

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL BAIL APPLICATION NO.1741 OF 2022

Sidharth Baban Nanavare	]	Applicant
Vs.		
The State of Maharashtra	]	Respondent

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Ms. Vilasini Balsubramanian i/b Mr. Jaydeep D. Mane, for Applicant.

Mr. A.A. Palkar, A.P.P, for Respondent – State.

Mr. Amit Munde, Special P.P, for Customs Narcotics Cell (Pune).

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CORAM : PRITHVIRAJ K. CHAVAN, J.

DATE : 16th JANUARY, 2024.

P.C.

1. This is an application under section 439 of the Code of Criminal Procedure, 1973 (for short “Cr. P.C”) moved by the applicant – Sidharth Baban Nanaware, seeking his release on bail in NDPS C.R. No. 6 of 2019, registered with Narcotic Cell, Custom Pune for the offences punishable under Sections 8 (c) , 20, 25 and 29 (1) of The Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “N.D.PS Act”). The applicant has been arraigned as

an accused and being prosecuted at the instance of Inspector of Customs, Narcotic Control Bureau, *Pune* for having found in possession of 106 k.g of *Ganja*. There are two accused. Accused – Rohit Kale has already been released on bail by Co-ordinate Bench of this Court (Coram: N.R. Borkar, J.) on 21st March, 2023. The applicant was arrested on 8th June, 2019 and is in custody for more than four years.

2. It appears that after a tip-off received by the Narcotic Cell, Customs, *Pune*, a car transporting 106 k.m *Ganja* in a *Maruti Brezza* Car to be delivered to a person in Mumbai was intercepted near *Hadapsar* between 17.00 hours and 18.00 hours. During search, the aforesaid contraband was found in the dickey. There were 49 cello taped packets containing green dried fruiting and flowering tops and dried leaves purported to be *Ganja*.

3. At the outset, learned Counsel for the applicant submits that she would argue her case on three folds. The first fold is parity. Second is non conscious possession of the contraband *qua* the applicant and the third is non compliance of section 52A of the N.DPS Act.

4. Mr. Munde, learned Special P.P. while strongly objecting the Bail Application, submits that it being a commercial quantity of contraband, bar under section 37 of the NDPS Act would operate, so also in view of presumption under Section 35 of the said Act, the applicant shall not be released on bail. Mr. Munde is at pains to submit that there is non compliance of section 42 of the N.D.P.S Act. Finally, according to him, it being a commercial quantity, the trial Court may be directed to expedite hearing of the case so that the offences with which the applicant and the co-accused have been charged can be brought to a logical end.

5. Rohit Kale came to be released on bail by the Co-ordinate Bench of this Court (Coram: N.R. Borkar, J.) on 21st March, 2023. This Court noted in the said order that in view of Section 2 (iii) (b) of the N.D.P.S Act, “*Ganja*” is defined as the flowering or fruiting tops of the cannabis plant, excluding the seeds and leaves when not accompanied by the tops. *Prima facie*, it appears that the weight of the leaves was not excluded from the weight of *Ganja*. It was also observed that since the applicant was incarcerated without framing the charge for about four years, he needs to be released on bail and accordingly, he was released. The learned Special P.P. submits that

the said order has not been challenged further. Obviously, the present applicant, on the ground of parity would be entitled for bail as he has also been arrested with the first accused.

6. Learned Counsel for the applicant, in addition to the ground of parity, invited my attention to the fact that the applicant was not found in conscious possession of the contraband in the car as the car does not belong to him and he was sitting as a co-passenger. Admittedly, the contraband was found in the dickey of the car and the material placed on record by the prosecution does not reveal as regards conscious possession of the said contraband *qua* the applicant.

7. Admittedly, there is non compliance of Section 52A of the N.D.P.S Act which mandates that the samples shall be collected before the Magistrate before sending the said samples to the Laboratory for testing. The Hon'ble Supreme Court in a recent pronouncement in case of **Simarnjit Singh Vs State of Punjab**¹ while considering an earlier judgment in case of **Union of India Vs. Mohanlal**² referred paragraphs 15 to 17 of the said judgment

1 2023 SCC Online SC 906

2 2016 (1) SCC (CRI) 864

which read thus;

“15. It is manifest from Section 52-A (2) include (supra) 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 sonner 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 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 subsections (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 times of seizure”.

8. Apart from the aforesaid facts, it must be noted that the charge has not yet been framed and there is no likelihood of trial being concluded in the near future. Right of an accused to have a speedy trial is a fundamental right in view of Part III of the Constitution. As such, rigours of Section 37 of the N.D.P.S act would not come in the way of this Court in exercising the power of this Court under constitutional provisions.

9. I am afraid, I can not buy the argument of Mr. Munde as regards bar under section 37 of the N.D.P.S Act in view of the attending facts and circumstances. Consequently, following order is passed.

: **ORDER** :

- (a) The application is allowed.
- (b) The applicant - Sidharth Baban Nanavare be released in Customs N.D.P.S C.R. No.06 of 2019 registered with Narcotic Cell, Custom, *Pune* on executing a P.R bond in the sum of Rs.50,000/- with one or two sureties in the like amount to the satisfaction of the Special Judge, N.D.P.S, Pune.
- (c) The applicant shall attend the Customs Office, *Pune* twice in a month on Monday between 10.00 a.m and 12.00 p.m till the charge is framed by the Special Court.
- (d) The applicant shall surrender his passport to the Investigating Officer. In case, he has no passport, an affidavit be sworn before the Special Court within two weeks from today.

(e) The applicant shall not leave the jurisdiction of the Special Court, *Pune* until conclusion of the trial.

(f) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing the facts to Court of any Police Officer. The applicant shall not tamper with the evidence.

(g) The applicant shall furnish his cell number as well as residential address to the Investigating Officer and shall also inform in case of any change in the Cell number or the residential address.

(h) Needless to say that breach of any of the conditions would entitle the prosecution to pray for cancellation of bail.

9. The application stands disposed of in the aforesaid terms.

[PRITHVIRAJ K. CHAVAN, J.]