

HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

*THE HONOURABLE Dr.JUSTICE B.SIVA SANKARA RAO

+ **Crl.P.Nos. 3930 and 5050 of 2018**

%08.06.2018

Crl.P.No. 3930 of 2018

#Between:

Satyaboina Chandrasekhar

...Petitioner/ A.1

AND

The State of Telangana

Rep. by its Public Prosecutor,

..... Respondent/ complainant

Crl.P.No. 5050 of 2018

#Between:

Kesireddy Nikhil Reddy @Nikhil Kumar Reddy

...Petitioner/ A.2

AND

The State of Telangana

Rep. by its Public Prosecutor,

..... Respondent/ complainant

!Counsel for the petitioners

: Sri Milind G.Gokhale for A.1

Sri H.Prahlad Reddy for A.2

Counsel for the respondent

: Public Prosecutor

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>Head Note

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? Cases referred:

1. 2018 SCC online Kar 448
2. 2017(2) KCCR 1765
3. 2001 (2) SCC 566
4. 2002 (2) SCC 562
5. 2001 (7) SCC 672
6. 2001 (7) SCC 677
7. (2004) 3 SCC 549: 2004 Cr LJ 1810
8. 2014 (13) SCC 1 : AIR 2014 SC 3625
9. (2001) CrI. L.J. 117 SC
10. 2009 CrI Law Journal 3043 (SC)
11. 2007 (7) SCC 798
12. 2003 SCC crl. 1664
13. 2002 SCC (CrI) 1769 (A&E)
14. 2002 SCC CrI 1865 (A)
15. (2009) 3 SCC (CrI) 887
16. 2014(5) SCC 345
17. 2005 (4) SCC 350
18. AIR 2011 SC 1939
19. 2011(1) SCC 609
20. 2009 (8) SCC 539
21. 2008(13) SCC 584
22. AIR 2008 SC 1044
23. 2006(13) SCC 210
24. 2009(12) SCC 161
25. AIR 1994 SC 1872=1994-SCC-CrI-634

26. 2004(5) SCC 223
27. 2004(5) SCC 230
28. AIR 1964 SC 221
29. 2005(8) SCC-725
30. 2004(3) SCC- 453
31. 2002 (4) SCC-380
32. 2004(1) SCC-337
33. 2004 (1) SCC. 337
34. 2000-SCC(CrI)1437
35. 2004(3) SCC-453
36. 2002(4) SCC-380
37. 1993 SCC (CrI) 1082
38. (2010) 3 SCC (CrI) 604=(2007) 15 SCC 569
39. 2009(2) SCC 624
40. 2004 (1) SCC 662
41. CrI. A. Nos.462 and 463 of 2018, dt.27.03.2018.



HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

Criminal Petition Nos.3930 and 5050 of 2018

COMMON ORDER:

The petitioner in CrI.P.No.3930 of 2018 is A.1 by name S.Chandra Sekhar, and the petitioner in CrI.P.No.5050 of 2018 is A.2 by name K.Nikhil Reddy of Cr.No.158 of 2017 of Police Station (Proh.& Excise), Quthbullapur of Ranga Reddy district, State of Telangana, registered for the offences punishable u/sec.8© r/w 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the NDPS Act'), for they are illegally in conscious possession of Alprazolam-a psychotropic substance defined in Sec.2(xxii) of the NDPS Act.

2. As per the prosecution case on some reliable information on 26.12.2017 evening, the Excise officials proceeded to Shapur Nagar for conducting raids and when they were present in front of the Muthoot Finance at Shapur Nagar towards Balanagar to Narsapur Road, along with panch witnesses-the respective VRAs of Jeedimetla, they found one person moving suspiciously and trying to skulk away on seeing them and they apprehended the person and on enquiry, the person disclosed his name as S.Chandra Sekhar and other details (described as A.1) found putting his hands in his pant pocket and on suspicion of any contraband, he was issued notice u/sec.50(1) of NDPS Act as to his willingness to search in the presence of either Gazetted Officer or learned Magistrate for which the A.1 chose to be searched in the presence of one of the Gazetted Officers who is in the raid team by name G.Venkatesham, Inspector of Proh. & Excise, SHO, Qutubullapur, and gave it in writing and when searched his pant pocket, found paper pocket containing contraband, which he disclosed of Alprazolam of 100 grams in weight to give as a sample to one person and there is further stock of about 6kgs. of Alprazolam with him that is kept

