

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.510 of 2017

ORDER:

The petitioners, who are A.1 and A.5, in Crime No.81 of 2016 of A.Konduru Police Station, Visakhapatnam District, filed the present application under Sections 437 and 439 Cr.P.C., seeking bail in the above crime, registered for the offence punishable under Section 8 (c) read with 20 (b) (i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (For short, 'NDPS Act'). The petitioners are in judicial custody since 23.12.2016.

2. The case of the prosecution is that on 23.12.2016, at about 04:00 hours, while the Sub-Inspector of Police is present in the police station, he received credible information about transportation of Ganja. Immediately, he issued requisition to the Deputy Tahsildar to act as mediator for searching of suspected accused and their belongings. The Sub-Inspector of Police along with his staff reached S.Anandapuram junction on police jeep and conducted vehicle check. During check, they found five persons proceeding from Devarapalli side by walk and on seeing the police party, they tried to escape. Then they chased with the help staff and caught hold of them at a distant place. On verification, they found three gunny bags containing Ganja and they were produced before the Deputy Tahsildar for obtaining confession of the accused for the offences to be charged. Then the Deputy Tahsildar questioned about their identity and accordingly they disclosed their identity and informed that the bags contained Ganja and produced cash, cell phones in the possession of each of the accused. The total Ganja contained in each bag is 22, 22 and 21 Kgs. Thus, they were jointly found in possession 65 kgs., of

Ganja, which is a commercial quantity. The samples were lifted in the presence of mediators and after following the procedure, seized the remaining contraband under the cover of panchanama after arrest of the accused. On the strength of the mediator's report, a crime was registered against the petitioners for the offence punishable under Section 8 (c) read with 29 (b)(i) of the NDPS Act.

3. The present petition is filed on three grounds:

1) The police did not comply with the procedure contemplated under Section 50 of the NDPS Act.

2) The panchanama is silent as to who is carrying the bag and in the absence of any details, they cannot be arrested and kept in prison to undergo pre-trial detention.

3) The search was conducted in an open place and Section 100 Cr.P.C. was not followed.

4. **Point Nos.1 to 3:**

Undisputedly, the Ganja allegedly recovered from the possession of five persons in three bags i.e., about 65 kgs., is a commercial quantity. The main contention raised before this Court is that no option was given to the accused persons to conduct their personal check either in the presence of Gazetted Officer or in the presence of Magistrate, thereby the entire search is vitiated and there is every chance of acquittal in the main case after trial.

5. Learned counsel for the petitioners has drawn the attention of this Court to Section 50 (1) of the NDPS Act, which says that when any officer duly authorized under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, 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. Therefore, it mandates that the search should be conducted either in the presence of nearest Magistrate or a Gazetted Officer depending upon the option exercised by the accused.

6. Here, the personal search was not conducted. As seen from the contents of mediators report, on interrogation they informed that they are in possession of cash and cell phones of different companies. But, there is nothing to indicate that the personal search was conducted. Even otherwise, according to Section 50 (5), which is inserted by Act 9 of 2001 w.e.f 02.10.2001, when an officer duly authorized under section 42 has reason to believe that it is not possible to take the person to be searched, to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973.

7. In the case on hand, it is not the case of the prosecution that they are parting with any contraband etc., as required under sub-section 5 of Section 50 of the NDPS Act. But, as seen from the mediator's report, no personal search was conducted and no contraband was seized, during the alleged personal search, from the presence of the accused. When no personal search was conducted, the question of complying with Section 50 of the NDPS and on that ground the proceedings would not vitiate. Therefore, it is not a ground to conclude *prima facie*, that the investigation agency violated Section 50 of the NDPS Act at this stage.

8. The second ground urged before this Court is that the panchanama is silent about possessing or carrying Ganja packet by five accused. No doubt, in normal course of evidence, one person can carry one bag containing Ganja and all the five are not expected to carry three Gunny bags containing Ganja. They collectively or jointly proceed on carrying three gunny bags by three persons and two other accompanied with them though details were not mentioned in the panchanama. Therefore, when all the five persons jointly proceeding carrying three gunny bags by any of them is not a ground to enlarge the petitioners on bail.

9. The other contention is that the procedure contemplated under Section 100 Cr.P.C. is not followed when search was conducted in an open place. As seen from the contents of the panchanama, they conducted search of the bag, but not the search of a person. Section 50 (5) of the NDPS Act applies only to conduct search of a person without producing him before the nearest Magistrate or Gazetted Officer after recording reasons for conducting such search, or particularly when there is a reasonable doubt about parting with contraband, documents etc. Therefore, non-compliance of Section 50 (5) of the NDPS Act read with Section 100 Cr.P.C. is not a ground to enlarge the petitioners on bail since the search of the Ganja packets was conducted in the presence of Gazetted Officer i.e., the Deputy Tahsildar of K.Konduru (V). On over all consideration of material available on record, it is clear that the investigating agency did violate any of the provisions of the mandatory, *prima facie*.

10. When the quantum of Ganja seized from the possession of the accused is a commercial quantity as per the schedule, Section 37 of the NDPS Act would come into play and it is for them to explain that

they have no mental element and rebut the presumption under Sections 34 and 54 of the NDPS Act, as reverse onus of proof is placed on the accused till then, it is presumed that the accused had mental element to commit such an offence. Therefore, at this stage, it is difficult to conclude that any one of them did possess Ganja.

11. As per judgment in **State of Madhya Pradesh v. Kajad**¹ the Supreme Court held when commercial quantity was involved for the offence punishable under Section 8 (c) read with 20 (b) (i) of the NDPS Act, Section 37 is applicable and 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.

12. In **Maktool Singh v. State of Punjab**², 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

¹ AIR 2001 SC 3317

² (1999) 3 SCC 321

reasonable grounds for believing that he is not guilty for such offences.

13. In **Customs, New Delhi v. Ahmadalieva Nodira**³ it was 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.

14. In view of law declared by the Apex Court in the judgments referred supra, Section 37 of NDPS Act, unless the Court concludes that the accused is not guilty based on reasonable ground and that there is no possibility of committing similar offences while on bail, where the offences are punishable for more than five years, he shall be enlarged on bail.

15. 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 as discussed in the earlier paras.

³ 2004 (1) JCC 662

16. Therefore, I find no reasonable ground to conclude that the petitioners did commit any offence punishable under Section 8 (c) read with 20 (b) (i) of the NDPS Act and that they did any offence while on bail. In view of bar under Section 37 of the NDPS Act and law declared by Apex Court, I find no ground to enlarge the petitioners on bail

17. In the result, the Criminal Petition is dismissed.

M.SATYANARAYANA MURTHY, J

FEBRUARY 23, 2017
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THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY



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Date: 23.02.2017

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