D(5) of UAPA merely provides another possible ground for the competent Court to refuse bail, in addition to the wellsettled considerations like gravity NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined of the offence, possibility of tampering with evidence, influencing the witnesses or chance of the accused evading the trial by absconsion etc."

7. In the facts of the case, the applicant is in incarceration for more than three years for the offences punishable under Sections 8(C), 15(C) and 29 of the NDPS Act which is more stringent than that of the provisions of the UAPA Act, more particularly, when the applicant was found in possession of poppy straw of 375.054 Kgs, the applicant cannot be enlarged on bail only on the ground of delay in trial as the period of two years of Covid-

19 pandemic is also required to be taken into consideration for delay in progress of trial.

8. In view of the foregoing reasons and in absence of any change in circumstances, considering the gravity of the offence under NEUTRAL CITATION R/CR.MA/21503/2023 ORDER DATED: 09/02/2024 undefined the NDPS Act, this second successive bail application for regular bail is accordingly rejected. Rule is discharged.

(BHARGAV D. KARIA, J) PALAK