with his friend and he called that friend over his mobile bearing No.9949128458 and that person came having light green colour carry bag hanging on his back and he was apprehended and when questioned, disclosed his name as K.Nikhil Reddy and other particulars (described as A.2) and A.2 was also given notice of the option u/ sec.50(1) of the NDPS Act for search, for which the A.2 also chose said G.Venkatsham, the Excise Inspector, in the raid party and given it in writing for search before him and then opened the light green carry bag and found therein one black polythene cover tied with thread and found therein white crystal powder which he also disclosed as Alprazolam saying one person wanted to purchase at Rs.1,35,000/- per kg. and asked them to come there with, they got the contraband 5 months back through one Srinivas who is no more and when questioned as to whether they got licence or permit to possess or sell, they stated nothing. On that the A.1 and A.2 were explained by the SHO, that it is an offence and cause weighed the Alprazolam from nearby kirana stores and found what was seized under the panchanama from A.1 of 100grams and from A.2 of 6kgs. and collected samples from each of 50gms duly packed and sealed the samples as well as the remaining contraband and affixed chits. It further discloses that there are two Nokia cell phones available with those two persons that were also seized and further formalities were complied with.

3. The contentions in the bail applications are that there is non-compliance with the mandatory requirements of Sections 50 & 42 of the NDPS Act and the so called disclosure is hit by law and it is a false case foisted and it is their further submission in the course of hearing in the bail applications through their learned counsel that from perusal of the occurrence report contents pursuant to the panchanama supra, it is mentioned date and hour of detection on 26.12.2017 at about 5.30p.m. in front of Muthoot Finance of Shapur Nagar, road leads to Balanagar to

Narsapur and at column No.10 mentioned about seizure of the light green colour carry bag with 6kgs. of Alprazolam and two cell phones of Nokia and Vivo and the names mentioned of the mediators and of the two persons the petitioners herein as A.1 and A.2 and there is no mention of the 100grams seized from A.1 at column No.10.

4. In fact as answer to the above, in the occurrence report at the column of brief particulars also mentioned about apprehension of the two persons with contraband and presence of mediators and notices given to exercise any option for search and found 100gms and 6kgs., of Alprazolam seized and drawn two samples each of 50grams from the respective seizures as per the procedure prescribed under cover of panchanama with details including arrest and seizure of the contraband and original case papers the contraband and remaining property including two cell phones and the accused persons were produced before the Court for judicial remand and further report would be submitted after investigation. Said occurrence report was also of even date prepared from panchanama and once panchanama contains the details, nothing to make a mountain out of mole-hill for mistake in mention in its scribing, that too once it discloses from the occurrence report prepared is based on two seizures from the disclosures in the presence of the mediators covered by the panchanama supra, when it is clearly mentioned of samples drawn of 50grams each from the respective seizures from A.1 and A.2 while mentioning 6 kgs. seized from one of them and 100grams seized from other of them. Thereby said contention of the petitioners has no basis including from anything to point out with reference to the remand report of the accused persons of even date pursuant to the apprehension, seizure covered by panchanamas and arrest and seizure of 100 grams of Alprazolam from A.1 and 6 kgs. from A.2 pursuant to the information given by A.1 by calling A.2 over cell phone of their conscious possession of the entire contraband. There is thus nothing

to the advantage of the accused much less to say the contraband is not of commercial quantity and or to say the twin requirements of the Section 37 of the NDPS Act have no application.

