

HON'BLE SRI JUSTICE C.PRAVEEN KUMAR

CRIMINAL PETITION No. 2946 of 2016

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ORDER:

The petitioner, who is A-1, in S.C. No.125 of 2015 on the file of the I Additional District and Sessions Judge, Rajahmundry, which arose out of Crime No.164 of 2015 of Bommuru Police Station, East Zone, Rajahmundry Urban, preferred the present application under Sections 437 and 439 Cr.P.C., seeking enlargement on bail in the above crime, registered for the offences punishable under Section 8(c) read with 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances (for short "the Act") Act, 1985.

The allegations in the charge-sheet are as under :

After sustaining loss in the transport business, the petitioner along with A-2 started indulging in business of Ganja. Both the accused got the vehicles designed specifically for their clandestine operation and indulged in transporting Ganja to Tamilnadu and other places. L.W.3 is the owner of the shop which was given on lease to A-1. On 23.05.2015 at 10.00 a.m., on receipt of credible information, L.W.19-the Inspector of Police organized a raid along with his staff after obtaining authorization from the Deputy Superintendent of Police, East Zone, Rajahmundry vide proceedings No.C.No.8/DSP-EZ/2015 dated 23.05.2015 against a shop in Plot No.22 of Sri Sri Sri Vijaya Durga Mechanic Works at Auto Nagar, behind Vinayaka Temple, Palacherla village, Rajanagaram Mandal. At about 11.00 a.m., L.W.19 arrested A-1 before the mediators when he was found under suspicious circumstances near his shop. The raid party found 18 bags of Ganja in the shop. A notice under Section 50 of the Act was served and it was informed to him about his right to be checked by a Gazetted Officer in the presence of mediators. As A-1 wanted his premises be searched by a Tahasildar, L.W.19 issued a requisition to the

Tahasildar to visit the spot and search the belongings of A-1. After some time L.W.10-Tahasildar visited the spot and A-1 was produced before him. In the presence of L.W.10, A-1 opened his shop and showed some bags, which on verification found to contain Ganja. A-1 is alleged to have made a confession stating that he is in possession of Ganja and is transporting the same as per the directions of A-2. A detailed statement/confession of A-1 was recorded which was made part of the charge-sheet. L.W.19 seized 18 bags of Ganja weighing about 375 Kgs., in the presence of mediators. He collected two samples of 200 grams of Ganja from each bag, packed in separate polythin covers; marked them as 1A and 1B etc., and got them packed in a cardboard box. The Government Chemical Examiner who analyzed the seized samples opined that the sample sent is Ganja. Though efforts were made to apprehend A-2 but in vain. Hence, a charge-sheet came to be filed showing A-2 as absconding.

Though the learned counsel for the petitioner admits that the quantity of Ganja seized from A-1 is commercial, but states that he was entitled for release since certain mandatory provisions are not complied with. Relying upon the judgment of the Constitutional Bench of the Apex Court in **State of Punjab v. Baldev Singh, etc.**^[1] he submits that there is a clear violation of Section 50 of the Act. He also relied upon standing order No.1/89 dated 13.06.1989 issued by the Ministry under Section 52A(1) of the NDPS Act, 1985 to show that the samples are not packed in the manner they ought to have been done. Lastly he submits that the mandatory requirement of Section 42 has not been followed before searching the premises of A-1.

Learned Additional Public Prosecutor opposed the application contending that all the statutory requirements are complied with and in view of Section 37 of the Act the petitioner is not entitled for any relief. He further submits that even earlier the petitioner moved an application for bail before this Court, which was rejected. Hence, he

submits that as there are no changed circumstances, the request of the petitioner cannot be considered.

In order to appreciate the rival submissions made, certain facts are to be referred to from the averments made in the charge-sheet and the panchanama prepared after the search. As seen from the record, on receipt of a credible information, the Inspector-L.W.19 along with raid party proceeded to the shop of A-1. They saw A-1 coming out of the shop after having locked it. He was arrested as he was moving under suspicious circumstances. Before the mediator, he is alleged to have disclosed about 18 bags of Ganja in his shop. He was informed about his right to be searched either before the Tahasildar or before the Inspector himself who is a Gazetted Officer. The Accused is alleged to have opted for a search before a Tahasildar and accordingly, L.W.10-Tahasildar was summoned. After seizing the contraband, the samples were taken from each bag and were initially packed in a plastic bag and then kept in a paper box.

As stated earlier, the learned counsel for the petitioner mainly relied upon the judgment of the Constitutional Bench to show that there was non-compliance of Section 50 of the Act. The Constitutional Bench of the Apex Court in **State of Punjab v. Baldev Singh** was dealing with an issue, where the contraband was seized from the person of the accused. Dealing with the said aspect, it has been held that when an empowered officer or a duly authorized Officer acting on a prior information is about to search a person, it is imperative for him to inform the concerned person of his right under sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for a search. It was held that if there is any failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate, the same would cause prejudice to the accused. It was also held that whether or not the safeguards provided in Section 50 have been duly observed or not

would have to be determined by the Court on the basis of evidence adduced at the trial. The finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. It has also been held that the presumption under Section 54 of the Act can be raised only after prosecution has established that the accused was found in possession of the contraband in a search conducted in accordance with the mandate of Section 50.

From the judgment of the Apex Court referred to above, it is clear that the mandate of Section 50 would apply if the search is made on the person of the accused and the contraband is sought to be recovered from the person of the accused. But the situation on hand is different. Here is a case where the contraband was seized from a room which was in possession of A-1.

In **Gurbax Singh v. State of Haryana**^[2], the Apex Court distinguished the search of person from search of the premises. It has been held that where an empowered officer or a duly authorised officer acting on prior information is about to carry out search of a "person" as distinguished from search of "premises", it is imperative for that officer to inform the person concerned of his right under sub-section 1 of Section 50 of being taken to the nearest Gazetted Officer or nearest Magistrate for making the search.

