



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

BAIL APPLICATION NO. 2009 OF 2024

Pravin Anil Narbhavar,
Age : 27 yrs., Occu. Labour,
R/o. Kothada, Tal.& Dist. Nandurbar.

...Applicant.

Versus

1. The State of Maharashtra
Through Superintendent of Police
Nandurbar, Tal. & Dist. Nandurbar.
2. The Police Station Incharge Officer,
Newapur Police Station,
Tal. & Dist. Nandurbar.

...Respondents.

Mr. Anju Ajay Fulfagar, Advocate for applicant.

Mr. A.A.A. Khan, APP for respondent Nos. 1 and 2.

CORAM : ARUN R. PEDNEKER, J.
DATE : 19.12.2024

ORDER :-

1. Heard **Mr. A.A. Fulfagar**, learned counsel for the applicant and **Mr. A.A.A. Khan**, learned APP for the respondents/State. **Mr. G.O. Wattamwar**, the learned APP and **Mrs. V.S. Choudhari**, the learned APP have also assisted the Court in dealing with legal submissions.

2. The applicant is seeking bail as he was arrested on 18.4.2024 in connection with Crime No. 280/2024 dated 18.4.2024 registered with Nawapur Police Station, District Nandurbar for the offences punishable under sections 8(c), 20(b)(ii)(c) and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'N.D.P.S. Act' for short).

3. The case of the prosecution in short is that on 17.4.2024 at about 6.30 p.m. at inter-State check post on Nandurbar to Dule Road, accused Nos. 1 and 2 were found travelling in Mahindra Pickup Bolero vehicle and they were found in possession of two blue plastic bags containing Ganja of 1.977 k.g. and 2.009 k.g. in each. It is the case of the prosecution that the accused Nos. 1 and 2 had procured the above Ganja from accused No. 6/present applicant. Present applicant was found storing 77.96 k.g. Ganja which came to be seized under seizure panchanama. Some of the accused are absconding.

4. The present applicant had filed Bail Application No. 827/2024, which was withdrawn on 1.7.2024. Thereafter, chargesheet was filed on 14.7.2024. After filing of the chargesheet, again bail application was filed by the applicant below Exh. 16 in Special Case No. 20/2024 before the Sessions Court. The learned Sessions Court rejected the bail application of the applicant on 29.8.2024. Hence, the present bail application is filed by the applicant for bail. The applicant was arrested on 18.4.2024 and is of 27 years of age.

5. The contention of the applicant is that under the seizure panchanama muddemal property containing Ganja was recovered which contains seeds, leaves, steams of cannabis plant. The contention of the applicant is that since the roots, stems and leaves are not separated from Ganja, the weight of sample is 77 k.gs. The learned counsel submits that the flowering tops (cannabis) is to be separated from the seeds, leaves and steams and if such

separation is done, the quantity recovered would not be commercial quantity and it would come within intermediate quantity if not less than that. The learned counsel for the applicant has placed reliance on following judgments.

(i) Order dated 20.9.2024 passed by Nagpur Bench of this Court in Criminal Application (BA) No. 602/2024 in the case of Mohammad Jakir Nawab Ali Vs. The State of Maharashtra thr. P.S.O., P.S. Sonala, Dist. Buldhana.

(ii) Order dated 14.6.2024 passed by this Court in Bail Application No. 763/2024 in the case of Sidique Farook Shaikh Vs. The State of Maharashtra.

(iii) Order dated 24.8.2023 passed by this Court in Bail Application No. 1363/2023 in the case of Subhash Baburao Patil Vs. The State of Maharashtra.

6. The second contention of the applicant is that the samples were drawn on the spot and not in presence of the Magistrate, as such, there is violation of section 52-A of the N.D.P.S. Act. The learned counsel relied on following judgments.

(i) Simarnjit Singh Vs. State of Punjab reported in 2023 SCC OnLine SC 906.

(ii) Order passed by this Court in Bail Application No. 1371/2024 in the case of Mirza Mohsin Beg Vs. The State of Maharashtra.

7. Per contra, the learned APP submits that applicant is chargesheeted for the offences punishable under sections 8(c),20(b)(ii)(c) and 22 of N.D.P.S. Act. As regards first submission of the applicant is concerned, the learned APP submits that since the recovered bags containing 77.96 k.g. of Ganja along with leaves, stems and small cannabis, it is not possible to separate the steams and leaves from Ganja and that the entire quantity of seized material has to be taken as commercial quantity. For that purpose,

the learned APP relied upon the following judgments :-

(i) Order dated 16.1.2024 in CRM-M-44787/2023 passed by the Punjab and Haryana High Court in the case of Sanjay Upadhya Vs. State of Punjab.

