

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CRIMINAL PETITION No.7455 of 2017

ORDER:

This petition is filed, under Sections 437 and 439 Cr.P.C., by the petitioners–accused Nos.1 and 2 in Crime No.48 of 2017 on the file of the Station House Officer, Nakkapalli Police Station, Visakhapatnam District, registered for the offences punishable under Sections 20(b)(ii) and 25 of the Narcotic Drugs and Psychotropic Substances Act (the NDPS Act).

2. The case of the prosecution is that on 20.3.2017, the Sub-Inspector of Police, Nakkapalli Police Station, received reliable information about transportation of Ganja. Immediately, he along with staff and mediators proceeded to Adduroddu on NH 16 near Saripallivanipalem Village and intercepted TATA Xenon Turbo Van No.AP 27 TW 3311 and one Pulsar motor cycle No.AP 31 CS 4908, and seized 22 gunny bags containing Ganja weighing about 550 Kgs from the Van and one gunny bag containing Ganja weighing 25 Kgs from the motor cyclist. The further case of the prosecution is that the driver and three persons got down from the Van and tried to flee away. The petitioners fled away and the Police caught-hold three persons, who disclosed their identity as accused Nos.3 to 5. After completion of necessary formalities, the above case was registered.

3. The petitioners filed CrI.M.P.No.1458 of 2017 on the file of the Court of Metropolitan Sessions Judge-cum-Special Court for NDPS Cases, Visakhapatnam, and the same was dismissed on 31.5.2017.

4. The learned counsel for the petitioners strenuously submitted that the Investigating Officer has not followed the procedure as contemplated under Section 52-A of the NDPS Act; therefore, the seizure is non-est in the eye of law; in such circumstances, the Court cannot draw a presumption as postulated under Sections 35 and 54 of the NDPS Act. He further submitted that when the seizure itself is non-est in the eye of law, the Court can safely presume that the petitioners are *prima facie* not guilty for the offences under the NDPS Act; therefore, the Court cannot press into service Section 37 of the NDPS Act. He further submitted that the Police falsely implicated the petitioners by taking them into custody on P.T. warrants. ***Per contra***, the learned Additional Public Prosecutor submitted that Section 52-A of the NDPS Act deals with storage and disposal of the contraband; moreover, the procedure contemplated therein is not mandatory in nature. He further submitted that the Investigating Officer seized Ganja from the possession of the petitioners and others; therefore, the petitioners are not entitled for bail in view of Section 37 of the NDPS Act.

5. To substantiate the argument, learned counsel for the petitioners has drawn the attention of this Court to the following decisions:

(i) In **Sardar v State**¹, the Karnataka High Court, while considering the point involved therein viz., “*Whether learned Judge of the Special Court is justified in convicting the accused in respect of the offences for which they have been charged?*” held as follows.

The relevant portion in paragraph No.24 reads as follows:

¹ Criminal Appeal No.579 of 2015, dated 03.9.2015

24. ... The learned Judge has attached too much importance to the oral evidence of the police officer without testing the case on the touchstone of the mandatory provisions of Sections 42 and 52A(2) and (4) of NDPS Act. Thus viewed from any angle, the learned Special Judge is not justified in coming to the conclusion that the prosecution has proved the guilt of the accused beyond all reasonable doubt. The learned Judge has failed to recognize non-compliance of the mandatory provisions. Hence, point No.1 is answered in the negative.

6. The above decision is not applicable to the facts of the case on hand for the simple reason that Ganja seized in that case is 4.5 Kgs., which is not a commercial quantity. Even otherwise that decision was delivered in Criminal Appeal setting aside the conviction and sentence imposed against the appellant whereas the present case is at the stage of granting bail.

(ii) **Naresh Kumar @ Nitu v State of Himachal Pradesh²**, wherein the Hon'ble apex Court held at paragraph No.9 held as follows:

9. The presumption against the accused of culpability under Section 35, and under Section 54 of the Act to explain possession satisfactorily, are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt. The presumptive provision with reverse burden of proof, does not sanction conviction on basis of preponderance of probability. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability. That the right of the accused to a fair trial could not be whittled down under the Act was considered in *Noor Aga vs. State of Punjab*, (2008) 16 SCC 417, observing:-

58. ... An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

² Criminal Appeal No.1053 of 2016, dated 27.7.2017.

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt.

7. In the above decision, the Hon'ble apex Court considered the scope of Sections 54 and 35 of the NDPS Act while deciding Criminal Appeal.

(iii) In **Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra**³, the Hon'ble apex Court held at paragraph Nos.35 to 38 as follows:

35. Presumption of innocence is a human right. (See *Narendra Singh v. State of M.P.*, (2004) 10 SCC 699, SCC para 31.) Article 21 in view of its expansive meaning not only protects life and liberty but also envisages a fair procedure. Liberty of a person should not ordinarily be interfered with unless there exist cogent grounds therefor. Sub-section (4) of Section 21 must be interpreted keeping in view the aforementioned salutary principles. Giving an opportunity to the Public Prosecutor to oppose an application for release of an accused appears to be reasonable restriction but clause (b) of sub-section (4) of Section 21 must be given a proper meaning.

