



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.2865 OF 2022

Shivraj Gorakh Satpute ...Applicant

Versus

The State of Maharashtra ...Respondent

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Mr. Aashish Satpute for the Applicant.

Ms A.A. Takalkar, APP for Respondent-State.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

ORDER PRONOUNCED ON : 15th SEPTEMBER, 2023.

ORAL ORDER :-

1. This is an application under Section 439 of Cr.P.C. filed by the aforesaid Applicant, who is facing trial in NDPS Special Case No.1494 of 2021 pending on the file of Special NDPS (C.R.42), Greater Bombay, for offences under Sections 8(c) r/w 20 (c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).

2. It is the case of the prosecution that on 1/7/2021 at about 17.40 hours, the team of Anti Narcotic Cell was deputed to trace an absconding accused. The NCB team saw one person near Surabhi Jewellers, Kathewadi Chowk, Malad carrying two bags. His conduct appeared to be suspicious. He tried to flee away from the spot on

seeing them. The NCB team apprehended the said person, who disclosed his name as Vinod Rajaram Shinde. Since he gave evasive replies, the presence of panchas was secured and his personal search was taken after complying with all the statutory provisions. It is stated that 22 Kgs of contraband i.e. Ganja was recovered from him. In the course of the investigation and on the basis of the information furnished by the said person, the accused No.2 -Samadhan Tawde came to be arrested at Nashik on 3/7/2021 and 10 Kg of ganja came to be seized from his possession. It is alleged that on the basis of the information given by said Samadhan Tawde, 50Kg of Ganja came to be recovered from the house of the Applicant at Ahmednagar. The Applicant came to be arrested on 06/07/2021. The investigation followed and upon completing the investigation charge-sheet came to be filed.

3. The Applicant filed an application for bail before learned Sessions Judge, which came to be dismissed by order dated 22/06/2022 mainly on the ground that the Applicant was found to be in possession of commercial quantity of contraband. Learned Judge further held that there was due compliance of Section 42 and 50 of the NDPS Act. Learned Judge further held that the Applicant is not

entitled for bail in view of interdict placed under Section 37 of the NDPS Act. Hence, the present application.

4. Mr. Ashish Satpute, learned counsel for the Applicant contends that search was conducted between sunset and sunrise without complying with the provisions of Section 42(2) of the NDPS Act. He has relied upon the decisions of *Mohinder Kumar Vs. The State, Panji Goa, AIR 1995 SC 1157*. He further submits that there is non compliance of mandatory procedure of seizure and sample, which prima facie renders the seizure illegal. Reliance is placed on the decision of *Union of India Vs. Bal Mukund and Ors., (2010) 1 SCC (Cri) 541*. Learned counsel for the Applicant further submits that section 2(b) of NDPS Act defines Ganja as the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops). He submits that chemical analysis report reveals that the contraband forwarded for analysis contained seeds, tops and flowering/fruiting tops. This discrepancy raises a doubt about the quantity of the contraband allegedly seized from the Applicant.

5. Per contra, learned APP submits that the contraband was recovered pursuant to the disclosure statement made by the co-accused

that he would show the place from where he had collected the contraband. There was no specific information as regards the contraband. It being a case of chance recovery, compliance of procedure under section 42 of the NDPS Act was not necessary. She has relied upon the decision of the Apex Court in ***Sorabkhan Gandhkhan Pathan and anr. v/s. State of Gujarat (2004) 13 SCC 608.*** She further submits that the seizure panchanama indicates that commercial quantity of flowering/fruited tops along with seeds, leaves and stalks which is Ganja within the meaning of section 2(b) of the NDPS Act, was seized from the house of the Applicant. She has relied upon the decision of ***Shivkumar Mishra vs. State of Goa (2009) 3 SCC 797.*** She submits that the seizure and sampling is in consonance with the procedure and the discrepancies pointed out by the learned counsel for the Applicant cannot be considered at this stage and are to be decided at trial.

6. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

7. The Applicant seeks bail inter alia on the ground of breach of section 42 of the NDPS Act. This provision deals with the power of

entry, search, seizure and arrest without warrant or authorization. The scope of section 42 has been considered by the Apex Court in ***State of Rajasthan v/s. Jagraj Singh @ Hansa (2016) 11 SCC 687*** and ***Boota Singh and ors v/s. State of Haryana 2021 SCC Online SC 324***. The Apex Court has observed that section 42(1) indicates that any authorized officer can carry out search between sunrise and sunset without warrant or authorization. The scheme indicates that in the event the search has to be made between sunrise and sunset, the warrant would be necessary unless the officer has reasons to believe that a search warrant or authorization cannot be obtained without affording the opportunity to the offender to escape and the grounds of belief have to be recorded.

8. In ***Union of India through Narcotic Control Bureau, Lucknow v/s. Md. Nawaz Khan in Criminal Appeal No.1043 of 2021***, the Apex Court has reiterated that though the writing down of information on the receipt of it should normally precede the search and seizure by the officer, in exceptional circumstances but warrant immediate and expedient action, the information shall be written down later along with the reasons for the delay. It is further observed that whether there was compliance of the procedure laid down under

section 42 of the Act, is a question of fact and should be raised in the course of the trial.

