

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**INTERIM APPLICATION NO. 1060 OF 2023
IN
CRIMINAL APPEAL NO. 501 OF 2022**

Santaji Malhari Kharat
Aged : 38 years, Occ. Agriculture
R/o. Kurul, Tal. Mohol, Dist. Solapur
(At present undergoing sentence at
Yerwada Central Prison) .. Applicant

Vs.

The State of Maharashtra,
(Panvel Taluka Police Station)
C.R. No.53/18 dated 21/03/2018) .. Respondent

**WITH
INTERIM APPLICATION NO. 1061 OF 2023
IN
CRIMINAL APPEAL NO. 500 OF 2022**

Mahesh Ravindra Vhatkar
Aged : 38 years, Occ. Grocery Shop,
R/o. Ghodeshwar, Tal. Mohol,
Dist. Solapur (At present undergoing
sentence at Yerwada Central Prison) .. Applicant

Vs.

The State of Maharashtra
(Panvel Taluka Police Station)
C.R. No.53/18 dated 21/03/2018) .. Respondent

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Mr. Ayaz Khan a/w Mr. Rajendra Bidkar for the applicant in both
the applications

Mr. A.R. Kapadnis, APP for the respondent – State

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CORAM : PRITHVIRAJ K. CHAVAN, J.

RESERVED ON : 9th AUGUST, 2023
PRONOUNCED ON : 21st AUGUST, 2023

ORDER :-

1. The applicants have been convicted by the NDPS Special Judge at Panvel in NDPS Special Case No. 297 of 2019 of the offences punishable under Section 20(b)(ii)(C), 29 r/w Section 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “NDPS Act”). Both applicants have been sentenced to undergo rigorous imprisonment for 13 years with fine of Rs.1,50,000/- each. In default of payment of fine to undergo rigorous imprisonment for 2 years.

2. Facts in brief are as below.

3. An information was received by PW-1 Head Constable – Mohammed Iqbal Shaikh, attached with Anti Narcotic Cell, Unit of Crime Branch, Navi Mumbai on 20.03.2018 that two persons would be coming in a vehicle Eicher tempo bearing Registration No. MH-09-BC-3789 and a white coloured car bearing Registration No. MH-13-BN-9535 along with *Ganja* weighing about 400 to 500

kgs. for selling the same in Raigad District. They would pass through Nisarg Nursery on Panvel – Alibaug road. The informant had also given minute details of the accused persons, including colour of clothes, colour of the shoes and having some skin disease on lips, fingers of both hand and legs etc. The information was passed by PW-1 Head Constable, Mohd. Iqbal Shaikh to PW-3 Smt. Rani Kale, Women Police Sub-Inspector (WPSI) and PW-5 Bajare - Senior PI. The information was reduced into writing by PW-3 Smt. Rani Kale.

4. The said information was conveyed to ACP and DCP by PW-5 Bajare. A direction was issued by ACP to conduct a raid under the supervision of PW-5 Bajare. PW-1 Mohd. Iqbal Shaikh took out the copies of the information book and station diary. PW-3 Smt. Rani Kale had prepared a report for sending the copies to the superior and produced before PW-5 Bajare. PW-5 Bajare, forwarded the copy of the information to DCP through Head Constable – Thakur.

5. Panchas were summoned. They were appraised of the raid to be conducted. Necessary material for conducting raid was taken. A pre-trap panchanama was prepared in the office vide Exh.68. The

Officers of the raiding party and panchas started for conducting raid at 22:30 hours. They reached the spot at about 23:40 hours in the police vehicle as well as in two private vehicles.

6. On 21.03.2018 around 1:30 hours, the raiding team noticed the vehicles about which information was received, which were intercepted. Two persons were found in the vehicle. Upon inquiry, they disclosed their identity as applicant no.1 - Mahesh Vhatkar and applicant no.2 – Santaji Kharat.

7. PW-5 Bajare appraised the applicants regarding the information and their rights under Section 50 of the NDPS Act in Marathi language. Two separate letters were also issued to the applicants vide Exh.103 and Exh.104.

