

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL PETITION No.8413 of 2017

ORDER:

This petition is filed, by the petitioner-accused No.1, under Section 438 Cr.P.C., seeking anticipatory bail in Crime No.80 of 2017 on the file of the Station House Officer, Chodavaram Police Station, Visakhapatnam District, registered for the offence punishable under Section 20(b)(1) read with 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'NDPS Act').

2. The learned counsel for the petitioner submitted that the petitioner is arrayed as an accused basing on the confession of co-accused i.e., accused No.3. He further submitted that the confession of the co-accused is not admissible under law; therefore the petitioner is entitled for pre-arrest bail.

3. The learned Additional Public Prosecutor submitted that the petitioner is not entitled for pre-arrest bail in view of Section 37 of the NDPS Act.

4. The case of the prosecution is that on 21.05.2017 the Assistant Sub-Inspector (A.S.I.) of Police received reliable information about the illegal transportation of ganja. Immediately he informed the same to his superior officers. Thereafter he along with his staff proceeded to Gowripatnam Junction at Visakhapatnam and intercepted two autos bearing Nos.AP 31 TG 0727 and AP 31 TB 2064. On seeing the police personnel, three persons fled away from the spot and the A.S.I. of Police caught hold one person, who in turn disclosed his identity as

Mahalakshmi Naidu i.e., accused No.3. The investigating agency seized 810 kgs. of ganja from the said two autos and drew the samples by following due procedure. After completion of the necessary formalities, the above case was registered.

5. The petitioner filed CrI.M.P.No.1859 of 2017 on the file of the Court of the Metropolitan Sessions Judge-cum-Special Judge for trial of offences under NDPS Act at Visakhapatnam and the same was dismissed on 13.07.2017.

6. The learned counsel for the petitioner strenuously submitted that the alleged search and seizure was conducted in contravention of the provisions of Section 50 of the NDPS Act, which is mandatory in nature; therefore, it is a fit case to grant pre-arrest bail to the petitioner.

7. In order to appreciate the contention of the learned counsel for the petitioner, this Court is placing reliance on the following decisions:

I. In **State of H.P. v Pawan Kumar**¹, the Hon'ble Apex Court held at paras 11 to 14 as follows:

11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a *thaila*, a *jhola*, a *gathri*, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within

¹ (2005) 4 SCC 350

the ambit of the word “person” occurring in Section 50 of the Act.

12. An incriminating article can be kept concealed in the body or clothings or coverings in different manner or in the footwear. While making a search of such type of articles, which have been kept so concealed, it will certainly come within the ambit of the words “search of person”. One of the tests, which can be applied is, where in the process of search the human body comes into contact or shall have to be touched by the person carrying out the search, it will be search of a person. Some indication of this is provided by sub-section (4) of Section 50 of the Act, which provides that no female shall be searched by anyone excepting a female. The legislature has consciously made this provision as while conducting search of a female, her body may come in contact or may need to be touched and, therefore, it should be done only by a female. In the case of a bag, briefcase or any such article or container, etc., they would not normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. They can be easily and in no time placed away from the body of the carrier. In order to make a search of such type of objects, the body of the carrier will not come in contact of the person conducting the search. Such objects cannot be said to be inextricably connected with the person, namely, the body of the human being. Inextricable means incapable of being disentangled or untied or forming a maze or tangle from which it is impossible to get free.

13. The scope and ambit of Section 50 of the Act was examined in considerable detail by a Constitution Bench in *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172, and para 12 of the Report is being reproduced below: (SCC p. 190)

“12. On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted.”

The Bench recorded its conclusion in para 57 of the Report and sub-paras (1), (2), (3) and (6) are being reproduced below: (SCC pp. 208-10)

“57. On the basis of the reasoning and discussion above, the following conclusions arise:

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his

right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded *only* on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

* * *

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from subsection (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.”

(emphasis in original)

14. The above quoted dictum of the Constitution Bench shows that the provisions of Section 50 will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which he may be carrying.