36. Does this statute require that before a person is released on bail, the court, albeit prima facie, must come to the conclusion that he is not guilty of such offence? Is it necessary for the court to record such a finding? Would there be any machinery available to the court to ascertain that once the accused is enlarged on bail, he would not commit any offence whatsoever?

37. Such findings are required to be recorded only for the purpose of arriving at an objective finding on the basis of materials on record only for grant of bail and for no other purpose.

38. We are furthermore of the opinion that the restrictions on the power of the court to grant bail should not be pushed too far. If the court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. If such an expansive meaning is given, even likelihood of commission of an offence under Section 279 of the Indian Penal Code may debar the court from releasing the accused on bail. A statute, it is trite, should not be

³ (2005) 5 SCC 294

interpreted in such a manner as would lead to absurdity. What would further be necessary on the part of the court is to see the culpability of the accused and his involvement in the commission of an organised crime either directly or indirectly. The court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea. Every little omission or commission, negligence or dereliction may not lead to a possibility of his having culpability in the matter which is not the sine qua non for attracting the provisions of MCOCA. A person in a given situation may not do that which he ought to have done. The court may in a situation of this nature keep in mind the broad principles of law that some acts of omission and commission on the part of a public servant may attract disciplinary proceedings but may not attract a penal provision.

8. This decision deals with scope of Sub-section (4) of Section 21 of Maharashtra Control of Organised Crime Act, which is akin to Section 37 of the NDPS Act. As per the principle enunciated in the cases cited supra, the Court has to give *prima facie* finding with regard to involvement of the petitioners in the alleged offence, while deciding bail application.

(iv) In **Union of India v. Mohanlal**⁴, the Hon'ble apex Court held at paragraph Nos.17 and 31.1 as follows:

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A, as discussed by us in the body of this judgment under the heading "seizure and sampling". The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order.

⁴ (2016) 3 SCC 379

9. In the above decision, the Hon'ble apex Court has not made any observation that Section 52-A of the NDPS Act is mandatory in nature. The Hon'ble apex Court issued guidelines to the State Governments to provide storage facilities and the High Courts to supervise and monitor the progress made by the State Governments in respect of storage facilities.

10. The learned Additional Public Prosecutor, in support of his contentions, has drawn the attention of this Court to the following decisions:

(i) In **Superintendent, Narcotics Central Bureau v R.Paulsamy**⁵, the Hon'ble apex Court held at Paragraph Nos.5, 6 and 7 as follows:

5. This court has laid down the parameters to be followed while considering the application for bail moved by an accused involved in offences under the NDPS Act vide *Union of India v. Ram Samujh*, 1999 (66) ECC 335. It is unnecessary for us to repeat those parameters over again. We have no doubt that learned Single Judge has not followed the aforesaid parameters in this case.

6. In the light of Section 37 of the Act no accused can be released on bail when the application is opposed by the Public Prosecutor unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. It is unfortunate that matters which could be established only in offence regarding compliance with Sections 52 and 57 have been pre-judged by the learned Single Judge at the stage of consideration for bail. The minimum which learned Single Judge should have taken into account was the factual presumption in law position that official acts have been regularly performed. Such presumption can be rebutted only during evidence and not merely saying that no document has been produced before the learned Single Judge during bail stage regarding the compliance with the formalities mentioned in those two sections.

7. We may also observe that learned Single Judge has not recorded a finding in terms of Section 37 of the Act which is sine qua non for granting bail to an accused involved in the offence under the Act.

⁵ (2000) 9 SCC 549

(ii) In **State of Punjab v. Makhan Chand**⁶, the Hon'ble apex

Court held at paragraph Nos.9 to 11 as follows:

9. Learned counsel for the respondent-accused relied on certain standing orders and standing instructions issued by the Central Government under Section 52-A(1) which require a particular procedure to be followed for drawing of samples and contended that since this procedure had not been followed, the entire trial was vitiated.

10. This contention too has no substance for two reasons. Firstly, Section 52-A, as the marginal note indicates, deals with "disposal of seized narcotic drugs and psychotropic substances". Under sub-section (1), the Central Government, by a notification in the Official Gazette, is empowered to specify certain narcotic drugs or psychotropic substances, having regard to the hazardous nature, vulnerability to theft, substitution, constraints of proper storage space and such other relevant considerations, so that even if they are material objects seized in a criminal case, they could be disposed of after following the procedure prescribed in sub-sections (2) and (3). If the procedure prescribed in sub-sections (2) and (3) of Section 52-A is complied with and upon an application, the Magistrate issues the certificate contemplated by sub-section (2), then sub-section (4) provides that, notwithstanding anything to the contrary contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973, such inventory, photographs of narcotic drugs or substances and any list of samples drawn under sub-section (2) of Section 52-A as certified by the Magistrate, would be treated as primary evidence in respect of the offence. Therefore, Section 52-A(1) does not empower the Central Government to lay down the procedure for search of an accused, but only deals with the disposal of seized narcotic drugs and psychotropic substances.

