

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Criminal Jurisdiction)

Wednesday, the Sixteenth day of October Two Thousand Nineteen

PRESENT

The Hon`ble Mr Justice R.SUBBIAH

CRIMINAL ORIGINAL PETITION No.22383 of 2019

KENNETH STANLEY (ALIAS) KEN

[PETITIONER / ACCUSED]

Vs

INTELLIGENCE OFFICER

[RESPONDENT]

NARCOTICS CONTROL BUREAU,

CHENNAI ZONAL UNIT,

CHENNAI-600 090.

R.R.NO.06/2014 IN NCB F.NO.48/1/02/2014/NCB-MDS]

For Petitioner : M/S.S.SHUJATH Advocate

For Respondent : MR.N.P.KUMA SPECIAL PUBLIC PROSECUTOR FOR NDPS ACT
CASES

PETITION FOR BAIL 439 Cr.P.C.

ORDER : The Court Made the following order :-

This Criminal Original Petition is filed under Section 439 of the Criminal Procedure Code (Cr.P.C) praying to enlarge the petitioner on bail in C.C.No.47 of 2014 on the file of the Principal Special Court under EC & NDPS Act cases, Chennai, against R.R.No.6/14 in NCB F.No.48/1/02/2014/NCB-MDS on the file of the Narcotics Control Bureau, Chennai Zonal Unit.

2. This is the second bail application filed by the petitioner. He was arrested on 30.01.2014 for contravention of the provisions of Section 8(c) read with 21, 23, 28 and 29 of the Narcotics Drugs and Psychotropic Substances Act (NDPS Act), as amended and the same are punishable under Sections 21(c), 23(c), 28 and 29 of the NDPS Act, as amended and the case pertains to NCB.F.No.48/1/02/2014/NCB-MDS on the file of the respondent-Police. The earlier bail application in CrI.O.P.No.7352 of 2015 was dismissed on 16.04.2015.

3. The case of the prosecution is as follows:

(a) On 27.01.2014, M.Saravanan, Investigating Officer, Narcotics Control Bureau (NCB), Chennai Zonal Unit received a Telephonic message from M/s.Aramex India Private Limited to the effect that they have received two international consignments for carriage under Airway Bill No.3381638315, dated 23.01.2014, destined for South Africa and Airway Bill No.3381638326, dated 23.01.2014, destined for

Canada, declared to be bangles and they have suspicion about the contents of the consignments. Based on the said information, the NCB officials went to the place and opened the boxes. On a closer examination, it was found that something was concealed in the cavity of the wooden rod. One of them was dismantled and cylindrical tube like shape wrapped with brown colour adhesive tape was found. The officer cut opened the tube like shaped and found that half-white coloured powder was concealed in that tube like shaped item. Similarly, the second parcel was also opened and 150 gms. of half-white coloured powder was found. The powder was tested positive for heroin, a narcotic drug covered under the NDPS Act. Thereafter, both the lots weighing 250 gms. were seized.

(b) On further enquiry, it was revealed from M/s.Aramex India Private Limited that the seized parcel was booked at Flywing Express Services, L.B.Road, Adyar, Chennai. On 28.01.2014, the NCB officials visited the said office and found that an African, by name Kenneth Stanley, had booked the consignments and he may come back to book a foreign destined consignment likely to contain drugs on 29.01.2014, on which date, the NCB officers went to the office of Flywing Express Services and at around 17.30 hours, the said Kenneth Stanley came to the office with a card-board box; on enquiry, he revealed that the said box contains concealed heroin. Upon opening the decorative box, two rows of bangles were seen suspended on removable two wooden rods. The wooden rods were cut opened and 100 gms. of brown coloured powder, viz., heroin was found. The contra-band was seized. Thereafter, summons were issued by the NCB Officer M.Saravanan under Section 67 of the NDPS Act to Kenneth Stanley to appear before him at NCB Office, Chennai on 29.01.2014 for further enquiry. Accordingly, the petitioner/accused-Kenneth Stanley appeared before the Office and gave his confession statement on 30.01.2014, in which, he admitted his guilt in procurement, possession, transportation and attempt to illegally export out of India to Canada, South Africa, New York and other countries, thereby, entered into criminal conspiracy for trafficking of the contra-band.

