

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION Nos.1092 of 2017 and 1093 of 2017

COMMON ORDER:

Criminal petition No.1092 of 2017 is filed under Sections 437 and 439 of Criminal Procedure Code (for short "Cr.P.C.") to enlarge the petitioner on bail in Crime No.94 of 2016 of Yeleswaram Police Station, registered for the offences punishable under Section 8 (C) read with 20 (b) (ii) (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act) in un-numbered N.D.P.S.case pending on the file of I Additional District and Sessions Judge – cum – Special Court for the trial of NDPS Cases, Rajahmundry, who is in judicial custody from 19.07.2016.

Criminal petition No.1093 of 2017 is filed under Sections 437 and 439 of Criminal Procedure Code (for short "Cr.P.C.") to enlarge the petitioners/accused Nos.5 and 6 on bail in Crime No.17 of 2016 of Mothugudem Police Station, registered for the offences punishable under Section 8 (C) read with 20 (b) (ii) (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the N.D.P.S. Act) in un-numbered N.D.P.S.case pending on the file of I Additional District and Sessions Judge – cum – Special Court for the trial of NDPS Cases, Rajahmundry, who are in judicial custody from 20.05.2016

The case of the prosecution, in brief, in CrI.P.No.1092 of 2017 is that the Inspector of Police, Tuni Town Police Station, who is in-charge of Prathipadu circle on 19.07.2016 at about 02.00 a.m. received information from the S.I. of Police about the illicit

transportation of Ganja and then he served notices to the mediators and obtained their consent and reached outskirts of Yerravaram near Sri Balaji Weigh Bridge, by that time i.e. 02.45 a.m. the S.I of police, Yerravaram and staff and mediators came there and then started vehicle checking in front of Balaji Weigh Bridge, N.H.16. At about 03.30 a.m. two persons came there on motor cycle bearing No.AP 31 CR 5022 and its back one Swaraj Mizda Van bearing No.AP 37Y 1801 came and on seeing the police the vehicles took reverse side and tried to escape. Then police detained the said two persons from the motor bike and three persons from the van. On interrogation they revealed their identity. Basing on the disclosure made by the accused, raid party came to conclusion that they are transporting huge quantity of Ganja and when police gave option for conducting search in the presence of any Gazetted Officer, they opted for the search of person in the presence of Gazetted Officer. Then raid party searched the van and found 16 bags containing 624 Kgs of Ganja and then the police lifted the samples from the contraband and seized cash of Rs.34,000/- from accused No.1, Rs.5,000/- from accused No.4, Rs.5,000/- from accused No.5 and total seized cash of Rs.44,000/- from the accused under the cover of panchanama.

On further probe, it came to the notice of the raid party that two accused came on motor bike to escort the Ganja and three accused were found in the van. Thus, all the persons indulged in transportation of Ganja are liable for punishment. Petitioner and others were arrested at the spot and later on the basis panchanama registered the crime and produced the accused before the concerned Court and remanded to judicial custody on

19.07.2016. Since then the petitioner is in judicial custody.

The case of the prosecution, in brief, in Crl.P.No.1093 of 2017 is that on 20.05.2016 at about 01.00 p.m. the Inspector of Police, Chintoor circle while he was present in Mothugudem Police Station received credible information about the transportation of Ganja in a van from Seeluru to Bhadrachalam as such he requested Veterinary Assistant Surgeon, Mothugudem attend to act as one of the mediators as he is a Gazetted Officer and further another mediator. He intimated the same to ASP, Rampachodavaram. He secured electronic weighing machine and C.I. along with S.I. of Police proceeded to Y.Junction, Polluru Village on jeep and motor cycles, at about 01.30 p.m. started vehicle checking. Then an Eicher van stopped near to the center and 3 persons got down the van and tried to escape from that place on seeing the police and police caught hold of them and they revealed their identity. Then police searched the van and found 1000 Kgs of Ganja in 33 gunny bags. Police lifted the samples for the purpose of chemical analysis under the cover of panchanama and arrested accused Nos.5 to 7 and seized the contraband and 3 mobile phones. On the basis of Panchanama, police registered the crime and produced the accused before the concerned Court and remanded to judicial custody on 21.05.2016. Since then the petitioners are in judicial custody.

The present petitions are filed under Sections 437 and 439 of Cr.P.C. on the following grounds.

