2023:BHC-AS:31040

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 125 OF 2023

VIKAS BABBARSINGH ITKAN ..APPLICANT
VS.
THE STATE OF MAHARASHTRA ..RESPONDENT

Adv. Pranav Pokale a/w Adv. Tanmay Karwa a/w Adv. Aditya Bagal for the Applicant.

Ms. Veera Shinde, APP for the State.

API Laxman Baliram Dhengle, Crime Branch Pune.

CORAM : **M. S. KARNIK, J.**

DATE : **OCTOBER 16, 2023**

ORAL JUDGMENT:

1. This is an application for bail in respect of the offence punishable under Sections 8(c), 20(b)(ii) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, (hereafter 'NDPS Act' for short) registered on 17/08/2021 vide C.R. No.249 of 2021 with Khadaki Police Station, Pune.

2. The applicant is accused No.1. There are in all 3 accused. The applicant was arrested on 17/08/2021. The applicant was noticed by the patrolling party carrying a sack. His movements were found to be suspicious. After

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necessary procedural formalities, the sack of the applicant was searched. The applicant was found in possession of the contraband 'charas' weighing about 1000 gms. Learned counsel for the applicant submitted that the applicant was in possession of contraband which quantity was less than the commercial quantity prescribed by the notification under the NDPS Act. According to him, therefore, the rigours of Section 37 of the NDPS Act for satisfying the twin conditions will not arise in the present case. It is further submitted that the applicant is in custody for more than 2 years and 2 months without any possibility of trial concluding any time soon. According to the learned counsel for the applicant, there are no prior offences under the NDPS Act registered against him. Learned counsel for the applicant relied upon the decision dated 13/06/2003 of the High Court of Himachal Pradesh in **Ratto Vs. The State of Himachal Pradesh**[1] and the decision dated 01/09/2015 in **Vakil Vs. State of Haryana**[2] of Punjab and Haryana High Court in support of his submissions.

1 Cr.M.P. (M) No. 1101 of 2002
2 2015(3) PLJ (Criminal) 677

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3. On the other hand, learned APP vehemently opposed the application. It is submitted that the quantity found in possession of the applicant i.e. 1000 gms of contraband charas will have to be regarded as commercial quantity in view of sub-clause (viia) of Section 2 of the NDPS Act read with the notification S.O. 1055(E) dated 19/10/2001, issued by the Central Government. Learned APP further submits that the procedure of search and seizure is fully followed. Learned APP submitted that if clause (viia) of Section 2 and the provisions of the notification are properly construed, then it follows that 1 Kg and above of the contraband 'charas' has to be regarded as commercial quantity.

4. Heard learned counsel.

5. I will have to first examine whether the quantity of 1000 gms of contraband 'charas' qualifies as a commercial quantity or whether it will have to be regarded as an intermediate quantity. While dealing with this contention, it would be material to refer to the definition of 'commercial quantity' in sub-clause (viia) of Section 2 and 'small quantity' in sub-clause (xxiiia) of Section 2 of the NDPS

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Act:-

> "(viia) "commercial quantity", in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette;"
>
> "(xxiiia) "small quantity", in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette;"

6. So far as the notification dated 19/10/2001 relied upon by learned APP is concerned, the relevant portion in the context of the present controversy reads thus:

> "In exercise of the powers conferred by clauses (viia) and (xxiiia) of section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and in supersession of Ministry of Finance, Department of Revenue Notification S.O. 527(E) dated 16th July 1996, except as respects things done or omitted to be done before such supersession, the Central Government hereby specifies the quantity mentioned in columns 5 and 6 of the Table below, in relation to the narcotic drug or psychotropic substance mentioned in the corresponding entry in columns 2 to 4 of the said Table, as the small quantity and commercial quantity respectively for the purposes of the said clauses of that section

TABLE
[See sub-clause (viia) and (xxiiia) of section 2 of the Act]

SI No.	Name of Narcotic Drug and Psychotropic Substance (International	Other non-propriety name	Chemical Name	Small Quantity (in gm.)	Commercial Quantity (in gm./kg.)

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	non-proprietory name (INN))				
23.	Cannabis and cannabis resin	CHARAS, HASHISH	EXTRACTS and TINCTURES OF CANNABIS	100	1 kg.

