



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

CRIMINAL APPLICATION (BA) NO. 550/2023

Malkan s/o Sardarsing Bassi V/s State of Maharashtra

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

Court's or Judge's Order

Mr. T.Deshpande, counsel for the applicant.

Mr. Suraj Hulke, APP for the non-applicant/State.

CORAM : URMILA JOSHI-PHALKE, J.

DATED : 20/12/2023.

1. By this application, the applicant is seeking bail under Section 439 of the Code of Criminal Procedure, in connection with the Crime No. 49/2021 registered with Police Station Shivaji Nagar, District Buldhana for the offence punishable under Section 20(b)(ii) of Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).

2. As per the allegation that on 04/02/2021 when the informant was present in the Police Station, he received the secrete information that one vehicle bearing No. AP-27/Q-6133 is proceeding from bypass road towards Khamgaon Nandura. Some persons are transporting the contraband article Ganja, he immediately rushed towards spot along with raiding party members. After following the due process, he conducted the search. During the search, four nylon

gunny bags were found containing weighed of green colour leaves, flowering buds, stems, and the seeds accordingly, he seized the seized contraband articles. After weighing the same, it was 85 Kg 650 gm. He seized the said contraband articles and brought to the Police Station. Before sealing the sample was taken from one bag, and after completion of the process, he has filed the report, on the basis of said report police have registered the crime.

3. The learned counsel Mr. T. Deshpande for the applicant submitted that contraband article seized is not the Ganja in view of the definition of Section 2-B of the NDPS Act. He submitted that the term Ganja has defined in Section 2(iii)(b) of the NDPS Act. He submitted that the term “Ganja” as defined in Section 2(iii) means flowering or fruiting tops of cannabis plant (excluding sees and leaves when not accompanied by tops), by whatsoever, name they may be known or designated. He further submitted that a plain reading of Section would reveal seeds and leaves would not be covered under the definition of Ganja unless they are accompanied by flowering or fruiting tops of the cannabis plant.

4. He further submitted that the investigating officer has not collected the samples from each of the bag, and only collected the sample from one of the

bag, and the said samples are also not produced before the magistrate. Thus there is no compliance of the mandatory provisions and therefore, the present applicant to be released on bail.

5. Per contra, learned APP for the State he relied upon the decision of the Apex Court in the case of *Shiv Kumar Mishra V/s State of Goa, (2009) 3 SCC 797* and submitted that the samples has been drawn in accordance with law.

6. I have perused the record and considered the submissions advanced by the learned counsel for the respective parties.

7. From recitals of the FIR, it reveals that the contraband articles seized by the investigating officer is the wet green leaves, stems, seeds and the flowers. The term “Ganja” defines and clarifies that “Ganja” is flowering on fruiting tops of cannabis plant excluding seeds and leaves when not accompanied by tops.

8. In the case in hand, as seen from the FIR and the investigating papers, quantity 85 Kg and 650 Grams. Ganja was seized from the vehicles, the samples are drawn immediately from one Gunny Bag in absence of inventory.

9. The inventory report only shows the quantity which was seized. From the inventory, it nowhere reveals that either the samples are obtained before the Magistrate or the samples taken are produced before the Magistrate. The description of the contraband articles is also not mentioned in the inventory report.

10. The above state of affairs would make it clear that there is nothing on record to prima facie show that before carrying weight of the seized plant of “Ganja”, the investigating officer has separated flowering or fruiting tops of cannabis plant in order to ascertain exact quantity of “Ganja”. In fact, it is not mentioned in the inventory report that the seeds substance includes flowering or fruiting tops of cannabis plant. This fact also makes it further clear from the Panchanama also. The seizure panchanama also nowhere shows that flowering or fruiting tops of cannabis plant where in any other manner separated in order to ascertain correct quantity of Ganja. The Chemical Analyzer Report also shows that greenish, brownish colour leaves, flowering tops, seeds and stocks are forwarded for the analysis.

11. Thus, perusal of the material on record shows that what was seized was stems, leaves and plant, and there was no quantification of flowering

tops and without separating flowering or fruiting tops, when the contraband article was weighed. As the seized material was not weighed after separating flowering tops, it is difficult to ascertain whether it can be said to be a commercial quantity.

