



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)

Wednesday, the Twenty Ninth day of August Two Thousand Eighteen

WEB COPY

PRESENT

The Hon`ble Mr.Justice G.K.ILANTHIRAIYAN

CRL OP (MD) No.12533 of 2018

KAVITHA

... PETITIONER / ACCUSED NO.2

Vs

STATE REP.BY
THE INSPECTOR OF POLICE,
CHEEKKANOORANI POLICE STATION,
MADURAI DISTRICT.
CRIME NO.171 OF 2018

... RESPONDENT / COMPLAINANT

For Petitioner : Mr.R.ANAND, Advocate
For Respondent : Mr.V.NEELAKANDAN, Additional Public Prosecutor

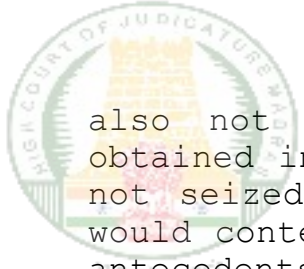
PETITION FOR BAIL Under Sec. 439 Cr.P.C.

ORDER : The Court Made the following order :-

The petitioner/A2, who was arrested and remanded to judicial custody on 28.05.2018 for the offence punishable under Section 8(c) read with 20(b)(ii)(c) of Narcotic Drug and Psychotropic Substances Act, in Crime No.171 of 2018, seeks bail.

2.The case of the prosecution is that on 28.05.2018, on secret information, the respondent conducted vehicle checkup near Puliyanikulam Othaveedu Railway Gate. At that juncture, the petitioner and another coming with the possession of one gunny bag. On identification by the informer, the respondent enquired them. On suspicion, they were issued search memo and informed their right to search before Gazetted Officer or Magistrate, which they allowed the police personnel to conduct search on them. Thereafter, the petitioner and another themselves handed over the white colour plastic gunny bag to the respondents. After verification, the respondent found that it was kanja weighed about 42 kgs and seized the contraband and arrested the petitioner and another on 28.05.2018 and remanded them to judicial custody and registered the complaint in crime No.171 of 2008 for the offences stated above.

3.The learned counsel appearing for the petitioner would submit that the respondent did not comply the mandatory provision under Section 50 of N.D.P.S. Act and it caused prejudice to the petitioner. Further he would contend that Section 57 of the Act was

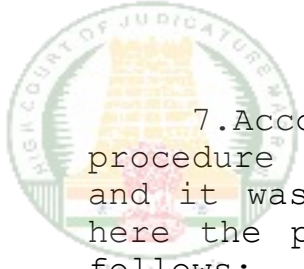


also not followed and a search accepting letter has not been obtained individually from the accused persons. The contraband was not seized at the time of remanding the petitioner. Further, he would contend that the petitioner is a lady and she had no previous antecedents and she hails from a very respectful family. To support his case, the learned counsel relied on the judgment reported in 2018(2) Crimes 389 (SC) - Arif Khan @ Agha Khan V. State of Uttarakhand and also the judgment reported in (2011) 1 Supreme Court Cases 609 - Vijaysinh Chandubha Jadeja V. State of Gujarat and submitted that the respondent did not conduct the search in the presence of Gazetted Officer or Magistrate, though the petitioner consented for search to be conducted by the police personnel, which would vitiate the entire case of the prosecution as the mandatory provision under Section 50 of N.D.P.S. Act has not been complied with and hence, he prayed for bail to the petitioner.

4. The learned Additional Public Prosecutor vehemently opposed the bail petition and contended by filing counter affidavit that the respondent complied the provisions laid down under Section 50 and 57 of N.D.P.S. Act. The petitioner accepted her guilty by her confession statement, which would reveal that the first accused and the petitioner are relatives and they purchased the contraband from Andhra Pradesh to sell the same in the State of Kerala. The contraband is weighed about 42 kgs and it is commercial quantity. As per the notification, possession of 1 kg Cannabis is notified as commercial quantity. Therefore Section 37 of N.D.P.S. Act clearly states that no person for the offences involved in commercial quantity shall be released on bail unless the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that the accused is not likely to commit any offence while on bail. He would further contends that the investigation is still pending and the respondent is yet to get the report from Forensic Sciences Laboratory and on the basis of such report, the respondent will file final report. To support his case, he relied upon the judgments viz., 1) (2005) 4 Supreme Court Cases 350 - State of H.P. V. Pawan Kumar, 2) 2009 CRI. L. J.3042 - Union of India V. Rattan Mallik @ Habul and 3) (2011) 1 Supreme Court Cases (Cri) 1099 - Sanjay Kumar Kedia V. Narcotics Control Bureau and prayed for dismissal of the bail application.

5. Heard the learned counsel appearing for the petitioner and the learned Additional Public Prosecutor appearing for the respondent and perused the materials placed before this Court.

