

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

BAIL APPLICATION NO.318 OF 2021

Lakhan s/o Deepak Jedhe,
Age 32 years, Occupation Business,
R/o Jedhe Colony, Sangamner
Tq. Sangamner Dist. Ahmednagar.

...Applicant

VERSUS

The State of Maharashtra.

...Respondent

.....
Advocate for Applicant : Mr. C. C. Deshpande
APP for Respondent-State : Mr. N. T. Bhagat

.....

WITH
BAIL APPLICATION NO.149 OF 2021

Jay Yogeshwr @ Yogesh Dagur
@ Dattu Gaikwad,
Age 24 years, Occupation Nil,
R/o Ranjangaon Deshmukh,
Kopargaon Tq. Kopargaon
District Ahmednagar.
At Present In Jail.

...Applicant

VERSUS

The State of Maharashtra,
Through Sangamner Police Station,
Sangamner Tq. Sangamner
District Ahmednagar.

...Respondent

.....
Advocate for Applicant : Mr. N. S. Shah h/f Mr. S. V. Nattu
APP for Respondent-State : Mr. N. T. Bhagat.

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CORAM : SMT.VIBHA KANKANWADI, J.

DATE : 08-04-2021.

ORDER :

1. Both the applicants have been arrested in connection with Crime No.1807 of 2020, dated 21-09-2020, registered with Sangamner City Police Station, Sangamner, District Ahmednagar, for the offence punishable under Section 8 (c), 20(b), 2(c), 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. They both have filed application under Section 439 of the Code of Criminal Procedure.

2. It will not be out of place to mention here that charge-sheet has been filed in the case on 12-11-2020. Further it will not be out of place to mention here that co-accused Vishal Nivrutti Arne and Deepak Suresh Tupsundar, who have been added as accused No.3 and 2 respectively, have been granted bail by this Court under Section 439 of Code of Criminal Procedure on 20-11-2020 and 27-01-2021. These are the factors which are also required to be considered while dealing with these applications.

3. Heard learned Advocate Mr. C. C. Deshpande and learned Advocate Mr. N. S. Shah holding for Advocate Mr. S. V. Natu for applicants, and learned Additional Public Prosecutor Mr. N. T. Bhagat for respondent-State. In order to cut short it is stated that, all of them have made submissions in support of their respective contentions.

4. Perusal of the charge-sheet would show that the First Information Report has been lodged by one Rana Pratapsing Pardeshi, who is serving as Police Sub-Inspector with Sangamner City Police Station. He states that a secret information was received that one person by name Yogesh Gaikwad and his associates have stored Narcotic Drugs at Row House No.4, Lane No.1, Shankar Township, Katariyanagar, Sangamner. After getting that information and completing all the formalities and mandatory requirements, the raiding party went to the said place with panchas. They found accused No.1 Jay Yogeshwar Dagdu Gaikwad at the said place and two persons were also present i.e. accused No.2 and 3. They were offered to have personal search of the raiding party as well as panchas, but they refused and then the search was taken. It is stated that they found dried as well as raw Ganja plant having

leaves, flowers, sticks and seeds. The plant of Ganja worth Rs.6,16,944/- weighing 23 Kilos 160 Gram in two gunny bags 24 Kilos 110 Gram in one separate gunny bag and 6 Kilos 905 Gram in fourth gunny bag was found at that place, therefore all these three persons were arrested, brought to the police station after drawing detailed panchanama by taking certain sample as required.

5. It can be seen that applicant in the Bail Application No.149 of 2021 is accused No.1 Jay Yogeshwar @ Yogesh Dagu @ Dattu Gaikwad, and as aforesaid, the bail applications of accused No.2 and 3 who were also allegedly found at the same place, have been released by this Court. Therefore, the ground of parity is definitely available to the accused No.1 i.e. applicant Jay Yogeshwar @ Yogesh Dagu @ Dattu Gaikwad. We need not then go much about the details though the learned Additional Public Prosecutor has strongly opposed the application. It was tried to be submitted on behalf of the prosecution that even the inventory has been taken under Section 52-A (3) of the Narcotic Drugs and Psychotropic Substances Act, 1985, by learned Chief Judicial Magistrate, Sangamner, and there is ample evidence against the applicant/ accused No.1 to show that he was found possessing the said

