

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No. 3134 OF 2018

ORDER:

This petition is filed, under Sections 437 and 439 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.'), for grant of bail to the petitioners-accused Nos. 1, 4 and 5 in Crime No. 25 of 2018 of Gopalapatnam Police Station, Visakhapatnam City, registered for the offence punishable under Section 8 (c) read with Section 20 (b) (ii) (C) of NDPS Act (for short, 'the Act').

2. Heard learned counsel for the petitioners and learned Public Prosecutor (A.P.).

3. The case of the prosecution is brief is that on 03-02-2018, the Sub Inspector of Police, Gopalapatnam Police Station, Visakhapatnam District, received credible information about transportation of Ganja and informed the same to his immediate superior *i.e.* ACP, West Sub Division, and after obtaining necessary proceedings from the latter, the former along with his staff and mediators reached near Bhagat Singh Nagar, Gopalapatnam, at about 17 hours and found five persons on two motorcycles and one mini tipper van; that when the five persons tried to flee away on seeing them, the police caught hold of them; that on interrogation, petitioner No. 1-accused No. 1 revealed that he sustained loss in business and at the instance of one of his friends, he along with others secured Ganja from interior villages and transporting the same in the van being driven by petitioner No. 2-accused No. 4 to sell the same at

higher price and that the police seized 390 kilograms of Ganja from their possession.

4. Learned counsel for the petitioners submits that nothing has been seized from the possession of petitioner Nos. 1 and 3; that the only allegation against the petitioners is that petitioner Nos. 1 and 3 were driving motorcycles piloting the van being driven by petitioner No. 2 and that there is absolutely no *prima facie* case against the petitioners.

5. The main contention of learned counsel for the petitioners before this Court is that search and seizure of contraband is in total contravention of Sections 41, 42 and 50 of the Act and when search and seizure are vitiated by any illegality, the prosecution case would not sustain even after trial and in such case, the Court can enlarge the petitioners on bail recording its satisfaction under Section 37 (1) (b) of the Act. In support of his contention, learned counsel for the petitioners has placed reliance on *Dilip and another Vs. State of M.P.*¹ and *Sarija Banu @ Janarthani @ Janani and another Vs. State through Inspector of Police*². Yet, another contention of learned counsel for the petitioners is that non-observance of mandatory provisions is impermissible and violation of Sections 27 and 29 of the Act is an illegality and placed reliance on *Union of India Vs. Rattan Mallik @ Habul*³ in support of his contention.

¹ (2007) 1 SCC 450

² (2004) 12 SCC 266

³ (2009) 2 SCC 624

6. Learned Public Prosecutor opposed the petition on the ground that when accused Nos. 1 and 5 are piloting the van, they are aiding accused Nos. 2 and 3 to transport Ganja illicitly in contravention of Section 8 (c) of the Act which is an offence punishable under Section 20 (b) (ii) (C) of the Act and he placed reliance on the statements recorded by the police during investigation under Section 67 (b) of the Act and submitted that on the strength of those statements, it can be concluded that the petitioners also involved in the offence punishable under Section 8 (c) read with Section 20 (b) (ii) (C) of the Act.

7. Considering rival contentions and perusing the material on record, the point that arises for consideration is

"Whether non-compliance of Sections 41 (2) and 42 of the Act is a ground to conclude that there is reasonable ground for believing that the petitioners did commit no offence under the provisions of the Act to record satisfaction under Section 37 (1) (b) of the Act, if so, whether the petitioners are liable to be enlarged on bail under Section 437 & 439 Cr.P.C?"

8. **POINT:**

The main contention of learned counsel for the petitioners is that the search and seizure are not in accordance with Sections 41 (2) and 42 of the Act. It is contended that Section 41 (2) of the Act is not complied with and the person who conducted search and seizure has no authorisation to conduct search and seizure. Therefore, the seizure itself is illegal and in such case, the petitioners are liable to be acquitted even at the

end of trial. In the circumstances, the petitioners cannot be allowed to languish in jail till completion of entire trial as it is infringement of fundamental right guaranteed under the Constitution of India and placed reliance on *Dilip* (1st *supra*) and *Sarija Banu* (2nd *supra*) in support of his contention. Turning to the case on hand, the case of the prosecution is that Section 42 of the Act is strictly adhered to and whether Section 41 (2) of the Act is complied with or not is a question of fact to be decided during trial. In *Karnail Singh Vs. State of Haryana*⁴, a 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 the Act deals with search, seizure and arrest without warrant. Search and seizure are essential steps in armoury 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 provision under Sections 42 (1) & 42(2) of writing down information is

⁴ 2009 3 SCC (CrI.) 887

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 view of the constitutional bench judgment referred *supra*, the principle laid down in the judgments relied upon by learned counsel for the petitioners cannot be applied to the present facts of the case at this stage to release the petitioners on bail.

