



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)

Friday, the Second day of December Two Thousand Sixteen

PRESENT

The Hon`ble Mr Justice S.VAIDYANATHAN

CRL OP(MD) No.14354 of 2016

1 SATHEESHKUMAR

2 RAMESH

..PETITIONERS/ACCUSED 2 & 1

Vs.

STATE REP.BY

THE INSPECTOR OF POLICE

NIB CID,

MADURAI DISTRICT.

IN CRIME NO. 114 OF 2016

..RESPONDENT/COMPLAINANT

For Petitioner : M/S.S.MUNIYANDI Advocate

For Respondent : M/s.S.PRABHA, Government Advocate (Crl.Side)

PETITION FOR BAIL Under Sec. 439 Cr.P.C.

ORDER : The Court Made the following order :-

Reserved on	Pronounced on
18.11.2016	02.12.2016

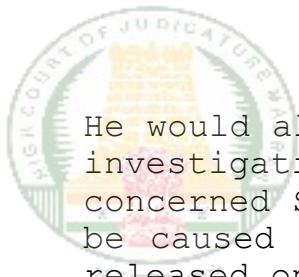
S.VAIDYANATHAN, J.,

The petitioners/accused, who were arrested and remanded to judicial custody on 04.07.2016 for the alleged offences punishable under Sections 8(C) r/w 20(b)(ii) C and Section 25 of NDPS Act in Crime No.114 of 2016 on the file of the respondent police, seek bail.

2. Heard the learned counsel for the petitioners and the learned Government Advocate (Crl. Side) appearing for the respondent police.

3. The case of the prosecution is that on receiving reliable information, Police party intercepted the petitioners and found that they were possessing two bags containing totally 36 kgs of Ganja worth about Rs.3,60,000/-, which resulted in registration of the case under NDPS Act.

4. Learned counsel for the petitioners would submit that there is no recovery of Ganja from these petitioners and that the respondent police neither followed the procedures contemplated under Sections 52, 42 and 55 of the NDPS Act nor examined any private witnesses at the place of occurrence. He would further submit that the respondent seized 36 kgs of Ganja from three accused and if it is divided into three, it would come below the commercial quantity.



He would also submit that the respondent police almost completed the investigation and a charge sheet is going to be filed before the concerned Special Court at Madurai and therefore, no prejudice would be caused to the prosecution in the event of the petitioners being released on bail.

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5. Learned Government Advocate (Crl.Side) appearing for the State submitted that the contraband seized weighs more than the commercial quantity and the bail petition filed by the petitioners herein before the Special Court for NDPS Act cases, Madurai in Cr.M.P.No.2315 of 2016 was dismissed on 22.07.2016 on account of huge quantity of contraband involved in the case and therefore, she prayed for dismissal of the petition.

6. Learned counsel for the petitioners, in support of his contention, relied on two judgments of this Court, viz., i) Crl.O.P. (MD) Nos.5213 and 5692 of 2015 dated 13.04.2015 and ii) Crl.O.P.(MD) No.14465 of 2016 dated 27.09.2016. Based on those judgments, I have also passed an order on 21.10.2016 in Crl.O.P.(MD) No.16966 of 2016, thereby released the petitioners therein on bail in the light of the judgment of the Hon'ble Supreme Court in the case of State of Rajasthan vs. Parmanand and another, reported in (2014) 5 SCC 345, which dealt with the procedures to be adopted before conducting a search on the accused as per the provisions of Section 50 of the NDPS Act. However, when I was hearing the present petition, a judgment of the Constitution Bench of the Hon'ble Supreme Court was placed before me on the side of prosecution in the case of State of Punjab vs. Baldev Singh [Appeal (Crl.) 396 of 1990] decided on 21.07.1999 wherein the applicability of Section 50 was discussed at length by referring to various judgments of the Supreme Court. For ready reference, conclusive portions of the said judgment (referred to above) are extracted as under:

"On the basis of the reasoning and discussion above, the following conclusions arise:

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing;

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;

(3) That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a



Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act;

(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 so must be viewed by the higher authorities seriously inviting action against the concerned official 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 judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for 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 50 have by Section 50 at the trial, would render the trial unfair;

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut- short a criminal trial;

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;



