



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

CRIMINAL APPLICATION (BA) NO.944 OF 2024
Sunil Sheshrao Pawar

..VS..

State of Maharashtra, thr.PSO PS Mehkar, District Washim

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

Court's or Judge's Order

Shri R.Bidkar, Counsel for the Applicant.
Ms.T.H.Udeshi, Additional Public Prosecutor for the NA /State.

CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 09/12/2024
PRONOUNCED ON : 18/12/2024

1. By this application under Section 439 of the Criminal Procedure Code, the applicant seeks regular bail in connection with Crime No.284/2022 registered with the non-applicant/police station for offences punishable under Sections 8(C), 20(B)(II) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act) read with 34 of the Indian Penal Code and 130 and 177 of the Motor Vehicles Act.

2. The applicant came to be arrested on 19.5.2022 and since then he is in jail.

3. Heard learned counsel Shri R.Bidkar for the

applicant and learned Additional Public Prosecutor Ms.T.H.Udeshi for the State.

4. The accusations against the applicant are on the basis of a report lodged by Police Sub Inspector Shri Vijaykumar Ghule (the complainant) attached to the Mehkar Police Station, district Buldana. As per the report, the complainant received a secrete information that the applicant is indulged in selling contraband substance i.e. "Ganja" in a hut situated at Janefar Road and, therefore, a raid was conducted and the applicant was found in possession with 17 sealed packets weighing 35.407 kilograms of "Ganja" and thereby committed an offence under the NDPS Act.

5. Learned counsel for the applicant submitted that the entire investigation papers show description of the contraband articles as "greenish leaves". The leaves are not within the definition of "Ganja". Moreover, there is no compliance under Section 52-A of the NDPS Act. The provisions of the NDPS Act are extremely stringent couple with various presumptions raised against the applicant as well as stringent bail conditions and, therefore, the same require a strict compliance. He submitted that even sampling

was not done properly. The samples are drawn on spot after mixing the contraband, which is not permissible. The samples are not obtained in presence of the Magistrate. There is no progress in the trial also. The applicant is behind the bar since 19.5.2022. In view of that, the applicant be released on bail.

6. In support of his contentions, learned counsel for the applicant placed reliance on following decision:

(1) Criminal Appeal No.585/2008 (Mohamad @ Hamya Razzak Pathan vs. State of Maharashtra) decided by Principal Seat at Bombay on 16.12.2008;

(2) Criminal Application (BA) No.720/2024 (Shaikh Asgar Ali s/o Shaikh Fakir Mohammad vs. The State of Maharashtra) decided by this court on 27.9.2024, and

(3) Bail Application No.4243/2023 (Moiz Shabbir Lokhandwala vs. State of Maharashtra) decided by Principal Seat at Bombay on 28.3.2024.

7. *Per contra*, learned Additional Public Prosecutor for the State strongly opposed the application on the ground that commercial quantity was seized from the applicant. In view of rigour under Section 37 of the NDPS Act, the application deserves to be rejected. Earlier bail application of

the applicant is rejected on merits and there is no change in circumstance. In view of that, the application deserves to be rejected.

8. After hearing both the sides and perusing of the investigation papers, it reveals that on receipt of the secret information, the complainant and other raiding party members conducted the raid. Prior to the raid, the information was reduced into writing and station diary entry was taken to that effect. A Gazetted Officer was also called and the applicant was informed as to his right to take their personal search. Thereafter, on conducting the raid, 17 packets were found and on opening the said packets, in presence of the panchas, the same were weighed and samples were obtained. After obtaining the samples, the same were sealed. Accordingly, panchanama was drawn. The entire seized material was forwarded for the inventory also. The inventory certificate is on record. The samples were referred for the analysis.

9. The first submission made by learned counsel for the applicant is that the contraband articles seized are not "Ganja" within the definition of "Ganja" as only leaves are

mentioned in the report as well as in the seizure panchanama. It is significant to note that the definition of “Ganja” under the NDPS Act takes in its ambit only flowering or fruiting tops of cannabis plant and excludes the seeds and leaves when not accompanied by the tops. Thus, the definition of “Ganja” is restricted and it does not include the seeds and leaves of “Ganja”.

10. In the light of the above definition, if the description in the case mentioned is taken into consideration, it shows that “उग्रट वासाचा कळीदार थोडा ओलसर आणि काही सुकलेला “गांजा”.” The word “कळीदार” itself is sufficient to show that it was along with the flowering tops. If the leaves are along with the flowering or fruiting tops, it is covered under the definition of “Ganja”.