- (1) The search was conducted in violation of Section 50 of NDPS Act, it vitiates the entire search and seizure and

when the search and seizure is vitiated the Court can enlarge the petitioners on bail.

- (2) Section 37 of NDPS Act cast a duty on the Court to come to conclusion that whether the petitioners committed an offence *prima facie* and that the Court has to weigh probability of his getting conviction or acquittal. But in the present cases the Court need not meticulously scrutinize the record to arrive at a finding whether the accused are guilty or not, which is to be done on a full-fledged trial.

- (3) If the Court came to the conclusion that the petitioners did commit no offence, the Court can enlarge the petitioners on bail.

It is further contended that the samples were not taken strictly adhering to Section 52-A of NDPS Act and when samples were not drawn as per Section 52 -A of NDPS Act and Standing Order issued by the department, the proceedings are vitiated and thereby the petitioners are entitled to be enlarged on bail in view of the law declared by the Apex Court in “**Union of India v. Mohanlal**”¹ and that the petitioners are law abiding citizens, thereby the question of tampering evidence and influencing the witnesses would not arise and they would not flee from justice and prayed to enlarge them on bail.

Sri Duvvuri Suryanarayana, learned counsel for the petitioners, during hearing contended that the investigating agency did not adhere to Section 50 of NDPS Act and Section 52-A of

¹ (2016) 3 SCC 379

NDPS Act and so also Standing Order No.1/89 dated 13.06.1989 and thereby the proceedings are vitiated, the same itself suffice to enlarge the petitioners on bail.

Learned Public Prosecutor (State of Andhra Pradesh) would contend that the material on record is suffice to conclude that the petitioners committed offence punishable under Section 8 (C) read with 20 (b) (ii) (c) of the NDPS Act and found transporting commercial quantity of Ganja, therefore, the petitioners are not entitled to claim bail as of right in view of the law declared in **“State of Madhya Pradesh v. Kajad²” “Maktool Singh v. State of Punjab³” and “Customs, New Delhi v. Ahmadalieva Nodira⁴”**

Learned Public Prosecutor (State of Andhra Pradesh) further contended that compliance of Section 52-A of NDPS Act is not mandatory and thereby deviation, if any, would not vitiate the entire proceedings unless circumstances creates any suspicion about the conduct of investigating agency and prayed to dismiss the petitions.

As seen from the material on record, more particularly case diary produced before this Court, accused were found transporting huge quantity of Ganja i.e. 624 Kgs in Crl.P.No.1092 of 2017 and 1000 Kgs in Crl.P.No.1093 of 2017. Police arrested the accused after following necessary procedure and lifted samples under the cover of panchanama and on the strength of panchanama police registered respective crimes and the accused were remanded to judicial custody.

² AIR 2001 SC 3317

³ (1999) 3 SCC 321

⁴ 2004 (1) JCC 662

No doubt, Section 50 of the Act mandates that taking the accused persons without unnecessary delay to the nearest Gazetted officer of any of the departments mentioned in Section 42 of the Act or to the nearest Magistrate by the Officer, who is authorized under Sections 41, 42 and 43 of NDPS Act. Here, the search of Swaraj Mazda was conducted and not the person of the accused. Therefore, compliance of Section 50 of the Act and production of accused before the nearest Magistrate or Gazetted Officer of any department mentioned in Section 42 of NDPS Act would arise only in case personal search was conducted. Therefore, non-compliance of Section 50 of NDPS Act does not arise in this case.

Here, admittedly no contraband was seized from the person of the accused, but police seized contraband from the vehicle i.e. Swaraj Mazda, in such case taking the accused persons to the nearest Magistrate or to the officer notified under Section 42 of NDPS Act does not arise.

This Court in “**Intelligence Officer, Narcotics Control Bureau Hyderabad Sub-Zone v. M.Shivakumar @ Raju**”⁵ held that if the conviction is based only on search and seizure of the contraband in possession of person of the accused, compliance of Section 50 is mandatory and when contraband is seized from room, practically there is no personal search involved, it would not vitiate the proceedings.

In “**State of Rajasthan v. Parmanand**”⁶ the Apex Court held that the investigating officer has only two options either to

⁵ 2014 (3) ALT (Crl.) 112 (A.P.)

⁶ (2014) 5 Supreme Court Cases 345

take the accused to Gazetted Officer or to the nearest Magistrate without delay. The investigating officer has no 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. When search of vehicle was conducted and seized contraband, non-compliance of Section 50 of NDPS Act would not vitiate the recovery.