(c) Based on the confession statement of the petitioner/accused, incriminating documents and material objects were seized and the petitioner/accused was arrested on 30.01.2014 for contravention of the provisions of Section 8(c) read with 21, 23, 28 and 29 of NDPS Act, as amended and the same are punishable under Sections 21(c), 23 (c), 28 and 29 of the NDPS Act, as amended. Subsequently, the petitioner/accused was produced before the learned IX Metropolitan Magistrate, Saidapet, Chennai on 30.01.2014 and remanded to judicial custody. According to the prosecution, the contra-band seized is about 350 gms., which is a commercial quantity. Moreover, the samples were sent for chemical analysis to Customs House Laboratory and the report also confirmed it as Diacetyl Morphine (Heroin) covered under the NDPS Act, 1985.

4. The earlier bail petition in CrI.O.P.No.7352 of 2015 was dismissed on 16.04.2015 holding as follows:

single Judge of this Court dated 23.12.2014 passed in M.P.No.2 of 2014 in Crl.O.P.No.9189 of 2014, I find that in that case, the accused was arrested for the offences under Sections 14(a), 4(a) and 14 (c) of the Foreigners Act, 1946 and Passport Act 12(10)(c) 1967 IPC and not for the offences under the NDPS Act. So far as the order of the Division Bench of this Court is concerned, I find that the Nigeria High Commission has submitted its explanation declaring that they would not issue any travel document to the accused in that case. By relying upon the said declaration, the detenus in that case sent to Camp. Therefore, the dictum laid down in the above orders cannot be made applicable to the facts of the present case.

7. So far as the NDPS Act cases are concerned, the petitioner has to satisfy the conditions laid down under Section 37 of the NDPS Act, i.e. he has to satisfy this Court 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. But, the petitioner has failed to satisfy the said conditions. Under such circumstances, the question of confinement in Camp does not arise. Hence, I am of the opinion, it is not a fit case to grant bail

In fine, the bail petition is dismissed."

5. Now, the present Crl.O.P. is filed after nearly 4-1/2 years.

6. The learned counsel for the petitioner/accused submitted that as on date, the accused is in incarceration for nearly five years and eight months. So far, only cross-examination of P.W.1 is completed and P.Ws.2 to 7 are yet to be cross-examined. The learned counsel appearing for the petitioner/accused now, had entered appearance in this case in C.C.No.47 of 2019 by filing a Memo of Appearance on 18.06.2019. The present counsel-on-record assured the trial Court that he would complete the trial even on day-to-day basis, provided the trial Court would re-open the cross examination stage of L.Ws.2 to 7. Only on 16.09.2019, the present counsel-on-record filed petition under Section 311 Cr.P.C. to re-call the witnesses L.Ws.2 to 7, which was allowed on condition that the petitioner/accused shall pay costs of Rs.25,000/-. But the said costs of Rs.25,000/- could not be paid by the petitioner/accused, and therefore, the earlier order dated 16.09.2019 worked itself out, i.e. the earlier order got automatically cancelled, without reference to Court.

7. The learned counsel for the petitioner/accused further submitted that the petitioner is a South African National, bearing South African Passport and he came to India under Student Visa, worked in Delhi and therein, he married a Tamil girl belonging to

Tanjore and both of them got re-located to Chennai and they are even having a baby. The learned counsel further submitted that the petitioner/accused is in jail for nearly five years and eight months.

8. The learned counsel for the petitioner/accused also submitted that for completion of trial, it would take further considerable time and the quantity of contra-band said to have been seized is not 'commercial quantity' and thus, the learned counsel prayed that bail may be granted to the petitioner/accused.

