



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 18.08.2016

CORAM

THE HONOURABLE DR. JUSTICE P.DEVADASS

Crl.R.C. (MD) No.538 of 2016

WEB COPY

Dr.P.Saravanan

... Petitioner/1st Petitioner/5th Accused
Vs.The Inspector of Police,
City Crime Branch,
Madurai,
Madurai City,
Crime No.55/2015)

... Respondent/Complainant

Prayer: Criminal Revision Petition is filed under Sections 397 r/w. 401 of Cr.P.C., to call for the records relating to the impugned order passed in Cr.M.P.No.1158 of 2016 in P.R.C.No.2 of 2016 on 21.04.2016 by the learned Judicial Magistrate No.I, Madurai and set aside the same and direct the learned Judicial Magistrate No.I, Madurai to recall the Non-Bailable Warrant issued against the petitioner without petitioner's surrender or appearance before the Court.

For Petitioner : Mr.V.Karthik, Senior counsel for
Mr.Babu Rajendran

For Respondent : Mr.B.Bugalendhi
Additional Advocate General
Assisted by Mrs.S.Prabha, G.A. (Crl.side)

ORDER

This revision is at the instance of A5 in P.R.C.No.2 of 2016, as against dismissal of his petition to recall the N.B.W. filed in Cr.M.P.No.1158 of 2016 by the learned Judicial Magistrate No.I, Madurai.

2. Based on the complaint of the petitioner, a Madurai Doctor, the City Crime Branch Unit of Madurai City Police registered a case in Crime No.55 of 2015 under Sections 328, 201, 409, 420, 468, 120-B, 109 I.P.C., and under Sections 33(eea) and 27 of Drugs and Cosmetics Act.

3. The Investigation Officer went on collection of materials. Completing his investigation, he filed the Final Report under Section 173(2) Cr.P.C. before the learned Judicial Magistrate No.I, Madurai as against 11 persons including the petitioner. In this case, the petitioner has been arrayed as A5.

4. On 15.10.2015, the learned Judicial Magistrate No.I, Madurai took cognizance on the Police Report in C.C.No.84 of 2015. A1 to A4 were shown as on bail. The learned Magistrate ordered summons to them. Subsequently, on 04.02.2016, on noting down that it involves certain ~~services~~ ^{services} triable by a Court of Sessions, the learned Magistrate converted the Calender Case as a Preliminary Register Case in P.R.C.No.2 of 2016. In the Final Report, since the Investigation Officer



has shown A5 to A11 as absconding accused the learned Magistrate ordered issuing of NBWs against them and adjourned the case to 18.02.2016.

5. In the circumstances, apprehending arrest the petitioner has filed Crl.O.P.(MD).No.2432 of 2016 in this Court under Section 438 Cr.P.C. seeking anticipatory bail. Similarly, some co-accused have also sought for anticipatory bail.

6. In Crl.O.P.(MD).No.2432 of 2016 (supra), on 22.03.2016, by a common order, a learned Judge of this Court granted anticipatory bail to certain co-accused, however, declined anticipatory bail to the petitioner. On 31.03.2016, the accused, who were granted anticipatory bail have surrendered themselves before the learned Magistrate No.I, Madurai, they have produced the said common order copy and went on bail.

7. Inspired by the decision of this Court in **N.K.K.P. RAJA V. STATE [2009 (4) MLJ Crl. 1190]** advocating issuance of summons first, thereafter only NBW has to be issued, the learned Magistrate issued summons to the petitioner for the hearing 21.04.2016. On 30.03.2016 summons was entrusted to the police for service upon the petitioner. It is stated that it was unserved. There is no indication as to the nature of service - whether it was attempted to be served, whether it was refused.

8. Subsequently, on 02.04.2016, the learned Magistrate noted down the dismissal of the anticipatory bail petition of the petitioner by this Court and the observations made against him by this Court in the common order dated 22.03.2016 and coming to the view that the petitioner is involved in an heinous crime revised its earlier view based on **N.K.K.P. RAJA** (supra) and now ordered issuing of NBW as against the petitioner.

9. Already, the petitioner is under fear psychosis. Naturally now it went high. In the circumstances, as against the dismissal of his first anticipatory bail petition in Crl.O.P.(MD).No.2432 of 2016 the petitioner has filed S.L.P. (Cr.) No.2619 of 2016, in the Honourable Supreme Court of India. Subsequently, on 18.07.2016, he had withdrawn the S.L.P. with liberty to approach the High Court for appropriate redress in accordance with law. Then, he filed Crl.O.P.(MD).No.12483 of 2016 (second anticipatory bail petition). It was also dismissed.

