



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.3053 OF 2024**

Zaheer Gayasuddin Shaikh	...	Applicant
versus		
Union of India	...	Respondent

Ms. Lochan Chandka, for Applicant.

Mr. Shriram Shirsat, APP with Mr. Karishma Rajesh, for Respondent.

CORAM: N.J.JAMADAR, J.

**CLOSED FOR ORDER ON : 02 DECEMBER 2024
PRONOUNCED ON : 20 DECEMBER 2024**

ORDER :

1. The Applicant, who is arraigned in C.R.No.25 of 2022 registered with Narcotic Control Bureau, Mumbai Zonal Unit, for the offences punishable under Sections 20(b)(ii)(c), 28 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act, 1985) has preferred this application to enlarge him on bail.
2. In fact, this is a second application for bail. First application, being BA No.2742 of 2023, was rejected by this Court by an order dated 14 March 2024. The applicant preferred Special Leave Petition (Crl.) No(s). 6179 of 2024 before the Supreme Court. On 8 May 2024, the said SLP came to be dismissed as withdrawn with liberty to apply for bail before this Court after sometime. Availing the said liberty, the applicant has again filed this application seeking bail.

3. The indictment against the applicant and the co-accused runs as under :

On 27 July 2022, a specific information was received by an Officer of NCB that four persons, including the applicant, were to transport huge quantity of Ganja in two vehicles from Vaijapur (Aurangabad) to Mumbai and deliver the same to an unknown person near Mulund Toll Plaza. The applicant and co-accused – Javed were to travel in a brown Suzuki Ertiga bearing registration No.MH-03/BW-7444. Co-accused Imran and Shoeb were to travel in a white Hyndai Accent car bearing Registration No.MH-05/J-2254. A surveillance was conducted at Arjunalli Toll Plaza, Padgha. Above described and numbered cars were intercepted. The applicant and co-accused were accosted. In the search of the Ertiga Car No.MH-03/BW-7444, 100 kgs ganja packed in six gunny bags was found. In the other vehicle, 80 kgs. Of ganja was found. Contraband articles were seized. The applicant and the co-accused were arrested.

4. I have heard Ms. Lochan Chandka, learned Counsel for the Applicant and Mr. Shriram Shirsat, learned APP for the Respondent.

5. Ms. Chandka submitted that the applicant was not found in conscious possession of the contraband as he was merely the driver of the car, which was hired by the co-accused. An endeavour was made to urge that even the

contraband substance was not loaded in the presence of the applicant. Secondly, there is no material to explain the custody of the contraband substance from the time of seizure till its deposit at the police Station. Thirdly, there was delay of about 5 days in forwarding samples which were allegedly collected before the Magistrate, during the course of the inventory, to the FSL. Fourthly, there was a clear infraction of the mandate contained in Section 42 of the Act, 1985. Though the search was conducted between sunset and sunrise, neither the said search was conducted by a Gazetted Officer, nor there was warrant or special authorization. The search and seizure also becomes suspect as the FIR number finds mention on the labels attached and stucked to the envelopes in which the contraband substance was allegedly collected and sealed. Since the search and seizure allegedly preceded lodging of the FIR, the presence of FIR number on the labels dents the genuineness of the prosecution case. Lastly, CA report indicates that the sample contained 'twigs', which do not form part of ganja, as defined under the NDPS Act, 1985. Therefore, a serious doubt arises as to the quantity of ganja allegedly found in the possession of the applicant.

6. To lend support to the aforesaid submissions, Ms. Chandka sought to place reliance on the decisions, reference to which would be made in the course of the order.

7. It was further submitted that the applicant has been in custody since 28

July 2022. The Applicant had lost his wife few days prior to the alleged occurrence. As the trial is unlikely to commence and conclude in the near future, further detention of the applicant would be unwarranted. Therefore, the applicant deserves to be enlarged on bail.

8. Mr. Shirsat, learned Special PP for the Respondent, stoutly resisted the prayer for bail. It was urged that on first principles, there is no propriety in entertaining the second application for bail on merits, as this Court has already rejected the application ascribing reasons. Nor the principle of long incarceration comes into play as the applicant has revived the prayer for bail few months of the withdrawal of the SLP before the Supreme Court.

9. Mr. Shirsat would urge, few of the aforesaid grounds *now* sought to be pressed into service on behalf of the applicant, were already urged in the first bail application, especially the contention that the applicant was merely the driver and was not in conscious possession of the contraband substance and the presence of FIR number in the contemporaneous documents.

