

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

11 BAIL APPLICATION NO.490 OF 2021

1. DONGARSING KHAJAN PAWARA
2. GABBARSING FIRANGYA PAWARA
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Applicants : Mr. Pawar Pawan B.
APP for Respondents/State : Mr. S.P. Sonpawale
...

CORAM : M.G. SEWLIKAR, J.
DATE : 20th September, 2021

PC.:-

Heard.

2. Prosecution case is that the informant got a tip-off that the applicant no.1 had cultivated ganja illegally in Borudi Shivar Eklavya Pada. Thereafter, the informant and the staff raided the said field. On seeing the police party the person in the said field took to his heels. On taking search of the hut, aadhar card in the name of Dongarsing Khajan Pawara (applicant no.1) was found and on inspecting the field plants of ganja were found grown in the field. On inspecting the other fields the police party noticed in the field of applicant no.2-Gabbarsing Firangya Pawara that ganja plants were grown. These ganja plants were uprooted. It weighed 290 kilograms. Price of the

same was Rs.2,00,000/-. This was in the field of Dongarsingh and in the field of Gabbarsingh the total quantity of ganja was of 290 kilograms worth Rs.2,90,000/-. Total ganja plants were worth Rs.5,90,000/-.

3. Learned counsel Shri Pawar for the applicants submitted that charge-sheet has been filed. However, along with the charge-sheet, CA report has not been filed. Learned counsel Shri Pawar submitted that without CA report if charge-sheet is filed, the charge-sheet is incomplete. On the basis of such charge-sheet the Court is not empowered to take cognizance. For this purpose he placed reliance on the Sunil Vasantrao Phulbande and Anr. V/s. State of Maharashtra; 2002 (3) Mh.L.J. 689.

"11. Andhra Pradesh High Court in para (9) of the judgment in Matchumari China Venkatareddy and Ors. v. State of Andhra Pradesh, 1994 Cri.L.J. 257 has observed thus :

"9. Fairness and reasonable procedure is what is contemplated by the expression "procedure established by law" in Art.21 of the Constitution. Section 167(2), Criminal Procedure Code was not there in the old Code. It was introduced in 1973 amendment. The effect of the new proviso is to entitle an accused person to be released on bail if the investigating agency fails to complete the investigation within 60 days or 90 days as the case may be. An order for release of bail made under proviso to Section 167(2) is not defeated by lapse of time, the filing of the charge-sheet or by remand to custody under Section 309(2). The order of bail can only be cancelled under Section 437(5) or 439(2). The duty of the police is to forward the police report after completion of investigation under Section 173(2) Criminal Procedure Code. The forwarding is done

for the purpose of taking the same on record and file of the court and then only, the same is perused by the Court to take cognizance of the offence. Mere forwarding without meaning it to be taken on file is not contemplated under law. If the police report is forwarded to the Magistrate for taking it on file, but if the Magistrate finds that the said report, is not in consonance with Section 173(2) read with Section 173(5) Criminal Procedure Code, he declines to take it on record and that act is only administrative and not judicial. The judicial act commences only when the charge-sheet is in order and the Magistrate proceeds further under Chapter XVI. Unless the charge-sheet is in the official custody of the court together with its accompaniments to be furnished to the accused, it cannot be construed that there is a filing of charge-sheet. Chapter XVI relates to commencement of proceedings before Magistrates, process to be issued when Magistrate takes cognizance of the offence. The next stage is framing of charges under Chapter XVII. Next stage is trial and the eventual being the judgment.

The observations in para (10) of the same judgment are also relevant for the controversy in issue. Those read thus :

".....It is not sufficient for the prosecution to just file some sort of police report not conforming to the provisions of Section 173(2) and 173(5) Criminal Procedure Code and then play fraud not only on the statute but also on the Constitution. This kind of tactics by the police to water down and nullify the constitutional and statutory guarantees cannot be countenanced and in fact, the courts should keep a strict vigil on this kind of unscrupulous acts of officers to get over the constitutional and statutory mandate of filing a charge-sheet within the stipulated time under the guise of filing defective charge-sheet and then knowing fully well that it will be returned. Until a charge-sheet with all specifications enumerated under Section 173(2) Criminal Procedure Code and accompaniments under Section 173(5) Criminal Procedure Code is filed into the court and the court scrutinises it on its administrative side to

satisfy that all such documents are in order and unless the court takes it on record and keeps it on its file for examination for taking cognizance or not, it cannot be said that a police report (charge-sheet) is filed as contemplated under Section 173(2) Criminal Procedure Code. Once the police report is filed, it should be capable of examination for the purpose of judicial determination to take cognizance of the offence and to proceed further into Chapter XVI Criminal Procedure Code and any act short of that cannot be construed as 'taking cognizance'." Similar view is taken by this Court in the case of Sharadchandra Vinayak Dongre and Ors. v. State of Maharashtra, 1991(1) Mh.LJ. 656 = 1991 Cri.L.J. 3329 where it has been observed that incomplete charge-sheet cannot be treated as Police report at all as contemplated under Section 173(2) of the Code.

12. *In the instant case, it is not in dispute that report of Chemical Analyser is the foundation on the basis of which Magistrate can proceed to take cognizance of the offences. The contraband, which is seized in the present case, is Ganja and unless and until sample, which was drawn by the prosecution, conforms with the article, which is seized during investigation, i.e. Ganja, the Magistrate is not in a position to proceed to take cognizance of the offence. The charge-sheet/report as contemplated under Section 173(5) of the 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.”

4. Learned APP Shri Sonpawale had sought time to take instructions as to whether charge-sheet was filed with the CA report or it was filed without CA report. He made a statement today that the charge-sheet was filed without CA report. CA report came to be filed subsequently. In view of this, the applicants are entitled to be released on bail. Hence, the following order is passed:

ORDER

- I) Application is allowed.
- II) Applicants be released on PR bond of Rs.50,000/- each with one solvent surety in the like amount each, in connection with Crime No.72 of 2020 under Section 20 and 22 of the N.D.P.S. Act registered with Shirpur Taluka Police Station, District Dhule and on condition that they shall not leave the jurisdiction of the Court without the permission of the concerned Court.
- III) These observations are made only for the disposal of this application and the learned trial Court shall not get influenced by these observations and can come to its independent conclusion during trial.

[M.G. SEWLIKAR, J.]