9. Countering the above submissions, the learned Special Government Pleader appearing for the respondent/accused, by filing counter affidavit, vehemently contended that the petitioner had not satisfied the conditions imposed by the statute under Section 37 of the NDPS Act. He further contended that the case is under trial and the prosecution-side evidence was closed and the questioning under Section 313 Cr.P.C. was completed on 20.02.2018. From that date onwards, the petitioner had been taking time for defence witnesses and at the behest of the petitioner/accused, the trial is pending. He further strenuously contended that if the petitioner is enlarged on bail, he may tamper the evidence and flee away from the clutches of law, and it will be very difficult to secure the petitioner/accused.

10. The learned Special Public Prosecutor further contended that the petitioner has financed for procurement of drug, which is commercial quantity, i.e. 350 grams of Heroin and he is not entitled for bail without satisfying the conditions imposed under Section 37 of the NDPS Act. There is no change of circumstance to file this second bail petition, though the earlier bail petition in CrI.O.P.No.7352 of 201 was dismissed as early as on 16.04.2015 by this Court. The petitioner is dragging on the trial of the case and is seeking time for examination of defence witness(es) and hence, for the above reasons, the learned Special Public Prosecutor prayed for dismissal of the present bail petition.

11. Heard both sides and perused the materials available on record.

12. Though very many contentions have been raised by the learned counsel on either side, I am of the opinion that the submissions made by the learned counsel for the petitioner will not fall within the scope of the provisions/conditions under Section 37 of the NDPS Act and if and if only the petitioner satisfies the conditions imposed under Section 37, the petitioner is entitled for bail.

13. In the above context, it is appropriate to look into a judgment of mine reported in 2013 (2) MLJ (Cri) 754 (Intelligence Officer, NCB Vs. Selvi) (CrI.O.P.No.24489 of 2012, dated 03.04.2013), relied on by the learned Special Public Prosecutor appearing for the respondent-NCB, wherein it was held as follows:

"10. On a perusal of the entire materials available on record, I find that, as contended by the learned senior counsel for the

petitioner/prosecution, though the accused have informed that they travelled along with other two persons, they were not in a position to give the address and identification of the said accused. Similarly, they were not in a position to give address of one Varusanattu Daivam who has been arrayed as A5. Whether those names are imaginary or not could be seen only at the time of trial and not at the time of considering bail application. Till such time, the said statement of the respondents can be taken only as a probable defence.

11. At this stage, it would be appropriate to extract section 54 of NDPS Act, which reads as follows:

"54. Presumption from possession of illicit articles:- In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of,--

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specifically designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactory".

12. A close reading of the above said provision would clearly show that unless and until the contrary is proved, the presumption is that the accused has committed the offence under this Act. Though, in the instant case, the trial court has rendered a finding that so far as these petitioners are concerned, they ought not to have carried the entire carry bags, the same can be proved only at the time of trial,

particularly in the circumstances when the accused have not given the address and identification of the other accused persons who have been referred to in their statements. In this regard, a reference could be placed in the judgment reported in Dharampal Singh Vs. State of Punjab - (2010) STPL (LE) 44317 SC) as under:

"15. From a plain reading of the aforesaid it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the appellants have not been able to account for satisfactorily the possession of opium.

16. Once possession is established the Court can presume that the accused had culpable mental state and have committed the offence. In somewhat similar facts this Court had the occasion to consider this question in the case of Madan Lal and another Vs. State of H.P., 2003 (7) SCC 465, wherein it has been held as follows:

"26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

27. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act".

13. The dictum laid down in the said judgment is that once possession is established, it is for them to prove at the time of trial that

such possession is not a conscious possession. Till such time it has to be presumed that the entire quantity of ganja is received only from the possession of the respondents. At this stage, it would be appropriate to extract section 35 of the NDPS Act, which reads as follows:

"35. Presumption of culpable mental state:- (1) In any prosecution for an offence under this Act, which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the Act charged as an offence in that prosecution.

(2) For the purpose of this section, a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability".

14. A close reading of the abovesaid provision would also show that the accused can prove the fact that he had no culpable mental state with respect to the Act charged as an offence in that prosecution only at the time of trial. Till such time, it is too early to presume that the respondents had the mental state to carry less than the commercial quantity and till the said statement of the respondents is proved by way of evidence, the said statement has to be construed only as a probable defence. Therefore, in my considered opinion, the bail granted by the trial court is not legally sustainable.

