

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

917 BAIL APPLICATION NO.676 OF 2021

Popya Demchya Pawara

Age : 25 years, Occu : Labour,

R/o. Pimpri, Tal. Shahada,

Dist. Nandurbar

.. Applicant

Versus

The State of Maharashtra

.. Respondent

...

Advocate for Applicant : Mr. Suniket A. Kulkarni

APP for Respondent – State : Mr. S.D. Ghayal

...

CORAM : M. G. SEWLIKAR, J.

DATE : NOVEMBER 26, 2021

PER COURT : -

1. This is an application under Section 439 of the Code of Criminal Procedure, for releasing the applicant / accused on bail.
2. Heard learned Counsel for the applicant and the learned APP for the respondent/State.
3. It is alleged that the applicant was found to be carrying Ganja of 61 Kg. 137 gram, in plastic gunny bags, in his vehicle bearing No.MH-39/0913. After completion of usual formalities an FIR bearing Crime No. 0959/2020 came to be filed against the applicant with Shahada Police Station for the offences punishable under

Sections 20 and 22 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called as the 'NDPS Act'). The charge-sheet has been filed.

4. Shri. S. A. Kulkarni, learned Counsel for the applicant, submits that incomplete charge-sheet has been filed as CA report was not annexed with the charge-sheet. On the basis of such an incomplete charge-sheet, the Special Court ought not to have taken the cognizance of the offence. He placed reliance on the judgment in the case of **Sunil Vasantrao Phulbande and Anr. V/s. State of Maharashtra** reported in 2002 (3) Mh.L.J. 689, wherein it is held as under : -

"11. Andhra Pradesh High Court in para (9) of the judgment in Matchumari China Venkatareddy and Ors. v. State of Andhra Pradesh, 1994 Cri.LJ. 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 fulfill 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."*

5. Shri. S.D. Ghayal, learned APP, submits that after filing of the charge-sheet CA report has been filed. Now the case is posted for evidence.

6. In view of the judgment of this Court (cited supra), it is clear that filing of charge-sheet without CA report is an incomplete

charge-sheet on the basis of which it is not permissible for the Special Court to take cognizance. Subsequent filing of the charge-sheet does not cure this defect. It remains an incomplete charge-sheet. In this view of the matter, it cannot be said that there is sufficient evidence against the accused for recording conviction. Therefore, the applicant comes out of the rigours of Section 37 of the NDPS Act. The applicant has no criminal antecedents. He will be available for trial.

7. In this view of the matter, the applicant is entitled to be released on bail. Hence, the following order.

ORDER

- (i) The application is allowed.
- (ii) The applicant be released on PR Bond of Rs.15,000/- with one solvent surety in the like amount, in connection with Crime No. 0959/2020 registered with Shahada Police Station for the offences punishable under Sections 20 and 22 of Narcotic Drugs and Psychotropic Substances Act, 1985.
- (iii) The application is disposed of accordingly.
- (iv) It is clarified that the observations made in the above order are restricted to the decision of this application only and the trial Court

shall not get influenced by the same and can come to its independent conclusion during trial.

[M. G. SEWLIKAR]
JUDGE