

Meena

**IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL REVISION APPLICATION NO. 1 OF 2024**

SAMEER SHIVAJIRAO PAWAR ...Applicant.

V/S.

STATE OF GOA REPRESENTED BY THE OFFICE
IN CHARGE PERNEM POLICE STATION GOA
AND ANR. ...Respondents

Mr. K. Poulekar with Mr. Yash Naik, Advocate for the Applicant.

Mr. Shailendra G. Bhobe, Public Prosecutor for the Respondents.

CORAM: B. P. DESHPANDE, J

DATED: 8th January, 2024

ORAL ORDER:

1. Heard Mr. K. Poulekar, learned Counsel for the Applicant and Mr. S.G. Bhobe, learned Public Prosecutor for the respondents.
2. The present revision is filed challenging the impugned order passed by the Trial Court dated 23/02/2024. By the said order the learned Trial Court directed that the charge to be framed against the accused for the offence punishable under Section 20(b) (ii) (B) of the NDPS Act.
3. Mr Poulekar appearing to the applicant would submit that first of all the complaint as well as panchanama nowhere refers to green colour

leafy substance containing flowering tops. He submits that first time there is a reference to the flowering top only in the report of the Chemical Analyser.

4. Mr. Poulekar then submits that the weight of the total substance found at the time of raid was 1 kg 115 grams which includes the weight of the polythene bag in which the entire substance was found. He would further submit that when the samples were taken in the presence of the Magistrate, the weight of the substance with the polythene bag was found to be 1 kg 61 grams. He therefore submits that there is variance of the weight of the substance found at the time of search and seizure and the one found at the time of taking samples. He further submitted that in the entire charge sheet Investigating Agency failed to disclose or to record the weight of the polythene bag alone. He therefore submitted that if the weight of the polythene bag is reduced, the substance alone could be below 1 kg and in that case, the matter will have to be decided by the Magistrate and not by the Special Court.

5. Mr. Poulekar then submitted that the Chemical Analyser's report is itself confusing as two tests show only the presence of cannabis product, which cannot be equated with Ganja. He would further submit that in case of the presence of leaves, seeds, and stems, the same cannot be considered as part of Ganja. Mr. Poulekar placed reliance on the following decisions:

1. Ibrahim Khwaja Miya Sayyed @ Raju v/s. The State of Maharashtra [Bail Application No. 1296 of 2022]

2. Hasubhai Kamabhai Thakor v/s. The State of Gujarat [2023 Live Law (SC) 354]

3. Rahul Bhimrao Pawar v/s. The State of Maharashtra [Criminal Bail Application No.2977 of 2021]

4. Mr. Amit Shankar Devmare v/s. The State of Maharashtra [Bail Application No. 4203 of 2021]

5. Hari Mahadu Valse v/s. The State of Maharashtra [Bail Application No. 2299 of 2019]

6. Kunal Dattu Kadu v/s Union of India [Anticipatory Bail Appln. 2173 of 2022]

6. Mr. Bhobe, learned Public Prosecutor would submit that the flowering tops found by the Chemical Analyser along with seeds and leaves is a mixture which has to be considered as Ganja. He then submits that the difference in the weight from the time of a search up to the taking of a sample can be by loss of moisture. He submits that the sample which was forwarded to the laboratory confirms that the substance is Ganja.

7. Mr. Bhobe would submit that the learned trial Court has considered all these aspects and taken a view that there is sufficient material to frame charge as a variable quantity. He submits that there is no jurisdictional error or perverse findings so as to interfere in the revisional jurisdiction.

8. The rival submissions fall for determination as under:

9. Section 8 of the NDPS Act deals with the prohibition of certain operations which include in cause (c) about the possession of the narcotic drug except for medical or scientific purposes. The definition of Ganja found in Section 2(b) which reads thus:

"Ganja, that is, the flowering or 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"

10. The complaint as well as Panchanama of search and seizure discloses that the raiding party found the transparent polythene bag containing in it green colour substance suspected to be ganja. The said substance was tested at the spot with the field testing kit and the result showed positive for the presence of ganja. The weight of the substance which was seized from the house of the applicant on 21/01/2020 was found 1 kg 115grams.

11. The inventory was conducted on 24/02/2020 i.e. more than a period of one month from the date of seizure. The leafy substance which was seized from the possession of the applicant was kept in the custody and it was opened only at the time of conducting inventory in the presence of the Magistrate. It is common knowledge that due to the passage of time, the possibility of moisture evaporating from the leafy substance is a natural phenomenon. Thus at the time of weighing the said

substance along with the polythene bag during the inventory was bound to reduce. Accordingly, the weight was found as 1kg 61 grams.

12. The sample was taken from the entire substance containing 25grams of green colour substance. The said sample was forwarded to the laboratory and the report was also received wherein the expert confirmed the presence of ganja.

13. The report received from the Chemical Analyser clearly shows that the packet was containing dried flowering/fruited tops with seeds, leaves and stalks. The various tests conducted on the said sample gave the result of presence of ganja.

14. Mr. Poulekar would submit that the colour test shows only the presence of cannabis product. However, the 3rd and 4th test which are the reagent test and microscopic examination clearly showing the presence of ganja and the 'hair' resembling to 'Ganja hair'. Such report which is received from the Chemical Analiser is the *prima facie* material before the trial Court for coming to the conclusion whether to frame charge against the accused or not.

15. In the impugned order it is noticed that similar arguments were advanced and the trial Court has considered it. The conclusion of the trial Court is found in paragraph 8.

16. Mr. Poulekar relied upon the decisions in the case of **Ibrahim Khwaja Miya Sayyed, Hasubhai Kamabhai Thakor, Rahul Bhimrao Pawar, Mr. Amit Shankar Devmare, Hari Mahadu Valse** and **Kunal Dattu Kadu**(supra). In all these matters the issue before the Court was in connection of grant or refusal of bail.

17. The parameters with regard to the grant or refusal of bail are distinctly separate from the parameters while coming to the opinion as to whether the charge is required to be framed against the accused or not.

18. It is no doubt true that the leaves, seeds and stems cannot independently or together be considered as ganja. The flowering top or fruiting top of the cannabis plant consists of ganja. The definition itself excludes the seeds and the leaves. However, if the flowering or fruiting tops are found along with the seeds and the leaves at the time of attachment, it has to be considered as a mixture as defined under the NDPS Act itself. It is practically difficult to separate the flowering and fruiting tops from the leaves and seeds so as to consider it for the purpose of the narcotic drug. The observations in the decisions cited by Mr. Poulekar are for grant or refusal of bail, which cannot be applied while framing of charge.

19. Mr. Poulekar would then submit that in the entire charge sheet, the Investigating Agency failed to disclose the exact weight of the polythene

bag alone. He submits that if the weight of the polythene bag is taken away from the substance, the quantity may fall below the variable quantity and the matter can to be decided by the Magistrate.

20. This contention has to be considered at the time of trial. It is not a case that if Special Court comes to the conclusion that the quantity which was found with the accused is below variable quantity, the jurisdiction of such Court is outstayed. Even at this stage, the Special Court is empowered to consider this aspect and pass necessary orders in accordance with law.

21. As rightly pointed out by Mr. Bhobe, there is no illegality or perversity in the impugned order so as to interfere in the revisional jurisdiction. The order passed by the Trial Court is after considering the entire material on record. Therefore at this stage, I am not inclined to interfere with the said order. Accordingly, revision petition fails and stands rejected.

B. P. DESHPANDE, J

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