

(1994) 07 MP CK 0049

In the Madhya Pradesh High Court

Case No : Miscellaneous Cri. Case No. 3462 of 1993

Ramchandra Jagdish Vijaywargiya

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 29-07-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 437, 439

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 37, 55, 57

Citation : (1994) JLJ 706 : (1995) 40 MPLJ 41 : (1995) MPLJ 41

Hon'ble Judges : Jayant Govind Chitre, J

Bench : Single Bench

Advocate : M.A. Khan and J.K. Joshi, for the Appellant; Girish Desai, Dy. Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

J.G. Chitre, J.

The applicant is praying for bail. He has been charged for committing offences punishable u/s 8/18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the N.D.P.S. Act")

Prosecution case is that on 9-9-1993 about 8.15 p.m. T.I.S.M. Khan in charge of P. S. Rajendra Nagar, Indore got information that a person wearing cream colour shirt and travelling in a private V.D.O. Coach bus bearing No. MPO-9 from Indore to Bombay was possessing brown sugar. Thereafter, the police took necessary steps and the applicant was caught in the said bus. 5 kgs. of brown sugar was found kept in a bag hanging on the shoulder of the applicant. The search was taken in presence of panch witnesses.

Learned counsel for the applicant Shri M. A Khan with Shri J. K. Joshi submitted that important provisions of NDPS Act have not been complied with by the prosecution and that has resulted in injustice. He placed reliance on a judgment of Supreme Court in the matter of State of Punjab v. Balbirsingh reported in

Judgments Today 1994 (2) at page 109 and submitted that Supreme Court has held that provisions of Section 50 are mandatory and non-compliance of that is fatal. He submitted that it is the duty of the officer who is searching the person of the accused to inform him that the said accused has a right to get searched before a Magistrate or Gazetted Officer, and in the present matter that has not been done. He further submitted that in the present matter, the police played trick and got consent from the accused indicating that he was ready to be searched by members of raiding party in presence of panch witnesses. Shri Khan further submitted that in the present matter the raiding party did not comply with mandatory provisions of Section 57 of the Act also. He further pointed out that some other relevant provisions have also not been complied with and that has led to failure of justice. In these circumstances, making reference to the judgment of Supreme Court in the matter of Balbirsingh (supra) and also a judgment of M. P. High Court in the matter of Ram Dayal v. Central Narcotic Bureau reported in 1993 Cri.L.J. 1444 he prayed for bail for the applicant. This is the sum and substance of the arguments advanced on behalf of the applicant.

Shri Girish Desai learned Dy. Government Advocate submitted that observations of Supreme Court will have to be read along with judgment of M. P. High Court (F. B.) in the matter of Ramdayal (supra). He pointed out that provisions of Section 50 are not applicable when the luggage of the accused is searched. He further pointed out that Section 37 has to be kept in mind while deciding the bail application. He brought it to the notice of this court that 5 kgs. of brown sugar has been seized from possession of the applicant accused which is valued in international market to the tune of Rs. 3 crores. He further submitted that two accused are still absconding. The Dy. Government Advocate urged that in view of all these facts, bail application should be dismissed.

After careful reading of the Judgment of Supreme Court in the matter of Balbirsingh (supra), it is quite clear that Supreme Court was dealing with that matter after trial was over and the said accused was convicted. It is evident from paragraph 8 of the judgment in which Supreme Court has observed that:

"Of course in such a situation the court has to consider whether any prejudice has been caused to the accused and also examine the evidence in respect of search in the light of the fact that these provisions have not been complied with and further consider whether the weight of evidence is in the manner affected because of non-compliance. It is well settled that the testimony of a witness is not to be doubted or discarded merely on the ground that he happens to be an official but as a rule of caution and depending upon the circumstances of the case, the courts look for independent corroboration. This again depends on question whether the official has deliberately failed to comply with these provisions or failure to comply was due to lack of time and opportunity to associate some independent witnesses with the search and strictly comply with these provisions."

The case of Full Bench of M. P. High Court in the matter of Ramdayal v. C.N.B.

(supra) deals with bail application of such accused and provisions of Section 167(2) of the Code of Criminal Procedure ,1973 as well as provisions of Section 37 of the N.D.P.S. Act. In the matter of Ramdayal's case (supra) it was observed :

"We accept the proposition canvassed on the basis of judicial consensus and other salutary considerations bearing on the object and scheme of that Act that procedural lapses are not to be overplayed when prayer for bail is considered as that may hamper territorially extensive and forensically penetrating investigation which offences committed under the Act deserve."

Shri Khan learned counsel for the applicant invited attention of this Court towards observations of Full Bench of M. P. High Court in Ramdayal's case (supra) wherein it has been observed :

"i) Before plea raised in terms of Section 50 of the Act by a person arrested in connection with an offence u/s 18 thereof is accepted and the Court reaches the conclusion that its jurisdiction to release the accused is not curbed by the "limitations" contemplated u/s 37 it must address itself to the question of bona fides of the plea and hold an enquiry in that regard. It may reject the plea if it is found, to be a mere pretence so also if it is not a case of searching the person of the accused and of alleged recovery in the course of such search of the contraband substance.

ii) Neither High Court nor the Supreme Court has jurisdiction to accept the plea waiving the "limitations" contemplated u/s 37 without investigating its truth and validity."

In view of these observations learned counsel Shri Khan submitted that this court will have to consider whether provisions of Section 50 of the Act have been complied with by the officer who searched the person of the appellant.

