

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL BAIL APPLICATION NO. 800 OF 2016

Chakradharrao Mohanrao

.....Applicant

V/s.

The State of Maharashtra and others

....Respondents

Mr. Ayaz Khan Advocate for the Applicant.

Mr. Vinod Chate APP for the State.

CORAM : SMT. SADHANA S. JADHAV, J.

DATED : 21st NOVEMBER, 2016.

PC :

1) Heard. This is an application under section 439 of Code of Criminal Procedure, 1973. Applicant herein is arrested on 07/12/2015 in crime no. 3077 of 2015 registered at Chandwad Police Station for offence punishable under sections 20 (b) 22 & 27 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (Hereinafter referred as “NDPS Act”)

2) It is the case of the prosecution that on 07/12/2015, P.I. Madhukar Varade posted at Chandwad Police Station alleging therein that on 06/12/2015, at about 6.40 p.m., P.I. Anant Mohite informed him that he has received an information from S.D.P.O. Manmad, informing him that a brown

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colour Eicher vehicle is passing through Bombay-Agra highway bearing no. MH 15 DK 9554. That there is contraband in the said vehicle. Upon receipt of the said information, the first informant made preparation for raiding by following due procedure such as calling upon Panchas, scale for weighing etc. The raiding staff had started inspecting all the vehicles passing through Bombay-Agra highway. At about 8.43 p.m., they saw a brown colour Eicher vehicle bearing no. MH 15 DK 9554 passing. They had intercepted the said vehicle.

3) Upon inspecting the said vehicle, after following due procedure of Law, it was noticed that there was a secret compartment just behind the driver's seat which was covered with tarpaulin and tied with a rope. It was noticed that the police officers found 1300 Kgs of Ganja. In the personal search, police officers found Rs. 10,810/- with the present applicant.

4) The learned counsel for the applicant has raised 4 grounds for seeking enlargement on bail. It is firstly submitted that there is non compliance of the mandatory section 42 of the NDPS Act and that the information was not given to the superior officers within the stipulated time i.e. within 72 hours. According to the learned counsel, it was incumbent upon Rahul Khade to pass

on the information to the superior officer, immediately. According to the learned counsel, since there is non compliance of the mandatory provision, applicant deserves to be enlarged on bail.

5) The learned counsel further submits that there was no search warrant obtained by the police officers before the said vehicle was intercepted and that it is mandatory upon the police authorities to have a search warrant which can be shown to the proposed accused persons before inspecting the vehicle. It is thirdly submitted that the Panchanama would show that what was seized was the Ganja and after the samples were sent for Chemical Analysis, it was reported that the seized contraband is Opium and not Ganja. The learned counsel has placed reliance upon the definition of Ganja as stated in Section 2 (b) of the NDPS Act which reads as follows:

“The flowering of fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever, name they may be known or designated”.

6) The learned counsel for the applicant vehemently submits that there is variance in what was seized and what was sent for Chemical Analysis. The learned counsel has placed implicit reliance on the certificate issued by the

Judicial Magistrate First Class Chandwad which shows that the police had placed on record, the detailed inventory of the seized Opium and that the said inventory is true and correct. The detailed report dated 17/12/2015 shows that the opium weighing 1284.80 gm and according to the learned counsel for the applicant, on the face of the record, there is deficit of 14 Kg for which there is no plausible explanation stated in the charge-sheet. The learned counsel further submits that in view of the above discrepancies in the course of investigation and violation of the mandatory provisions, applicant deserves to be enlarged on bail.

7) As against this, the learned APP submits that there is compliance of section 42 of the NDPS Act as the police officer Anant Mohite had informed Superintendent of Police, Nashik on 06/12/2015 itself that he had received information from Rahul Khade, S.D.P.O., Sub-Division Manmad, telephonically that he had received an information about an Eicher vehicle carrying a contraband and passing through Bombay-Agra highway. It was received by the Superintendent of Police, Nashik on the same day i.e. on 06/12/2015 and hence, it cannot be said for a moment that there is non compliance of section 42 of the NDPS Act. The learned APP has further

submitted that the information was in respect of passing vehicle that too after sunset and therefore, there was no time for obtaining a search warrant as contemplated under section 42 of the NDPS Act.

