

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO.2675 OF 2021

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Rajesh Surpal Pawara
V/s.

... Applicant

The State of Maharashtra

... Respondent

Ms.Sana Raees Khan for the Applicant.

Mr.R.M. Pethe, APP for the Respondent –State.

CORAM : C.V. BHADANG, J.

RESERVED ON : 10 FEBRUARY 2022

PRONOUNCED ON : 11 APRIL 2022

P.C.

. By this Application, the Applicant (Accused No.3) is seeking release on bail. The Applicant along with co-accused has been charge-sheeted, for the offence punishable under Section 8(c) 20(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 in Special Case No.157 of 2020 read with Section 188 of the Indian Penal Code, arising out of Crime No.209 of 2020 of Adgaon Police Station, District-Nashik.

2. The prosecution case is that on 11 July 2020 at about 1.20 p.m. a secret information was received, that a Swift Desire Car, coming from Dhule and passing through Nashik was

carrying *Ganja*. Accordingly the car bearing No.MH-18-AJ-2133 was intercepted at Adgaon Shevar and on search was found containing *Ganja* worth 32 Kgs 350 grms in the dicky of the car. There were 5 occupants in the car including the present Applicant. In this case after investigation a charge-sheet came to be filed.

3. I have heard the learned counsel for the Applicant and the learned Additional Public Prosecutor. Perused record.

4. It is submitted by the learned counsel for the Applicant that the co-accused Bhushan Bhoi (Accused No.2) has been released on bail by the Special Court by order dated 31 October 2020. It is submitted that the role attributed to the Applicant is similar to Bhushan Bhoi and therefore, parity arises.

5. It is submitted that the Applicant has no knowledge and there is no conscious possession of the contraband which was stored in the trunk of the car. It is submitted that there are serious discrepancies regarding the alleged recovery of the samples and the weight of the contraband, particular when the samples were drawn along with stems and leaves which casts a doubt as to weight of the contraband recovered. It is submitted that weight of the stem and leaves has to be excluded and if that is done this cannot be a case of recovery of commercial quantity. It

is submitted that Section 29 of the Act is inapplicable in this case. The charge-sheet is already filed and further detention of the Applicant is not justified.

6. The learned counsel for the Applicant has placed reliance on the following decisions:

(i) *Hari Mahadu Valse V/s. The State of Maharashtra, decided on 29 July 2021 in Criminal Bail Application No.2299 of 2019.*

(ii) *Sanjay Mohan Garad V/s. State of Maharashtra, decided on 23 November 2021 in Criminal Bail Application No.459 of 2021.*

(iii) *Sandip Ashok Raut V/s. State of Maharashtra, decided on 25 March 2015 in Bail Application No.2522 of 2014.*

(iv) *Ranver Singh V/s. State of Goa & Anr, decided on 23 September 2021 in Criminal Misc. Application (Bail) No.583 of 2021. (Goa Bench).*

(v) *Harsh Shailesh Shah V/s. State of Maharashtra & Ors, decided on 24 August 2021 in Criminal Bail Application No.2471 and 2565 of 2021.*

(vi) *Tushar Suresh Pingle V/s. The State of Maharashtra decided on 9 January 2020 in Criminal Bail Application No.1337 of 2019 (Aurangabad Bench).*

(vii) Jignesh P. Bhanushali V/s. The Intelligence Officer & Ors, decided on 25 January 2022 in Criminal Bail Application No.404 of 2021 and 867 of 2021 (Aurangabad Bench).

(viii) Ramesh Prakash Jadhav V/s. State of Maharashtra, decided on 30 November 2021 in Criminal Bail Application No.1329 of 2021 (Aurangabad Bench).

(ix) Abdul Aleem S/o Fayaz V/s. Intelligence Officer, decided on 15 September 2020, in Criminal Bail Application No.9319 of 2016 (High Court of Karnataka at Bengaluru).

7. The learned Additional Public Prosecutor has submitted that the Applicant is one of the occupants in the car and as such the conscious possession of the Applicant cannot be disputed. It is submitted that the detailed examination of the material/evidence is not required to be done at this stage. It is pointed out that the raiding party has complied with all the statutory requirements and even the samples were properly drawn. The learned Additional Public Prosecutor has referred to the panchanamma drawn, in order to point out that it does refer to the 'flowering tops'.

8. The learned Additional Public Prosecutor has placed reliance on the decision of the Supreme Court in ***Shiv Kumar***

*Mishra V/s. State of Goa*¹, *Hira Singh and Another V/s. Union of India and Another*² and the decision of the learned Single Judge of this Court in Bail Application No.1623 of 2021 decided on 3 February 2022 (Ilaibaksh Babamiya Mundhe V/s. State of Maharashtra & Anr.).