5. Among several contentions raised in the bail applications, besides the one referred supra, one more is regarding the sample collection based on two Single Judge expressions of the Karnataka High Court placed reliance by the respective counsel, viz., (1). in Noble Vs. State of Karnataka¹ where the bail application filed u/ sec.439 CrPC by the accused against whom the FIR registered from the occurrence report of the offences punishable u/ sec.22(b) of NDPS Act as Cr.No.2 of 2018 and there is an observation of no specific mention about the credible information reduced into Case Diary and there is non-compliance of the mandatory requirements of 42(1) and 42(2) of the NDPS Act on furnishing copies to immediate superior officer and material goes to show 18grams of MDMA seized from the accused person and with regard to personal search, there is a duty of the police officer to explain to the petitioner that he is having legal rights about the exercise of option for conducting search before the Gazetted Officer or Magistrate and there is no averment that police explained that legal right for said seizure and prosecution not produced the qualitative as well as quantitative test where the instruction No.1.18 of Annexure-1 in the standing instructions purports expeditious analysis of a narcotic drug and psychotropic substance is of essence to all proceedings under the NDPS Act and in many cases the Court may refuse to extend police/judicial remand beyond 15 days, however, where quantitative analysis requires longer time, the result of the qualitative test should be dispatched within 15days and there is thereby non-compliance with the mandatory requirements of Sections 42 and 50 of NDPA Act and thereby the

¹ 2018 SCC online Kar 448

accused is entitled to bail and (2). in Ejem Peter Vs. State of Karnataka² where it is observed that out of quantity seized, the samples drawn and sent to the FSL and at this stage bail sought and as per the counsel for the bail applicant even assumed that psychotropic substance seized from the petitioner, it would be necessary for the prosecution to demonstrate that it was a quantity which could be considered as a commercial quantity to attract stringent punishment and substance seized into is indeed narcotic drug or psychotropic substance falling under the notifications appended to the NDPS Act and out of the 5 items, the article 1 revealed positive of charas and not indicated as to what percentage of charas was found and Articles 2 and 5 are concerned found positive for the presence of cocaine and paracetamol and Articles 3 and 4 shows the negative report for presence of cocaine; thereby as the qualitative analysis coupled with quantitative test required to be conducted and once it is adulterated with other substance and contains a percentage of cocaine it might be shown what percentage and whether it is commercial and in the absence of which benefit must go to the accused of no commercial quantity and referred the standing instruction No.1.18 as also referred the other expression of another single judge supra besides instructions 1.19 and 1.22 by saying accused made out case for enlargement on bail from the lacunae.

6. These two decisions have in fact no application to the present facts more particularly for the reasons the quantity seized is clearly cause weighed and mentioned apart from their disclosure of the contraband is Alprazolam of 100 grams and 6 kgs. respectively seized from A.1 A.2 and A2 was called with contraband by A1 to say same A1 also in conscious and constructive possession within the meaning of section 54 of the Act. It is in fact there is disclosure by accused persons within the meaning of section 67 of the Act of the contraband is Alprazolam and its weight referred supra

² 2017(2) KCCR 1765

and not even any mention of same is an adulterated substance mixed with Alprazolam. It cannot be disputed that the person conducted the raid is the empowered officer statutorily by the State Govt., and not an authorised officer by the empowered officer and as such compliance of Section 42 does not arise and he is also covered by Section 67 of the Act.

7. Apart from it, as referred in the panchanama supra, they clearly mentioned about their conscious possession of the contraband and both got culpable mental state regarding their possession attracting sections 35 and 54 of the Act of 6 Kgs. that was kept with A.2 who is kept away while A1 came forward with the sample of 100 grams kept in his pant pocket and waiting for the person to whom they negotiated to sell that contraband after supply of the sample with the rate already fixed and as per the pre-arranged plan, which contraband they already secured from their late friend earlier. Once such is the case, there is nothing to show that any of the petitioners is entitled to acquittal ultimately for the entitlement of the concession of bail, leave about the fact of any of them may not involve in another crime in future.

