

(2010) 05 MP CK 0037

In the Madhya Pradesh High Court

Case No : Miscellaneous Cr. Case No. 8321 of 2009

Chand Khan

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 11-05-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 437(3), 439
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 15, 37, 50, 8
Penal Code, 1860 (IPC) — Section 294, 323, 34, 506

Citation : (2010) 4 MPHT 262

Hon'ble Judges : J.K. Maheshwari, J

Bench : Single Bench

Judgement

J.K. Maheshwari, J.—This is first bail petition u/s 439 of Cr.P.C. The applicant is in custody with effect from 26-3-09 in connection with Crime No. 192/09, registered at Police Station, City Kotwali, Mandsaur for the offence punishable under section 8/15 of the Narcotic Drugs & Psychotropic Substances Act (hereinafter referred to as "NDPS Act").

2. As per prosecution allegation on the information of the informant a raid was conducted near Pashupatinath Mahadeo Temple Gate, Mandsaur. Thereupon two persons were found standing and inside two bags were there. Thereafter, the search of the bags was taken, wherein possibility of Poppy Straw was found. They were apprised of their right u/s 50 of NDPS Act. The entire investigation was conducted and then offence u/s 8/15 of the NDPS Act was registered against them.

3. Learned Senior Advocate, Shri Z.A. Khan contends that the applicant has been falsely implicated in this case. It is submitted by him that he was illegally detained about 10 days back City Kotwali, Mandsaur for the offence registered under sections 323, 294, 506 and 506/34 of the IPC, on a complaint made by one Aarif Parshad, joining the applicant as one of the accused. In Sessions Trial No. 134/07, pending in the Court of 2nd Additional Sessions Judge, Mandsaur the

present applicant was the accused and required to appear along with other accused person in the said Court on 25-3-09, i.e., date fixed for evidence. The applicant could not have appear; however, 2nd Additional Sessions Judge, Mandsaur directed to forfeit the bail bonds of applicant and to recover the amount from surety. The co-accused of the said case has filed an application on the same day, i.e., 25-3-09, for recalling the order of forfeiture of the bail bonds specifying the fact that the applicant has been kept into illegal custody in City Kotwali, Mandsaur in Crime No. 161/09, i.e., the offence registered on the complaint of Aarif Parshad. In support of the said application affidavit was filed; later on, the Court has passed the order on 25-3-09 itself and recalled the order of forfeiture of bail bonds, satisfying the reason of the absence of applicant. It is also contended that because the application was filed in the Court complaining the illegal custody; however, showing the incident of night and intervening night of 25/26-3-09 the present applicant has been made accused in this case under section 8/15 of the NDPS Act, though, he was already in the illegal custody in the same police station. In view of the aforesaid it is urged that prima facie it is a case of false implication.

4. It is further contended by him that in the investigation of this case the age of applicant has shown 35 years in various papers while in the offence of Crime No. 161/09 his age has shown 45 years, though both the offences are investigated in the same police station. My attention has been drawn to the of the search of applicant as required u/s 50 of the NDPS Act, thereby it appears that the applicant voluntarily offered of his search before Gazetted Officer or before Magistrate, but the word has been subsequently added in the said Panchnama which may be gathered from the naked eyes, because the writing, ink and ball pen to write the said word is different. It is submitted that accused is having right to have his search before Magistrate or a Gazetted Officer u/s 50 of the NDPS Act, which is mandatory and non-compliance is fatal; thus, on this ground alone the applicant is entitled to be acquitted.

5. It is further contended by him that on going through the order-sheet of the Special Judge NDPS Mandsaur, before whom the present applicant was produced on 26-3-2009 in this case as well as the order-sheet of the CJM Court, Mandsaur of production of the applicant in Crime No. 161/09 does not indicate that the officers have brought this fact to the knowledge of the Courts. More so, the intimation received in the NDPS Court regarding arrest is at 3.30, which is apparent from the record, though he was produced in the said Court prior to the same and, thereafter, in Crime No. 161/09 before the CJM. In view of the aforesaid submission it is urged that the applicant has been falsely implicated, because he has complained to the Court regarding his illegal custody on 25-3-2009 in 2nd ASJ Mandsaur. Thus, in the evening of 25-3-09 police authorities have made him accused in this case. In view of the said submissions prayer is made to release the applicant on bail.

6. On the other hand, Shri Raghuveer Singh, Deputy Government Advocate

contends, that it is a case in which the applicant was found involved in an offence u/s 8/15 of the NDPS Act and 65 Kgs of Poppy Straw has been recovered from two bags found in possession of the present applicant and one other accused. The investigation has been completed on the same day, i.e., 25-3-09 from 10 p.m. to 2.25 a.m. of 26-3-09 and, thereafter, the applicant has rightly been taken into custody and produced before the Special Judge. It is said that applicant was also the accused of an offence registered at Crime No. 161/09, therefore, in the said case formal arrest was shown and later produced before the CJM Court. As he was not in a position to furnish the bail bonds before CJM Court, therefore, he has rightly been sent to judicial custody. Thus, merely submitting an application before the 2nd ASJ Court on 25-3-09 may not be sufficient to create suspicion of false implication in this case. It is also contended by him that the report was called for by this Court from the Courts as well as the Superintendent of Police, Mandsaur thereby it does not reveal that any discrepancy in investigation is there. So far as consent memo of search is concerned, it is a matter of trial and, as such, at the stage of bail no inference may be drawn. However, it is urged that the bail may not be granted to the applicant as bar u/s 37 of the NDPS Act attracts, if the objection has been made by the Public Prosecutor.

7. After having heard learned Counsel for the parties and on perusal of the original record which is called for, by this Court, I find that there is overwriting in the time of incident in FIR. It is also found that in the personal search memo of the present applicant the word has been added. It further appears that the ink ball pen and writing of the said word is different, the said addition may be visualized by naked eyes. It is not in dispute that the said memo relates to compliance of section 50 of the NDPS Act, which is mandatory and its non-compliance may result into acquittal of accused; coupled with the fact that on 25-3-09 itself an application was submitted before the 2nd ASJ Court that applicant has been illegally detained in other offence of Crime No. 161/09 long back; however, his absence in Special Sessions Trial No. 134/07 on 25-3-09 found bonafide allowing the application. It is also seen that neither before the Special NDPS Court nor before the CJM it has been disclosed that he is in custody in different case also and produced in Court on the same date. It is also seen that two bags of Poppy Straw were seized from the road and in the personal search nothing was found from the present applicant; however, the issue of conscious possession is also involved. On perusal of the original record of this case as well as the case diary of Crime No. 161/09, which are of the same police station the age of the present applicant in one case is shown as 35 years, while in the another case he has been shown of 45 years. All these facts are sufficient to arrive at conclusion of possibility of false implication of applicant. At this stage, I am not recording any specific finding, because it may affect the merit of the case during trial, therefore, prima facie I am of the opinion that by brushing aside the bar of section 37 of the NDPS Act the applicant deserves to be enlarged on bail.

8. Considering the aforesaid, without commenting on the merits of the case and

subject to final outcome of trial, I allow this bail petition and direct that applicant be released on bail subject to his furnishing a personal bond in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of the CJM/JMFC concerned for his appearance before him or Trial Court, as the case may be, on all dates of hearing fixed in this behalf by the Court concerned during trial and subject to abiding the conditions as specified u/s 437(3) of the Cr.P.C. The observations made hereinabove relates to the consideration of bail petition and the Trial Court while deciding the case on merits shall not be influenced by those observations.