



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

CRIMINAL APPLICATION (BA) NO.650/2023

Shrinivas Narsayya Machidi

..VS..

**State of Mah., thr.PSO PS Ram Nagar, Chandrapur (City),
District Chandrapur**

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

Court's or Judge's Order

**Shri S.P.Bhandarkar, Counsel for the Applicant.
Shri M.Kavimandan, Additional Public Prosecutor for the State.**

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 08/12/2023

PRONOUNCED ON : 20/12/2023

1. By this application, under Section 439 of the CrPC, the applicant seeks bail in connection with Crime No.295/2022 registered with the non-applicant/police station for offences punishable under Sections 8(c), 20(B), 11(c), and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).

2. The applicant is arrested on 27.3.2022 and since then he is in jail.

3. The crime is registered on the basis of report lodged by a police official of the Local Crime Branch, Chandrapur on allegations that he received a reliable information to the effect that two vehicles, viz. "Honda City Car" bearing registration No.AP-9-BE-1122 and "Swift" AP-10-AP-2769, are proceeding towards Chichpalli, Mul Road, near "Shere Punjab Dhaba" carrying "Ganja". Accordingly, a trap was arranged and the police official recovered 51 packets worth of 107.052 kilograms from both vehicles. As per allegations, the applicant had driven the said

"Honda City Car." As the driver of the said "Honda City Car" and driver of the said "Swift" were found on the spot, they were added as accused and arrested. On the basis of the report, accordingly the crime was registered.

4. Learned counsel Shri S.P.Bhandarkar for the applicant, submitted that the contraband, alleged to have been recovered, is not "Ganja", as per definition provided under the NDPS Act. In fact, there is no material against the applicant to connect him with the alleged offence. Moreover, the investigating officer has not complied with mandatory provisions under the NDPS Act especially Sections 42 and 52A. Neither the samples are brought nor it is obtained before Magistrate. There is no evidence as to sanctity of seal. Thus, considering that the mandatory provisions are not followed, the applicant deserves to be released on bail. He further submitted that the alleged contraband would not fall within definition of "Ganja" defined under Section 2(b) of the NDPS Act. During investigation, seizure panchanama was drawn, which does not describe the contraband article properly. The inventory carried out shows that bundles, containing wet leaves, flowers, stems, and greenish colour plant, not Ganja as per definition of the NDPS Act. Even, while issuing the inventory, seeds and leaves were not excluded. Moreover, along with the chargesheet, Forensic Science Laboratory Report is not filed and, therefore, the chargesheet is incomplete. Thus, in view of the non-compliance of the mandatory provisions, exact quantity of "Ganja" is not weighed. As such, the applicant is entitled to be released on bail.

5. In support of his contentions, learned counsel Shri S.P.Bhandarkar for the applicant placed reliance on following decisions:

1. Komallu Shanthram Gughlot and anr vs. State of Mah. (Criminal Application (APPA) No.217/2023 decided by this court on 16.3.2023);
2. Praveen Supda Chavan and anr vs. State of Mah. (Criminal Application (BA) No.101/2023 decided by this court on 23.6.2023);
3. Chandrakant s/o Murlidhar Trivedi vs. The State of Mah. (Criminal Application (BA) No.416/2023 decided by this court on 20.7.2023);
4. Kunal Dattu Kadu vs. Union of India, reported in 2022 SCC OnLine Bom 1770;
5. Hari Mahadu Valse vs. The State of Mah. (Bail Application No.2299/2019 decided by this court at Principal Seat at Bombay on 19.7.2021);
6. Tilakdhari Yadav vs. State as rep. by officer Incharge Vasco Police Station and anr, reported in 2023 SCC OnLine Bom 792;
7. Suresh Maruti Pawar vs. The State of Mah. (Bail Application No.1599/2020 decided by this court at Principal Seat at Bombay on 17.11.2021;
8. Tanaji Jagannath Shinde vs. The State of Mah. (Bail Application NO.3035/2021 decided by this court at Principal Seat at Bombay on 17.11.2021;
9. Boota Singh and ors vs. State of Haryana, reported in 2021 SCC OnLine SC 324;
10. Hira Singh and anr vs. Union of India and anr, reported in (2020)20 SCC 272;
11. H.S.Arun Kumar vs. The State of Goa, reported in 2022 LiveLaw (Bom) 432;
12. Intelligence Officer, Thiruvananthapuram vs. Naushad K.K. and ors, reported in 2022 LiveLaw (SC) 978;
13. Amani Fidel Chris vs. Narcotics Control Bureau, reported in 2020 SCC OnLine Del 2080, and

14. Mahesh Gorakh Salunke vs. The State of Mah. (Bail Application No.1837/2023 decided by this court at Principal Seat at Bombay on 6.10.2023).

