

· **Narcotic Drugs and Psychotropic Substances Act, 1985 - Weight Adjustment due to Drying :**

- interpretation of “commercial quantity” under the NDPS Act, specifically Section 2 (viia) read with the notification S.O. No. 1055 (E). Initially, the seized ‘Charas’ weighed 1 kg and 10 grams, classified as a commercial quantity. However, after 59 days, the weight reduced to 1 kg, falling into the category of an intermediate quantity, attributed to drying.
- The court decided that the rigours of Section 37 of the NDPS Act, which pertains to stringent conditions for bail in cases involving commercial quantities, would not apply in this scenario.
- Weight recorded during inventory before the Magistrate considered, compliant with Section 52A, considering the personal liberty of the applicant.

· **Bail Consideration for Multiple Accused:**

- The first accused was found in possession of 1 kg and 10 grams, and the second accused with 1 kg and 15 grams of Charas. Together, they possessed 2 kg and 25 grams, a commercial quantity under the NDPS Act.
- Despite the joint possession of a commercial quantity, the court decided to consider their bail applications separately. This was due to the lack of evidence indicating that the accused were acting jointly or in connivance with each other.

(2023-4)212 PLR 012

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(2023-4)212 PLR 012 (Bom.)

HIGH COURT OF JUDICATURE AT BOMBAY

Before: Justice M. S. Karnik.

SUNIL SHISHUPAL NAYAK – Applicant ,

Versus

THE STATE OF MAHARASHTRA – Respondent,

Bail Application No. 1450 of 2023

(i) Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), Section 2 (viia) read with the notification S.O. No. 1055 (E) dated 19/10/2001 , Section 37, 52A – “commercial quantity” - Weight reduced due to drying up - At the time of seizure contraband ‘Charas’ weighed 1 kg and 10 grams which was “commercial quantity”- After period of 59 days, in compliance with the provisions of section

52A when weighed before the Magistrate the seized contraband of Charas was found to be weighing 1 kg which is an intermediate quantity - The reason according to the respondent is that 'Charas' was moist at the time of seizure but after 59 days it got dried - Rigours of section 37 of NDPS Act will not be applicable - For the purpose of this application considering that the personal liberty of the applicant is involved, find it appropriate to go by the weight of the contraband recorded at the time of inventory before the Magistrate which is in compliance with section 52A of the NDPS Act.

(ii) Bail - First accused found in possession of 1 kg and 10 grams and Second accused was found in possession of 1 kg and 15 grams - Accused were together in possession of 2 kg and 25 grams of Charas which is a commercial quantity - Except for the fact that the accused were found together, there is nothing on record to indicate that the accused were indulging in these activities jointly or in connivance with each other - Applications for bail considered separately.

[Para 4]

Mr. Aniket Ujjwal Nikam, Mr. Aashish I. Satpute, Mr. Piyush Toshnival, Mr. Amit Icham, for the Applicant. Mr. P. H. Gaikwad, APP for the State. API- Bhoje, ANC, Bandra Unit present.

M. S. Karnik - (23.10.2023) - Heard learned counsel for the applicant and learned APP for the State.

2. This is an application for bail in respect of the offence punishable under sections 8(c), 20(c), 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'the NDPS Act' for short) registered on 16/04/2022 vide C.R. No. 66 of 2022 with Anti Narcotic Cell, Bandra Unit police station.

3. There are in all 2 accused. The applicant is the accused no.1. The applicant was arrested on 16/04/2022.

4. It is the case of the prosecution that while on patrolling duty, the respondent noticed the activities of 2 persons suspicious. On search of the persons upon completion of the necessary procedural formalities, so far as the present applicant- accused no.1 is concerned, he was found in possession of 1 kg and 10 grams of contraband 'Charas' which is a commercial quantity. So far as the accused no. 2 is concerned, he was found in possession of 1 kg and 15 grams of 'Charas'.