In view of the law declared by this Court and Apex Court, it is difficult to sustain the contention of the learned counsel for the petitioner that the entire search and seizure is vitiated. Learned counsel for the petitioners drawn the attention of this Court to a judgment of Apex Court in “**State of Punjab v. Baldev Singh**”⁷, wherein the Apex Court held that during trial the factum of compliance of Section 50 of NDPS Act is to be appreciated. Panchanama/mediators report is the basic document which will stand up to the final decision of the case and it is clear if the petitioner was not apprised of his existing right and any search conducted in violation of Section 50 of NDPS Act may not vitiate the trial but vitiates the sentence and conviction and further the search conducted in violation of Section 50 of NDPS Act will render the recovered article suspect and cannot be used as a mark of unlawful possession against the person.

But here in the present cases search of person was not conducted, thereby the principle laid down in the above said judgment has no application to the present facts of the cases.

The other contention raised before this Court is that Section 52-A of NDPS Act was not complied with by the police.

⁷ AIR 1999 SC 2378

Section 52-A (2) of NDPS Act deals with procedure for disposal of seized narcotic drugs and psychotropic substances:

Section 52-A (2) reads as under:

“(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyance] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

- (a) certifying the correctness of the inventory so prepared; or
- (b) taking, in the presence of such Magistrate, photographs of [such drugs, substances or conveyances] and certifying such photographs as true; or
- (c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.”

Thus, the officer, who conducted search and seized the contraband is required to follow the procedure under Section 52-A (2) of the NDPS Act, but here it is the contention of the learned counsel for the petitioners is that it was not complied with and he has drawn the attention of this Court to Standing Order No.1/89 dated 13.06.89, which was issued in exercise of the power conferred on the Government for the benefit of the officer, who are conducting search and seizure etc., and the same is extracted herein.

Standing Order No.1/89, dated 13.06.1989 reads as under:

“Whereas the Central Government considers it necessary and expedient to determine the manner in which the Narcotic Drugs and Psychotropic Substances, as specified in Notification No.4/89 dated the 29th May, 1989 (F.No.664/23/89-Opium, published as S.O.381 (E)), which shall, as soon as may be, after their seizure, be disposed off, having regard to their hazardous nature, vulnerability to theft, substitution and constraints of proper storage space;

Now, therefore, in exercise of the powers conferred by sub-section (1) of section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) (hereinafter referred to as ‘the Act’), the Central Government hereby determines that the drugs specified in the aforesaid Notification shall be disposed of in the following manner, namely:

Section I – Drugs Meant for Disposal

Narcotics Drugs

- (i) Opium
- (ii) Morphine
- (iii) Heroin
- (iv) Ganja
- (v) Hashish (Charas)
- (vi) Codeine
- (vii) Thebaine
- (viii) Cocaine
- (ix) Poppy straw; and
- (x) Any other manufactured drug, as defined under clause (xi) of Section 2 of the Act.

Psychotropic Substances:

- (i) Methaqualone
- (ii) T.H.C.
- (iii) Amphetamine, and
- (iv) Any other psychotropic substance, as defined under clause (xxiii) of section 2 of the said Act.

The said standing order is pertaining to the procedure to be followed for disposal of seized narcotic drugs and psychotropic substances. In the present case, search of Swaraj Mazda van was conducted and seized the contraband, but no personal search was conducted.

Learned counsel for the petitioners in support of his contention relied on “**Union of India v. Mohanlal**” (referred supra), wherein the Supreme Court framed certain guidelines to be followed, which are as follows:

(1) No sooner the seizure of any Narcotic Drugs and Psychotropic and controlled Substances and Conveyances is effected, the same shall be forwarded to the officer in-charge of the nearest police station or to the officer empowered Under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application Under Section 52A(ii) of the Act, which shall be allowed by the Magistrate as soon as may be required Under Sub-Section 3 of Section 52A, as discussed by us in the body of this judgment under the heading 'seizure and sampling'. The sampling shall be done under the supervision of the magistrate as discussed in paras 13 and 14 of this order.