11. Another limb of submission was that, there was no compliance of Section 52-A of the NDPS Act. 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.

12. 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 hereinafter 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 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.

13. Thus, provisions contained in Section 52-A of the NDPS Act show that it is connected 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.

14. This aspect is considered by the Hon'ble Apex Court in catena of decisions. The purpose of incorporation of

Section 52-A of the NDPS Act is to mitigate the issues of the hazardous nature of the contraband, vulnerability to theft, substitution, and constraint of proper storage space etc. The same is a major to safeguard primary evidence even when the contraband is disposed.

15. In case of State of **Punjab vs. Balbir Singh, reported in (1994)3 SCC 299** it has been held that while officers cannot totally ignored the provisions under the NDPS Act, mere non-compliance will not vitiate the prosecution. It was held that prejudice caused by the non-compliance would have to be shown by the accused and alternatively, the prosecution would need to give a proper explanation for non-compliance without which the non-compliance will adversely affect the prosecution's case.

16. In the case of **Arvind Yadav in JC through his Parokar vs. Government of NCT of Delhi (Bail Application No. 1416/2021)**, the Delhi High Court held that non-compliance of Section 52-A of the NDPS Act would not vitiate the trial.

17. In the case of **Superintendent, Narcotics Central Bureau of Investigation vs. R.Paulsamy,**

reported in AIR 2000 SC 3661 it is observed by the Hon'ble Apex Court that it is unfortunate that matters which could be established only in offence regarding compliance with Sections 52 and 57 have been prejudged by the learned single Judge at the stage of consideration for bail. The minimum which learned single Judge should have taken into account was the factual presumption in law position that official acts have been regularly performed. Such presumption can be rebutted only during evidence and not merely saying that no document has been produced before the learned single Judge during bail stage regarding the compliance of the formalities mentioned in those two sections.

18. The Hon'ble Apex Court has laid down the parameters to be followed while considering the bail applications moved by the accused involved in offences under the NDPS Act in the case of **Union of India vs. Ram Samujh and anr, reported in (1999)9 SCC 421** wherein it is held that the jurisdiction of the Court to grant bail is circumscribed by the provision of Section 37 of the NDPS Act. It can be granted in case where there are reasonable grounds for believing that accused is not guilty of such offence and

that he is not likely to commit any offence while on bail. It is the mandate of the legislature which is required to be followed. At this juncture, a reference to Section 37 of the Act is apposite. That provision makes the offences under the Act cognizable and non-bailable. It reads thus:

"37. Offences to be cognizable and non-bailable:

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973:

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 of section 27-A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) the limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting bail."

19. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered and followed. It should be borne in mind that in murder case, accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instruments in causing death or in inflicting death blow to number of innocent young victims, who are vulnerable: it causes deleterious effects and deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely.

20. To check the menace of dangerous drugs flooding the market, the Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless mandatory conditions provided in Section 37 are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent accused on bail and cancelled the bail.

21. This court, at this stage, is ceased with the limited question of whether the alleged non-compliance would entitle

the applicant to grant bail. The most of decisions are placed by learned counsel for the applicant especially the decision in Criminal Appeal Nos.585 and 586/2008 which is passed on the basis of the evidence recorded therein. As far as issue regarding improper sampling is concerned, the onus is on the prosecution to establish that the seized substance is the contraband and in the absence of proper procedure being followed, the recovery would be deemed suspicious. The Courts have noted the irregularity in the procedure and discrepancies in the case of the prosecution to hold that the prosecution has not been able to prove the guilt of the accused beyond reasonable doubt. Therefore, in my opinion, it can be determined at the time of conclusion of the trial and it would be premature to comment on the procedure adopted by the investigating agency while considering applications for bail.

22. Earlier bail application of the applicant is already rejected by this court on merits. As far as change in circumstances is concerned, nothing is pointed out by learned counsel for the applicant.

23. The Hon'ble Apex Court in the case of **Kalyan**

Chandra Sarkar vs. Rajesh Ranjan alias Pappu Yadav and anr, reported in (2005)2 SCC 42 observed that the principles of *res judicata* and such analogous principles although are not applicable in a criminal proceeding, still the Courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher court or a co-ordinate bench must receive serious consideration at the hands of the Court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event, the courts must give due weight to the grounds which weighed with the former or higher court in rejecting the bail application. Ordinarily, the issues which had been canvassed earlier would not be permitted to be re-agitated on the same grounds, as the same would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting.

