



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

CRIMINAL APPLICATION (BA) NO.1071/2023

Ramesh s/o Rambhar Jaiswal

..VS..

State of Mah., thr.PSO PS Butibori, Nagpur

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

Court's or Judge's Order

.....
Shri S.V.Sirpurkar, Counsel for the Applicant.
Shri V.A.Thakare, Additional Public Prosecutor for the State.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 03/01/2024

PRONOUNCED ON : 16/01/2024

1. Heard.
2. By this application under Section 439 of the Code of Criminal Procedure, the applicant seeks bail in connection with Crime No.410/2021 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 said Act).
3. The applicant is arrested on 2.9.2023 and since then he is behind bars.
4. The accusations against the applicant are on the basis of report lodged by Assistant Police Inspector Jitendra Namdev Wairagade. As per his report, while on patrolling, he received a secret information that in truck bearing No.RJ-27/Ga/8804 "Ganja" is being transported via Hinganghat to Nagpur.

He submitted the intimation to his superior. On interception of the said vehicle, 1104 kilograms moist "Ganja" was found and seized. Accordingly, the crime was registered against two accused namely Rohit Lakhan Jaiswal and Sonu Chauhan, who were in the vehicle. The applicant was arrested during investigation on the basis statement of one person that he transferred the amount to co-accused Sonu chauhan on the say of the applicant. The CDR collected by the investigating agency reveals there was a call between the applicant and co-accused Rohit Jaiswal and the applicant and co-accused Sonu Chauhan. The statements of the co-accused are also recorded showing involvement of the applicant.

5. As per contentions of the applicant, merely on the basis of statement of one of witnesses Rajbhan Jaiswal, involvement of the applicant was shown. As per his statement, he transferred the amount on the say of the applicant to co-accused Rohit Jaiswal. Learned counsel Shri S.V.Sirpurkar for the applicant, submitted that surprisingly, said Rajbhan Jaiswal, who transferred the amount, is not made an accused. As per the investigation, one Suresh Jaiswal has also transferred amount to co-accused to Rohit Jaiswal on the say of Rajbhan Jaiswal and Rajbhan Jaiswal states that he transferred the amount on the say of the applicant. He further submitted that the applicant was not found in possession of the contraband.

There is no material to show that the applicant is dealing with the contraband article. Moreover, the contraband article "Ganja" seized is not as per the definition under Section 2(ii) (b) and 2(iii)(b)(c) of the said Act. He further submitted that samples are not obtained in presence of the Magistrate. Thus, there is no compliance of Section 52-A of the said Act. Except the statements of two witnesses, no other material is on record. He further submitted that though the prosecution placed reliance on the CDR, no material is collected to show that the applicant was holding mobile phone bearing No.8109273945. Thus, merely on suspicion, the applicant is implicated in the alleged offence.

6. In support of his contentions, learned counsel for the applicant placed reliance on orders passed in Criminal Application (BA) Nos.650/2023 and 703/2023 by this court on 20.12.2023.

7. *Per contra*, learned Additional Public Prosecutor Shri V.A.Thakare for the State submitted that the applicant's involvement reveals from investigating papers as during the investigation, the investigating officer recorded two statements which show involvement of the applicant. The CDR shows the consistent calls between the applicant and the other co-accused which is sufficient to show the link between them. The amount

was transferred by one of witnesses on the say of the applicant to the co-accused. In view of rigor under Section 37 of the said Act, the court should be satisfied that the accused is not guilty and would not commit any offence. In view of the rigor under Section 37 of the said Act and *prima facie* material on record, the involvement of the applicant revealed and, therefore, the application deserves to be rejected.

8. In support of his contentions, learned Additional Public Prosecutor for the State placed reliance on following decisions:

1. Union of India vs. Prateek Shukla, reported in (2021)5 SCC 430;

2. M.D.Kale, Intelligence Officer, Narcotic Control Bureau, Bombay vs. Mohd.Afzal Mohd.Yarkhan and anr, reported in 1998(2) Mh.LO.J. 779;