9. The other contention raised by learned counsel for the petitioners is that statements recorded under Section 67 of the Act can be used for limited purpose of information and conviction should not be based merely on the basis of a statement without any independent corroboration as per the principle laid down in *Union of India Vs. Bal Mukund*⁵. Learned Public Prosecutor contended that even if the principle enunciated in *Bal Mukund* (5th *supra*) applied to the present facts of the case, independent corroboration is required to record conviction and on the basis of information collected under Section 67 of the Act alone, conviction cannot be recorded. In such case, question of corroboration would arise only during trial. Therefore, at this stage, the petitioners cannot be enlarged on bail.

10. One of the contentions raised by learned counsel for the petitioners is that based on the statement recorded under

⁵ (2009) 12 SCC 161

Section 67 (b) of the Act, the petitioners cannot be convicted for the offence after trial and this view is supported by the judgment of the Apex Court in *Bal Mukund* (5th *supra*). In the said judgment, the Trial Court and High Court recorded conviction of the accused for the offences punishable under the provisions of the Act and when the matter reached the Supreme Court, the Supreme Court held that where the statute confers such drastic powers and seeks to deprive a citizen of his liberty for not less than ten years, and making stringent provisions for grant of bail, scrupulous, compliance with the statutory provisions must be insisted upon. While considering a case of the present nature where two persons may barely read and write Hindi, are said to have been used as carrier containing material of only 1.68% of narcotics, a conviction, should not be based merely on the basis of a statement made under Section 67 of the Act without any independent corroboration particularly in view of the fact that such statements have been retracted. No doubt, as per the law declared by the Apex Court in the judgment referred *supra*, statements recorded under Section 67 of the Act cannot alone form the basis for conviction, if it is corroborated by any evidence, the Court can record conviction, if any statement is recorded under Section 67 of the Act, it is only an additional circumstance to substantiate the prosecution case. But, the question of corroboration would arise only when the Trial is completed and at this stage, the same principle cannot be applied to the present facts of the case. It is also difficult to decide whether the information furnished under Section 67 (1)

(b) of the Act is voluntary or obtained such information by using coercion *etc.*, to vitiate such statement and it has to be decided only during trial and not at this stage. Therefore, the contention of learned counsel for the petitioners with regard to Section 67 of the Act cannot be accepted since the scope of enquiry in a petition under Sections 437 and 439 of Cr.P.C. is limited and on the strength of those confessions, it is difficult to record satisfaction as required under Section 37 (1) (b) of the Act.

11. At this stage, it is relevant to note Section 37 of the Act which reads as follows:

37. Offences to be cognizable and non-bailable .-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) (a) every offence punishable under this Act shall be cognizable; (b) no person accused of an offence punishable for 2[offences under section 19 or section 24 or section 27 A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.

In *Union of India Vs. Ram Samujh*⁶ and *Durand Didier Vs. Chief Secretary, Union Territory of Goa*⁷, the Apex Court discussed the scope of Section 37 of the Act. In *State of*

⁶ 1999 Supp (2) SCR 76

⁷ 1989 AIR 1966

*Uttaranchal Vs. Rajesh Kumar Gupta*⁸ and *Union of India Vs. Rattan Mallik alias Habul*⁹, the Supreme Court extensively discussed the scope and consequences failing to adhere to Section 37 of the Act and concluded that Section 37 of the Act created an interdict to grant bail for the offences punishable under the provisions of the Act, where a commercial quantity of contraband is involved. In *Maktool Singh Vs. State of Punjab*¹⁰, the 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 Vs. Ahmadalieva Nodira*¹¹, the Apex Court held that the Court has to keep in mind two conditions *i.e.* the satisfaction of the Court that there are reasonable grounds for 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

⁸ (2007) 1 SCC 355

⁹ (2009) 2 SCC 624

¹⁰ (1999) 3 SCC 321

¹¹ 2004 (1) JCC 662

probable causes for believing that the accused is not guilty of the alleged offence.

12. In view of the law declared by the Apex Court in the judgments referred *supra*, unless the Court concludes that the accused is not guilty based on reasonable grounds and that there is no possibility of committing similar offences while on bail as required under Section 37 (1) (b) of the Act, he shall be enlarged on bail. Even according to Section 37 of the Act, the general provisions regarding grant of bail under Sections 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 Sections 35 & 54 of the Act. Therefore, the general principles governing bail under Sections 437 to 439 are equally applicable to the bail applications filed by accused for the offences punishable under the provisions of the Act where commercial quantity is involved.

13. In view of my foregoing discussion, I find no ground to grant bail to the petitioners and therefore the criminal petition is liable to be dismissed.

14. The criminal petition is accordingly dismissed. Pending miscellaneous petitions, if any, shall stand dismissed in consequence.

M.SATYANARAYANA MURTHY, J.

16-04-2018.

JSK