

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL PETITION No.6610 of 2017

ORDER:

This criminal petition is filed, by the petitioners-accused Nos.1 and 2, under Sections 437 and 439 Cr.P.C., seeking bail in Crime No.117 of 2017 on the file of the Station House Officer, Anakapalli Town Police Station, Visakhapatnam Rural, registered for the offences punishable under Sections 8(c) read with 20(B) of Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).

2. The learned counsel for the petitioners strenuously submitted that the Investigating Agency has not followed the procedure as contemplated under Section 50 of the NDPS Act; therefore, the version put-forth by the prosecution is not legally sustainable. He further submitted that the Ganja is not seized from the physical possession of the petitioners, but from the autos, which indicates that the Prosecuting Agency has violated the above said provision. He also submitted that the Police falsely implicated the petitioners in this case; therefore, it is a fit case to grant bail to the petitioners. ***Per contra***, learned Additional Public Prosecutor representing the State submitted that the Police seized 240 Kgs of Ganja from the possession of the petitioners; therefore, it is not a fit case to grant bail to the petitioners, in view of the statutory embargo contained under Section 37 of the NDPS Act. He further submitted that the investigation is not completed.

3. The facts leading to filing of the present petition are briefly as follows: On 23.5.2017, the Traffic Police had been conducting

search in Anakapalli, to prevent extremist activities. On the same day, at about 4.00 p.m., one motor cyclist and two autos came from Chodavaram side. On seeing the Police, the motor cyclist fled away towards fish market. The Police intercepted the two autos and interacted with the persons, who disclosed their names as Kolli Pydibabu @ Pydithalli Naidu (petitioner No.1-accused No.1) and Vanjuvajula Nagaraju (petitioner No.2-accused No.2) respectively. The Police seized two autos and 240 Kgs of Ganja under the cover of Mediatornama. After completion of necessary formalities, the Police registered a case in Crime No.117 of 2017 and produced the petitioners before the concerned Court on 23.5.2017 itself for judicial custody.

4. The petitioners and other accused filed CrI.M.P. No.1645 of 2017 under Section 439 Cr.P.C., on the file of the Court of Metropolitan Sessions Judge-cum-Special Judge for Trial of Offences under the NDPS Act at Visakhapatnam, and the same was dismissed on 14.6.2017 in view of Section 37 of the NDPS Act.

5. To substantiate the argument, learned counsel for the petitioners has drawn the attention of this Court to the following decisions:

(i) In **Yusuf Suleman Hattia v V.M.Dosi**¹, the Bombay High Court held at paragraph Nos.10 and 11 as follows:

10. Ms. Kaushik appearing for the appellant raised several contentions and challenged the conviction of the appellant under the provisions of NDPS Act as well as the Customs Act. In my view, the order of convictions and sentences of the appellant under the provisions of NDPS Act and under the provisions of Customs Act can be quashed for noncompliance with the mandatory provisions under Section 50 of the NDPS Act and under Section 102 of the Customs Act.

¹ 2001 CRILJ. 4830

11. It is well settled by a catena of judgments, including the judgment of the Constitution Bench in the case of *State of Punjab v. Bombay Singh*, that provision of Section 50 is mandatory and non-compliance thereof would create suspicion about search, seizure and arrest of the accused and, therefore, conviction under the provisions of N.D.P.S. Act is liable to be quashed and set aside. The said judgment is followed in the subsequent judgments by the Supreme Court in the case of *Kalayath Nassar v. State of Kerala*, and in the case of *Abdul Rashid Ibrahim Mansuri v. State of Gujarat* reported in (2000) 2 SCC 513 : (2000 Cri LJ 1384).

(ii) In **Babulal v Union of India**², the Indore Bench of Madhya

Pradesh High Court held at paragraph No.3 as follows:

3. The words "take such person" used in Sub-section (1) are very important. So also words "the Gazetted Officer or Magistrate before whom any such person is brought" used in Sub-section (3) are important. The words "take and brought" used invariably indicate that the person apprehended by raiding party has to be taken before a Magistrate or Gazetted Officer and if such person is "brought" before a Magistrate or Gazetted Officer and if there is no ground for search, such person be discharged forthwith. If there are reasons for taking search, such Magistrate or Gazetted Officer should direct such search in his presence. Therefore, the legislature has taken special care to see that search of such accused should be taken before an independent person who happens to be a Magistrate or Gazetted Officer so as to see that the accused should get all necessary protection offered by the law. Taking a person with the raiding party makes such person impliedly interested in success of the raid. At least, he cannot be said to be totally independent of the work done by the raiding party in the said raid. Provisions of Section 50 have been declared to be mandatory by the Supreme Court and in the matter of *Balbirsingh v. State of Punjab*, (1994) JT 427 : 1994 Cri LJ 1206, Supreme Court has made it very clear that being searched before a Magistrate or Gazetted Officer is an important right which is available to a person who has been apprehended as an accused of an offence punishable under Narcotic Drugs and Psychotropic Substances Act. The Investigating agency cannot be permitted to foil the intention of legislation guaranteeing such an important right available to an accused who is accused of an offence punishable under provisions of Narcotic Drugs and Psychotropic Substances Act by playing tricks. Taking a Gazetted Officer with the raiding party is a clever trick which seems to be used by raiding party for the purpose of showing that raiding party wanted to do necessary compliance in respect of provisions of Narcotic Drugs and Psychotropic Substances Act; at the same time foiling such an important right of the accused available to him under provisions of Section 50 of Narcotic Drugs and Psychotropic Substances Act.