contraband. The important point to be noted is that when the charge-sheet has been filed and a copy of the same has been given to the applicant / accused No.1 Jay Yogeshwar Gaikwad, there is absolutely no copy of the report of the Chemical Analyser stating that the seized article is a Narcotic Drugs and, therefore, this Court by order dated 10-03-2021 had called upon the learned Additional Public Prosecutor to take instructions as to whether the learned Special Judge has taken cognizance of the offence or not. This was in view of the fact that the charge-sheet is filed without attaching the Chemical Analysis report. It has been submitted by learned Additional Public Prosecutor that when the charge-sheet was filed on 12-11-2020, the Chemical Analysis report was not received. A kind of explanation which has been tendered by the then Investigating Officer to the learned Additional Public Prosecutor shows that he claims ignorance that without filing Chemical Analysis report the charge-sheet cannot be filed. Learned Additional Public Prosecutor says that Chemical Analysis report has now been received. Here note of the decisions by this Court in *Sunil Vasantrao Phulbande and Another v. State of Maharashtra*, reported in 2002 (3) Mh.L.J. 689, will have to be taken wherein following are the observations : -

"The Charge-sheet / report as contemplated under

Section 173 (5) of the Criminal Procedure Code, forwarded to the Magistrate should be such that on the basis of which Magistrate should be able to proceed further and take cognizance. The documents, which are required to be accompanied with the charge-sheet/ report as contemplated under sub-section (5) of section 173 of the Code, therefore, assume importance, without which charge-sheet / report submitted by the Police under section 173 of the Code would be incomplete and Magistrate also may not be in a position to proceed to take cognizance on the basis of the said report. The concept of filing of charge-sheet by the Police in the Court must fulfil requirement of section 173 (2) and (5) of the Code and it is only after such compliance, report which is filed by the Police in the Court can be construed as complete report under section 173 (2) and (5) of the Code. In a given case, certain documents, which are formal in nature, if not accompanied with the report/ charge-sheet may not change the nature of report/charge-sheet contemplated under section 173 (2) and (5) of the Code particularly when material is sufficient for the Magistrate to take cognizance of the offence as per provisions of the Code. In prosecution for the offences punishable under sections 20, 22 and 25 of the Narcotic Drugs and Psychotropic Substances Act,

1985, the Chemical Analyser's report which was the basis for deciding whether substance which was seized during raid was Ganja or not, which would determine whether provisions of the Narcotic Drugs and Psychotropic Substances Act are attracted or not was not filed with the charge-sheet as filed. The Magistrate in such situation undoubtedly cannot proceed to take cognizance of the offence for want of incomplete charge-sheet/ report and, therefore, the charge-sheet / report which was submitted by the Police in the Court on 4-8-2001 could not be said to be a charge-sheet/ report as contemplated under section 173 (5) of the Criminal Procedure Code. The applicants who were in Police custody for more than 90 days from 24-06-2001 the date of first remand were therefore entitled to be released on bail as prayed by application made on 31-10-2001 since prosecution failed to file charge-sheet/ report within the stipulated period as contemplated under section 167 (2) of the Code."

If this position would have been considered by the learned Special Judge in this case also, he ought to have allowed the application which should have been considered under Section 167 (2) of the Code of Criminal Procedure. Further, recently Hon'ble Supreme Court in, *Fakhrey Alam v. The State of Uttar Pradesh*,

(Criminal Appeal No.319 of 2021 (arising out of SLP (Crl.) No.6181 of 2020), decided on 15-03-2021, it has been noted that,

"The charge-sheet under UAPA Act was filed within 90 days and then a second charge-sheet which is styled as supplementary charge-sheet was thereafter filed. This situation was held as not permissible to defeat the right of default bail under Section 167 (2) of the Code of Criminal Procedure."

The legal position in, *Bikramjit Singh v. State of Punjab*, reported in 2020 (10) Supreme Court Cases 616, has been reiterated and it is observed that,

"We need only emphasize what is already observed in Bikramjit Singh case (supra) that default bail under first proviso of Section 167 (2) of the Cr.P.C. is a fundamental right and not merely a statutory right as it is, a procedure established by law under Article 21 of the Constitution. Thus a fundamental right is granted to an accused person to be released on bail once the conditions of the first proviso to Section 167 (2) of the Cr.P.C. are fulfilled."

