

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 19.11.2019
CORAM:
THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA
Crl.R.C.No.1226 of 2019
and
Crl.M.P.No.16404 of 2019

Thanika @ Thanikaivel

... Petitioner/Accused

Vs.

1.Executive Magistrate Cum
Deputy Commissioner of Police,
Pulianthope District, Chennai.

2.State:The Inspector of Police,
P4, Basin Bridge Police Station,
Chennai.

.... Respondents/Complainant

PRAYER: The Criminal Revision Petition has been filed, under Section 397 read with 401 Cr.P.C, to call for the entire records on the file of the first respondent/learned Executive Magistrate, Deputy Commissioner of Police, Pulianthope District, Chennai, in M.P.No. of 2019 in C.No.275/Sec.Pro/DCP (P)/2019 and set aside the order dated 26.10.2019.

For Petitioner : Mr.M.Rajavelu

For Respondents: Mr.M.Mohamed Riyaz
Additional Public Prosecutor

J U D G M E N T

This revision has been filed seeking to set aside the order passed in C.No.275 of/Sec.Pri/DCP (P)/2019 passed by the first respondent/Executive Magistrate Cum Deputy Commissioner of Police,Pulianthope District, Chennai, dated 26.09.2019.

2 The brief facts of the case are as follows:

(i) On 13.09.2019, when the Sub Inspector of Police attached to the second respondent police was in patrol, he had found the petitioner loitering in a suspicious manner and on seeing the Sub Inspector of Police, the petitioner attempted to slip away and when he was stopped and enquired, it was found that the petitioner had a criminal case pending on the file of the second respondent. Thereafter, when the petitioner was brought to the second respondent Police Station and when the records were perused, it was found that the petitioner was

involved in Cr.No.127 of 2019 registered for offence under Section 8(c), read with 20(b)(ii)(B) NDPS Act and he had been remanded and thereafter, released on bail. Finding reasons to believe that the petitioner may create law and order problem and in order to control his activities, proceedings were initiated in C.No.39/Inspr.P4 PS/Sec.Pro/2019 and, the petitioner was summoned and produced before the first respondent and the petitioner had executed a bond for Rs.10,000/-, to keep good behavior on 17.09.2019 under Section 107 Cr.P.C.

(ii) While so, on 04.10.2019, the petitioner had involved in a case registered by G3, Kilpauk Police Station in Crime No.300 of 2019 for the offences under Sections 147, 148, 341, 294(b) and 307 of IPC on 04.10.2019 and the petitioner was arrested on 08.10.2019 and remanded to judicial custody by the II Metropolitan Magistrate. Finding that the petitioner had violated the bond executed by him on 17.09.2019, by involving in a subsequent offence, a request was made by the second respondent to the first respondent to initiate action under Section 122(1)(b) of Cr.P.C. Based on the request, the petitioner was produced on PT warrant from the prison before the first respondent on 17.10.2019. Thereafter, copies of the documents were furnished to the petitioner and after giving sufficient time, the petitioner was directed to be produced from prison again on 26.10.2019. On 26.10.2019, when the petitioner was produced before the first respondent, he was informed about the action taken under Section 122(1)(b) of Cr.P.C. and the petitioner had not objected to it and no advocate had appeared. Thereafter, five witnesses were examined and Exs.P1 to P9 were marked. The petitioner was questioned under Section 313 Cr.P.C and the petitioner had denied the allegations and on his side, his mother and sister were examined and their statements were recorded. Based on the enquiry, the impugned order has been passed, convicting the petitioner to undergo imprisonment for 328 days. As against the same, the present revision has been filed.

