

IN THE HIGH COURT OF KARNATAKA AT BENGALURUDATED THIS THE 15TH DAY OF JULY, 2022

BEFORE

THE HON'BLE MR.JUSTICE MOHAMMAD NAWAZ

CRIMINAL PETITION NO.2612 OF 2022BETWEEN:

MR. ZAKIR HUSSAIN,

... PETITIONER

[BY SRI. DHAMANJAY JOSHI, SENIOR ADVOCATE
FOR SRI. RUDRABHUSHAN C.B., ADVOCATE]AND:STATE BY
INTELLIGENCE OFFICER,
NARCOTICS CONTROL BUREAU,
BANGALORE UNIT,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KARNATAKA,
BENGALURU - 560 001.

... RESPONDENT

[BY SRI. MADHUKAR M. DESHPANDE, SENIOR C.G.S.C.]

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THIS CRIMINAL PETITION IS FILED UNDER 439 OF CR.P.C., PRAYING TO ENLARGE THE PETITIONER ON BAIL IN NCB.F.NO.48/1/05/2021/BZU, REGISTERED BY N.C.B. POLICE, BENGALURU, FOR THE OFFENCES PUNISHABLE UNDER SECTIONS 8(c) READ WITH SECTION 20(b)(ii)(C), 23, 27A, 28 AND 29 OF THE NDPS ACT 1985 AND THE LEARNED XXXIII ADDITIONAL CITY CIVIL AND SESSIONS JUDGE AND SPECIAL JUDGE (NDPS), BENGALURU HAS REJECTED THE BAIL PETITION ON 25.01.2022 IN CRL.MISC.NO.139/2022.

THIS CRIMINAL PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 21.06.2022 AND COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

This is a successive bail petition filed by accused No.2 praying to enlarge him on bail in relation to a case registered by respondent/NCB in NCB F.No.48/1/5/2021/BZU for offences punishable under Sections 8(c) read with Section 20(b)(ii)(C), 23, 27(A), 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 [hereinafter referred to as 'NDPS Act' for short].

2. The petitioner had approached this Court in Criminal Petition No.3921/2021 seeking similar prayer and the said petition was dismissed by an Order dated 14.07.2021.

3. Heard the learned senior counsel for petitioner and the learned counsel for respondent.

4. The learned senior counsel submitted that, this Court dismissed the earlier petition when the

investigation was still pending and now the investigation is over and the entire material is available on record including the FSL Report and therefore, the petitioner is before this Court praying to enlarge him on bail.

5. The learned senior counsel contends that the alleged ganja was concealed underneath the coconut bags and therefore it cannot be said that the petitioner was in conscious possession of ganja. He contends that the petitioner was only the owner-cum-driver of the truck which was transporting the load of coconuts and he was not aware that there was ganja in the truck. He contends that there is non-compliance of Section 42 of the NDPS Act, as the secret information said to be received by the complainant was not reduced into writing and reported to his superior officer. He further contends that no quantitative analysis of the seized material has been carried out and in the absence of quantitative analysis, prosecution must fail. He contends that the search and seizure has been carried out during night

hours on a private vehicle, which is in violation of the mandatory provisions of Sections 42 and 43 of the NDPS Act. He has also contended that the samples were drawn on 12.04.2021 and the FSL report was received on 11.06.2021, which is not within 15 days and it is in violation of Standing Instructions 1/38, hence on this ground also the petitioner is entitled for bail.

6. The learned senior counsel has also contended that no analysis by separation of the seeds, stems, buds and flowers etc, has been carried out and therefore it cannot be said that the quantity of the ganja seized is commercial quantity. It is further contended that the prosecution has nowhere alleged that the petitioner was engaged in financing illicit traffic or harbouring the offenders, hence Section 27A of the NDPS Act also does not attract. He therefore submits that there are reasonable grounds for believing that the petitioner is not guilty of the alleged offences and therefore seeks to allow the petition and release the petitioner on bail.

7. The learned senior counsel has relied on a decision of the Hon'ble Apex Court in **Abdul Rashid Ibrahim Mansuri vs. State of Gujarat** reported in **(2000)2 SCC 513** to contend that it is imperative on the Officer who receives a credible information that any narcotic drug or psychotropic substance has been concealed in any building, conveyance or enclosed place, to take it down in writing and he shall forthwith send a copy thereof to his immediate official superior. He contends that the action of the officer, who claims to have exercised it on the strength of such unrecorded information, would become suspect.