6. It is seen from the FIR and other records that on the basis of the secret information, the respondent suspected the petitioner and another and stopped them. Thereafter, they were informed about the search for which, they accepted the search to be conducted by the respondent police. Thereafter, they themselves handed over the white plastic gunny bag to the respondent, where, it was found that they were in possession of 42 kgs of kanja.



7. According to the learned counsel for the petitioner, the procedure laid down under Section 50 of N.D.P.S. is mandatory one and it was not complied in this case. It is relevant to mention here the provision of Section 50 of N.D.P.S. Act, which reads as follows:

"50. Conditions under which search of persons shall be conducted.— (1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made."

Admittedly, the petitioner was not searched by the respondent, though the petitioner and another consented for search to be conducted by the respondent, before search, the petitioner and another themselves handed over the white colour plastic gunny bag to the respondent. As such, this Court is of the view that the search was not conducted on the accused by the respondent. The learned Additional Public Prosecutor also rightly pointed out that no search was conducted on the petitioner and they themselves produced the contraband. In this regard, it is relevant to extract paras 10 and 11 of the Judgement relied on by the learned Additional Public Prosecutor reported in (2005) 4 Supreme Court Cases 350 - State of H.P. V. Pawan Kumar, which read as follows:

"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 commonsense 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 civilized 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 clothings". In a civilized



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."

Considering the above said decision, the plastic gunny bag is not at all possible to include within the ambit of the word "person" occurring in Section 50 of N.D.P.S. Act.

8. It is true that the procedure laid down under Section 50 of N.D.P.S. Act is mandatory as laid down by the Hon'ble Supreme Court of India in the judgment reported in 2018(2) Crimes 389 (SC) - Arif Khan @ Agha Khan V. State of Uttarakhand, wherein, in paras 25 to 28, it has been held as follows:

"25. In our considered view, the evidence adduced by the prosecution neither suggested and nor proved that the search and the recovery was made from the appellant in the presence of either a Magistrate or a Gazetted Officer.



26. It is the case of the prosecution and which found acceptance by the two Courts below that since the appellant (accused) was apprised of his right to be searched in the presence of either a Magistrate or a Gazetted Officer but despite telling him about his legal right available to him under Section 50 in relation to the search, the appellant (accused) gave his consent in writing to be searched by the police officials (raiding party), the two Courts below came to a conclusion that the requirements of Section 50 stood fully complied with and hence the appellant was liable to be convicted for the offence punishable under the NDPS Act.

27. We do not agree to this finding of the two Courts below as, in our opinion, a search and recovery made from the appellant of the alleged contraband "Charas" does not satisfy the mandatory requirements of Section 50 as held by this Court in the case of Vijaysinh Chandubha Jadeja (supra). This we say for the following reasons.

28. First, it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or Gazetted Officer; Second, it is also an admitted fact that due to the aforementioned first reason, the search and recovery of the contraband "Charas" was not made from the appellant in the presence of any Magistrate or Gazetted Officer; Third, it is also an admitted fact that none of the police officials of the raiding party, who recovered the contraband "Charas" from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband "Charas" as provided under Section 50 of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a Magistrate or a Gazetted Officer."

If the search is conducted on the accused, he should be searched before a Gazetted Officer or a Magistrate. It is also held by the Hon'ble Supreme Court in (2011) 1 Supreme Court Cases 609 - Vijaysinh Chandubha Jadeja V. State of Gujarat in paras 24 and 29 as follows:

"24. Although the Constitution Bench did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to inform the person concerned (suspect) about the existence of his right that if he so requires, he shall



be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, 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 the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.

25 to 28.

29. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision."

The judgments relied on by the petitioner are arising out of a criminal appeal against conviction. Furthermore, these judgments are not applicable to the present case on hand for the simple reason that the question of search does not arise at all. The grounds raised by the learned counsel appearing for the petitioner have to



be gone into only at the time of full pledged trial. Now, it cannot be weighed the evidence and the materials for consideration.

9. Considering the above said decision along with the facts of the present case, this Court is of the view that the petitioner is not entitled for any relief for non compliance of Section 50 of N.D.P.S. Act by the respondent police. That apart, the petitioner has been arrested only on 28.05.2018 itself and the offences allegedly to have committed by the petitioner is heinous one and affecting the public at large. That apart, the investigation is still pending and the respondent is yet to file the final report. If the petitioner is released on bail, there is a likelihood of hampering and tampering the investigation and witnesses.

10. In view of the above, this Court is not inclined to enlarge the petitioner on bail. Accordingly, this criminal original petition is dismissed.

sd/-
29/08/2018

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Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

TO

1. THE INSPECTOR OF POLICE,
CHEEKKANOORANI POLICE STATION,
MADURAI DISTRICT.
2. THE OFFICER INCHARGE,
WOMEN PRISON, MADURAI.
3. THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT,
MADURAI.

ORDER
IN
CRL OP(MD) No.12533 of 2018
Date :29/08/2018

MS/MMS/SAR-2/04.09.2018/7P.4C