10. Petitioner filed Cr.M.P.No.1158 of 2016 before the learned Judicial Magistrate No.I, Madurai under Section 70(2) Cr.P.C., to recall the NBW issued against him. Drawing inspiration from **N.K.P.P. RAJA Case** (supra) and from **SUNDAR VS. STATE [2016-1-L.W. (Cr1.) 506]**, the petitioner sought for recalling of the NBW without his physical (actual) presence before the learned Magistrate.

11. The learned Magistrate focused his attention on the nature of the case and the dismissal of his first anticipatory bail petition by this Court and the pendency of his SLP before the Hon'ble Supreme Court refused to recall the NBW. However, ultimately the learned Magistrate observed that the petitioner could appear and seek recalling of NBW.



12. After the said order of the learned Magistrate, the petitioner has become more panicky. Because he thought that if he go to the Magistrate's Court, he may not go to home but will be sent to jail. In the facts and circumstances, his this apprehension is understandable. In the circumstances, he came to this Court invoking the revisional jurisdiction under Section 397 r/w. 401 Cr.P.C.

13. The learned Senior Counsel appearing for the petitioner would contend that in the facts and circumstances and the stage of the case, straight away issuing NBW is uncalled for. At one stage of the case, to secure the presence of the petitioner, the learned Magistrate has elected to issue summons to the petitioner. Subsequently, even before the petitioner's appearance on the hearing date, the learned Magistrate has issued NBW as against him. There was no abscondance on the part of the accused. No material to show that he has disobeyed or will disobey the Court summons. Suddenly, suo motu, on 02.04.2016, the learned Magistrate has issued NBW. This is as against the dictum of the Honourable Supreme Court in **INDER MOHAN GOSWAMI V. STATE OF UTTARANCHAL [(2007) 12 SCC 1]**, which has been followed in **N.K.P.P.Raja** Case (supra) and **JEEVA EMU CARE INDIA (P) Ltd., Vs. STATE THROUGH D.S.P., E.W.O. II, DINDIGUL [Cr1.R.C. (MD) No.186 OF 2015 dated 18.06.2015]**. and also the scheme devised in the Code of Criminal Procedure to secure the attendance of the accused in Court to effect progress in the case.

14. The learned Senior Counsel appearing for the petitioner further contended that in this case no summons at all has been served upon the petitioner. There is no material to show that any attempt has ever been made to serve the summons upon the petitioner. Petitioner did not refuse to receive the summons also.

15. The learned Senior Counsel would further submit that in this case no occasion, no material for the learned Magistrate to invoke Section 87 Cr.P.C., The exercise of judicial discretion conferred upon the Magistrate under Section 87 Cr.P.C. is guided and controlled by sub clause (a) and (b) of the said Section. In this case, application of Section 87(b) Cr.P.C. is unthinkable. And the contingency contemplated in Section 87 (a) Cr.P.C. was not at all present. So, the order directing issuing of NBW suffers from legality, propriety, regularity and fundamental judicial principles.

16. The learned Senior Counsel appearing for the petitioner also submitted that the petitioner cannot be faulted for he having knocked the doors of this Court under Section 438 Cr.P.C. seeking a judicial remedy. Of course, the petitioner could not get the relief. That does not mean he cannot recourse to a judicial remedy available to him under Section 397 r/w. 401 of Cr.P.C., to canvass the correctness, legality, propriety and regularity of the order of the learned Judicial Magistrate No.I, Madurai, passed in Cr1.M.P.No.1158 of 2016 refusing to recall the NBW issued against him.

<https://hcservices.ecourts.gov.in/hcservices/> 17. According to the learned Senior Counsel appearing for the petitioner that in this case issuance of NBW on 02.04.2016 is not in accordance with law and in the facts and circumstances of the case, if



the petitioner goes to the Magistrate's Court, there is every reason to believe that the petitioner runs the risk of being sent to jail.

18. The learned Senior Counsel appearing for the petitioner would further submit that under this grim situation, the petitioner turned to the revisional jurisdiction of this Court. And dismissal of his anticipatory bail petitions under Section 438 Cr.P.C. have been dealt with under different jurisdiction and his withdrawal of SLP from the Honourable Apex Court will not fetter or come in the way of the petitioner invoking the revisional jurisdiction of this Court under Section 397 r/w 401 Cr.P.C. Each jurisdiction has been governed by different set of legal principles and one cannot be mixed with other and confused.