"

7. I am afraid that the interpretation placed by the learned APP is in the teeth of clause (viia) of Section 2 of the NDPS Act. Entry 23 of the above table is relevant. Clause (viia) of Section 2 defines commercial quantity in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by the notification in the official gazette. The Central Government, therefore, in the exercise of powers conferred by clause (viia) of Section 2 specified the quantity by way of the notification. If the quantity specified in the notification has to be regarded as commercial quantity for the purpose of clause (viia) of Section 2 then the words "any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette" in clause (viia) of Section 2 will be rendered meaningless. A definite meaning has to be assigned to these words. The language employed by clause

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(viia) of Section 2 is plain and unambiguous. A plain reading of clause (viia) of Section 2 leaves no manner of doubt that what can be specified by the Central Government by notification in the official gazette is the quantity for the purpose of clause (viia) of Section 2. Merely because the word 'commercial quantity' is used in the table of the notification does not by itself mean that the same has to be regarded as commercial quantity within the meaning of clause (viia) of Section 2 of the NDPS Act. The notification is issued in exercise of power conferred by clause (viia) of Section 2, in that sense, the notification is a piece of subordinate legislation. The subordinate legislation cannot override the main provision. The provisions of clause (viia) of Section 2 and that of the notification have to be harmoniously construed. Just because the title or expression or nomenclature used in the table of the notification is 'commercial quantity' that by itself does not mean that the same has to be regarded as a commercial quantity within the meaning of clause (viia) of Section 2, which will otherwise virtually have the effect of overriding

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the provisions of clause (viia) of Section 2 of the NDPS Act.

8. I, therefore, have no hesitation in holding that the quantity greater than the quantity specified by the Central Government by notification in the official gazette, in the present case, has to be more than 1 Kg for the contraband 'charas' to be regarded as commercial quantity within the meaning of clause (viia) of Section 2. The applicant was found in possession of 1000 gms of contraband 'charas'. The quantity found in possession of the applicant will, therefore, have to be regarded as intermediate quantity less than the commercial quantity. The rigours of Section 37 of the NDPS Act will not apply in the present case. I am in respectful agreement with the view expressed in Ratto Vs. The State of Himachal Pradesh (supra) and Vakil Vs. State of Haryana (supra). Paragraph No.4 in Vakil Vs. State of Haryana reads thus:

> "4. Appreciating the contentions of both sides, the very definition of commercial quantity' of Charas as enunciated in Section 2(via) of the Act makes it sufficiently clear that the quantity to fall within the ambit of 'commercial quantity' must be greater than the quantity specitied by the Central Government by Notification in the Official Gazette. The Notification specifying small quantity' and 'commercial quantity' shows 1 kg of Charas under the commercial' head

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and in the light of definition of 'commercial quantity' to fall under the same, it should be more than 1 kg."

9. The applicant has been in custody for more than 2 years. The trial is likely to take a long time to conclude. The investigation is complete and the charge-sheet is filed. There are no criminal antecedents reported against the applicant for the offences under the provisions of the NDPS Act. Learned APP presented a chart showing there are as many as 6 offences against the applicant registered in the state of Haryana between 2018 to 2021. These criminal antecedents are in respect of Indian Penal Code (IPC) offences. The applicant is from the state of Haryana. In such view of the matter, though a case is made for enlargement of the applicant on bail, however, I propose to impose stringent conditions to ensure that the applicant does not evade trial. Hence, the following order :-

O R D E R

(a) The application is allowed.

(b) The applicant- Vikas Babbarsingh Itkan in connection with C.R. No. 249 of 2021 registered with Khadki Police Station shall be released on bail on his furnishing P.R. Bond of Rs.1,00,000/- with one or more solvent sureties in the

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like amount.

(c) The applicant shall attend the Investigating Officer of Khadki police station once in a month every first Monday of the month between 11.00 a.m. and 1.00 p.m.

(d) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing the facts to Court or any Police Officer. The applicant shall not tamper with evidence.

(e) On being released on bail, the applicant shall furnish his contact number and residential address to the Investigating Officer and shall keep him updated, in case there is any change.

(f) The applicant shall attend the trial regularly. The applicant shall co-operate with the trial Court and shall not seek unnecessary adjournments.

(g) The applicant shall surrender his passport, if any, to the investigating officer.

(h) The applicant shall not leave the country without prior permission of the trial Court.

10. The application is disposed of.

(M. S. KARNIK, J.)

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