

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL MISC.APPLICATION NO. 11079 of 2023

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MUHAMMAD TAYYAB SHAIKH S/O MUHAMMAD NIHAL SHAIKH
Versus
UNION OF INDIA
=====

Appearance:

MR RAJ K. AWASTHI for MR A.R.KADRI(7330) for the Applicant(s)
No.1

for the Respondent(s) No. 1

MR KARTIK V PANDYA(2435) for the Respondent(s) No. 1

MS KRINA P. CALLA, APP for the Respondent(s) No. 2
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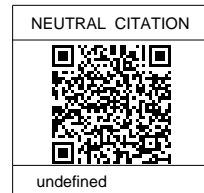
CORAM:HONOURABLE MR. JUSTICE UMESH A. TRIVEDI

Date : 22/09/2023

ORAL ORDER

1. This application is filed under Section 439 of the Code of Criminal Procedure, 1973, by the applicant, who is an accused of an offence under Section 8(c), 20(b)(ii)(C) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act").

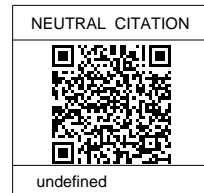
2. Narcotics Control Bureau, Ahmedabad Unit, based on prior information, carried out a search near Adalaj Toll Plaza in a Traveller Bus coming from Delhi going to Mumbai bearing registration No. RJ-19-PB-4007, which led to seizure of 6.359 Kgs of *Charas* which is commercial quantity from the joint possession of present applicant along with other co-accused



found from a red coloured bag, identification mark is also mentioned in the panchanama. While both were found travelling in the bus, came to be arrested after accused failed to account for the contraband found from their possession. Pursuant thereto, an investigation is carried out by the Narcotics Control Bureau Officers and complaint came to be filed against both of them. The said complaint came to be registered as NDPS Sessions Case No. 8 of 2022 pending in the District and Sessions Court, Gandhinagar.

3. Heard Mr. Raj K. Awasthi, learned advocate for Mr. A.R.Kadri, learned advocate for the applicant.

3.1 According to his submission, the seizure panchanama, whereby commercial quantity of *Charas* found, lacks in so many details, and therefore, it cannot be presumed that *Charas* is found from the possession of the accused. He has also submitted that nothing is mentioned in the panchanama as to in which berth or seat number the accused were travelling, from where the contraband is seized, and no option is given to them to have their search in presence of any Gazetted Officer, and therefore, seizure panchanama cannot be relied on for the purpose of even denying bail to the present applicant.



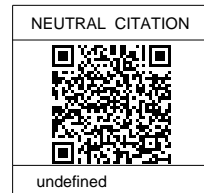
3.2 He has further submitted that the Narcotics Control Bureau Officers are supposed to record entry in general diary / station diary / daily diary when they receive an information in respect of cognizable offence received in a police station, as mentioned in para 120.8 in the case of **Lalita Kumari v. Govt. of U.P. & Ors.**, reported in **(2014) 2 SCC 1**.

3.3 He has further submitted that identification of the accused through photographs, that too, after a prolonged period, loses its significance and it is of no use.

3.4 He has further submitted that statement of the driver and conductor of the bus, wherein the accused were travelling, came to be recorded nearly after 4 months to the date of incident, and therefore, on which berth or seat they were travelling mentioned by them is of no use.

3.5 He has further submitted that even travel tickets are also not seized by the officer concerned, which creates doubt about the genuineness of the prosecution itself. Therefore, he has submitted that the accused deserves to be enlarged on bail pending trial.

4. As against that, Mr. Kartik V. Pandya, learned Standing Counsel for Narcotics Control Bureau, submitted that after



following every required procedure under "the Act", the prosecution is launched against the applicant and co-accused.

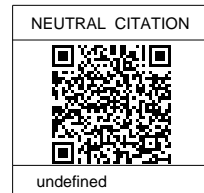
4.1 He has further submitted that the prior information received has been reduced into writing and it is also forwarded to the higher officer, as coming out from the record itself.

4.2 He has further submitted that since there was no search of a person, as contraband found from bag of the accused, there is no requirement of following even Section 50 of "the Act".

4.3 He has further submitted that though some minute details may have been missing to be recorded in the panchnama, on that ground, seizure of commercial quantity of *Charas* cannot be thrown overboard.

4.4 He has further submitted that not only the applicant is having criminal antecedent of the very offence under "the Act", he is convicted in the offence and has undergone sentence also.

