

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.951 OF 2022**

Santosh Apposo Naik ... Applicant
versus
The State of Maharashtra ... Respondent

Mr. Vikrant Desai with Mr. S.M.Kamble i/by Mr. Asggar Kalim Ansari,
for Applicant.
Mr. R.M.Pethe, APP, for State.

CORAM: N.J.JAMADAR, J.

**RESERVED ON : 11th MAY, 2022
PRONOUNCED ON : 13TH MAY, 2022
(VACATION COURT)**

P.C.

1. The Applicant who is arraigned in NDPS Special Case No.1187 of 2021 arising out of C.R.No.30 of 2021, registered with Anti Narcotic Cell, Mumbai, for the offences punishable under Sections 20(C) read with Section 8(C) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act'), has preferred this Application to enlarge him on bail.

2. The indictment against the Applicant can be summarised as under :

On 7th April, 2021, pursuant to the directions of the superior officer to trace out the absconding accused and initiate action against the persons who were consuming and peddling

drugs, a team of ANC Kandivali Unit reached near Nirmal Rubber and Board factory compound, Goregaon (East), Mumbai. A white Hyundai Accent Car bearing Registration No.MH-04/JK-3508 was found parked thereat, with parking lights on. The Applicant came out of the said car with a green sack bag. As his movements appeared suspicious, the members of the police party approached him. The Applicant tried to flee away. The Applicant was apprehended. In the meanwhile, the co-accused also attempted to take out a white gunny bag from the car. The co-accused was also apprehended. As the Applicant and the co-accused gave evasive answers about the contents of those bags, a search was conducted in the presence of the public witnesses. The bag which the Applicant was carrying, contained 26 kilo Ganja. Whereas, 8 kilo Ganja was found in the bag of the co-accused. Incriminating articles were seized. Samples were collected. The accused came to be arrested. Samples were sent for analysis. After completion of the investigation, charge sheet came to be lodged against the Applicant and the co-accused for the offences punishable under Sections 20(C) read with Section 8(C) and 29 of the NDPS Act.

3. The Applicant preferred an Application for bail before the learned Special Judge (NDPS). By an order dated 19th January,

2022, the learned Judge rejected the Application, an opining, inter alia, that the Applicant was found in conscious possession of contraband material in commercial quantity. The interdict contained in Section 37 of the NDPS Act, against the grant of bail was attracted. Hence, the Applicant was not entitled to be released on bail. The Applicant has, thus, preferred this Application seeking bail.

4. I have heard Mr. Vikrant Desai, learned Counsel for the Applicant and Mr. Pethe, learned APP, for the State at some length. With the assistance of the learned Counsel for the parties, I have also perused the report under Section 173 of the Code of Criminal Procedure, 1973 and the documents annexed with it.

5. The learned Counsel for the Applicant advanced a two-pronged submission. First, the finding recorded by the Special Judge that the Applicant was found in possession of Ganja in commercial quantity, is unsustainable. It was submitted that the material allegedly seized from the possession of the Applicant, in its entirety, does not fall within the definition of Ganja contained in Section 2(iii) (b) of the NDPS Act. Laying emphasis on the report of the Forensic Science Laboratory dated 7th September, 2021, which indicates that the articles forwarded for analysis, contained flowering / fruiting tops, leaves, seeds and stalks, Mr. Desai would urge that in the

absence of material to demonstrate that the flowering or fruiting tops were of commercial quantity, the charge against the Applicant becomes unsustainable.

6. Secondly, it was urged that there is a clear non-compliance with the provisions contained in Sections 42 and 50 of the NDPS Act. In view of the aforesaid infirmity, it cannot be said that the interdict contained in Section 37 of the NDPS Act, comes into play and, therefore, the Applicant deserves to be enlarged on bail, urged Mr. Desai.

7. In opposition to this, Mr. Pethe, learned APP submitted that both the grounds sought to be urged on behalf of the Applicant, are neither well-grounded in facts nor sound in law. It was submitted that the challenge to the prosecution on the count that there is no distinct quantification of the flowering or fruiting tops, so as to fall within the ambit of the definition of Ganja under Sections 2(iii)(b) of the NDPS Act, is wholly misconceived.