9. I have carefully considered the rival circumstances and the submissions made.

10. According to the prosecution, the contraband *Ganja* was recovered from the dicky of the said car. The *Ganja* was found stored in two gunny bags. The quantity recovered is 22.350 gms from one bag and 10 kgs from other. The seizure panchanama shows that after the car was intercepted and the driver was asked to alight, the driver along with four occupants tried to escape/flee from the spot. One of the persons was caught at the spot. Out of four, two stumbled and fell down while running. However, the raiding party could apprehend all four of them. It can thus prima facie be seen that all five occupants had made an attempt to flee from the spot. It is in this context, it was submitted by the learned APP that the occupants had knowledge about the possession of the contraband and had a guilty mind.

1 (2009) 3 Supreme Court Cases 797

2 (2017) 8 Supreme Court Cases 162

11. Be that as it may. First, it is necessary to corridor the claim of parity, based on the release of the co-accused Bhushan Bhoi by the learned Special Court. The claim of parity, in my considered view cannot be accepted, more so, for the reason that the learned Special Court itself in its discretion has refused to extend parity. That apart, Bhushan Bhoi was found to be the driver of the car and the learned Special Court had found from the statement of one Ganesh Barku Gavali, who was the owner of the car that accused Bhushan Bhoi had asked the owner for carrying four passengers to Kasara. On the basis of the statement of Ganesh Gavali, it has been found that the driver would not have sought permission from the owner and in any event, was only carrying other four passengers to Kasara after obtaining the permission from the owner. This is the principal reason why Bhushan Bhoi has been granted bail, which is not applicable to the present Applicant.

12. Coming to the contention based on certain discrepancies about contraband recovered and the sample sent in the context of the definition of cannabis under Section 2(b), it is necessary to note that the substance recovered is described as punjent smelling flowering tops (*kalidar*), which was moist in condition. The perusal of the C.A. report shows that Exh. 1 and 2 (Specimen) drawn from two gunny bags were comprising of flowering/fruited tops with greenish coloured leaves, seeds and

stalks. Prima facie, I am unable to see any discrepancy in the description. It is true that specifically the presence of leaves, seeds and stalks, is not found in the panchnama. However, the essential ingredient of the presence of flowering tops (kalidar) is there in the panchnama.

13. Section 2(iii)(b) and (c) of the Act, which are relevant for the purpose read thus:

“2(iii) “cannabis (hemp)” means -

(a)

(b) ganja, that is, the flowering of 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;”

It can thus be seen that the essential ingredient of *Ganja* is “flowering of fruiting tops of the cannabis plant”. This is excluding the seeds and leaves, only when not accompanied by the tops. It is significant to note that clause (c) provides that any mixture, with or without any neutral material, of any of the form of cannabis or any drink prepared therefrom, comes within the definition of cannabis (hemp).

14. As noticed earlier, the panchnama as well as the CA report prima facie indicates presence of ‘fruiting tops’ which are the essential ingredient.

15. In case of *Shiv Kumar Mishra(supra)*, a similar contention was raised before the Supreme Court based on Section 2(iii)(b) of the Act claiming that the seeds and leaves ought not to have been included while weighing the seized contraband since the same was not accompanied by tops. The Supreme Court in paragraph 14 of the Judgment while negating the contention has held thus:

“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.”

(Emphasis supplied)

16. It may be mentioned that the learned Single Judge of this Court (V.G.Bisht, J) by an order dated 03.02.2022 in Bail Application No. 1623 of 2021 placing reliance on the decision of the Supreme Court in *Shivkumar Mishra (supra)* has refused to accept a similar contention holding that since the contraband recovered was flowering tops along with leaves, prima facie would be covered in the definition of *Ganja* (cannabis) under Section 2(iii) (b) of the Act.

17. This is not the stage to appreciate the material in details so as to prejudice either the prosecution or the defence at the trial. However, the reliance placed on the various decisions, to my mind is misplaced for the reason that they turned on their own facts. It is hardly needs to be stated that I am bound by the decision of the Supreme Court which has also been followed by learned Single Judge of this Court in Bail Application No. 1623 of 2021, I do not find that a case for grant of bail is made out.

18. The criminal application stands rejected. The trial stands expedited.

19. It is made clear that the observations herein are essentially of a prima facie nature and the learned Special Judge shall not be influenced by the same at the trial.

C.V. BHADANG, J.