8) As against this, the learned counsel for the applicant has submitted that the Proviso to section 42 of the NDPS Act reads as follows:

“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.

(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”.

9) According to the learned counsel for the applicant, the police officer was fully authorized to intercept the said vehicle, but he ought to have recorded the reasons for not obtaining a search warrant and should have highlighted the emergency clause.

10) The learned APP submits that this aspect can be proved at the time of

trial and only after recording the substantive evidence of the investigating officer and the same cannot be considered at the time of deciding an application under section 439 of the Code of Criminal Procedure, 1973 as it would deprive the prosecution of proving its case at the time of trial.

11) As far as the submission in respect of search and seizure is concerned, the the Hon'ble Apex Court in the case of **Union of India V/s. Mohanlal and another [2016 (3) Supreme Court Cases]** after examining several matters, where the mandate for search and seizure was not followed, had taken into consideration the ramifications of the offences under the provisions of NDPS Act and had issued certain directions to the agencies investigating the offences under the provisions of NDPS Act as well as to the Chief Justices of all High Courts. Hence, it would not be proper to show any leniency to the accused involved in an offence under the provisions of NDPS Act.

12) The learned APP has further submitted that in the present case, there are in fact 4 accused persons. One of them who was in the truck has expired. The vehicle belonged to Deepak Pawar, resident of Nashik and the said accused is absconding. Similarly, Shrinivas Rao is the permanent resident of the State of Andhra Pradesh who is accused in the present case and is also absconding.

The learned APP submits that in view of this, application filed by the present applicant also deserves to be rejected.

13) The learned counsel for the applicant has prayed for bail on technical grounds contending therein that procedure contemplated by the Statute has not been followed. The learned counsel for the applicant has placed reliance upon the orders passed by this Court in various criminal bail applications under section 439 of the Code of Criminal Procedure, 1973 where the accused were enlarged on bail mainly on the ground that the procedure contemplated by the Statute was not followed.

14) This Court is of the opinion that in matters under section 439 of the Code of Criminal Procedure, 1973, there cannot be precedent and each application has to be dealt with on the facts of that case coupled with the fact that there are serious ramifications of the offences under NDPS Act and no leniency can be shown as the offences under NDPS Act are on the rise. This Court is of the opinion that in most of the cases, the executive i.e. the implementing agency does not follow the mandate of the procedural aspect of the Statute and the benefit is extended to the accused. This Could be one of the reason why the menace of the drug trafficking has gained alarming

proportions and dimensions. The availability of contraband is at hand's reach and therefore, the younger generation is getting addicted to it.

15) The Hon'ble Apex Court in the case of **Union of India V/s. Mohanlal and another [Cited Supra]** had implicitly observed as follows:

“Only hope expressed that serious drug menace in the country is not an account of any unholy alliance between drug traffickers and enforcement agencies”.

16) It is in view of this, this Court is not inclined to consider the procedural aspect at the stage of grant of bail. The investigating agency needs an opportunity to prove the case at the time of trial or to offer a plausible explanation for the lapses in following the mandate of procedural Law. It is high time that no leniency should be extended to the people involved in drug trafficking at the initial stage. All these aspects can be seen and gone into at the time of trial. It is in this view that the contentions raised by the learned counsel for the applicant in respect of violation of section 42 of the NDPS Act and the lapses in search and seizure of the contraband cannot be considered at this stage. The co-accused was the alternative driver on the same truck at the relevant time. Due to his demise, the trial stands abated against him.

17) Taking into consideration the fact that a huge quantity of contraband

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was seized and it was being transported from one place to another, applicant who feigns ignorance, cannot be enlarged on bail for the simple reason that upon perusing the manner in which the contraband was concealed, it is clear that the applicant was in conscious possession of the contraband. That a special cabin made just behind the driver's seat for concealing the said contraband.

18) Application, being sans merits, stands rejected.

19) The Special Court, in the fitness of circumstance and upon an application by the State, may prove the possibility of separating the trial of the present applicant from that of absconding accused against whom the charge-sheet is filed under section 299 of the Code of Criminal Procedure, 1973 and the learned Special Court may proceed with the trial as early as possible.

(SMT. SADHANA S. JADHAV, J.)