3. Karnail Singh vs. State of Haryana, reported in (2009)8 SCC 539;

4. Hira Singh and anr vs. Union of India and anr, reported in (2020)20 SCC 272;

4. Shiv Kumar Mishra vs. State of Goa, through Home Secretary, reported in (2009)3 SCC 797;

5. Mukesh Singh vs. State (Narcotic Branch of Delhi), reported in (2020)10 SCC 120;

6. Vijaysingh Chandubha Jadeja vs. State of Gujarat, reported in (2011)1 SCC 609;

7. Narcotics Control Bureau vs. Mohit Aggarwal, (2022)7 SCR 600, and

8. Union of India vs. Rattan Mallik alias Habul, reported in (2009)2 SCC 624.

9. Having heard both the sides and perused the investigating papers, it reveals that the applicant was not found in his possession the said contraband article. Though the prosecution claimed the involvement of the applicant in the alleged offence on the basis of two statements, recital of the First Information Report shows that the secret information is received and raiding party members intercepted the truck carrying contraband article "Ganja". On interception of the truck, two accused Rohit Jaiswal and Sonu Chauhan were arrested. As per the allegations of the prosecution, during the investigation, the investigating officer recorded statement of Rajbhan Jaiswal who stated that he transferred amount Rs.1.00 lac i.e. Rs.49500 on 13.8.2021 and Rs.49,500/- on 19.8.2021 to co-accused Rohit Jaiswal through PayTM by using his mobile number on the say of the applicant. Whereas, the statement of Suresh Jaiswal shows that he has also transferred amount Rs.49,500/- each on 13.8.2021 and 19.8.2021 on the say of Rajbhan Jaiswal. Admittedly, said Rajbhan is not made an accused in the present crime.

10. Another incriminating circumstance on which the prosecution placed reliance is, that there was consistent calls

between the applicant and co-accused Rohit Jaiswal from 1.9.2021 to 9.9.2021. The Truck was intercepted on 11.9.2021. Perusal of the CDR shows that admittedly, the investigating officer has not collected any document to show that the mobile phone bearing No.8109273945 is owned by the applicant. The customers details are not collected by the investigating agency during the investigation.

11. Learned counsel for the applicant submitted that mere call records showing the call details and the statement of the co-accused are not sufficient material to connect the applicant with the alleged offence. He submitted that the Honourable Apex Court in the cases of **Tofan Singh vs. The State of Tamil Nadu, reported in (2021)4 SCC 1** and **State (By NCB) Bengallure vs. Pallulabid Ahmad Arimutta and anr, reported in (2022)12 SCC 633** held that statement recorded under Section 67 of the said Act cannot be used as confessional statement.

The Honourable Apex Court in the case of **Tofan Singh vs. The State of Tamil Nadu** *supra*, in paragraph No.59, observed that the marginal note to Section 67 indicates that it refers only to the power to “call for information etc”. It is further held that the said statement recorded under Section 67 of the said Act cannot be used as confessional statement and

the accused.

The Honourable Apex Court in the case of **State (By NCB) Bengallure vs. Pallulabid Ahmad Arimutta and anr**, also it has been held in clear terms in **Tofan Singh vs. The State of Tamil Nadu** *supra* that confessional statement recorded under Section 67 will remain inadmissible in the trial of an offence under the said Act.

He submitted that in the light of the above observations, except the confessional statements, there is no other material to connect the applicant with the alleged offence. He further submitted that as far as statements of two witnesses are concerned, there is no material to show that the amount was transferred on the say of the applicant.

12. Learned counsel for the applicant, on merit also, submitted that the description mentioned in the First Information Report shows that the contraband article was moist leaves. The seizure panchanama also discloses the same description. The inventory drawn by the Magistrate also discloses that all sacks were unpacked and it revealed that they are containing dark green moist grassy leaves mixed with dried with dried yellow grassy leaves and some quantity in powder form at the base. The inventory nowhere shows that the samples obtained during seizure are either produced before the

Magistrate or the samples are obtained before the Magistrate. Thus, there is no compliance of Section 52-A of the said Act also.

13. The definitions under section 2(ii)(b) and 2(iii)(b)(c) of the said Act specify "Ganja" 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.

14. Thus, term "Ganja" defines and clarifies that "Ganja" is flowering or fruiting tops of cannabis plant excluding seeds and leaves when not accompanied by tops.

15. In the case in hand, as seen from the First Information Report and seizure panchanama, the description as moist green colour leaves, the certificate of inventory describes the same. Perusal of the First Information Report shows that on interception, they found moist "Ganja" and nowhere stated about its powder form. Whereas, inventory shows some quantity in a powder form. The quantity in powder form is not weighed separately. Admittedly, the samples were not taken in presence of the Magistrate nor the samples obtained are produced before the Magistrate.

Thus, there is no compliance under Section 52-A of the said Act also.

16. Learned Additional Public Prosecutor for the State strongly opposed the application and placed reliance on various judgments.

In the case of **Union of India vs. Prateek Shukla** *supra* some documents were recovered from the house of the accused and the accused was director of the company wherein the contraband article was found and the Honourable Apex Court held that the High Court has misapplied the law and cancelled the bail.

In the case of **M.D.Kale, Intelligence Officer, Narcotic Control Bureau, Bombay vs. Mohd.Afzal Mohd.Yarkhan and anr** *supra* the seizure of the contraband was from the house of the accused.

The decision of **Karnail Singh vs. State of Haryana** *supra* is in respect of compliance under Sections 42 and 50.

Admittedly, the applicant was not found in possession of the contraband and, therefore, the compliance of Sections 42 and 50 in respect of the applicant does not arise.

In case of **Hira Singh and anr vs. Union of India and anr** *supra* the Honourable Apex Court described the expressions as small and commercial quantity.

In the case of **Mukesh Singh vs. State (Narcotic Branch of Delhi)**, *supra* the issue raised was whether investigation is vitiated on the ground that the informant himself was investigator and held that that the same cannot be a ground to vitiate the investigation.

