

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

BAIL APPLICATION NO.1360 OF 2022

Shaikh Akil s/o Shaikh Latif

... APPLICANT

VERSUS

The State of Maharashtra

... RESPONDENT

.....
Mr. Mohd. Sharif Latif, Advocate for applicant
Mr. N.T. Bhagat, A.P.P. for respondent – State
.....

CORAM : R. G. AVACHAT, J.

Date of reserving order : 30th September, 2022

Date of pronouncing order : 6th October , 2022

ORDER :

Heard. This is an application for bail under Section 439 of the Code of Criminal Procedure. The applicant has been arrested in connection with Crime No.140/2021, registered at Bhusawal Bazarpeth Police Station, District Jalgaon for the offence punishable under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (N.D.P.S. Act for short).

2. The First Information Report (F.I.R.) has been

lodged by Assistant Police Inspector attached to Bhusawal Bazarpath Police Station on 3/4/2021. It is averred in the F.I.R. that, the Sub-Divisional Police Officer (S.D.P.O.), Bhusawal has received a tip-off on 3/4/2021 that two Ashok Layland Trucks (Nos.GJ-05-BU-0177 and GJ-05-BT-5155) were carrying contraband 'Ganja'. The S.D.P.O., therefore, asked the Assistant Superintendent of Police and other police staff to intercept those trucks and effect a raid. The concerned police officer, therefore, made a station diary entry in that regard. A copy thereof was forwarded to the S.D.P.O. with a request for grant of permission to effect the raid. Presence of two Government officials was secured to act as panch witnesses. All the arrangements of trap and seizure were made. The trap party reached near Nahata Chaufuli on Khadka-Jalgaon Road. It was about 3.35 a.m. Both the trucks were seen approaching. Those trucks were, therefore, intercepted. The applicant was driver on one of the trucks. There were in all three persons including the driver on the another truck. The Assistant Superintendent of Police gave them notice under Section 50 of the N.D.P.S. Act. They declined to be searched in presence of Executive Magistrate. A search of the truck was made. It was found that, watermelons were being transported in the truck. On further

search, it was found that, below the watermelons, there were 14 packets in each truck. The packets contained contraband Ganja. Samples of Ganja from each of the packet were separated in requisite quantity for analysis. A seizure panchanama was drawn. Statements of persons acquainted with the facts and circumstances of the case were recorded. The C.A. report indicates the seized contraband was Ganja. The total ganja seized from both the trucks was more than commercial quantity.

3. Learned counsel for the applicant would submit that, the applicant was a driver. He did not know what was being transported in the truck besides watermelons. The applicant, therefore, cannot be even prima facie observed to have been in conscious possession of the contraband. He would further submit that, the entire Ganja was not made homogeneous. Samples of requisite Ganja was not obtained. As such, there is breach of the Standing Order No.1/1989. Regarding search, seizure of the contraband, the learned counsel would further submit that there is non-compliance of Section 42 or 50 of the N.D.P.S. Act. Compliance of Sections mandatory. He relies on the judgment of the Apex Court in case of **Vijaysinh Chandubha Jadeja Vs. State of Gujarat**

reported in **(2011) 1 SCC 609**. The learned counsel ultimately urged for grant of the bail application.

4. The learned A.P.P. would, on the other hand, submit that, there is station diary entry to indicate compliance of Section 42 of the N.D.P.S. Act. The search of the person of the applicant was not undertaken, non-compliance of Section 50 of the N.D.P.S. Act, if any, has, therefore, no relevance. The learned A.P.P. drew attention of this Court to the seizure panchanama to indicate compliance of the Standing Order 1/1989. According to him, since such contraband was more than commercial quantity, rigours of Section 37 of the N.D.P.S. Act would disentitle the applicant for grant of bail.

5. Perused the F.I.R. and the related police papers of investigation. The charge sheet has been filed. The applicant was a driver on the truck, wherein the Ganja was found. There were watermelons in the truck. The Ganja packets were concealed below the heap of watermelons. The seizure panchanama indicates the seized contraband was of more than commercial quantity. Section 37 of the N.D.P.S. Act, therefore, gets attracted.

6. As per the case of the prosecution, Ganja belonged to accused No.4 namely Hamid Palangwala, resident of Bhusawal. It was being transported to Surat. The applicant has been arrested on 3/4/2021. As such, he is in jail for little over one and a half year. The roznama of the proceeding indicates that, almost on all the dates the applicant was not produced before the trial Court. The charge has even not been framed.

7. So far as regards Section 42 of the N.D.P.S. Act is concerned, it is to be stated that, the secret information/ tip-off was received by the S.D.P.O. Let us first have a glance at the provisions of Section 42.

42. Power of entry, search, seizure and arrest without warrant or authorisation.— (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal

knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset, —

- (a) enter into and search any such building, conveyance or place;
- (b) in case of resistance, break open any door and remove any obstacle to such entry;
- (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act; and
- (d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of holder of a licence for

manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.”

8. In the case in hand, the secret information was received by the S.D.P.O. he immediately called upon his subordinate and directed to effect the raid. The concerned subordinate, in turn, made a station diary entry regarding the tip-off shared with him by the S.D.P.O. There is another station diary entry to indicate that the same was communicated to the very S.D.P.O. with a request to grant permission for effecting raid. The question is, whether this amounts to compliance of Section 42 of the N.D.P.S. Act.

9. In view of this Court, when the tip-off was

received by the S.D.P.O., it should have been reduced into writing by himself and copy thereof should have been submitted to his higher-up namely the Superintendent of Police. The same has not been done. In view of this Court, therefore, it is a case of non-compliance of mandatory provisions of Section 42 of the N.D.P.S. Act. These are the observations made as regards hearing of the application for bail. These observations are, therefore, prima facie in nature. The trial Court shall not be influenced thereby and shall decide the issue on its own merits. Suffice it to say, since this Court is of the prima facie view of it being a case of non-compliance or irregular compliance of Section 42 of the N.D.P.S. Act, the Court is inclined to grant the application. Hence the order :

ORDER

- (i) The Bail Application is allowed.

- (ii) The applicant be released on bail in connection with Crime No.140/2021, registered at Bhusawal Bazarpeth Police Station, District Jalgaon for the offence punishable under Sections 20 and 29 of the Narcotic Drugs and Psychotropic

Substances Act, 1985 on his executing P.R. bond in the sum of Rs.15,000/- (Rupees fifteen thousand) with one surety in the like amount.

(iii) The applicant shall not tamper with the prosecution evidence.

(R. G. AVACHAT, J.)

fmp/-