In **State of Himachal Pradesh v. Pawan Kumar**^[3] the Apex Court explained the meaning and scope of the word "person". A Three Judge Bench held that search of a 'bag, briefcase' or any such article or container etc., which is being carried by the accused is not a search of a person and Section 50 of the Act would not apply.

Therefore, the argument of the learned counsel for the petitioner that the mandatory requirement of Section 50 viz., informing him about the search before a Magistrate or a Gazetted Officer has not been

complied with, cannot be accepted. Apart from that, it is also to be noticed that the averments in the charge-sheet clearly indicate that the accused was informed about his right to be searched before a Tahasildar or a Gazetted Officer. But A-1 opted to be searched in the presence of a Tahasildar. Therefore, even under this count, it cannot be said that there was no compliance of Section 50, which in strict terms may not be required since it is not the case of the prosecution that the contraband was seized from the person of the accused.

The next ground urged by the learned counsel for the petitioner is that the contraband was not seized as per the guidelines laid down in standing orders. It may be useful to extract the relevant portion of standing order, which is as under :

"2.9: The sample in duplicate should be kept in heat sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelope should bear the S.No. of the package(s)/containers from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope which should also be sealed and marked "secret-drug sample/Test memo" to be sent to the chemical laboratory concerned."

As per the standing order referred to above, the sample and duplicate should be kept in heat sealed plastic bag as it is convenient and safe. The said plastic bag should be kept in a paper envelope which is sealed properly. Such sealed envelope may be marked as original and duplicate. Though the learned counsel for the petitioner tried to impress upon the Court by contending that the said requirement is not followed, but the averments in the charge-sheet clearly disclose that the sample was initially kept in a plastic bag, thereafter in a wooden card board box and then the same was sealed by giving markings. Therefore, the grievance of the petitioner that the requirement of the standing orders are not complied with, cannot be considered. But, however the learned Public Prosecutor submits that these standing orders are not mandatory and they are issued only as

guidelines for the Investigating Officer. In **State of Punjab v. Makhan Chand**^[4], the Apex Court after referring to **Khet Singh v. Union of India**^[5], held as under :

“10. The instructions issued by the Narcotics Control Bureau, New Delhi are to be followed by the officer in-charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer in-charge of the investigation. It is true that when a contraband article is seized during investigation or search, a seizure mahazar should be prepared at the spot in accordance with law. There may, however, be circumstances in which it would not have been possible for the officer to prepare the mahazar at the spot, as it may be a chance recovery and the officer may not have the facility to prepare a seizure mahazar at the spot itself. If the seizure is effected at the place where there are no witnesses and there is no facility for weighing the contraband article or other requisite facilities are lacking, the officer can prepare the seizure mahazar at a later stage as and when the facilities are available, provided there are justifiable and reasonable grounds to do so. In that event, where the seizure mahazar is prepared at a later stage, the officer should indicate his reasons as to why he had not prepared the mahazar at the spot of recovery. If there is any inordinate delay in preparing the seizure mahazar, that may give an opportunity to tamper with the contraband article allegedly seized from the accused. There may also be allegations that the article seized was by itself substituted and some other items were planted to falsely implicate the accused. To avoid these suspicious circumstances and to have a fair procedure in respect of search and seizure, it is always desirable to prepare the seizure mahazar at the spot itself from where the contraband articles were taken into custody.”

Even assuming for the sake of arguments that there was no strict compliance of standing order but as held by the Apex Court they are only guidelines given to be followed by the Investigating Agency and any violation there of does not invalidate either search or seizure.

The third argument which is sought to be advanced is non-compliance of Section 42 of the Act. It is said that when the search is made on prior information, the Investigating agency before going for the search had to record the information and also inform the same to his superior officers.

A perusal of the averments in the charge-sheet show that after receipt of credible information, L.W.19-the Investigating Officer, organized the raid after obtaining authorization from Deputy Superintendent of Police, East Zone, Rajahmundry, vide proceedings C.No.8/DSP-EZ/2015 dated 23.05.2015, which indicate that he has informed his higher officer before effecting search and seizure. Hence, the argument that there was no compliance of Section 42, cannot be accepted.

As held by the Apex Court in **State of Madhya Pradesh v. Kajad**^[6], Section 37 of the N.D.P.S. Act enjoins that a person accused of an offence for imprisonment of five years or more shall generally be not released on bail. It has been held that negation of the bail is a rule and its grant an exception under sub-clause (ii) of clause (b) of Section 37(1). For the purpose of granting bail, the Court must be satisfied that there are reasonable grounds for believing that the accused is not guilty of offences with which he is charged and further he is not likely to commit any offence while on bail. It has been held that the conditions for grant of bail specified in Clause (b) of subsection (1) of section 37 are in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail. It has been held that liberal approach in the matter of bail under the N.D.P.S. Act is uncalled for. Since the court is satisfied that there is enough material on record to prove the guilt of the accused and in the light of Section 37 of the Act, the petitioner is not entitled for the relief. Having regard to the circumstances stated above and in view of the fact that the request of the petitioner for bail was rejected thrice by this Court, I am not inclined to consider his request and accordingly, the same is dismissed.

Accordingly, the Criminal Petition is dismissed.

JUSTICE C.PRAVEEN KUMAR

Date: 30.03.2016
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[\[1\]](#) (1999(6) SCC 172)
[\[2\]](#) (2001(3) SCC 28)
[\[3\]](#) (2005)4 SCC 350
[\[4\]](#) (2004(3) SCC 453)
[\[5\]](#) (2002)4 SCC 380
[\[6\]](#) (2001)7 SCC 673