9. In the instant case, it is not in dispute that the house of the Applicant was searched and Ganja was seized between sunset and sunrise without any warrant or authorization and that there was no compliance of Section 42 of the NDPS Act. It is sought to be projected that it was a chance seizure and hence, compliance with section 42 was not possible. In this regard, it is relevant to note that the accused no.1 – Vinod Rajaram Shinde, who was allegedly found in possession of two bags containing 22 kgs of Ganja was arrested on 01/07/2021. It is the case of the prosecution that on 02/07/2021, the accused no.1 had made a disclosure statement that he was willing to show the place and the person from whom he had purchased the contraband and that pursuant to the said disclosure statement, 10 kgs of Ganja was recovered from the house of accused no.2 – Samadhan Tawde at Nashik. The accused no.2 allegedly made a disclosure statement on 05/07/2021 that he had purchased the contraband from the Applicant herein, who was a resident of Sangamner, Ahmednagar and that he was willing to show his house. Pursuant to the said disclosure statement, the NCB team proceeded to the house of the Applicant at

Ahmednagar and allegedly recovered 50 kgs of Ganja from his residence. The material on record reveals that the co-accused had disclosed the name of the Applicant as well as his address. Hence, prima facie it was not a case of chance recovery or seizure in the normal course of investigation but it was on the basis of specific information given by the co-accused. It is also pertinent to note that the said information was given at about 3.00 p.m. and the search and seizure was conducted after sunset. It is not the case of the prosecution that the empowered officer did not have sufficient time to obtain warrant or authorization without affording opportunity to the Applicant to escape or conceal the evidence. The concerned officer has not recorded reasons for such belief in terms of proviso to Section 42(1) of the NDPS Act. Hence, prima facie the search and seizure, which is in contravention of the mandatory provisions of Section 42 of the NDPS Act prima facie makes the recovery doubtful.

10. The records further indicate that the Investigating Agency had taken samples of the contraband without taking recourse to Section 52(A) of the NDPS Act. In the case of ***Simranjit Singh Vs. State of Punjab (Criminal Appeal No.1443 of 2023)*** the Apex Court has observed that drawing samples from all the packets at the time of

seizure is not conformity with the law laid down in ***Union of India Vs. Mohanlal and Anr. (2016) 3 SCC 379*** and the same creates a serious doubt about the prosecution case that substance recovered was a contraband.

11. The above facts and circumstances raise a reasonable doubt about the involvement of the Applicant in the aforesaid crime. The Applicant, who is a young boy of 22 years of age, is in custody since last more than two years. The Applicant has no criminal antecedents. Considering the large pendency and the fact that the charge is not yet framed, it is evident that the trial is not likely to conclude within a reasonable time. The Apex Court has time and again observed that prolonged custody infringes the fundamental right under Article 21 of the Constitution of India and grant of bail on the ground of undue delay in trial is not fettered by Section 37 of the NDPS Act. Reliance is placed on the the decision of ***Rabi Prakash Vs. The State of Odisha in Special Leave to Appeal (Crl.) No.4169 of 2023*** wherein the Hon'ble Supreme Court has observed that "*The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created*

*under Section 37(1)(b)(ii) of the NDPS Act.” Reliance is also placed on **Nitish Adhikary @ Bapan Vs. The State of West Bengal (Special Leave to Appeal (Crl.) No.5769 of 2022)**, **Gopal Krishna Patra @ Gopalrusma Vs. Union of India (Criminal Appeal No.1169 of 2022)** decided on 05/08/2022, and **Sharifulislam @ Sarif Vs. The State of West Bengal (Special Leave to Appeal (Crl.) 4173 of 2022)** decided on 04/08/2022.*

12. Considering the above facts and circumstances, the Applicant is entitled for bail. Hence, the following order:

- (i) The Applicant, who is facing trial in NDPS Special Case No.1494 of 2021 pending on the file of Special NDPS (C.R.42), Greater Bombay, he is ordered to be released on bail in the sum of Rs. 50,000/- with one or two sureties to the like amount;
- (ii) The Applicant shall report NCB, Mumbai Zonal Unit, Mumbai, once in three months on the first Monday of the month between 11.00 a.m. to 2.00 p.m.
- (iii) The Applicant shall co-operate with the conduct of the trial and attend the trial Court on all dates,

unless exempted.

(iv) The Applicant shall not leave the State of Maharashtra without prior permission of the court.

(v) The Applicant shall not interfere with the witnesses or tamper with the evidence in any manner.

(vi) The Applicant shall keep the Investigating Officer informed of his current address and mobile contact number, and/or change of residence or mobile details, if any, from time to time.

13. The application stands disposed of.

14. It is made clear that observations made hereinabove be construed as expression of opinion only for the purpose of bail and the same shall not in any way influence the trial in other proceedings.

(SMT. ANUJA PRABHUDESSAI, J.)