

**(2014) 04 AP CK 0034**  
**In the Andhra Pradesh High Court**  
**Case No : Criminal Petition No. 4145 of 2014**

Abdul Aziz

APPELLANT

Vs

State of A.P.

RESPONDENT

**Date of Decision :** 29-04-2014

**Acts Referred:**

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 22, 28, 29, 37(1)(b)(ii), 42

**Citation :** (2015) 1 ALD(Cri) 86 : (2014) 3 ALT(Cri) 107

**Hon'ble Judges :** K.G. Shankar, J

**Bench :** Single Bench

**Advocate :** P. Amarender Reddy, Advocate for the Appellant; V. Gopala Krishna Gokhale, Spl. Public Prosecutor, Advocate for the Respondent

**Final Decision :** Dismissed

## Judgement

Dr. K.G. Shankar, J.—The petitioners are A.2 & A.3 in NCB.F.No. 48/1/2/2013/ NCB/HYD of Narcotics Control Bureau (N.C.B., for short) South Zone, Hyderabad. They allegedly committed offences under Sections 8(c) read with Sections 22, 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (N.D.P.S. Act, for short). Out of 7 accused, 6 accused moved for grant of bail. I granted bail to A.5 & A.6 and dismissed the bail application so far as A.4 is concerned. Now, A.2 & A.3 moved for grant of bail. A. 1 did not seek for grant of bail.

2. The case of the prosecution is:

a) The N.C.B. officials received information that A. 1 would deliver Methamphetamine, a psychotropic substance in Room No. 304, Vishnu Priya Lodge, Kukatpally on 26-11-2013 to 2 persons who are in the lodge. The N.C.B. officials raided Room No. 304, Vishnu Priya Lodge along with mediators. A. 1 to A.3 were found in Room No. 304. A.1 allegedly confessed that Methamphetamine was kept in a black coloured rexin bag which was handed over by A.1 to A.2 & A.3. N.C.B. officials claimed that after issuing notice u/s. 50 of N.D.P.S. Act upon A. 1 to A.3, search was conducted after questioning whether A. 1 to A. 3 would

like the presence of a Magistrate or a Gazetted Officer. It is their further case that the provisions of Sec. 50 of N.D.P.S. Act were complied with.

b) The further case of the prosecution is that the substance in the rexin bag seized from A.1 to A.3 was tested with the field drug testing kit. It was found that the bag contained Amphetamine, which is also a psychotropic substance. A.1 to A.3 made voluntary statements that they were manufacturing Methamphetamine illegally at Balaji Labs, Subashnagar, Jeedimetla, Ranga Reddy District. It involved the complicity of A.4 to A.7. As the present bail application is on behalf of A. 2 & A. 3 only, it would suffice if the allegations of the prosecution to the extent of the complicity of A.2 & A.3 are considered.

3. Indeed, one of the grounds urged by the learned counsel for the petitioners is that A.5 & A.6 had already been enlarged on bail and that A.2 & A.3 also deserved to be enlarged on bail. I am afraid that the complicity of A.5 & A.6 in the commission of the offence is quite distinct from the role played by A.2 and A.3 in the offence. Further, if the analogy of A.5 & A.6 is brought in, it may also be recalled that the bail application of A.4 was dismissed by me. I do not consider it appropriate to dismiss this bail application in limine on the ground that the bail application of A.4 was dismissed nor do I propose to allow this bail application summarily on the ground that A. 5 & A.6 had already been enlarged on bail. The case of each of the applicants in the present case has its own special dimensions. Consequently, each of the cases stands separately all by itself. I, therefore, consider it appropriate to deal with the case of A.2 & A.3 independently.

4. The N.C.B. officials effected seizure of the contraband. They also examined the accused u/s. 67 of N.D.P.S. Act. The learned counsel for the petitioners raised various contentions such as violation of Sections 42 and 50 of N.D.P.S. Act and also contended that the very mediators report was spurious. He referred to the mediators report dated 26.11.2013, which was computer typed in English and submitted that the signatures of the mediators were obtained on blank papers and the contents of the mediators report was subsequently prepared. The learned counsel for the petitioners drew my attention to various pages of the mediators report and particularly to page containing Annexure-A. There was a wide gap between the contents in Annexure-A and the signatures of the mediators. The learned counsel for the petitioners also submitted that same is the position in respect of Annexure-C. His contention is that had the report been prepared after the same was drafted, the signatures of mediators would have been just below the written portion in the pages containing Annexures A & C.

