



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

CRIMINAL APPLICATION (BA) NO.178/2024
Deepak Dhaniram Sharma

..VS..

State of Mah., thr.PS Butibori, Crime Branch, NDPS, Nagpur

AND

CRIMINAL APPLICATION (BA) NO.14/2024
Pawan Kumar s/o Rajkumar Kashyap

..VS..

State of Mah., thr.PS Butibori, Crime Branch, NDPS, Nagpur

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

Court's or Judge's Order

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Shri P.Naidu, Counsel for Applicants.
Mrs.Swati Kolhe, Additional Public Prosecutor for
the State.

CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 12/03/2024
PRONOUNCED ON : 19/03/2024

COMMON ORDER

1. Heard learned counsel Shri P.Naidu for applicants and learned Additional Public Prosecutor Mrs.Swati Kolhe for the State.

2. By these applications under Section 439 of the Code of Criminal Procedure, applicants seek regular bail in connection with Crime No.599/2021 registered with the non-applicant/police station for offences

punishable under Sections 20, 22, and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).

3. Both applicants came to be arrested on 29.12.2021.

4. Accusations against applicants are that, on 29.12.2021 informant Police Sub Inspector Vyankatesh Donode was on patrolling duty along with his staff. At the relevant time, he received a secret information that one white car "Ertiga" bearing registration No.HR-55/AE/2470, proceeding on Chandrapur-Nagpur Road, is carrying contraband articles. Immediately, he made a phone call as well as issued letter to the Sub Divisional Police Officer for making two persons available to act as panchas. In presence of panchas, they intercepted the vehicle. On search of the vehicle, applicants Pawan and Deepak, residents of New Delhi and Muzaffar Nagpur (UP), are found in the car. During search, it revealed that they are carrying contraband articles "Ganja" in two gunny bags. On weighing said contraband articles, it was 74.780 kilograms. In

presence of panchas, they obtained samples and after following a due procedure, arrested applicants. Thus, applicants, as per allegations, were found in possession of 74.780 kilograms of "Ganja" and they were arrested.

5. Learned counsel for applicants submitted that applicants are falsely implicated in the alleged offence. In fact, no contraband articles were found in possession of applicants. The investigating officer has not complied with Sections 42 and 50 of the NDPS Act. After seizure of contraband articles, samples are not produced before the Magistrate. Thus, there is also non-compliance under Section 52-A of the NDPS Act. Without following the due procedure, articles were seized. The seized materials i.e. samples are not produced before the Magistrate. The drawing of samples at the time of seizure of contraband is also not before the Magistrate. As there is non-compliance, rigor under Section 37 of the NDPS Act would not attract and, therefore, applicants are entitled to be released on bail.

6. In support of his contentions, learned counsel for applicants placed reliance on

following decisions:

1. **Kuldeep vs. State of Maharashtra,** reported in 2023(3) AIR Bom.R (Cri) 569;
2. **Bail Application No.1017/2022 (Shakil Shafi Memon @ Chikna vs. State of Maharashtra)** decided by this court on 28.6.2023;
3. **Hasubhai Kamabhai Thakor vs. The State of Gujarat,** reported in 2023(3) AICLR 489;
4. **Saddam Hussain vs. State of Karnataka,** reported in 2019(1) DC(Narcotics) 540;
5. **Ramesh Bahan Badhe vs. State of Maharashtra,** reported in 2023(1) BOM CR (Cri) 563;
6. **Shri Hari Mahadu Valse vs. State of Maharashtra,** reported in Law Finder Document No.1874112;
7. **Ramesh Rangrao Mohite vs. State of Maharashtra,** reported in 2006 ALL MR(Cri) 1754;
8. **Shivraj Gorakh Satpute vs. State of Maharashtra,** reported in Law Finder Document No.2321073;
9. **Allabakash vs. State of Karnataka,** reported in Law Finder document No.902791;
10. **Criminal Bail Application No.2583/2019 (Laxman Shankar Ghankute vs. The State of Maharashtra)** decided by this court on 23.6.2021;
11. **Sudhir vs. State of Haryana,** reported in 2008(4) RCR (Cri) 385;
12. **Sunil Gujar vs. The State of Madhya Pradesh,** reported in 2015(1) DC

(Narcotics) 62;