3 Heard both sides and perused the materials placed on record.

4 The learned counsel for the petitioner would submit that the impugned order has been passed without following the procedures contemplated under the Code of Criminal Procedure. The learned counsel would submit that the initial order under Section 107 Cr.P.C, itself was passed in violation of the procedure and thereafter, no enquiry had been conducted in accordance with the procedures under Chapter VIII of Cr.P.C. and he would submit that the entire proceedings initiated by the respondents are in violation of established principles of law and the procedures contemplated under Chapter VIII of

Cr.P.C. The impugned order does not disclose subjective satisfaction of the first respondent and that the respondents have not followed the guidelines issued by this Court in various judgments and would thereby seek to set aside the impugned order. In support of his contentions, the learned counsel would rely on the judgment of this Hon'ble Court reported in 2017 (1) LW (Cr1.) 218 - [Balamurugan Vs. State represented by the Inspector of Police, (Law and Order), Palayamkottai Police Station, Tirunelveli City and 2019 (2) MLJ (Cr1) 556 - [P.Sathish Vs. State and Others]

5 The learned Additional Public Prosecutor would submit that the petitioner had executed a bond before the first respondent on 17.09.2019 under Section 107 Cr.P.C to keep good behavior for one year and while the bond was in force, the petitioner has involved himself in a case registered in Crime No. 300 of 2019, under Sections 147, 148, 341, 294(b) and 307 of IPC and the petitioner was arrested and remanded to judicial custody. Finding that there was a possibility of the petitioner filing a petition for bail and coming out on bail and also finding that if he was let out on bail, he will indulge in similar crimes, the second respondent had requested for initiation of proceedings under Section 122(1)(b) of Cr.P.C. for having violated the bond. Based on that, the petitioner was produced from prison under PT warrant on 17.10.2019 and thereafter, after affording sufficient opportunity, an enquiry was conducted on 26.10.2019 and the impugned order has been passed by the first respondent on the same day.

6 In the Judgment reported in 2019 (2) MLJ(Cr1) 556 - [P.Sathish Vs. State and Others], this court had evolved legal principles/guidelines before passing orders under Section 122(1)(b) of Cr.P.C. and directed all the Executive Magistrates to follow it. It is apposite to refer to the relevant paragraphs under.:

13. Moreover, the guidelines are integral part of Articles 21 & 22 of the Constitution of India and also inconsonance with Section 39-A of the Direct Principles of State Policy. No doubt, the State may have practical difficulties and may confront glitches in completing the enquiry in furtherance of exercise of power under Section 122(1)(b) of Cr.P.C., nevertheless, the Constitutional mandate, as provided under Articles 21 & 22 of the Constitution is paramount and supreme and the same has to be followed under all circumstances, notwithstanding the difficulties to be faced by the administration. When the liberty of an individual is sought to be affected and curtailed, the State is bound

to provide legal assistance and also provide meaningful and fair opportunity to the persons concerned. In the absence of such opportunity, as aforementioned, the orders to be passed by the Executive Magistrates is prone to interference as being unconstitutional and contrary to the legal principles laid down by this Court. When a State is governed by a written Constitution and when the Constitution reigns supreme in our polity, it is the bounden duty of the State to protect the personal liberty of the citizen by following the constitutional mandate and the personal liberty cannot be made a casualty on the basis of administrative expediency. That alone can uphold the rule of law. When the personal liberty of a person is sought to be taken away by condemning him into prison for an unexpired period of bond, it is statutorily and constitutionally imperative that the person concerned must be given the benefit of meaningful, real and fair opportunity, as that alone would be the safeguard for the citizens against misuse of the provisions of Cr.P.C., by the Executive Magistrates concerned.

14. In the conspectus of the above, this Court is of the considered view that the suggestions/guidelines as given by the learned Senior Advocate and others on one side and the learned Public Prosecutor on the other side have been considered by this Court and the following legal principles emerge on such consideration:

1. Notice to be sent to the person by the Executive Magistrate to show cause as to why action under Section 122(1) (b) of Cr.P.C should not be taken for breach of the bond executed under Section 117 Cr.P.C on a date fixed.

2. At the enquiry, the Executive Magistrate should furnish the person the materials sought to be relied upon, including statements of witnesses, if any, in the vernacular (if the person is not knowing the language other than his mother tongue).

