

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

BAIL APPLICATION NO.1986 OF 2022

POPAT GOVARDHAN NAGODE
VERSUS
THE STATE OF MAHARASHTRA

...
Advocates for Applicant : Mr. Abhay D. Ostwal with Mr. Kiran D.
Jadhav, Mr. Mohit L. Deoda and Mr. Sourabh Munot
APP for Respondent : Mr. K. S. Patil
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CORAM : S. G. MEHARE, J.

DATE : 03-01-2023

PER COURT :-

1. Heard the learned counsel for the applicant and the learned A.P.P. for the respondent/State.
2. The facts of the case were that when the police were on regular patrolling, they reached the toll. At that time, some policemen were present there. At about 3.15 a.m., a car came from the direction of Aurangabad at high speed. So, he applied the barricades and stopped the said car. In the said car, an electric weighing machine was found. The police asked for the names of the persons sitting in the car. They told their names. One of them was the present applicant. Police got suspicious and asked to open the dickey. They were avoiding opening, but lastly, the dickey was opened. Gunny bags lying in the dickey were opened. Greenish-

dried leaves were found therein. When police took the smell, they confirmed that it was a Ganja. Then, they gave intimation to the Police Inspector of the concerned police station. He asked them to stay there. Then, he reached the spot of the incident along with Naib Tahsildar, two panchas, a photographer, a weighing machine and material for sealing and labelling. At about 5.25 hours, they weighed that contraband. It weighed 40 Kg. and 350 grams. Hence, they took the said persons in their custody.

3. The prosecution also has a case that a notice under Section 50 of the NDPS Act was given. Further, the prosecution has a case that it was commercial quantity. Hence, the offence under Sections 20 and 29 of the NDPS Act was registered.

4. The vehement argument of the learned counsel for the applicant was that there was absolutely no compliance with Sections 42 and 50 of the NDPS Act. He would refer to the contents of the alleged notice under Section 50 of the NDPS Act. He has vehemently argued that it was not in strict compliance with the law. The joint notice to all accused is illegal and impermissible in the law.

5. To bolster his argument, the learned counsel for the applicant relied on the case of *State of Rajasthan Versus Parmanand and another, (2014) 5 SCC 345*. In this case, the Hon'ble Supreme Court has observed that there should be

individual communication to each accused and independent consent by each accused. Joint communication of the right of the accused not found sufficient in the said case.

6. *Secondly*, learned counsel for the applicant has argued that in view of the ratio laid down in the case of **Karnail Singh Versus State of Haryana, (2009) 8 SCC 539**, compliance with Section 42 of the NDPS Act is mandatory. Though the intimation was received during the course of regular patrolling, the compliance required under Sections 42(1) and 42(2) of the NDPS Act was not done with a satisfactory explanation about the delay. In the said case, Hon'ble Supreme Court, referring to its earlier judgments in the cases of **Abdul Rashid (2000) 2 SCC 513 and Sajan Abraham [(2001) 6 SCC 692]** has observed, in clause (d) of paragraph 35 that "while total non-compliance with requirements of sub-Sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in police station with sufficient time to take action, and if the police officer fails to record in writing the

information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001”.

7. Further, the learned counsel for the applicant has vehemently argued that contraband was weighed with flowering buds and pieces of stalks, stems, leaves and seeds without quantifying the weight of flower tops. Therefore, that raises doubt about the commercial quantity to attract Section 20 (c) of the NDPS Act. To bolster his arguments, he relied upon the order delivered at the Principal Seat at Bombay in Bail Application No.2299 of 2019, dated 29.07.2021 and Criminal Bail Application No.1601 of 2018 and companion matter, dated 21.11.2018. He also referred to the order passed by this Court in Bail Application No.1451 of 2022 (***Vaibhav Ranba Ujagare Versus State of Maharashtra and another***), dated 19.10.2022.

8. Per contra, the learned A.P.P. has vehemently opposed the application. He would submit that an appropriate notice was given

to the accused, and they were apprised of their right as contemplated under Section 50 of the NDPS Act. He would argue that the accused were well informed about their right and they understood their rights from the contents of the notice. Therefore, it cannot be said that Section 50 of the NDPS Act has not been complied with. He would also argue that the contrabands were found in the gunny bag kept in the dickey. Therefore, the right of the accused to get examined before a Gazetted Officer or a Magistrate has not been affected. In other words, he has argued that if a personal search is not taken, then the requirement under Section 50 of the NDPS Act is not mandatory. He would also argue that there is evidence the contraband was found carried in a dickey, and the police asked to inspect the dickey during their patrolling. Therefore, Section 42 of the NDPS Act would also not attract. The quantity was apparently commercial. Hence, Section 37 of the NDPS Act would come into play. There is no material on record to satisfy the Court that the applicant may not commit the same offence in the near future.

9. Perusal of the record reveals that the so-called alleged notice under Section 50 of the NDPS Act was served jointly upon the accused. In the said notice, it has been mentioned that the police wanted to search the accused personally as well as the dickey. The suspicion raised by the learned counsel for the applicant about the absence of the Tahsildar also found substance as the seizure

panchnama does not bear his signature. In view of the contents of the notice allegedly served under Section 50 of the NDPS Act, the ratio laid down in the case of ***State of Rajasthan Versus Parmanand*** (*supra*) is squarely applicable to the present case.

10. As far as the quantity of the contraband seized is concerned, the Chemical Analyzer's report reveals that the contraband was sent to his office containing flowering tops mixed with pieces of stalks, stems, leaves and seeds without quantifying the weight of floor tops. There is no reason to take a different view as taken by this Court in Bail Application No.2299 of 2019 dated 29.07.2021 and Criminal Bail Application No.1601 of 2018 and companion matter (*supra*).

11. The absence of separating the flowering buds from pieces of stalks, stems, leaves and seeds, *prima facie*, raises a doubt about the commercial quantity to attract the provision of Section 20(c) of NDPS Act. This Court has also taken the same view in Bail Application No. 1451 of 2022.

12. The prosecution has no explanation or a record showing that after the seizure of the contraband, they have intimated the official superior, as has been observed by the Hon'ble Supreme Court in Karnail Singh's case (*supra*). *Prima facie*, there are various legal defects. That raises doubt about the commercial quantity of the Ganja. Since mandatory compliance with the

provisions of the law is missing, the applicant deserves bail. Hence, the following order:-

- i) The application is allowed.
- ii) Applicant Popat s/o. Govardhan Nagode be released on bail, on furnishing PB and SB of Rs.1,00,000/- with two solvent sureties of the amount of Rs.50,000/- each, in Crime No.39 of 2022, registered with Paithan Police Station, Taluka Paithan, District Aurangabad, for the offence punishable under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, (now Special Case No.201 of 2022) on the conditions to attend the trial on each effective date of hearing during the course of the trial and shall not involve in the similar offence.

(S. G. MEHARE)
JUDGE

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