



**ORDER BELOW EXH.03**  
(Passed on 23.03.2023)

1. The accused Shehzad Khan Firoz Khan filed this subsequent bail application under Section 439 of the Code of Criminal Procedure (the Code for short) in Crime No.11/2023 registered against him in Shegaon City Police Station for the offences punishable under Section 20(b)(ii), 8(c) of the NDPS Act. This petition is filed as investigation is over and charge sheet is filed on 10.03.2023. Based on change in circumstance present bail application is filed.

2. Reply of State is called. It is at Exh.6. I have heard learned Advocate Mr.Ajay Dinode and learned APP Mr.U.S.Apte at length.

3. Learned Advocate for the accused submits that, investigation is completed is the mojour change in circumstance so the accused may be released on bail as his custody is no longer required. He further submits that without seeking permission of Magistrate the raid conducted at 20.55 hours is not legal. Moreover, there is non compliance of Section 42, 50, 52, 57 of the NDPS Act by investigating agency. It is argued the alleged quantity is intermediate so there would no bar of Section 37 of NDPS Act. The exact weight of the so called narcotic drug is not there on record. There is no previous criminal record of the



accused so learned Advocate prayed for bail.

4. To the contrary learned APP submits that, the offence is serious in nature and quantity of the *Ganja* involved is 10kg. Moreover, the accused is not resident of Maharashtra so he may not be available for trial if released on bail. It is argued that Prosecution has filed draft charge and it is ready for trial if at all the charge is framed. Thus, learned APP prayed for rejection of bail petition.

5. Section 2(b) of the NDPS Act defined *Ganja* as "*the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops)*". Table appended to the said Act describe small, commercial quantity of the narcotic drug and psychotropic substance. For *Ganja* 1000 gm. is the small quantity and 20 kg. is the commercial quantity. I have gone through FIR, spot panchnama on record which shows that the investigating agency has allegedly seized 10 kg. *Ganja* from the accused. However, in vernacular it is mentioned that कळीदार बीजा असलेला which means that it is not clear whether seeds or leaves were excluded while weighing the seized substance or not. So at this stage the exact weight of the *Ganja* can not be precisely commented upon.

6. Even if it is considered that it was 10 kg. of *Ganja* still



it would not come under commercial quantity. Under Section 37 of the NDPS Act, so far as offences under Section 19, 24 and 27 A of the NDPS Act are concerned there is a bar that no person shall be released when the quantity is commercial and unless opportunity is given to the public prosecutor to oppose the bail application. And bail can be granted only if the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty. However, in this case evidently the quantity involved is not commercial. Nor offence punishable under Section 19, 24, 27 A of the NDPS Act is involved.

7. So far as mandate of Section 37 and quantity of the alleged seizure is concerned Advocate for the accused has relied on judgment of Hon'ble Supreme Court **Birbal Prasad @ Birbal Prasad Sah @ Birbal Prasad Sao @ Birbal Sah Vrs. The State of Bihar** Criminal Appeal No.175 of 2018 order dated 25.01.2018, judgment of Hon'ble Bombay High Court in the case **Raju @ Mohd. Hussain S/o Ahmad Ali Vrs. State of Maharashtra** decided on 05.08.2002, **Gokul S/o Mahadev Chandurkar Vrs. State of Maharashtra**, Criminal Application (BA) No.1155 of 2018 and **Govindaprasad Amritlal Burman Vrs. State of Maharashtra** reported in 2004 ALL MR (Cri) 635 . In these judgments the quantity of Ganja below 20 kg. is held to be non commercial quantity and in that context it is observed



that rigor of Section 37 will not attract. So the bail was granted. Thus, these rulings are helpful to the stand taken by the accused so far as quantity of the *Ganja* and non applicability of Section 37 of the NDPS Act is concerned.