In the case of **Vijaysingh Chandubha Jadeja vs. State of Gujarat** *supra* it is held that the concept of substantial compliance is neither borne out from the language of Section 50(1) nor it is in consonance with law laid down in the case of **State of Punjab vs. Baldev Singh**, reported in **(1999)6 SCC 172**.

The case of **Union of India vs. Rattan Mallik alias Habul** *supra* speaks about rigor under Section 37 of the said Act. It is held that the expression 'reasonable grounds' has not been defined in the said Act but means something more than *prima facie* grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to 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 both the aspects, noted above, is *sine quo non* for grant of bail under the said Act. It is further held that while considering an application for bail with reference to Section 37 of the said Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the said Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.

In **Narcotics Control Bureau vs. Mohit Aggarwal** *supra*, similar ratio is laid down by the Honourable Apex Court.

17. In view of Section 37 of the said Act, power to release an accused on bail subject to limitation contained in Section 439 of the CrPC coupled with limitation contemplated in view of Section 37 itself, viz. (i) there are reasonable ground for releasing that accused is not guilty of such an offence and (ii)

he is not likely to commit such offence while on bail. 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 offence he is charged. The satisfaction that reasonable grounds exist to believe that the accused is not involved in an offence under the Act and enjoins upon the court a duty to probe deeper into the material on record. The case which is stronger and the existing of substantial cause and circumstances which individually may impel the court to record the satisfaction which is envisaged is necessary. If on broad probabilities which emerge for the material on record, a satisfaction can be recorded that the accused is not likely to be convicted, the court would be justified in granting bail. The Honourable Apex Court, while considering the provisions of Section 21(4) of the MCOC Act, under which similar rigor regarding the grant of bail is enumerated, in the case of **Ranjitsing Brahmajeetsingh Sharma vs. State of Maharashtra and anr, reported in 2005 ALL MR Cri 1538**, held that the restrictions imposed by Section 21(4) of the MCOC Act on the powers of the courts cannot be pushed too far. It is not as if a person can be released on bail only if there would be no ground for proceeding against him at all on the charge of an offence punishable under MCOC Act. The provisions required to be interpreted in a

reasonable manner. They cannot be interpreted in such a manner so as to make the grant of bail impossible. The court is required to come to positive finding that the applicant for bail is not guilty of an organize crime before grant of bail. A careful analysis of the relevant provisions and observations made reveals that the legal position in that regard is that for enabling the court to exercise its discretion what is required is existence of reasonable ground for believing that the applicant before the court is not guilty of an offence alleged. The phrase reasonable grounds should not be construed with the phrase “sufficient grounds”.

18. As far as the limitations under Section 37 of the said Act are concerned, the Honourable Apex Court in the case of **Mohd.Muslim @ Hussain vs. State (NCT of Delhi), reported in 2023 Live Law SC 260** held that special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. It is further held that the conditions which courts have to be cognizant of are that there are reasonable grounds for believing that the accused is “not guilty of such offence” and that he is not likely to commit any offence while on bail. What is meant by “not guilty” when all the evidence is not before the

court? It can only be a *prima facie* determination. That places the court's discretion within a very narrow margin. Given the mandate of the general law on bails (Sections 436, 437 and 439, CrPC) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted reasonably.

It is further held that a plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a *prima facie* look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section of the said Act.

19. Thus, perusal of the investigation papers and the

material contained with the chargesheet *prima facie* shows that the contraband article is not seized from the possession of the applicant. The article found is not as per the definition given under Section 2(ii)(b) and 2(iii)(b)(c) of the said Act.

20. The only material available is the statement of the co-accused and the statements of two witnesses which are not sufficient to show the connection of the applicant. The CDRs are not sufficient to connect the applicant with the alleged offence.

21. At this state, the material which is collected on record is sufficient to come to positive finding that there are reasonable grounds to show that the applicant is not connected with the alleged offence.

22. In this view of the matter, the application deserves to be allowed. Accordingly, I proceed to pass following order:

ORDER

(1) The criminal application is **allowed**.

(2) Applicant - Ramesh s/o Rambhar Jaiswal, in connection with Crime No.410/2021 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,

shall be released on bail on his executing a P.R.Bond in the sum of Rs.50,000/- with one solvent surety of the like amount.

(3) The applicant shall report the concerned police station once a month i.e. first Saturday of every month between 10:00 am and 1:00 pm.

(4) The applicant shall not directly or indirectly make any inducement and threat or promise to any person acquainted with the facts of the present case.

(5) The applicant shall furnish his cell phone number(s) and address with the address proof. Additionally, he shall furnish names of his two relatives and their addresses with proofs.

(6) Needless to mention that the observations made in this order are purely *prima facie* for deciding the present application for grant of bail only and learned Judge before whom the trial will be conducted shall not get influenced by the said observations.

The application stands **disposed** of.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!