8. Secondly, non-compliance of the statutory requirements under Sections 42 and 50 of the NDPS Act, sought to be urged on behalf of the Applicant, according to Mr. Pethe, also does not merit countenance, as it was a case of chance recovery in the course of routine patrolling exercise. Thus, as the bar under Section 37 of the

NDPS Act, was clearly attracted, the learned Special Judge committed no error in rejecting the prayer for bail, submitted Mr. Pethe.

9. Section 2(iii) (b) and (c) of the NDPS Act, reads thus :

“(iii) “Cannabis (hemp)” means -

(a).....

(b) ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever, name they may be known or designated; and

(c) any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom;”

10. From the text of the aforesaid provisions, it becomes explicitly clear that the essence of ganja is in flowering or fruiting top of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops). It implies that if the seeds and leaves are accompanied by the tops, the former form of the fruiting tops, and are excluded only when they are not accompanied by the tops. It all turns upon the question as to whether the seeds and leaves were accompanied by the flowering or fruiting tops of the cannabis plant.

11. In the aforesaid context, reverting to the facts of the

case, especially the seizure panchanama, it becomes evident that in the packets found in the bag which the Applicant was carrying, there were flowering or fruiting tops of the cannabis plant along with the stalks and seeds, as a whole.

12. Undoubtedly, the FSL report dated 27th September, 2021 indicates that the articles sent for analysis, included the flowering and fruiting tops, leaves, seeds and stalks and the analysis revealed that those articles were ganja, falling under Section 2(iii) (b) of the NDPS Act. Evidently, what were seized and sent for analysis, were flowering or fruiting tops, leaves, seeds and stalks. In the face of aforesaid material, at this juncture, it would be difficult to draw an inference that the seeds and leaves which were seized and sent for analysis, were not accompanied by the flowering or fruiting tops.

13. The learned Counsel for the Applicant placed reliance on an order passed by this Court in the case of Laxman Shankar Ghankute V/s. The State of Maharashtra¹ to bolster up the submission that in the absence of independent quantification of the flowering tops, it would be doubtful whether the quantity seized from the accused, was commercial one.

14. The aforesaid order indicates that cannabis plants were

1 Criminal Bail Application No.2583 of 2019 dated 23rd June, 2021

seized from the fields. The result of analysis should that the seized crop was of cannabis plant. Evidently, what was seized by the police was only the plants and there was no quantification of the flowering tops. In that backdrop, it was observed that it was doubtful whether the quantity which was seized from the Applicant therein, in such circumstances, be said to be commercial one. It was further noted that no ganja was found in the chemical analysis. Noting that there was no separate record/document to show the quantity of the flowering plants and, therefore, it was doubtful whether the offence would fall in clause (b) of Section 20 of the NDPS Act, the accused was ordered to be released.

15. Evidently, the aforesaid order turned on its own facts. It was a case where the flowering tops were not at all seized. The police claimed to have seized only the plants. In that view of the matter, a doubt was expressed as to whether the offence would fall under clause (b) of Section 20 of the NDPS Act.

16. The facts of the case at hand, are quite distinct. The seizure panchanama expressly records that flowering or fruiting tops of the cannabis plant, were found along with the leaves, seeds and stalks, as a whole. The report of the FSL lends further support to the prosecution case.

17. Mr. Desai banked upon another order of this Court passed in the case of *Hari Mahadu Valse V/s. The State of Maharashtra*², wherein the following observations were made :

“4. The Panchanama prima facie reveals that the seized material contained green leaves, flower bud and seeds were weighing approximately 71 kg 190 gms. The seized material was forwarded for chemical analysis 10 days after the seizure. The delay per se is immaterial as prima facie there is nothing to show that the seal of the parcel, received by chemical analyzer was tampered with.

5. It is however, to be noted that the chemical analysis report reveals that the material forwarded for analysis contained flower buds with pieces of stalks, stems, leaves and seeds, without quantifying the weight of flower tops. This fact prima facie raises a doubt whether the ganja seized from the warehouse of the accused was of commercial quantity as to attract the provisions under Section 20 (C) of the NDPS Act.”

18. The aforesaid observations are required to be appreciated in the backdrop of the definition of ganja, adverted to above.