10. Mr. Shirsat further submitted that the submission based on the alleged non-compliance of the mandate contained in Section 42 of the Act, 1985, cannot be countenanced as the case is covered by Section 43 of the Act, 1985, since the vehicle was intercepted in transit at a public place.

11. To begin with, it is necessary to note that, in the first bail application, two grounds were primarily urged. First, the mixing of the contents of all the

packets allegedly found in the car in which the applicant and co-accused were travelling and the presence of FIR number in the notice given to the applicant at the time of the alleged seizure. This court found both the grounds unworthy of acceptance. Indeed, in paragraphs (c) and (d) of the first bail application, the applicant had taken the ground that he works as a driver at Zuber Travels, of which his brother Zuber Shaikh was the proprietor and was not in conscious possession of the contraband substance which was allegedly found in the car driven by the applicant.

12. The submission of Mr. Shirsat that the said ground cannot be again urged, appears to carry substance. Even otherwise, the concomitant factors, namely, the consignment was transferred from Vaijapur, Aurangabad to Mumbai, consignment was kept in the rear seat of the vehicle and the CDR between the applicant and the co-accused render it prima facie difficult to agree with the submission that, despite such a huge quantity of contraband substance being transported in the car driven by the applicant, he was totally unaware of the contents of the said packets.

13. The decisions in the cases of **Mahadev Vishwanathrao Shinde V/s. State of Maharashtra**¹, **Premnath s/o Chandrakant Shinde V/s. State of Maharashtra and Anr.**², **Jahirabi Shafikhan Pathan V/s. State of Maharashtra**³ and **Md. Dilshad MD. Ayyub Shaikh V/s. The State of**

1 BA No.3662 of 2021 dated 5 May 2022

2 BA No.46 of 2022 dated 21 Feb. 2022

3 BA No.2785 of 2022 dated 19 Dec. 2022

Maharashtra⁴, on which reliance was placed by Ms. Chandka do not advance the cause of the submission on behalf of the applicant. To put in other words, the quantity of the contraband substance recovered from the car of the applicant, the place at which the contraband substance was kept in the car, the duration of travel and the material to show that the applicant and co-accused were in touch with each other, constitute the distinguishing factors and make out a very strong prima facie case against the applicant.

14. Reliance placed by Mr. Shirsat on the judgment of the Supreme Court in the case of **Union of India through Narcotics Control Bureau, Lucknow V/s. Md. Nawaz Khan**⁵ appears to be well founded. In the facts of the said case, the Supreme Court culled out the circumstances which were crucial to assessing the question of applicability of the bar under Section 37 of the Act, 1985, as under :

“30. The following circumstances are crucial to assessing whether the High Court has correctly evaluated the application for bail, having regard to the provisions of Section 37 :

- (i) The respondent was travelling in the vehicle all the way from Dimapur in Nagaland to Rampur in Uttar Pradesh with the co-accused;
- (ii) The complaint notes that the CDR analysis of the mobile number used by the respondent indicates that the respondent was in regular touch with the other accused persons who were known to him;

4 BA No.2306 of 2023 dated 30 Jan. 2024

5 Criminal Appeal No.1043 of 2021 dated 22 Sept. 2021

- (iii) The quantity of contraband found in the vehicle is of a commercial quantity; and
- (iv) The contraband was concealed in the vehicle in which the respondent was travelling with the co-accused.”

15. The submission premised on the presence of FIR number on the labels pasted on the envelopes, in which the contraband substance was allegedly packed at the time of seizure, also does not appear to carry much substance. While dealing with an identical challenge with regard to the presence of FIR in the notice given to the applicant under Section 67 of the Act, this Court has recorded in the order dated 14 March 2024 that in the context of the recovery of huge contraband substance, the entire search and seizure cannot be thrown overboard, on the ground that the FIR number found mention in the notice under Section 67 of the Act and the explanation for the same cannot be said to be inconceivable. The aforesaid reasons equally govern the challenge sought to be mounted on behalf of the applicant.

16. As regards, the ground that there is no evidence of safe keeping of the contraband substance from search till the deposit of the said substance in the property room attached to the police station, Ms. Chandka placed reliance on the decisions of the Supreme Court in the cases of **Valsala V/s. State of Kerala**⁶ and **State of Gujarat V/s. Ismail U. Haji Patel and Anr.**⁷ to bolster

⁶ 1994 Cri.L.J. 1

⁷ (2003) 12 SCC 291

up the submission that the delay in depositing the seized property in the property room creates a serious doubt.