(ii) Order dated 16.3.2022 passed by this Court in Bail Application No. 1725/2021 in the case of Ajay Vitthal Shriram Vs. The State of Maharashtra.

(iii) Order dated 7.12.2022 passed by Karnataka High Court in Criminal Petition No. 11678/2022 in the case of Sri Rangappa Vs. State and Anr.

(iv) Judgment dated 22.4.2020 delivered by the Hon'ble Supreme Court in Criminal Appeal No. 722/2017 in the case of Hira Singh and Anr. Vs. Union of India and Anr.

8. As regards the submission of violation of section 52-A of N.D.P.S. Act, the learned APP submits that the samples are drawn by the police on the spot, so also samples are drawn before the Magistrate and both samples are sent to chemical analysis and as such, there is no violation of section 52-A of N.D.P.S. Act. He also relies upon following judgment.

(i) Judgment dated 27.9.2023 delivered by this Court in Bail Application No. 54/2023 in the case of Mukesh Rajaram Choudhari Vs. The State of Maharashtra.

9. Considering the submissions of parties, this Court is called upon to decide the following questions :-

(i) What is Ganja ?

(ii) If the recovered 'Ganja' contains neutral material like stems and roots, whether the 'Ganja' has to be separated from stems and roots to ascertain the quantity of 'Ganja' so as to determine the 'small, intermediate or commercial quantity' for the purpose of section 20(b)(ii) and section 37 of N.D.P.S. Act ?

(iii) In the present case, whether there is violation of of section

52-A of N.D.P.S. Act ?

10. The first question that arises for consideration of this Court is 'what is 'Ganja' ?. For that purpose, it is necessary to examine the definition of 'Ganja' given in section 2(b) of N.D.P.S. Act, which reads as under :-

“(b) *ganja*, that is the flowering of fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever, name they may be known or designated;”

11. Bare perusal of the definition of the word 'Ganja' would indicate that Ganja is the flowering of fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops). Thus, the flowering of fruiting tops of the cannabis plant alone is considered to be 'Ganja' except when it is accompanied by the tops when the seeds and leaves are also included in the definition of 'Ganja'. This is the consistent view of this Court in all the above judgments cited by the parties at para 5 and 7 above.

12. In the instant case, from perusal of the Certificate of Inventory as per section 52-A of the N.D.P.S. Act dated 23.4.2024 of the Judicial Magistrate, First Class, it is seen that the contraband seized from the applicant is as under :-

“Thirdly, Muddemal “Article F/2, F/1 and F one Yellow Colour Plastic Sack and two small sample Khaki Paper pockets” came to be measured on electronic machine in present of panch witnesses with the help of electronic weighing machine owner Shri. Lalsing Aamnsing Rajpurohit. Yellow Colour Plastic Sack and two Khaki paper pockets are having weight as under.

Article	Weight
F/2	24Kg 85 Gram
F/1	116 Gram
F	125 Gram

Thenafter Bulk Muddemal Article F/2 opened it contains **"Ganja' alongwith leafs, stem, roots and small cannabis.** The leaves are greenish in colour having strong smell. Thenafter samples were taken in presence of Panch Witnesses and before me in Two Plastic pockets of 50 Gram each. Thenafter these two sample plastic pockets came to be sealed in Khaki colour paper pockets and they are given Article F/3 and F/4. After taking sample from Article F/2 it came to be again sealed and also samples pockets taken before me "Article F/3 and F/4" came to be sealed in presence of Panchas in the Court....."

13. From perusal of the of the above Certificate of Inventory, the seized contraband Ganja is mixed alongwith leafs, stem, roots and small cannabis. The same is not accompanied by the fruiting tops as could be reflected from the Certificate of Inventory as per section 52-A of the N.D.P.S. Act. The learned counsel for the applicant submits that since the leafs, steam, roots do not constitute 'Ganja', the same has to be separated and excluded in computing the quantity of 'Ganja'. The 'Ganja' containing leafs, stem, roots would create doubt as regards the total quantity of contraband seized and whether the applicant would be entitled for bail as the rigours of section 37 would not come into play.

14. The above submission of the learned counsel for the applicant calls for determination of the next question i.e. whether leafs, stem and roots has to be excluded in computing the weight of 'Ganja' while determining the quantity of 'Ganja' being small, intermediate or commercial quantity for the

purpose of section 20(b)(ii) and section 37 of the N.D.P.S. Act. For this purpose, it is necessary to consider the law laid down by the Supreme Court in it's judgments noted below.

