

rajshree

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
ANTICIPATORY BAIL APPLICATION NO.2173 OF 2022

Kunal Dattu Kadu	]	..	Applicant
vs.			
Union of India	]	..	Respondent

Mr.Mithilesh Mishra i/b Sadiya Khan for the Applicant.

Mr.Shreeram Shirsat a/w Amandeep Singh Sra for Respondent No.1.

Mr.S.V. Gavand, APP for the State

CORAM : BHARATI DANGRE, J

DATE : 29th AUGUST, 2022.

P.C.

1] The Applicant apprehend his arrest in connection with case No.NCB/MZU/CR-41/2021 registered with Narcotic Control Bureau which invoke offence punishable under Section 8(C), read with 20(b) (ii)(c) , 28 and 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985. On the complaint being filed before the Special Judge for NDPS Cases by the Intelligence Officer of NCB, Mumbai Zonal Unit, three persons are charged under the NDPS Act with the above-mentioned Sections and the Applicant is arraigned as Accused No.3.

2] It is alleged that on 17.04.2021 a specific information was received by one Sudhakar R. Shinde, J.I.O. which was reduced into writing and put up before Vishwa Vijay Singh, Superintendent, NCB,

Mumbai at 18.00 Hours and he instructed Satish Kumar, Intelligence Officer, to constitute a team and take necessary action as per the law. The information was put up before the Zonal Director, NCB, Mumbai for approval and he approved the above instructions of Superintendent, NCB, Mumbai.

As per the information, there was a possibility of availability of huge quantity of Ganja at the house premises of the Applicant at Gandhi Nagar, 2/2, Kulgown Jhoparpatii, Near Badlapur Bus Stand, Badlapur (W), Badlapur, District Thane, Maharashtra-421 503 in the morning of 18.04.2021. It is alleged that the Applicant is involved in selling of Ganja from the said house with the help of his two associates viz. Sunny Pardeshi and Ajay Nair, who are involved in selling of Ganga in small packets to the customers. It was proposed to search the said house in the morning of 18.04.2021 and to take further necessary steps for possible recovery of Ganja.

3] Accordingly, a team was formed which reached on the given address. The door was opened by accused Nos.1 and 2 and on establishing identity the entry was gained in the house by the officers. Two persons informed that they were working for the Applicant, but he was not available in the house. There were two parts of the house, one of which was occupied by the Applicant. Search was carried out which led to green leafy substance found in 3 kattas and on weighing scale it was found to be 15 kg, 15 kg and 13 kg. in 3 distinct plastic bags. Marking the same as P-1, P-2 and P-3, the leafy substance purported to be Ganja was put in the bag and seal of NCB was applied.

Apart from this some plastic covers were also recovered and it was sated that they were used as packing material for selling of Ganja.

4] On the material being collected in the form of P-1, P-2 and P-3, representative samples were drawn in presence of the JMFC Court, Ulhasnagar on 22.04.2021 and by issuing certificates under Section 52A(2) of the NDPS Act, from the 3 kattas containing green leafy substance purported to be Ganja, two representative samples from each containing 25 Grams was taken out and sent for analysis.

The report of Analysis is as follows :

“The sample is in the form of soft greenish heterogeneous mixture flowering and fruiting tops, bits of leaves, stem and stalk alongwith seeds of plant. On the basis of chemical and chromatographic examination. It is concluded that the sample under reference answer positive test for Ganja (Marijuana).

Lab NO.	04/seizure/23.04.2021
Gross weight of sample received with pouch	25.10 gms
Gross weight of remnant sample returned with pouch	14.49 gms

5] The learned counsel for the Applicant in support of the Application would vehemently submit that the substance which was seized from accused Nos.1 and 2 failed to match with the definition of “Ganja” as described in the NDPS Act. He would invite my attention to the discrepancy in the material that has been seized and the material that has been analyzed. In any case, he would submit that mere leaves and seeds, in absence of fruiting and flowering tops, would not bring the substance within the purview of term Ganja, a contraband.

