

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.1623 OF 2021

ILAIBAKSH BABAMIYA MUNDHE)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA & ANR.)...RESPONDENTS

Mr.Chaitanya Pendse i/b. Ms.Siddhi Bhosale, Advocate for the Applicant.

Mrs.Anamika Malhotra, APP for the Respondent – State.

Mr.Advait M. Sethna a/w. Ms.Ruju Thakker a/w. Mr.Pranav Gohil, Advocate for Respondent No.2 -DRI.

CORAM : V. G. BISHT, J.

**RESERVED ON : 20th DECEMBER 2021
PRONOUNCED ON : 3rd FEBRUARY 2022**

P.C. :

1 The present application has been moved by the applicant under Section 439 of the Code of Criminal Procedure in F.NO.No.DRI/MZU/PRU/INT-90/2019 registered by Directorate

of Revenue Intelligence (DRI), Pune Regional Unit, Pune, for offences punishable under Section 8(c), 20b(ii)(C), 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act).

2 It is the case of prosecution that on 19th May 2019 while informant and other police personnel were patrolling on Ahmednagar Kalyan Road, they received secret information about transportation of illegal narcotic drugs through a Ashok Leyland truck bearing Registration No.AP-27-W-2461 and further got information that a Toyota Innova Cresta bearing Registration No.MH-12-QF-4567 is escorting the said truck. Accordingly, both vehicles were intercepted. Accused Gundurao Patil, Ilaibaksh Mundhe (applicant) and one Nisar Pathan were found in the said car. Accused Gundurao Patil, on being grilled, revealed of concealment of ganja in the truck. The raiding team found 149 packets weighing 835.48 kgs of ganja worth Rs.1,25,32,200/-. After carrying out necessary formalities of panchnama and drawing of sample, the said contraband came to be seized. The

sample was sent to Central Forensic Science Laboratory and they confirmed it to be ganja.

3 Mr.Chaitanya Pendse, learned counsel for the applicant, has raised threefold submissions. Firstly, the applicant has been arraigned as an accused on the basis of statement of co-accused which is not admissible in law, in view of dictum laid down in **Tofan Singh vs. State of Tamil Nadu**¹. Secondly, there is no compliance of Section 42 and 52A of the NDPS Act and thirdly, there is no material on record to connect the applicant to the alleged offence. Investigation is over and charge-sheet has been filed. In such circumstances, no purpose would be served by keeping the applicant behind the bars, argued learned counsel.

4 Mr.Advait Sethna, learned counsel for the respondent no.2-DRI, on the other hand, vehemently opposed the submissions by contending that there is due compliance of

¹ 2020 DGLS(SC) 591

Section 42 and 52A of the NDPS Act. According to the learned counsel the statement of accused cleaner (A-5), namely, Deepak Keshav Khatpe cannot be treated as a confessional statement and therefore can be read for the purpose of showing how the applicant was actively associated with the crime in question. The learned counsel during the course of argument also filed compilation wherein all these points are raised. According to the learned counsel, the samples of the seized contraband was tested at Central Forensic Science Laboratory, Pune, and it revealed tht the seized contraband was ganja (cannabis). According to the learned counsel there is overwhelming evidence on record to prove complicity of the applicant in the crime. The learned counsel also placed reliance in **Rajbir vs. State of Haryana**², **Meharunnissa Farooq Shaikh vs. The State of Maharashtra**³ and **Shiv Kumar Mishra vs. State of Goa through Home Secretary**⁴.

² CRM-M-25786-2021 (O&M) dated 30.11.2021

³ 2014 ALL MR (Cri) 4922

⁴ AIR 2009 SC 2011

5 First of all, I would like to clear the points raised in law by the learned counsel for the applicant. The first such objection is about non-compliance of Section 42 of the NDPS Act. The prosecution has come with a specific case that specific intelligence was received on 18th May 2019 which indicated that a truck bearing Registration No.AP-27-W-2461 containing a product suspected to be contraband (ganja) in a considerable quantity is being moved from Yavatmal in Vidharbha region of Maharashtra to Pune via Ahmednagar. From the record it appears that the said intelligence note was recorded by Manish Padole, Senior Intelligence Officer, DRI. It further appears that Shri. Manish Padole, on his part, then reported the said intelligence note to his superior official, namely, Shri. Maneesh Dudpuri, Deputy Director, in compliance with Section 42 of the NDPS Act. Similarly, Mr.Maneesh Dudpuri, on his part, then authorized Shri. Pankaj Raghuwanshi, Senior Intelligence Officer, DRI, to take the necessary action in accordance with intelligence note.

6 From the above it is quite clear that not only the precise intelligence note was reduced into writing by Senior Intelligence Officer Shri. Manish Padole on first point of time but later on he immediately transmitted the said intelligence note to his superior official Shri. Maneesh Dudpuri, who, in turn, authorized Senior Intelligence Officer Shri. Pankaj Raghuwanshi to take necessary action and even was also asked to put up a detailed action plan as per the intelligence note. *Prima facie*, there is sufficient compliance of Section 42 of the NDPS Act. I do not find merit in the submission of learned counsel for the applicant that there is non-compliance of Section 42 of the NDPS Act.