15. Though the learned counsel for the respondents/accused relied upon a judgment reported in Sami Ullaha Vs. Superintendent, Narcotic Central Bureau (spura) (AIR 2009 SC 1357) that only under certain circumstances, the bail could be cancelled, I am of the opinion that in view of section 37 of NDPS Act, if the Court satisfies that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail, bail could be granted. These two conditions were not satisfied in the instant case. Looking at any angle, I am of the view that bail granted by the trial court is not proper and correct and as such, it has to be cancelled.

Accordingly, Crl.O.P.No.24489 of 2012 is allowed and the bail granted by the trial court is hereby cancelled. However, the court below is directed to conduct the trial and dispose of the case as early as possible. Consequently, connected M.Ps. are closed."

14. A reading of the above judgment of this Court in 2013 (2) MLJ (Cri) 754 (cited supra), would show that only if the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail, bail could be granted. This Court could not find any such situation in the present second bail petition of the petitioner/accused.

15. The learned Special Public Prosecutor also relied on the following judgments in support of his submissions, in support of his submission that the bail could not be granted as a matter of right and fact, that too, in NDPS cases:

(i) 2009 (2) MLJ (Cri) 407 = 2009 (1) LW (Cri) 218 (Division Bench of this Court) (Palani Vs. State represented by the Inspector of Police);

(ii) 2006 (9) SCC 712 (Narcotic Control Bureau Vs. Raju alias Natarajan),

(iii) 2000 (9) SCC 549 (Supdt., Narcotics Control Bureau, Chennai Vs. R.Paulsamy), and

(iv) 2000 (9) SCC 221 (Union of India Vs. Ikram Khan and others).

16. In the above decisions, it is held as follows:

(i) 2009 (2) MLJ (Cri) 407 = 2009 (1) LW (Cri) 218 (Division Bench of this Court) (Palani Vs. State represented by the Inspector of Police):

---> The general rule for the use of discretionary power of grant of bail cannot be made applicable to the offence under NDPS Act as grant of bail will be examined and the Court must satisfy itself that there are reasonable grounds for believing that the accused is not guilty of offence and further, the accused is not likely to commit any offence while on bail. Further, in view of the specific provisions of Sub-Section (2) of Section 37 contemplating the limitations to be in addition to the limitations for grant of bail under Cr.P.C., the power of the Court to grant bail in NDPS cases, where the punishment is five years or more, is contemplated, should be exercised with great caution, keeping in view the Legislative intent, namely the parameters of Section 37(1)(b)(i) and (ii) of the NDPS Act.

(ii) 2006 (9) SCC 712 (Narcotic Control Bureau Vs. Raju alias Natarajan):

---> The accused should not be released on the ground that the sample did not contain presence of narcotic and psychotropic substance and the fact that he had been in custody for a period of six months was also not a valid reason to release him on bail in a crime of this nature.

(iii) 2000 (9) SCC 549 (Supdt., Narcotics Control Bureau, Chennai Vs. R.Paulsamy) :

---> the decision of the Supreme Court reported in JT 1999 (6) SC 397 (Union of India Vs. Ram Samajh and another, reiterated, i.e. the parameters to be followed while considering the application for bail moved by accused involved in offences under the NDPS Act.

---> 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. The matters could be judged/established only on compliance of Sections 52 and 57 of the NDPS Act.

(iv) 2000 (9) SCC 221 (Union of India Vs. Ikram Khan and others) :

---> While considering the question of bail, the Court has to bear in mind the provisions of Section 37 of the NDPS Act, which are mandatory in nature and the Court must also bear in mind the said provisions before deciding an application for bail in case an accused is facing a trial under the provisions of the NDPS Act.