6] Apart from this, the submission is that, the Applicant was nowhere named in the remand applications and only on the statement of the co-accused his involvement is presumed. It is submitted that the statements of the co-accused are inadmissible in evidence and in absence of any material to connect him, his involvement in the subject CR is mis-founded. It is submitted that considering the antecedents attributed to the Applicant and since material against the accused persons is already crystalized in the charge-sheet, it is submitted that the custodial interrogation is not necessary.

7] The learned counsel for the Applicant has relied upon various orders passed by this Court in support of his first submission that in absence of substance seized, clearly falling within the preview of "Ganja", the quantity which has been assumed to be a commercial quantity, cannot be considered to be an incriminating circumstance.

Reliance is placed upon orders passed by this Court :

- (a) Shankar Shivaji Dhale vs. The State of Maharashtra, (ABA No.1820/2021);
- (b) Kallappa Irappa Biradar vs. The State of Maharashtra, (BA No.590/2021);
- (c) Sandip Ashok Raut vs. State of Maharashtra (BA No.2522/2014)
- (d) Hari Mahadu Valse vs. State of Maharashtra (BA No.2299/2019);
- (e) Suresh Maruti Pawar vs. State of Maharashtra (BA No.1599/2020) ;

8] Per contra, Mr. Shreeram Shirsat, learned counsel for the Applicant admit that the Panchanama do not mention detail

description of the contraband recovered, but it mention the recovered substance as leafy substance, but on its test it was found to be Ganja. When it is sent for analysis it is found to be heterogeneous mixture flowering and fruiting tops, bits of leaves, steam and stalk alongwith seeds of plant and test has been answered as positive for “Ganja”.

Mr. Shirsat would submit that the definition of Ganja would reveal that if flowering tops are there , those tops including seeds and leaves becomes Ganga and; if flowering tops are not there,Ganja does not include seeds and leaves.

9] Mr. Shirsat, has placed reliance upon the decision of this court in the case of Santosh Apposo Naik vs. State of Maharashtra (BA No.951/2022) and decision of Punjab and Haryana High Court in CRM-M-25786/2021 in the case of Rajbir vs. State of Haryana. Mr.Shirsat also placed reliance in the case of Mangilal Barku Pawara vs. State of Maharashtra in BA No.147/2022.

He would submit that the application filed by the Applicant deserves to be dismissed as the recovery of Ganja at the instance of accused Nos.1 and 2 is attributed to the Applicant and it is a commercial quantity.

10] With the able assistance of respective counsels, I have perused various orders placed on record. The ratio flowing from the said decisions will have to be appreciated in the peculiar facts involving in that case and it has to be carefully seen what was the substance that was seized and forwarded for analysis.

I do not agree with the observation of the learned senior Judge in the case of Mangilal (*supra*) that whether fruiting tops were sent or not can be determined during trial. It is the duty of the bureau to be

assure of what substance is seized and what is forwarded for analysis as it cannot be left to the guess work of the trial Court.

11] The Hon'ble Apex Court in the case of Union of India vs. Shiv Shankar Keshari (2007) 7 SCC 798 has held that the Court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially to the question of releasing the accused on bail, when the Court has called upon to see if there are reasonable grounds for believing that the accused is not guilty and record satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronounced in the Judgment of acquittal and recording the finding of not guilty.

Bearing the aforesaid proposition in mind, it is necessary to look into the nature of accusations and evidence that is collected by the prosecution during the course of investigation and circumstances peculiar to particular cases shall be determined in the backdrop of the fact whether suspicion of the prosecution about indictment of accused/ Applicant is prima-facie true and correct.

