

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.2718 of 2017

ORDER:

This Criminal Petition, under Sections 437 and 439 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.'), is filed to enlarge the petitioner/A.1 on bail in Crime No.59 of 2016 of Hukumpeta Police Station, Visakhapatnam, registered for the offence punishable under Sections 8(c) read with 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act'), as he is in judicial custody since 17.12.2016.

2. The case of the prosecution, in brief, is that on 17.12.2016 at about 10.30 hours, while the Sub Inspector of Police, Hukumpeta Police Station was engaged on other duty, the Head Constable being the Station House Officer, by that time received information regarding the illegal smuggling of ganja from Pedabayalu towards Paderu via Kontili village junction of Hukumpeta Mandal, then he secured the presence of mediators and also secured the P.C.Nos.1939 and 1507 and rushed to Konthali village junction at 11:00 hours and while conducting vehicle checking with the help of staff, by that time, one Bajaj Auto bearing No.AP 31 TC 3856 was coming from Hukumpeta and proceeding towards Paderu side with six persons and found two bags emitting ganja smell, then he sent a requisition to the Mandal Education Officer, Hukumpeta, through P.C.No.1507 and in his presence, they are confessed about transporting of ganja. The total

ganja found in possession of the accused is 30 kgs. worth Rs.60,000/- and seized the same and the persons made negotiations about ganja rate and also tried to give cash of Rs.10,000/-. On the strength of the report, a crime was registered for the offence punishable under Sections 8(c) read with 20(b)(ii)(C) of the Act.

3. The contention of the petitioner is that Section 50 of the Act was not followed. Similarly, Section 53-A(2) of the Act was also not followed. Thereby, there is every possibility to conclude that the petitioner committed no offence and placed reliance on a judgment in **State by Inspector of Police, Narcotic Intelligence Bureau, Madhurai, Tamil Nadu v. Rajangam**¹ and while granting bail in compliance of Section 37 of the Act and without recording such conclusion, the Court cannot grant bail in view of bar under Section 37(1) of the Act.

4. Learned Additional Public Prosecutor opposed the petition on the ground that the petitioner along with other accused were found in possession of ganja while transporting the same in auto and search conducted by the Investigating Officer i.e., Circle Inspector of Police himself is a Gazetted Officer and thereby non-compliance of Sections 42 to 43 of the Act would not apply and on account of such non-compliance, the petitioner cannot be enlarged on bail at this stage in view of the bar under Section 37 of the Act.

¹ (2010) 15 SCC 369

5. Admittedly, the petitioner is in judicial custody since long time as the petitioner along with other accused were found in possession of huge ganja, which was seized under the mediators report. The main endeavour of the learned counsel for the petitioner is that Section 50 of the NDPS Act has not been complied. Section 50 of the Act applies only to personal search and recovery or seizure of contraband. But, in this case, the petitioner herein was found in auto and no contraband was seized from the person of the petitioner. Even if such search was conducted without following the pre-requisites in view of Section 50 of the Act, the search is vitiated on the basis of such illegal search, the petitioner cannot be convicted for the offence punishable 8(c) read with 20(b)(ii) (C) of the Act in view of the principle laid down in **The State of Punjab v. Baldev Singh**², wherein it is observed, when a search of person was not conducted, the question of petitioner's vitiation of entire seizure and search on account of violation to afford an opportunity to give option to conduct search either to the nearest Magistrate or Gazetted Officer is not a ground to enlarge the petitioner on bail, at this stage.

6. The counsel for the petitioner further contended that Sections 52 and 57 of the Act have not been complied. Section 52 of the Act deals with disposal of persons arrested and articles seized. Section 52A of the Act deals with the procedure to be followed for seizure and search, which reads as follows:

² AIR 1999 SC 2378

“Where any narcotic drug or psychotropic substance 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 or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances 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 or psychotropic substances 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 (2) taking, in the presence of such Magistrate, photographs of such drugs or substances 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.”

