

(1993) 03 AHC CK 0051

In the Allahabad High Court

Case No : Criminal Miscellaneous Bail Application No. 2186 of 1993

Bal Mukund Jaiswal

APPELLANT

Vs

Bharat Sangh Dwara Aasuchana Adhikari Narcotic Control
Bureau

RESPONDENT

Date of Decision : 26-03-1993

Acts Referred:

Constitution of India, 1950 — Article 22, 22(2)
Criminal Procedure Code, 1973 (CrPC) — Section 167, 173, 4(2), 88
Evidence Act, 1872 — Section 25, 36A
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 22, 37, 41(2), 42, 43

Citation : (1993) 2 ALT(Cri) 9 : (1993) AWC 1683 : (1994) CriLJ 818

Hon'ble Judges : V.N. Mehrotra, J

Bench : Single Bench

Advocate : Daya Shankar Misra, for the Appellant; A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

V.N. Mehrotra, J.—This application for bail has been moved by the applicant in a case u/s 8/22 of the Narcotic Drugs and Psycho-tropic Substances Act (hereinafter referred to as the Act).

2. According to the prosecution case, Sri S.P. Singh, an officer of the Narcotics Control Bureau, Varanasi, on receiving information that the applicant Bal Mukund Jaiswal was dealing in psychotropic substances at his house situated in Kabirchaura, Varanasi, reached that place at 7.00 a.m. on 26-11-1992. It is said that the officer concerned was accompanied by other officers and constables of the Narcotic Control Bureau. He had also collected two witnesses of the locality before starting with the search of the house of the applicant. It is said that the search of the house of the applicant yielded more than 60,000 Gardenal tablets. It is asserted that the said tablets came within the definition of "psychotropic substances". The officer concerned also recovered certain documents from the house of the applicant which related to the alleged purchase and sale of the

above tablets. It is also said that at the time of search, the applicant disclosed to the officer concerned about his activities regarding the sale and purchase of the psychotropic substances. The recovery memo was prepared on the spot which was signed by the officers of the Narcotics Control Bureau, the witnesses of recovery as well as by the applicant. It is said that a copy of the recovery memo was also supplied on the spot to the applicant. The applicant was taken into custody. He was produced before the Magistrate concerned on 27-1-1992 and was remanded to the judicial custody.

3. The first point, which has been pleaded by the learned Counsel for the applicant in support of his plea for bail, is that in this case no FIR was lodged by the officer concerned at the Police Station nor any investigation under the Code of Criminal Procedure (hereinafter referred to as the Code) was initiated or was pending and so the officer concerned cannot be termed as a Police Officer and as such he could not seek remand of the applicant u/s 167 of the Code. Before considering these arguments, it will be proper to refer to the relevant provisions of the Act and the Code. Section 37 of the Act runs as under :

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 a term of imprisonment of five years or more under this Act 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, or any other law for the time being in force on granting of bail.

It is obvious that the restrictions placed under Sub-section (1) of Section 37 of the Act are in addition to the limitations on granting of bail under the Code of Criminal Procedure. These limitations or restrictions are applicable to the High Court also as observed in the case of Narcotics Control Bureau Vs. Kishan Lal and others,

4. Under the provisions of Sub-section (2) of Section 41 of the Act, the Central Government can authorise an officer of gazetted rank of the department of narcotics by general or special order, and such an officer can authorise any officer subordinate to him but superior in rank to a peon, sepoy, or a constable,

to arrest such a person or search a building, conveyance or place whether by day or night, or himself arrest a person or search a building, conveyance or place, if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under Chapter IV of the Act. Section 42 of the Act relates to the power of entry, search, seizure and arrest without warrant or authorisation. An officer, who has been empowered by the Central Government or a person who has been authorised by such officer, can inter alia, enter into and search any such building, conveyance or place. He can also arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV of the Act. Section 51 of the Act, provides that the provisions of the Code of Criminal Procedure, 1973 shall apply, in so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act. Under Subsection (1) of Section 53 of the Act, the Central Government, after consultation with the State Government, may by notification published in the Official Gazette, invest any officer of the department of Central Excise, narcotics, etc. with the powers of an officer-in-charge of a police station for the investigation of the offences under this Act.