II. In **Ajmer Singh v. State of Haryana**², the Hon’ble apex Court held at Paragraph No.15 as follows:

15. The learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply, while searching the bag, briefcase, etc. carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of the learned counsel. It requires to be noticed that the question of compliance or non-compliance with Section 50 of the NDPS Act is relevant only where search of a person is involved and the said section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container, etc. does not come within the ambit of Section 50 of the NDPS Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the section speaks of taking of the person to be searched by the gazetted officer or a Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more res integra in view of the observations made by this Court in *Madan Lal v. State of H.P.*, (2003) 7 SCC 465. The Court has observed: (SCC p. 471, para 16)

“16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (see *Kalema Tumba v. State of Maharashtra*, (1999) 8 SCC 357, *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172, and *Gurbax Singh v. State of Haryana*, (2001) 3 SCC 28). The language of Section 50 is implicitly clear that the search has to be in relation to a person as

² (2010) 3 SCC 746

contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in *Baldev Singh case*, (1999) 6 SCC 172. Above being the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance.”

III. In **Jarnail Singh v State of Punjab**³, the Hon’ble apex Court held at Paragraph Nos.15 to 19 as follows:

15. The next submission made by Mr Ujjal Singh is that there has been non-compliance with Section 50 of the NDPS Act, in that requisite option was not given to the appellant, as to, whether he wanted to be searched in the presence of a gazetted officer or a Magistrate. We are unable to accept the aforesaid submission. Inspector Ram Pal (PW 4) has clearly stated that the option was duly given to the appellant. The appellant had, in fact, signed on the consent statement expressing his confidence to be searched in presence of the aforesaid witness. Similarly, Satpal Singh, PW 5 has also stated that before effecting the search, the appellant-accused was given the necessary option as to whether he wanted to be searched before a gazetted officer or a Magistrate. This witness also stated that the appellant reposed his confidence in Inspector Rampal. In such circumstances, it cannot be held that there was non-compliance with Section 50 of the NDPS Act.

16. This apart, it is accepted that the narcotic/opium i.e. 1 kg and 750 gm was recovered from the bag (thaili) which was being carried by the appellant. In such circumstances, Section 50 would not be applicable. The aforesaid section can be invoked only in cases where the drug/narcotic/NDPS substance is recovered as a consequence of the body search of the accused. In case, the recovery of the narcotic is made from a container being carried by the individual, the provisions of Section 50 would not be attracted.

17. This Court in *Kalema Tumba v. State of Maharashtra*, (1999) 8 SCC 257, discussed the provisions pertaining to “personal search” under Section 50 of the NDPS Act and held as follows: (SCC p. 260, para 4)

“4. ... If a person is carrying a bag or some other article with him and a narcotic drug or a psychotropic substance is found from it, it cannot be said that it was found from his ‘person’.”

18. Similarly, in *Megh Singh v. State of Punjab*, (2003) 8 SCC 666, this Court observed that: (SCC p. 670, para 16)

“16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to a search of a vehicle or a container or a bag, or premises.”

19. The scope and ambit of Section 50 was also examined by this Court in *State of H.P. v. Pawan Kumar*, (2005) 4 SCC 350. In SCC paras 10 and 11, this Court observed as follows: (SCC pp. 359-60)

“10. We are not concerned here with the wide definition of the word ‘person’, which in the legal world

³ (2011) 3 SCC 521

includes corporations, associations or body of individuals as factually in these type of cases search of their premises can be done and not of their person. Having regard to the scheme of the Act and the context in which it has been used in the section it naturally means a human being or a living individual unit and not an artificial person. The word has to be understood in a broad common sense manner and, therefore, not a naked or nude body of a human being but the manner in which a normal human being will move about in a civilised society. Therefore, the most appropriate meaning of the word 'person' appears to be—'the body of a human being as presented to public view usually with its appropriate coverings and clothing'. In a civilised society appropriate coverings and clothings are considered absolutely essential and no sane human being comes in the gaze of others without appropriate coverings and clothings. The appropriate coverings will include footwear also as normally it is considered an essential article to be worn while moving outside one's home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For interpreting the provision, rare cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothings, are not to be taken notice of. Therefore, the word 'person' would mean a human being with appropriate coverings and clothings and also footwear.

11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word 'person' occurring in Section 50 of the Act."

