

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

CRIMINAL APPLICATION (BA) NO. 603/2023

Satyaveer s/o Shahukar Rajput
 VS
 State of Maharashtra, thr. P.S.O., P.S. GRP Gondia

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

Court's or Judge's Order

Mr A.K. Bhangde, counsel for applicant.
 Mr. M.J.Khan, APP for non-applicant/State.

CORAM : URMILA JOSHI-PHALKE, J.
DATE FOR RESERVE: 02/08/2023
DATE OF DECISION : 18/08/2023

1. The present application is moved by the applicant 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. 68/2022 registered at Police Station, GRP Gondia, District Gondia, for the offence punishable under Section 8(c), 20(b) ii (C) and 29 of the NDPS Act.

2. The crime is registered on the basis of report lodged by Vainktrao Laghuji Kavas on an allegation that on 13/07/2022, he was performing duty along with Crime Detection Squad under the supervision of R.P.F. Inspector Nandabhadur. The train No. 12409 Gondwana Express haulted in between Gondia and Tumsar Road. The three

suspected persons were travelling in General Coach and they were having three different colour bags. As the squad suspected the said three persons and inquired about their valid ticket for travelling. They were also asked to open their bags and it was found that the said bag was containing Ganja. Accordingly, the Raiding Officer after due compliance, seized the said Contraband Article. The three persons were taken into possession, the spot panchanama and seizure memo was prepared. The seized Ganja weighing approximately 36.22 Kg. The weight description of the three bags was as under :-

- a. Blue colour bag-12 Kg. 220 gm possessed by Pralhad Rajput.
- b. Golden brown bag – 13 Kg. 0.50 gm possessed by Satyaveer Rajput i.e. present applicant.
- c. Black colour bag – 10 Kg. 950 gm possessed by Avaransingh Rajput.

On the basis of said report, the Police have registered the crime against the present applicant and other co-accused. The present applicant is arrested on 14/07/2022 since then he is in jail.

3. As per the contention of the applicant that he is arrested merely on suspicion, nothing is seized from him.

The seizure memo is not explained to him and it also does not bear his signature. The entire charge-sheet nowhere discloses the description of the Contraband Article which is seized by the Police. There is no compliance of Section 52-A of the NDPS Act, as the samples were obtained at the time of the seizure memo itself, and not obtained before the Magistrate. As the mandatory provisions are not followed, the entire prosecution case becomes doubtful. There are no criminal antecedents against the present applicant, in view of that he be released on bail.

4. The said application is strongly opposed by the State on the ground that the Police Sub-Inspector, RPF Tumsar Road lodged this report, as on the basis of secrete information, the lead was given about the women trafficking in the said train, and consequently, the complainant noticed three suspected persons in a general bogey possessing three bags. They were accosted and their bags were searched, wherein Contraband Article i.e. Ganja was found. Compliance of Section 41(i)(ii) of the NDPS Act was also done and thereafter, the samples were obtained, the seizure memo was prepared, and the cell phones of the present applicant was seized. The present applicant was found in possession of the Contraband Article weighing 13 Kg. During the course of the investigation, the investigating officer has also drawn the seizure memo. The Contraband Article was also forwarded

to the Magistrate to obtain the inventory certificate under Section 52-A of the NDPS Act. The said certificate is also issued. Thus, there is a prima-facie case. In view of the limitation under Section 37 of the NDPS Act, the present application deserves to be rejected.

5. Heard learned counsel Mr. A.K.Bhangde for the applicant. He reiterated the contention and submitted that the description of the Contraband Article is mentioned as 'घास चुम्मा' having a strong odour. Thus, a description of the contraband article is not mentioned. In view of the definition of 'Ganja' given under Section 2(iii)(b) and (c) defines Ganja as 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.

6. Thus the definition of the term 'Ganja' defines and clarifies that 'Ganja' is the flowering or fruiting tops of the cannabis plant and it excludes the seeds and leaves. Here the entire investigation papers nowhere disclose the description of the material which was seized. He further submitted that the seizure memo though prepared by investigating agency, however, it does not bear the signature of the accused which is a mandatory provision.

