

THE HON'BLE SRI JUSTICE T.MALLIKARJUNA RAO

CRIMINAL PETITION No.47 of 2024

ORDER:

This Criminal Petition under Sections 437 and 439 of Cr.P.C., has been filed by the petitioner/A.3 seeking regular bail in Crime No.82 of 2023 of Krishna Devi Peta Police Station, Anakapalli District.

2. The above said crime was registered against the petitioner herein and others for the offence punishable under Section 20(b)(ii)(C) read with 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act').

3. Brief facts of the case are that, on 11.08.2023, on credible information about transportation ganja, the Sub Inspector of police along with his staff and mediators rushed to a road running from K.D.Peta to Narsipatnam situated opposite to A.L.Puram village bus stand and found the accused having in possession of 22kgs of ganja and 1kg liquid ganja (hashish oil)

4. Learned counsel for the petitioner contended that while drawing samples the investigating authorities have not followed the procedure as contemplated under Section 52-A of NDPS Act. In support of his

contention, the petitioner has brought to the notice contents of the remand report.

5. Learned counsel for the petitioner points out that even the contents of remand report show the samples were not drawn before the Magistrate and as such it is deviation to the procedure contemplated under Section 52-A of NDPS Act. Moreover, the petitioner has been in judicial custody since 09.07.2023.

6. On the other hand, learned Assistant Public Prosecutor submits that investigation is still pending. Ganja allegedly seized from the possession of accused is 22kgs. He further submits that there are no previous criminal antecedents to the petitioner.

7. Heard both sides. Perused the material on record.

8. A perusal of mediators report and remand report clearly shows that the samples are drawn in the presence of mediators, but not in the presence of Magistrate.

9. In a decision reported in between **Simarnjit Singh vs. State of Punjab**¹ wherein it was categorically held that:

¹ 2023 Law Suit(SC) 859

16. Sub-section (3) of Sec.52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with subsections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

9. Hence, the act of PW-7 of drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court in the case of **Union of India v. Mohanlal & Anr**². This creates a serious doubt about the prosecution's case that substance recovered was a contraband.

10. Hence, the case of the prosecution is not free from suspicion and the same has not been established beyond a reasonable doubt. Accordingly, we set aside the impugned judgments insofar as the present appellant is concerned and quash his conviction and sentence.

11. The appeal is accordingly allowed."

10. By following the above principle laid down, this Court found that the said principle is clearly applicable to the facts of the case. Moreover, the petitioner is in judicial custody for more than four months. In view

² (2016) 3 SCC 379

of the aforesaid facts and circumstances of the case, this Court is inclined to grant bail to the petitioner/A.3.

11. Accordingly, the Criminal Petition is allowed on the following conditions:

- i. The petitioner/A.3 shall be released on bail on executing a personal bond for Rs.25,000/- (Rupees twenty five thousand only) with two (02) sureties for a like sum each to the satisfaction of the learned Judicial Magistrate of First Class, Narsipatnam; and
- ii. After release, the petitioner shall appear before the Station House Officer concerned, once in a week i.e. on every Sunday between 10.00 a.m and 01.00 p.m., for a period of three (03) months; and
- iii. that the petitioner is directed not to hamper the investigation and tamper with the prosecution witnesses.

JUSTICE T.MALLIKARJUNA RAO

Dt. 11.01.2024

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