5. The learned Special Public Prosecutor for N.C.B., on the other hand, contended that the truth or otherwise of the mediators report cannot be considered at this stage and that it is only the trial which can determine about the acceptability of the mediators report. I make it clear that the petitioners also contended about the violation of Sections 42 & 50 of N.D.P.S. Act. Those questions will be considered separately. So far as the mediators report is concerned, one of the

contentions is that the very mediators report cannot be accepted as the same is not true. In this context, be it noted that the case is heard in respect of the bail application of A.2 & A.3. This is not a stage of final hearing. Considering the merits of the case including question whether the mediators report was true or otherwise does not fall for consideration at this stage. I am afraid that the mediators report has to be accepted and determine whether bail can be granted or not. The contention of the learned counsel for the petitioners that the very mediators report is false and has been drafted after the signatures of the mediators were obtained cannot be accepted at this stage.

6. The learned counsel for the petitioners contended that the provisions of Sec. 50 of N.D.P.S. Act are violated, so much so, the accused would be entitled to an acquittal. He further submitted that the accused, who are obviously liable to be acquitted, deserve to be enlarged on bail. Sec. 50 contemplates that if a person is sought to be searched, such a person shall be taken to the nearest Gazetted Officer or nearest Magistrate before whom the search can be made. In *Aswini alias Ashoka Kumar Behera Vs. State of Orissa*, , the Orissa High Court observed that the officer, who is empowered to search u/s. 42 of N.D.P.S. Act, should inform the person of his right to be searched before a Gazetted Officer or a Magistrate. In *Gurjant Singh @ Janta Vs. State of Punjab*, , the accused was proceeded against for the offence u/s. 50 of N.D.P.S. Act. The trial Court convicted him. The accused took the clear stand that the provisions of Sections 42 and 50 of N.D.P.S. Act were violated on the ground that search was not conducted in the presence of a Gazetted Officer or a Magistrate and on the ground that the accused was forcibly taken away from his house and a false case was foisted against him. The Supreme Court observed that the trial Court was incorrect in holding that Sections 42 and 50 were not applicable to the case on hand. It was further noticed that the compliance of Sec. 50 of N.D.P.S. Act would enable the accused to avail the opportunity of a Gazetted Officer concluding that there was no need for holding any search of the accused. Indeed, the Court held that compliance of Sections 50 and 42 of N.D.P.S. Act was mandatory.

7. The learned counsel for the petitioners placed other decisions to show that the provisions of Sections 42 and 50 of N.D.P.S. Act are mandatory and are to be complied with compulsorily. It would appear that the Special Public Prosecutor for N.C.B. has not been disputing the mandatory nature of Sections 42 & 50. Inter alia, he contended that the accused can raise such a defence at the time of trial and not at the time of grant of bail.

8. The learned counsel for the petitioners placed reliance upon other decisions to show that the accused is entitled to raise the question of violation of Sections 42 & 50 of N.D.P.S. Act at the time of grant of bail as well. Before going into this question, I may notice that Sec. 42 confers powers on the officials such as a) entry into building, b) search of the building, c) seizure of drugs liable for confiscation, d) seizure of documents or articles furnishing evidence of offence under the Act, e) seizure of conveyance liable to be confiscated, f) arrest of a

person, who is believed to have committed the offence and g) search of such a person. A conjoint reading of Sections 42 & 50 of N.D.P.S. Act shows that when a person is arrested by the officials having power to arrest or proposed to be seizure, search should be in the presence of a Gazetted Officer or a Magistrate. It is also evident that both the provisions of Sections 42 & 50 are mandatory and violation of the same may lead to acquittal of the accused.

9. In *Sewa Ram and Others Vs. State*, a learned single Judge of Allahabad High Court observed that question of violation of the provisions of Sections 42 & 50 of N.D.P.S. Act can be considered at the stage of grant of bail. Relying upon this decision, in *Dadan Singh Vs. State of U.P.*, the same Judge reiterated that the Court can examine about the violation of Sections 42 & 50 of N.D.P.S. Act at the time of grant of bail. The learned counsel for the petitioners cited a few other decisions but it was not held by any other Court that the defence for violation of Sections 42 & 50 of N.D.P.S. Act can be raised at the time of grant of bail. I consider that the violation of the provisions of Sections 42 & 50 of N.D.P.S. Act to the extent they are questions of fact cannot be considered in a bail application and that what is found on record however shall decide whether the provisions of Sections 42 & 50 of N.D.P.S. Act were complied with or violated by the officials at the time of search/arrest of an accused.

