

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL PETITION No.6666 of 2017

ORDER:

This criminal petition is filed, by the petitioners-accused Nos.1 to 3, under Sections 437 and 439 Cr.P.C., seeking bail in N.S.C.No.368 of 2017 on the file of the Metropolitan Sessions Judge cum Special Court for NDPS Cases, Visakhapatnam, arising out of Crime No.49 of 2017 on the file of the Station House Officer, Paderu Police Station, Visakhapatnam District, registered for the offence punishable under Section 20(b)(i) of Narcotic Drugs and Psychotropic Substances Act, 1985(for short 'the Act').

2. Heard the learned counsel for the petitioners. The learned Additional Public Prosecutor representing the State opposed the bail application.

3. The facts leading to filing the present petition are briefly as follows: On 19.03.2017 at about 12.00 noon on receiving credible information, the Station House Officer, Paderu along with his staff and mediators conducted vehicle checking at RTC complex, Paderu, and found three persons in suspicious circumstances. On interrogation, those three persons revealed their names as Kambira Singh, Deva Sing and Sanjai, who are the petitioners herein. The raiding party seized three gunny bags containing 75 kgs., of ganja from the

possession of the petitioners-accused. The riding party after following due procedure, registered the above case against the petitioners-accused and produced them before the Judicial Magistrate of First Class, Paderu, for judicial custody.

4. A perusal of the record reveals that earlier the petitioners filed CrI.M.P.No.1686 of 2017 on the file of the Metropolitan Sessions Judge – cum- Special Judge for trial of Offences under NDPS Act at Visakhapatnam, seeking bail and the same was dismissed on 14.06.2017.

5. The pre-dominant contention of the learned counsel for the petitioners is that the investigating agency has not followed the procedure as contemplated under Section 50 of the Act; therefore, the petitioners are entitled for bail. He further submitted that the trial Court dismissed the petition erroneously placing reliance on Section 37 of the Act. **Per contra**, learned Additional Public Prosecutor submitted that the ganja seized is 75 kgs., which is a commercial quantity, therefore, the petitioners are not entitled for bail in view of Section 37 of the Act.

6. In order to appreciate the first contention of the learned counsel for the petitioners, this Court carefully perused the remand report, which clearly reveals that three gunny bags of ganja was seized from the possession of the petitioners. The crucial question that falls for consideration is whether Section

50 of the Act *prima facie* applicable to the facts of this case or not. In order to appreciate the contention of the learned counsel for the petitioners, 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 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

¹ (2005) 4 SCC 350

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 sub-section (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 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

² (2010) 3 SCC 746

³ (2011) 3 SCC 521

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 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 SINGH⁴**, 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 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.

7. As per the principle enunciated in the cases cited supra, Section 50 of the NDPS Act can be pressed into service only when any narcotic drug or psychotropic substance is seized from the accused touching the body. As per the principle enunciated from

⁴ (2011) 11 SCC 559

the cases cited supra, if the ganja seized from any container, gunny bags etc., Section 50 of the Act will not be applicable. In the instant case, the ganja was seized from the gunny bags.

8. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that Section 50 of the Act is not *prima facie* applicable to the facts of the case on hand.

9. With regard to the second submission of the learned counsel for the petitioners, this Court is placing reliance on the following decisions:

V) In **State of M.P. v. Kajad**⁵, 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.

(VI) In **Collector of Customs v. Ahmadalieva Nodira**⁶, 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

⁵ (2001) 7 SCC 673

⁶ (2004) 3 SCC 549

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.

(VII) The Hon'ble apex Court reiterated the same principle in *Union of India v Sanjeev V. Deshpande*⁷.

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.

10. In the instant case, the ganja seized is 75 kgs, which is a commercial quantity. The first petitioner belongs to State of Punjab and the petitioners No.2 and 3 belong to Haryana State. As rightly pointed out by the learned Additional Public Prosecutor, if the petitioners are released on bail, it is very difficult to the prosecution to secure their presence at the time of trial.

⁷ (2014) 13 SCC 1

11. Having regard to the facts and circumstances of the case, this Court is of the considered view that it is not a fit case to grant bail to the petitioners.

12. In the result, the Criminal Petition is dismissed. Miscellaneous petitions, if any, pending in this Criminal Petition shall stand closed.

T.SUNIL CHOWDARY, J

23rd August, 2017

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