

pending the hearing and final disposal of the appeal, the substantive sentence imposed upon him be suspended and that, he be released on bail.

2. The facts of the prosecution case, as reflected from the Judgment delivered by the trial Court are, in brief, to the effect that acting on a specific information that certain persons: viz- Vasant Saglani, Yashwant Vitthal Patil and Bhima Valmiki More would be traveling in a white colour Tavera bearing Registration No.MH-05/AB-7540 and would be entering Maharashtra through Charoti Toll Naka of IRB, Mumbai-Ahmedabad Highway, District Thane, on 14/01/2012 a trap was laid and at about 2.00 a.m. on 14/01/2012, after the said Tavera car was noticed and was waiting in queue at the Toll Booth, the same was stopped and the occupants were asked to come out. Apart from the three persons, who have been named earlier, two more, one Abdul Rahim Shaikh and one Ridwan Kazi were also found occupying the said Tavera Car. Eight packets of Hashish each weighing about 600 gms. were found to have been kept inside a blue and ash colour stitched cloth bag that had been kept beneath the rear seat of the said vehicle. They were seized under a panchanama.

The said five persons, who had been apprehended, were brought to the office of the Narcotics Control Bureau (NCB) and their statements were recorded under the provisions of Section 67 of the N.D.PS.Act. In their statements, Vasant *alias* Ashok Saglani and Abdul Rahim Shaikh implicated the applicant

by saying that it was he, who had given an amount of Rs. 1,20,000/- to the said Vasant *alias* Ashok Saglani for bringing *charas* from Gujarat. Based on this, the applicant, who was in prison in some other case, was brought to the N.C.B. Office and his statement under the provisions of Section 67 of the said Act also came to be recorded. In his statement, the applicant **did** incriminate himself.

3. Mr.Khan, the learned counsel for the applicant raised primarily two contentions. According to him, this is a case where the provisions of Section 42 of the N.D.P.S. Act had not been complied with, in as much as, though the search was taken in mid night, no search warrant or authorization for the same had been obtained. He submitted that the record indicates that the alleged information was received in the N.C.B. office at 3.45 p.m. and that, therefore, the concerned officers had sufficient time to obtain a search warrant or the requisite authorization. He also submitted that no reasons as to why the search warrant or authorization could not be obtained, had been recorded by the concerned officers. According to him, since at the time of raid, there was no gazetted officer in the raiding party, this factor creates some suspicion about the case of the Investigating Agency.

4. The second contention raised by Mr.Khan is to the effect that except the statements of the co-accused and that of the applicant, there is no other material against the applicant. It is

submitted that the applicant has not been involved in any offence under the N.D.P.S. Act previously. It is submitted that though he was in prison, it was not in connection with an offence under N.D.P.S. Act. It is submitted that the statements of the co-accused and that of the applicant had been retracted by them. According to Mr.Khan, since the said Ashok Saglani and Shaikh had been taken to the N.C.B. Office, their statements as recorded by the N.C.B. Officers cannot be treated as voluntary. He also submitted that the same would be the case with respect to the applicant's own statement. In support of his contention, he placed reliance on the observations made by the Apex Court in the case of *Union of India v. Bal Mukund & Ors.*, 2009 ALL MR (Cri.) 1570 (S.C.).

5. The learned counsel for the respondent No.1 submitted that the statements of the co-accused and that of the applicant are clearly admissible in evidence in view of the provisions of Section 67 of the Act. She submitted that said co-accused were taken to N.C.B. Office for recording their statements, as it was dark and it was not possible to record their statements on the spot. She submitted that the statements cannot be presumed to be involuntary, only because the said accused were taken to N.C.B. Office. She also submits that so far as the applicant's own statement is concerned, that 'the retraction thereof was an after thought' has been the finding which has been arrived at by the trial Court.

6. I have carefully considered the matter. It is a fact that the case against the applicant is based only on the statements made by the co-accused and by the applicant himself recorded under Section 67 of the N.D.P.S.Act. It is not in dispute that the statements have been subsequently retracted. Since, *prima facie*, the deponents were under the control of the N.C.B. Officers, at the time when their statements were recorded, whether or not they are hit by the provisions of Section 24 of the Evidence Act, would need examination in the light of the evidence recorded during the trial. The evidentiary value of those statements cannot be fully gone into or discussed while considering the present application and such exercise would need to be undertaken only at the time of final hearing of the appeal. Similarly, whether the provisions of Section 42 had been complied with, in the instant case, would also need some serious consideration in the light of the evidence adduced and this can be properly done only at the time of final hearing of the appeal.

7. Arguable points which need serious consideration have been raised. In the ordinary course, the appeal is not likely to be taken up for final hearing within a short time.

8. The applicant is in custody since last about three years.

9. Considering all the relevant aspects of the matter, in

my opinion, the substantive sentence imposed upon the applicant should be suspended till the hearing and final disposal of the appeal and that, he be released on bail subject to certain conditions.

10. The application is allowed.

11. Pending the hearing and final disposal of the appeal, the substantive sentence imposed upon the applicant shall stand suspended; and that the applicant shall be released on bail in the sum of Rs.1,00,000/-, with one surety in like amount, or two sureties in the sum of Rs.50,000/- each, on the condition that the applicant shall report to the office of N.C.B., Mumbai on every Monday between 11.00 a.m. to 2.00 p.m. till the disposal of the appeal.

12. Any default on the part of the applicant in reporting to the N.C.B. Office as aforesaid, shall forthwith be brought to the notice of this Court by the concerned N.C.B. Officials, for further appropriate action in the matter.

13. The application is allowed in the aforesaid terms.

(ABHAY M. THIPSAY J.)