17. Hence, for the foregoing reasonings and by following the above decisions relied on by the learned Special Public Prosecutor, this second bail petition of the petitioner/accused, is dismissed. However, the trial Court is directed to speed up/expedite the trial and complete the trial in C.C.No.47 of 2014 (pending on the file of the Principal Special Court under EC and NDPS Act cases against R.R.No.6 of 2014 in N.C.B.F.No.48/1/02/2014/NCB-MDS on the file of the respondent-NCB) without adjourning the trial for one reason or the other at the behest of either side, and dispose of the said C.C. within a period of six months from the date of receipt of a copy of this order.

-sd/-

16/10/2019

This order, on being produced, be punctually observed and carried into execution by all concerned

TRUE COPY

Sub-Assistant Registrar (Statistics/C.S.)
High Court, Madras - 600 104.

TO

1 THE PRINCIPAL SPECIAL COURT
UNDER EC AND NDPS ACT CASES AGAINST
R.R.NO.6 OF 2014 IN N.C.B.F.NO.48/1/02/2014 NCB-MDS
ON THE FILE OF THE RESPONDENT-NCB] CHENNAI

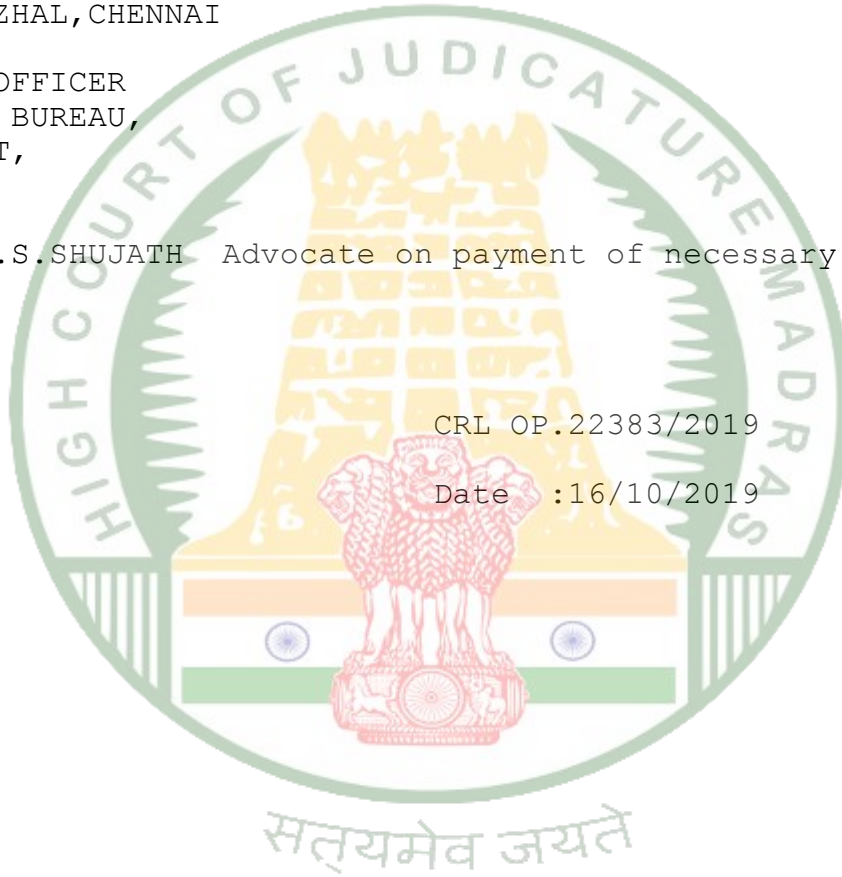
2 THE SPECIAL PUBLIC PROSECUTOR
NDPS ACT CASES, HIGH COURT, MADRAS

3 THE SUPERINTENDENT,
CENTRAL PRISON, PUZHAI, CHENNAI

4 INTELLIGENCE OFFICER
NARCOTICS CONTROL BUREAU,
CHENNAI ZONAL UNIT,
CHENNAI-600 090.

+1 CC to M/S.S.SHUJATH Advocate on payment of necessary charges
SR.NO. 21286

RD 31/10/2019



CRL OP.22383/2019

Date :16/10/2019

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