8. During search of the vehicles, the Officer recovered 15 gunny bags having Ganja weighing about 377 kgs. Out of 15 gunny bags, 14 gunny bags were of 25 kgs. each and weight of 15th bag was 27 kgs. On instructions of PW-5 Bajare, test of the alleged Ganja was done on the field with the help of testing kit by PW-3 Smt. Rani Kale. It gave positive result for Ganja as it's colour changed to brownish.

9. Upon inquiry with the applicants, it was learnt that white coloured Maruti Ciaz bearing Registration No. MH-13-BN-9535 was driven by accused no.1 Mahesh Vhatkar. The truck in which Ganja was recovered was brought by the accused no.2 – Santaji Kharat from Telangana and after reaching Kalamboli circle, the accused no.2 also occupied the said truck. During search, mobile phones, some currency notes and Aadhar Cards of the applicants were seized along with the vehicles.

10. One sample of 50 grams each was drawn from each bag and the same were kept in plastic pouches and ultimately wrapped in a brown coloured envelope. The labels were affixed bearing signatures of PW-3 Smt. Rani Kale and panch witnesses. The samples were sealed with official brass seal of the crime branch. The remaining bulk in 15 gunny bags were separately packed, sealed and marked as A to S. The Eicher tempo and Ciaz car also came to be seized under panchanama. The panchanama (Exh.69) was completed on 21.03.2018 at 7:30 a.m.

11. The Officer along with the contraband came to Panvel Taluka Police Station. PW-1 Mohd. Iqbal Shaikh of Anti Narcotic Cell,

Crime Branch, Navi Mumbai, registered an FIR against the applicants as above. The muddemal property was deposited in the godown by PW-3 Smt. Rani Kale with Panvel Taluka Police Station (Exh.70). The Search and Seizure Report dated 22.03.2018 was forwarded to the superior officer at Crime Branch, Navi Mumbai (Exh.71).

12. On 22.03.2018 itself, samples were forwarded to the Office of the Forensic Science Laboratories, Kalina, Mumbai through PW-4 Head Constable, Utgikar (Exh.72). The CA report was received.

13. On 10.04.2018 proceeding under Section 52A of the NDPS Act was completed before the JMFC, Panvel. After investigation, a charge-sheet was filed against the applicants.

14. After framing charge, the applicants pleaded not guilty and claimed a trial. Prosecution examined five witnesses. The learned trial Court after hearing the prosecution and defence, convicted and sentenced the applicants as above.

15. Heard Mr. Khan, learned Counsel for the applicants at length. He mainly emphasized on non-compliance of several mandatory

provisions under the NDPS Act. He would argue that the samples were not drawn before the Magistrate but on the spot itself, which is in total violation of the judgment of the Supreme Court in case of **Union of India Vs. Mohanlal & Anr.** as well as in the case of **Simarnjit Singh Vs. State of Punjab.** He would argue that the articles were not produced before the trial Court nor they have been marked as articles. The prosecution has not examined the carrier of the samples. According to the learned Counsel, non-compliance of these mandatory provisions would itself vitiate the entire prosecution.

16. *Per contra*, learned APP would argue that the evidence of the prosecution witnesses is quite trustworthy and clinching. Looking to the gravity of the offence, it would not be proper to suspend the execution of the sentence, pending the appeal.

17. From the perusal of the testimonies of PW-1 Mohd. Iqbal Shaikh, PW-3 Smt. Rani Kale and PW-5 Bajare, *prima facie* it appears that there is non-compliance of Section 42(1) and 42(2) of the NDPS Act. Section 42(1) contemplates that an Officer who receives the information has to submit the same in writing and

thereafter, the same is required to be sent to the immediate superior official for compliance of Section 42(2) of the NDPS Act. Section 42(2) contemplates that the information which is taken down in writing by an Officer under Sub-Section (1) or records grounds for his belief under the proviso, the same shall be immediately sent to the superior official within 72 hours. From the evidence of PW-1 Mohd. Shaikh, it is not clear whether there was a compliance of Section 42(2) of the NDPS Act. PW-1 Mohd. Shaikh had simply identified the copy of the information register (Exh.53). It was PW-5 Bajare who appears to have made the so called compliance of Section 42(2) of the NDPS Act, who had not received the information.

