



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

**CRIMINAL APPLICATION (BA) NO.703/2023**

**Jaypal Reddy Gopal Reddy Adia**

**..VS..**

**The State of Mah., thr.PSO PS Ballarpur, District Chandrapur**

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

Court's or Judge's Order

**Shri Rohan Deo, Counsel for the Applicant.  
Shri S.S.Hulke, Additional Public Prosecutor for the State.**

**CORAM : URMILA JOSHI-PHALKE, J.**

**CLOSED ON : 14/12/2023**

**PRONOUNCED ON : 20/12/2023**

1. Heard learned counsel Shri Rohan Deo for the applicant and learned Additional Public Prosecutor Shri S.S.Hulke for the State.
2. By this application, under Section 439 of the CrPC, the applicant seeks bail in connection with Crime No.714/2021 registered with the non-applicant/police station for offences punishable under Sections 8(c) and 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).
3. The applicant is arrested on 24.6.2021 and since then he is in jail.
4. As per accusations against the applicant, one police constable Satish Patil received a secret information that certain persons travelling in a four-wheeler bearing registration No.TS-02-FD-6090 are carrying contraband article. He conveyed the said information to his superior officer and sought permission to conduct a raid and search the vehicle. Subsequently, they received an information that the offending vehicle is parked at a place near "Subhash Talkies Square".

Accordingly, they visited the spot and found two persons sitting in the vehicle including the applicant. Accordingly, the vehicle was searched and team of police officials found various bags containing 21.622 kilograms "Ganja". After following due procedure, the contraband article was seized and after completion of the investigation, chargesheet is filed.

5. Learned counsel Shri Rohan Deo for the applicant, submitted that the applicant was not found in possession of the said contraband article. He was sitting in the car. Nothing is on record to show that he had any knowledge that the said contraband article was being transported in the said vehicle. He further submitted that as per description mentioned in the FIR, the seized article was green colour leaves, flowering tops, stems, and seeds. He submitted that the said description is not within definitions of "Ganja". The investigating officer has not separated flowering or fruiting tops before weighing the same. If it would have been weighed after separating the same, it would not have been commercial quantity. He further submitted that Chemical Analyzer's Report also shows that flowering and fruiting tops were not separated before forwarding to the Chemical Analyzer. There is no compliance of Section 52-A of the NDPS Act as samples are not drawn in presence of the Magistrate. The inventory report nowhere shows that the samples were opened in presence of the Magistrate. The inventory report shows that though earlier samples were taken, again two samples were taken in presence of the Magistrate. The description of contraband article is not mentioned in the inventory report. Only it is mentioned to be moist cannabis. The Chemical Analyzer's Reports are not filed along with the chargesheet. Thus, incomplete chargesheet is filed. Such incomplete chargesheet cannot be said to be the chargesheet as contemplated under Section 173(5) of the CrPC so as to enable the Magistrate to take cognizance of the offence.

6. In support of his contentions, learned counsel Shri Rohan

Deo for the applicant placed reliance on following decisions:

**1. Criminal Application (BA) No.1495/2022 (Mohammad Isaruddin s/o Mohammad Shahuddin vs. The State of Maharashtra, thr.PSO PS Bhandara, Tahsil and District Bhandara decided by this court on 26.7.2023);**

**2. Bothilal vs. The Intelligence Officer, Narcotics Control Bureau, reported in 2023(6) SCALE 377.**

**3. Sunil Vasantrao Phulbande and anr vs. State of Mah., reported in 2002(3) Mh.L.J. 689.**

7. *Per contra*, learned Additional Public Prosecutor Shri S.S.Hulke for the State, submitted that as commercial quantity of contraband article was found in possession of the applicant, in view of rigor of Section 37 of the NDPS Act, the application deserves to be rejected.

8. Having heard both the sides and perused investigation papers, it reveals that the applicant was not found in his possession the said contraband article though the prosecution has claimed that the applicant was found to be in possession of the said article. Recital of the FIR shows that the secret information is received and the raiding party members visited the spot and the car was found at "Subhash Talkies Square" in front of "Mulchandani Kirana Stores" and the applicant was found inside the car. The contraband article was found in the deekay of the car and three packets are found in seat cover weighing 21.622 kilograms of "Ganja."

9. The definitions under section 2(ii)(b) and 2(iii)(b)(c) of the NDPS Act specify "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.

10. 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.

