

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.718 OF 2015

IN

CRIMINAL APPEAL NO.351 OF 2015

Gurmeet Singh s/o. Sh.Harjinder Singh ... **Applicant**
V/s.

Davinder Singh & Anr. ... **Respondents**

CRIMINAL APPLICATION NO.45 OF 2016

IN

CRIMINAL APPEAL NO.426 OF 2015

Pyarelal Shridhar Keer @ Pahalwan ... **Applicant**
V/s.

Davinder Singh & Anr. ... **Respondents**

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Mr.Ayaz Khan with Mr.Dilip Mishra, Advocate for the Applicant in APPA/718/2015.

Mr.Dilip Mishra, Advocate for the Applicant in APPA/45/2016.

Ms.Rati B. Amorolia, Advocate for the Respondent No.1.

Ms.Anamika Malhotra, APP for the Respondent/State.

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CORAM : A.M.BADAR J.

DATED : 19th MARCH 2018.

P.C. :

1 These are applications by accused No.1 Gurmeet Singh and accused No.2 Pyarelal Keer for suspension of sentence and releasing them on bail during pendency of appeals filed by them.

2 By the impugned Judgment and Order passed in N.D.P.S.Special Case No.148 of 2010, both of them are convicted of offence under Section 8(c) punishable under Section 20(b)(ii) (C) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, (hereinafter referred to as 'N.D.P.S.Act" for the sake of brevity) and under Section 28 read with Section 8(c) and Section 29 of the N.D.P.S.Act. On each count, they are sentenced to suffer rigorous imprisonment for fifteen years apart from payment of fine of Rs.One Lakh and in default to undergo further rigorous imprisonment for one year each.

3 Heard the learned Advocate appearing for applicants/accused No.1 and 2, by taking me through evidence of P.W.No.1 Shri.Sanjay Sinha, P.W.No.2 Davinder Singh, P.W.No.6 Mr.Claudius Fernandes, P.W.No.8 Mohammed Shafi Ajhmed Khan and P.W.No.9 Prakash Antony, who were members of the raiding team, being Intelligence Officers of the Narcotic Control Bureau (hereinafter referred to as "NCB" for the sake of brevity), argued that the raid was undoubtedly effected during the sunset and sunrise. Evidence of all these witnesses shows that Information Register was not maintained by the NCB, though it was necessary

as per Judgment of the Honourable Apex Court in the matter of Kuldeep Singh v. State of Punjab¹ The learned Advocates further argued that evidence of all these witnesses goes to show that the NCB had not applied for search warrant for search of vehicle. No authorization for search was ever issued and, therefore, search and seizure became suspect. The learned Advocates further argued that perusal of panchanama shows that panchas were given information which was more than what was the information recorded vide Exhibit 31. The recorded information does not show name of father of accused No.1 Gurmeet Singh as well as details of Maruti Car. The reliance was placed on Judgment of the Honourable Apex Court in ***State of Rajasthan v. Jag Raj Singh @ Hansa***² in order to demonstrate breach of provisions under Section 42(2) of the N.D.P.S.Act. It was argued that information which is allegedly recorded by P.W.No.1 Shri.Sanjay Sinha is a tampered information and as such, cannot be relied upon. It was further argued that even if the Gazetted Officer accompanies the raiding party, then also compliance of Sections 41 and 42 of the N.D.P.S.Act is necessary. For this purpose, reliance is placed on ***State of Rajasthan v. Chhagan Lal***³. Reliance is also placed on the Order of this Court in the matter of ***Sunil Bhagwandas Dhutiya v. The State of Maharashtra***⁴ to demonstrate that strict adherence to the concerned provisions of N.D.P.S. Act is necessary.