8. Per contra, the learned counsel appearing for respondent/NCB contends that this Court has already rejected the prayer of the petitioner and there are no changed circumstances to once again consider his bail petition. Pointing out to the order passed by this Court in Criminal Petition No.3921/2021 he contends that this Court has observed that an information report under

Section 42 of the NDPS Act was prepared and forwarded to the superior officer prior to conducting seizure. Further, a mahazar was prepared for seizure of ganja weighing about 93.8 kgs. which was concealed in large brown coloured jute gunny bags. He would further point out placing reliance on the Judgments of the Hon'ble Apex Court that non-compliance of Section 50 of the NDPS Act would not invalidate the effect of recovery from the search of vehicle, since the recovery was affected from the bag and Section 50 of the NDPS Act could be made applicable only in case of personal seizure of contraband material.

9. Learned counsel for the respondent has further contended that the procedures contemplated under law for the search and seizure has been strictly followed and there are sufficient material to show that the petitioner is involved in a serious offence of trafficking ganja and a commercial quantity of ganja weighing 93.8 kgs. has been seized and therefore there

is a *prima facie* case against the petitioner. He contends that Section 37 of the NDPS Act restricts grant of bail to a person against whom there is a *prima facie* case. He therefore seeks to reject the petition.

10. It is the case of prosecution that, on 08.04.2021 at about 17.45 hours, a secret information was received from reliable source that two persons are carrying huge quantity of ganja in their truck bearing registration No.KA-16-A-9235 and that they will be entering Bengaluru through Devanahalli toll gate around 1.00 a.m. The Investigation Officer along with the NCB team from Bengaluru Zonal unit secured independent witnesses and they proceeded to the spot and intercepted the vehicle, in which the petitioner and another person were present. They interrogated them and on searching the vehicle, found three large brown coloured jute gunny bags concealed beneath the huge load of coconuts inside white gunny bags. The said jute

gunny bags contained flowering and fruiting tops of the cannabis plants.

11. The material on record would disclose that an information report under Section 42 of the NDPS Act was prepared on receiving the secret information and it was sent to the Assistant Director, NCB. The Assistant Director, NCB has authorized to search under sub-Section (2) of Section 41 of the NDPS Act. Further, sample of the suspected material was collected from the gunny bag and it was tested with the field drug detection kit, which gave positive result for ganja. The contraband was seized which weighed 93.8 kgs.

12. The material on record would further disclose that the prosecution sought permission from the Court to draw samples under Section 52A of the NDPS Act, so that the seized narcotic drugs could be thereafter be disposed of as per sub-Section (1) of Section 52A of the Act, after retaining the certificate, photographs and samples and also to forward the original sample to the

Government laboratory for chemical analysis. The samples were drawn accordingly with certification by the learned Magistrate under Section 52A(3) of the NDPS Act, who certified that the inventory is as per the seizure documents etc, and thus certifying the correctness of the inventory. After the samples were sent for chemical analysis, a test report was received confirming the contraband as ganja.

13. Going through the material on record, this Court finds that there is no violation of the mandatory provisions with regard to search and seizure of ganja and the quantitative analysis, taking sample and sending the contraband for chemical examination. Hence, the contentions raised by the learned senior counsel, in this regard cannot be accepted.

14. It is contended that the chemical analysis report has not been received within 15 days as per the Standing Instruction No.1/88. In this regard, the learned counsel for the petitioner has relied on a decision

rendered in the case of **Chandru Kunthur Raghuegowda vs. State by Inspector of Customs CIU, Bengaluru**, reported in **ILR 2017 KAR 4053**.

15. The Hon'ble Apex Court in the case of **Union of India vs. Bal Mukund and others** reported in **(2009)12 SCC 161** which was relied on by this Court in the above referred Judgment has not held that infraction of Standing Instruction No.1/88 is a ground for releasing the accused on bail. In the case on hand, there is a report of the FSL confirming that the contraband is ganja. Hence, merely because the report is not received within 15 days is not a ground to release the accused on bail. There is no inordinate delay in receiving the FSL Report.

16. In the case of **Union of India Vs. Mohanlal and another** reported in **(2016)3 SCC 379** relied on by the learned counsel for the respondent, the Hon'ble Apex Court at para 19 has held as under :

"19. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by

an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time-frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52-A.”