11. In the case in hand, as seen from the FIR and the seizure panchanama, the description mentioned as greenish colour leaves, flowers, stems, and seeds on it. The certificate of inventory describes only as moist cannabis. The said contraband article is not weighed by separating flowering tops and buds. However, the same was weighed along with the leaves. The leaves and seeds are not contraband within definitions of "Ganja" under section 2(ii)(b) and 2(iii)(b)(c) of the NDPS Act.

12. The inventory carried out in presence of the Magistrate also shows that the contraband article is weighed along with leaves. The samples were taken at the time of seizure which is contrary to the provisions of the NDPS Act. In view of Section 52-A of the NDPS Act, the samples are to be taken in presence of the Magistrate. Thus, it reveals that at the time of seizure, the samples were taken and not at the time of inventory. The seizure panchanama also shows that samples were taken at the time of seizure. From the inventory, it reveals that samples obtained at the time of seizure were not produced before the Magistrate.

13. 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". Neither the FIR nor the seizure panchanama and inventory shows that flowering and fruiting tops were separated in order to ascertain correct quantity of "Ganja". The Chemical Analyzer Report also shows that flowering tops, leaves, seeds, and stalks were received.

14. Thus, perusal of the material shows that there was no

quantification of flowering tops and, therefore, it is difficult ascertain whether quantity can be said to be commercial.

15. 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* grounds. It contemplates substantial probable cause for believing that the accused is not guilty of the offence.

16. In the decision of **Bothilal vs. The Intelligence Officer, Narcotics Control Bureau, reported in 2023(6) SCALE 377** cited *supra*, as relied by learned counsel for the applicant, wherein 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. Thus, the act of drawing samples from all the 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 Chemical Analyzer's Reports are not submitted along with the chargesheet.

20. Learned counsel Shri Rohan Deo for the applicant, placed reliance on the decision in the case of **Sunil Vasantrao Phulbande and anr vs. State of Mah.** *supra* wherein it has been held that the The charge-sheet/report as contemplated under Section 173(5) of the Code, forwarded to the Magistrate should be such that on the basis of which Magistrate should be able to proceed further and take cognizance. The documents, which are required to be accompanied with the charge-sheet/report as contemplated under sub section (5) of Section 173 of the Code, therefore, assume importance, without which charge-sheet/report submitted by the Police under Section 173 of the Code would be incomplete and Magistrate also may not be in a position to proceed to take cognizance on the basis of the said report. The concept of filing of charge-sheet by the Police in the Court must fulfill requirement of Section 173(2) and (5) of the Code and it is only after such compliance, report which is filed by the Police in the Court can be construed as complete report under Section 173(2) and (5) of the Code. Certain documents which are formal in nature, if not accompanied with the report/charge-sheet may not change the nature of report/charge-sheet contemplated under Section 173(2) and (5) of the Code particularly when material is sufficient for the Magistrate to take cognizance of the offence as per provisions of the Code. In prosecution for the offences punishable under Sections 20 22 and 25 of the NDPS Act, the Chemical Analyzer's Report, which was basis for deciding whether substance, which was seized during the raid of "Ganja" or not, which would determine whether provisions of the NDPS Act are

attracted or not, was not filed with the chargesheet. The Magistrate in such situation undoubtedly cannot proceed to take cognizance of the offence for want of complete charge-sheet/report. This court held that since prosecution failed to file chargesheet within the stipulated period, as contemplated under Section 173(5) of the CrPC, the accused is released on bail under Section 167(2) of the Code.

21. Thus, perusal of investigating papers and the material contained with the chargesheet *prima facie* shows that the contraband article is not seized after separating flowering and fruiting tops and it is weighed and, therefore, it is difficult to say that the alleged prohibited substance is "Ganja" and it is of commercial quantity. There is no compliance under Section 52-A of the NDPS Act. The chargesheet is not filed along with the Chemical Analyzer's Reports and incomplete chargesheet is filed. Whether the police can submit a chargesheet which is incomplete within a stipulated period, in the instant case admittedly, the chargesheet is not filed with the Chemical Analyzer's Report.

22. Thus, incomplete chargesheet is filed.

23. Considering the entire investigation papers, it creates a doubt about the prosecution case. In the light of the above, the application deserves to be allowed by imposing certain conditions, as per order below:

### **ORDER**

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

(2) Applicant - Jaypal Reddy Gopal Reddy Adia, in connection with Crime No.714/2021 registered with the non-applicant/police station for offences punishable under Sections 8(c) and 20(b)(ii)(c) of 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 !!