1 Criminal Appeal No.1842 of 2010; Dated 23/09/2010.

2 Criminal Appeal bearing No.1233 of 2006

3 2014(1) Drugs Cases (Narcotics) 399 Supreme Court of India

4 Bail Application No.2138 of 2017, Dated 14th November 2017.

To demonstrate that recording of grounds for belief is must, reliance is placed on Judgment of the Honourable Apex Court in the matter of ***State of Orissa v. Laxman Jena***¹. It was further argued that Sections 41 and 42 of the N.D.P.S.Act provide for three separate and distinct formalities which are to be followed separately. For this purpose, reliance is placed on Judgment of the Honourable Apex Court in the matter of ***Darshan Singh v. State of Haryana***². The learned Advocate further argued that according to the prosecution case, the Maruti Car was intercepted at Prabhadevi area at Mumbai. P.W.No.6 Mr.Claudius Fernandes had allegedly directed the raiding team to effect search and necessary panchanama and, therefore, even if prosecution case is accepted, then the search and resultant panchanama ought to have been conducted at Prabhadevi area itself. The Judgment of the learned Single Judge of this Court in the matter of ***Ravi Raju Mane v. The State of Maharashtra***³ is also pressed in service. It is further argued that evidence of P.W.No.4 B.S.Bisht, Chemical Analyzer cannot be accepted to infer that the seized material was a contraband. He has failed to state that the sample tested by him was a resinous mass from the cannabis plant and had not calculated the percentage of the T.H.C.. The Chemical Analyzer has categorically admitted that he is not expert on the subject of Cannabis and he was unable to state whether the sample could be that of a Bhang, to which N.D.P.S.Act is not applicable. It is

1 2009 (16) SCC 332.

2 2015(12) Scale 579.

3 Bail Application 2020 of 2017; Dtd. 10th November 2017.

further argued that the applicants are behind bar right from the 2010 and as such, they have undergone about half of the substantive sentence. Therefore, in view of the Order dated 19th February 2018 passed by the Honourable Apex Court in the matter of *Mayuresh Nandkumar Purohit v. Kaushik Manna & Anr.*¹, they are entitled to be released on bail.

4 The learned Advocate for the N.C.B. opposed the application by contending that bar of Section 37 is also applicable on post-conviction application for bail and has placed reliance on Judgment of the Honourable Apex Court in *Union of India v. Rattan Mallik @ Habul*². She further drew my attention to the evidence of P.W.No.2 Davinder Singh to demonstrate that the Maruti Car was taken to the office of N.C.B. because the contraband was kept concealed in the said car and it would not be possible to recover the same on spot. My attention was also drawn to the evidence of P.W.No.6 Mr.Claudius Fernandes to demonstrate that he had personally taken the noted information to his superior and then it was got approved from the Zonal Director.

5 I have carefully considered the rival submissions and also perused the cited Judgments as well as evidence adduced by the prosecution.

1 Criminal Appeal No.287 of 2018; Dated 19th February 2018.

2 2009(2) SCC 624.

6 Prosecution case in brief is to the effect that on 08/05/2010 P.W.No.1 Shri.Sanjay Sinha of the N.C.B. received information that Gurmeet Singh, resident of Jammu is coming to deliver substantial quantity of Hashish to Pyarelal Keer by a Maruti Car bearing registration No.DL-08-CR-0460 in front of ICICI Prudential Bank building, Veer Savarkar Marg, Prabhadevi, Mumbai. That information was reduced into writing and was submitted before the Superintendent of the NCB namely P.W.No.6 Mr.Claudius Fernandes, who directed for conducting raid, search as well as seizure. It was got approved from the Zonal Director, NCB. In pursuant to this, the team was formed and at Prabhadevi area of Mumbai, a Maruti car came to be intercepted. It was driven by appellant/accused No.1 Gurmeet Singh and at the relevant time, it has been approached by appellant/accused No.2 Pyarelal Keer. It is case of the prosecution that the appellant/accused No.1 Gurmeet Singh informed that he is carrying Hashish/Charas weighing 40 kg. concealed in the car. Then that car was taken to the NCB Office, Ballard Pier and search and seizure of 40 kg. Charas/Hashish was allegedly effected. After necessary investigation, the complaint came to be filed, the prosecution of which ultimately resulted in conviction and resultant sentence of appellants/accused persons.

7 Arguments of the learned Advocates for the applicants is primarily based on foundation that there is no authorization to

effect search and seizure. Therefore, it is apposite to put on record information and subsequent steps taken in pursuant to that information. The said document is at Exhibit 31 and it reads thus :

INFORMATION

Specific information has been received to the effect “that one Gurmeet Singh, aged 24 years, resident of Jammu is to deliver a substantial quantity of Hashish, a narcotic drug under NDPS Act, 1985 to a person by name Pyarelal Shridhar Keer @ Pahalwan, aged 50 yrs, a resident of room No.7, Shivram Sadan, Veer Savarkar Marg, Prabhadevi, Mumbai. It is further informed that the said Gurmeet Singh would be coming in a white Maruti car bearing Reg. No. DL-8-CR-0460, in front of ICICI Prudential Bank Building, Veer Savarkar Marg, Prabhadevi, Mumbai-25, at around 11:00 P.M. today i.e. 08.05.2010, to give delivery of Hashish.