5. While opposing the application, learned APP submitted that the accused were found independently as well as jointly with the contraband Charas which either way is a commercial quantity. It is thus the case of learned APP that both accused were together in possession of 2 kg and 25 grams of Charas which is a commercial quantity. Prima facie except for the fact that the accused were found together, there is nothing on record to indicate that the accused were indulging in these activities jointly or in connivance with each other.

6. At the time of seizure on 16/04/2022, the applicant was found with the contraband 'Charas' of 1 kg and 10 grams. After the period of 59 days, in compliance with the provisions of section 52A of the NDPS Act, samples were drawn before the learned Metropolitan Magistrate, 64th Court, Esplanade, Mumbai on 13/06/2022. In the presence of the Magistrate, the weight of the contraband so far as the present applicant is concerned including the samples was found to be 1 kg. 1 kg of 'Charas' will have to be regarded as an intermediate quantity having regard to the definition of "commercial quantity" in clause (viiia) of section 2 of the NDPS Act read with the notification S.O. No. 1055 (E) dated 19/10/2001.

7. My attention is invited by learned APP to the affidavit in reply filed on behalf of the respondent. In the affidavit, the stand taken by the prosecution is that the delay of 59 days in drawing the samples before the Magistrate has worked to the prejudice of the prosecution, in as much as, though the 'Charas' at the time of seizure weighed 1 kg and 10 grams which is a commercial quantity, in the inventory panchanama while drawing samples, the weight of the contraband changed. The reason according to the respondent is that 'Charas' was moist at the time of seizure but after 59 days it got dried. It is therefore that the weight at the time of inventory changed than what the actual weight was at the time of seizure. It is the submission of the learned APP that weight at the time of seizure will have to be considered and not the weight taken before learned Magistrate. He submits that the delay of 59 days was because of the circumstances which were beyond the control of the prosecuting agency. It is the submission of learned APP that such a delay should not act to the prejudice of the prosecuting agency. It is submitted that it is beyond their control as to when compliance of section 52A will be made in view of the large number of seizures effected.

8. In my opinion, these are the matters which have to be considered at the time of trial. I may not be understood to have expressed any opinion on these aspects. I am considering an application for bail. The trial will proceed on its own merits uninfluenced by any observations made by me which is for the limited purpose of considering the application for bail.

9. Suffice it to observe that before the Magistrate in compliance of section 52A of NDPS Act, the contraband Charas seized from the applicant was found to be weighing 1 kg which is an intermediate quantity. In the facts and circumstances of the present case, rigours of section 37 of NDPS Act will not be applicable. It is again made clear that I have not expressed any opinion as to whether the weight of the contraband seized at the time of seizure or the one before the learned Magistrate in compliance of section 52A has to be considered in the facts and circumstances of the present case, having regard to the submission of learned APP that delay in compliance of section 52A caused prejudice to the prosecution as at the time of seizure, the 'Charas' was found to be moist which underwent a change at the time of sampling when the contraband by then had dried. These are the aspects which will be decided by the trial Court during the trial and I may not be understood to have expressed any opinion on merits. For the purpose of this application considering that the personal liberty of the applicant is involved, I found it appropriate to go by the weight of the contraband recorded at the time of inventory before the Magistrate which is in compliance

with section 52A of the NDPS Act.

10. The applicant was arrested on 16/04/2022 and now in custody for more than 1 year and 6 months with possibility of trial commencing and concluding any time soon appears to be remote. Further, there are no criminal antecedents reported against the present applicant. The investigation is complete. The charge-sheet has been filed. Further custody will be by way of a pretrial detention. In the facts and circumstances of the present case, I am inclined to enlarge the applicant on bail.

Hence, the following order :-

ORDER

(a) The application is allowed.

(b) The applicant- Sunil Shishupal Nayak in connection with C.R. No. 66 of 2022 registered with Anti Narcotic Cell, Bandra Unit police station shall be released on bail on his furnishing P.R. Bond of Rs.1,00,000/- with one or more sureties in the like amount.

(c) The applicant shall attend the investigating officer of the Anti Narcotic Cell, Bandra Unit police station once in a month on 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.

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

(i) The applicant shall not leave the country without permission of the trial Court till the trial concludes.

11. The application is disposed of.

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