11. Secondly, when the very same Standing Orders came up for consideration in *Khet Singh v. Union of India*, (2002) 4 SCC 380, this Court took the view that they are merely intended to guide the officers to see that a fair procedure is adopted by the officer in charge of the investigation. It was also held that they were not inexorable rules as there could be circumstances in which it may not be possible for the seizing officer to prepare the mahazar at the spot, if it is a chance recovery, where the officer may not have the facility to prepare the seizure mahazar at the spot itself. Hence, we do not find any substance in this contention.

11. As per the principle enunciated in the case cited supra, Section 52-A of the NDPS Act is mandatory in nature.

12. Let me consider the facts of the case on hand in the light of the above legal principles.

⁶ (2004) 3 SCC 453

13. A perusal of Section 35 of the NDPS Act, at a glance, demonstrates that the presumption of culpable mental state of accused arises only after the evidence proved beyond reasonable doubt. It is needless to say that culpable mental state of an accused can be ascertained basing on the facts pleaded and proved. Section 54 of the NDPS Act enables the Court to draw a presumption, basing on the seizure of the contraband, that the accused has committed the alleged offence unless contrary is proved. Though the Court can draw a presumption under Section 54 of the NDPS Act, still the burden of proof lies on the prosecution to establish the guilt of the accused beyond reasonable doubt. A perusal of Section 52-A of the NDPS Act contemplates the procedure to be followed at the time of inventory and disposal of the contraband.

14. In the case on hand, the Investigating Officer prepared panchanama and seized 570 Kgs of Ganja from the possession of the other accused while the petitioners fled away from the spot. Section 52-A of the NDPS Act mainly deals with disposal of seized narcotic drugs and psychotropic substances. Sub-section (2) of Section 52-A of the NDPS Act deals with the inventory of contraband. If the learned Magistrate certifies that the inventory was conducted and photographs were taken in his presence, the same can be used as primary evidence, in view of Sub-section (4) of Section 52-A of the NDPS Act. Nowhere it is mentioned that non-compliance of Section 52-A of the NDPS Act, which deals with inventory and taking of photographs in the presence of learned Magistrate, would amount to drawing of samples and seizure of contraband as illegal or void ab initio. In **State of Punjab v Baldev**

Singh⁷, a Constitutional Bench of the Hon'ble apex Court held at paragraph No.57 as follows:

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

... ..

(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.

... ..

15. As per the principle enunciated in the case cited above, the failure of the empowered officer to conduct search before a gazetted officer or a Magistrate may not vitiate the trial. If once the trial is not vitiated, then the Court has to consider the bail application within the legal parameters of the NDPS Act. The learned counsel for the petitioners mainly placed reliance on **Mohanlal** case, wherein guidelines were issued for proper storage and disposal of the contraband.

16. Whether the seizure of contraband from the possession of the petitioners is irregular or illegal? has to be decided after full-fledged trial. At the time of disposing of the bail applications, the Court has to consider whether there is any *prima facie* material to establish that the contraband was seized from the possession of the accused or not. If the contraband seized from the possession of the accused is a commercial quantity, the Court shall not lose sight of Section 37 of the NDPS Act.

⁷ (1999) 6 SCC 172

17. I have carefully perused the material placed before the Court in order to appreciate the contention of learned counsel for the petitioners. The record *prima facie* reveals that the Investigating Officer seized the contraband in the presence of mediators and drew the samples as per the procedure. The material placed before the Court *prima facie* reveals that the Investigating Officer has not even slightly deviated the procedure.

18. As per the principle enunciated by the Hon'ble apex Court in **State of M.P. v. Kajad**⁸, **Collector of Customs v. Ahmadaliev Nodira**⁹ and **Union of India v Sanjeev v. Deshpande**¹⁰, the court can grant bail to the persons allegedly involved in the cases under the NDPS Act, though the contraband seized is a commercial quantity, if the court satisfied that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and even if he is released on bail, he will not involve in similar type of offences. In the instant case, Ganja seized is 570 Kgs, which is a commercial quantity.

19. Taking into consideration the facts and circumstances of the case, I am of the considered view that there is a *prima facie* case against the petitioners as to the commission of the offence.

20. Accordingly, the criminal petition is dismissed.

T.SUNIL CHOWDARY, J

September 15, 2017
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⁸ (2001) 7 SCC 673

⁹ (2004) 3 SCC 549

¹⁰ (2014) 13 SCC 1