Learned Dy. Government Advocate invited attention of this court to the observations made by Full Bench of M. P. High Court in Ramdayal's case (supra) wherein it has been observed :

"When any officer duly authorised u/s 42 is about to search any person under the provisions of Section 41 or Section 42 or Section 43. The provision does not apply to search of any luggage of any person or the vehicle in which he is travelling."

Placing reliance on these observations of Full Bench of M. P. High Court Shri Desai submitted that in the present matter the person of the accused applicant is not searched but his luggage had been searched and, therefore the applicant cannot take advantage of plea of non-compliance of Section 50 of the NDPS Act.

Section 37 of the N.D.P.S. Act provides that (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (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. Sub-section (2) of Section 37 provides that 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 bail. Section 18 of the N.D.P.S. Act provides sentence of R.I. for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. It further provides that the court may for reasons to be recorded in the judgment impose a fine exceeding two lakh rupees.

When prayer for bail of an accused charged for serious offence is to be considered, the Court has to consider seriousness of allegations made against such accused likelihood of the said accused to repeat offences likelihood of the accused tampering with prosecution evidence. The Court at the time of deciding bail application, does not conduct trial, but considers whether the prosecution has made out prima facie case against such an accused. While dealing with bail application of such an accused the court has to bear in mind larger interest of the society.

Learned counsel for the applicant Shri Khan submitted that the applicant is in jail for a long time and, therefore, on that count also he is entitled to get bail. He further pointed out that other co-accused are absconding and, therefore, trial of this accused would be protracted one. In the matter of Full Bench decision of M. P. High Court in Ramdayal's case (supra) this aspect has been considered. It has observed in paragraph 14 that -

"Long pre-trial detention is an anathema but is not unconstitutional, nor even it is a novelty."

Therefore long detention of the accused will not make the appellant entitled to earn bail on that count.

Papers of investigation show that brown sugar was of three crore rupees in international market. It is further important to note that the present applicant was travelling from Indore to Bombay in the said bus. Learned Dy. Government Advocate therefore, submitted that tickets were reserved from Indore but the applicant and his associates boarded in the bus not from Indore but from some other destination after bus left Indore from point of start. In the matter of Ramdayal v. State of M. P. (supra) Full Bench of M. P. High Court made certain observations in respect of traffic in Narcotic Drugs so far as M. P. State is concerned. It observed that:

"We accept the proposition canvassed on the basis of judicial consensus and

other salutary considerations bearing on the subject and scheme of the Act that procedural lapses are not to be overplayed when prayer for bail is considered as that may hamper territorially extensive and forensically penetrating investigation which offences committed under the Act deserve. Materials placed before us with the affidavit of Deputy Narcotics Commissioner (Enforcement) show that instances are not infrequent of C.B.I.-Interpol linkage for tracing the source and also foreign destinations of drugs and indeed the traffic route is by now convincingly identified. Correspondence filed shows this State as an important transit and trade centre of drug traffic having links with far off places like Nigeria, Kenya, France, but also with Pakistan. Section 37 commands the courts to submit to the "Additional Limitations" deliberately contemplated in the event only of the proceeding under the Act legitimately aborting the "limitations" are not to be considered. If that view is not taken clandestine activities in drug trafficking may never abate frustrating the object and purpose of the Act. The lucrative trade promotes recidivists. Paradoxically though it also generates corruption requiring care to be taken of any dishonest act of law enforcement agency booking an offender. Unless such doubt is created the offender must be tried, indeed fairly as also expeditiously, and adequately punished if found guilty. Minor and inadvertent lapses during investigation after lawful and honest detection of the crime may raise the question of "prejudice" to be decided during trial. On that account it will be unfair to the State, society and international community to scuttle or stagger trial of a person arrested for committing an offence under the Act which is deliberately loaded with stringent provisions."

Papers of investigation show that for the purpose of producing the absconding accused the investigating machinery raided some places, but in spite of that those persons were not found.

It is to be noted that this applicant was found travelling in a bus which was going from Indore to Bombay and larger quantity of brown sugar has been seized from the applicant. Section 37 of the N.D.P.S. Act indicates that the Court has to consider possibility of accused repeating such offences.

So far as arguments advanced in respect of non-compliance with the provisions of Sections 50 and 57 of the Act are concerned the prosecution may give explanation explaining alleged lapses which have been canvassed on behalf of the applicant. The persons who are to be examined on behalf of the prosecution as prosecution witnesses may give explanation as to why there had been alleged lapses which were canvassed on behalf of the applicant in this bail matter. It is for the trial court to see whether there has been non-compliance with the mandatory provisions of the N.D.P.S. Act in view of the judgment of Supreme Court in the matter of State of Punjab v. Balbeersingh (supra). At this stage no conclusion can be drawn as canvassed on behalf of the applicant.

Thus keeping in view the gravity of the offence which has been alleged against this applicant keeping in view of larger quantity of brown sugar alleged to have been seized from the applicant and keeping in view larger interest of society, this

bail application stands dismissed.

It has been urged by Shri Khan learned counsel for the applicant that trial of the applicant needs to be expedited if necessary by separating the present case from the case of other co-accused who are absconding by following legal procedure within four months. Hence it is directed that trial of this accused applicant be expedited within a period of four months from 6-5-1994 by separating it from the case of the accused who are absconding by following appropriate legal procedure.

A copy of this order be sent to the trial Court for further proceedings after filing of charge-sheet. A copy be also supplied to learned counsel for the parties.