



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

CRIMINAL APPLICATION (BA) NO.121/2024

Kisan s/o Ananda Mandalkar

..VS..

State of Mah., thr.its PSO PS Deulgaon Raja, District Buldhana

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

Court's or Judge's Order

Shri R.V.Gahilot, Counsel for the Applicant.
Shri Nitin Autkar, Additional Public Prosecutor for the State.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 03/04/2024

PRONOUNCED ON : 15/04/2024

1. This is an application under Section 439 of the Code of Criminal Procedure for grant of regular bail in connection with Crime No.336/2023 registered with the non-applicant/police station for offences punishable under Section 8(c) and 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).

2. Heard learned counsel Shri R.V.Gahilot for the applicant and learned Additional Public Prosecutor Shri Nitin Autkar for the State.

3. The applicant came to be arrested on 10.9.2023.

4. Police Sub Inspector Sachin Sheshrao Kanade of Buldana Local Crime Branch, Buldana, lodged a report. As per the report, on 10.9.2023, when he was on patrolling duty in a police vehicle, he received a secret information that the applicant is selling cannabis (Ganja) illegally at his house. On the basis of the said information, he conducted a raid and preliminary report was prepared. A photographer (pancha) reached the spot i.e. in front of the house of the applicant. The applicant was sitting on motorcycle and four packets of the cannabis were found in his possession. Thereafter, the police entered into the house of the applicant and searched his house. During search of the house, one green plastic bag and one brown colour packet were found containing green and black seeds in twenty packets and wet ganja was found. The police seized the said contraband article weighing 24.300 kilograms. After following a due procedure, samples are obtained in presence of panchas and the applicant was arrested. As per accusations, the applicant was found in possession of contraband articles.

5. Learned counsel for the applicant submitted that contraband articles are not found in physical possession of the applicant. As far as the house is concerned, it is not owned by the applicant. The seizure is not from his exclusive possession. The

description of contraband articles is also not described to show that it comes within definition of “Ganja”. As such, the applicant be released on bail.

6. Learned Additional Public Prosecutor for the State opposed the application on ground that considering *prima facie* case, that contraband articles are found in possession of the applicant, his custodial interrogation is required and, therefore, the application deserves to be rejected.

7. First ground raised by the applicant is that contraband articles seized are not within the definition of “Ganja”. It was further submission that samples are not obtained in presence of the Magistrate and there is no compliance of Section 52-A of the NDPS Act. In view of non-compliance of mandatory provisions, the application deserves to be allowed. Much emphasize by learned counsel for the applicant was on ground that the description mentioned in the First Information Report nowhere discloses that it is within the meaning of “Ganja”.

8. Term “Ganja” defines and clarifies that 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.

9. In the present case, it is mentioned in the First Information Report that articles seized were flowering and fruiting bubs along with stems.

10. Thus, the definition of “Ganja” includes flowering or fruiting tops of cannabis plant, excluding seeds and leaves when not accompanied by tops. The definition is restricted and it does not include seeds and leaves of “Ganja”.

11. Perusal of the panchanama shows that contraband articles seized were leaves of green black colour having flowering tops along with seeds. The Chemical Analyzer’s Report discloses it, after analysis, as “Ganja”.

12. Thus, *prima facie* material placed on record sufficiently shows contraband articles seized as “Ganja”.

13. It is vehemently submitted that there is no compliance of statutory provisions including compliance under Section 52-A of the NDPS Act.

14. Chapter-II of the Standing Orders deal with seizure and storage of seized material. Narcotic drugs and psychotropic substances and controlled substances seized under the NDPS Act shall be classified in view of sub clause (1) of Clause-3 of Chapter-II of the said Standing Orders and the said classification is based on physical properties and shall be weighed separately.

Sub clause (2) of Clause-3 of Chapter-II of the said Standing Orders states that if narcotic drugs, psychotropic substances, and controlled substances are found in packages or containers, such packages and containers shall be weighed separately and serially numbered for the purpose of identification.

Proviso to sub clause (3) of Clause-3 of Chapter-II of the said Standing Orders states that bulk quantities of “Ganja” and poppy straw may be packed in gunny bags and sealed in such a way that it cannot be tampered with.

Sub clause (4) of Clause-3 of Chapter-II of the Said Orders states that clarification, weighing, packaging, and numbering referred to in this sub-rule shall be done in presence of search witnesses (panchas) and the person from whom possession drugs and substances were recovered and a mention to this effect shall

invariably be made in panchanama drawn on the spot of seizure.

Sub clause (5) of Clause-3 of Chapter-II of the said Standing Orders states detailed inventory of packages, containers, conveyances, and other seized articles shall be prepared and attached to panchanama.

Chapter-III of the said Standing Orders deals with sampling. Whereas, Chapter-IV of the said Standing Orders deals with disposal.

15. Chapter-V of the NDPS Act pertains to procedure.

Section 51 contained in the said Chapter provides that provisions of the Code of Criminal Procedure shall apply insofar as they are not inconsistent with provisions of the NDPS Act to all warrants issued and arrests, searches and seizures made under the NDPS Act.

16. Thus, unless there is anything contrary provided in the NDPS Act, in relation to all warrants issued and arrests, searches and seizures carried out by investigating agency during course of investigation, provisions of the Cr.P.C. would apply.

17. In the case of **Simarnjit Singh vs. State of Punjab, 2023**

LiveLaw (SC) 570 *supra*, it is observed that seizure was not in conformity with law laid down by the court and creates a serious doubt.

18. In the light of the above, if facts of the present case and rigor under Section 37 of the NDPS Act are considered, admittedly, samples were not obtained and produced before the Magistrate. It is undoubtedly true that when investigating agency has not followed procedure under Section 52-A of the NDPS Act, deeming fiction of photograph samples etc. being treated as primary evidence as provided under sub-section (4) of Section 52-A of the NDPS Act would not be available. Whether any mode otherwise in which the prosecution can establish a charge against the accused, though the prosecution has not followed provisions of Section 52-A of the NDPS Act and not drawn samples in presence of Magistrate, still the prosecution has followed procedure of obtaining samples in presence of independent witnesses i.e. panchas. Whether procedure followed by the investigating agency is sufficient to establish a charge against accused, is a matter of evidence.

19. At this stage, when the court is concerned with question of granting or refusing bail, the same cannot be the sole consideration. However, consideration should be viewed in the

light of rigor of Section 37 of the NDPS Act. In view of Section 37 of the NDPS Act, bail can be granted if court is satisfied i.e. applicant is not likely to commit offence while on bail and the bail can be granted if the court is satisfied that there are reasonable grounds for believing that applicant is not guilty of offence.

20. The lapses pointed out by learned counsel for the applicant are *prima facie*. This aspects can be considered at the time of trial. Question is, whether the applicant is entitled to claim any benefit at this stage for grant of bail on the basis of contentions raised in the context of Sections 42 and 52-A of the NDPS Act.

21. The Honourable Apex Court in the case of **State of Kerala vs. Rajesh, reported in 2020 ALL SCR CRI 1555** laid down liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

22. Thus, satisfaction contemplated regarding accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than *prima facie* grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence

of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. Thus, recording of satisfaction on these aspect is *sine qua non* for grant of bail.

23. In the light of the above well settled legal position, there is sufficient material on record to hold that the applicant is involved in crime. In view of the rigor under Section 37 of the NDPS Act, I do not find merits in submissions of learned counsel for the applicant and there are reasons to believe that the applicant is guilty of said offences.

24. In this view of the matter, the application deserves to be rejected and the same is **rejected**.

25. The record and proceedings be sent back.

The application stands **disposed** of.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!