17. The learned senior counsel has contended that the alleged bag containing ganja was hidden underneath the coconut bags and the petitioner being the driver of the truck was only accompanying accused No.1 for transporting coconuts and therefore, it cannot be said that he was in conscious possession of ganja.

18. The Hon'ble Apex Court in the case of **Union of India Vs. Md. Nawaz Khan** reported in **(2021)10**

SCC 100 while considering what amounts conscious possession has observed in para 26 as under:

"26. What amounts to "conscious possession" was also considered in Dharampal Singh v. State of Punjab [Dharampal Singh v. State of Punjab, (2010) 9 SCC 608 : (2010) 3 SCC (Cri) 1431] , where it was held that the knowledge of possession of contraband has to be gleaned from the facts and circumstances of a case. The standard of conscious possession would be different in case of a public transport vehicle with several persons as opposed to a private vehicle with a few persons known to one another. In Mohan Lal v. State of Rajasthan [Mohan Lal v. State of Rajasthan, (2015) 6 SCC 222 : (2015) 3 SCC (Cri) 881] , this Court also observed that the term "possession" could mean physical possession with animus; custody over the prohibited substances with animus; exercise of dominion and control as a result of concealment; or personal knowledge as to the existence of the contraband and the intention based on this knowledge."

19. The truck from which the ganja was seized was found moving in the wee hours of 09.04.2021. The petitioner is admittedly the owner-cum-driver of the truck. Three large brown coloured jute gunny bags were

concealed beneath the huge load of coconuts. The voluntary statement of the petitioner was recorded.

20. Under Section 35 of the NDPS Act, in any prosecution for an offence under the Act, which requires a culpable mental state of the accused, the Court shall presume the existence of such a mental state but, it shall be a defence of the accused to prove the fact that he had no such mental state with respect to the act charged as an offence. In the case on hand, at this stage, this Court finds that the petitioner had real knowledge of the nature of the substance concealed in the jute gunny bags.

21. Section 37 of the NDPS Act regulates the grant of bail in cases involving offences under the NDPS Act. Section 37 reads as follows:

“37. Offences to be cognizable and non-bailable;

“(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

- (a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27-A and also for offences involving commercial quantity 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.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Criminal Procedure Code , 1973 (2 of 1974) or any other law for the time being in force, on granting of bail”.

22. The learned counsel for the respondent has relied on a decision of a coordinate bench of this Court in the case of **Emmanuel Michael Vs. Union of India** passed in **Criminal Petition No.3406/2021**, disposed of on 08.10.2021, wherein this Court has relied on a decision of the Hon'ble Apex Court in **Paulswamy's**

case [(2000) 9 SCC 549] relating to matter regarding non-compliance with the formalities during the bail stage. Para 24 of the said order is extracted hereunder:

"24. It is relevant to refer to the decision of **Paulswamy** (supra), wherein, the Hon'ble Apex Court held that it would be too early to take into account and judge the matter regarding non compliance with the formalities during the bail stage, since recording of findings under Section 37 of the Act was a sine-qua-non for granting bail under the Act and held at para 6 as under:

6. In the light of Section 37 of the Act no accused can be released on bail when the application is opposed by the Public Prosecutor unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. It is unfortunate that matters which could be established only in offence regarding compliance with Sections 52 and 57 have been pre-judged by the learned Single Judge at the state of consideration for bail. The minimum which learned Single Judge should have taken into account was the factual presumption in law position that official acts have been

regularly performed. Such resumption can be rebutted only during evidence and not merely saying that no document has been reduced before the learned Single Judge during bail stage regarding the compliance with the formalities mentioned in those two sections.”

emphasis supplied

In so far as quantity of ganja seized, this Court has already considered in the earlier petition that the same is much more than the commercial quantity. Further, the accused has been found transporting ganja in his vehicle and at this stage, the material collected is sufficient to show that he had real knowledge of the nature of substance concealed in the jute gunny bags beneath the load of coconuts. Hence, taking into consideration all the above, this Court is of the considered view that, a *prima facie* case is made out against the petitioner and it cannot be said at this stage that there are reasonable grounds for believing that the petitioner is not guilty of the offence alleged against him.

Hence, the following:

ORDER

Criminal Petition is dismissed.

**SD/-
JUDGE**

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