13. Shri Yogesh Naik s/o Rehya Naik vs. State of Karnataka, reported in 2019(1) DC (Narcotics) 612;

14. Basavaraju vs. State of Karnataka, reported in 2017(1) DC (Narcotics) 578;

15. Vithal vs. State, reported in 2017(1) DC (Narcotics) 576;

16. Manukumar (Manukumar M) and ors vs. State of Karnataka, reported in 2018(1) DC (Narcotics) 434;

17. Baba Sow Chandekar vs. The State of Telangana, reported in 2022(3) Cri.C.C. 734;

18. Toure Mustafa @ Mustafa vs. State of Karnataka, reported in 2022 (1) KCCR 566;

19. Ajinath Aaba Shinde vs. State of Maharashtra, Law Finder document No.2317153;

20. Kashif vs. Narcotics Control Bureau, reported in Law Finder document No.2226372;

21. Venkatesh Shiva Permal vs. The State of Maharashtra, Law Finder document No.2476585;

22. Hajipasha vs. The State, through Shanthapur, reported in Law Finder document No.2039589, and

23. Anticipatory Bail Application No.2173/2022 (Kunal Dattu Kadu vs. Union of India) decided by this court on 29.8.2022.

7. *Per contra*, learned Additional Public Prosecutor for the State strongly opposed

application on ground that samples were drawn at the time of seizure in presence of panchas and the same were immediately sent to Forensic Science Laboratory for its analysis. Analysis report shows that it is analyzed as "Ganja". She further submitted that provisions under Section 52-A of the NDPS Act nowhere prohibit to obtain samples at the time of seizure. In view rigor under Section 37 of the NDPS Act, the application deserves to be rejected.

8. Having heard learned counsel for parties and perused the record, it shows that on the basis of secret information received by the informant, while he was on patrolling duty, it reveals to him that one car is carrying contraband article. He immediately forwarded the information to his superior and called two panchas. He has also called photographer and seizure material. At about 5:00 pm, near Punjab Dhaba, on Chandrapur-Nagpur Highway, they intercepted the car. The applicants were travelling in the said car and they disclosed their identities. After issuing them notices under Section 50 of the NDPS Act, search and

seizure of the vehicle and personal search of applicants were carried out. During the search of the vehicle, the raiding team seized one plastic gunny bag and some brown colour packing. On opening the said packing, it revealed that it was wet "Ganja". In presence of panchas, samples were obtained and the entire contraband was weighed and seized. Applicants were arrested. It further reveals from investigation papers that samples forwarded to the Chemical Analyzer are analyzed as "Ganja". The Regional Forensic Science Laboratory also forwarded analysis data sheet. The contraband article was also forwarded for inventory to the Magistrate. The Magistrate conducted the inventory and it revealed to him that said bags are having half green dried leaves and some quantity in blocks form and other quantity in a powder form at the base. After completion of the investigation, chargesheet is filed.

9. First limb of submissions of learned counsel for applicants is that seized materials are not "Ganja", as per definition. Term "Ganja" defines and clarifies that as flowering or

fruiting tops of the cannabis plant (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. He submitted that in the case in hand the FIR and seizure panchanama describe contraband materials as wet "Ganga" and nothing more than that. The inventory conducted by the Magistrate shows two polythene sack containing dark green half dried leaves and some quantity in block form and other quantity in a powder form at the base including weight of sack label seal and string. It further discloses that three polythene sacks containing dark green half dried leave and some quantity in block form and other quantity in a powder form at the base including weight of sack label, seal, and string. He submitted that thus the contraband articles seized, as per seizure panchanama and the report, were "Ganja". Whereas, inventory shows that some material is half dried leaves and some quantity in the block form. Thus, the above state of affairs would make it clear that the seized articles were not "Ganja" in view of the

definition of "Ganja" given under the NDPS Act.

10. Admittedly, in the report and seizure panchanama, no detailed description is given by the investigating agency. The inventory report shows that some portion was half dried leaves and some portion was in the powder form. After seizure of the panchanama, immediately, on 27.2.2022 the contraband articles were forwarded to the Chemical Analyzer. The Chemical Analyzer Report shows that it is greenish brownish colour leaves, flowering tops, seeds, and stalks put in the ziplock. Thus, though the description is not mentioned in the report or the spot panchanama, the Chemical Analyzer Report discloses that it was containing brownish colour leaves, flowering tops, and stalks. The definition of "Ganja" clarifies that "Ganja" is flowering or fruiting tops of cannabis plant, excluding seeds and leaves. Thus, the contraband recovered at the instance of applicants was "Ganja" analyzed by expert i.e. analyst. The data sheet of the analysis is also on record which shows that after putting to article on various tests, it was analyzed as "Ganja" and, therefore, contention of

learned counsel for applicants is not sustainable.

