

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL BAIL APPLICATION NO.851 OF 2018

Smt.Khanisa @ Khairun Parook Sardar .. Applicant
(At present Thane Central Prison)

Vs.

State of Maharashtra .. Respondent

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Mr.P.S. Jain a/w. Mr.S.S. Redkar with Ms.Chandka, Advocate for
the Applicant.
Mrs.G.P. Mulekar, APP for the Respondent – State.
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CORAM : PRAKASH D. NAIK, J.

DATED : SEPTEMBER 19, 2018.

P.C. :

Applicant is arrested on 6th August, 2016, in connection with C.R. No.II-52 of 2016, for the offence punishable under Section 8(c) read with 20(c) with Section 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “NDPS Act”, for short).

2 The case of the prosecution is that on 6th August, 2016, Thane Anti Narcotic Unit received a secret information that the applicant would arrive *via* Vashi-Thane road. Hence trap

was laid at the spot. Maruti Swift Desire vehicle was apprehended along with the applicant and there was recovery of 150 kilogram of Ganja. Applicant was arrested under the provisions of the NDPS Act. Charge-sheet is filed.

3 Applicant preferred an application for bail before the Sessions Court, which was rejected by order dated 17th March, 2017. While rejecting the said application, it was observed that the grounds raised in the application will be considered at the time of trial and that the applicant was found in possession of commercial quantity. It was also observed that the applicant has indulged in similar type of offence while she was enlarged on bail in another offence in accordance with Section 37 of the NDPS Act, the applicant is not entitled for bail.

4 Learned counsel appearing for the applicant submitted that the applicant is in custody from 6th August, 2016. There is violation of Section 42 of the NDPS Act. Search and seizure was carried out after the sunset and in view of that strict compliance of Sections 41 and 42 was required to be adhered to by the investigating agency. It is further submitted that genuineness of the documents relied upon by the prosecution is

doubtful. There is no authorization to conduct the search in accordance with the provisions of Section 42 of the NDPS Act, more particularly, considering the fact that the search was to be carried out after sunset. It is further submitted that the authorization has to be specific. The authorization does not indicate that the investigating officer was permitted to carry out search after the sunset. The documents are fabricated. The information stipulated in the letter dated 6th August, 2016, wherein alleged authorization was granted refers to the car being hired on rental basis, which is apparently disclosed during the investigation and the said fact could not have been reflected in the said document. Thus, the alleged authorization is fabricated. It is further submitted that the compliance of the said provisions is mandatory and it has to be strictly in accordance with the requirement of law. Learned counsel drew my attention to the Sections 41 and 42 of the NDPS Act. It is submitted that the information was received by the police well in advance, which is evident from the alleged information recorded on 6th August, 2016, and, therefore, it was necessary for the investigating machinery to comply the aforesaid provisions. It is submitted that the investigating machinery should have reason to believe that the accused are indulging in narcotic drugs, which should be

reflected in the documents. It is submitted that the provisions of Section 42(1) provides that if the officer has reason to believe that a search warrant or authorization 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 grounds of his belief. It is submitted that in other circumstances, where a prior information is received by the investigating machinery without authorization strictly in accordance with the said provisions, any search carried out by the investigating machinery would be bad in law. Learned counsel relied upon the decision of the Supreme Court of India in the case of ***Darshan Singh Vs. State of Haryana***¹. Reliance is also placed on the decision delivered by this Court in Bail Application No.2138 of 2017 in the case of ***Sunil Dhutiya Vs. State of Maharashtra*** delivered on 14th November, 2017. He also relied upon the decision of the Hon'ble Supreme Court in the case of ***Sarija Banu (A) Janarthani & Ors. Vs. State through Inspector of Police***² delivered in Criminal Appeal No.302 of 2014 and the order passed by this Court in Bail Application No.2108 of 2016 dated 13th June, 2017, in the case of

1 2016(4) SCC 358

2 MANU/SC/0529/2004

Rajaram Kadu Vs. State of Maharashtra.

5 Learned counsel has also pointed out that in the earlier case the applicant has been granted bail by the Sessions Court. In the said case, the applicant was arrested on the basis of the statements of the co-accused and, there is no recovery at her instance. It is also submitted that the applicant is a lady and she has been languishing in jail since last about two years.

6 Learned APP submitted that there is sufficient compliance of the provisions of the NDPS Act. The submissions advanced by the learned counsel for the applicant can be considered during the trial and bail cannot be granted to the applicant by accepting the same at this stage. It is submitted that the applicant was found in possession of about 150 kilogram of Ganja. The applicant is also involved in another case under NDPS Act in which he has been granted bail and while on bail he has committed the offence which is the subject matter of this case. It is submitted that in accordance with Section 37 of NDPS Act, on account of her involvement in this case and also in view of earlier similar offence registered against her, applicant is not entitled for bail. It is further submitted that there is no violation

