

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

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**

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

Court's or Judge's Order

.....
Shri Atharva Manohar, Counsel for the Applicant.
Shri A.M.Kadukar, Additional Public Prosecutor for the State.

CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 20/07/2023
PRONOUNCED ON : 26/07/2023

1. By this application moved under Section 439 of the Code of Criminal Procedure, the applicant seeks regular bail in connection with Crime No.415/2021 registered with Bhandara Police Station, district Bhandara for offences punishable under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1988 (the NDPS Act).

2. The applicant is arrested on 7.12.2021 and since then he is in jail.

3. The crime is registered on the basis of report lodged by Police Sub Inspector Arvindkumar Shamrao Jagane against unknown persons. As per the report, on 28.12.2021, vehicle White Colour Mahindra Bolero Pick Up bearing

registration No.OD-05/AW/9092 was parking at the National Highway No.6, near Mujbi, Dawdipar Phata. The driver of the said vehicle fled away along with keys of the said vehicle. The said vehicle was taken to the police station for panchanama. On inspection of the said vehicle, 608 kilograms of cannabis (ganja) came to be recovered from the said vehicle which was hidden beneath the load of coconut. During investigation, it was revealed that the said vehicle was owned by one Arun Surendra Nayak. During interrogation with the owner of the said vehicle, it was revealed that the applicant has obtained and was using the said vehicle on rent from the said owner of the said vehicle. On 7.12.2021, the applicant was arrested on an allegation that he was transporting the said "Ganja" from the State of Odisha to the State of Maharashtra.

4. As per contentions of the applicant, he was not found in the said vehicle and was not found in possession of the said contraband article with him. He was not found at the spot of the incident also. It is nowhere his case that he was involved in trading of the said contraband article. According to him, nothing is on record to show that he had any knowledge that the said contraband article was being transported in the said vehicle. Now, investigation is

completed and chargesheet is filed. The investigating agency has not complied with the necessary mandatory provisions. The said contraband articles are not weighed by separating flowering tops and buds, however the same was weighed along with the leaves. The leaves and the seeds are not contraband within the definition of "Ganja" under Section 2(iii) (b) and 2(iii)(c) of the NDPS Act. The inventory, carried out in presence of Magistrate, also shows that the said contraband articles was 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 obtained in presence of Magistrate. According to the applicant, since his arrest he is behind the bars and there is no progress in the trial and, therefore, he prays that he be released on bail.

5. Learned Additional Public Prosecutor Shri A.M.Kadukar for the State, has strongly opposed the application He submitted that there is a *prima facie* material against the applicant to connect him with the alleged offence. The contraband articles were seized in presence of panchas and the same were sent for its chemical analysis. The inventory certificate is obtained. As per the investigation, it

transpired that the applicant was travelling in a Chevrolet Car bearing registration No.OD/05/T/0551 and the said Bolero vehicle was also proceeding at the same time. The fast-track stickers affixed on both the vehicles were in the name of the applicant. As per the investigation, the vehicle was in possession of the applicant. In view of Section 37 of the NDPS Act, there are limitations while considering the bail applications in the crime.

6. Heard learned counsel Shri Atharva Manohar for the applicant and learned Additional Public Prosecutor Shri A.M.Kadukar for the State.

7. Learned counsel Shri Atharva Manohar for the applicant submitted that the applicant was neither found in possession of the said contraband articles with him and nor driving the said vehicle. He was arrested on the basis of confessional statement of the co-accused. There is no compliance under Section 52-A of the NDPS Act as no photograph is obtained while carrying out the inventory. The description mentioned in the seizure memo shows that the said contraband articles are wet "Ganja" having leaves and flowering buds etc.. The investigating officer has not

separated the flowering buds and weighed the same. Thus, the quantity shown by the investigating agency is also not correct. In view of Section 52-A of the NDPS Act, the samples are to be obtained in presence of Magistrate. However, at the time of seizure itself, the samples were obtained. The inventory report also shows the description as blackish leaves, flowers, and seeds of "Ganja". Neither the inventory nor the seizure report shows leaves, flowers, and seeds were separated and weighed. Thus, mandatory provisions are not complied with. In view of that, the applicant be released on bail. In support of his contentions, he placed reliance on the decision in the case of **Bothilal vs. The Intelligence Officer, Narcotics Control Bureau, reported in 2013(6) SCALE 377.**

8. *Per contra*, learned Additional Public Prosecutor Shri A.M.Kadukar for the State submitted that though the applicant was not found in the said vehicle, the investigation report shows that he was also travelling in a separate car followed by the said Bolero vehicle. As soon as the said Bolero vehicle was restrained by the police, the applicant fled away. The statements of co-accused show involvement of the applicant. In view of the limitation under Section 37 of the NDPS Act, the application deserves to be rejected.