19. The Investigation Officer filed counter.

20. The learned Additional Advocate-General would submit that the petitioner is involved in a heinous and serious offence. He is concerned with using expired stents on patients. He wields enormous power that the police cannot go near him fairly for a long time. He invited the adverse comments upon him in his two anticipatory bail petitions.

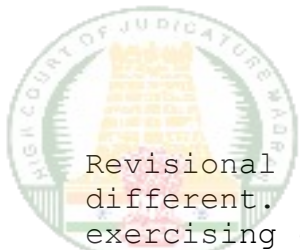
21. The learned Additional Advocate-General would draw the attention of this Court to paras 55 and 56 of **INDER MOHAN GOSWAMI** case (supra) and would submit that there shall not be any indulgence to persons involved in serious and heinous crimes and considering the seriousness of the offence alleged the learned Magistrate has rightly issued NBW against the petitioner.

22. I have anxiously considered the rival submissions, perused the impugned order, the materials on record and the decisions cited at the bar.

23. We have already given the necessary factual matrix for the disposal of this revision. Let us not duplicate it.

24. One facet of Administration of Criminal Justice is dealing with criminals. Basic principles of criminal jurisprudence is that unless the contrary is established beyond all reasonable doubts everyone is presumed to be innocent. It itself is one facet of human right. But at the same time, interest of the State to bring the offenders to justice cannot be lost sight of. A harmonious construction of individual liberty and the interest of State is the need of the hour. It is not only the right of the accused but also the right (plight) of the victims matters. But at the same time, neither be at the cost of law and the cherished human rights.

25. The High Courts have been endowed with different, jurisdictions on different aspects of law, field of law. In criminal matters it has Appellate, Revisional, Review, inherent, bail jurisdiction and also writ jurisdiction. Exercise of each jurisdiction is governed by different set of legal principles. One cannot be mixed with, or confused with the other. The consideration and governing principles relating to bail jurisdiction (See Section 436, 437, 439 and 438 Cr.P.C.) and the



Revisional jurisdiction (See Section 397, 401 Cr.P.C.) of this Court are different. Exercise of one jurisdiction will not oust or preclude exercising of other jurisdiction as they were exercised on different set of principles and considerations. Each have their own ambit purport and scope. In revisional jurisdiction, the Court is concerned with legality, propriety, regularity, principles of natural justice, fundamental judicial procedures and settled principles of law with regard to the orders passed by the inferior Courts. It is conventional jurisdiction. Whereas exercising bail jurisdiction by this Court under Section 438 Cr.P.C. is an original jurisdiction, it is not appellate or correctional jurisdiction. Thus in our exercising revisional jurisdiction under Section 397 r/w 401 Cr.P.C. dismissal of petitioner's anticipatory bail petition under Section 438 Cr.P.C. or his withdrawal of S.L.P. from Hon'ble Supreme Court will not be a barrier.

26. Securing the presence of an accused in the Court is a must to effect progress in a case (See Section 204(1) Cr.P.C. Part A of Chapter VI of the Code of Criminal Procedure deals with issuing of summons to the accused. Its part B deals with issuing of NBWs to the accused under certain circumstances and its Part C deals with making of proclamation and attachments with a view to secure the attendance of the accused in the Court.

27. Fairly, for a long time, Courts used to deny anticipatory bail when a person is sought to be arrested under NBW. Now, it is not so. But the apprehension arising out of arrest is too serious. Because it is an hindrance to civil liberty. Section 41 Cr.P.C., speaks about arrest. Issuance of arrest warrant is provided in Section 70(1) Cr.P.C. of Part B of Chapter VI of the Code. Naturally, the word arrest used in the said Chapter should be understood as contemplated in Section 41 Cr.P.C. Section 204 (1), 70, 73, 87 Cr.P.C. deals with issuing of process. NBW is also a process. But they are concerned with enforcing or securing the attendance of the accused in the Court.

28. In **INDER MOHAN GOSWAMI** case (supra) referring to the finer aspects of individual liberty and the interest of the State, the Hon'ble Supreme Court advocated issuance of summons in the first instance, then issuance of bailable warrant and thereafter under certain circumstances issuance of NBW.