of Sections 41 and 42 of the NDPS Act. On 6th August, 2016, the information was received by Anti Narcotic Cell Thane, which was recorded in writing. The said information was received at about 11:00 a.m. and it was forwarded to Assistant Commissioner of Police Crime Branch for further directions. It is submitted that the said fact is reflected in the recorded information dated 6th August, 2016. Learned APP further pointed out the documents dated 6th August, 2016, wherein it was mentioned that the accused is likely to arrive with contraband/Ganja to the extent of 150 to 200 kilograms by concealing the same in the dickey of the car and she is likely to sell the same in the area of Mumbra and Kalwa. It is submitted that the said information was forwarded by Senior Inspector of Police and Assistant Commissioner of Police. In support of her submission that, there is compliance of the said provisions, she relied upon the document dated 6th August, 2016, wherein the Assistant Commissioner of Police had considered the information provided to him and directed that appropriate steps in accordance with law while taking all precaution initiated in respect of the information received by the investigating machinery. It is submitted that therefore the investigating machinery has proceeded towards the spot and ganja was recovered from the car. Learned APP also relied upon the

Circular bearing No.BPA 1085/1180/ 81-A(II)/ PRO-1 issued by the Home Department dated 14th November, 1985, in which the State Government had empowered the officers of the Government for the purpose of Sub-section 2 of Section 41 of the NDPS Act. It is submitted that in accordance with the said Circular, all officers of the police department of and above the rank of Inspector of Police posted at any part of the State of Maharashtra are empowered for the purpose of compliance of Sections 41(2) of the NDPS Act. It is submitted that in accordance with the said Circular, the Assistant Commissioner of Police was authorized to give such authorization for the search carried out even after sunset. It is submitted that in view of the above, there is no substance in the submissions advanced by the counsel for the applicant. *Prima facie*, case is made out against the applicant. The submission that the document is fabricated or the same is not genuine is without merits and all submissions advanced by the advocate for the applicant can be agitated during the trial.

7 On perusal of the charge-sheet, it is apparent that the information was received on 6th August, 2016, at about 7:00 p.m., the accused was supposed to arrive *via* Vasai-Thane Vitava Road by car bearing No.MH-01/BT-4503, carrying narcotic drug by

concealing the same in the dicky of the car for the purpose of sale. The information received was recorded by the police inspector. The information also reflects the time when the accused is supposed to arrive with the contraband. The information recorded also bears the endorsement of Senior Inspector of Police Crime Branch Shri U.R. Shelke. The other document dated 6th August, 2016, is a forwarding letter issued by Shri U.R. Shelke to Assistant Commissioner of Police intimating him about the receipt of information. The document also reflects that directions are sought for carrying out or conducting trap and carry out search in accordance with information. The said information also reflect that the applicant is likely to come at about 7:00 p.m. The Assistant Commissioner of Police to whom the information was forwarded was appraised about the receipt of information and the fact that the accused is likely to be arrive after sunset on the same day. In the information forwarded to ACP, it was stated that reliable information regarding arrival of accused with narcotics is received. The details reflected therein shows that the officer had reason to believe about this arrival of accused with contraband. The Assistant Commissioner of Police has responded by directing the investigating authority to take all the precautions and action in accordance with law and to submit

the report in that regard. The submissions of the learned counsel for the applicant that the information which was forwarded to this officer is fabricated, as there is a reference of rented car, is a matter of evidence, which will have to be taken into consideration at the time of trial. The other submissions, that the authorization does not indicate that the search carried out after the sunset and that there is no direct adherence to the said provisions, is also devoid of merit since the information which was forwarded to the ACP gives all the details and he had authorized the officer to take steps in accordance with law. It is also pertinent to note that in view of Circular submitted by learned APP, all officers of police department above the rank of Inspector of Police visited in any part of the State of Maharashtra shall empower to act in accordance with Section 41(2) of the NDPS Act. The decisions relied upon by the learned counsel for the applicant are not applicable in the present case. In the case of ***Darshan Singh (Supra)***, the Court had considered the issue after trial and was dealing with issue relating to compliance of Section 42(1) and (2) of the NDPS Act. The other decisions relied by advocate for applicant are also not applicable in the light of factual aspects of the case. The issues raised are matter of evidence. It is true that the issue regarding non-compliance of Section 42 of NDPS Act,

can be considered at this stage of trial in accordance with the decision of the Supreme Court. However, in view of the factual aspects referred to hereinabove, the submissions advanced by the counsel for the applicant, cannot be considered at this stage. The issue can be agitated at the time of trial. It is also pertinent to note that the applicant is involved in another case in which she was granted bail although she was arrested on the basis of the statement of co-accused, the said proceedings are pending and while on bail, she has committed another offence. Provisions of Section 37 would come into force in view of the involvement of the applicant in the present case and the earlier case pending against her. In pursuant to search carried out and contraband 150 kilograms were recovered. In the circumstances, no case is made out for grant of bail. The application is rejected.

8 At this stage, learned counsel for the applicant submits that the applicant is a lady and she is in custody for a period of about two years. She is a minor child aged about two years and the minor child is with the applicant in the custody. In the circumstances, trial Court is directed to make an endeavour to complete the trial within a period of nine months from today.

9 The observations made in this order are only for considering the present bail application and the trial Court shall not be influenced by the same.

(PRAKASH D. NAIK, J.)