

(2021) 03 OHC CK 0027

In the Orissa High Court

Case No : Bail Application No. 9319 Of 2019

Sanjit Jena @ Sanji And Another

APPELLANT

Vs

State Of Odisha

RESPONDENT

Date of Decision : 31-03-2021

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 439
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 2(viia), 2(xxiiiia),
20(b)(ii)(C), 37(1), 37(2), 42, 42(1), 42(2), 50, 54

Citation : (2021) 03 OHC CK 0027

Hon'ble Judges : S. K. Panigrahi, J

Bench : Single Bench

Advocate : Akshaya Kumar Nayak, T. Nayak, Karunakar Nayak

Final Decision : Dismissed

Judgement

S.K. Panigrahi, J

1. The petitioner has filed the instant application under Section 439 of CrPC seeking bail in connection with P.R. No.129/2018-19 dated 27.01.2019 corresponding to 2 (a) CC No.04 of 2019(N) pending before the Court of the learned Sessions Judge-cum-Special Judge, Ganjam, Berhampur. The petitioner herein is the accused in connection with alleged commission of offences punishable under Section 20 (b) (ii) (C) of the N.D.P.S. Act.

2. The case of the prosecution is that Ganja weighing 94 kgs kept in four jerry bastas were recovered and seized from the possession of the present petitioners (Narayan Jena and Sanjeet Jena) while they along with two others were transporting the same in one sleek silver coloured Hyundai Xcent VTVT car bearing registration No.OD-02AX-0206. The petitioners are in jail custody since 27.01.2019 (i.e., the date of their arrest).

3. Heard Mr. Akshaya Kumar Nayak, learned Counsel for the petitioners and Mr. Karunakar Nayak, learned Additional Standing Counsel for the State-opposite

party and perused the case records.

4. Learned counsel for the petitioners Mr. Akshaya Kumar Nayak has contended that the court below has not properly examined the question of exclusive conscious possession, transportation, search, recovery, test, measure, seizure, drawing samples and production of sample before the chemical examiner without following due procedure and hence the order is dubious. He has further contended that the case of prosecution regarding the test and measurement of the seized 'ganja' is completely doubtful as no proper procedure was followed as the Inspector of Excise seems to have identified the substance by smelling and without any weighing machine. Moreover, no local witnesses were present during the search and seizure. It has further been submitted that the failure of the Inspector to produce the accused persons before the Gazetted Officer or any Magistrate during the seizure of the alleged 'Ganja' is a violation of Section 50 of the NDPS Act which is a mandatory provision of the said Act. Hence, the petitioners may be granted bail.

5. Learned counsel for the State submitted that the contraband articles were seized by the raiding officer. It was not possible to arrange the presence of a Magistrate at that point in time. On search of dicky of the Car, the raiding officer recovered four white coloured jari basta containing 'ganja' weighing about 94 Kgs. Seizure lists have been prepared in the presence of the witnesses and the seized vehicle was also kept in the office of the EDC (SD), Berhampur.

6. It is a settled position of law that Section 37(1) and 37(2) of the NDPS Act shall be applicable in regard to a bail application only when the seized contraband (Narcotic Drug or Psychotropic Substance) is of commercial quantity. Several High Courts have iterated the same in cases of *Rajvir Singh @ Raju vs State of Punjab* CRM-M-35080 of 2018 and *Ranjeet Singh vs State* CRL.A. No. 89/2011. The Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 introduced the concept of "small quantity" and "commercial quantity" for the purpose of imposing punishment. The punishment is graded as per the quantity involved "small quantity", "commercial quantity" or an intermediate quantity.

7. The Central Government in the Ministry of Finance (Department of Revenue) by way of a Notification-S.O. 1055 (E) dated 19.10.2001 issued in exercise of the powers conferred by clauses (viia) and (xxiia) of Section 2 of the NDPS Act, has specified what would constitute "commercial quantity" and "small quantity" respectively, for different substances. The quantity mentioned in columns 5 and 6 of the table, in relation to the Narcotic Drug or Psychotropic Substance mentioned in the corresponding entry in the columns 2 to 4 of the said table are the "small quantity" and "commercial quantity" respectively for the purposes of the said clauses of that Section. Serial No.55 relates to 'Ganja'. In respect of 'Ganja', the quantities prescribed as "commercial quantity" and "small quantity" are 1000 kg and 20 kg respectively. Here the quantity of 'ganja' is 94 Kgs., hence comes under commercial quantity.

8. It is a settled position of law that Sections 42 and 50 of the NDPS Act mandates the Officers to follow the due process of law while and after conducting search and seizure for alleged narcotic substance. The non-compliance of the said Sections would lead to vitiation of trial under certain circumstances. The Division Bench of Hon'ble Supreme Court in the case of State of Punjab Vs. Balbir Singh AIR 1994 SC 1872 has observed as follows:-

"16.....The object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore, these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements thus affects the prosecution case and therefore vitiates the trial.

26. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows :

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of Cr. PC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance of recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc., when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal.

Likewise only empowered officers or duly authorised officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as

mentioned therein. If there is a contravention that would affect the prosecution case and vitiate the conviction.

(2C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial."

The Constitutional Bench of Hon'ble Supreme Court in the case of State of Punjab Vs. Baldev Singh AIR 1999 SC 2378 , has observed as follows:-

"52. Thus, even if, it be assumed for the sake of argument that all the material seized during an illegal search, may be admissible as relevant evidence in other proceedings, the illicit drug or psychotropic substance seized in an illegal search cannot by itself be used as proof of unlawful conscious possession of the contraband by the accused. An illegal search cannot also entitle the prosecution to raise a presumption under Section 54 of the Act because presumption, is an inference of fact drawn from the facts which are known as proved. A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50.

53. We, therefore, hold that an illicit article seized from the person of an accused, during search conducted in violation of the safeguards provided in Section 50 of the Act, cannot by itself be used as admissible evidence of proof of unlawful possession of the contraband on the accused. Any other material/article recovered during that search may, however, be relied upon by the prosecution in other/independent proceedings against an accused notwithstanding the recovery of that material during an illegal search and its admissibility would depend upon the relevancy of that material and the facts and circumstances of that case."

9. Having considered the matter in the aforesaid perspective and guided by the precedents cited hereinabove, this Court is of the view that there is a compliance of procedures during search and seizure as mentioned in Sections 42 and 50 of the NDPS Act with some deficiencies which can very well be raised by the petitioner at the time of trial.

10. Accordingly, this Court is not inclined to enlarge the petitioner on bail. Hence, the Bail Application is dismissed.

However, it is made clear that any of the observation made hereinabove with

respect to the facts of the case, shall not come in the way or prejudicially affect the fair trial of the present case.