

HON' BLE SRI JUSTICE SURESH KUMAR KAIT

CrI.P. Nos. 14971, 14483, 14199, 14502, 14634, 14935,
15103 and 15155 of 2016

COMMON ORDER:-

These Criminal Petitions are filed seeking to enlarge the petitioners on bail in respective cases registered in different police stations for the offence punishable under Section 8(c) read with Section 20(b)(ii)(c) of Narcotic Drugs & Psychotropic Substances Act, 1985 (for brevity "the Act").

The issue involved in these petitions is that the respondent-State, having violated the procedure laid down in the Act, has registered the cases against the petitioners. It is averred in the petitions that Sections 41, 42 and 43 of the Act in general and Section 50 of the Act in particular have not been followed by the investigating officer. In all the cases, while complying with Section 50 of the Act, an officer of the raiding party came forward and claimed to be Gazetted Officer as required under Section 50 of the Act.

Since the issue in all the petitions is the same, the learned counsel for the petitioners have argued the matter in CrI.P.No.14971 of 2016 at length and agreed that the issue raised in all these petitions may be decided together. Accordingly, these Criminal Petitions are taken up for disposal by this Common Order.

Sri V.Nitesh, Sri Sravan Kumar Naidana and Sri T.D.Phani Kumar, learned counsel for the petitioners, have submitted that as per one of the conditions under which search of persons shall be conducted as contemplated under Section 50 of the Act, when any officer duly authorized under Section 42 of the Act is about to search any person under the provisions of Sections 41, 42 or 43 of the Act, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. However, in the present cases, without taking the petitioners to any Gazetted Officer or to the nearest Magistrate, the officer of the raiding party, who claimed to be Gazetted Officer, searched the petitioners in person and recovered cell phones, ATM Cards and some amount, thereby violated the provisions contemplated under Section 50 of the Act.

To strengthen their arguments, the learned counsel have heavily relied upon the case of State of Rajasthan v. Parmanand and Another¹ wherein the Apex Court, while referring to the case of Dilip v. state of M.P. [(2007) 1 SCC 450: (2007) 1 SCC (Cri) 377)] and some other cases, held that the investigating officer has only two options either to take the accused to Gazetted Officer or to the nearest Magistrate without delay. The Investigating Officer has no

¹ (2014) 5 Supreme Court Cases 345

power to evolve third option i.e. presenting himself as Gazetted Officer and conduct search on person in terms of Section 50 of the Act.

Based upon the said ratio of the cases, the accused therein were finally acquitted on the ground that the investigating agency has violated the scheme of Section 50 which is mandatory. While deciding the case of Paramanand cited 1 supra, the Apex Court has considered number of cases and in every case search was conducted on person and recovery was also effected, and accordingly, held that if search is conducted in violation of Section 50 it is illegal and the accused are entitled for acquittal.

The learned counsel for the petitioners have further submitted that the scheme of Section 50 of the Act is evolved for the reason that there may not be misuse of the powers of the investigating agency to harass and book the innocent persons, and in such case, where if quantity is commercial, even for grant of bail, Section 37 comes into play and the Courts have no power to grant bail unless and until opinion is recorded that the accused is likely to be acquitted and he shall not commit similar offence while on bail.

I Heard the learned counsel for the petitioners and the learned Additional Public Prosecutor appearing for the respondent-State and perused the material placed on record.

The cases in hand are regarding transportation of Ganja in huge quantity. Almost in every case, the quantity is more than 20 kgs. which, as per the schedule, comes under commercial quantity. In Paramanand's case as cited supra, bag of the accused was searched by investigating officer. Inside the bag in a polythene bag, some black material i.e. opium was found. The weight of the opium was 9 kg 600 gm. In that case, the accused was not produced either before the Gazetted Officer or before the nearest Magistrate, however an officer from the investigating team came forward as Gazetted Officer and searched the accused persons and booked in the cases.

It cannot be disputed that if search of a person is conducted, Section 50 of the Act is mandatory and if there is violation of Section 50, then recovery becomes illegal and *non est*. In such a situation, the accused is not only entitled to bail but also entitled to acquittal as held in different cases by the Apex Court as discussed *inter alia*.