9. Having heard both the sides and perused the investigation papers, it reveals that the applicant was not found along with the said contraband articles though the prosecution has claimed that he was found in possession of the said articles with him. There is no dispute that commercial quantity in relation to the NDPS Act for "Ganja" means any quantity greater than 20 kilograms. The quantity found in the said vehicle is 632.382 kilograms.

10. Definitions under Section 2(iii)(b) and 2(iii)(b)(c) specify 'Ganja' as flowering or fruiting tops of the cannabis plants (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 definitions of term "Ganja" clarify that "Ganja" is the flowering or fruiting tops of the cannabis plants excluding the seeds and leaves when not accompanied by the tops.

12. In the case in hand, as seen from the First Information Report and the seizure panchanama, the

description mentioned is greenish colour leaves having flowers on it. The quantity 632.382 kilograms of "Ganja" was seized from the said vehicle. The certificate of inventory shows that it contained blackish leaves, flowers, and seeds of "ganja" which was placed on weighing machine after setting it at zero and it was weighed. It appears that when the gunny bags were measured with the help of electronic weighing machine, there were in all 17 gunny bags each containing approximately 30-40 kilograms of "Ganja". All the 17 bags are opened and it was measured along with the sacks and bags. On measurement, the alleged "Ganja" was contained in 17 gunny bags and its weight was noted. After weighing the said "Ganja", it was seized in the same sacks and bags with seals along with the particulars of the crime.

13. Thus, it reveals that at the time of seizure, the samples were taken which were not produced before the Magistrate at the time of inventory. The separate samples were obtained at the same of inventory also. The inventory report shows that in presence of the Magistrate 24 grams samples of "Ganja" were taken in one polythene for chemical analysis. The seizure panchanama also shows that the samples were also taken from each bag at the time of the

seizure.

14. As observed above, the samples, obtained at the time of the seizure, were not produced before the Magistrate at the time of the inventory.

15. The above state of affairs would make it clear that there is nothing on record *prima facie* to show that before carrying the weight of the seized plants of 'ganja', the Investigating Officer has separated the flowering and fruiting tops of cannabis plants in order to ascertain the exact quantity of 'Ganja'. In fact, neither in the First Information Report nor in the inventory report it is mentioned that the flowering and fruiting tops of cannabis plants were separated in order to ascertain the correct quantity of 'Ganja'. The seizure panchanama also nowhere shows that the flowering or fruiting tops of cannabis plants were separated in order to ascertain the correct quantity of ganja. The Chemical Analyzer's Report shows that the flowering tops, seeds, brownish colour leaves, and stalks were received.

16. Thus, perusal of the material shows that there was no quantification of flowering tops and without separating the flowering or fruiting tops, the "Ganja" was weighed and,

therefore, it is difficult to ascertain whether the quantity can be said to be commercial.

17. In view of Section 37 of the NDPS Act, powers to 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 Section 37 of the NDPS Act are itself mainly on, (1) there are reasonable grounds for releasing accused that he is not guilty of such offence and (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 accused is not guilty of the offence.

18. In the decision of **Bothilal vs. The Intelligence Officer, Narcotics Control Bureau**, reported in 2013(6) SCALE 377 cited *supra*, as relied by learned counsel Shri Atharva Manohar for the applicant, 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.**

19. 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.

20. 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.

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

22. 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.

23. 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.

24. The applicant is not found in possession of the said contraband articles with him. Nothing is on record except the

confessional statement of the co-accused to show involvement of the applicant in trading of the said contraband articles. Though it is submitted by the State in the reply that the contraband articles were also found in possession of the applicant, which were kept in his house, no such panchanama is on record to show that the house of the applicant was searched and the applicant was found in possession of the said contraband articles at his house.

25. In the result, the application can be allowed, however imposing certain conditions upon the applicant, as per order below:

ORDER

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

(2) Applicant Mohammad Isaruddin s/o Mohammad Shahuddin, in connection with Crime No.415/2021 registered with Bhandara Police Station, district Bhandara for offences punishable under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1988, be released on bail on his executing a P.R.Bond in the sum of Rs.25,000/- with one solvent surety of the like amount.

(3) The applicant shall attend the concerned police station once a month on first Saturday of such month between 11:00 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.

With this, the criminal application stands **disposed of.**

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!