



The order dated 4th January, 2024 is corrected as per the order of speaking to the minutes dated 8th January, 2024.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

915 BAIL APPLICATION NO. 2129 OF 2023

SUKHLAL DHENA JADHAV
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Applicant : Mr. Bharat S. Doifode.
APP for Respondent/State : Mr. Satish A. Gaikwad.
...

AND

BAIL APPLICATION NO. 2130 OF 2023

BHURLAL DHENA JADHAV
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Applicant : Mr. Y. L. Bidve, h/f Mr. Bharat S. Doifode.
APP for Respondent/State : Mr. Satish A. Gaikwad.
...

CORAM : **SANJAY A. DESHMUKH, J.**

DATE : 04th January, 2024.

P.C.:

1 These are applications, under Section 439 of the Code of Criminal Procedure, 1973, for grant of regular bail in connection with Crime No.156 of 2023, registered with Fardapur Police Station, District **Aurangabad**, for the offences punishable under Sections 20(b)(ii) and 20(b)IIA of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "NDPS Act").

2 It is alleged that the informant alongwith official staff, Tahsildar and Panch witnesses went to the agriculture land of accused / Sukhlal at village Tatavi, Taluka Soygaon, District Aurangabad. They found 585 big and small Ganja trees, which were having leaves and flowers, in the agriculture land bearing Block No.38. All these trees were seized under seizure *Panchanama*. Total quantity was 273 KG. It was seized under seizure *Panchanama* and report was lodged by AIS D. S. Jadhav.

3 The learned counsel for applicants submitted that the investigating officer though seized Ganja trees, it is not Ganja as defined under sub-clause iii (b) of Section 2 of the NDPS Act. The roods of the Ganja trees were not removed. Therefore, the quantity of that seized articles exceeds 20 Kg. The learned counsel for applicants further submitted that the applicants have no criminal antecedents. They have roots in the society. Both the applicants are old aged persons. They will not flee away from trial. He lastly prayed for granting bail to the applicants.

4 The learned APP for the State strongly objected both these applications. The learned APP pointed out the inventory certificate issued by J.M.F.C., Soygaon dated 13th October, 2023. He submitted that charge-sheet is not yet filed. He lastly prayed to reject the applications.

5 Perused the papers of investigation. The seizure *Panchanama* of Ganja trees does not disclose that roots were removed and thereafter, flowering or fruiting tops of the cannabis plants were seized as defined in sub-clause iii (b) of Section 2 of NDPS Act.

6 The learned counsel for applicants is relying upon the order passed by this Court at Principal Seat in Bail Application No.1296 of 2022 (Ibrahim Khwaja Miya Sayyed @ Raju Vs. The State of Maharashtra) dated 17th March, 2023. In the said order, this Court in paragraph Nos.4 and 5 observed as under:-

“4. Learned counsel for the Applicant states that apart from the flowering buds, the Investigating Officer has also attached stalks, leaves and seeds. She submits that leaves, seeds and stalks cannot be considered as 'Ganja' unless accompanied by the tops. She has relied upon the decisions of learned Single Judge of this Court in ***Rahul Bhimrao Pawar vs. The State of Maharashtra, (Bail Application No.2977 of 2021)***, ***Kunal Kadu vs. Union of India (ABA No.2173 of 2022)***, ***Hari Mahadu Walse vs. The State of Maharashtra (Bail Application No.2299 of 2019)*** and ***Amit Shankar Devmare vs. The State of Maharashtra (Bail Application No.4203 of 2021)***.

5. Learned counsel for the Applicant contends that the actual flowering or fruiting tops were not separately weighed and this raises a doubt whether the 'Ganja' seized from the

Applicant was of commercial quantity. She further submits that the police had not drawn sample from each of the travel bags but had mixed the substance from both the bags and thereafter drawn the sample, which was sent to CFSL for examination. She has relied upon the decision of the Delhi High Court in ***Ram Bharose vs. State (Govt. of NCT of Delhi) in Bail Application No.1623 of 2022*** to substantiate her contention that the samples, which were sent to CFSL were not representative sample and that mixing of the contents contained in both the travel bags before drawing from the bags looses the sanctity of the entire process.”

7 The learned APP is relying upon the decision of the Honourable Supreme Court in case of ***Hira Sing and another Vs. Union of India and another, 2020 AIR (SC) 3255***, in which the Honourable Supreme Court in paragraph No.10 held as under:-

“10. In view of the above and for the reasons stated above, Reference is answered as under:

(I). The decision of this Court in the case of E. Micheal Raj (Supra) taking the view that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight of the offending narcotic drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, is not a good law;

(II). In case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the “small or commercial quantity” of the Narcotic Drugs or Psychotropic Substances;

(III). Section 21 of the NDPS Act is not stand-alone provision and must be construed along with other provisions in the statute including provisions in the NDPS Act including Notification No.S.O.2942(E) dated 18.11.2009 and Notification S.O 1055(E) dated 19.10.2001;

(IV). Challenge to Notification dated 18.11.2009 adding “Note 4” to the Notification dated 19.10.2001, fails and it is observed and held that the same is not ultra vires to the Scheme and the relevant provisions of the NDPS Act. Consequently, writ petitions and Civil Appeal No. 5218/2017 challenging the aforesaid notification stand dismissed.”

8 Nobody will dispute the ratio laid down in the above authority. But the facts of the case are always decisive.

9 Perused the papers of investigation. If the papers of investigation are considered, particularly seizure *Panchanama* of the articles and report lodged by the police officer, the ingredients of Ganja as defined under sub-clause iii (b) of Section 2 of the NDPS Act, are not establishing. On the contrary, the roots of Ganja trees with its

stems are also seized. Therefore, weight is enhanced and it becomes commercial quantity. It is not Ganja as discussed above. In such fact situation, considering the fact that the applicants have no criminal antecedents, both these applications deserve to be allowed on certain conditions. Hence, following order:-

ORDER

- I. Both these applications are allowed.
- II. Both the applicants in connection with Crime No.156 of 2023, registered with Fardapur Police Station, District **Aurangabad**, for the offences punishable under Sections 20(b)(ii) and 20(b)IIA of the Narcotic Drugs and Psychotropic Substances Act, be released on bail on furnishing personal bond of Rs.50,000/- each with surety of the like amount on following conditions:-
 - a) The applicants shall not pressurize the witnesses.
 - b) The applicants shall not tamper with the prosecution evidence in any manner.

[SANJAY A. DESHMUKH, J.]