19. Mr. Pethe, learned APP was justified in canvassing a submission that the contention that to fall within the mischief of commercial quantity under NDPS Act, only the weight of the flowering / fruiting tops of the cannabis plant, is required to be

2 Bail Application No.2299 of 2019 dated 29th July, 2021

considered, is not in consonance with law. Reliance was placed by Mr. Pethe on judgment of the Supreme Court in the case of Shiv Kumar Mishra V/s. State of Goa, through Home Secretary³. The observations of the Supreme Court in paragraphs 12 to 14 are material and hence extracted below :

“12. Section 2(iii)(b) of the NDPS Act defines “ganja” as follows :

.....

13. An attempt has been made on behalf of the Appellant to convince us that the seized ganja was not accompanied by flowering or fruiting tops and hence, the weight of the seeds and the leaves would have to be excluded on account of the said definition, which would reduce the weight of the seized ganja considerably so as to exclude it from the definition of commercial quantity and attract a much lesser sentence than when the seized commodity was treated to be of commercial quantity.

14. The submissions made by learned counsel for the appellant are not convincing since from the evidence on record it has been established that the seized ganja consisted of greenish-brown coloured leafy and flowery parts of the plant (in moist condition) which, in terms of the definition of the expression “ganja” would include the seeds and leaves of the cannabis plant since the seized ganja was accompanied by the flowery parts of the plant.”

20. The Supreme Court has, thus, held in no uncertain terms

3 (2009) 3 SCC 797

that the seized contraband articles consisted of greenish brown coloured leafy and flowery parts of the plant, which in terms of the definition of the expression “ganja” would include the seeds and leaves of the cannabis plant since the seized ganja was accompanied by the flowery parts of the plant.

21. This judgment was followed by a learned Single Judge of this Court in the case of Ilaibaksh Babamiya Mundhe V/s. The State of Maharashtra and Anr.⁴ wherein an identical challenge was repelled by the learned Single Judge by observing that “since contraband was accompanied by flowering part of the plant along with leaves, prima facie, it would be covered in terms of definition of the expression “ganja” as given by Section 2(iii)(b) of the NDPS Act.”

22. The judgment in Shiv Kumar (Supra) was followed by another learned Single Judge of this Court in the case of Rajesh Surpal Pawara V/s. The State of Maharashtra⁵.

23. For the foregoing reasons, I am not persuaded to agree with the submission of the learned Counsel for the Applicant that in the absence of the quantification of the flowering or fruiting tops of the cannabis plant, it cannot be said that 26 kg of contraband which

4 Bail Application No.1623 of 2021 dated 3rd Feb. 2022.

5 Cri. Bail Application No.2675 of 2021 dated 11th April, 2022

was found in possession of the Applicant, does not satisfy the description of the 'commercial quantity'.

24. On the aspect of the alleged non-compliance of Sections 42 and 50 of the NDPS Act, it may be apposite to note that the challenge proceeds on the premise that there was a specific direction by an empowered officer to arrest the absconding accused and drug peddlers. The aforesaid premise, it seems, is incorrect. What the FIR and the seizure panchanama indicate is that a general direction was issued by the superior officer of ANC Kandivali Unit, to carry out patrolling to apprehend the absconding accused and initiate action against the drug peddlers and consumers. It is not the case of the prosecution that there was a specific direction by the competent officer, which was required to be recorded under sub-Section (1) or forwarded to the immediate superior officer under sub-Section (2) of Section 42 of the NDPS Act. As it turned out to be a case of detection of the offences in the course of regular patrolling, the provisions of Section 42 are, prima facie, not attracted.

25. The second limb of the submission of Mr. Desai, based on non-compliance with the provisions contained in Section 50 of the NDPS Act, also does not merit acceptance, for the very reason that

the Applicant came to be apprehended along with the contraband in a chance recovery during the course of regular patrolling.

26. The aforesaid consideration impels me to hold that since the Applicant was found in possession of commercial quantity of ganja, the bar under Section 37 of the NDPS Act, comes into play and the Applicant failed to make out a case which renders the interdict inoperative, the Applicant is not entitled to be released on bail.

27. Hence the order :

ORDER

(i) The Application stands rejected.

(N.J.JAMADAR, J.)