6. *Per contra*, learned Additional Public Prosecutor Mrs.M.Kavimandan for the State submitted that the applicant along with co-accused was found in his possession huge quantity of "Ganja" of 107.052 kilograms. Chemical Analyzer's Report described it as "Ganja". There is a substantial compliance of the mandatory provisions. In view of the same, the application deserves to be rejected.

7. In support of her contentions, learned Additional Public Prosecutor Mrs.M.Kavimandan for the State, placed reliance on the decision in the case of Praveen Khatri vs. State (NCT of Delhi), (Bail Application No.1245/2022 decided on 21.9.2023).

8. Having heard both the sides and perused investigation papers made available on record in the form of chargesheet and other documents including inventory certificate relied upon by the learned counsel for the applicant as well as learned APP, there is no dispute that commercial quantity, in relation to the NDPS Act, "Ganja" means any quantity greater than 20 kilograms. Section 2(iii)(b) and 2(iii)(c) define "Ganja", as flowering or fruiting tops of cannabis plant (excluding seeds and leaves when not accompanied by 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.

9. Thus, term "Ganja" defines and clarifies that "Ganja" is flowering of fruiting tops of cannabis plant excluding seeds and leaves when not accompanied by tops.

10. In the case in hand, as seen from the FIR and the investigating papers, quantity 107.052 kilograms of "Ganja" was seized from both vehicles. The samples are drawn immediately after seizure in absence of Magistrate. The inventory report shows that the samples were not shown to Magistrate. The description mentioned in the inventory also shows that it is wet leaves, flowers, and stems. Admittedly, the alleged contraband articles before weighing was not separated from flowering or fruiting tops of cannabis plant.

11. 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 had separated flowering or fruiting tops of cannabis plant in order to ascertain exact quantity of "Ganja". In fact, there is no mention in the inventory report that the sealed 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 were, in any other manner, separated in order to ascertain correct quantity of "Ganja". The Chemical Analyzer's Report shows that leaves, flowering tops, stems, and fruiting tops of cannabis plant were sent for analysis.

12. 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, the "Ganja" 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 commercial quantity.

13. The report of analysis is that, "greenish brown colour leaves, flowering tops, seeds, and stalks are put in a packet labelled. On the basis of chemical examination, it is concluded that the sample under reference is answered positive test for "Ganja".

14. 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, viz. (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 not to consider the matter as if it is pronouncing the judgment of acquittal and recording finding of not guilty.

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

16. As observed earlier, that seeds and leaves are not part of definition of Ganja", it is implied that if seeds and leaves are accompanied by tops, it would amount to "Ganja". However, whether seeds and leaves are not accompanied by tops, this will not consider as "Ganja". Ultimately, it has to be ascertained, whether flowering or fruiting tops of cannabis is accompanied with the leaves.

17. 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 107.052 kilograms. 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.

18. Learned counsel Shri S.P.Bhandarkar for the applicant, further raised a point that there is no compliance under Section 42 of the NDPS Act. The Honourable Apex Court in the case of **Karnail Singh vs. State of Punjab**, reported in 2008 SCC OnLine P&H 912 followed in subsequent judgments in the cases of **Sukhdev Singh vs. State of Haryana**, reported in (2013)2 SCC 212 and **State of Rajasthan vs. Jagraj Singh**, reported in (2016)11 SCC 687 wherein it is held that for non-compliance of Section 42 of the NDPS Act, appellants are entitled for acquittal.

19. The Hon'ble Apex court in the case of **Boota Singh and ors vs. State of Haryana** *supra* described the effect of the above decisions as under,

(1) officer on receiving the information from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1);

(2) but if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior;

(3) in other words, the compliance with the requirements of Section 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(4) while total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42.

The Constitution Bench came to conclusion that non-compliance of requirement of Sections 42 and 50 is impermissible whereas delayed compliance satisfactory explanation will be acceptable as compliance of Section 42.

20. The investigation material in the present case clearly shows that when the complainant was present in the police station, he received the secret information which is not reduced into writing by him in view of Section 42(1) of the NDPS Act. The compliance only shows that he has taken entry in station diary.

21. Thus, there is no compliance of Section 42 of the NDPS Act.

22. The seizure panchanama shows that the samples are not obtained in presence of the Magistrate.

23. In the case of **Bothilal vs. The Intelligence Officer, Narcotics Control Bureau, reported in 2023(6) SCALE 377** it is held that sub-section (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.

24. 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**.

25. 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.

26. 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.

27. Thus, definition of "Ganja" is restricted and it does not include the seeds and leaves of "Ganja" plants.

28. Another aspect of the matter is that the leaves and fruiting tops were not separated while weighting quantity of "Ganja". There is no compliance under Section 52-A of the NDPS Act.

29. Thus, perusal of the investigation papers and the

material complied with the chargesheet, *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.

30. 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 - Shrinivas Narsayya Machidi, in connection with Crime No.295/2022 registered with the non-applicant/police station for offences punishable under Sections 8(c), 20(B), 11(c), and 29 of the 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.)

!! BrWankhede !!