6. Thus, it is to be noted that when the Chemical Analysis report itself was not filed, this Court has taken a view in case of *Sunil Vasantrao Phulbhande and Another (Supra)* that the charge-

sheet itself is incomplete and such charge-sheet cannot be said to be a charge-sheet as contemplated under Section 173 (5) of the Criminal Procedure Code so as to enable the Magistrate (herein the Special Judge under 'NDPS Act') to take cognizance of the offence and, therefore, on this ground also applicant Jay Yogeshwar @ Yogesh Dagdu @ Dattu Gaikwad deserves to be released on bail. Here note of another decision by this Court is also required to be taken which is in *Rafael Palafox Garcia v. Union of India and Another*, reported in 2009 (1) Bom.C.R. (Cri.) 411 : 2008 (6) AIR Bom R 709. In this case also Chemical Analysis report was not filed along with the charge-sheet and the stand that was taken that since the Chemical Analysis report was filed much after 90 days period, the applicant was entitled for the default bail, but the facts in that case were slightly different. At the time of seizure of the contraband, the raiding party had taken help of a field test kit and the substance was tested on that field kit which showed positive results, and it was held by this Court that that material on record was sufficient for the Court to take cognizance as at the stage of cognizance only *prima facie* facts are required to be considered. Here in this case, the entire charge-sheet would show that no such field test kit was with the raiding party and there was no testing on the same. It is stated

that only on the basis of smell the informant and the raiding party could come to the conclusion that the said substance is 'Ganja'. It is to be noted that in case of *Sunil Vasantrao Phulbande (Supra)* the Narcotic Drugs that was seized was also 'Ganja' and, therefore, applicant Jay Yogshwar @ Yogesh Dagu @ Dattu Gaikwad deserves to be released on bail.

7. Now turning towards the another bail application filed by Lakhan Deepak Jedhe. His name is not appearing in the First Information Report nor it is stated that he was present at the time of raid. It appears that his name figured out in the interrogation with the co-accused and in the remand report dated 29-09-2020 it was then stated that the applicant sells Ganja in the small quantity. Learned Additional Public Prosecutor strongly submitted that the present applicant was absconding and could be arrested only on 10-02-2021, possibility he getting absconding cannot be ruled out. Further it is submitted that since now the Chemical Analysis report is available showing that the seized article from the place which was raided is 'Ganja', any legal impediment will not be there. The learned Additional Public Prosecutor also submitted that now the supplementary charge-sheet as against the present applicant Lakhan Jedhe is

ready and it would be filed.

8. Important point to be noted is that at this stage there is nothing on record to show as to how many times the police had visited the place of the applicant in order to conclude that he is absconding. Further it appears that he was persuading his relief of grant of anticipatory bail but it was not accepted, under such circumstance, it cannot be said that he was absconding. Further after his arrest this applicant was sent to police custody but nothing has been recovered from him. Under such circumstance, what remains is the only statement made by the co-accused stating that the present applicant sells 'Ganja' in small quantity. Such statement is not admissible in evidence and, therefore, he also deserves to be released on bail. Hence, following order.

ORDER

- 1) Both the applications are hereby allowed.
- 2) Applicants Lakhan s/o Deepak Jedhe (in BA No.318 of 2021) and Jay Yogeshwar @ Yogesh Dagu @ Dattu Gaikwad (in BA No. 149 of 2021) be released on bail in connection with Crime No.1807 of 2020, registered with Sangamner City Police Station,

Taluka Sangamner District Ahmednagar, for the offences punishable under Section 8(c), 20(b), 2(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, on executing P.R. of Rs.30,000/- each (thirty thousand) with one solvent surety in the like amount and on condition that they shall not influence the witnesses in Special Case No.54 of 2020, pending before learned Additional Sessions Judge, Sangamner District Ahmednagar.

3) The above observations are made for deciding of these applications only. The Trial Court shall not get influenced by these observations and may come to independent conclusion during trial.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-