

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

945 BAIL APPLICATION NO.1256 OF 2021

1. Bakhtuyarkhan @ Raja S/o. Jahangirkhan
Age: 35 years, Occu.: Scarab Contractor,
R/o. Kiradpura, Sharif Clony, Tq. and
District Aurangabad.
2. Shaikh Parvez @ Shaharukh Shaikh Samad
Age: 23 years, Occu.: Driver,
R/o. Jama Majjid, Town Hall, Ashefiya Colony,
Aurangabad, Tq. and District – Aurangabad.
(At present in Central Jail Aurangabad) ..Applicants

VERSUS

- . State of Maharashtra through
Police Station MIDC Cidco,
Aurangabad City, Aurangabad. ..Respondent

...
Advocate for Applicants :Shri Sandip P. Rathod
APP for Respondent : Shri V.M.Kagne

...
CORAM : M.G.SEWLIKAR, J.

DATE: 16th November, 2021

PER COURT :-

1. This is an application under Section 439 of the Code of Criminal Procedure for releasing the applicants on bail in connection with Crime No.31 of 2021, registered with MIDC Cidco Police Station, Dist.Aurangabad, under Sections 8(c), 20(b)((ii)(c), 29 of the Narcotic Drugs and Psychotropic Substances (NDPS) Act.
2. It is alleged that applicant No.1 was found possessing

contraband articles of commercial quantity. Applicant No.2 is Auto Rikshaw Driver in whose Auto applicant No.1 was carrying contraband articles. It is alleged that contraband articles were being transported in Auto Rikshaw No.MH-20 EF-5582. On 2nd February, 2021 at 03:30 a.m. the raiding party noticed a person riding a two wheeler Suzuki Burgman. On interception, the rider told his name as Shaikh Shoyab Shaikh Munir. Shaikh Shoyab was having a bag in which Ganja was found. Shaikh Shoyab disclosed that this Ganja belongs to Bakhtiyar Khan @ Raja Bhaiya, the applicant No.1. The Auto in which applicant No.1 was travelling was noticed by raiding party. When Auto was stopped, applicant No.1, who was sitting in Auto started running. On arrest, he told his name as Bakhtiyar Khan @ Raja Bhaiya i.e. applicant No.1. On taking search of Auto and the bag of Shaikh Shoyab, Ganja weighing 1 Quintal 11 Kilo and 70 Grams was found. Applicant No.2 was driving the Auto.

3. Heard Shri S.P.Rathod, learned counsel for the applicants and Shri V.M.Kagne, learned APP for the respondent-State.

4. Shri S.P.Rathod, learned counsel for the applicants submits that accused Shaikh Shoyab Shaikh Munir has been released on bail by this Court. He submits that alongwith charge-sheet, CA report was not filed. He placed reliance on the case of **Sunil**

**Vasantrao Phulbande and another Vs. State of Maharashtra
[2002(3) Mh.L.J. 689].**

5. Shri V.M.Kagne, learned APP for the respondent-State opposed the application.

6. Admittedly, alongwith charge-sheet CA report was not filed. On perusal of the charge-sheet, it reveals that test kit was carried by raiding party alongwith it. However, papers do not show that the raiding party had tested the substance. Charge-sheet, therefore, is incomplete. In the case of **Sunil Vasantrao Phulbande** (supra) following observations are made:

"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 (Coram : M.G.Sewlikar, J.) has also taken the view that submission of charge-sheet without CA report is incomplete charge-sheet and cognizance of it cannot be taken on the basis of such incomplete charge-sheet.

8. So far as test kit is concerned, Shri Kagne, learned APP for the respondent submits that raiding party had carried test kit

with it. However, the raiding party had simply carried with it a field test kit but there is no evidence to show that substance was tested on that field test kit to show positive results. Merely carrying field test kit while raiding 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. Admittedly, CA report is not filed. Having regard to this, I am inclined to release the applicants on bail. Hence, order :

ORDER

- i) Application is allowed.
- ii) Each of the Applicants be released on bail on their furnishing P.R.Bond of Rs.50,000/- (Rs.Fifty thousand only) with one solvent surety in the like amount, in connection with Crime No.31 of 2021, registered with MIDC Cidco Police Station, District Aurangabad, under Sections 8(c), 20(b)(ii) (c), 29 of the NDPS Act.
- iii) Application is disposed of.
- 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**