11. Another limb of submissions of learned counsel for applicants is, that there is no compliance of Section 52-A of the NDPS Act.

12. Chapter-V of the NDPS Act pertains to procedure. Section 51 contained in the said Chapter provides that the provisions of the Code of Criminal Procedure shall apply insofar as they are not inconsistent with the provisions of the Act to all the warrants issued and arrests, searches and seizures made under the NDPS Act. Thus, unless there is anything contrary provided in the NDPS Act, in relation to all the warrants issued and arrests, searches and seizures carried out by the investigating agency during the course of investigation, the provisions of the Cr.P.C. would apply.

13. Section 52 of the NDPS Act pertains to disposal of persons arrested and articles seized. Sub-section (2) of Section 52 provides that every person arrested and articles seized under the warrant issued under sub-section (1) of

Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued. Sub-section (3) of Section 52 provides that every person arrested and article seized under sub-section (2) of Sections 41, 42 or 43 or 44 shall be forwarded without unnecessary delay (a) to the officer in-charge of the nearest police station; or (b) to the officer empowered under Section 53. Sub-section (4) of Section 52 which is of importance, provides, that the authority or officer to whom any person or article is forwarded under Sub-section (2) or sub-section (3) shall with all convenient dispatch take such measures as may be necessary for the disposal according to law of such person or article. It is in this context that Section 52A comes into play. The Section pertains to disposal of seized narcotic drugs and psychotropic substances. Sub-section (1) of Section 52A provides that the Central Government may having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration in respect to narcotic drugs or psychotropic substances specify such substances

which shall as soon as may be after the seizure be disposed off by such officer and in such manner as the government may from time to time determine after following the procedure hereafter specified. Sub- section (2) of Section 52 prescribes the procedure for preparation of inventory etc., of the seized substances and enables the competent officer to apply to the Magistrate for the purpose of (a) certifying the correctness of inventory; or (b) taking in presence of the Magistrate photographs of such drugs, substances or conveyances and certifying such photographs as true; or (c) allowing to draw representative samples of such drugs or substances in the presence of such Magistrate and certifying the correctness of any list of samples so drawn. Sub- section (3) of Section 52A provides that when an application is made under sub-Section (2) the Magistrate shall as soon as may be allow the application. This is significant since this sub-section does not leave any discretionary powers in the Magistrate to grant or not to grant an application so made under sub-Section (2). It only requires the Magistrate to allow the application as soon as

possible. Sub-section (4) of Section 52A is of great importance. It provides that notwithstanding anything contained in the Indian Evidence Act or the Cr.P.C., every court trying an offence under the NDPS Act shall treat the inventory, the photographs of narcotic drugs, psychotropic substances or controlled substances or conveyances and any list of samples drawn under sub-Section (2) and certified by the Magistrate as primary evidence in respect of such offence.

14. Thus, provisions contained in Section 52-A of the NDPS Act show that it is in connection with disposal of seized narcotic drugs psychotropic substances. What is required is that the Magistrate shall certify the same and inventory and any list of samples drawn certified by the Magistrate would be treated as a primary evidence.

15. Learned counsel for the applicant has placed reliance on **Simarnjit Singh vs. State of Punjab, 2023 LiveLaw (SC) 570** wherein the Honourable Apex Court has refused to accept

evidence of drawing of samples at spot and conviction was set aside. The Honourable Apex Court has given benefit of observation and the view is expressed on the basis of the evidence recorded and the decision is delivered after a full-fledged trial.

He has further placed reliance on the decision of the Honourable Apex Court in the case of **Union of India vs. Mohanlal and anr, reported in (2016)3 SCC 379** wherein in the light of possibility of pilferage contraband goods and its return into the market took help of Islamic *curiae* and examined the issue of proper disposal of same at considerable length. In paragraph No.14, the Honourable Apex Court has taken a note of the statutory provisions contained in Section 52-A of the NDPS Act. Perusal of the entire judgment reveals proper disposal of contraband goods seized during course of investigation was an issue and it is observed that 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. The question of drawing of samples at

the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the things arise.