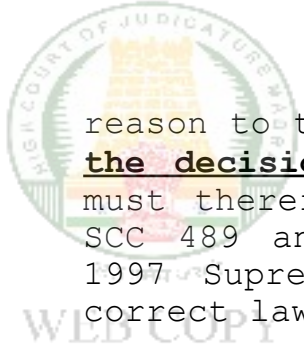
(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search;

(8) 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. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act;

(9) That the judgment in Pooran Mal's case cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search;

(10) That the judgment in Ali Mustaffa's case correctly interprets and distinguishes the judgment in Pooran Mal's case and the broad observations made in Pirthi Chand's case and Jasbir Singh's case are not in tune with the correct exposition of law as laid down in Pooran Mal's case. The above conclusions are not a summary of our judgment and have to be read and considered in the light of the entire discussion contained in the earlier part."

7. Had the judgment been brought to my knowledge earlier while hearing the case in Crl.O.P.(MD) No.16966 of 2016, I would not have released those petitioners on bail, as I was not assisted properly in the said case. Anyhow, I have no hesitation to record my deep regret for having passed the said order, as I had passed the order, releasing the petitioners therein on bail based on the implicit faith in the representation of the counsel on either side, but it was proved to be wrong otherwise. I am also sure that the judgment of the Constitution Bench of the Supreme Court had been brought to the notices of my brother Judges, who granted bail to the petitioners in Crl.O.P.(MD) Nos.5213 and 5692 of 2015 and Crl.O.P.(MD) No.14465 of 2016, they would not have let off the accused fleeing from justice. Anyhow, we are bound to maintain judicial discipline, as the Hon'ble Supreme Court in the case of **General Manager, Telecom vs S.Srinivasa Rao & Ors**, reported in 1998-1-LLJ 255 held that "it is needless to add that it is not permissible for us, or for that matter any Bench of lesser strength, to take a view contrary to that in Bangalore Water Supply (supra) or to by pass that decision so long as it holds the field. Moreover, that decision was rendered long back - nearly two decades earlier and we find no



reason to think otherwise. **Judicial discipline requires us to follow the decision** in Bangalore Water Supply case (1978) 2 SCC 213. We must therefore, add that the decisions in Theyyam Joseph (1996) 8 SCC 489 and Bombay Telephone Canteen Employees' Association (AIR 1997 Supreme Court 2817) cannot be treated as laying down the correct law."

8. It is also pertinent to refer to the judgment of the Hon'ble Supreme Court in the case of **Padmasundara Rao (Dead) & others vs. State of Tamil Nadu and others**, reported in **(2002) 3 SCC 533**, holding that each case has to be looked into on its own perspective based on the pleadings placed before the Court on the particular case on hand and the relevant paragraph is extracted as under:

"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington vs. British Railways Board (1972) 2 WLR 537. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

9. Moreover, the judgment relied upon by the learned counsel for the petitioner in the case of **Rajasthan vs. Parmanand and another (cited supra)** to substantiate that Section 50 of NDPS Act will have application, if a person is searched bodily, has been rendered in an appeal and not at the time of hearing bail petition.

10. At this juncture, the learned Government Advocate (Crl.Side) represented that State has already moved a petition for cancellation of the bail granted by this Court in Crl.O.P.(MD) No.16966 of 2016 and notice has already been ordered in it.

11. The principle laid down by the Hon'ble Supreme Court in the case of **Gudikanti Narasimhulu and others vs. P.P., High Court of Andhra Pradesh**, reported in **1978 SCC (1) 240** that bail is the rule and jail is the exception, has been followed by various Courts even now and the said ratio cannot be said to be precedent for ever, more specifically after the enactment of Special Statutes like "The Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act)" etc.

12. Taking note of all these factors and the serious nature of the offences alleged to have been committed by these petitioners, this Court is not inclined to grant bail to the petitioners. Hence, this petition is dismissed.

sd/-

02/12/2016

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TO

1 THE INSPECTOR OF POLICE, NIB CID, MADURAI DISTRICT.

2 THE ADDL.PUBLIC PROSECUTOR, MADURAI BENCH OF MADRAS HIGH COURT,
MADURAI.

3 THE SUPERINTENDENT, CENTRAL PRISON, MADURAI.

+1. CC to M/S.S.MUNIYANDI Advocate SR.No.78666

ORDER IN
CRL OP(MD) No.14354 of 2016
Date :02/12/2016

PBK/GSV-PM/SAR-I 02/12/2016 ::6P-5C: