

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

BAIL APPLICATION NO. 4413 OF 2021

Aman Suraj Gagde ...Applicant

vs.

The Narcotics Control Bureau
Mumbai Zonal Unit and Ors. ...Respondents

Mr. Taraq Sayed a/w Mr. Advait Tamhankar - Advocate for the Applicant

Mr. Y. Y. Dabke - APP for the Respondent-State

Mr. S. K. Halwasia, Advocate for Respondent Nos. 1 and 2.

CORAM : S. M. MODAK, J.

RESERVED ON : 25th APRIL, 2023

PRONOUNCED ON : 4th SEPTEMBER, 2023

ORAL ORDER :-

1. Though the Applicant/charge-sheeted accused no. 3 was not found in exclusive possession of the contraband/ganja, he is chargesheeted for hatching conspiracy with other accused persons for selling of the Ganja. In all there are 3 accused who are charge sheeted /against whom complaint is filed.

2. The main thrust of the argument of the learned Advocate Shri Sayed is that as there are no materials to show the involvement of this Applicant. The rigors under Section 37 of the Narcotic Drugs and Psychotropic Substances Act will not be applicable. Whereas

learned Advocate Shri. Halwasia for Union of India submitted that if the person is prosecuted for offence of conspiracy under Section 29 of the NDPS Act, the materials collected against other charge-sheeted accused can also be considered against the conspirator.

3. Learned Advocate Shri Sayed has invited my attention to the papers annexed to the charge-sheet. At two places, the Intelligence officer of the Narcotic Central Bureau has seized the contraband of the Ganja.

- (a) One is on 25/04/2021, from the Toyota Innova Car, **20 kg of Ganja** was seized. The car was possessed by accused-Jaybharat Rathod.
- (b) Whereas, secondly, it was found from Tata Nexon Car on 06/06/2021 near Patas Toll Plaza, Solapur Pune Highway. The present Applicant was driver whereas co-accused Sunil Bhandari was sitting on cleaner side and **12 kg of Ganja** was kept in the said car.

4. Prosecution filed 2 affidavits sworn on 22nd September, 2022 and on 17th November, 2022. The prosecution relied upon the following materials to show the involvement of the present Applicant as a conspirator:-

- a) The statement of accused-Jaybharat dated

25/04/2021, 27/04/2021 and 28/04/2021 mentioning that accused Sunil Bhandari brought this Ganja from Andhra Pradesh and he went there on 31/03/2021 and returned on 04/04/2021.

- b) The statement given by Jaybharat stating that present Applicant used to work alongwith accused Sunil in Ganja dealing.
- c) Whereas accused Sunil Bhandari has stated that he alongwith the present Applicant went to Bidar and procured Ganja from one lady Reshma and they left Bidar on 05/06/2021. It is same Ganja which was seized from Tata Nexon car on 06/06/2021.
- d) The receipt issued by Talegaon Toll Plaza mentions that car number MH 05 EA 3340 Tata Nexon car has passed the toll plaza.
- e) There are two Call details reports showing the interaction in between this Applicant and other accused, the cell number of this Applicant is 8180808787. The Call details report shows that the Applicant-Aman has left Maharashtra on 31/03/2021 and entered the Andhra Pradesh on 04/04/2021.
- f) Certificate issued by BSNL mentioning that Cell number 9403421128 stands in the name of the present Applicant and showing the movement from 31/03/2021 to 03/04/2021 in the Andhra Pradesh.

5. Mr. Halwasia relied upon following judgments :-

(a) *NCB Vs. Mohit Aggarwal*¹

(b) *Sukhdev Singh Vs. State of Punjab*²

6. Learned Advocate Shri Sayed to buttress his submission that evidence on the point of the conspiracy is not sufficient, he relied upon the following judgments:-

a) *Akash J. Jariwala Vs. State of Maharashtra and Another*³

b) *Amarsing Ramjibhai Barot Vs. State of Gujarat*⁴

c) *Rashida Iqbal Khan Vs. State of Maharashtra*⁵

d) *Sangeeta Y. Gaikwad Vs. State of Maharashtra*⁶

e) *Roshan Munan Singh Vs. State of Maharashtra*⁷

f) *Sandip Ashok Raut Vs. State of Maharashtra*⁸

g) *Ibrahim Khwaja Miya Sayyed @ Raju Vs. State of Maharashtra*⁹

7. In case of *Mohit Aggarwal (supra)*, two prominent observations are brought to my notice. They are:-

(i) Even though statement recorded under Section 67 of the Narcotic Drugs and Psychotropic Substances Act is now

1 AIROnline 2022 SC 1048

2 AIROnline 2022 SC 256

3 2020 SCC Online Bom 3474

4 (2005) 7 Supreme Court Cases 550

5 Criminal Application No.2177 of 2006 dated 21/06/2006

6 2006 All Mr (Cri) 2405

7 Criminal Application No.1227 of 2008 dated 7/07/2008

8 Criminal Bail Application No.2522 of 2014 dated 25/03/2015

9 Criminal Bail Application No.1296 of 2022 dated 17/03/2023

inadmissible, still Court can consider other materials collected during investigation.