12] The facts of the present case would clearly reveal that the house premises of the Applicant were raided on the secret information received, that he is involved in selling of Ganja from the house with the help of his two associates i.e. accused Nos.1 and 2, who are also involved in selling of Ganja in small packets to the customers. In absence of Applicant being present in the house, when the NCB team raided the house, accused Nos.1 and 2 who were present permitted entry into the house. They informed the team that they are working for the Applicant and search was carried out.

The search led to three plastic kattas and the complaint as well as Panchanama refer to the substance in the Katta as “leafy substance”, which on weighing was found to be 43 grams, packed in sacs of 15 kg, 15 kg and 13 kg. .

13] The case of the prosecution is that Ganja belong to the Applicant and Accused Nos.1 and 2 used to sell it in small packets to the customers of the Applicant and each packet comprised of 10 Grams and it was sold for Rs.100/- per packet. This has been discerned from the statement of Accused Nos.1 and 2 recorded under Section 67 of the NDPS Act.

14] The muddemal marked as P-1, P-2 and P-3 containing 15 Kg, 15Kg and 13 Kg of green leafy substance purported to be Ganja which was seized, was produced before the JMFC and representative samples as per standing order were prepared from the bulk muddemal for analysis.

15] The CA report has mentioned that the sample under reference has tested positive for Ganja. However, for the first time in contrast to the green leafy substance which was found and seized, from each samples were drawn, report of analysis refer to the sample which is in the form of soft greenish heterogeneous mixture flowering and fruiting tops, bits of leaves, stem and stalk alongwith seeds of plant and this was tested positive for Ganja.

16] The NDPS Act defined Ganja under Section 2(iii)(b) as under :

“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 which means that if the seeds and leaves are accompanied by the tops then the same can be termed as ganja.”

From the reading of aforesaid description, it can be seen that Ganja is flowering or fruiting tops of the cannabis plant and when the flowering or fruiting tops are not accompanied, the seeds and leaves are to be excluded.

It is implied that if seeds and leaves are accompanied by tops by way of flowering or fruiting, it would amount to Ganja, but when the seeds and leaves are not accompanied by the tops, this will not be considered as Ganja, ultimately it would have to be ascertained whether the flowering or fruiting tops of the cannabis are accompanied by the seeds and leaves.

17] Now, whether the substance is ‘Ganja’ will have to be determined on facts of each case. In the present case, if the complaint alleges that the substance which was seized is green leafy substance, but there is no reference of the flowering and fruiting of tops and leafy substance indicating that it is a mixture of green leafy substance and it can only amount to Ganja, when it is accompanied with the flowering and fruiting tops.

Strangely, the report of analysis refers to the sample which is heterogeneous mixture of flowering and fruiting tops, bits of leaves, stem and stalk along with seeds of plant. Necessarily the entire mixture is weighed and found to be 43 Kg. on the basis of which the Applicant is charged for possession and delivering with commercial quantity of Ganja. The discrepancy in what was seized and what was analyzed, prima-facie satisfies me that there are reasonable grounds for believing that the Applicant is not guilty of offences of dealing in

commercial quantity and in absence of any antecedent he is not likely to commit any offence on bail.

18] The decision relied upon by Mr.Shirsat, ultimately revolve around the facts of each case and considering the case when the investigation is complete and material against the Applicant are crystalized in the form of complaint/charge, the custodial interrogation of the Applicant is not warranted. He may take consequences of accusation faced byher when he face the trial. Hence, following order :

19] In the wake of above, following order is passed :

(a) Application is allowed.

(b) In the event of arrest in connection with NCB/MZU/CR-41/2021 registered with Narcotic Control Bureau , the applicant Kunal Dattu Kadu shall be released on bail on furnishing P.R. bond to the extent of Rs.30,000/- with one or more sureties of the like amount.

(c) The applicant shall report to the concerned police station on first Monday of every month between 10.00 a.m. to 12.00 noon till framing of charge.

(d) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with facts of case so as to dissuade him from disclosing the facts to Court or any Police Officer and should not tamper with evidence.

[BHARATI DANGRE, J]