7 The next point raised by learned counsel for the applicant was about the non-compliance of Section 52A of the NDPS Act. The said section deals with disposal of seized narcotic drugs and psychotropic substances. According to learned counsel in the case in hand the investigating machinery had sought certification of correctness of inventory, photographs and samples

of seized narcotic drugs from Sub-Divisional Magistrate, Pune City, Pune, which is not in accordance with Section 52A of the NDPS Act, in as much as the said section contemplates that such application ought to have been made to Magistrate. Although the Annexure 2 which deals with application for disposal of seized narcotic drugs and psychotropic substances under Section 52A(2) of the NDPS Act, shows that the application was addressed to Sub Divisional Magistrate, Pune city, Pune, however the bottom portion of said Annexure 2 reads “Certification by the Magistrate under Section 52A(3)” and also shows that certification is to be signed by the Magistrate with “Signature, name and designation of the Magistrate”. This aspect can be looked into at the time of trial and therefore same should not detain me.

8 Coming to the raiding of vehicle in question, there is no dispute that on the date of incident truck bearing registration No. AP-27-W-2461 and Toyota Innova Cresta bearing Registration No.MH-12-QF-4567 were intercepted. Truck on being searched

was found to have containing contraband i.e. *ganja*. Similarly, there were three persons in the said Toyota Innova Cresta, namely, accused Gundurao Patil, Ilaibaksh Mundhe (applicant) and one Nisar Pathan. It is the case of prosecution that on persistent enquiry with accused Gundurao Patil, he revealed about concealment of *ganja* below the carriage space of the truck.

9 It is also clear from the record that various statements under Section 67 of the NDPS Act came to be recorded of accused. The learned counsel, during the course of submissions, submitted that those statements, in view of the dictum laid down in the case of **Tofan Singh (supra)** are not admissible in evidence. As far as statements of accused Gundurao Baburao Patil and the present applicant are concerned, for the sake of argument, I may not look into those statements in the light of law propounded in the case of **Tofan Singh (supra)**. However, when I read the statement of Deepak Keshav Khatpe, who, at the relevant time, was cleaner on the said truck, I have a different perception. His

statement, read as a whole, suggests on one hand that he was not aware of the concealment of *ganja* in the said truck while on the other he also admits that the truck which they had taken from Yavatmal to Pimpalgaon, Khadki, was having 149 packets of *ganja* in the cavity of the truck. Either of the statement is incorrect. His statement also shows that while they were taking the truck, on their way, the applicant and said Gundurao Baburao Patil were repeatedly calling driver of the vehicle, namely, Amit Bidkar and were verifying as to how far they had reached.

10 The above statement nowhere imputes any accusation on the part of the present applicant, that is to say, that applicant was knowing the fact of concealment of *ganja* and that is why he was repeatedly calling the driver of the vehicle. However, one cannot lose sight of the fact that the applicant was in constant touch with the driver of the vehicle in which the contraband was concealed. At the same time, it may also be noted that he was found in company of co-accused Gundurao Patil when the Innova Cresta came to be intercepted.

11 Apart from above, the prosecution has produced on record CDR analysis which *prima facie* shows that the present applicant was in touch with co-accused Gundurao Baburao Patil (A-1).

12 Lastly, it is also seen from the record that the samples from the seized *ganja* was sent to Director, Central Forensic Science Laboratory, Pune, vide letter dated 31st July 2019. Examination report / opinion is on record which shows that various exhibits sent for analysis were found to be sample of *ganja* (cannabis). During the course of submissions, learned counsel for the applicant invited my attention to the description including details of the seals of the exhibits and pointed out that Parcel No.A1 had comprised of flowering and fruiting tops and leaves and was sample of about 30 grams. According to the learned counsel the sample included the leaves also and therefore it does not conform to the definition of *ganja* given in the NDPS Act.

13 In **Shiv Kumar Mishra (supra)** after referring to the definition of *ganja* given in Section 2(iii)(b) of the NDPS Act, the Hon'ble Apex Court made following observations :

“11 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 a greenish brown colour 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. As far as exclusion of the moisture content of the seized Ganja is concerned, there is nothing in the NDPS Act to suggest that when the weight of a quantity of Ganja is to be ascertained, the moisture content has to be separately ascertained and excluded. On the other hand, we are of the view that the weight of the contraband would be the weight taken at the time of seizure.”

14 Similar observations were made at paragraph 14 by this Court in the case of **Meharunnissa Farooq Shaikh (supra)**.

15 In the case in hand, what Parcel A-1 shows is that the Exhibit comprised of flowering and fruiting tops and leaves, and therefore, since the *ganja* was accompanied by the 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.

16 For the aforesaid reasons and as also having regard to the nature and gravity of the offence, I do not find merit in in the application. Therefore, I am not inclined to allow the application. Hence, the following order is passed :

ORDER

Application is rejected.

(V. G. BISHT, J.)