5. It is, at this stage, not disputed that the officer of the Narcotics Control Bureau, who conducted the search and arrested the applicant, was authorised to do so. It is also not disputed that the officer concerned of the department of narcotics has been invested with the powers of an officer-in-charge of a police station for the investigation of the offence under this Act. The question now arises as to whether such an officer, who has been invested with the powers of an officer-in-charge of a police station for the purposes of investigation, can produce the accused, who has been arrested for the alleged commission of offence punishable under the Act, before a Magistrate for seeking remand of the accused, and whether, in such a case, the Magistrate can remand the accused to custody. The learned Counsel for the applicant has argued that an officer of the narcotics department, who has been invested with the powers of an officer-in-charge of a police station for the purpose of investigation, cannot be termed as a "Police Officer" and so the provisions of Section 167 of the Code, relating to the remand of the accused cannot be applicable. The learned Counsel has referred to the decision of the Supreme Court in the case *Raj Kumar Karwal Vs. Union of India and others*, in support of his contention that an officer of the narcotics department, invested with the powers of an officer-in-charge of a police station, cannot be said to be a "police officer". In this case the point for decision before the Hon"ble Supreme Court was whether an officer invested with the powers of an officer-in-charge of a police station u/s 53 of the Act can be termed as "a police officer" within the meaning of Section 25 of the Evidence Act, 1872. This question arose as it was alleged that there was confessional statement of the accused after he was arrested by the officer of the narcotics department and an objection was raised about the admissibility of that confessional statement on the ground that the provisions of Section 25 of the Evidence Act were applicable to

such a case. Their Lordships considered and repelled this argument. It was observed that an officer, of the narcotics department invested with the powers of an officer-in-charge of a police station for investigation of the offence under the Act, does not possess the power to submit a report u/s 173 of the Code. Such an officer can only file a complaint before the Court concerned in view of the provisions of Section 36A of the Act. It was observed that such an officer is not entitled to exercise "all" the powers under Chapter XII of the Code including the power to submit a report or charge-sheet u/s 173 of the Code. Obviously, the point for determination in this case was quite different. It was neither asserted nor decided that an officer authorised u/s 53 of the Act, could not seek remand of the accused u/s 167 of the Code, as such an officer has not been invested with "all" the powers of a police officer under the Act. Sub-section (3) of Section 52 of the Act, provides :

(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 :--

(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered u/s 53.

6. Under the Sub-section (4) of this section, the authority or officer to whom any person or article is forwarded under Subsection (2) or Sub-section (3), is required to take such measures as may be necessary for the disposal according to law of such person or article. In this act, the manner and mode of investigation by the officer authorised u/s 53 of the Act has not been provided. Subsection (2) of Section 4 of the Code provides that all offences under any other law shall be investigated inquired into tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

7. Considering these provisions, unless something is inconsistent in the Act, the investigation of the offences punishable under the Act, are to be investigated as provided under the Code.

8. As mentioned earlier, the concerned Officer of the narcotics department has been invested with the powers of an officer-in-charge of a police station for the purpose of conducting investigation. That officer is bound to take measures, as may be necessary for the disposal according to law of the person arrested, as mentioned earlier. The question will arise that in case the provisions of Section 167 of the Code are not applicable then what such an officer is required to do with the person who has been arrested and who is in his custody. Article 22(2) of the Constitution of India provides "Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no such person shall

be detained in custody beyond the said period without the authority of a magistrate. (Emphasis supplied). Thus, under this provision, the officer concerned, who has arrested the accused or in whose custody the accused is, is bound to produce the accused before the Magistrate concerned within the period mentioned under this provision. The officer concerned cannot keep the accused in his custody beyond that period as the same will amount to the breach of fundamental rights of the accused. u/s 57 of the Code also, the accused is required to be produced before the magistrate within the above mentioned period and in the absence of a special order of the Magistrate u/s 167 of the Code the accused cannot be kept in custody for a longer period. The question now arises that when the officer concerned, who has arrested the accused or who has been authorised to investigate the offence u/s 53 of the Act produces the accused before the Magistrate concerned can the Magistrate remand the accused to custody as provided u/s 167 of the Code or he cannot do so. In case it is held that the Magistrate cannot remand such an accused to custody for the alleged reason that the accused has not been forwarded before him by the police officer, then a very difficult situation will arise. In such a case, the accused cannot be kept in custody for a longer period by the officer concerned as that will be violative of Article 22 of the Constitution, nor such an accused can be released by him as it will amount to breach of provisions of Section 57 of the Act, referred to above.

9. The learned Counsel for the applicant has argued that unless there is a provision for remand, the Magistrate has no authority to do so. The learned Counsel has referred to Section 88 of the Code and has suggested that under this provision, the Magistrate can direct the accused to execute a bond with or without sureties, for his appearance before the Court where the trial may be conducted. I am, however, unable to agree with this argument. Section 88 of the Code cannot be applied to a person who is already under custody. In case of such a person, the only remedy is to seek remand u/s 167 of the Code. A similar question arose in the case *Teer Singh and Anr. v. State*, registered as Criminal Misc. Case No. 2085(B) of 1986, which was decided by Hon'ble G. B. Singh, J. on 4th February, 1987. In this case, his Lordship repelled the contention that the officer of the narcotics department, who was investigating the case, could not obtain the remand of the accused. Similarly, in the case of *Hamid Ullah Vs. State of U.P. and Another*, , the order of remand granted by the Magistrate for producing the accused before him by the officer of the excise department was challenged. It was held that the officer concerned could seek order of remand u/s 167 of the Code.