The informant further conveyed to the undersigned that he did not wish to claim reward.

Sd/-
[S.K.Sinha]
Intelligence Officer
Narcotics Control Bureau,
Mumbai Zonal Unit, Mumbai.

Place : Mumbai.
Date : 8.05.2010
Time : 19:00 hours.

It is proposed that watch may be kept near ICICI Prudential Bank Building, Veer Savarkar Marg, Prabhadevi, Mumbai – 25 for locating the suspect vehicle for recovery of contraband along with person concerned.

Submitted for necessary Order.

S.K.Sinha
I.O., NCB, Mumbai.

Supdt.

The information is specific. Shri.Davinder Singh I.O. to proceed with other staff and seizure kit to the spot and take appropriate action to intercept the vehicle for recovery of contraband along with concerned persons.

Put up for Orders please Claudius Fernandes.

8.5.10

As proposed

Sd/-

8/5/10.

Careful perusal of document at Exh.31 goes to show that recorded information was placed before P.W.No.6 Mr.Claudius Fernandes, Superintendent of the NCB by P.W.No.1 Shri.Sanjay Sinha. In no unclear words, P.W.No.6 Mr.Claudius Fernandes, who himself, as seen from evidence of the prosecution, was empowered Gazetted Officer had authorized search and seizure to be conducted by P.W.No.2 Davinder Singh. It is further seen that this authorization was also got approved from the Zonal Director of the NCB immediately on 08/05/2010 itself.

8 At the stage of considering the matter from the angle whether *prima faice*, the offence under the N.D.P.S. Act is held to be proved or not, detailed analysis of evidence is not required. Suffice to state that the document at Exhibit 31 *prima faice*, reflects authorization by the empowered Gazetted Officer P.W.No.6 Claudius Fernandes to P.W.No.2 Davinder Singh,

Intelligence Officer of the NCB to effect search and seizure. Admission given by P.W.No.2 Davinder Singh in paragraph 55 of his evidence, will have to be construed in the light of document at Exhibit 31. This witness has admitted that none of the officer from the raiding team had applied for any search warrant or authorization. This statement can not be understood to mean that there was no authorization. What is conveyed by the statement is members of the raiding team, who were P.W.No.2 Davinder Singh, P.W.No.8 Mohammed Shafi Ajhmed Khan and P.W.No.9 Prakash Antony had not applied for authorization. Evidence on record shows that authorization was applied by P.W.No.1 Shri.Sanjay Sinha, who was not the member of the raiding team which had effected search and seizure. As such, no overbearing importance can be given to such admission by construing it out of context. Similar is the evidence of other witnesses and the admissions given by them cannot be construed to mean that there was no authorization for effecting search and seizure.

9 The contraband was concealed in rear door cavities as well as gas-cylinder cavities of the Maruti Car. It cannot be expected in such case to effect recovery on the spot in the wake of concealment of the contraband in the body of the Car. Therefore, at this stage, it would not be proper to infer that the search and seizure become suspect only because the Car was taken to the NCB Office, particularly, when the incident took place at about midnight.

10 The Chemical Analyzer, who was examined by the prosecution is a post-graduate in the Organic Chemistry and his modest admission that he is not expert in the subject would not mean that he has not chemically analyzed the contraband.

11 Most of the arguments were advanced on the subject that the information must be recorded in the Information Register. Evidence on record shows that Information Register was not maintained at the NCB Office. What is maintained is Information-cum-Reward Register when the information was given for claiming reward. My attention is not drawn to any Rule or Statutory provisions which mandates keeping of the Information Register. The same appears to be the Rule of Prudence. Moreover, the effect of not keeping the Information Register will have to be appreciated at the time of final hearing of the appeal.

12 It is seen that accused persons are behind bar from May, 2010. However, nature of crime is also relevant consideration while granting bail. In the case in hand, what was seized was Hashish/Charas weighing about 40 kg., and, therefore, merely because the appellants/accused persons have undergone seven years sentence out of 15 years sentence imposed upon them, they are not entitled for bail.

13 In the light of foregoing discussion, the cited authorities are of no assistance to the applicants at this stage.

14 The applications are, therefore, rejected.

15 Needless to mention that above observations are *prima facie* in nature and shall have no bearing on result of the appeal.

(A.M.BADAR J.)