

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/CRIMINAL MISC.APPLICATION NO. 1234 of 2022

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YASH JAYESHBHAI CHAMPAKLAL SHAH
Versus
STATE OF GUJARAT

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Appearance:

MR. RAHUL R DHOLAKIA(6765) for the Applicant(s) No. 1
MS MAITHALI MEHTA APP for the Respondent(s) No. 1

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CORAM:HONOURABLE MR. JUSTICE UMESH A. TRIVEDI

Date : 02/03/2022

ORAL ORDER

1. The present application is filed under Section 439 of the Code of Criminal Procedure, 1973 by the applicant for regular bail post submission of charge-sheet in connection with an FIR being C.R.No.11191012211362 of 2021 registered with Danilimda Police Station, District : Ahmedabad for the offences under Sections 8(C), 22(c) and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985, (for short, 'the Act').

2. Mr.Rahul Dholakia, learned advocate for the applicant submitted that going through the entire papers of charge-sheet except the call data records showing that in an around the time of offence, applicant was in contact with co-accused. Over and above that, prosecution relies on Whatsapp chat in between the present applicant and the accused. He has further submitted that, as claimed by the prosecution, material Whatsapp chats are deleted from the devices and therefore, it has been sent for FSL for the purpose of retrieving. He has further submitted that though quantity seized from two of the accused found in

possession of Methamphetamine about 62 gram, which is commercial quantity, nothing is recovered or found in possession of applicant either at the time of arrest or subsequent thereto while searching even his premises. He has further submitted that based on statement of co-accused the arrest of the applicant is effected. The other connecting material sought to be relied on by the prosecution, according to submission of Mr.Dholakia, learned advocate for the applicant, is insufficient to bring home charge against the applicant. At any rate, according to him, the applicant cannot be said to have conspired together along with other co-accused based on material collected during the course of investigation to be a part of conspiracy as under Section 29 of 'the Act'. He has further submitted that similarly situated co-accused of this very offence came to be released on regular bail vide an order passed in Criminal Misc. Application No.1764 of 2022 dated 23.2.2022 in the case of co-accused, Rajin Abdulandim Saiyed, and therefore, even on the ground of parity, he submitted that applicant may also be released on bail.

3. Mr.Dholakia, learned advocate for the applicant relied on a decision in the case of ***Bharat Chaudhary V/s. Union of India*** reported in **2021 SCC OnLine SC 1235** in support of his submission that in absence of any possession of contraband article and the print outs of whatsapp messages downloaded from the mobile phone and devices seized from the mobile phone were not treated to be sufficient material to establish live link between the co-accused and the accused whose bail was under consideration before the Supreme Court as Scientific reports in respect of the said devices was still awaited.

4. Ms.Maithali Mehta, learned APP submitted that in an around the time of the incident, the applicant was in live contact with the arrested accused and from whom contraband is found. She has further submitted that, according to the case of the prosecution, the applicant had ordered for the same and before it could be delivered to him, the two accused have been arrested in possession of contraband in a commercial quantity. She has further submitted that though screenshot of one Whatsapp chat available on devices / mobile phone of the applicant is not in clear terms indict the applicant, since Whatsapp chat came to be deleted by the applicant, it has been sent to FSL for retrieving it. However, no such report based on examination by FSL is yet available. Ms.Mehta, learned APP further submitted that in view of Section 35 of 'the Act', there is a presumption of culpable mental state of the accused. Considering the material available with the prosecution, it is urged that, the presumption of culpable mental state of the accused may be inferred from the Whatsapp chat between the accused as also the call data records. Therefore, she has submitted that the applicant be denied bail.

5. Having heard learned advocates for the appearing parties, it emerges on record that the applicant is not found in possession of any contraband article. Over and above that, the call data records may reveal that in an around the time of incident, he was in contact with the co-accused who were found in possession of contraband. Since there is no recording of conversation in between the accused, mere contacts with the co-accused who were found in possession cannot be treated to be a corroborative material in absence of substantive material found against the accused. However, screenshot of one of the

whatsapp chat in between the co-accused shown to the Court, there is hardly anything which connects the applicant with the present offence or even asserting that he ordered for the same which were to be delivered by the accused found in possession of contraband. In absence of any other material, which is still to be retrieved from the devices of the mobile phone and information thereon which is still awaited, as considered by the Supreme Court in the case of *Bharat Chaudhary (Supra)* said material cannot be considered to be a sufficient material to establish any live link with the co-accused who were found in the possession of contraband.

6. So far as submission that presumption of culpable mental state be raised against the applicant is also for the time being in absence of other material, which is to be proved at the time of trial, without concluding thereon, suffice it to say that when co-accused with similar role has come to be released on bail, even on the ground of parity, application of the applicant is required to be considered as from his possession nothing is found at any point of time.

7. I am conscious of the fact of restrictions imposed under Section 37 of 'the Act', however, with a view not to prejudice the case of either side, I am not recording any conclusion with regard to existence of *prima-facie* case at this stage. As submitted by the learned advocate and confirmed by the learned APP, there is no criminal antecedents of the applicant. There is also no apprehension shown even by the prosecution that he is likely to commit any offence while on bail. Considering the order passed by co-ordinate Bench of this Court in case of co-accused who is similarly situated as also aforesaid decision of the

Supreme Court in the case of *Bharat Chaudhary (Supra)*, I am inclined to grant bail to the applicant, that too, post submission of charge-sheet on following terms and conditions.

8. In the result, the present application is allowed and the applicant is ordered to be released on regular bail in connection with an offence being **C.R.No.11191012211362 of 2021 registered with Danilimda Police Station, District : Ahmedabad** on executing a personal bond of Rs.15,000/- (Rupees Fifteen Thousand Only) with one surety of the like amount to the satisfaction of the learned Trial Court and subject to the conditions that the applicant shall;

- (a) not take undue advantage of liberty or misuse liberty;
- (b) not act in a manner injurious to the interest of the prosecution;
- (c) surrender passport, if any, to the lower court within a week;
- (d) not leave the India without prior permission of the Sessions Judge concerned;
- (e) mark presence before the concerned Police Station once between 1st and 5th day of every English calendar month for a period of six months.;
- (f) furnish latest and permanent address of residence as well as mobile number to the Investigating Officer and also to the Court at the time of execution of the bond and shall not change the residence without prior permission of this Court;

9. The authorities shall adhere to its own Circular relating to COVID-19 and, thereafter, will release the applicant only if he is

not required in connection with any other offence for the time being. If breach of any of the above conditions is committed, the Sessions Judge concerned will be free to issue warrant or take appropriate action in the matter. Bail bond to be executed before the lower Court having jurisdiction to try the case.

10. Rule is made absolute to the aforesaid extent.

Direct service permitted.

ASHISH M. GADHIYA

(UMESH A. TRIVEDI, J)

