

(2016) 09 AP CK 0020
In the Andhra Pradesh High Court
Case No : Crl. P No. 12461 of 2016.

Bhaskara Govindu and another - Petitioners @HASH State of Andhra Pradesh

Date of Decision : 16-09-2016

Acts Referred:

Citation : (2017) 1 AICLR 737 : (2016) 3 ALTCrI 477 : (2016) 2 AndhLDCriminal 961

Hon'ble Judges : C. Praveen Kumar, J.

Bench : Single Bench

Advocate : G. Venkata Reddy, Advocate, for the Petitioners; Public Prosecutor (AP), for the Respondent

Final Decision : Allowed

Judgement

C. Praveen Kumar, J. - The petitioners, who are accused Nos. 1 and 2, filed the present criminal petition, under Sections 437 and 439 Cr.P.C., seeking enlargement on bail in Crime No.138 of 2016 of Anakapalli Town Police Station, Visakhapatnam, registered for the offences punishable under Sections 8(c) and 20(b)(ii)(a) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short The NDPS Act").

2. The case of the prosecution is as under:

On 3.7.2016 at about 2.00 p.m., on receipt of credible information that two male persons are moving under suspicious circumstances with luggage, the Sub-Inspector of Police along with his staff rushed towards Anakapally Railway Station. On seeing the police, the said two persons tried to run away, but the S.I. of Police along with his staff apprehended both of them. After receiving instructions from the Sub-Divisional Magistrate, Anakapalli, a notice under Section 50 of the NDPS Act was served and their signatures were obtained on the original notice in the presence of mediators for causing their production with the suspected contraband before the nearest Gazetted Officer i.e., Medical Officer, Area Government Hospital, Anakapally. Thereafter, the S.I. of Police along with the staff recorded the statements of the accused, who disclosed purchase of 44

Kgs., of contraband. Later, the S.I. of Police and his staff produced the accused before the Medical Officer for conducting proceedings under Section 50 of the Act.

The averments in the remand report show that the Medical Officer after searching the bags, which contained ganja, also searched the person of accused Nos. 1 and 2 and recovered one Lenovo Cell Phone, one Karbon Cell Phone and cash of Rs. 5,600/- from accused No. 1 one NJ Cell Phone and cash of Rs. 3,900/- from accused No. 2. Basing on the search and seizure, the above case came to be registered.

3. Heard the learned Counsel for the petitioners and the learned Public Prosecutor (AP) appearing for the respondent-State.

4. Learned Counsel for the petitioners mainly submits that the procedure that is followed by the investigating agency at the time of search and seizure is contrary to Sections 42 and 50 of the Act. He further submits that the Medical Officer, who acted as Gazetted Officer is not the prescribed officer under Section 50 of the Act as he is not authorised to conduct search under Section 42 of the Act. Learned Counsel further submits that since a joint notice came to be issued to both the accused, the same is contrary to law laid down by the apex Court in *State of Rajasthan v. Paramanand and another*, 2014 (1) ALD (Crl.) 909 (SC) = (2014) 5 SCC 345. The same is opposed by the learned Public Prosecutor, but, however, he admits that no separate circulars are issued by the Government authorising the Medical Officers to act as Gazetted Officers for the purpose of search and seizure of contraband as required under Section 50 of the Act.

5. Section 37 of the NDPS Act prohibits grant of bail under certain circumstances. As per Section 37(1)(b) of the Act, no person accused of an offence punishable under Section 19 or 24 or 27(a) and also for the offences involving commercial quantity shall be released on bail if the Court is satisfied that there are reasonable grounds for believing that he is not guilty of said offences and that he is not likely to commit an offence while on bail. Therefore, under Section 37(1)(b) of the Act unless there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit an offence, while on bail, alone will entitle him to bail.

6. The question is whether the accused would be entitled for bail if the material on record produced by the prosecution show that there was a violation of the mandatory provisions of the Act?

7. In *Babua alias Tazmul Hossain v. State of Orissa*, 2002 (2) ALD (Crl.) 157 (SC) = (2001) 2 SCC 566, the apex Court, while dealing with the release of the accused on bail, who was charged with the offence punishable under the provisions of the NDPS Act, observed as under

"In view of Section 37(1)(b) of the Act unless there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail alone will entitle him to a bail. But those

reasons would be insignificant if we bear in mind the scope of Section 37(1)(b) of the Act. At this stage of the case all that could be seen is whether the statements made on behalf of the prosecution witnesses, if believable, would result in conviction of the petitioner or not."

8. In *Sarija Banu alias Janarthani alias Janani v. State through Inspector of Police*, (2004) 12 SCC 266, the apex Court, while considering the release of the accused on bail in respect of offence punishable under Sections 20(b)(ii)(C) and 25 of the NDPS Act, observed as under:

"It is pertinent to note that in the bail application of the appellants, it was alleged, that there was serious violation of Section 42 of the NDPS Act. In the impugned order nothing is stated about the alleged violation of Section 42, and it is observed that it was not necessary to consider such violation at this stage. The compliance with Section 42 is mandatory and that is relevant fact which should have engaged the attention of the Court while considering the bail application.

