

* SMT JUSTICE T. RAJANI
+ CRIMINAL PETITION No.20 of 2018

% 23.01.2018

Jajimoggala Apparao

... Petitioner

Vs.

\$ Munivel Balakrishnan

... Respondent

! Counsel for the petitioners: SRI DUVVURI SURYANARAYANA

Counsel for the Respondents: PUBLIC PROSECUTOR

< Gist :

> Head Note:

? Cases referred:

1. (2005) 5 SCC 294
2. (2009) 8 SCC 539
3. (2005) 8 SCC 183



In the High Court of Judicature at Hyderabad
for the State of Telangana and the State of Andhra
Pradesh

CRIMINAL PETITION No.20 of 2018

Between:

Jajimoggala Apparao

... Petitioner

Vs.

Munivel Balakrishnan

... Respondent

Date of Judgment Pronounced: 23.01.2018

Submitted for Approval:

SMT JUSTICE T. RAJANI

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1. Whether Reporters of Local newspapers may be allowed to see the judgments ? Yes/ No
 2. Whether the copies of judgment may be marked to Law Reporters/Journals Yes/ No
 3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment ? Yes/ No

SMT JUSTICE T. RAJANI

CRIMINAL PETITION No.20 of 2018

ORDER:

This petition is filed, under Sections 437 and 439 of the Criminal Procedure Code, 1973, seeking to enlarge the petitioners, who are A1 and A2, on bail in Sessions Case No.552 of 2017 (Crime No.20 of 2017) on the file of the Metropolitan Sessions Judge-cum-Special Judge for the trial of Cases under NDPS Act, Visakhapatnam.

2. Heard the counsel for the petitioners and the Public Prosecutor appearing for the respondent.

3. As per the case of the prosecution, the commercial quantity of contraband, which is ganja, was seized from A1 and A2. Hence, the petitioners' counsel should be able to explain as to how the petitioners would be entitled for bail and as to how they would satisfy the requirements of Section 37 of the NDPS Act, which does not permit granting of bail to the accused when commercial quantity is involved, unless the court is satisfied that there are reasonable grounds for believing that they are not guilty of such offence and that they are not likely to commit such offence while on bail.

4. The counsel for the petitioners, in order to satisfy the court on the said two aspects, relies on the ruling of the Apex Court

reported in *Ranjeet Singh Brahmajeet Singh vs. State of Maharashtra*¹ wherein it was that as follows:

“Presumption of innocence is a human right. [See Narendra Singh and Another Vs. State of M.P., (2004) 10 SCC 699, 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 31](#) must be given a proper meaning. 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?

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

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,

¹ (2005) 5 SCC 294

it is trite, should not be 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.”

5. In order to contend that petitioners will be acquitted in this case, the counsel submits that Section 42(1) stands violated in this case. Section 42(1) requires search to be conducted by a person, who is authorised by the Central Government. The counsel contends that in this case, it is the Assistant Sub-Inspector of Police, who conducted the search and as per the notification of the Central Government, which is undisputed by the Public Prosecutor, the Search has to be conducted by a person not below the rank of Sub-Inspector. He contends that the compliance of Section 42(1) is mandatory and hence, non-compliance of the same would vitiate the trial and the case would end in acquittal, thereby bringing the petitioners out of the clutches of Section 37 of the NDPS Act.

6. Contrary to the said argument, the Public Prosecutor relies on the ruling of the Apex Court reported in *Karnail Singh vs.*

*State of Haryana*², rendered by a Constitutional Bench, wherein it was observed that both Abdul Rashid's case (2000) 2 SCC 513 and Sajan Abraham's case (2001) 6 SCC 692, held, revolved on facts, and did not require literal compliance of Section 42 clauses 1 and 2. It also observed that whether there is adequate or substantial compliance for Section 42 or not, is a question of fact to be decided in each case.

7. The counsel for the petitioner contends that the said Ruling is only in respect of Section 42(2) and not of Section 42(1). But the categorical observation made by the Apex Court that the *Abdul Rashid's* case does not require literal compliance with Section 42(1) and (2), would negate the merit in the contention of the petitioners' counsel.

8. Apart from the above, the Public Prosecutor relies on the ruling of the Apex Court reported in between *G.Srinivas Goud vs. State of A.P.*³ wherein the Apex court at paragraph 9 observed as follows:

"It will be seen from [Section 41\(2\)](#) that it refers to 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

² (2009) 8 SCC 539

³ (2005) 8 SCC 183

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 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.”

9. Hence, from the above, it can be understood that not only Section 42(2), but also Section 42(1) is not mandatory and the non-compliance of the same would not vitiate the trial. When section 42(2) permits an officer without authorisation to conduct search after complying with the conditions laid therein, it goes without saying that section 42(1) is not a mandatory provision.

10 The other contention of the petitioners' counsel that the other accused in this case were already enlarged on bail also cannot entitle him for bail, as the other accused were enlarged on bail, by considering that these accused i.e., A1 and A2 are the prime accused and that they have been falsely implicated on the confession of A1 and A2.

11. In view of the above, this court is of the opinion that the petitioners are not entitled for bail.

With the above observations, the Criminal Petition is dismissed. As a sequel, the miscellaneous applications, if any pending, shall stand closed.

T. RAJANI, J

January 23, 2018
LMV