7. But, here, no such ground was raised in the entire grounds before this Court in the present petition. However, the search and seizure would not vitiate for such non-compliance of Section 53A(2) of the Act.

8. It is further contended that Section 57 of the Act has not been complied with. It deals with report of arrest and seizure and according to it, whenever any person makes any arrest or seizure, under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior.

9. Here, the Inspector of Police himself conducted search and he is the official superior under Section 42 of the Act. Therefore, failure to intimate to the official superior by the Gazetted Officer is not a ground to enlarge the petitioner on bail.

10. Learned counsel for the petitioner placed reliance on judgment reported in **State by Inspector of Police, Narcotic Intelligence Bureau, Madurai, Tamil Nadu v. Rajangam**³, where the Supreme Court held as follows:

“The learned counsel appearing for the accused submitted that the controversy involved in this case is no longer res integra. In *Megna Singh v. State of Haryana* (1996) 11 SCC 709, this Court has taken a categorical view that the officer who arrested the accused should not have proceeded with the investigation of the case. The relevant paragraph reads as under:

"4. We have also noted another disturbing feature in this case. P.W.3, Sri Chand, Head Constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the accused. It was on his complaint a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under Section 161 Cr.P.C. Such practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation."

The ratio of Megna's case has been followed by other cases.

³ (2010) 15 SCC 369

In another case in *Balasundaran v. State* 1999 (113) ELT 785 (Mad), in para 16, the Madras High Court took the same view. The relevant portion reads as under:

"16. Learned Counsel for the appellants also stated that P.W. 5 being the Inspector of Police who was present at the time of search and he was the investigating officer and as such it is fatal to the case of the prosecution. P.W. 5, according to the prosecution, was present with PWs 3 and 4 at the time of search. In fact, P.W. 5 alone took up investigation in the case and he had examined the witnesses. No doubt the successor to P.W. 5 alone had filed the charge sheet. But there is no material to show that he had examined any other witness. It therefore follows that P.W. 5 was the person who really investigated the case. P.W. 5 was the person who had searched the appellants in question and he being the investigation officer, certainly it is not proper and correct. The investigation ought to have been done by any other investigating agency. On this score also, the investigation is bound to suffer and as such the entire proceedings will be vitiated."

The judgment relates to conviction of an accused in criminal appeal, but not in consideration of bail petition.

11. In view of the above facts, the Court concluded that in view of the **Megha Singh v. State of Haryana**⁴, the Investigating Officer himself being a complainant could not have proceeded with the investigation and therefore it is vitiated.

12. Here, in this case, the Inspector of Police during search, found the Auto and when checking, the accused persons transporting ganja and there itself prepared entire mediators report and conducted search

⁴ (1996) 11 SCC 709

and seizure of contraband from the said vehicle, but did not record any statements further. Therefore, Circle Inspector of Police, being a complainant and Investigating Officer, though not competent, but for granting bail, this is not a ground in view of the bar under Section 37 of the Act. Section 37 of the Act mandates recording of satisfaction of this Court by the petitioner that there is a reasonable ground to believe that the petitioner did commit no offence punishable under the provisions of Act where commercial quantity is involved and that there is no possibility of similar offences while on bail. Here, in this case, the material on record shows that the petitioner committed an offence, prima facie and quantity involved is commercial quantity, therefore, in view of the bar under Section 37 of the Act, it is difficult to conclude at this stage that the petitioner is entitled for enlarge of bail in view of the law declared by the Apex Court in **State of Madhya Pradesh v. Kajad**⁵.

13. In view of the principle laid down in the above judgment, it is difficult for me to enlarge the petitioner on bail, at this stage. The material on record would prima facie conclude that the petitioner committed an offence. Therefore, the petition is liable to be dismissed.

14. Accordingly, the criminal petition is dismissed.

M. SATYANARAYANA MURTHY, J

18th April 2017.
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⁵ AIR 2001 SC 3317