In the aforesaid circumstances having regard to the special facts of the case, we direct that appellants 1 and 2 be released on bail on executing a bail bond for Rs. 50,000/- each with two solvent sureties for the like amount to the satisfaction of the Special Judge, EC/NDPS, Madurai."

9. In *Superintendent, Narcotics Control Bureau, Chennai v. R. Paulsamy*, (2000) 9 SCC 549, the apex Court, while dealing with a bail application filed by the accused for non-compliance of Sections 52 and 57 of the Act, observed as under:

"In the light of Section 37 of the Act no accused can be released on bail when the application is opposed by the Public Prosecutor unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. It is unfortunate that matter which could be established only in offence regarding compliance with Sections 52 and 57 have been pre-judged by the learned Single Judge at the stage of consideration for bail. The minimum which the learned Single Judge should have taken into account was the factual presumption in law position that official acts have been regularly performed. Such presumption can be rebutted only during evidence and not merely saying that no document has been produced before the learned Single Judge during bail stage regarding the compliance with the formalities mentioned in Sections 52 and 57.

10. Learned Public Prosecutor main relied upon the judgment of the apex Court in *Palswamy* case (*supra*), to show that non-compliance of the mandatory provisions would not entitle the petitioners for bail. But, in the said case, the apex Court was dealing with non-compliance of Sections 52 and 57 of the Act. Dealing with the observations made by a learned Single Judge with regard to non-compliance of Sections 52 and 57 of the Act, the Court found fault with the same since there was some discrepancy with regard to informing the accused about his grounds of arrest as the same was not reflected in the Mahazar or in the Remand Report. Further, no document was produced to show that the report was sent to

the immediate superiors within 48 hours, as required under Section 52 of the Act.

11. The above judgment may not apply to the case on hand for the reason that to establish non-compliance of Sections 52 and 57 of the NDPS Act, evidence has to be adduced, which can be done only during the course of trial. Compliance of Sections 52 and 57 of the Act cannot be recorded in the proceedings, which are prepared at the time of search or after the search. Situation on hand is different. It is the case of the accused that there is gross violation of Section 50 of the NDPS Act, which stands established from the mahzama, prepared immediately after the search.

12. As seen from the record, the petitioners herein were searched before a Gazetted Officer, as required under Section 50 of the NDPS Act, who is a Medical Officer in Area Government Hospital, Anakapally.

13. Section 50(1) of the NDPS Act states that when any officer duly authorised under Section 42 of the NDPS Act is about to search any person under the provisions of the Section 41, 42 or 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 of the Act or to the nearest Magistrate. Section 42 of the Act gives a list of officers/departments, who are authorised or competent to enter search, seize and arrest without warrant or authorisation. Section 42 states that any such officer (being an officer superior in rank to a peon, sepoy or constable) of the department of Central Excise, Narcotics, Customs Revenue, Intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the Revenue, Drugs Control, Excise, Police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government is authorised to search and seize.

14. A reading of the above makes it clear that there is no reference to an officer of a Medical Department being authorised to affect the search and seizure. Therefore, prima facie, it appears that there is a clear violation of Section 50 of the Act. Apart from that, the contents of the panchanama or the Remand Report do not anywhere indicate giving individual notice to each of the accused, as per the judgment of the apex Court in *State of Rajasthan v. Paramanand and another* (supra). The relevant portion of the judgment is as under:

"In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has

to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. Therefore, we are of the view that the accused must be individually informed that under Section 50(1) of the Act, he has a right to be searched before the nearest Gazetted Officer or before the nearest Magistrate."

15. Therefore, viewed from any angle, it appears to be a case where, prima facie, there is violation of Section 50 of the Act, which vitiates the search and seizure. Further, the learned Public Prosecutor did not express any apprehension that the petitioner is likely to commit any offence under this Act, if released on bail. In fact, the record does not anywhere indicate that the petitioner is involved in offences of this nature. Having regard to the above circumstances, the bar under Section 37 of the Act, as urged by the learned Public Prosecutor, may not come in the way to grant bail. Hence, the request of the petitioners can be considered on certain terms and conditions.

16. Accordingly, the criminal petition is allowed and the petitioners shall be released on bail on their executing a bond for Rs. 20,000/- (Rupees twenty thousand only) with two sureties for a like sum each to the satisfaction of the V Metropolitan Magistrate, Anakapalli, and on a further condition that they shall appear before the Station House Officer, Anakapalli Town Police Station, once in a week i.e., on every Saturday between 10.00 a.m., and 5.00 p.m., for a period of six weeks or till filing of the charge-sheet whichever is earlier.