Moreover, the investigation papers show that samplings were done as soon as the seizure memo was prepared. In fact, in view of Section 52-A sampling ought to have been done in the presence of the Magistrate. Thus, there is no compliance under Section 52-A also.

7. In support of his contention, he placed reliance on following decisions;

(a) Sanjay Chandra v/s Central Bureau of Investigation reported in (2012) 1 SCC 40;

Wherein a relevant consideration regarding the grant of bail is considered and held that the object of bail is secure the appearance of the accused person at his trial by a reasonable amount of bail. The object of bail is neither punitive nor preventive. Deprivation of liberty must be considered a punishment unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. The detention in custody pending completion of trial could be a cause of great hardship.

(b) Simarnjit Singh V/s State of Punjab in Criminal Appeal No. 1443/2023 decided on 09/05/2023;

*Wherein it is held that seizure is not in conformity with the law laid down by this Court in the case of **Union of India V/s Mohanlal and another reported in (2016) 3 SCC 379**. This creates serious doubt about the prosecution's case that the substance recovered was contraband.*

(c) Criminal Bail Application (BA) No. 4125/2021 Santosh Pandurang Parate V/s Amar Bahadur Maurya and another decided on 19/07/2023;

Wherein by relying upon Union of India V/s Mohan Lal and Simarnjit Singh V/s State of Punjab held that the bar under Section 37 is lifted.

(d) Criminal application (BA) 101/2023 – Pravin Supda Chavan and another vs State of Maharashtra, through its PS, Risod, District Washim decided on 23/06/2023;

Wherein it is held that it is difficult to accept that alleged prohibited substance is Ganja since it do not come within the definition of Ganja.

(e) (1) Criminal application (BA) No. 1296/2022 - Ibrahim Khwaja Miya Sayyed @ Raju V/s the State of Maharashtra decided on 17/03/2023; (2) Ahmed Adenwala Kola v/s V.M.Dosi and others reported in 2001 All MR (Cri) 857; (3) Shankar Raju Banglorkar vs State of Goa reported in 1992 (2) Bom. C.R. 169; (4) Muthu Kumar vs Station House Officer reported in 2008(4) Crimes 722(Ker).

Wherein it is held that no link established between capsules purged and samples sent to Chemical Analyzer for analysis.

On the basis of the catena of decisions, the learned counsel for the applicant submitted that in view of the observations of the Hon'ble Apex Court, the mandatory provision of Section 52A is not followed which vitiates the trial. Therefore, the bar under Section 37 does not attract and applicant to be released on bail.

8. Per contra, learned APP strongly opposed the present application on the ground that the investigating officer has followed the mandatory provisions. The samples are obtained and forwarded to the chemical analyser. The chemical analyser report shows that the articles forwarded is the Ganja. So, the analysis done on the basis of samples taken shows that the contraband article was Ganja. Therefore, the contention as to the description of Ganja is not relevant. It is further submitted that possession of the contraband article is established on the basis of investigation papers. As far as non-compliance of mandatory provisions is concerned, is a matter of trial. At this stage, the criminal application deserves to be rejected.

9. Having heard learned counsel for the applicant and learned APP for the non-applicant/State. Perused the investigation papers, it reveals that present applicant along with two co-accused found in possession of three bags which was containing the contraband articles. The said contraband articles was seized and forwarded to chemical analyser. As far as the chemical analyser report, the said contraband article forwarded to chemical analyser is Ganja.

10. There is no dispute that commercial custody in relation to NDPS Act for 'Ganja' means any quantity greater than 20 Kg. 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.

