

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.106 OF 2022**

Ashutosh Anant Pature	...	Applicant
versus		
Panvel Taluka Police Station and Anr.	...	Respondents

Mr. Francis E. Saldanha, for Applicant.
Ms. P.N.Dabholkar, APP, for State.

CORAM: N.J.JAMADAR, J.

RESERVED ON	: 8th JULY, 2022
PRONOUNCED ON	: 29th JULY, 2022

P.C.

1. The Applicant who is arraigned in C.R.No.115 of 2021 registered with Panvel Taluka Police Station for the offences punishable under Sections 20(b)(ii)(C) read with Section 8(c) and Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act) has preferred this Application for bail.

2. Shorn of unnecessary details, the indictment against the Applicant runs as under :

On 26th March, 2021 pursuant to an intimation, Panvel Taluka Police intercepted a Innova Car bearing registration No.MH-04/CJ 9363 which was on its way to Mumbai in front of the main gate of J&K Lifters Pvt. Ltd., within the limits of Mauje Kon, on Pune Mumbai Express Way, Panvel By-pass road. The Applicant was at the wheel of the said car. After compliance with the provisions contained in the

NDPS Act in the presence of two public witnesses, a search of the vehicle was conducted. In 10 white bags, flowering or fruiting tops of the cannabis plant and seeds and leaves accompanied by the flowering or fruiting tops were found. Those bags were weighed. Each bag contained 20 kgs of ganja. Those bags containing 200 kgs ganja were found concealed beneath back seat of the said car. The contraband articles were seized. Samples were collected. The Applicant and the co-accused Asif Abdul Memon, who was also found in the said car, were arrested. Post completion of investigation, charge sheet has been lodged against the Applicant and the co-accused Asif Abdul Memon.

3. The Applicant preferred an Application for bail before the learned Special Judge. By an order dated 6th December, 2021, the learned Special Judge was persuaded to reject the Application opining inter alia that the interdict contained in Section 37 of the NDPS Act, came into play as there was material to show that in the trap the Applicant and the co-accused were found in possession of commercial quantity of ganja.

4. The Applicant has preferred this Application on the grounds that there is non-compliance of the provisions contained in Section 42 of the NDPS Act. Secondly, the mandate of Section 50 has not been complied with, in letter and spirit. Thirdly, the Applicant being a driver, who was deputing for a regular driver, was wholly unaware of the contraband articles being transported in the said car and, thus,

there was a complete absence of culpable mental state and, therefore, the presumption under Section 35 of the NDPS Act, was not prima facie attracted. Therefore, the Applicant deserves to be released on bail.

5. I have heard Mr. Saldanha, learned Advocate for the Applicant and Ms. Dabholkar, learned APP appearing for the State at some length. With the assistance of the learned Advocates for the parties, I have perused the material on record.

6. The learned Advocate for the Applicant made an endeavour to draw home the point that the Applicant was totally unaware of the contents of the bags which were kept and transported in the car. Since the Applicant is admittedly not the owner of the said car, the Applicant could not have been fastened with the knowledge of the contraband articles being transported in the car, for the mere reason that the Applicant was driving the car.

7. I find it rather difficult to accede to the aforesaid submission. Prima facie, there is material to show that as many as 10 bags containing 200 kgs of ganja were seized from the said car which the Applicant was allegedly driving. The sheer quantity of the contraband allegedly seized from the car renders the claim on behalf of the Applicant that he was totally unaware of the contents of the bags, being transported in the said car, prima facie, unworthy of acceptance as it does not appeal to human credulity that the Applicant who had allegedly carried the said articles from Solapur District had not known the contents of those bags. Mr. Saldanha attempted to

salvage the position by canvassing a submission that since the incident occurred during the pandemic the Applicant was wearing a mask and, therefore, he could not even smell the contraband. The explanation, prima facie, is too good to be believed.

8. The further submission of Mr. Saldanha that there is no material to show that the Applicant is the owner of the vehicle wherein contraband was found, also does not advance the cause of the Applicant. What has to be considered is whether there is prima facie material to show conscious possession of the contraband articles. If a contraband is found in a vehicle which, in turn, was found in the control of a person, the prosecution is not obligated to further establish that the said person is the owner of the said vehicle. On first principles, to bring home the charge for the offences punishable under the NDPS Act, where the contraband is seized from the vehicle, the ownership of the vehicle is not required to be established and proved.

9. A useful reference in this context can be made to a three Judge Bench Judgment of the Supreme Court in the case of *Rizwan Khan V/s. State of Chhattisgarh*¹.

Paragraph No.17 of the said judgment reads as under :

“17. Now so far as the submission on behalf of the accused that the ownership of the motorcycle (vehicle) has not been established and proved and/or that the vehicle has not been recovered is concerned, it is required to be noted that in the present case the appellant and the other accused persons were found on the plot with the contraband articles in the vehicle. To prove the case under the NDPS Act, the ownership of the vehicle is not required to be established and proved. It is enough to establish and prove

1 (2020) 9 SCC 627

that the contraband articles were found from the accused from the vehicle purchased by the accused. Ownership of the vehicle is immaterial. What is required to be established and proved is the recovery of the contraband articles and the commission of an offence under the NDPS Act. Therefore, merely because the ownership of the vehicle is not established and proved and/or the vehicle is not recovered subsequently, trial is not vitiated, while the prosecution has been successful in proving and establishing the recovery of the contraband articles from the accused on the spot.”