8. Further, so far as seizure from A.2 from disclosure by A.1 and also by A.2 as referred supra from no search involved even for such seizure is not from person of A.2 but for from his bag and as such Section 50 compliance also not required leave about notice given intimating his right of search with option either before a Gazette Officer or Magistrate and one of the raid parties is also a gazetted officer, when wanted to be searched before the Gazetted Officer of the raid party and has given it in writing the willingness to be searched by the raid party itself, it tantamounts to waiving of right of search before independent gazetted officer or Magistrate and the same also applies to A.1 so far as 100 grams of Alprazolam seized from his pant pocket that seizure is also even from his disclosure and leave it even there is taken for arguments sake, search and

seizure from the pant pocket as involves personal search, once notice served informing his right and options for search and did not exercise option before independent gazetted officer or Magistrate and willingness once given in writing to be searched before the gazetted officer among the raid party it shows prima facie compliance with the requirements of Section 50 of the Act.

9. For more elaboration on the legal aspects it is for more clarity to the conclusions the legal position is detailed hereunder:

9(a). As per Section 37 (1)(b), if it is the commercial quantity of the Narcotic drug or psychotropic substance, whatever be the penal provision, leave about irrespective of commercial quantity similar rider is there for those offences punishable under Sections 19, 24 and 27(a). 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, then question of considering to grant bail if any arises.

9(b). In Babua Vs State of Orissa³, the Apex Court held that the Court should examine whether prosecution statements, if believed would result in conviction, if it could not give an answer in negative, bail could not be granted; another expression in Intelligence Officer, Narcotics Controal Bureau Vs Shambhu Shankar⁴ that bail cannot be granted unless the public prosecutor has been heard and Court is satisfied that the accused is not guilty and not likely to commit any offence while on bail; State of M.P., Vs Kajad⁵ held that Court's satisfaction under Section 37 (1) (b) (ii) about accused being not guilty must be arrived based on the

³ 2001 (2) SCC 566

⁴ 2002 (2) SCC 562

⁵ 2001 (7) SCC 672

record; also held the same in *D. Sarojini Vs State of A.P.*,⁶ and further in *Customs, New Delhi Vs Ahmadalieva Nodira*⁷.

9(c). In *Union of India Vs. Sanjeev V.Deshpande*⁸ the Apex Court three judge bench held referring to Sections 2(xiv), 8(c), 19, 24, 37 of the Act and Rules 64, 65, 65A of the Narcotic Drugs and Psychotropic Substances Rules, 1985 as to whether exclusion of a particular substance in Schedule 1 to Rules of 1985 would exclude application of Section 8 of the Act, though it is mentioned in Schedule to the Act, it was held that both Rules 53 and 64 are really in the nature of exception to the general scheme of Chapters VI and VII respectively containing a list of narcotic drugs and psychotropic substances which cannot be dealt in any manner notwithstanding the other provisions of these two chapters. Neither Rule 53 nor Rule 64 is a source of authority for prohibiting the dealing in narcotic drugs and psychotropic substances. The source is Section 8. *Rajesh Kumar Gupta's* case in Court's view is wrongly decided. Provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of the Drugs and Cosmetics Act, 1940 or the rules made thereunder as per Section 80 of the Act. Same is not really called for in the instant case. It is only required to be stated that essentially the Drugs & Cosmetics Act deals with various operations of manufacture, sale, purchase etc. of drugs generally, whereas Narcotic Drugs and Psychotropic Substances Act deals with a more specific class of drugs and, therefore, a special law on the subject. Further the provisions of the Act operate in addition to the provisions of 1940 Act. Considering scope of Section 37 of Act of 1985, finding by High Court that prohibition in Section 8 of 1985 Act is not attracted to the drugs not mentioned in Schedule 1 to Rules of 1985, though mentioned in Schedule I to Act of 1985 is not sustainable.