- (ii) Even though nothing was found in possession of the Applicant still other materials need to be considered, and bail can be refused. In that case, on the basis of disclosure of the Respondent /accused large haul of contraband was seized from one godown and there were CDRs also. On these materials, the Hon'ble Supreme Court cancelled the bail. Mr. Halwasia is perfectly right that mere non possession cannot be considered as a ground to grant bail.

8. Whereas in case of **Sukhdev Singh (supra)** referred above, report of Chemical Analysis was considered sufficient to find out whether it is contraband or not. It is not necessary that one should do physical analysis.

- (a) In case of **Amarsing Ramjibhai Barot (supra)** referred above, Hon'ble Supreme Court dealt with the issue of considering the "quantity of contraband found in possession of one accused" against other accused. Even though two persons were found together, but individually carrying recovered substances. There was no evidence to suggest that there was any abetment and /criminal conspiracy (para 8).

9. Whereas in case of **Akash J. Jariwala (supra)** referred above, the Applicant was found in possession of small quantity and contraband was also found in the glove box. This Court found the contents of statement under Section 67 of NDPS Act short of indicating conspiracy. This Court granted bail.

10. In the orders in case of **Rashida Iqbal Khan (supra)**, **Sangeeta Y. Gaikwad (supra)** and **Roshan Munan Singh (supra)**, this Court granted bail. The quantity found with one accused can be considered against co-accused with the aid of section 29 of NDPS Act provided there should be evidence of conspiracy.

11. If we apply the ratios in above referred judgments to the facts we may find that the Applicant was driving Tata Nexon Car and 12 Kg Ganja was found in the car. There are two other materials:-

- (a) This Applicant accompanied co-accused Sunil Bhandari to Bidar. It is for the purpose of procuring ganja from one lady by name Reshma.
- (b) C.D.R. and tower location showing interaction with co-accused and location in and around spots.

12. The statement recorded under section 67 of NDPS Act is now inadmissible. But if certain materials are found in pursuance thereof, certainly, it can be considered what is found is movement of

present Applicant on the basis of electronic evidence. But when prosecution says that one lady Reshma was contacted, there is no material pointed out to justify that allegation. Furthermore, there are two recoveries on different dates, at different time from different persons. There has to be connecting link. I am afraid that is shown on the basis of materials.

13. Let the prosecution explain these circumstance at the time of trial. At prima facie stage, I found them inadequate so as to warrant further detention. The Applicant has made out a case for grant of bail. There are no criminal antecedents pointed out against the Applicant. The bar under Section 37 of NDPS Act is lifted. Hence order :-

ORDER

- (i) Bail application is allowed.
- (ii) Applicant-Aman Suraj Gagde arrested in connection with C.R. No. 43 of 2021 registered with NCB, Mumbai Zonal Unit, Mumbai for the offence punishable under Sections 20 (B)(ii)(c), 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, be released on bail on furnishing Personal bond and surety bond in sum of Rs. 50,000/-.

- (iii) Applicant is directed to give attendance to the Office of NCB, Mumbai on last Monday of the month of September and March of every year from 10.00 a.m. to 12.00 noon till completion of trial.
- (iv) Applicant shall not threaten the prosecution witnesses.
- (v) The Applicant shall regularly attend the proceedings before the trial Court.
- (vi) Needless to say, violating of the condition above will make the Applicant liable for cancellation of bail.

14. Application is disposed of in the aforesaid terms.

[S. M. MODAK, J.]

Another matter

The predominant point which was argued in this application is whether the provisions of Section 42 of the NDPS Act were followed in this case. Accordingly we have heard ____

It is true that when information is received that contraband will be found, the officers are supposed to write down that information. In this case, according to the learned Advocate ____ this provision has not been followed and as such Rigors under Section 37 of the NDPS act will not be applicable. The Applicant was arrested on 29/11/2019 at Kasarwadawali Pune and thereafter he was produced before _____. The prosecution claims that the involvement of the Applicant is disclosed as per Memorandum statement given by already arrested accused-Sushant Rasal. Whereas Mr. Ta. contends that still the provisions of the Section 42 need to be followed.

In nutshell the prosecution case is as follows:-

[S. M. MODAK, J.]