3. If the person wishes to engage an Advocate to represent him at the

enquiry, an opportunity to have a counsel of his choice should be provided to him.

4.The Executive Magistrate shall inform the person about his right to have the assistance of a lawyer for defending him in the enquiry.

5.The enquiry shall be conducted by the Executive Magistrate on the notified date or such other date as may be fixed and the person should be allowed to participate in the same.

6.At the enquiry, an opportunity should be given to the person to:

(i)Cross-examine the official witnesses, if any and

(ii)produce documents and witnesses, if any, in support of his case.

7.Such Executive Magistrate or his successor in office, should then, apply his mind on the materials available on record, in the enquiry, and pass speaking order.

8.An order u/s.122(1)(b) of Cr.P.C should contain the grounds upon which the Executive Magistrate is satisfied that the person has breached the bond.

9.A copy of the order should be furnished to the person along with the materials produced at the enquiry.

10.The enquiry, as far as possible shall be completed within 30 days and at no circumstance, the enquiry shall be adjourned unnecessarily. The advocates, who appear on behalf of the persons concerned, are expected to co-operate with the enquiry process for its expeditious completion."

The above legal principles as evolved to be followed by all the Executive Magistrates concerned in future. In order to infuse uniform approach by all the Executive Magistrates concerned, the learned State Public Prosecutor is directed to circulate this decision to

the Government and the Government shall act upon the principles as laid down above and issue necessary instructions to all the designated Executive Magistrates to follow the principles strictly while exercising their power under Section 122 (1) (b) of Cr.P.C.

15. In the result, all the Criminal Revision Cases are allowed and the respective impugned orders are hereby set aside.

7 Further, in the judgment reported in 2017 (1) LW (Crl.) 218 - [Balamurugan Vs. State represented by the Inspector of Police, (Law and Order), Palayamkottai Police Station, Tirunelveli City, wherein, this Court has held as under:

"Before passing the order, Executive Magistrate shall refer the materials produced, must give an opportunity to the petitioner and apply his judicial mind and arrive at this subjective satisfaction that the petitioner has breached the security bond executed by him to keep good behaviour. He must also record grounds of such proof."

8 This Court, on an earlier occasion on 12.11.2019 had directed the second respondent to be present with the files. The second respondent is present along the files. This Court has perused the files.

9 A perusal of the records shows that the Executive Magistrate has not followed the guidelines given by this Court. Further, whenever, the order under Section 122(1)(b) Cr.P.C is passed, it is mandatory on the Executive Magistrate to refer to the materials and to apply his judicial mind and arrive at a subjective satisfaction and record his ground of satisfaction. Further, he must say whether sufficient cause has been established for passing the order. On a perusal of the impugned order, it does not disclose subjective satisfaction and does not disclose with regard to the steps taken after the petitioner had executed a bond under Section 107 of Cr.P.C and no observation has been made as to whether the procedure as contemplated under Chapter VIII of Cr.P.C has been followed. Thus, in the opinion of this Court, the impugned order suffers from legality and thereby, it is vitiated.

10 In view of the same, the Criminal Revision Case stands allowed and the order passed by the first respondent/learned Executive Magistrate, Deputy Commissioner of Police, Pulianthope

District, Chennai, in C.No.275 of/Sec.Pri/DCP (P)/2019 dated 26.10.2019, is set aside. The Superintendent of Central Prison, Puzal is directed to set at liberty, the revision petitioner if his further detention is no longer required in connection with any other case or proceedings. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Asst.Registrar (CS VI)

/true copy/

Sub Asst. Registrar

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To

1.Executive Magistrate Cum
Deputy Commissioner of Police,
Pulianthope District, Chennai.

2.The Inspector of Police,
P4, Basin Bridge Police Station,
Chennai.

3.The Public Prosecutor,
High Court, Madras.

4. The superintendent
Central prison
Puzhal Chennai

+1 cc to Mr.M.Rajavelu Advocate sr96352

Cr1.R.C.No.1226 of 2019

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