10. The ground of non-compliance of the provisions contained in Section 42 of the NDPS Act, sought to be urged on behalf of the Applicant does not seem to be prima facie, sustainable. There is adequate material to show that the Police Officer who had received the information had made a record thereof, in the NDPS Crime Information Book and brought the same to the notice of the Senior Police Inspector along with the extract thereof. The Senior Inspector of Police, Crime Branch, Unit II, Navi Mumbai, gave intimation thereof to the Assistant Commissioner of Police along with a copy of the extract of the Information Book. Thereupon, the Assistant Commissioner of Police seems to have given directions to conduct the raid and take necessary action. Thereafter, trap seems to have been laid. Copies of the relevant records are annexed to the report under Section 173 of the Code of Criminal Procedure, 1973. I am, therefore, not persuaded to accede to the submission on behalf of the Applicant that there was non-compliance of the provisions contained in section 42(1) and (2) of the NDPS Act.

11. The challenge to the non-compliance of the provisions contained in Section 50 of the NDPS Act, was sought to be urged on the premise that the Applicant was not communicated his right to be taken before the nearest Magistrate and searched before the Magistrate.

12. It is pertinent to note that the contraband articles have not been recovered in the personal search of the Applicant, but in the search of the vehicle which the Applicant was driving at the time of the alleged occurrence.

13. It is well recognized that compliance of Section 50 of the NDPS Act is imperative in case of, and confined to “personal search”. Section 50 does not cover the cases of seizure of contraband material in the search of a vehicle or container or the premises. A useful reference in this context can be made to a recent three Judge Bench Judgment of the Supreme Court in the case of State of Punjab V/s. Baljinder Singh and Anr.² In somewhat similar fact situation, the following question was considered by the Supreme Court :

“8 The question that arises in the matter is :

If a person found to be in possession of a vehicle containing contraband is subjected to personal search, which may not be in conformity with the requirements under Section 50 of the Act; but

the search of the vehicle results in recovery of contraband material, which stands proved independently;

would the accused be entitled to benefit of acquittal on the ground of non-compliance of Section 50 of the Act even in respect of material found

2 (2019) 10 SCC 473

in the search of the vehicle ?”

14. After adverting to the previous pronouncements including the judgment of the Constitution Bench in the case of State of Punjab V/s. Baldev Singh³ the Supreme Court enunciated the law as under :

“17. In the instant case, the personal search of the accused did not result in recovery of any contraband. Even if there was any such recovery, the same could not be relied upon for want of compliance of the requirements of Section 50 of the Act. But the search of the vehicle and recovery of contraband pursuant thereto having stood proved, merely because there was non-compliance of Section 50 of the Act as far as ‘personal search’ was concerned, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle. Any such idea would be directly in the teeth of conclusion (3) as aforesaid.

18.....

19. Since in the present matter, seven bags of poppy husk each weighing 34 kg were found from the vehicle which was being driven by accused Baljinder Singh with the other accused accompanying him, their presence and possession of the contraband material stood completely established.”

15. Even otherwise, the contention on behalf of the Applicant that the Applicant was not informed of his right to be searched in the presence of a Gazetted Officer or a Magistrate, appears to be, prima facie, against the weight of the material on record. The Panchanama dated 25th March, 2021 records that the Applicant and the co-accused were duly informed of their right to be searched in the presence of a

3 (1999) 6 SCC 172

gazetted officer or a Magistrate and the intimation was given in writing. A copy of the intimation whereby the Applicant and the co-accused were apprised of the said right, is placed on record. It shows that the Applicant and the co-accused had duly acknowledged the receipt of the said intimation. The said intimation appears to have been signed by the public witnesses as well. Prima facie, the submission on behalf of the Applicant regarding the non-compliance of the mandatory provisions contained in Section 50 of the NDPS Act, does not seem to have been borne out by the record.

16. The situation which, thus, emerges is that there is prima facie material on record to show that the Applicant was found in possession of commercial quantity of ganja. The interdict contained in Section 37 of the NDPS Act comes into play. In the circumstances of the case it cannot be said that, prima facie, there are reasonable grounds for believing that the Applicant is not guilty of the offences for which he is arraigned. For the foregoing reasons, I am inclined to hold that the Applicant does not deserve to be released on bail.

17. Before parting, it must be noted that the learned Advocate for the Applicant invited the attention of the Court to the order dated 9th June, 2022 passed in Criminal Application No.950 of 2021, whereby the co-accused-Applicant therein, came to be enlarged on default bail under Section 167(2) of the Code of Criminal Procedure, 1973 read with Section 36-A of the NDPS Act.

18. The said order came to be passed as the Applicant therein had acquired

an infeasible right to be released on bail on account of default on the part of the investigating agency in lodging the charge sheet and the Special Judge had erred in extending the period for completing investigation for want of CA report. This Court had, thus, set aside the order granting extension of time to complete the investigation. In all fairness to the learned Advocate for the Applicant, it needs to be recorded that the Applicant in this Application has not sought default bail. Therefore, the aforesaid order is of no avail to the Applicant. Yet, it is clarified that, the rejection of this application on merit will not bear upon the Applicant's claim for 'default bail', if he is otherwise entitled for default bail.

19. Hence, the following order :

ORDER

- (i) The Application stands rejected.
- (ii) By way of abundant caution, it is clarified that the observations made hereinabove are confined to the consideration of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the co-accused.

(N.J.JAMADAR, J.)