18. PW-3 Smt. Rani Kale in her evidence states that she had prepared a letter for permission to conduct a raid and the same was forwarded to PW-5 Bajare. There is no document on record to show that PW-3 Smt. Rani Kale had prepared the report, which was signed by PW-5 Bajare. Interestingly, it reflects from the evidence of PW-3 Smt. Rani Kalke and PW-5 Bajare that the copy of the information was sent to the superior Officer through Head Constable - Thakur. However, Head Constable - Thakur had

neither examined by the prosecution nor his statement was recorded. Exh.99 is the covering letter while Exh.100 is the computer extract of the station diary, over which there is neither any inward number of the office of ACP nor signature of the ACP. The original register has not been filed during the trial. Copy of the information book is tendered, which is at Exh.53. Exh.53 is just a torn page of the register as per the evidence of PW-1 Mohd. Shaikh.

19. Importantly, the property was not marked as articles during trial. The prosecution has not brought to the notice of the seized muddemal during the evidence of PW-4 Head Constable - Utgikar, PW-2 Yogesh Patil - panch witness and PW-5 Bajare. Even the sample packets were not marked as articles during the course of trial.

20. There is also a serious doubt as regards compliance of Section 52A of the NDPS Act. PW-2 Yogesh Patil is the panch witness, who turned hostile. He admits that he had acted as a panch witness in other similar cases. He admits that he had acted as panch witness in 8 to 10 cases. He further admits that on many occasions his signatures were obtained by the Police without calling him at the

scene of occurrence. Interestingly, he had signed the panchanama.

21. The prosecution had not examined Chemical Analyser from FSL, Kalina. The report of the FSL was exhibited on the basis of evidence of PW-3 Smt. Rani Kale.

22. FIR (Exh.54) was registered at Panvel Taluka Police Station by the concerned Officer of that police station. The Officer who registered an FIR has not been examined by the prosecution.

23. PW-1 Mohd. Iqbal Shaikh gave vital admissions in cross that Exh.53 is a torn page from the information book. He further admits that after receipt of information about the alleged offence, at the first instance, he did not pass it on to PW-5 Bajare. He had information as to the alleged contraband and the vehicle in which it was carried. There was no information as to who were travelling and by which vehicles. He had not produced the copy of the report prepared by him and forwarded to the Office of ACP and DCP. He also admits that there appears an overwriting in the 'month' mentioned in the date at Exh.53. The samples of the contraband which were produced in the Courts in an envelop, did not bear the signatures of the applicants over the paper seal pasted

upon it.

24. PW-3 Smt. Rani Kale admits that she did not see the secret information noted down by PW-1 Mohd. Iqbal Shaikh personally. She also admits that PW-1 Mohd. Iqbal Shaikh did not reduced the information in the information book in her presence. She also admits that there was no information as regards the travelling route of the suspects or about the vehicles. These are all vital admissions given by the prosecution witnesses apart from non-compliance of Section 42(1) and 42(2) of the NDPS Act, which would *prima facie* speaks volumes.

25. PW-3 Smt. Rani Kale had also given some vital admissions which *prima facie* indicates the manner in which the prosecution against the applicants had been launched. The admissions in para 37 and 38 of her cross-examination speaks for itself, which read thus:-

“37. It is correct that as per the standing orders reference No.1/88, two samples from the bulk quantity are required to be extracted. It is correct that in this matter we extracted only one sample from each gunny bag. It is correct that from the quantity of ganja in each gunny bag it was possible for us to extract two samples each from the said gunny bag. I cannot assign any reason such type of task was not performed

by us. It is not true that the sample packets were prepared in the office. It is not true that sample packets were not from bulk quantity.