24. In the case of **Prasad Shrikant Purohit vs. State of Maharashtra, reported in (2015)7 SCC 440**, the Hon'ble Apex Court held that, "we must note that though an accused had a right to make successive applications for grant of bail the court entertaining such subsequent bail

applications has duty to consider the reasons and grounds on which the earlier bail applications were rejected and in such cases the court also has a duty to record what are the fresh grounds which persuaded it to take a view different from the one taken in the earlier applications.”

25. In the case of **State of Tamil Nadu vs. S.A.Raja, reported in (2005)8 SCC 380**, the Hon’ble Apex Court observed that when a learned Single Judge of the same Court had denied bail to the respondent for certain reasons and that order was unsuccessfully challenged before the appellate forum, without there being any major change of circumstances, another fresh application should not have been dealt with within a short span of time unless there were valid grounds giving rise to a tenable case for bail. Of course, the principles of res judicata are not applicable to bail applications, but the repeated filing of the bail applications without there being any change of circumstances would lead to bad precedents.

26. In the case of State of **M.P. vs. Kajad, reported in (2001)7 SCC 673**, also the Hon’ble Apex Court made the similar observations that it is true that successive bail

applications are permissible under the changed circumstances. But, without the change in the circumstances the second application would be deemed to be seeking review of the earlier judgment which is not permissible under the criminal law as has been held by this court in the case of **Hari Singh Mann vs. Harbhajan Singh Bajwa, reported in (2001)1 SCC 169** and various other judgments.

27. In the light of the above observations of the Hon'ble Apex Court, if the earlier order passed by this court is considered, it is specifically mentioned that from the chargesheet it can be seen that there is a material available against the accused which *prima facie* shows his involvement. It is further observed that non-compliance of Section 52-A of the NDPS Act can be considered at the time of trial. At the stage when the court is concerned with the question of granting or refusing bail, this cannot be the sole consideration. In view of Section 37 of the NDPS Act, the bail can be granted if the court is satisfied that reasonable grounds of believing that the accused is guilty of offence that is likely to commit while on bail, the bail should be granted.

28. 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.

29. In the light of the above well settled legal position, at this stage, there is a sufficient material on record to hold that the applicant is involved in the crime.

30. Another ground raised by learned counsel for the applicant is that there is no substantial progress in the trial.

From the Roznama, it reveals that the charge is already framed and during pendency, various applications are filed by the other co-accused and the trial could not proceed. On some occasions, the accused who is on bail remained absent. A specific letter is issued by the court to the Superintendent, District Prison, Buldana for production of

the accused.

31. As far as delay in the trial is concerned, there is no dispute as to the fundamental right of accused to have a speedy trial as enshrined under Article 21 of the Constitution of India.

32. Learned counsel for the applicant submitted that there is a delay in trial. He submitted that in catena of decisions the Hon'ble Apex Court has considered this aspect and released the accused on bail. The decision in the case of **Union of India vs. K.A.Najeeb, reported in (2021) SCC OnLine SC 50** was relied upon in the decision in Criminal Appeal No.2790/2024 (**Sheikh Javed Iqbal @ Ashfaq Ansari @ Javed Ansari vs. State of Uttar Pradesh**) decided by the Hon'ble Apex Court on 18.6.2024 wherein respondent therein was in jail for more than 5 years and charges were framed and 276 witnesses were left to be examined. The decision in the case of **Union of India vs. K.A.Najeeb** *supra* was distinguished by Two-Judge Bench of the Hon'ble Apex Court in the case of **Gurwinder Singh vs. State of Punjab, reported in (2024)SCC OnLine SC 109**.

33. The Hon'ble Apex Court in Special Leave Petition

(Criminal) No.13378/2024 (**X vs. State of Rajasthan and anr**) decided on 27.11.24 also this aspect is considered and observed that it is only in the event if the trial gets unduly delayed and that too for no fault on the part of the accused, the Court may be justified in ordering his release on bail on the ground that right of the accused to have a speedy trial has been infringed.

34. Considering the intent of the legislation behind Section 37 of the NDPS Act, the offence committed by the applicant is socio economic offence. The Hon'ble Apex Court in the case of **Durand Didier vs. Chief Secretary, Union Territory of Goa, reported in (1990)1 SCC 95**, observed that, "with deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious

effects and deadly impact on the society as a whole, the Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.”

35. To check the menace of dangerous drugs flooding the market, the Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless mandatory conditions provided in Section 37 are satisfied.

36. In the result, the application deserves to be rejected and the same is rejected.

Application stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!