

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRL.P.No.1311 OF 2017

ORDER:

This criminal petition is filed under Sections 437 and 439 of Cr.P.C to enlarge the petitioners/A3 and A5 on bail in connection with Crime No.1 of 2017 of Mothugudem Police Station, East Godavari District, registered for the offences punishable under Sections 8(c) read with 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act') and they are in judicial custody since 11.01.2017.

2. As seen from the material on record, the Circle Inspector of Police, Chinturu Circle received credible information on 10.01.2017 at 02.00 PM about illegal transportation of Ganja conducted vehicle check along with staff securing mediators at Lakkavaram Junction and on seeing the police party A3 to A6 coming from Maredumilli side towards Chinturu on a Tata Indica car bearing No. AP 09 BC 2169 and lorry bearing No. AP 12V 2851 stopped the vehicle and skulk away. But the police apprehend the three persons with the help of others and on interrogation they confessed that they are transporting Ganja. Raid party after following necessary procedure seized two bags of Ganja from the dicky of Tata Indica car and 17 bags from the lorry cabin under cover of mediators report, lift samples as per procedure and on the strength of the mediators report, the police registered the above crime for the above offence.

3. The main contention of the learned counsel for the petitioner before this Court is that the investigating agency did not comply with the mandatory requirement under Section 41(1) and (2) of the

Act since the information received one hour prior to search and seizure under the mediators report.

4. Learned Additional Public Prosecutor produced copy of entry in General Dairy dated 10.01.2017 was recorded at 11 AM, but the incident took place at 2 O' clock i.e 02.00 PM. So at 06.30 PM the entire proceedings were completed. Thus, Section 41(2) of the Act was complied and also complied with Section 41(1) of the Act. Apart from that the Circle Inspector of Police conducted raid and he is not required to intimate any thing to the superior officer in view of the judgment in **G.Srinivas Goud v State of Andhra Pradesh**¹ wherein the Apex Court held in paras 9 and 10 that under Section 41(2) of the Act, the only officers of gazetted rank and it is such officers who can authorise their subordinates, not below the rank of peon, sepoy or constable, to carry out arrest, search or seizure. The function of arrest, search and seizure carried out under Section 42(1) is by officers who do not have warrants or authorization in their hands before proceeding to take action. This is as per the heading of the Section which reads: "Power of entry, search, seizure and arrest without warrant or authorization". Under Section 41 it is the specified Magistrates who issue warrants of arrest and it is officers of gazetted rank who give authorisation in favour of their juniors. Provisions of sub- section (2) of Section 42 are meant to cover cases falling under Section 42(1). Therefore, in our view, the requirement under Section 42 (2) need not to be extended to cases of arrest, search and seizure by officers of gazetted rank. The officer of gazetted rank while authorising junior officers under Section 41(2) knows what he is requiring them to do and, therefore, there is no

¹ 2005(8) SCC 183

need for reporting. For this reason Section 41 does not contain any such requirement. The need for reporting under Section 42(2) arises because the officer proceeds without authorisation in terms of Section 41(1) or 41(2). The requirement of informing the immediate official superior under Section 42(2), in our view, has to be confined to cases where the action is without authorisation by officers below the rank of gazetted officers.

5. Further the Apex Court held that it will be anomalous to say that officers of gazetted rank who are conferred with power to authorise junior officers to carry out arrest, search and seizure, are required to report to their superior officers when they carry out arrest, search or seizure on their own. As already seen the rationale for this provision of informing superiors appears to be that when the arrest, search and seizure is without authorisation by gazetted rank officers, the officers taking action must keep their superiors informed. The superior officers must know about the action taken by their subordinates. However, the position of gazetted rank officers, in view of their rank and seniority and power to authorise subordinates to proceed to action, is totally different. They are the source of power of authorization. The gazetted rank officers enjoy special position and privileges under the Act. They need not be equated to officers taking action without authorisation or warrants. The requirement of sending information to superior officers under sub-section (2) of Section 42 cannot be insisted upon in their case. There is no bar in the statute to functions of arrest, search and seizure being carried out by the officers of the gazetted rank themselves. When they act on their own, they do not have to report to their seniors on such things.

6. Thus in view of the judgment of the Apex Court in **G.Srinivas Goud** referred supra, the Circle Inspector of Police, who is an officer of Gazetted rank is not required to inform to his superior officer as required under Section 41(2) of the Act. However, the material discloses that information was passed to the Deputy Superintendent of Police. But it is not a mandatory requirement as the Circle Inspector of Police is an officer of gazetted rank as stated above. Therefore, on this ground, the Court cannot enlarge the petitioner on bail. However, there is a clear bar under Section 37 of the Act.

7. In **State of Madhya Pradesh v. Kajad**² the Supreme 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.

8. In **Maktool Singh v. State of Punjab**³ 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

² AIR 2001 SC 3317

³ (1999) 3 SCC 321

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.

9. In **Customs, New Delhi v. Ahmadalieva Nodira**⁴ 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.

10. In view of the law declared by the Apex Court and applying the principle laid down in the above judgments as the quantity involved is commercial, which is in contravention of Section 8(c) of the Act and the punishment is more than five years, I find no ground to enlarge the petitioners on bail at this stage.

11. In the result, the criminal petition is dismissed.

Pending miscellaneous petitions in the petition, if any, shall stand closed.

M.SATYANARAYANA MURTHY,J

22.02.2017
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⁴ 2004 (1) JCC 662