⁶ 2001 (7) SCC 677

⁷ (2004) 3 SCC 549: 2004 Cr LJ 1810

⁸ 2014 (13) SCC 1 : AIR 2014 SC 3625

9(d). The Apex Court in Superintendent, NCB, Chennai Vs. R.Poulsawmy⁹ held that once Section 37(1)(b) NDPS Act applies, it is mandatory on the part of the Court of its satisfaction to grant or decline to grant bail to consider the scope of Section 37 of the Act. The rigour of Section 37(2) of the NDPS Act is in addition to the restrictions for grant of bail under Chapter XXXIII CrPC. The subjective satisfaction of the Court must reflect in the order granting bail of the twin conditions of reasonable grounds to believe that the accused is not likely to be convicted and he is not likely to commit any offence while on bail and the conditions are cumulative and not alternative.

9(e). In Union Of India v. Rattan Mallik @ Habul¹⁰, wherein it was observed in paras 13 to 16 thatOffence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from opportunity to the Public Prosecutor to oppose, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be made out. The conditions are cumulative and not alternative. The satisfaction contemplated has to be based on “reasonable grounds”, means something more than prima facie grounds. Existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.

9(f). In Union of India Vs. Shiv Shanker Kesari¹¹ also it was held that recording of satisfaction on both the aspects, noted above, is sine qua non

⁹ (2001) CrI. L.J. 117 SC

¹⁰ 2009 CrI Law Journal 3043 (SC)

¹¹ 2007 (7) SCC 798

for granting of bail under the NDPS Act. The Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail.

9(g). As per Section 2 sub section (vii-d) of the Act, 'controlled substance' means any substance which the Central Government may, having regard to the available information as to its possible use in the production or manufacture of narcotic drugs or psychotropic substances or to the provisions of any International Convention, by notification in the Official Gazette, declare to be a controlled substance. From this, it is important to note the fact that the contraband, involved in this case is a commercial quantity, which is undisputedly a psychotropic substance either in one category or the other very nearer to it.

9(h). Among the other provisions that to be kept in mind, Section 35 speaks on mensrea a reverse onus clause putting burden on accused to rebut the presumption and thus the Court shall draw till rebutted of the culpable mental state. Similarly under Section 54 regarding possession, which needless to say includes a conscious possession –whether physical or constructive is suffice of awareness about a particular fact from State of mind is criteria –as held in Madanlal v. State of Himachal Pradesh¹² and Avtar Singh and Ors. vs State of Uttar Pradesh¹³.

9(i). Coming to other relevant sections - Section 25 speaks same punishment of substantive against those allowed the premises in use;

¹² 2003 SCC crl. 1664

¹³ 2002 SCC (CrI) 1769 (A&E)

Section 28 speaks of an attempt is also a punishable offence providing same punishment of accomplished act, if some act done under the attempt; Section 30 speaks of even preparation is an offence punishable, (like in Sections 399 I.P.C.); Sections 29 speaks of vicarious liability (like in Sections 107 to 120-B & Sections 34 to 37 I.P.C.). For the NDPS Act not defined conspiracy separately, it can thus be taken note of the punishment provided under Section 120-B IPC from its definition under Section 120-A IPC and its application to be r/ w. Section 10 Evidence Act.

9(j). Coming to Sections 41 & 42 (like sections 100 & 165 CrPC.) where the officer is empowered officer and where the officer is authorised officer (to say because of empowerment by delegation) otherwise by statutory empowerment to intimate to the superior within the prescribed time of search proceedings, compliance of Section 42 is not required if not a delegated exercise and from Section 43 (like Section 102 CrPC.) where only seizure involved with no search, there also compliance of Section 42 not required and coming to compliance of Section 57 if any which is even directory as held by the Apex Court in *Narayana Swamy v. Assistant Director of D.R.I.*¹⁴. In *Karnail Singh Vs. State of Haryana*¹⁵ the Apex Court Constitution Bench held categorically that even where Sections 41 and 42 of the Act compliance required, mere non-compliance will not vitiate the proceedings, unless it is shown from said mandatory provisions applicable not complied, prejudice is caused to the accused.

