

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.659 of 2017

ORDER:

This Criminal Petition, under Section 439 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.'), is filed to enlarge the petitioner/A-2 on bail in Crime No.91 of 2016 of Katauratla Police Station, who allegedly committed the offences punishable under Sections 8(c) read with 20 (b) (ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act'). He is in judicial custody since 08.12.2016.

The case of the prosecution, in brief, is that on 08.12.2016 at about 14-00 hours on receipt of credible information about transportation of ganja, the police officials secured the presence of mediators i.e. Mandal Revenue Officer along with others to conduct search by serving notices to them and after their arrival, informed the matter to the mediators and MRO and proceeded to conduct vehicle check, where they found an Auto bearing No.AP 31 TG 6618 and another Hero Glamour Motor Cycle bearing No.AP 31 CN 2741. On seeing the police, the petitioner and others tried to escape, but police caught hold them and found 80 kgs., of ganja in auto, thereafter seized the same under the cover of panchanama in the presence of Mandal Revenue Officer, who is a gazetted Officer, and lifted the samples as per the procedure under the cover of mediators report and thereafter produced the accused along with property before the Station House Officer. On the strength of the mediators report, case was registered in Cr.No.91 of 2016.

The present petition is filed to enlarge the petitioner, who is in jail since 08.12.2016, on the ground that the investigating agency did not comply Sections 41(2) & 42(2) of the NDPS Act.

In **Karnail Singh v. State of Haryana**¹ the Constitutional Bench of the Apex Court considered the scope of Sections 41(2) & 42(2) and specifically held that, Legislature has made some of its provision obligatory for the prosecution to comply with, which the Courts have interpreted to be mandatory. This is an order to balance stringency for an accused by casting an obligation on prosecution for its strict compliance, balance must be struck between need of law and enforcement of such law on one hand and protection of citizens from oppression and injustice on other. Court while constructing such provisions strictly should not interpret them literally so as to render their compliance impossible. Section 42 of NDPS Act deals with search, seizure and arrest without warrant. Search and seizure are essential steps in armory of an investigator in investigation of a criminal case. Non-compliance of Section 42 may not vitiate trial if it does not cause any prejudice to accused. In view of changed circumstances in technology, if statutory provisions under Sections 42(1) & 42(2) of writing down information is interpreted as a mandatory provision, it will disable haste of an emergency situation and may turn out to be in vain with regard to criminal wrongdoers/drug offenders as a major ground for acquittal. These provisions should be taken as discretionary measure which should check the misuse of Act rather than providing an escape to hardened drug-peddles.

¹ (2009) 3 SCC (Cri) 887

At paragraph 17 of **Karnail Singh's** case, the Apex Court concluded that what is to be noticed Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) & 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) & 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of Section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) If the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42. to illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

Thus, in view of the principle laid down by the Apex Court in **Karnail Singh's** case, the Court has to take discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug-peddlers and that compliance of Sections 41(2) & 42(2) is a measure of check for the officials to exercise power under the Act in search, seizure and arrest of the accused persons for the offences committed under the provisions of NDPS Act. Therefore, a reasonable margin is to be given to the authorities concerned when they conducted search to detect the offences punishable under NDPS Act and incidents of liberal compliance would denude the very object and safeguards provided under the Act.

Similarly, in **G. Srinivas Goud v. State of A.P.**² the Apex Court held that non compliance of Section 42(2) of the NDPS Act is not a ground to vitiate the proceedings when search was not conducted by a gazetted officer. Here the search and seizure was conducted by the gazetted officer, thereby compliance of Section 42(2) of the NDPS Act does not arise. Hence, on that ground the petitioner cannot be enlarged on bail.

On the other hand, the learned counsel for the petitioner has contended that the petitioner is only a driver, who drove the vehicle at the time of incident and the total quantity involved in the case is only 80 Kgs.

According to Section 8(c) of the NDPS Act, transportation of ganja without any authorization is also contravention. Here the petitioner is found transporting ganja being the driver of the vehicle i.e. Auto bearing No.AP 31 TG 6618 at the instance of other accused. It is a clear contravention of Section 8(c) of the NDPS Act, which is punishable under Section 20(b)(ii) of the NDPS Act.

As seen from the material on record, the total quantum of ganja involved in this case is 80 kgs., which is a commercial quantity and it is an offence punishable with imprisonment for more than 5 years. In **State of Madhya Pradesh v. Kajad**³ 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

² (2005) 8 Supreme Court Cases 183

³ AIR 2001 SC 3317

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.

Thus, in view of the principles laid down by the Apex Court, the petitioner is disentitled to claim bail as the offence allegedly committed by the petitioner is punishable with imprisonment for more than 5 years. Hence, I find no ground to enlarge the petitioner on bail. Consequently, the criminal petition is liable to be dismissed in view of the principle laid down by the Apex Court in **State of Maharashtra v. Kajad** referred to supra.

In the result, the criminal petition is dismissed.

M.SATYANARAYANA MURTHY, J

14.02.2017
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