

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION (BA) NO.345 OF 2023

Arvind s/o Suresh Bansal (Banskar)

Vs.

State of Maharashtra, through PSO, PS, GRP Railway, Nagpur

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.

Court's or Judge's orders.

Shri A.K. Bhangde, Advocate for applicant.

Shri M.J. Khan, APP for non-applicant/State.

CORAM : URMILA JOSHI-PHALKE, J.

DATE : AUGUST 07, 2023.

The present application is for grant of bail under Section 439 of the Code of Criminal Procedure (CrPC) in connection with Crime No.488/2022 registered with Police Station, GRP Railway, Nagpur for the offences punishable under Sections 20 (b)(ii) (C) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (For short, "NDPS Act"). The applicant is arrested on 19.07.2022 and since then he is in jail.

2. The crime is registered on the basis of a report lodged by Suhasini Uday Lade. As per the accusation, on 11.07.2022, the informant, who was serving as Assistant Sub Inspector RPF Railway, lodged a report alleging that on 11.07.2022 at about 10.25 am accused persons were found in the waiting room in a suspicious condition and they were carrying certain bags along with them. Out of them, one child in conflict with the law also accompanied them. Except

the child in conflict with the law the other accused persons managed to flee away from the spot. During the interrogation, the child in conflict with the law was not giving any information. Subsequently, the present applicant was also arrested. The bags with whom the child in conflict with law was found were containing toxicant substance (ganja). The same was examined and verified on the spot. Upon primary inspection, it was noticed that the said substance is ganja. Accordingly, the seizure panchanama came to be conducted in the presence of the gazetted officer and panchas. The two bags was containing 28.885 kg of ganja. Accordingly, the sampling was obtained and the same was forwarded to the forensic laboratory. One bag was found containing 14.552 kg of ganja and the total weight of the said ganja along with the bag was 15.594 kg and another bag was also containing 14.333 kg along with the bag its total weight measured upto 15.594 kg. On the basis of said report, the police have registered the crime against the child in conflict with the law and other co-accused. The present applicant is also arrested during the investigation.

3. As per the contention of the present applicant, he is arrested merely on suspicion and on the basis of the statement of the co-accused. In fact, he is not involved in the alleged offence. There are no criminal antecedents against him. It is further contention of the applicant that the investigating officer tried to secure electronic evidence

captured in CCTV footage however it nowhere shows the involvement of the present applicant. The other co-accused person are not traced out. Now the investigation is completed and charge-sheet is already filed. Further custody of the present applicant is not required.

4. The said application is strongly opposed by the State on the ground that the applicant was found in possession of substance like ganja. The children of the tender age are used in the commission of the said crime. If the applicant is released on bail again there is apprehension of his involvement in similar types of offences. The ganja seized from the spot is of commercial quantity. There is a *prima facie* case against the present applicant and hence, the bail application deserves to be rejected.

5. Heard learned counsel Shri Bhangade for the applicant. He submitted that there is non-compliance with the mandatory provisions of Section 52A of the NDPS Act. The weight of the ganja was not obtained by separating the flowering and fruiting tops of the said ganja. The entire weight is taken by the investigating officer. The inventory was carried out however sample was not obtained at the time of inventory but it was obtained at the time of seizure of the said contraband article. Thus, the mandatory provisions are not followed. On that ground also, the applicant is also entitled to be released. Now the

investigation is completed. There are no criminal antecedents against the present applicant. In view of that, the present applicant deserves to be allowed.

6. The learned APP Khan for the State submitted that commercial quantity is sized and the applicant ran away from the spot of incident. Teenage boys are used in the commission of the crime. Though the samples are not obtained at the time of inventory however considering the statement of the co-accused and the seizure of the contraband articles were sufficient to show the involvement of the present applicant in the alleged offence. Therefore, the application deserves to be rejected.

7. There is no dispute that commercial quantity in relation to the NDPS Act for ganja is any quantity greater than 20 kg. Section 2(iii) (b) and (c) defines ganja that the flowering or 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 any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom.

