

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (BA) NO. 410/2023

Raosaheb s/o Bhagwan Malwar and another

vs

State of Maharashtra, thr. Police Station Officer, P.S. Deulgaon (Raja), Tq. Deulgaon
(Raja), Dist. Buldana

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Mr. Anilkumar Thakkar, counsel for applicants.

Mr. S.M.Ghodeswar, APP for non-applicant/State.

CORAM : URMILA JOSHI-PHALKE, J.

DATE FOR RESERVE: 28/07/2023

DATE OF DECISION : 18/08/2023

1. The present application is moved by the applicants under Section 439 of the Code of Criminal Procedure, 1973 and under Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act') in respect of Crime No.111/2022 registered at Police Station Deulgaon (Raja), Tq. Deulgaon (Raja), District Buldana, for the offence punishable under Section 8(c), 20 and 29 of the NDPS Act.

2. The crime is registered on the basis of report lodged by Police Sub Inspector – Shrikant Jindamwar, Local Crime Branch, Buldana. The

applicants are arrested on 22/03/2022 since then, they are in jail.

3. As per the contention of the prosecution on 22/03/2022 at about 1.30 p.m. at Deulgaon-Raja to Jalna Road, while informant was discharging his duty along with the other Police Officials, one vehicle bearing No. MH-28/AZ-0632 came from opposite direction and on seeing the Police Party, the driver of the said vehicle took the vehicle in the reverse position. Therefore, the informant suspected and chased the vehicle along with other raiding party members. However, two of the persons in the car managed their escape by taking disadvantage of the darkness. It was further alleged that present applicants were occupying the backside seats in the vehicle, both the applicants found possession of contraband namely Ganja weighing about 42.360 Kgs. It was alleged that after completing the formalities as required, both the applicants are arrested.

4. As per the contention of the applicants that they are arrested merely on suspicion. There are no criminal antecedents against them. Nothing has been seized from their physical possession and the applicants are neither the owner of the vehicle nor any contraband articles found in their physical possession. The mandatory provisions are not

followed. Since the date of arrest, they are behind bar. Now, the investigation is completed and charge-sheet is filed, further custody is not required and they be released on bail.

5. The said application is strongly opposed by the State on the ground that both the applicants were travelling in the accosted vehicle along with contraband article. The vehicle was chased by the informant and other raiding party members. Though the applicants succeeded in eloping from the place, however, subsequently they are arrested. They are found in possession of contraband article i.e. Ganja 42.360 Kg worth of Rs. 5,08,320/-. In view of Section 37, there is a bar to release the present applicants on bail. All the mandatory provisions are followed by the Investigating Officer. In view of that application deserves to be rejected.

6. Heard Mr Anilkumar Thakkar, learned counsel for the applicants. He reiterated the contentions and submitted that the samples were not obtained in presence of the Magistrate, there is no compliance of Section 52-A of the NDPS Act. The applicants are not found in possession of the Contraband Article. The present applicants are arrested on the basis of confessional statement of the co-accused which is not admissible. There is no

compliance under Section 52-A of the NDPS Act. In view of that the applicants are released on bail.

7. Learned counsel for the applicant placed reliance in the case of ***State by (NCB) Bengaluru Vs Pallulabid Ahmed Arimutta and another reported in (2022)1 S.C.R. 422***; wherein it is held that confessional statement recorded under Section 62 of the NDPS Act will remain inadmissible in the trial by an offence under the NDPS Act.

He further placed reliance in the case of ***Union of India through Narcotics Control Bureau, Lucknow V/s Md. Nawaz Khan reported in (2021)7 S.C.R. 819***, wherein the Hon'ble Apex Court has discussed Section 37(1)(b)(ii) and held that the word "reasonable" signifies "in accordance with the reasons" in the ultimate analysis, it is a question of fact, whether a particular act is reasonable or not depends on the circumstance in a given situation.

8. Per contra, the learned APP Mr S.M. Ghodeswar, vehemently submitted that the applicants were arrested, and during investigation it reveals that they were travelling by the vehicle bearing No. MH-28/AZ-0632. The contraband articles was also found in the vehicle. Thus there is a prima-facie material against the present applicants. The said contraband

article was forwarded to chemical analyser and reveals that it is analysed as Ganja. In view of Section 37, there are limitations to release the present applicants on bail. In view of that application deserves to be rejected.

9. Having heard the learned counsel for the applicants and learned APP for the State. Perused the investigation papers. There is no dispute that commercial quantity in relation to the NDPS Act for 'Ganja' means any quantity greater than 20 kg. The Section 2(iii) (b) and (c) defines 'Ganja' as the flowering or fruiting 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.