² 1996 CRI.L.J. 1864

(iii) In **Bidyadhar Dolai v The State**³, the Orissa High Court held at paragraph No.9 as follows:

9. The position is not the same so far as an arrest is made or detention is continued in contravention of the provisions. If the law requires and expressly mandates that certain steps are to be taken before an arrest is made or detention is continued, it must be ordinarily the rule that such steps are to be followed at the risk of arrest or the detention becoming illegal otherwise. To that extent the provisions must be regarded as mandatory as otherwise the protection afforded by the statute would become illusory which is not what the statute must have intended. If a departure is made either the arrest or the detention would become vulnerable with the onus squarely resting upon the authority making the arrest to establish that in the circumstances of the case the departure was unavoidable and was necessitated in the very exigencies of the situation. Hence when a complaint is made of the arrest and the detention to be illegal because of violations of the provisions of Sections 50, 52 and 57 or any of them, the arrested person, may become entitled to liberty, the arrest having been unauthorised or even if the arrest is valid the detention to be unauthorised, unless the contravention is otherwise justified.

As per the principle enunciated in the cases cited supra, (1) the Investigating Agency has to strictly adhere to the provisions of the NDPS Act and while conducting a search in order to seize a narcotic drug or psychotropic substance; and (2) The Police Officials they have to inform the individual, in whose custody such a narcotic drug or a psychotropic substance is suspected to be there, about his right to be searched in the presence of any Magistrate or a Gazetted Officer. To appreciate the contention of the learned counsel for the petitioners, it is not out of place to extract hereunder the relevant portion from the Mediatornama.

అంతట S.I. గారు ఆటోలో ఉన్న గంజాయిని గజెటిడ్ ఆఫీసర్ సమక్షంలో తనిఖీ చేయవలసి ఉన్నప్పటికీ వీరికి నోటిసు సర్వ్ చేయగా మా ఎదుట తనిఖీ చేయుటకు ఎటువంటి అభ్యంతరము లేదని చెప్పగా రెండు ఆటోలలో ఉన్న 12 మూటలు గంజాయి బస్తాలను తనిఖీ చేయగా వీటి అన్నింటిలో గంజాయి మొక్కలకు చెందినా పువ్వులు, ఆకులు, చిన్న చిన్న కొమ్మలు, పుల్లలతో నిండిన గంజాయి ఉన్నది. అంతట S.I. గారు, వీరు గంజాయి ఎక్కడనుండి రవాణా

³ 1993 CRILJ. 260

చేస్తున్నారు అని నిర్ధారించి మా ఎదుట అరెస్టు చేసినారు. ముందు ఆటో రిక్షా నెంబరు : AP 31 TC 8417 లో ఉన్న ఇద్దరు ఆసామీలలో డ్రైవరును మిగతావారిని దూరంగా ఉంచి ప్రశ్నించగా తనంతట తాను ఈ క్రింది విధంగా చెప్పినాడు.

A perusal of the same *prima facie* reveals that the Investigating Agency informed the petitioners about their right to be searched in the presence of any Magistrate or a Gazetted Officer. The petitioners expressed their willingness to be searched even in the absence of Magistrate or a Gazetted Officer. The record *prima facie* reveals that the Investigating Agency has not violated the provisions of the NDPS Act while seizing 240 Kgs. of Ganja from the autos, wherein the petitioners were travelling as its custodians.

6. In order to appreciate the contentions of learned counsel for the petitioners, this court is placing reliance on the following decisions:

(i) In **State of M.P. v. Kajad**⁴, the Hon'ble apex Court held at paragraph No.5 as follows:

5. ... The purpose for which the Act was enacted and the menace of drug trafficking which it 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 an exception under sub-clause (i) of clause (b) of Section 37(1). For granting the 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. It has further to be noticed that the conditions for granting the bail, specified in clause (b) of sub-section (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. Liberal approach in the matter of bail under the Act is uncalled for.

⁴ (2001) 7 SCC 673

(ii) In **Collector of Customs v. Ahmadalieva Nodira**⁵, the Hon'ble apex Court at paragraph No.7 as follows:

7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are: 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. The expression "reasonable grounds" means something more than *prima facie* grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.

(iii) The Hon'ble apex Court reiterated the same principle in **Union of India v Sanjeev V. Deshpande**⁶.

As per the principle enunciated in the cases cited supra, the court can grant bail to the persons involved in the cases under the NDPS Act, if it satisfies that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and even if the accused is released on bail, he will not involve in similar type of offences.

7. In the instant case, the Police officials caught hold the petitioners while they were transporting 240 Kgs of Ganja, which is a commercial quantity. The material placed before the court is *prima facie* sufficient to arrive at a conclusion that the petitioners have committed the offence punishable under Sections 8(c) read with 20(B) of the NDPS Act. If the petitioners are released on bail,

⁵ (2004) 3 SCC 549

⁶ (2014) 13 SCC 1

the possibility of involving in similar type of cases cannot be ruled out completely. Moreover, the learned Additional Public Prosecutor submitted that the investigation is in progress.

8. Having regard to the nature of the offence alleged to have been committed by the petitioner and also the principle enunciated in the cases cited by this court supra, I am of the considered view that it is not a fit case to grant bail to the petitioners.

9. Hence, the criminal petition is dismissed.

T.SUNIL CHOWDARY, J

August 07, 2017
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