8. Thus, the definition of the term 'ganja' defines and clarifies that ganja is a flowering or fruiting tops of the cannabis plant excluding the seeds and leaves when not accompanied by the tops. The recitals of the FIR show that

the three bags were found along with the boys. Only a child in conflict with the law was caught. There is no description mentioned in the FIR regarding contraband articles seized from the said bags. The description mentioned in the seizure panchanama is also only as 'ganja'. It further appears from the investigation papers that the entire quantity was weighed totally and not separating the flowering tops and fruiting tops. Whether the flowering tops or fruiting tops were there is also not mentioned in the seizure panchanama.

9. The above state of affairs would make it clear that the investigating officer has not followed the due procedure while seizing the said contraband articles.

10. The learned counsel for the applicant has pointed out that the samples are not obtained during the inventory, which is mandatory, in view of section 52A of the NDPS Act. The inventory report is perused, which also shows that contraband articles were produced. Even there is no description in the inventory also. The contraband articles were produced before the Magistrate. In the inventory report also only 'ganja' is mentioned and a description is given. It further reveals that the samples were obtained during the said inventory. Learned counsel rightly placed reliance on recent judgment of the Hon'ble Apex Court in the case of ***Simarnjit Singh Vs. State of Punjab*** in Criminal Appeal No.1443 of 2023 decided on 09.05.2023, wherein the

Hon'ble Apex Court by referring the judgment of in the case of *Union of India v. Mohanlal and another* reported in (2016) 3 SCC 379 held that it is manifest from Section 52-A(2)include (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

11. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire

exercise has to be certified by him to be correct.

12. Thus, the Hon'ble Apex Court held that seizure is not in conformity with the law laid down by this Court in the case of *Mohanlal*. This creates a serious doubt about the prosecution's case that substance recovered was a contraband. Here in the present case also, the description of the contraband is neither mentioned in the FIR nor mentioned in the seizure panchanama or in the inventory. Thus, the mandatory provisions are not followed by the investigating officer.

13. In view of Section 37 of the NDPS Act, the power to release an accused on bail subject to the limitation contained in Section 439 of the CrPC coupled with the limitation contemplated in view of Section 37 itself, mainly (1) there are reasonable ground for releasing that accused is not guilty of such offence, (2) that he is not likely to commit such offence while on bail. The expression reasonable ground means something more than *prima facie* ground it contemplates substantial probable cost for believing that the accused is not guilty of the offence.

14. It is significant to note that the definition of 'ganja' under NDPS Act takes in its ambit only the flowering or fruiting tops of cannabis plant and excludes the seeds and leaves when not accompanied by the tops. Here, the

description of the contraband article is not mentioned. There is no compliance of section 52A of the NDPS Act

15. Thus, after perusal of the investigation papers, prima facie, the material complied with the charge-sheet, it is difficult to accept that the alleged prohibited substance is 'ganja' since no description is mentioned in any of the documents, which is prepared during the investigation. In view of the aforesaid reasons, the mandatory provision regarding the sampling in the presence of the Magistrate is also not complied with. In view of the aforesaid reasons, the applicant is entitled to be released on bail.

16. Needless to say that the observations made are relied on the basis of the facts of present case and trial Court shall not be influenced by the said observations during the course of the trial. Accordingly, I proceed to pass the following order:

ORDER

- i. The application is allowed.
- ii. The applicant- Arvind S/o Suresh Bansal (Banskar), in connection with Crime No.488/2022 registered with Police Station, GRP Railway, Nagpur for the offences punishable under Sections 20 (b)(ii) (C) and 29 of the Narcotic Drugs and Psychotropic Substances

Act, 1985, shall be released on bail on furnishing PR bond of ₹25,000/- with one surety of like amount.

- iii. The applicant shall report to the concerned Police Station once in a month on first Saturday between 11.00 a.m. to 1.00 p.m.
- iv. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the present case.
- v. The applicants shall furnish his cellphone number address with the address proof. Additionally, he shall furnish the names of their two relatives and their address with the address proof.

With this, the application is disposed of.

JUDGE

Wagh

Signature Not Verified

Digitally Signed By: SURESH RAOSAHEB
WAGH
Personal Assistant to Hon'ble
Judge, High Court of Bombay, Nagpur
Bench, Nagpur.
Signing Date: 08.08.2023