

THE HON' BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL PETITION Nos.2052 of 2017 and 2056 of 2017

COMMON ORDER:

Criminal petitions No.2052 of 2017 and 2056 of 2017 are filed under Sections 437 and 439 of Criminal Procedure Code (for short "Cr.P.C.") to enlarge the petitioners/ A2 and A1 respectively on bail in Crime No.21 of 2017 of Kotananduru Police Station, East Godavari District, 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") pending on the file of I Additional District and Sessions Judge, East Godavari District, at Rajahmundry, who are in judicial custody from 27.01.2016.

The case of the prosecution, in brief, in both the petitions is that on 26.01.2017 A1 and A2 were found together while proceeding on Hero Honda Activa while carrying two bags and on seeing the police they tried to abscond from the police, but police caught hold of them and one bag was found between the legs of A1 and another bag was found on the shoulder of A2. Both the accused revealed their identity, on search, police found six packets of ganja in each bag and each packet containing 2 kgs of ganja each. Thus, 24 kgs of ganja was found in possession of A2 and A1 together. Thereafter, the police drawn samples from the seized contraband, arrested the accused under the cover of panchanama. On the strength of panchanama, the crime was registered and

issued FIR.

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) The petitioner in Criminal Petition No.2056 of 2017 is suffering from heart ailment and in case he is not released, there is every possibility of increasing of heart problem and prayed to enlarge the petitioner/ A1 on bail.
- (3) Section 37 of NDPS Act cast 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.
- (4) If the Court came to the conclusion that the petitioners did commit no offence, the Court can enlarge the petitioners on bail.

Learned Public Prosecutor (State of Andhra Pradesh) would contend that the total ganja involved in the offence was 24 kgs, which is commercial quantity and both A1 and A2 were carrying

these two bags containing 24 kgs of ganja, therefore, they are liable for the offence punishable under Section 8 (C) read with 20 (b) (ii) (c) of the NDPS Act and therefore, the petitioners are not entitled to claim bail as of right in view of the law declared in “*State of Madhya Pradesh v. Kajad*”¹ “*Maktool Singh v. State of Punjab*”² and “*Customs, New Delhi v. Ahmadalieva Nodira*”³

Learned Public Prosecutor (State of Andhra Pradesh) further contended that there is every possibility of committing the similar offence by the accused and thereby prayed to dismiss the petitions.

According to the mediators report, both A1 and A2 were proceeding on Hero Honda Activa possessing two bags containing 12 kgs. of ganja each jointly. 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

¹ AIR 2001 SC 3317

² (1999) 3 SCC 321

³ 2004 (1) JCC 662

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.

Similarly, 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 24 Kgs of Ganja 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. In view of the specific provision in the Act, it is for the Court to record such satisfaction, otherwise, the Court is bound to reject bail. In the present cases, except raising the contention that the petitioners did commit no offence and that charge sheet is filed on 16.02.2017, no material is produced to come to a conclusion that there are reasonable grounds to believe that the petitioners committed the offence. In the absence of such satisfaction, this Court cannot exercise its power under Sections 437 and 439 Cr.P.C. to grant bail to the petitioners, who committed the offence punishable for more than five years. Therefore, it is not fit cases to grant bail to the petitioners.

The other contention raised by the counsel for the petitioners is that Section 50 of the Act is not complied. 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 Hero Honda Activa 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. from Honda Activa, 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*”⁴ 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 vehicle, practically when no personal search is involved, it would not vitiate the proceedings.

⁴ 2014 (3) ALT (Crl.) 112 (A.P.)

In “*State of Rajasthan v. Parmanand*⁵” the Apex Court 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 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.

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*⁶”, 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 judgment has no application to the present facts of the cases. Therefore, I find that alleged non compliance of Section 50 of NDPS Act is not

⁵ (2014) 5 Supreme Court Cases 345

⁶ AIR 1999 SC 2378

a ground to enlarge the petitioners on bail. The last ground urged before this Court is that the petitioner in Crl.P.No.2056 of 2017 is suffering from heart ailment. But he did not produce any evidence to show that he is suffering from heart ailment. In the absence of any medical report, it is difficult for this Court to accept that the petitioner in Crl.P.No.2056 of 2017 is suffering from heart ailment.

On the over all consideration of entire material on record, I find that the petitioners in both the petitions are not entitled to bail.

In the result, both the criminal petitions are dismissed.

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

15.03.2017
Pns

JUSTICE M. SATYANARAYANA MURTHY