38. I have gone through C.A. report on its receipt. It is correct that after depositing the muddemal to the malkhana it is marked as MR number and same is referred later on for further investigation. It is correct that there is no reference of MR number on any sample packet. I did not record the statement of malkhana karkoon of Panvel Taluka police station. It is not true that I did not deposit any sample packets with malkhana of Panvel Taluka police station.”

26. PW-3 Smt. Rani Kale admits that in the copy of FIR which was forwarded to the Court, the name of one Rupali Chaudhari is shown as an Investigating Officer.

27. The learned Counsel for the applicants has placed reliance on a judgment of the Supreme Court in the case of **Union of India Vs. Mohanlal & Anr.** on the point of Section 52A of the NDPS Act, which deals with the disposal of the seized drugs and psychotropic substances. In case of Mohanlal (supra), the Supreme Court in para 20 had summed up and issued directions, which are reproduced hereinbelow.

“20. To sum up we direct as under :-

(1) No sooner the seizure of any Narcotic Drugs and Psychotropic and controlled Substances and Conveyances is effected, the same shall be forwarded to the Officer in-charge

of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52A(ii) of the Act, which shall be allowed by the Magistrate as soon as may be required under Sub-Section 3 of Section 52A, as discussed by us in the body of this judgment under the heading 'seizure and sampling'. The sampling shall be done under the supervision of the Magistrate as discussed in paras 13 and 14 of this order.

(2) The Central Government and its agencies and so also the State Governments shall within six months from today take appropriate steps to set up storage facilities for the exclusive storage of seized Narcotic Drugs and Psychotropic and controlled Substances and Conveyances duly equipped with vaults and double locking system to prevent theft, pilferage or replacement of the seized drugs. The Central Government and the State Governments shall also designate an officer each for their respective storage facility and provide for other steps, measures as stipulated in Standing Order No.1/89 to ensure proper security against theft, pilferage or replacement of the seized drugs.

(3) The Central Government and the State Governments shall be free to set up a storage facility for each district in the States and depending upon the extent of seizure and store required, one storage facility for more than one districts.

(4) Disposal of the seized drugs currently lying in the police maalkhans and other places used for storage shall be carried out by the DDCs concerned in terms of the directions issued by us in the body of this judgment under the heading 'disposal of drugs'."

28. It is submitted that there was no compliance of Section 52A of the NDPS Act as the seized muddemal had not been brought before the concerned Magistrate. The Supreme Court in the case of **Simarnjit Singh Vs. State of Punjab** has followed the view taken by

it in case of Mohanlal (supra). The prosecution has been quashed by setting aside the conviction and sentence of the appellant on the ground of non-compliance of mandate of Section 52A of the NDPS Act.

29. In the aforesaid facts and circumstances of the case, without expressing any opinion on merits / demerits of the case, the applicants will have to be released on bail by suspending the execution of the substantive sentence, pending the appeal. This is also in light of the fact that the appeal would not be finally heard in the near future, in view of the pendency of the older appeals.

30. There are strong and compelling reasons for suspension of execution of the substantive sentence of the applicants in light of the observations made hereinabove. Now, to the order.

ORDER

(i) Pending the appeal, execution of the sentence is suspended upon the applicants executing a P.R. bond in the sum of Rs.50,000/- each with two sureties in the like amount to the satisfaction of the Registrar (Judicial) of this Court, subject to deposit of fine of Rs.1,00,000/- each.

(ii) The applicants shall attend the Panvel Taluka Police Station on first day of each month between 10.00 a.m. to 12.00 noon.

(iii) If the applicants commit two consecutive defaults or two defaults in attending the police station, the prosecution is at liberty to pray for cancellation of their bail.

(iv) The applicants shall furnish their permanent residential address as well as mobile numbers to the concerned police station.

(v) The applicants shall deposit their passports, if any, with the Panvel Taluka Police Station.

31. The applications are disposed of in the aforesaid terms.

(PRITHVIRAJ K. CHAVAN, J.)