12. In view of Section 37 of the NDPS Act, power to release an accused on bail subject to limitation contained in Section 439 of the CrPC coupled with limitation contemplated in view of Section 37 itself, i.e. (i) there are reasonable ground for releasing that accused is not guilty of such an offence and (ii) he is not likely to commit such offence while on bail. The expression reasonable grounds means something more than prima facie ground it contemplates substantial probable cause for believing that accused is not guilty of offence and record satisfaction about the existence of such grounds. But, the court has to consider the matter as if it is not pronouncing the judgment of acquittal and recording finding of not guilty.

13. Bearing the aforesaid proposition in mind, it is necessary to look into nature of accusation and evidence collected by the prosecution.

14. The report of analysis refers to the sample as greenish brownish colour leaves, flowering tops, seeds, and stalks. Necessarily, the entire mixture is

weighed and found to be 85 Kg 650 grams. On the basis of the same, the applicant is charged for possession and delivering commercial quantity of "Ganja". The discrepancies in the manner of seizure and analysis prima facie satisfy that there are reasonable grounds for believing that the applicant is not guilty for the offence. The panchanama prima facie reveals that the seized material contained green leaves and flowering buds without separating the same is forwarded to the Chemical Analyzer.

15. The seizure panchanama also shows that the samples are not obtained in the presence of the Magistrate. In the case of **Bothilal vs. The Intelligence Officer, Narcotics Control Bureau, reported in 2023(6) SCALE 377** wherein it is held that subsection (3) of Section 52-A of the NDPS Act 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.

16. Thus, the act of drawing samples from all packets, at the time of seizure, is not in conformity with what is held in the case of ***Union of India vs. Mohanlal and anr, reported in (2016)3 SCC 379.***

17. As far as the limitations under Section 37 of the NDPS Act are concerned, the Honourable Apex Court in the case of ***Mohd.Muslim @ Hussain vs. State (NCT of Delhi), reported in 2023 Live Law SC 260*** held that special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. It is further held that the conditions which courts have to be cognizant of are that there are reasonable grounds for believing that the accused is “not guilty of such offence” and that he is not likely to commit any offence while on bail. What is meant by “not guilty” when all the evidence is not before the court? It can only be a prima facie determination. That places the court’s discretion within a very narrow margin. Given the mandate of

the general law on bails (Sections 436, 437 and 439, CrPC) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted reasonably.

It is further held that a plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section of the NDPS Act.

18. It is significant to note that the definition of “Ganja” under the NDPS Act takes in its ambit only

the flowering or fruiting tops of cannabis plants and excludes the seeds and leaves when not accompanied by the tops.

19. Another aspect of the matter is that the leaves and fruiting tops were not separated while weighing quantity of “Ganja”. The samples are not taken before the Magistrate. Thus, there is no compliance under Section 52-A of the NDPS Act.

20. Thus, perusal of the investigation papers and the material complied with the charge-sheet, prima facie, shows that it is difficult to say that the alleged prohibited substance is “Ganja” since it does not come within the definition of “Ganja” under the NDPS Act.

21. In view of the aforesaid reasons, as there is no ground to believe that the applicant is guilty of the offence for the aforesaid recorded reasons, the applicant is entitled to be released on bail. Hence, following order is passed:

ORDER

(1) The criminal application is **allowed**.

(2) Applicant – Malkan s/o Sardarsing Bassi, in connection with Crime No. 49/2021 registered with Police Station Shivaji Nagar, District Buldhana for the offences punishable under Section 20(b)(ii) of

Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act), shall be released on bail on his executing a P.R.Bond in the sum of Rs.50,000/- with one solvent surety of the like amount.

(3) The applicant shall report to the concerned police station once a month i.e. first Saturday of every month between 10:00 am and 1:00 pm.

(4) The applicant shall not directly or indirectly make any inducement and threat or promise to any person acquainted with the facts of the present case.

(5) The applicant shall furnish his cell phone number(s) and address with the address proof. Additionally, he shall furnish names of his two relatives and their addresses with proofs.

(6) Needless to mention that the observations made in this order are purely prima facie for deciding the present application for grant of bail only and learned Judge before whom the trial will be conducted shall not get influenced by the said observations.

The application stands disposed of.

[URMILA JOSHI-PHALKE, J]