10. The learned counsel for the petitioners inter alia contended that the petitioners were not searched in the presence of a Gazetted Officer or a Magistrate. The learned Special Public Prosecutor contended that the mandatory provision u/s. 50 of N.D.P.S. Act applies in respect of search of a person but not in respect of premises. He contended that the case of the prosecution is that the contraband was found in Room No. 304, Vishnu Priya Lodge, but not the person of A. 1 to A.3 and that there was no search of A. 1 to A. 3 by the N.C.B. officials to follow the mandatory provision u/s. 50 of N.D.P.S. Act. This question indeed comes up for consideration at the time of trial. I do not, therefore, wish to go into this question at this stage. At any rate, in the remand report, it was recorded that when the N.C.B. officials informed A. 1 to A. 3 about their legal right that they can be searched in the presence of a Gazetted Officer or a Magistrate A. 1 to A.3 politely declined and also had given in writing that any official that was present could conduct personal search. Thus, it is evident from the remand report as well as from the statements of the accused that the accused did not want themselves to be examined in the presence of a Magistrate or any Gazetted Officer. Having chosen so, the petitioners cannot now turn round and claim that N.C.B. officials violated the provisions of Sections 42 & 50 of N.D.P.S. Act.

11. It is contended by the learned counsel for the petitioners that the accused were never asked whether they would like to be taken before a Gazetted Officer or a Magistrate, that the question of accused politely declining the offer did not arise and that the alleged written statement of the accused is false. Once again, the truth or otherwise of the alleged statements of the accused would come up for

consideration at the time of the trial. As at this moment, there are written statements by the accused that they were not insisting upon to be searched before a Magistrate or any Gazetted Officer. Consequently, I agree with the contention of the learned counsel for N.C.B. that the N.C.B. officials did not violate the mandatory provisions of Sections 42 & 50 of N.D.P.S. Act.

12. The learned counsel for the petitioners also contended that N.C.B. officials violated the provisions of Section 67 of N.D.P.S. Act. As already pointed out, Sec. 67 of N.D.P.S. Act confers powers on the officials to call for certain information from any person and that the authorized persons may examine any person acquainted with the facts and circumstances of the case. The alleged confession recorded u/s. 67 of N.D.P.S. Act is questioned by the learned counsel for the petitioners and contended that the statement of the accused u/s. 67 of N.D.P.S. Act itself is not admissible. In *Shahid Khan Vs. Director of Revenue Intelligence*, , a learned single Judge of this Court held that the statement of the accused recorded u/s. 67 of N.D.P.S. Act is not admissible and conviction cannot be based on the same. In *Tofan Singh Vs. State of Tamil Nadu*, , it was observed that confession cannot be recorded u/s. 67 of N.D.P.S. Act and a statement made u/s. 67 cannot be used as a confession. More important, it is the case of the learned counsel for the petitioners that the alleged confessions of the accused were statements on which the signatures of the accused were obtained by force and that the accused never made such confessions.

13. As already pointed out, this question once again comes up for consideration in the main case at the time of the trial and not in this petition for grant of bail. The prosecution violated the provisions of Sections 42, 50 & 67 of N.D.P.S. Act. The accused consequently do not deserve to be enlarged on bail. As much as 5.215 kgs. of Amphetamine/Methamphetamine was seized from the room where A. 1 to A. 3 were present. It is the case of the prosecution that A. 1 to A. 3 admitted that they were manufacturing Amphetamine/Methamphetamine in Balaji Labs. Thus, prima facie case was made out against the petitioners. U/s. 37(1)(b)(ii) of N.D.P.S. Act, the petitioners cannot be enlarged on bail unless a finding is issued that in all probability the accused are likely to be acquitted. I am afraid that the available record does not lead to the inescapability conclusion that there is possibility of acquittal of A.2 & A.3/petitioners herein. Where far beyond the commercial quantity of psychotropic substance was seized from A. 1 to A. 3, I am afraid that it would not be appropriate to consider enlarging the petitioners on bail. I, therefore, see no merits in this bail application.

14. The Criminal Petition is accordingly dismissed.