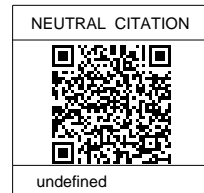
4.5 He has further submitted that the said conviction can be termed as a previous conviction under "the Act", and therefore, provision of enhanced penalty can also be invoked by the Narcotics Control Bureau, and therefore, the applicant -



accused, who is found in possession of more than commercial quantity of *Charas*, may not be enlarged on bail.

5. Mr. Raj K. Awasthi, learned advocate for Mr. A.R.Kadri, learned advocate for the applicant, in reply, clarified that earlier conviction of the applicant under the provisions of “the Act” is for an offence under Section 8(a) and 27 of “the Act”, for which he confessed to the crime and is sentenced till rising of the Court and a fine of Rs. 1,000/- was imposed upon him. Therefore, he has submitted that it is not an offence of possessing commercial quantity on previous occasion, and therefore, it may not be considered as a previous conviction of the applicant so as to impose enhanced penalty.

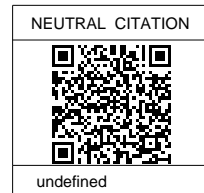
6. Having heard the learned advocates for the appearing parties and going through the contents of the complaint as also the documents produced along with the application and additional documents furnished by the learned advocate for the applicant, it appears that seizure of 6.359 Kgs of *Charas* found from a bag carried by applicant along with co-accused in a joint possession, as clothes of both of them found from the said bag containing commercial quantity of *Charas*, as revealed from the panchnama itself, it cannot be said that



applicant is an innocent person and he is not guilty of the offence under “the Act”.

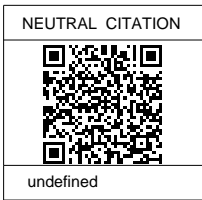
6.1 If seat number or berth number, where applicant and other co-accused were travelling, is not mentioned in the panchanama, it will not render presumption of a commercial quantity of *Charas* from the joint possession of both the accused invalid, which is seized in presence of two panchas. However, what is required to be stated in the panchanama and whether that is followed during seizure or not, would be determined on conclusion of full-fledged trial when evidence is led before the Court where the applicant - accused may cross-examine the panch-witnesses for any shortcomings recorded the panchnama, if at all it is there.

6.2 The argument that identification by photograph of the accused, in absence of any test-identification parade, is of no use. He has submitted that there is no test-identification parade conducted and when there is identification of the accused through photograph after 4 months of the incident, it is of no use. However, the identity of the accused is not in dispute/question in the present case for the simple reason that he was arrested on the spot in possession of commercial



quantity of *Charas*, in presence of two panchas. Therefore, his identity was never in dispute. The identification conducted through photograph after 4 months is for the purpose of corroboration only and it is not impermissible.

6.3 So far as argument based on para 120.8 of the judgment of Supreme Court in the case of *Lalita Kumari (Supra)* that prior/secret information should have been recorded either in general diary/station diary/daily diary, is again misconceived as Narcotics Control Bureau is not a police station so as to have those diaries for recording thereof, and therefore, information relating to cognizable offence to be recorded in the police station will not be of any use in support of the application for bail. The further submission that outward/inward number is also not mentioned in the prior/secret information, it is on a loose piece of paper and having even no seal of the higher officer, is also of no use as law requires recording of a secret/prior information in writing and superior officer is to be informed under the provisions of “the Act”. Since it is already complied with, whether it bears outward or inward number or not, all these questions are required to be determined at the time of trial so as to render the whole procedure invalid, and which has no bearing on the



main issue of an offence being committed by the accused possessing commercial quantity of *Charas*.

6.4 Over and above that, there is a presumption of 'culpable mental state', when the accused is found in possession of commercial quantity of *Charas* under Section 35 of "the Act", coupled with the 'presumption from possession of illicit article', as provided under Section 54 of "the Act". Under Section 54 of "the Act", burden is on the accused to rebut the presumption from possession of illicit article.

6.5 When commercial quantity of *Charas* is found from the possession of the applicant, of course joint possession with co-accused, as referred to hereinabove, I am unable to record conclusion that he is not guilty of an offence under "the Act" and will not commit any offence if released on bail.

7. In view thereof, I am unable to exercise discretion releasing the applicant on bail and it is hereby rejected.

Rule is discharged.

Raj

(UMESH A. TRIVEDI, J.)