10. Thus the definition of term 'Ganja' defines and clarifies that 'Ganja' is the flowering or fruiting tops of the cannabis plant excluding the seeds and leaves when not accompanied by the tops. In case in hand, as seen from the FIR and the investigation papers, the quantity of 46.360 kg of ganja was seized from the vehicle. The description mentioned in the FIR, shows that the green black similar to leaves and seeds having strong odour, contraband was found in

the gunny bags, and total contraband article was 42.360 kg. The similar description is mentioned in the seizure memo as well as in the inventory. It further reveals that the said contraband article was weighed by removing it from the gunny bags and sealed in the said gunny bag. As per the seizure memo and inventory, it was in the two plastic gunny bags, and on measurement, the contraband article found in one gunny bag as 25.240 kg. and in another gunny bags as 17.280 kg. After weighing the aforesaid Ganja, it was seized and sealed in the same Gunny bags along with particulars of crime.

11. The above state of affairs would make it clear that there is nothing on record to show that before carrying a weight of the seized plant of ganja, the investigating officer has separated the flowering or fruiting tops of cannabis plant in order to ascertain the exact quantity of Ganja. In fact, the description mentioned in the FIR as well as in the seizure memo is blackish leaves and seeds. Thus the description not mentions about flowering or fruiting tops of cannabis plant. Admittedly, it was not separately weighed in order to ascertain the exact quantity of Ganja. As per the definition of Ganja defines flowering or fruiting tops of the cannabis plants and excluding the seeds and the leaves. Here the

description is regarding leaves and seeds only. This fact becomes further clear from the panchanama also. The seizure panchanama also nowhere shows that the flowering or fruiting tops of cannabis plants were in any other manner, separated in order to ascertain the correct quantity of Ganja. The chemical analyser report though forthcoming and shows the flowering or fruiting tops and cannabis plant. Thus, on perusal of the material on record shows that what was seized was green black leaves and seeds and there was no quantification as flowering tops and without separating the flowering or fruiting tops, the contraband was weighed. As the seized materials was not weighed after separating the flowering tops and therefore, it is difficult to ascertain whether the quantity can be said to be commercial.

12. Another aspect of the matter is that the samples were not obtained before the Magistrate, neither the samples were produced before the Magistrate. Thus, there is no compliance, in view of Section 52-A of the NDPS Act. This aspect is recently dealt by the Hon'ble Apex Court in the case of ***Simarnjit Singh Vs State of Punjab in criminal appeal No. 1443/2023 decided on 09/05/2023***, wherein the Hon'ble Apex Court by referring the judgment of

Union of India vs Mohanlal and another reported in (2016) 3 SCC 379, wherein it is held that;

‘15. 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.

16. 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.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise.

This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

13. Thus, the Hon'ble Apex Court has held that the seizure is not in conformity with law laid down by this Hon'ble Court in the case of **Mohanlal** referred (supra), this creates a serious doubt about the prosecution case that substance recovered was a contraband. The case of the prosecution is not free from suspicion and the same has not been established beyond reasonable doubt. Here, in the present case also, the samples neither obtained in presence of Magistrate nor it is produced before the Magistrate. Thus, there is absolutely no compliance in view of Section 52-A of the NDPS Act.

14. In view of the Section 37 of the NDPS Act, the power of release an accused on bail subject to the limitation contained in Section 439 of the Code of Criminal Procedure coupled with the limitation contemplated in view of the 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 cause for believing that the accused is not guilty of the offence.

15. 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. Thus, the definition of 'Ganja' is restricted and it does not include the seeds and leave of ganja plant. The panchanama and seizure only reflect the seized ganja, as a seized material. Another aspect of the matter is the compliance under Section 52-A is not carried out by the raiding party members. The inventory certificate mentions about the leaves and seeds, it nowhere shows that it includes flowering or fruiting tops.

16. 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 it do not come within the definition of Ganja under the NDPS Act. Since the only leaves and seeds are mentioned in the informant, and in the FIR and the seizure memo

which are not classified as Ganja, and only flowering or fruiting tops of cannabis plants are classified as ganja. In absence of the prima-facie material, it is difficult to accept that applicant is guilty for such offence. There is no ground for believing that the applicant is guilty of the offence for the aforesaid recorded reasons. In view of the aforesaid reasons, the applicants are entitled of being released on bail.

17. Needless to say that the trial Court shall not be influenced by the observations during the course of the trial. Accordingly, I proceed to pass the following order:

ORDER

- i. The application is allowed.
- ii. The applicants (1)***Raosaheb Bhagwan Malwar and (2) Samadhan s/o Bhagwan Jadhav***, in connection with Crime No.111/2022 registered with Police Station, Police Station Deulgaon Raja, Tq. Deulgaon Raja, District Buldana, for the offence punishable under Section 8(c), 20 and Section 29 of the Narcotic Drugs And Psychotropic Substances Act, 1985, shall be released on bail on furnishing PR bond

of Rs. 25,000/- each with one surety of like amount.

- iii. The applicants 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 applicants 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 their cellphone numbers address with the address proof. Additionally, they shall furnish the names of their two relatives and their address with the address proof.

With this, the application is
disposed of.

JUDGE