11. 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 the case in hand, as seen from the FIR and the investigation papers, the quantity of 36.22 Kg of Ganja was seized when the present applicant along with other two accused were travelling in the train. The informant has described the said contraband article in the report as on 'घास जुमा नमीयुक्त गांजा'. The seizure memo also describes the contraband article in the similar manner. The seized contraband article was forwarded to inventory. The inventory was carried out before the Magistrate wherein also, the description of the contraband article is not mentioned. The recitals of the FIR shows that three bags namely the blue colour bag possessed by co-accused –(1) Pralhad Rajput, was containing 12 Kg. 2.20 gram., (2) the Golden brown bag possessed by present applicant containing 13 Kg 0.50 gram and black colour bag possessed by the co-accused, containing 10 Kg 950

gram and the description is mentioned as 'घास नुमा नमीयुक्त गांजा'.

12. It further appears that when the said bag was measured with the help of a weighing machine, there were three bags, and the bundles from the bags were opened and measured. After weighing the above said Ganja, it was approximately 36.22 kg. On measurement, the weight was found as mentioned above. After weighing the above said Ganja, it was seized in the same bags, and it further reveals that samples were not produced before the Magistrate at the time of inventory. It further reveals that the samples are not obtained before the Magistrate.

13. As observed by the Hon'ble Apex Court in the case of ***Simarnjit Singh*** referred (supra), wherein by referring its earlier judgment in the case of ***Union of India vs Mohanlal and another*** referred (supra), wherein it is held that;

'15. It is manifest from Section 52-A(2) include 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.”

14. Thus, it is observed by the Hon'ble Apex Court that all the packets at the time of seizure is not in conformity with the law laid down by this Court in the case of ***Mohanlal*** referred (supra). This creates serious

doubt about the prosecution's case that the substance recovered was contraband.

15. The above state of affairs would make it clear that there is nothing on record to prima-facie show that the contraband article seized was Ganja. The investigating officer has not separated the flowering or fruiting tops of the cannabis plant in order to ascertain the exact quantity of Ganja. In fact, there is no mention in the inventory report that the sealed substance includes the flowering or fruiting tops of cannabis plant. This fact becomes further clear from the panchanama. The seizure panchanama also nowhere shows the flowering or fruiting or fruiting tops of the cannabis plant, wherein in any other manner separated in order to ascertain the correct quantity of Ganja. The chemical analyzer report is forthcoming and it shows that it contends flowering or fruiting tops of cannabis plant. Thus, on a perusal of the material on record shows that what was seized was 'घास जुमा नमीयुक्त' and nowhere discloses flowering or fruiting or fruiting tops of the cannabis plant. The investigating officer nowhere shows that flowering or fruiting or fruiting tops are separated and thereafter it was weighed. As the seized material was not weighed after separating flowering tops and therefore, it is difficult to ascertain whether the quantity can be said to be commercial. Similar observations were made in the case of *Kallappa Irappa Biradar vs The*

State of Maharashtra in Criminal Application No. 590/2021 decided on 20/08/2021.

16. In view of Section 37 of the NDPS Act, the power of release the 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 Section 37 itself, mainly (1) there is 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.

17. 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 leaves of ganja plant. The panchanama and seizure do not reflect that the seized contraband was of flowering or fruiting tops along with the plant. Another aspect of the matter is that there is no compliance in view of Section 52-A and in view of the reasoned judgment of the Hon'ble Apex Court in ***Simarnjit Singh*** referred (supra). The non-compliance of Section

52-A vitiates the trial. The inventory certificate also nowhere mentions that the seized contraband article includes the flowering or fruiting tops. The samples were neither obtained in presence of the Magistrate nor produced before the Magistrate. Thus, there is no compliance in view of Section 52-A of the NDPS Act.

18. 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 there is no description to ascertain whether it comes within definition of Ganja under the NDPS Act. There is no compliance under Section 52-A. Thus, 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 applicant is entitled of being released on bail.

19. Needless to say that the observations made are relied on the decision of the present application and the 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- Satyaveer s/o Shahukar Rajput, in connection with Crime No.68/2022

registered with Police Station, GRP, Gondia, District Gondia, for the offence punishable under Section 8(c), 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 Rs. 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 applicant shall furnish the cellphone number address with the address proof. Additionally, the applicant shall furnish the names of his two relatives and his address with the address proof.

With this, the application is disposed of.

JUDGE