15. The Two Judge bench of the Supreme Court in the case of **E. Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau reported in (2008) 5 SCC 161** had taken view that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance/s, for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration alone. In the case of E. Micheal (supra) the Supreme court had given illustration that one "A" is having quantity of 4 grams heroin which is less than the 'small quantity' which is 5 grams. Another "B" is in possession of 1 gram of heroin, but has mixed it with "neutral material" of 250 grams, it becomes 251 grams, more than the 'Commercial quantity" which is 250 grams. If these two offenders "A" and "B" are convicted, then "A" would be given a punishment of 1 year while "B" can be given up to 20 years though actual content of the offending drug is lesser in case of "B". It means one year punishment for heroin and 19 years for "neutral material" which is not otherwise punishable under the NDPS Act. Thus, the effect is more the dilution, less the potency of the drug, but more the punishment. Therefore, it wold lead to injustice and would lead to variation in the punishment of the accused depending upon the quantity of the "neutral material" instead of the "drug material".

16. Thus, in the case of **E. Micheal Raj** (supra) the Supreme Court has

held that only the quantity of the offending article is to be taken into consideration for the purpose of punishment. If has been mixed with any other substance, which is non-offending substance, then not the whole bulk is to be taken into consideration and that the punishment must be graded in relation to the quantity of the offending article only.

17. The law as laid down in the case of **E. Maichel Raj** (supra) was referred to the larger bench and in the case of **Hira Sing and Anr. Vs. Union of India and Anr. Reported in (2020) 20 SCC 272**, the larger bench of the Supreme Court noted the questions referred to it as under :-

“(a) Whether the decision of this Court in **E. Micheal Raj** (supra) requires reconsideration having omitted to take note of entry no. 239 and Note 2 (two) of the notification dated 19.10.2001 as also the interplay of the other provisions of the **Narcotic Drugs and Psychotropic Substances Act, 1985** (for short “the **NDPS Act**”) with **Section 21**?

(b) Does the impugned notification issued by the Central Government entail in redefining the parameters for constituting an offence and more particularly for awarding punishment?

(c) **Does the NDPS Act** permit the Central Government to resort to such dispensation? (d) **Does the NDPS Act** envisage that the mixture of narcotic drug and seized material/substance should be considered as a preparation in totality or on the basis of the actual drug content of the specified narcotic drug?

(e) Whether **Section 21** of the **NDPS Act** is a stand along provision or intrinsically linked to the other provisions dealing with “manufactured drug” and “preparation” containing any manufactured drug?”

18. The Supreme Court while considering the above issues, has answered the issues in the case of **Hira Singh** (supra) as under :-

“(I). The decision of this Court in the case of **E. Micheal Raj** (Supra) taking the view that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance(s), **the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight of the offending narcotic drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, is not a good law;**

(II). In case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) **is not to be excluded** and to be taken into consideration along with actual content by weight of the offending drug, while determining the “small or commercial quantity” of the Narcotic Drugs or Psychotropic Substances;

(III). **Section 21** of the NDPS Act is not stand-alone provision and must be construed along with other provisions in the statute including provisions in the **NDPS Act** including Notification No.S.O.2942(E) dated 18.11.2009 and Notification S.O 1055(E) dated 19.10.2001;

(IV). Challenge to Notification dated 18.11.2009 adding “Note 4” to the Notification dated 19.10.2001, fails and it is observed and held that the same is not ultra vires to the Scheme and the relevant provisions of the **NDPS Act.**”

19. The larger bench in the case of **Hira Singh** (supra) has reconsidered the logic of the Supreme Court in the case of **E. Micheal Raj** (supra) and it is

observed by the larger bench that it is not in agreement with the view taken in the case of **E. Micheal Raj** (supra) that the mixture of a narcotic drug or psychotropic substance with one or more neutral substance, the quantity of neutral substance is not to be taken into consideration and it is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute "small quantity or commercial quantity.

20. In the case of **Hira Singh** (supra), the Supreme Court has observed that as per the preamble of N.D.P.S. Act, 1985, it is an Act to consolidate and amend the law relating to Narcotic Drugs, to make stringent provisions for the control and regulation of operation relating to narcotic Drugs and psychotropic substance. The Supreme Court has observed that it was never the intention of the legislature to exclude the quantity of neutral substance and to consider only the actual content by weight of offending drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity. For the purpose of determination of the "small quantity or commercial quantity", the entire weight of the mixture/drug by whatever named called, weight of neutral material is also required to be considered, subject to whether the mixture is consisting of two different Narcotic Drugs and Psychotropic Substance with neutral material, one drug is heroin and another is methadone, lesser of commercial quantity between the quantities given against the aforesaid two respective Narcotic Drugs and Psychotropic Substance is required to be considered.

21. The Supreme Court in **Hira Singh** (supra) has also noted that illicit drugs are seldom sold in a pure form. They are almost always adulterated. It is noted that the total weight of such "manufactured drug" or "preparation", including the neutral material is required to be considered while determining small quantity or commercial quantity. If it is interpreted in such a manner, then and then only, the objects and purpose of N.D.P.S. Act would be achieved.

