

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.875 of 2017

ORDER:

This petition is filed under Sections 437 and 439 of Code of Criminal Procedure (for short "Cr.P.C.") to enlarge the petitioners/accused Nos. 1 to 3 on bail in Crime No.172 of 2016 of Railway Police Station, Vikarabad, Ranga Reddy District, registered for the offence punishable under Section 20 (b) (ii) (C) of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "N.D.P.S.Act").

The case of the prosecution, in brief, is that on 27.12.2016 at 3.30 p.m., the Railway Police, who are conducting checking in LTT Express train found Ganja in possession of the petitioners/accused Nos.1 to 3 in coach No.S-6 found Ganja weighing about 62 Kgs and they were transporting the same to Mumbai. On enquiry they disclosed that the said Ganja was purchased by them under supervision of Kumar. Accordingly, petitioners/accused Nos.1 to 3 were found transporting 7 bags containing 62 Kgs of Ganja. Thereafter, they were produced before the Inspector of Police and the Inspector of Police seized the contraband from the possession of the accused in bags, which is about 62 Kgs and lifted the samples as per the procedure under the cover of mediators report.

Sri G.Ramu, learned counsel for the petitioners, contended that the Inspector of Police, Railway Police Station violated the Section 50 (4) and also Sections 41(2) and 42(2) of N.D.P.S. Act and that the petitioners did commit no offence and prayed to enlarge the petitioners on bail.

Learned Public Prosecutor for the State of Telangana would contend that Section 42 (2) of the N.D.P.S.Act need not be complied with since the accused were found transporting Ganja in routine check of coaches by the Railway Police and it is a sudden detection of offence under the Act. So far as compliance of Section 41 (2) of the N.D.P.S.Act is concerned the Inspector of Police is a Gazetted officer and no information to the superior officer need be passed, therefore, it is not a ground to enlarge the petitioners on bail.

As seen from the mediators report, the petitioners/accused Nos.1 to 3 were found transporting 62 Kgs of Ganja and the same was detected during the routine check of coaches by the Railway Police, they did not receive any prior information to make an entry in the General Diary and the Inspector of Police is a Gazetted Officer, the compliance of Section 42 (2) of N.D.P.S. Act is concerned, such compliance is required only when search and seizure was conducted by the Officer below the rank of Gazetted and when Gazetted Officer conducted search, compliance of Section 42 (2) of N.D.P.S. Act cannot be insisted in view of the law declared by the Apex Court in “**G.Srinivas Goud v. State of A.P.**”¹. Hence it is not a ground to grant bail to the petitioner. Even in “**Karnail Singh v. State of Haryana**”² the Constitutional Bench of Supreme 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

¹ (2005) 8 SCC 183

² (2009) 3 SCC (Cri) 887

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.

In paragraph 17 of the said judgment (***Karnail Singh v. State of Haryana***), the Supreme 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 law laid down by the Apex Court in various judgments referred supra, more particularly, the judgment of the Constitution Bench in “**Karnail Singh v. State of Haryana**” (referred supra), 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

literal compliance would denude the very object and safeguards provided under the Act.

Therefore, on account of alleged non-compliance, more particularly when the accused were found transporting Ganga during routine check of coaches, is not a ground to enlarge the petitioners on bail.

The other contention raised by the petitioner is that non-compliance of Section 50 (2) of the N.D.P.S.Act as the petitioner No.1 is a woman and she was not searched in the presence of woman as required under Section 50 (4) of the N.D.P.S.Act.

As seen from the material on record, no personal search of petitioner No.1 was conducted, on the other hand the bags, that were kept in the coach were searched and found Ganja. Therefore, non-compliance of Section 50 (4) of the N.D.P.S. Act does not arise even otherwise the same would not vitiate the entire proceedings. Moreover, compliance of Section 50 of N.D.P.S. Act cannot be insisted when no personal search was conducted by the officials. Hence, on that ground the petitioners are not entitled for bail.

The total quantity of Ganja involved in this case is 62 Kgs i.e. commercial quantity, when such quantity is found transporting Section 37 of the N.D.P.S.Act is applicable to such cases. Section 37 of NDPS Act created an interdict to grant bail for an offence punishable under various provisions of the Act, where a commercial quantity of contraband is involved. According to Section 37(1)(b) of NDPS Act, unless the Court records its satisfaction that the petitioner did commit no offence and that he would not commit no offence again while on bail under Section 439

Cr.P.C in serious offences like the offence punishable under Section 20 (b) of N.D.P.S.Act.

In “**State of Madhya Pradesh v. Kajad**”³ 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.

In **Maktool Singh v. State of Punjab**⁴ 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 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.

In “**Customs, New Delhi v. Ahmadalieva Nodira**”⁵ held that the Court has to keep in mind two conditions i.e, the satisfaction of the Court that there are reasonable grounds for

³ AIR 2001 SC 3317

⁴ (1999) 3 SCC 321

⁵ 2004 (1) JCC 662

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.

In view of the law declared by the Apex Court in the judgments referred supra, Section 37 of NDPS Act, unless the Court concludes that the accused are not guilty based on reasonable ground and that there is no possibility of committing similar offences while on bail, where the offences are punishable for more than five years, they shall be enlarged on bail.

Even according to Section 37 of NDPS Act, the general provisions regarding grant of bail under Section 437, 438 & 439 are applicable. Besides the application of general provisions of Cr.P.C, certain safeguards are provided in the Act to grant bail, while placing reversal burden in view of Section 35 & 54 of NDPS Act. Therefore, the general principles governing bails under Section 437, 438 & 439 are equally applicable to the bail applications filed for the offences punishable under Sections 8(C) read with Section 20(b)(ii)(C) of NDPS Act for enlarging the accused in the crimes under NDPS Act, where commercial quantity is involved.

In view of the law declared in the above judgments and the material on record, the petitioners were found transporting 62 Kgs i.e. commercial quantity and the offence allegedly committed by the

petitioners is punishable under Section 20 (b) (ii) (C) of N.D.P.S. Act. Hence, I find no ground to enlarge the petitioners on bail. Consequently, the petition is liable to be dismissed.

In the result, the criminal petition is dismissed.

Consequently, miscellaneous applications pending if any, shall also stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

10.02.2017
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