9(k). Coming to compliance of the mandatory provision u/ sec.50 of the Act, in *State of Rajasthan Vs. Paramanand*¹⁶ also it was held by the Apex Court that if merely a bag carried by a person is searched without there being any search of his person, Section 50 has no application.

¹⁴ 2002 SCC CrI 1865 (A)

¹⁵ (2009) 3 SCC (CrI) 887

¹⁶ 2014(5) SCC 345

9(l). In *State of H.P. Vs. Pawan Kumar*¹⁷ also the Apex Court held that, search of a person would mean person covering with clothing and pockets and baggage carrying any article or container etc., can under no circumstances be treated as search and seizure from person.

9(m). In *Narcotics Central Bureau Vs. Sukh Dev Raj Sodhi*¹⁸ it was held by the Apex Court that for the search of a person, Section 50 compliance is mandatory and the accused is provided with an option either to be searched in the presence of any Gazetted Officer or Magistrate. The accused must be physically produced before such Gazetted officer or Magistrate once he opted to be so searched before any of them and the non-compliance by taking him before a Gazetted officer or Magistrate at his option for search of his person entitles said search and seizure illegal.

9(n). In fact regarding such requirement as to what is a compliance of section 50, the five judge bench expression of the Apex Court in *Vijayasingh Chandubha Jadeja Vs. State of Gujarat*¹⁹- observed categorically also with reference to the amendment to section 50 by Act 9 of 2001 and by clarifying the earlier constitutional bench expressions in *Baldev Singh(supra)* and another expression in *Karnail Singh Vs. State of Haryana*²⁰ on the section 50 compliance that, informing to the suspect under section 50 of the NDPS Act of right to be searched of his person in the presence of any Gazetted Officer or Magistrate can be either oral or in writing and it is any of such non-compliance that too it must be shown that failure to apply such mandatory provision of Section 50 of the NDPS Act cause prejudice to the accused and then only it has to render such recovery of illicit article from the suspect inadmissible to vitiate the conviction, if the conviction is recorded solely on the basis of such illicit article

¹⁷ 2005 (4) SCC 350

¹⁸ AIR 2011 SC 1939

¹⁹ 2011(1) SCC 609

²⁰ 2009 (8) SCC 539

recovered by violating of the section 50 of the NDPS Act by searching a person. It is also observed that whether complied with or not and any prejudice caused or not must be matters in trial to appreciate from evidence to be let in.

9(o). Thus any contentions regarding Section 50 compliance required or not, being a matter for decision in trial and not a consideration for grant or refusal of bail, that too from the material on record of the prosecution it shows the compliance prima facie.

9(p). As laid down by the three judge bench expression in Narendra K.Amin Vs. State of Gujarat²¹ at para-22 in its saying mere fact that accused has undergone certain period of incarceration that by itself would not entitle him to be enlarged on bail, nor the fact that the file is not likely to be concluded in near future, when the gravity of offence is severe and there are allegations against the accused of possibility of interfering with witnesses and the like.

9(q). The Apex Court in Kanhaiyalal v. Union of India²², held that confession of offence, other than to a police officer, before an officer governed by the provision of Narcotics Act is not hit by Section 25 of the Indian Evidence Act. As referred supra from very wording of Section 67 discloses the same and the officer in raid party is an officer governed by the provisions of the Act and not mere police officer, leave about any contention including as to the issue pending on reference before a larger bench of the Apex Court is a matter for appreciation during trial to so raise and consider if at all same hit by Section 25 of the Evidence Act and to consider of the fact discovered from the disclosure to that extent admissible under Section 27 of the Evidence Act. Further the earlier expression of the Apex Court in Francis Stanly @ Stalin Vs. I.O. Narcotic

²¹ 2008(13) SCC 584

²² AIR 2008 SC 1044

Control Bureau, Tiruvananthapuram²³, it was held that Section 67 of the Act response is admissible. Further even in a later expression Union of India Vs. Bal Mukund²⁴, it was held that to act on Section 67 of the Act disclosure some other corroboration is required to base a conviction therefrom during trial.

