
(2000) 09 RAJ CK 0025

In the Rajasthan High Court

Case No : Criminal Miscellaneous Second Bail Application No. 3743 of 2000

Vishnu Prasad

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 14-09-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 439
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 37, 42, 50, 8

Citation : (2000) 72 ECC 737 : (2000) 4 RLW 213 : (2001) WLC 38 : (2001) 1 WLN 552

Hon'ble Judges : Shiv Kumar Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Shiv Kumar Sharma, J.—Charge-sheet for having committed offence Under Sections 8/21 of the NDPS Act 1985 was filed against the petitioner. According to prosecution story the petitioner on being searched by Bhanwar Singh CO. was found illegally possessing smack weighing 8 gms. and 5 milligrams.

2. Shri Jagdeep Dhankar, learned Sr. Advocate canvassed that CO. Bhanwar Singh was member of raid party and having some interest in the success of raid therefore from the material on record it is evident that provisions contained in Section 50 of the NDPS Act have been flouted and there are reasonable grounds for believing that the petitioner is not guilty of the offence. Reliance was placed on Nadeem v. State of Rajasthan 1998 (2) EFR 632, Babu Lal v. State 1999 (1) RCR 424, Babulal v. U.O.I 1996 (2) EFR 78 and prayer was made to release the petitioner on bail u/s 439 Cr. PC.

3. I have provided opportunity to Shri Rajendra Yadav learned Public Procetutor to oppose the bail application in view of provisions contained in Section 37 of the NDPS Act.

4. While approaching in the matter of bail claimed by an accused of an offence

under NDPS Act it cannot be lost sight of that drug abuse is a menace to the society and is spreading like an epidemic vilifying all efforts at combating it. Discretion of the court faced with a prayer for bail in an offence under the NDPS Act cannot be encircled in a straight jacket formula. Section 37 of the NDPS Act only says that after providing an opportunity to the Public Prosecutor to oppose the bail application if court is satisfied that there are reasonable grounds for believing that the accused is not guilty of offence and he is not likely to commit any offence when on bail, he may be released on bail. These limitations are in addition to the limitations under the Code of Criminal Procedure, on granting bail.

5. In order to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search, safeguard to be searched in the presence of a Gazetted Officer or a Magistrate has been laid down in Section 50 of the NDPS Act. In my opinion the protection to be searched in the presence of a Gazetted Officer or a Magistrate u/s 50 was incorporated by the framers looking to the reliability and independence of Gazetted Officer and Magistrate. The framers of NDPS Act would not have imagined that the investigating agency for its convenience may reconstrue the provisions.

6. In *Nadeem v. State of Rajasthan* (supra), it was indicated in para 14 thus:

There is yet another deliberate attempt to defeat the legislative safeguard. The words take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate used in Sub-section (1) and words "the Gazetted Officer or Magistrate" before whom any such person is brought used in Sub-section (3) of Section 50 of the Act are of much significance. The words "take and brought" imply that search should be conducted by taking the person before the Gazetted Officer or a Magistrate and the said officer or Magistrate before whom the person is brought shall, if he sees no reasonable ground for search, discharge the person but otherwise shall direct that search be made. But it appears in the case on hand that the investigating agency for its convenience has redrafted the salutary provisions of Section 50 of the Act by taking the Gazetted Officer Satish Khurana C.O. (PW. 6) to the accused, when Satish Khurana was brought before the accused, the accused volunteered that he may be searched before Satish Khurana. It cannot therefore be said that Satish Khurana was totally independent. Being a member of raid party he was having some interest in the success of raid.

7. In the instant case Bhanwar Singh, Co. who is a Gazetted Officer accompanied the raid party. He even put his signatures on the alleged notice given by the SHO Police Station Pushkar to the petitioner. Bhanwar Singh also put his signature on the memo of alleged consent given by the accused. In the said consent memo, the petitioner is alleged to have stated that he would not get any relief before the Gazetted Officer or the Magistrate and he was ready to be searched by Bhanwar Singh Dy. S.P. I am satisfied that there is a deliberate attempt to defeat

the legislative safeguard provided in Section 50 of the NDPS Act. In the instant case also the Investigating Officer for its convenience has reconstrued the salutary provisions of Section 50 of the Act by taking Bhanwar Singh Dy. S.P. to the accused.

8. Their lordships of the Supreme Court in *State of Punjab Vs. Balbir Singh*, referred the following words of Supreme Court of Canada in *R. v. Collins* 1987(1) SCR 265 .

The situation is very different with respect to cases where, after a violation of the Chapter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair; for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial.

In para 57 their Lordships of the Supreme Court concluded thus--

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone act of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial would render the trial unfair.

9. I am satisfied that the investigating agency in the instant case has not followed the procedure as envisaged by the statute scrupulously.

10. In *Babulal v. State of Rajasthan* (supra), this Court after placing reliance on *Nadeem v. State of Rajasthan* (supra) granted bail to accused Babulal on the ground that police officer in that case was a member of raid party.

11. In *Babulal v. Union of India* (supra) the Madhya Pradesh High Court also granted bail in similar circumstances.

12. In view of what I have discussed herein above, I have no option but to grant bail to the accused petitioner. The bail application stands accordingly allowed. The applicant Vishnu Prasad is hereby ordered to be released on bail on his furnishing a personal bond in the sum of Rs. 30,000 with two sureties of Rs.

15,000 each to the satisfaction of the learned District Judge Ajmer. The applicant shall not indulge in any crime while on bail.