16. In the case of **Bothilal vs. The Intelligence Officer, Narcotics Control Bureau, reported in 2023(6) SCALE 377** it is observed that drawing of samples from all packets at the time of seizure is not in conformity with what is held by this Court in the case of Mohanlal *supra*. It was, therefore, observed that this creates a serious doubt about the prosecution's case that the substance recovered was contraband.

17. In the case of **Simarnjit Singh vs. State of Punjab** *supra* also, it is observed that seizure was not in conformity with the law laid down by the court and creates a serious doubt.

18. In the case of **Mangilal vs. The State of Madhya Pradesh, reported in 2023(5) Mh.L.J. (Cri) 321** the Honourable Apex Court observed that when there is non-compliance, where a certification of Magistrate is lacking any inventory, photograph or list of samples, would not constitute primary evidence.

19. As far as non-compliance of Section 52-A of the NDPS Act is concerned, learned counsel for applicants placed reliance on catena of judgments. None of judgments states non-compliance of Section 52-A of the NDPS Act and, therefore, the rigor under Section 37 of the NDPS Act is not attracted.

20. The Honourable Apex court in the case of **Karnal Singh vs. State of Haryana, reported in 2010 ALL SCR 968** held that non-compliance or substantial compliance of Section 42 of the NDPS Act is a question of fact which can be decided in each case. This court is of opinion that it is only upon trial that the aforesaid aspect would be decided in the present case also.

21. In view of above observations, the same ratio can be made applicable in the present cases also.

22. The entire case revolves around fact, whether the Honourable Apex Court's judgments in the cases of **Simarnjit Singh vs. State of Punjab** *supra* and **Bothilal vs. The Intelligence Officer** *supra* take away discretion of the court while

considering question of bail and whether rigor under Section 37 of the NDPS Act would not apply. It is apparent that samples are obtained on 29.12.2021 and they are forwarded for the analysis and it is analyzed as "Ganja". As said samples are not produced before the Magistrate, it is submitted that it is non-compliance of Section 52-A of the NDPS Act.

23. It is undoubtedly true that samples were not produced before the Magistrate. However, question is, whether by producing samples before the Magistrate is the only way to prove charge against accused.

24. This Court in the case of **Mukesh Rajaram Chaudhari vs. The State of Maharashtra, reported in MANU/MH/3934/2023** took a view that there are other ways also to prove charge. In this context, even if it is accepted that the prosecution has not followed provisions of Section 52-A of the NDPS Act, samples are drawn in presence of panchas. The said samples are obtained by following a due procedure. Let us assume that the prosecution has not followed provisions of

Section 52-A of the NDPS Act, in that case, if seized substances are not still destroyed and are available in the custody of investigating agency, there is nothing to stop the said agency from following the procedure provided under Section 52-A of the NDPS Act before destroying or disposing of goods and they rely on deeming fiction contained in sub section (4) of Section 52-A of the NDPS Act.

25. The second aspect is that samples have been drawn in presence of panchas and articles have been destroyed with permission of the Magistrate, then at the most, the prosecution is unable to avail the deeming fiction in view of sub section (4) of Section 52-A of the NDPS Act. Thus, ways are available with the prosecution to establish charges against accused with the help of other evidence available with it.

26. The Honourable Apex Court in the case of **State of Kerala vs. Rajesh, reported in 2020 ALL SCR CRI 1555** held that while exercising powers under Section 37 of the NDPS Act, liberal approach in the matter of bail under the NDPS Act

is indeed uncalled for.

27. Admittedly, the aspect of non-compliance of Section 52-A of the NDPS Act can be considered at the time of trial.

28. 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, the bail can be granted if court is satisfied that reasonable grounds of believing that accused is guilty of offences that is likely to commit while on bail. The bail should be granted.

29. Thus, satisfaction contemplated regarding the 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 quo non* for grant of bail.

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

31. In this view of the matter, applications deserve to be rejected and the same are **rejected**.

Applications stand **dispose** of.

(**URMILA JOSHI-PHALKE, J.**)

!! BrWankhede !!