9(r). Here from this perspective, once there is a disclosure statements made by the accused, which are prima facie for purpose of the bail application scope to hold as part of prosecution material for consideration for the bar to the entitlement to the concession of bail under Section 37 of the Act.

9(s). Even coming to the contention of the search before one of raid party even Gazetted officer, it is answered that same is after serving notice of options available and waived and asked the search can be before them, there is nothing more on it to discuss. For the other contention in this regard of same tantamounts to search/ seizure, report, registration and crime investigation by same officer a bar, it is the well settled position of law right from *Balbir Singh's case*²⁵ that there cannot be any argument in defence to doubt the prosecution case that complainant and investigating officer cannot be one person. The officer who conducted search and seizure cannot be technically called as complainant. Even there can be no bar for the person who conducted search/ seizure to investigate the case and file charge sheet. Same is also the law well laid down in *State Vs. Jayapal*²⁶, *S.Jeevanatham Vs. State*²⁷ apart from the law settled way back in *State Vs. Bhagwant Kishore Joshal*²⁸.

²³ 2006(13) SCC 210

²⁴ 2009(12) SCC 161

²⁵ AIR 1994 SC 1872=1994- SCC-CrI-634

²⁶ 2004(5) SCC 223

²⁷ 2004(5) SCC 230

²⁸ AIR 1964 SC 221

9(t). Coming to the compliance of provisions U/s. 52 and 52-A are concerned, the law is well settled holding that compliance of Sections 57, 55, 52-A & 52 are only directory and not at all mandatory. It is at best for the accused to show any prejudice from any non-compliance of such directory provisions during trial and when not so shown, from any non-compliance of such directory provisions by itself is no way fatal to the prosecution-case as held by the Apex Court in Babubhai Vs. State²⁹ at para 8, State Vs. Makkan Chand³⁰; Khat Singh Vs. Union of India³¹ and Khandoori Sahoo's case³².

9(u). Coming to delay in sending samples or any other irregularities concerned, in State Vs. Kandari Sahoo³³ it was held that delay in sending samples to laboratory is not at all fatal, where the articles are in safe custody. It is for the accused to show any prejudice to consider. In Karnal Singh Vs. State³⁴ also it was held that the alleged violation of Secs. 52, 52-A, 55 & 57 does not affect merits of case.

9(v). Regarding any non following of any administrative instructions interdepartmental in sending samples to Analyst and sending remaining contraband to court are concerned, for more clarity it is required to reproduce sections 52 and 52-A which read as follows:

Section 52: (1) Any officer arresting a person under section 41, Section 42, Section 43 or section 44 shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under warrant issued under sub-section (1) of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under sub-section (2) of Section 41, Section 42, Section 43 or section 44 shall be forwarded without unnecessary delay to (1) the officer in charge of the nearest police station or (b) the officer empowered under section 53.

²⁹ 2005(8) SCC-725

³⁰ 2004(3) SCC-453

³¹ 2002 (4) SCC-380

³² 2004(1) SCC-337

³³ 2004 (1) SCC. 337

³⁴ 2000-SCC(CrI)1437

(4) The authority or officer to whom any person or article is forwarded under sub-section (2) or Sub-section (3) shall, with all convenient dispatch, take such measures as may be necessary for the disposal according to law of such person or article.

Section 52-A: (1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette specify such narcotic drugs or psychotropic substances or class of narcotic bags or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that government may from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub section(1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub section(1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any magistrate for the purpose of

(a) Certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

© allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section(2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872(1 of 1872) or the code of Criminal Procedure, 1973(2 of 1974), every Court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or substances and any list of samples drawn under sub-section(2) and certified by the Magistrate, as primary evidence in respect of such offence).

