

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

917 BAIL APPLICATION NO. 1094 OF 2021

SHAIKH SHOE B S/O. SHAIKH MUNEER
VERSUS
THE STATE OF MAHARASHTRA

Shri. P. P. More, Advocate h/f Shri. S. P. Rathod, Advocate for
the applicant
Smt. P. V. Diggikar, APP for the respondent/State

CORAM : M. G. SEWLIKAR, J.
DATED : 22nd OCTOBER, 2021

PER COURT :-

1. Heard.
2. It is the prosecution case that the applicant was found in possession of contraband articles of commercial quantity. It is alleged that the complainant received a tip off that contraband articles were being transported in auto rickshaw No. MH 20 EF 5582. On 2nd February, 2021 at 3.30 a.m. two wheeler Suzuki BURGMAN was noticed. When it was intercepted, the rider on enquiry told his name as Shaikh Shoeb Shaikh Muneer i.e. the applicant. The applicant was having a shoulder bag in which *ganja* was found. The applicant informed the police that the said *ganja* belonged to

accused Bakhtiyar Khan alias Raja Bhayya and he was following the applicant. Soon thereafter the complainant noticed the auto rickshaw. When it was stopped, the occupant in the auto rickshaw started running. When he was caught he told his name as Bakhtiyar Khan Jahangir Khan alias Raja and name of the driver of the auto rickshaw was Shaikh Sharukh Shaikh Samad. On taking search of the auto rickshaw and the bag of the applicant *ganja* weighing 1 quintal 11.70 kilograms was found.

3. Learned counsel Shri. More for the applicant submits that application for default bail was filed before the learned Special Court under Section 167(2) of the Code of Criminal Procedure as alongwith the charge-sheet CA report was not produced. The learned Special Court rejected the application.

4. Learned counsel Shri. More submits that without CA report charge-sheet is incomplete. On the basis of such incomplete charge-sheet cognizance cannot be taken. He further submits that test kit was carried by the raiding party alongwith it but perusal of entire papers of the charge-sheet

does not reveal that the substance was tested by the test kit. He submits that merely carrying the test kit with it by the raiding party does not exempt the investigating authority to produce the CA report. Therefore, there is total non compliance and therefore, the applicant is entitled to be released on bail. He also made submissions on merits as the application for bail was rejected by the Special Court after filing of charge-sheet. He placed reliance on the case of ***Sunil Vasantrao Phulbande and another Vs. State of Maharashtra*** reported in ***2002(3) Mh.L.J. 689***.

5. Learned APP Smt. Diggikar submits that mere non filing of CA report does not render the charge-sheet incomplete. For this purpose she placed reliance on the case of ***Saharath V.P. Vs. State of Kerala*** in ***Bail Application No. 4070 of 2020*** decided on ***21st October, 2020***. She also admits that there is nothing on record to indicate that substance was actually tested on test kit.

6. Admittedly, alongwith charge-sheet CA report was not filed. On perusal of the entire papers alongwith the

charge-sheet it reveals that test kit was carried by the raiding party alongwith it. However, papers do not show that the raiding party took pains in testing the substance. Charge-sheet, therefore, still remains incomplete. In the case of ***Sunil Vasantrao Phulbande and another Vs. State of Maharashtra*** reported in ***2002(3) Mh.L.J. 689***. It reads thus:

“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.

13. It is true that in the 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. However, in the instant case, the Chemical Analyser's report is the basis for deciding whether substance which is seized during raid is Ganja or not, which would determine whether provisions of the Narcotic Drugs and Psychotropic Substances Act are attracted or not. The Magistrate in such situation undoubtedly cannot proceed to take cognizance of the offence for want of complete charge-sheet/report and therefore, in the present case, the charge-sheet/report which is submitted by the Police in the Court on 4-8-2001 cannot be said to be a charge-sheet/report as contemplated under section 173(5) of the code.

14. There is another dimension of the issue in question. In the given set of circumstances, Police may submit a charge-sheet in the Court though incomplete, but within a stipulated period as contemplated under section 167(2) of the Code, i.e. sixty days or ninety days, if all the relevant documents are filed in the Court as contemplated under section 173(5) of the Code, in that event, the accused cannot seek bail in view of provisions of section 167(2) of the Code. However, in the instant case, Chemical Analyser's report was filed in the Court beyond the period of ninety days, i.e. on 9-11-2001 and, therefore, prosecution in the present case cannot take any advantage in this regard. It is needless to mention that if the Police fails to file charge-sheet/report contemplated under section 173 of the Code within the stipulated period

of sixty days or ninety days, a right is accrued to the accused to seek release on bail and Courts in such situation are expected to dispose of such applications forthwith granting time to prosecution to fill up the lacuna.”

7. This Court also (Coram-M.G. Swelkar, J.) has taken the view that submission of charge-sheet without CA report is incomplete charge-sheet and congiance of it cannot be taken on the basis of such incomplete charge-sheet.

8. So far as test kit is concerned in the case of *Rafael Palafox Garcia Vs. Union of India and Another* reported in *2009(1) Bom.C.R. (Cri.) 411:2008 (6) AIR Bom R. 709*. CA report was not filed. The raiding party had carried with it a field test kit and the substance was tested on that field kit which showed positive results. As stated earlier merely carrying field test kit is not enough. Prosecution must bring on record that the substance which was found in the possession of the applicant was infact tested and the results were positive. No such exercise seems to have been done by the raiding party. Therefore, this Court does not have any alternative but to hold that the charge-sheet was incomplete and on the basis of such incomplete charge-sheet no

cognizance can be taken. In this view of the matter, following order is passed.

ORDER

1. Application is allowed.
2. Applicant be released on bail on his furnishing PR bond of Rs. 50,000/- (Rupees Fifty Thousand only) with one solvent surety in the like amount in connection with CR No. 31 of 2021 under Sections 8(c), 20(b)(ii)(c), 29 of the NDPS Act registered with MIDC CIDCO Police Station, Dist. Aurangabad.
3. Application is disposed of.
4. 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, J.]

ssp