22. The Hon'ble Supreme Court in the case of the **State of Himachal Pradesh Vs. Karuna Shanker Puri** reported in 2022 LiveLaw (SC) 173, relying upon the judgment in the case of **Hira Singh** (supra) and in group of matters in Criminal Appeal Nos. 234-236/2022 has observed as under :-

"b) The *charas* sample which was examined both for qualitative and quantitative test would not meet the principles laid down in respect of quantification of the drug, an aspect we may note stands covered by the judgment in **Hira Singh** (supra) opining that in the case of seizure of a mixture, the quantity of neutral substance is not to be excluded and to be taken into consideration along with the actual contents of weight of the offending drug while determining the small or commercial quantity."

23. Applying the law as laid down in the judgment of **Hira Singh** (supra) to the facts of the present case, it is to be noted that although there is neutral material in the form of stems, leaves and roots mixed with the seized contraband 'Ganja', the mixture is composite and the investigating Officer or the Chemical Analyst cannot separate the Ganja from the neutral material and only compare the weight of the 'Ganja' separately. In the case

of **Hira Singh** (supra), it was observed that neutral material cannot be separated and thus, the total weight is required to be taken into consideration for the purpose of determining the "small quantity, intermediate quantity or the commercial quantity".

24. The Hon'ble Supreme Court in the case of **Hira Singh** (supra) has interpreted the section 21 of N.D.P.S. Act and has observed that section 21 is not stand-alone provision. Section 20 (b)(ii) of the N.D.P.S. Act is identical to section 21 of N.D.P.S. Act and has to be interpreted in identical manner as section 21 of N.D.P.S. Act as has been interpreted in the case of **Hira Singh**. For ready reference, section 20(b)(ii) and section 21 of the N.D.P.S. Act are quoted below :-

"20. Punishment for contravention in relation to cannabis plant and cannabis.— Whoever, in contravention of any provisions of this Act or any rule or order made or condition of licence granted thereunder :-

(a)

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable -

(i)

(ii) where such contravention relates to sub-clause (b),—

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to one year, or with fine, which may extend to ten thousand rupees, or with both;

(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;

(C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

21. Punishment for contravention in relation to manufactured drugs and preparations.— Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable,-

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to one year, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

The Hon'ble Supreme Court in the case of **Hira Singh** (supra) has observed that the punishment part in drug trafficking is an important one, but its preventive part is more important. Therefore, prevention of illicit traffic in

Narcotic Drugs and Psychotropic Substances Act, 1988 came to be introduced. The aim was to prevent illicit traffic rather than punish after the offence was committed. Therefore, the provisions of NDPS Act are required to be interpreted keeping in mind the object and purpose of N.D.P.S. Act; impact on the society as a whole and the Act is required to be interpreted literally and not liberally which may ultimately frustrate the object, purpose and preamble of the Act. Therefore, the interpretation of the relevant provisions of the statute canvassed on behalf of the accused that quantity of neutral substance is not to be taken into consideration and it is only actual content of the weight of the offending drug, which is relevant for the purpose of determining whether it would constitute "small quantity or commercial quantity", cannot be accepted.

25. Considering the judgment of the Supreme Court in the case of **Hira Singh** (supra), I am of the considered view that the contraband seized 'Ganja' which is mixed with stem, roots etc. cannot be separated from the flowering or fruiting tops of the cannabis plant so as to ascertain the weight of the seized contraband. Ganja if mixed with neutral material in terms of the stem, leave, roots, cannot be separated and has to be considered as whole for the purpose of section 20(b)(ii) of N.D.P.S. Act for determining whether the quantity seized is small quantity, intermediate quantity or the commercial quantity. Since the larger bench of the Supreme Court in the case of **Hira Singh** (supra) has conclusively dealt with the issue that the neutral material cannot be separated from the offending narcotic or psychotropic drug, I have not dealt with any other judgments of this Court on this issue, indicating to the contrary. In the instant case, the quantity

seized is 77.96 k.g. and thus, there cannot be any doubt that the seized quantity is the commercial quantity for which rigour of section 37 of N.D.P.S Act comes into play.

26. As regards the submission of the learned counsel for the applicant that there is violation of section 52-A is concerned, that the sample is drawn on the field and not before the Magistrate. The counsel for the applicant has not refuted the submission of the APP that the sample was also drawn before the Magistrate and both the samples are send for chemical analysis and thus, this question would be matter of trial if there is any violation of section 52-A of the Act as the samples are also drawn before the Magistrate.

27. In view of the discussion made above, I hold that no case is made out for grant of regular bail. The application is dismissed.

[ARUN R. PEDNEKER, J.]

ssc/