(2) The Central Government and its agencies and so also the State Governments shall within six months from today take appropriate steps to set up storage facilities for the exclusive storage of seized Narcotic Drugs and Psychotropic and controlled Substances and Conveyances duly equipped with vaults and double locking system to prevent theft, pilferage or replacement of the seized drugs. The Central Government and the State Governments shall also designate an officer each for their respective storage facility and provide for other steps, measures as stipulated in Standing Order No. 1/89 to ensure proper security against theft, pilferage or replacement of the seized drugs.

(3) The Central Government and the State Governments shall be free to set up a storage facility for each district in the States and depending upon the extent of seizure and store required, one storage facility for more than one districts.

(4) Disposal of the seized drugs currently lying in the police maalkhans and other places used for storage shall be carried out by the DDCs concerned in terms of the directions issued by us in the body of this judgment under the heading 'disposal of drugs'.

Thus, the investigating agency is bound to follow the procedure under Section 52-A of the NDPS Act for the purpose of lifting samples, disposal etc., but at this stage it is difficult to find out whether the procedure laid down in “**Union of India v. Mohanlal**” (referred supra) was followed or not and conclude prima facie that the petitioners did commit any offence punishable under Section 8 (C) read with 20 (b) (ii) (c) of the NDPS Act.

Judgment in “**Union of India v. Mohanlal**” (referred supra) was pronounced on 28.01.2016, wherein certain directions were issued to the States whereas the offences in the present cases took place on 20.05.2016 and 19.07.2016, hence the guidelines framed in the said case have to be followed scrupulously subject to framing rules by Government. However, at this stage it is difficult to decide whether such procedure was followed or not and it is a disputed question of fact. Therefore, on the ground of alleged non-compliance of Section 52-A of NDPS Act, it is difficult to come to **prima facie** conclusion at this stage that the petitioners did commit no offence.

As per panchanama in both crimes, the contraband seized is commercial quantity, in such case Section 37 of the Act would come into play and unless the Court comes to conclusion that the petitioners did not commit any offence on reasonable ground and that the petitioners may not commit identical offence while on bail. In this connection, learned Public Prosecutor for the State of Andhra Pradesh relied on the judgment of Apex Court rendered in “**State of Madhya Pradesh v. Kajad**”, wherein the Apex Court held that the purpose for which the NDPS Act was enacted and the

menace of drug trafficking which intends to curtail is evident from its scheme. A perusal of Section 37 of the Act leaves no doubt in the mind of the Court that a person accused of an offence, punishable for a term of imprisonment of five years or more, shall generally be not released on bail. Negation of bail is the rule and its grant is an exception under sub clause (ii) of clause (b) of Section 37(1). For granting bail, the Court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail.

In “**Maktool Singh v. State of Punjab**” (referred supra) the Supreme Court held that for all the offences punishable more than five years, the Courts power to release the accused on bail during the period before conviction has been thus drastically curtailed by providing that if the Public Prosecutor opposes the bail application, no accused shall be released on bail, unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty for such offences.

In “**Customs, New Delhi v. Ahmadalieva Nodira**” (referred supra) held that the Court has to keep in mind two conditions i.e, the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail, the conditions are cumulative and not alternative, the satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds and the expression reasonable

grounds means something more than prima facie grounds and it contemplates substantial probable causes for believing that the accused is not guilty of the alleged offences.

Even according to Section 37 of NDPS Act, the general provisions regarding grant of bail under Section 437, 438 & 439 are applicable. Besides the application of general provisions of Cr.P.C, certain safeguards are provided in the Act to grant bail, while placing reversal burden in view of Section 35 & 54 of NDPS Act. Therefore, the general principles governing bails under Section 437, 438 & 439 are equally applicable to the bail applications filed for the offences punishable under Sections 8(C) read with Section 20(b)(ii)(C) of NDPS Act for enlarging the accused in the crimes under NDPS Act, where commercial quantity is involved.

In view of the law declared in the above judgments and the material on record, the petitioners were found transporting 624 Kgs of Ganja (Crl.P.No.1092 of 2017) and 1000 Kgs of Ganja (Crl.P.No.1093 of 2017) i.e. commercial quantity and the offence allegedly committed by the petitioners is punishable under Section 20 (b) (ii) (C) of N.D.P.S. Act. Hence, I find no ground to enlarge the petitioners on bail. Consequently, the petition is liable to be dismissed.

In the result, the criminal petitions are dismissed.

Consequently, miscellaneous applications pending if any, shall also stand dismissed.

JUSTICE M. SATYANARAYANA MURTHY

14.03.2017
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