



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.1296 OF 2022

Ibrahim Khwaja Miya Sayyed @ Raju ...Applicant

Versus

The State of Maharashtra ...Respondent

...

Ms Sana Raees Khan with Mr. Aniket Pardeshi for the Applicant.

Mr. R.M. Pethe, APP for Respondent -State.

Mr. Bhoje, API, ANC Bandra Unit, present.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 17th MARCH, 2023.

P. C. :-

1. At the outset learned counsel for the Applicant seeks leave to amend prayer clause (a) as to give details of the NDPS Case. Leave granted. Amendment to be carried out forthwith.

2. This is an application under Section 439 of the Cr.P.C. filed by the aforesaid Applicant, who is facing trial in NDPS Special Case No.617 of 2021, Sessions Court, Mumbai, for the offences punishable under Sections 8(c) and 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985.

3. The case of the prosecution in brief is that on 24/11/2020 at about 15.15 p.m. the Complainant found the Applicant moving around in a suspicious manner with two travel bags. When the police team went towards him, he tried to run away from the place of the incident. He was caught and his travel bags were seized and opened in presence of panchas. It is stated that the accused was carrying 10 kg of Ganja in one bag and 11 Kg of Ganja in the other bag. It is stated that the sample of Ganja was drawn in presence of the panchas and was sent to the forensic laboratory. The forensic report classifies the sample as 'Ganja' within the definition of Section 2 (iii) (b) of the NDPS Act.

4. Learned counsel for the Applicant states that apart from the flowering buds, the Investigating Officer has also attached stalks, leaves and seeds. She submits that leaves, seeds and stalks cannot be considered as 'Ganja' unless accompanied by the tops. She has relied upon the decisions of learned Single Judge of this Court in *Rahul Bhimrao Pawar vs. The State of Maharashtra, (Bail Application No.2977 of 2021)*, *Kunal Kadu vs. Union of India (ABA No.2173 of 2022)*, *Hari Mahadu Walse vs. The State of Maharashtra (Bail Application No.2299 of 2019)* and *Amit Shankar Devmare vs. The State of Maharashtra (Bail Application No.4203 of 2021)*.

5. Learned counsel for the Applicant contends that the actual flowering or fruiting tops were not separately weighed and this raises a doubt whether the 'Ganja' seized from the Applicant was of commercial quantity. She further submits that the police had not drawn sample from each of the travel bags but had mixed the substance from both the bags and thereafter drawn the sample, which was sent to CFSL for examination. She has relied upon the decision of the Delhi High Court in *Ram Bharose vs. State (Govt. of NCT of Delhi)* in *Bail Application No.1623 of 2022* to substantiate her contention that the samples, which were sent to CFSL were not representative sample and that mixing of the contents contained in both the travel bags before drawing from the bags loses the sanctity of the entire process.

6. Per contra, Mr. Pethe, learned APP for the Respondent - State has relied upon the decision of the Apex Court in *Shivkumar Mishra vs. State of Goa, (2009) 3 SCC 797* as well as the decision of the learned Single Judge of this Court in *Santosh Apposo Naik vs. The State of Maharashtra (Bail Application No.951 of 2022)* to counter the submissions that leaves, seeds and stalks ought to have been excluded while weighing the seized 'Ganja'. He further contends that the sample has been drawn in accordance with law.

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

8. The records prima facie reveal that the Applicant was seen moving in suspicious manner with two travel bags. He was apprehended and the two bags were searched. The bags contained some greenish leaves, seeds, stalks, flowering fruiting tops, the total weight of which was 21 kg. The said bags were seized under panchanama. A perusal of the panchanama reveals that the contents in each of these bags were mixed together and thereafter sample was taken and the same was forwarded to CFSL for opinion.

9. The forensic report reveals that flowering/fruiting tops, seeds, leaves and stalks were received in a sealed packet marked as Exhibit- A-1. The report reveals that the contraband, which was recovered from the Applicant is 'Ganja' within the meaning of Section 2(iii) (b) of the NDPS Act. The term 'Ganja' as defined in Section 2(iii) (b) means the flowering or fruiting tops of the Cannabis Plant (excluding the seeds and leaves when not accompanied by the tops), by whatsoever name they may be known or designated. A plain reading

of this section would reveal seeds and leaves would not be covered under the definition of 'Ganja' unless they are accompanied by the flowering or fruiting tops of the Cannabis plant. This has been the consistent interpretation of this Court in *Rahul Bhimrao Pawar, Kunal Dattu Kadu, Hari Mahadu Walse, Amit Shankar Devmare*, (supra). In the instant case, the material on record does not prima facie indicate that the leaves, seeds and stalks were accompanied by the flowering or fruiting tops of the Cannabis plant. A perusal of the decision in *Shivkumar* (supra) and *Santosh Appaso Naik* (supra) reveals that seized 'Ganja' in the aforesaid cases was accompanied by flowering or fruiting tops. In this fact situation, the aforesaid decisions are distinguishable.

10. It is the case of the prosecution that the Applicant was in possession of commercial quantity of 'Ganja' i.e. more than 20 kgs of 'Ganja'. The records prima facie reveal that the total weight of 'Ganja' allegedly seized from the Applicant was 21 kgs., which is 1kg in excess of the quantity specified by the Government in the notification. As noted above, the substance, which was seized contained leaves, seeds, stalks and flowering fruiting tops. The total weight of the substance, which was seized was 21 kgs. and this includes the weight of leaves,

seeds and stalks, which prima facie were not accompanied by the flowering or fruiting part. The fact that the entire substance was weighed together without quantifying the weight of the flowering or fruiting tops, casts a doubt whether 'Ganja' seized from the Applicant was of commercial quantity as to attract provision under Section 20(c) of the NDPS Act.

11. The records also indicate that the investigating agency has not drawn samples independently from both the bags, but had mixed together the entire contraband in both the bags and thereafter drawn two samples, one of which was forwarded to CFSL for analysis. The Delhi High Court in *Amani Fidel Chris vs. Narcotics Control Bureau CRL Appeal No.1027 of 2015* and *Ram Bharose* (supra) has considered the Standing Order 1 of 88, which is pari material with Standing Order 1 of 89 and has held that "*Mixing of the contents of container/package (in one lot) and then drawing the representative samples is not permissible under the Standing Orders and rightly so since such a sample would seized to be a representative sample of the corresponding container/ package*". In the instant case, as noted above, the sample sent to CFSL was not the representative sample. Considering this vital aspect, in my considered view the Applicant

would be entitled for bail.

12. Under the circumstances, the application is allowed.:-

- (i) The Applicant, who is facing trial in NDPS Special Case No.617 of 2021, Sessions Court, Mumbai, is ordered to be released on bail on furnishing PR bonds in the sum of Rs.50,000/- with one or two sureties of the like amount;
- (ii) The Applicant shall not leave the State without prior permission of the Special Court;
- (iii) The Applicant shall report to ANC, Bandra Unit, Mumbai on the first day of every month till framing of the charge;
- (iv) The Applicant shall keep the Special Court informed of his current address and mobile contact numbers, and /or change of residence or mobile details, if any, from time to time.

13. The Application stands disposed of.

(SMT. ANUJA PRABHUDESSAI, J.)