

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

CRIMINAL APPLICATION (BA) NO. 464 of 2020

(Yash @ Sonu s/o Dinkar Pawar and another ..vs.. State of Maharashtra, through its PSO, PS Karanja City)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. R.R. Vyas, Counsel for the applicants,
Mr. Bhagwan M. Lonare, Addl.P.P. for the non-applicant/State.

CORAM : ROHIT B. DEO, J.

DATED : 29-10-2020

Hearing was conducted through video conferencing and the learned Counsel agreed that the audio and visual quality was proper.

2. The applicants are seeking bail in connection with Crime 481/2019 registered with Karanja (City) Police Station, District Washim for offences punishable under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

3. The crime is registered on the basis of report dated 03-11-2019 lodged by Mr. Atul Mohankar, attached to the Local Crime Branch, Washim as Sub-Inspector.

4. The gist of the report is that on 02-11-2019 Sub-Inspector Atul Mohankar received information from his subordinate Assistant Sub-Inspector Bhagwan Gawande

that secret information is received to the effect that between 10-00 p.m. and 11-00 p.m., ganja (marijuana) would be transported in i20 Car bearing registration MH-29/R-7420 and gray Innova vehicle bearing registration MH-03/BJ-7406, which vehicles are proceeding from Nagpur towards Pune.

The secret information was communicated to Police Inspector Shivaji Thakare who in turn communicated the same to the Deputy Superintendent of Police vide written intimation. The superior officers directed that the vehicles be intercepted and the police squad accompanied by panchas set up a barricade at Koli Fata. At 10-30 p.m. the two vehicles were intercepted. The driver of the i20 Car disclosed his name as Yash Dinkar Pawar and the two persons accompanying him disclosed their names as Pritesh Balasaheb Shinde and Mahesh Prakash Parande. A body search and that of the vehicle was taken after due compliance with the provisions of the NDPS Act. Ganja weighing 50 kg. 700 gm. worth Rs.12,67,500/- was recovered from the car.

5. The driver of the Innova car was Vijay Rajendra Shinde and the two persons accompanying were Dnyaneshwar Balasaheb Shinde and Ashutosh Kailash Gaiakwad. Body and vehicle search revealed ganja weighing 49 kg.650 gm. worth Rs.12,41,250/-.

6. The ganja, the cars, certain cash and nine mobile

sets were seized. Samples were taken and the accused were arrested.

7. Mr. R.R. Vyas, learned Counsel fairly states that while the application questions the procedure adopted on the premise that Section 50 of the NDPS Act is violated, in view of the settled legal position, he would not press the said submission, at this stage, and, I am, therefore, not considering the submission that there was a breach of Section 50 of the NDPS Act. Needless to state, the applicants are free to agitate the ground, if so advised, during the course of the trial.

8. Mr. R.R. Vyas would submit that the applicants have made out a case for grant of bail, notwithstanding the rigors of Section 37 of the NDPS Act, since there is a clear breach of the provisions of Section 42 of the NDPS Act.

9. According to Mr. R.R. Vyas, the secret information received by the officer under Section 42 of the NDPS Act is required to be taken down in writing by that officer and then the same needs to be forwarded to the immediate official superior. Perusal of the material on record would reveal that the information was, as a fact, duly taken down in writing by Mr. Bhagwan Gawande who received the information. The information was then conveyed to the informant who in

turn conveyed the information to Police Inspector Mr. Shivaji Thakare and written intimation was given to the Dy. Superintendent of Police (Home). On facts, there is no merit in the submission that there is breach of Section 42 of the NDPS Act.

10. Even otherwise, the Constitution Bench of the Apex Court, in ***Karnail Singh v. State of Haryana, (2009) 8 SCC 539***, has observed thus :

“34. The advent of cellular phones and wireless services in India has assured certain expectation regarding the quality, reliability and usefulness of the instantaneous messages. This technology has taken part in the system of police administration and investigation while growing consensus among the policy makers about it. Now for the last two decades police investigation has gone through a sea change. Law enforcement officials can easily access any information anywhere even when they are on the move and not physically present in the police station or their respective offices. For this change of circumstances, it may not be possible all the time to record the information which is collected through mobile phone communication in the register/ records kept for those purposes in the police station or the respective offices of the authorized officials in the Act if the emergency of the situation so requires. As a result, if the statutory provisions under [Section 41\(2\)](#) and [42\(2\)](#) of the Act of writing down the information is interpreted as a mandatory provision, it will disable the haste of an emergency situation and may turn out to be in vain with regard to the criminal search and seizure. These provisions should not be misused by the wrongdoers/offenders as a major ground for acquittal. Consequently, these provisions should be taken as discretionary measure which should check the misuse of the Act rather than

providing an escape to the hardened drug-peddlers.

35. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of [Sections 42\(1\)](#) and [42\(2\)](#) nor did Sajan Abraham hold that the requirements of [Section 42\(1\)](#) and [42\(2\)](#) need not be fulfilled at all. The effect of the two decisions was as follows :

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of section 42) from any person had to record it in writing in the concerned register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of [section 42\(1\)](#).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of [section 42\(1\)](#) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior .

(c) In other words, the compliance with the requirements of [Sections 42 \(1\)](#) and [42\(2\)](#) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of [section 42](#) is impermissible, delayed compliance with

satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001.”

11. Even if it is assumed that there is some non-compliance, whether the alleged non-compliance vitiates the trial, is a matter which can be looked into after the evidence is recorded since the implication and effect on the trial is a question of fact to be decided on the facts of each case.

12. Section 37 of the NDPS Act reads thus :

“37. Offences to be cognizable and non-bailable –
(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable.

(b) no person accused of an offence punishable for (offence under section 19 or section 24 or section 27-A and also for offences involving commercial quantity) shall be released on bail or on his own bond unless -

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.”

13. Since the quantity seized from the possession of the applicants is a commercial quantity, bail cannot be granted unless the Court is satisfied that there are reasonable grounds for believing that the applicants are not guilty of such offence and that he is not likely to commit any offence while on bail. Section 37 of the Act starts with a non obstante clause and the limitations are in addition to the limitations under the Code of Criminal Procedure, 1973. In ***Union of India v. Rattan Mallik Alias Habul, (2009) 2 SCC 624***, the Apex Court articulates thus :

“12. It is plain from a bare reading of the non-obstante clause in the Section 37 of the NDPS Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the [NDPS Act](#) is not only subject to the limitations imposed under [Section 439](#) of the Code of Criminal

Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub-section (1) of [Section 37](#) of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds."

13. The expression "reasonable grounds" has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. [vide Union of India Vs. Shiv Shanker Kesari²]. Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act."

14. It is difficult, and indeed impossible to record a satisfaction that there are reasonable grounds for believing that the applicants are not guilty of the offence. Since the first condition is not satisfied, the applicants are not entitled to bail.

15. The application is dismissed.

JUDGE

adgokar

**Prafulla
Adgokar**

Digitally signed by
Prafulla Adgokar
Date: 2020.11.02
10:41:41 +0530