It is pertinent to mention here that there were divergent views on this aspect. Therefore, a reference was made to the Constitution Bench. Out of three questions of law, which the Constitution Bench dealt with in the case of State of Punjab v. Baldev Singh², the relevant question for the present situation was whether it is mandatory requirement of Section

² (1999) 6 SCC 172

50 of the Act that when an officer duly authorized under Section 42 of the Act is about to search a person, he must inform him of his right under sub-section (1) of Section 50 of the Act of being taken to the nearest Gazetted Officer or the nearest Magistrate? Accordingly, the Constitution Bench concluded in paragraph 10 of the Judgment as under:

- (1) That when an empowered officer or a duly authorized officer acting on prior information is about to *search a person*, it is *imperative* for him to *inform* the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.
- (2) That failure to *inform* the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.
- (3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.
(emphasis in original)

In point No.3 of the above conclusions, it is clearly stated that a search made by an empowered officer, on prior information, without informing the person of his right that if

he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted or a Magistrate, may not vitiate the trial but would render the recover of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

In the present cases, though search was conducted on persons in violation of Section 50 of the Act, however, except mobile phone, ATM cards and some amount, nothing contraband was recovered from the petitioners. Thus, every contraband was recovered from their respective vehicles while transporting Ganja in all the cases in hand.

In case of Dilip v. State of M.P. as cited supra, search of the person of the accused was conducted. However, nothing was found on their person. But on search of the scooter they were riding, opium contained in plastic bag was recovered. In paragraph No.16 of that judgment, it is observed that the provision of Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but keeping in view the fact that the person of [the accused] was also searched, it was obligatory on the part of the

investigating officers to comply with the said provisions. It is pertinent to mention that the accused therein were acquitted not only on the violation of terms of Section 50 of the Act but on other grounds also. In paragraph No.18 of that case, it is observed with regard to requirements of law, whereas in the cases on hand, the same had been given a complete go by. The prosecution story that as to how the Station House Officer found the police on the raid near the police station is also not free from doubt.

The learned counsel for the petitioners have also placed reliance on the case of State of H.P. v. Pawan Kumar³, wherein it is observed in paragraph No.6 as under:

“The question, which requires consideration, is what is the meaning of the words “search any person” occurring in sub-section (1) of Section 50 of the Act. Learned counsel for the accused has submitted that the word “person” occurring in Section 50 would also include within its ambit any bag, briefcase or any such article or container, etc., being carried by such person and the provisions of Section 50 have to be strictly complied with while conducting search of such bag, briefcase, article or container, etc. Learned counsel for the State has, on the other hand, submitted that there is no warrant for giving such an extended meaning and the word “person” would mean only the person himself and not any bag, briefcase, article or container, etc., being carried by him.”

It is pertinent to mention here that the definition of the word “person” has been elaborately discussed in the judgment as under:

³ (2005) 4 Supreme Court Cases 350

“We are not concerned here with the wide definition of the word “person”, which in the legal world includes corporations, associations or body of individuals as factually in these type of cases search of their premises can be done and not of their person. Having regard to the scheme of the Act and the context in which it has been used in the section, it naturally means a human being or a living individual unit and not an artificial person. The word has to be understood in a broad common-sense manner, and therefore, not a naked or nude body of a human being but the manner in which a normal human being will move about in a civilized society. Therefore, the most appropriate meaning of the word “person” appears to be “the body of a human being as presented to public view usually with its appropriate coverings and clothing”. In a civilized society, appropriate coverings and clothings are considered absolutely essential and no sane human being comes in the gaze of others without appropriate coverings and clothings. The appropriate coverings will include footwear also as normally it is considered an essential article to be worn while moving outside one’s home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For interpreting the provision, rare cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothings, are not to be taken notice of. Therefore, the word “person” would mean a human being with appropriate coverings and clothings and also footwear.”

In paragraph No.11 of the judgment, it is observed thus:

“A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a *thaila*, a *jhola*, a *gathri*, a holdall, a carton, etc. of varying

size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word “person” occurring in Section 50 of the Act.”