IV. In **State of Rajasthan v. Tara Singh**⁴, the Hon'ble apex Court held at Paragraph No.4 as follows:

4. At the very outset, it must be understood that the provisions of Section 50 would no longer be applicable to a search such as the one made in the present case as the opium had been carried on the head in a gunny bag. A Bench of this Court in *State of H.P. v. Pawan Kumar*, (2005) 4 SCC 350, after examining the discrepant views rendered in various judgments of this Court has found that Section 50 of the Act would not apply to any search or seizure where the article was not being carried on the person of the

⁴ (2011) 11 SCC 559

accused. Admittedly, in the present case, the opium was being carried on the head in a bag. Mr Abhishek Gupta, the learned counsel for the appellant State, therefore, appears to be right when he contends that the observations of the High Court that the provisions of Section 50 of the Act would not (*sic*) be applicable was no longer correct in view of the judgment in *Pawan Kumar case*, (2005) 4 SCC 350.

8. As per the principle enunciated in the cases cited *supra*, Section 50 of the NDPS Act can be pressed into service if any contraband is recovered in consequence of body search of the accused. If the contraband is seized from a bag, gunny bag, brief case, being transported in a vehicle, or carried on by the accused on his shoulder or head, the provisions of Section 50 of the NDPS Act will not be applicable.

9. In the present case ganja was seized from autos. Nothing was seized in consequence of personal search of accused No.3. In view of the above factual scenario and principle enunciated in the cases cited *supra*, I am unable to accede to the contention of learned counsel for the petitioner that the investigating officer violated Section 50 of the NDPS Act.

10. The contention of the learned counsel for the petitioner is that the confession of the co-accused is not admissible under law.

11. In order to appreciate the contention of the learned counsel for the petitioner, this Court is placing reliance on the decision in **State of U.P. Through CBI v. Amarmani Tripathi**⁵, wherein the Hon'ble apex Court held at paragraph Nos.18 and 22 as follows:

“18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any *prima facie* or reasonable ground to believe that the accused had committed the offence; (ii) nature and

⁵ (2005) 8 SCC 21

gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail (see *Prahlad Singh Bhati v. NCT, Delhi* (2001) 4 SCC 280) and *Gurcharan Singh v. State (Delhi Admn.)* (1978) 1 SCC 118). While a vague allegations that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in *Kalyan Chandra Sarkar v. Rajesh Ranjan* ((2004) 7 SCC 528) (SCC PP.535-36, PARA 11).

“11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See *Ram Govind Upadhyay v. Sudarshan Singh* ((2002) 3 SCC 598) and *Puran v. Rambilas* ((2001) 6 SCC 338).”

22. While a detailed examination of the evidence is to be avoided while considering the question of bail, to ensure that there is no prejudging and no prejudice, a brief examination to be satisfied about the existence or otherwise of a prima facie case is necessary. An examination of the material in this case, set out above, keeping in view the aforesaid principles, disclose prima facie, the existence of a conspiracy to which Amarmani and Madhumani were parties. The contentions of the respondents that the confessional statement of Rohit Chaturvedi is inadmissible in evidence and that should be excluded from consideration, for the purpose of bail is untenable. This Court had negated a somewhat similar contention in *Kalyan Chandra Sarkar*⁸ ((2004) 7 SCC 528) thus: (SCC p. 538, para 19)

“19. The next argument of learned counsel for the respondent is that prima facie the prosecution has failed to produce any material to implicate the respondent in the crime of conspiracy. In this regard he submitted that most of the witnesses have already turned hostile. The only other evidence available to the prosecution to connect the respondent with the crime is an alleged confession of the co-accused which according to the learned counsel was inadmissible in evidence. Therefore, he contends that the High Court was justified in granting bail since the prosecution has failed to establish even a prima facie case against the respondent. From the High Court order we do not find this as a ground for granting bail. Be that as it may, we think that this argument is too premature for us to accept. The admissibility or otherwise of the confessional statement and the effect of the evidence already adduced by the prosecution and the merit of

the evidence that may be adduced hereinafter including that of the witnesses sought to be recalled are all matters to be considered at the stage of the trial.””

12. As per the principle enunciated in the case cited supra, the Court cannot exclude the confession of the co-accused while deciding the bail petitions. The legality or otherwise of confession of co-accused will be decided at the time of full-fledged trial only.

13. A perusal of the record *prima facie* reveals the role played by the petitioner in the commission of the offence.

14. Taking into consideration the facts and circumstances of the case and also the principle enunciated in the case cited supra, this Court is of the considered view that it is not a fit case to grant pre-arrest bail to the petitioner.

15. Accordingly, the Criminal Petition is dismissed.

Date: 11.10.2017
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T.SUNIL CHOWDARY, J