29. In this connection it is apposite to note here the following guidance provided in **INDER MOHAN GOSWAMI** (supra):

"When non-bailable warrants should be issued

53. Non-bailable warrant should be issued to bring a person to court when summons of bailable warrants would be unlikely to have the desired result. This could be when:

- it is reasonable to believe that the person will not voluntarily appear in court; or
- the police authorities are unable to find the person to serve him with a summon; or



it is considered that the person could harm someone if not placed into custody immediately.

54. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the Criminal Complaint or FIR has not been filed with an oblique motive.

55. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable- warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the courts proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants.

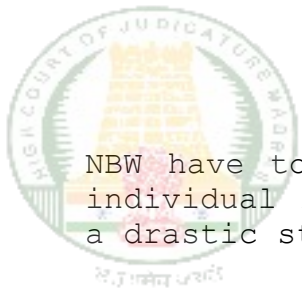
56. The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straight-jacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided.

57. The Court should try to maintain proper balance between individual liberty and the interest of the public and the State while issuing non-bailable warrant."

30. Thus, issuance of summons as a first step to secure the attendance of the accused has been advocated. But, there are instances where the police may not be a match for the accused. In such cases, summons to such accused will be ineffective. Where the accused is powerful and is involved heinous crimes, if summons alone is issued it will not serve the purpose, then and then alone, the Court can think of issuing N.B.W. But, while doing so, the Court cannot disregard law (See Section 87(a) or (b) Cr.P.C. But, before that much more care is needed.

<https://hcservices.ecourts.gov.in/hcservices/>

31. But why the Magistrate/Judge think of issuing of NBW in lieu of summons have to be stated. Why they should go for his arrest first under



NBW have to be satisfied. While doing so they should keep in mind the individual liberty, the interest of the State and the need to take such a drastic step.

32. In the present case investigation was over. Cognizance was taken. The case is at the stage of securing the presence/attendance of the petitioner. Only with a view to secure his presence the learned Magistrate has issued N.B.W. as against the petitioner. First he has ordered issuance of N.B.W. Then he has changed his mind and issued summons to the accused. No material to show that the summons was served upon him or attempted to be served upon him or he has refused to receive it. After having issued summons, on perusing the common order of this Court under which his anticipatory bail petition was dismissed, suo motu, the learned Magistrate has ordered N.B.W. as against the petitioner. None of the criteria contemplated in Section 87(a) or (b) Cr.P.C. has been satisfied. No such contingency in this case at all. Here we shall recall the guidance provided by the Hon'ble Supreme Court in **INDER MOHAN GOSWAMI** (supra). Thus, in the facts and circumstances of this case, exercise of judicial discretion by the learned Magistrate in issuing N.B.W. to the petitioner is not proper.

33. At this stage of the case the Court is very much concerned with securing the attendance of the petitioner for making further progress in the case. This is what the spirit of the impugned order of the learned Magistrate, which has been expressed in para 7 of his order dated 21.04.2016 and that is what also the wish of the prosecution that has been expressed in paragraph-9 of the counter filed today. In his petition to recall N.B.W. filed before the learned Magistrate and in his revision petition filed before this Court the petitioner had also stated that he is prepared to participate in the Court proceedings.

34. Consideration of what we have stated so far, we pass the following orders:

(I) The petitioner/A5 shall surrender before the learned Judicial Magistrate No.I, Madurai on or before the hearing date, namely, 26.08.2016.

(ii) On such surrender, the learned Magistrate will recall the NBW.

(iii) There shall be two sureties, they and the petitioner shall execute a bond for Rs.20,000/- (Rupees Twenty Thousand only) each to the satisfaction of the said Magistrate.

(iv) Petitioner shall regularly attend on all the hearing dates unless his absence is condoned on a petition filed under Section 317 Cr.P.C.

(v) Till his such surrender, the NBW shall not be executed.

35. Accordingly, this CrI.R.C. is disposed of.

Sd/

Assistant Registrar

/TRUE COPY/



To

1. The Judicial Magistrate No.I,
Madurai.

2. The Inspector of Police,
Central Crime Branch,
Madurai City,
Madurai.

3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1cc to M/S.Mr.Babu Rajendran, Advocate in SR.No.45600

Cr1.R.C. (MD) No.538 of 2016
18.08.2016

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PA/SAR I/19.08.2016/8P/5C (IT)