10. On a consideration of the provisions of law and the above mentioned rulings, I am of the view that the officer concerned of the narcotics department could seek remand of the accused u/s 167 of the Code and the contention of the learned Counsel for the applicant to the contrary cannot be accepted.

11. The learned Counsel for the applicant has then argued that the applicant was

not produced before the Magistrate within the period of twenty four hours of his arrest and so the provisions of Article 22(2) of the Constitution and Section 57 of the Act have been infringed. This assertion has been denied on behalf of the Union of India by filing a counter-affidavit. In para 8 of the affidavit filed on behalf of the applicant by one Jagdish Prasad. It has been asserted that actually the accused was arrested at 5.00 a.m. on 26-11-1992 but was not produced before any Magistrate. It has been also asserted that the signatures and thumb impressions of the applicant were taken on certain papers forcibly by the officers concerned on 27-11-92 and further, those officers obtained illegal remand order at 5.00 p.m. on the same day without producing the applicant before the Magistrate. These allegations have been denied on behalf of the opposite party in the counter-affidavit. I am, at this stage, unable to hold that the applicant was arrested at 5.00 a.m. or he was taken to the Court of Magistrate at 4.00 p.m. on 27-11-1992 and his remand was obtained on that day without producing him before the Magistrate concerned. The recovery memo, which was allegedly signed by the accused indicates that the officers concerned, accompanied by others, had reached the house of the applicant at 7.00 a.m. It must have taken a long time to conduct search as well as to prepare the recovery memo and other connected documents and to seal the recovered articles and take sample. After that, the applicant was taken into custody. The learned Counsel for the opposite party has filed certified copy of the remand sheet relating to the applicant which shows that the applicant was, in fact, produced before the Chief Judicial Magistrate, Varanasi at 2.45 p.m. on 27-11-1992 and the learned Magistrate remanded him to judicial custody for a period of 14 days. This remand sheet also shows that the recovery memo as well as the recovered articles were also produced before the Magistrate. In view of this, it is difficult to accept the contention that the officer concerned had obtained the remand order at 5.00 p.m. on that day without even producing the accused before the Magistrate. It does not prima facie appear that the breach of provisions of Article 22(2) of the Constitution of India was committed in this case.

12. The next contention by the learned Counsel for the applicant is that the applicant was not informed about the grounds of his arrest immediately after his arrest. This contention has also been denied on behalf of the opposite party. The learned Counsel for the opposite party has also referred to the detailed recovery memo which bears the signatures of the applicant also in which all the facts about the recovery have been mentioned. The recovery memo also mentions that the officer concerned had told the applicant about the offence which he has committed. It further mentions that the applicant understood the contents of the memo before he signed the same. The recovery memo also bears an endorsement by the applicant that he had received the copy of the memo along with the sample of seal. Considering these facts, it cannot prima facie be said that the applicant was not informed about the grounds of his arrest at the time he was arrested.

13. The learned Counsel for the applicant has further argued that in this case the

officer concerned has committed the breach of the mandatory provisions of Sections 42, 50, 52, 52A, 55 and 57 of the Act. On behalf of the opposite party, this assertion has been denied by filing counter-affidavit. It has been asserted that the provisions of these sections have been complied with.

14. The learned Counsel for the applicant has referred to the judgment delivered by Hon'ble I.S. Mathur, J. on 10th February, 1993 in Criminal Misc. Bail Application No. 14479 of 1992 *Dadan Singh v. State of U.P.* in which it has been held that the provisions of Ss. 42 and 50 of the Act were mandatory and in case, these provisions have been violated and it has not been shown that no prejudice was, in fact, caused to the applicant, then the applicant shall be entitled to bail.

15. First coming to the provision of Section 42 of the Act, the argument by the learned Counsel for the applicant is that as the officer concerned, who had conducted the search, had not taken down in writing the information allegedly given by any person to him before the search, it amounts to the breach of this provision. It is true that such a provision has been made u/s 42 of the Act. The question arises as to whether such a provision has been actually violated and if so, what will be the effect of the same. As mentioned earlier, though the applicant has asserted that the officer concerned has committed breach of provision of Section 42 and other sections of the Act, this assertion has been specifically denied on behalf of the opposite party Union of India. Obviously, this matter can be decided on the basis of the evidence which may be produced in the case. In my view, it cannot properly be decided only on the basis of the affidavits exchanged between the parties. The parties will have an opportunity to raise this contention before the trial Court, who will consider and decide the same on the basis of oral and documentry evidence which may be produced before him.