17. In the case of **Valsala (supra)**, it was enunciated that there ought to be material to show that the seized property was kept in proper custody so that the Court can have an assurance that what was seized only was sent to the CA. In the case of **State of Gujarat (supra)**, it was enunciated that what has to be established is that the seized articles were in proper custody, in proper form and the samples sent to the CA related to the seized articles.

18. In the case at hand, there is material to indicate that on 28 July 2022 itself, while depositing the vehicles with Padhga Police Station, the IO had recorded that there was seizure of 190 kgs of ganja under a panchanama dated 28 July 2022. The said fact was reiterated in the communication dated 29 July 2022. There is also material to show that the seals were intact. In this view of the matter, the delay of about one day in depositing the seized property with the godown of the Superintendent of Police, is a matter which deserves adjudication at the trial. Whether the delay, in the facts of the case was such that the Court could draw an inference that the seized property was not kept in the safe custody and the samples that were eventually forwarded to FSL, were not the samples of the seized property, would be a matter for adjudication at the trial. That does not constitute a justifiable ground to drawn an inference that the applicant may not be guilty of the offences.

19. The second limb of the submission of Ms. Chandka that there was a delay in forwarding the samples to CA post inventory, also does not seem to carry much substance. The delay of about five days in forwarding the samples to FSL after the inventory before the learned Magistrate, prima facie, does not seem to be of such as to throw a cloud of doubt over the safe keeping. Even otherwise, there is material to indicate that after the sampling, the property was deposited with the Superintendent of Police, Thane Rural. The extract of the register tendered for the perusal of the Court indicates that the samples were deposited in a sealed condition and again collected for forwarding the same to the FSL in a sealed condition. At any rate, the said aspect is a matter for adjudication at the trial.

20. The ground of non-compliance of the mandate contained in Section 42 of the NDPS Act 1985 premised on the search after sunset is required to be appreciated in the light of the fact that the vehicle which the applicant was driving, was intercepted on a public highway, 'in transit'. Mr. Shirsat placed reliance on the decision of the Punjab and Haryana High Court in the case of **Mandeep Kaur vs. State of Punjab (CRM-M-27760-2021, dtd.25/7/2022)**, wherein it was enunciated that in case of search of a vehicle in transit there is no requirement of obtaining any search warrant even if search is conducted after sunset by a non-gazetted officer unlike a case of search of building, conveyance or an enclosed place. In the case at hand, it is imperative to note,

the vehicle which the applicant was driving was stated to be a tourist vehicle. The applicant claims that it was hired by the co-accused.

21. In such a situation, when the said vehicle was intercepted on a public highway, “in transit” and the contraband was found therein, *prima facie*, it appears the provisions contained in Section 43 may apply. At any rate, the infraction of the provisions contained in Section 42 warrants adjudication at the trial.

22. The submissions on behalf of the applicant that since CA Report reveals that “twigs” formed part of the sample, the contraband allegedly found in possession of the applicant cannot be said to be *ganja* and, therefore, the applicant deserves to be enlarged on bail, on the said count, is again required to be appreciated in the light of the quantity of the contraband substance found in possession of the applicant. Ms. Chandka placed reliance on the orders passed by this Court in the cases of ***Rahul Bhimrao Pawar vs. State of Maharashtra (Cri. BA/2977/2021, dtd.2/1/2022)***, ***Ramesh Prakash Jadhav vs. State of Maharashtra (BA/1329/2021 dtd.30/11/2021)*** and ***Bandu A. More vs. The State of Maharashtra (Cri. BA/1903/2021 dtd.12/8/2021)***. The decisions turned on the peculiar facts in those cases.

23. In CA Report the description of the samples is furnished as, “green dry leaves with flowering and fruiting tops purported to be *ganja*.” In Part ‘B’ of the report, it is mentioned that each of the 10 sample in the form of

“heterogeneous mixture of dry greenish brown flowering fruiting tops twigs etc.” and samples under reference answered positive test for *ganja*. Ms. Chandka laid emphasis on the word “twigs”. The description of the samples in the forwarding letter and the test memo clearly indicates that the samples consisted of green dry leaves of flowering and fruiting tops. Mention of the word “twigs”, in the context of the huge quantity of 110 kgs. recovered from the possession of the applicant, *prima facie* does not detract materially as the commercial quantity of *ganja* is 20 kgs. only.

24. For the foregoing reasons, I am not inclined to exercise the discretion in favour of the applicant.

ORDER

(i) The Application stands rejected.

(ii) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and co-accused and the trial Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

(N.J.JAMADAR, J.)