8. Section 42 of the NDPS Act provides for search, seizure and arrest between sunrise and sunset without warrant or authorization. At the same time only if there is no time to apply for search warrant and authorization in that case only concerned officer may enter and search any building, conveyance or enclosed place. However, in this case there was no occasion for the investigating agency to enter any enclosed place. As charge sheet shows that the accused was allegedly found at a public place and was proceeding towards Railway Station. So it will be a point of consideration only during trial whether provisions of Section 42 of the NDPS Act were followed or not ?

9. So far as Section 42 of the NDPS Act is concerned learned Advocate for the accused relied on judgment of Hon'ble Bombay High Court, Aurangabad Bench in the case **Vicky Bhagwan Sonawane & other Vrs. State of Maharashtra** Bail Application No.1534 of 2019 decided on 06.03.2020. In that case it is observed that the question of compliance or otherwise under Section 42 of the NDPS Act can be gone into even at stage of deciding bail application. In this case the investigating agency



has not entered into any building, conveyance or enclosed place. So such point can only be decided during trial on merit.

10. It is a matter of record that first bail application No.19 of 2023 is rejected by Additional Sessions Judge on 15.02.2023. At that point of time investigation was pending. In this case charge sheet is filed on 10.03.2023. Learned Advocate for the accused relied on judgment of Hon'ble Bombay High Court in the case **Laxman Irappa Hatti and Suresh Vrs. State of Maharashtra** reported in 2004 (4) Mh.L.J 415. In this case Hon'ble Bombay High Court is pleased to observe that filing of charge sheet is a material change in circumstance. So the subsequent bail petition filed by the accused is tenable.

11. Custodial interrogation of the accused has already been done. The investigating agency has seized 10 kg. of *Ganja* from the accused. The accused was arrested on 12.01.2023 and till completion of investigation he was and still he is in judicial custody. Now physical custody of the accused is not required. As the investigating is completed there would be no apprehension of tampering evidence of prosecution. Reply of State does not reflect that there is any previous record of the accused. The quantity involved in this case is not commercial. So bar under Section 37 of the NDPS Act is not applicable as 8(c), 20(b)(ii) are the offences allegedly committed by the accused. Samples are



sent for chemical analysis and it will take time to receive the reports. Without such reports trial can not be commenced and completed. So it will take time to complete the trial. During that period physical custody of the accused is not required.

12. The accused is resident of Gujrat. By pointing out his address learned APP argued that bail may not be granted to the accused as he will not remain present for the trial. On this point Advocate for the accused relied on judgment of Hon'ble Bombay High Court in the case **Mohammad Asgar Vrs. State of Maharashtra** reported in II (2004) DMC 704. I have gone through said ruling wherein the bail was granted to the accused even though he is resident of other State.

13. Thus, only because the accused is resident of other State can not be the reason to refuse him bail. Thus, grounds are satisfactory. Conditional bail order will be justified in these facts and circumstances. Hence, following order.

### ORDER

1. Application is allowed.
2. The accused be released on bail on his executing PB & SB of Rs.50,000/- with one surety in like amount.
3. The accused shall not directly or indirectly make any inducement, threat or promise to the informant and witnesses.



4. The accused shall furnish his address proof and address proof of his two near relatives along with their mobile numbers.
5. The accused shall attend each date of hearing and shall not leave the Country without prior permission of this Court.
6. The accused shall not indulge in any criminal activity/offence.
7. If the accused violate any of the above mention condition his bail will be cancelled forthwith.
8. Application is disposed off.

Dt. 23.03.2023

(Prasad P. Kulkarni)  
Additional Sessions Judge,  
Khamgaon



**Certificate**

I affirm that the contents of this P.D.F. file is correct,  
word to word as per original order.

Name of Court : Addl. Sessions Judge, Khamgaon, Dist.Buldana.

Name of Steno : Govinda D. Bhoite (Stenographer Grade-III)

Dictated on : 23.03.2023

Checked & Signed on : 23.03.2023

Decided on : 23.03.2023

Uploaded on : 23.03.2023