16. In the case of *Yogesh Kumar alias Tillu v. State of U. P.*, (1993) 21 All LR 109 , a Division Bench of this Court considered the effect of non-compliance of the provisions of Sections 42, 43 and 50 of the Act. A number of decisions by the Hon'ble Supreme Court were referred to and relied upon. It was held that in case the search was illegal and was in contravention of any provisions of Sections 42 and 50 of the Act, the F.I.R. and investigation in consequence thereof and the trial of the petitioner, cannot be quashed. The learned Judges referred to the observations in the case of *Dr Partap Singh and Another Vs. Director of Enforcement, Foreign Exchange Regulation Act and Others*, that the illegality of the search does not vitiate the evidence collected during such illegal search. The only requirement is that the Court or the authority, before which such material or evidence seized during the search shows to be illegal is placed, has to be cautious and circumspect in dealing with such evidence or material. In the present case, as mentioned earlier, it is too early to say that the provisions of Section 42 or other Sections of the Act have been violated by the officer concerned. This matter can be properly considered and decided when the parties have opportunity to lead evidence, ? oral or documentary, before the trial Court

particularly in view of the fact that on behalf of the opposite party, it has been specifically denied, by filing counter-affidavit, that the provisions of these sections of the Act were violated.

Further, it will be for the trial Court to first consider as to whether the provisions of these Sections were, in fact, violated and if so, what will be the effect of the same on the evidence which is produced by the prosecution in support of its plea regarding the guilt of the accused.

17. The learned Counsel for the applicant has also referred to the provisions of Section 50 of the Act and has argued that at the time of search, the officer concerned did not inform the applicant that he can be searched in presence of the Magistrate or Gazetted Officer. In my view, the provisions of Section 50 of the Act cannot be made applicable in the present case as it relates to the search of any person and not to the search of any premises. In the present case, actually the applicant was not searched but his premises were searched and the recovery of the articles was made from those premises. As regards the alleged violation of Section 52 and other sections of the Act, the same observations which I have made earlier, will be applicable.

18. The learned Counsel for the applicant has then argued that on facts also, the applicant is entitled to bail. It is asserted that a telegram was sent to the S.S.P. at 10.25 a.m. on 26-11-1992 mentioning that actually the applicant was arrested at 5.00 a.m. A copy of the telegram has been annexed with the affidavit filed in support of the petition. It was allegedly sent by the brother of the applicant at 10.25 a.m. i.e. after the premises of the applicant had been searched by the officer concerned. On behalf of the opposite party, it has been denied that the applicant was arrested at 5.00 a.m. or he and witnesses of the recovery were taken away by the Officer concerned. At this stage, there is no sufficient ground to come to the conclusion that the search did not take place at 7.00 a.m. or that the applicant was arrested at 5.00 a.m. on 26-11-1992. This matter can properly be considered and decided at the stage of trial.

19. The learned Counsel for the applicant has then argued that both the witnesses of the search have filed affidavits denying the prosecution allegations. According to these witnesses, no recovery memo was prepared in their presence but they along with the applicant were taken to the police station. The effect of these affidavits can obviously be considered at the stage of trial, more so, when the recovery memo was actually signed by these witnesses. Apart from these witnesses, there are other witnesses also who are officers and employees of the department concerned in whose presence the search was conducted. It is for the trial Court to judge the veracity of those witnesses. The present case is not such a case in which some small quantity of psycho-tropic substance might have been planted on the person or the premises of the applicant. As mentioned earlier, more than 60,000 tablets of psychotropic substance were allegedly recovered from the premises of the applicant. I am for this reason unable to hold, at this stage, that there are reasonable grounds for believing that the applicant is not

guilty of the offence under the Act. Further, the officer concerned has in the recovery memo recorded the alleged confessional statement made by the applicant regarding his dealing with the narcotic substance in the past. Considering these facts, I am also not satisfied that the applicant is not likely to commit any offence under the Act while he is on bail.

20. The learned Counsel for the applicant has also raised the plea that actually the Gardenal tablets which were allegedly recovered from the premises of the applicant cannot be said to be "psychotropic substance". I am, however, unable to agree with this argument at this stage. The trade name of these tablets is Gardenal but the international name is said to be "phenobarbitone" which is a psychotropic substance. The recovery memo also indicates this fact. In the circumstances, it is at this stage, not possible to come to the conclusion that the tablets cannot be said to be psychotropic substance.

21. It should not be forgotten that the offences under the NDPS Act are very serious and grave and people indulging in such offences are causing havoc to the health of the inhabitants of this world. The Legislature has thought to prescribe very deterrent punishment for committing the offences under this Act. The offences which have such serious effect on the health of the people are always to be dealt with a heavy hand. A person found committing such offences, normally does not deserve to be released on bail.

22. On a consideration of the arguments by the learned Counsel for the parties and the material placed before me, and also on consideration of the relevant provisions of law, as referred to above, I am of the view that it will not be just and proper to grant bail to the applicant. The bail application is rejected.