The learned counsels for the petitioners have submitted that the common issue raised in these Criminal Petitions is subject to trial and the petitioners have spent substantial amount of time in jail, as such, these petitions may be allowed. In order to strengthen their arguments, the learned counsels have relied on the judgment of the Supreme Court in *Sarija Banu Alias Janarthani Alias Janani and Another v. State Through Inspector of Police*⁴ wherein it is held to the following effect:

“It is pertinent to note that in the bail application of the appellants, it was alleged that there was serious violation of Section 42 of the NDPS Act. In the impugned order nothing is stated about the alleged violation of Section 42, and it is observed that it was not necessary to consider such violation at this stage. The compliance with Section 42 is mandatory and that is a relevant fact which should have engaged the attention of the Court while considering the bail application.”

In the present cases, it is not disputed that recovery of Ganja i.e. commercial quantity of more than 20 kg was affected only from the vehicles during the course of

⁴ (2004) 12 Supreme Court Cases 266

transportation. But, in some cases, recovery was effected from the dickey of the Scooter or bags carried by the accused whereas in all the case referred and discussed above, recovery was effected from the persons which is in utter violation of the scheme of Section 50 of the Act. The other substances like heroin opium, etc. are concentrated ones and the accused persons were carrying them in small quantities, however that also come under commercial quantity, and if sold in the open market, they fetch substantially high prices.

As argued by the learned counsel for the petitioners, the market value of the substance i.e. Ganja in the present cases, as on date, ranges from Rs.5,000/- to Rs.10,000/- per kg. Therefore, the Ganja that was transported by the accused persons in all the cases is more than 20 kgs., and in some of the cases it ranges from 500 to 2000 kgs. Certainly, this cannot be concealed in person or small bag that can be easily carried on the body. If the arguments of the learned counsel for the petitioners that the petitioners are entitled to be enlarged on bail, are accepted, then in every case there would be no fear of law to any of the offenders. The youth of the society will be spoiled. There will be no fear of police at all and at the end they may get acquittal of the offence by fully destroying the society by way of transporting Ganja and selling it to the consumers.

I am of the view, the ratio of the judgments discussed above is that if any recovery is effected from the person by violating the scheme of Section 50 of the Act that recovery would be illegal and based upon that the accused cannot be convicted. But if recovery is otherwise and not from the person the accused cannot take benefit of Section 50 of the Act, if violated. In none of the cases on hand, recovery of the contraband was effected from any of the persons, but was effected from the vehicles during the course of transportation of Ganja from one place to another.

In view of the above discussion and the settled law, I am of the view that the petitioners are not entitled to bail.

On 24.10.2016, this Court, in one of the connected cases in the present batch, in Crl.P.No.14483 of 2016, while considering that the recovery of contraband was from the person and as the search and seizure were not made in the presence of an independent Gazetted Officer, which amounts to violation of Section 50 of the Act, granted bail. But as per the facts of the said case, the seizure was not from person, but otherwise i.e. from the vehicle. Subsequently, on noticing the same, in exercise of the jurisdiction under Section 439(1) read with 482 Cr.P.C., by a detailed order dated 26.10.2016, this Court has recalled the earlier order dated 24.10.2016 made in Crl.P.No. 14483 of 2016 and also

ordered for taking into custody of the petitioner/ accused therein, if already released. The counsel for the petitioner appeared in Crl.P.No.14483 of 2016 is also heard.

Accordingly, these Criminal Petitions are devoid of merits, and the same are, accordingly dismissed.

However, the investigating officers concerned are expected to complete investigation and file charge sheet in the respective cases where charge sheets have not yet been laid.

As a sequel, Miscellaneous Petitions, if any pending, shall stand disposed of as infructuous.

Before parting from the present cases, it is necessary to observe that the Supreme Court of India, time and again, reminded that the investigating officer cannot evolve third option while complying with Section 50 of the Act, then why the officers are not taught about the decisions of the Supreme Court, which are very necessary in day to day functioning of the investigating agencies. Accordingly, the Registry of this Court is directed to send copy of this order to all the Superintendents/ District Heads of Police, who shall further transmit to all the Station House Officers and other investigating agencies.

SURESH KUMAR KAIT, J

27.10.2016
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