From these provisions there is no set procedure specifically including to provide for any administrative instructions for that. In this regard in State of Punjab Vs. MakhanChand³⁵ Paras 4-12, by relying on the ratio laid down in Khat Singh Vs. Union of India³⁶ and after referring to Valsala Vs. State³⁷

³⁵ 2004(3)SCC-453

³⁶ 2002(4)SCC-380

³⁷ 1993 SCC (CRI) 1082

it was held that when there is no case from the accused about any tampering with seals of the samples that could be made out, the conviction can be upheld. It was also held that the contention that standing orders and instructions issued U/s.52 A are not followed regarding procedure for drawing sample is held untenable, since Section 52-A, no where empowered the Central Govt. to lay down any procedure for search/seized contraband sample collection and at best, the standing instructions and orders are a mere guidance and have no any legal force since not the inexorable rules. Further, it was held that Sec.52-A only deals with disposal of seized narcotic Drugs and psychotropic substances. It was further held in Valsala supra that as it was not laid down that whenever there is a delay in the sending of samples, the prosecution version would not become vulnerable, it is to be shown from any inordinate delay that it caused prejudice.

10. In Union of India vs Ashok Kumar Jaiswal³⁸ the Apex Court cancelled the bail granted by the High Court having find fault for non-application of mind to the parameters required to be considered in granting or refusal from non-consideration of the limitations laid down in Section 37 of the Act. It was held at para 3. "It is evident that the High Court did not at all take into consideration the requirements of Section 37 of the Act as it stood when the application of the respondent for grant of bail was allowed and bail was granted to him merely observing that "considering the recovery and detention it is a fit case for bail". The legislature with a view to check the menace of drugs incorporated in the Act the stringent provisions of Section 37 for considering prayer for grant of bail of those who are accused of offence punishable for a term of imprisonment of five years or more under the Act. Under the mandatory conditions provided in Section 37 before granting bail the court is to be

³⁸ (2010) 3 SCC (CrI) 604=(2007) 15 SCC 569

satisfied that there are reasonable grounds for believing that the accused is not guilty of offence and that he is not likely to commit offences under the Act while on bail". See also Union of India Vs. Rattan Malik @Habul³⁹, Customs, New Delhi Vs. Ahmadalieva Nodira⁴⁰ and the recent one in Satpal Singh Vs. State of Punjab⁴¹ by a constitution bench.

11. The purpose of penal law as rightly stated by Wechsler – an American jurist is to express a formal social condemnation of a forbidden conduct, buttressed by sanctions calculated to prevent it. Even according to Robert Jackson – liberty to be achieved is only within and through the rule of law.

12. From the very preamble of the Act, the policy, purpose, reasons and the objects to be achieved are clearly explained as to for which the Act (NDPS Act) 61 of 1985, later amended by Act 2/1989, 9/2001 and 16/2014 is brought. It is an exhaustive law enacted with stringent punishments to control the malady of drug abuse of trafficking etc., by consolidating and amending the then existing laws in this field viz., opium Act & Dangerous Drug Act. There is one more related Act called Prevention of Illicit traffic in NDPS Act, 1988. Though solutions do not lie with law alone, however, provision for stringent punishments made, at least to control the offences to a considerable extent. Article 21 is not an absolute fundamental right but qualified and in consideration of bail it is not the personnel liberty alone, but impact of the crime on society. Thus what ever the contentions of the personnel liberty is a constitutional guarantee cannot be claimed for release on bail unless it is shown the limitations laid down in Section 37 of the Act have no way apply and the other general parameters for bail laid down in CrPC are no way a bar for

³⁹ 2009(2) SCC 624

⁴⁰ 2004 (1) SCC 662

⁴¹ CrI.A.Nos.462 and 463 of 2018,dt.27.03.2018.

the entitlement. Here once there is as discussed supra prima-facie case against the petitioners and the twin requirements of reasonable grounds exist in their favour of not being held guilty from taken on face value the prosecution material and there is also no likely hood of committing any offence further once released on bail, the question of entitlement does not arise on the facts of the case on hand with reference to the law supra.

13. Having regard to the above, the two Criminal Petitions are dismissed. Consequently, miscellaneous petitions, if any, in these Criminal Petitions shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 08.06.2018
Note: L.R. Copy to be marked
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