

THE HONOURABLE Dr. JUSTICE D. NAGARJUN

CRIMINAL PETITION No.11767 OF 2022

ORDER:

This Criminal Petition is filed by the petitioner/accused No.1 under Section 437 & 439 of the Criminal Procedure Code seeking bail in Crime No. (C.O.R.No.) 157 of 2022 of Station House Officer, Prohibition and Excise, Zaheerabad Station, Zaheerabad, registered for the offence under Section 8 (C) read with Section 22 (b) of the Narcotic Drugs and Psychotropic Substance Act, 1985.

2. Heard Sri Srinivas Chathurvedula, learned counsel for the petitioner/accused No.1 as well as Sri T.V. Ramana Rao, learned Additional Public Prosecutor for the Respondent / State and perused the record.

3. The case of the prosecution, in brief, is that on 05.12.2022 at about 09:30 AM., the Prohibition and Excise Officials having reliable information regarding illegal transportation of Narcotic drugs from Goa to Hyderabad, by a Car bearing No. TS 07 GZ 9957 passing through the Excise check-post at Chiragpally, on National Highway No.65. On

watch, the Excise Officials stopped Polo car and found three male and one female persons and searched the car. The two Gazetted Officers, who are available in Excise team have searched the petitioner/accused No.1 and found one capsule of cocaine which is 13.7 grams weight. The petitioner / accused No.1 confessed that he along with other accused purchased the said contraband at Carl-Cox event at Marbela Beach resort Goa on 03.12.2022 and that he along with three friends in the vehicle have consumed the drug together at their places and previously too they had been to Goa to take drug and further confessed that all of them have a share in purchase of said contraband. The Excise Officers have seized contraband packet, cell phones and vehicle by conducting panchanama.

4. It is submitted by the learned counsel for the petitioner/accused No.1 that the petitioner has been in judicial custody since 05.12.2022 and that the confession made by the accused No.1 before the Excise Officials is not admissible in law and the respondent officials have not followed the mandatory provisions of Section 50 of the NDPS Act and that the petitioner is innocent and not committed

any offence and sought for grant of bail.

5. Learned Additional Public Prosecutor for the State / Respondent has submitted that that petitioner – accused No.1 is found in possession of contraband and alleged to have purchased the same for his self consumption along with other accused. It is further submitted that the investigation is completed and contraband seized from the possession of accused persons is not a commercial quantity.

6. Now the point for consideration is:

Whether the petitioner/accused No.1
is entitled for grant of bail as prayed for?

7. The quantity of contraband seized from the possession of accused is 13.7 grams of cocaine, which is less than commercial quantity and above small quantity, thereby Section 37 of the NDPS Act will not apply to the facts of the case. Section 50 (1) of the NDPS Act reads as follows:

“50. Conditions under which search of persons shall be conducted: —

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 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 or to the nearest Magistrate.”

8. In view of the above provision, it is clear that Section 50 (1) of the NDPS Act mandates that at the time of seizure or search, an option has to be given to the accused, whether to take him to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate. In the case on hand, as seen from the panchanama of seizure, the raiding party has given three options to the accused to be searched either before the nearest magistrate or before the nearest Gazetted Officer and that two Gazetted Officers are available in the raiding party by name M. Subramanyam and Ch. Chiranjeevi. But giving of three options to the accused at the time of search is against the provisions and spirit of the NDPS Act.

9. The Honourable Apex Court in **State of Rajasthan v. Paramanand**¹ held as under:

“15. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S.

¹ MANU/SC/0158/2014

Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated. We have, therefore,

no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed."

10. In view of the principle laid down in the above said authority, giving of three options at the time of search and seizure is per-se illegal.

11. Now, the question further arises as to whether this aspect can be considered at the time of deciding bail application or it can be considered only during the course of final hearing of the case. Learned counsel for the petitioner has relied upon an authority in **Sarija Banu (A) Janarthani and others v. State through Inspector of Police², wherein the Honourable Apex Court held as under:**

"7. It is pertinent to note that in the bail application 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

² MANU/SC/0529/2004

consider such violation at this stage. The compliance of Section 42 is mandatory and that is a relevant fact which should have engaged attention of the Court while considering the bail application.”

12. Considering the above facts and circumstances and since the contraband seized from the possession of the petitioner – accused No.1 is not a commercial quantity and since material part of investigation is completed, it is a fit case to grant bail to the petitioner.

13. Accordingly, the Criminal Petition is allowed and the petitioner/Accused No.1 is ordered to be enlarged on bail subject to following conditions:

i) The petitioner/Accused No.1 is ordered to be enlarged on bail on his executing personal bond for a sum of Rs.25,000/- (Rupees Twenty Five Thousand only) with two sureties each for a like sum to the satisfaction of learned I Additional District and Sessions Judge, Medak at Sangareddy.

ii) On such release, the petitioner/Accused No.1 shall appear before the Station House Officer, Prohibition

and Excise, Zaheerabad, Sangareddy District, on every Monday and Friday between 10:00 AM and 12:00 PM until further orders or as and when required for the purpose of further investigation.

iii) The petitioner/Accused No.1 shall abide by the other conditions stipulated in Section 437 (3) of the Criminal Procedure Code.

As a sequel, pending Miscellaneous Applications in this matter, if any, shall stand closed.

Date: 09-Jan-2023
KHRM/AS

DR. D.NAGARJUN, J

THE HONOURABLE DR. JUSTICE D.NAGARJUN

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