



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT, MADURAI

(Criminal Jurisdiction)

Date on which reserved : 12/06/2019

Date on which pronounced:18/06/2019

PRESENT

The Hon`ble Mr.Justice P.RAJAMANICKAM

CRL OP(MD) . No.7116 of 2019

Prabu

... Petitioner/Accused No.2

Vs

The State rep by its,
The Inspector of Pollice,
Thirupananthal Police Station.
Thanjavur District.
Crime No.247 of 2018

... Respondent/Complainant

For Petitioner : Mr.Navaneetha Krishnan
Senior Counsel for
Mr.B.Jameel Arasu, Advocate

For Respondent : Mr.V.Neelakandan,
Additional Public Prosecutor,

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

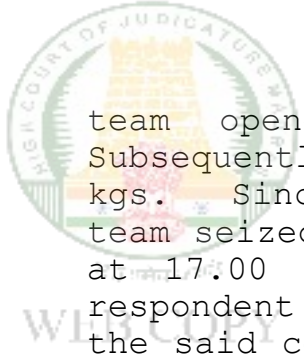
PRAYER :-

For bail in Crime No.247 of 2018 on the file of the Respondent Police

ORDER : The Court Made the following order :-

This petition has been filed by the Accused No.2 seeking bail for the alleged offences punishable under Sections 8(C) r/w 20(b) (ii) (c) of NDPS Act in Cr.No.247 of 2018.

2.The case of the prosecution is that on 02.01.2019 at about 16.00 hours, on information, a Police team led by Ms.P.Kavitha, Inspector of Police of Thirupananthal Police Station, was on surveillance, on the back side of Government Higher Secondary School, Vilanthakandam. At that time, three persons were standing with two motor cycles along with two white nylon gunny bags. On seeing the Police team, the aforesaid three persons by leaving the said gunny bags, escaped through the said motor cycles. The Police

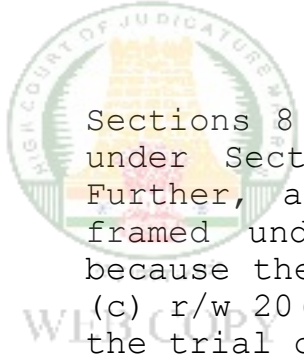


team opened the said nylon bags and found ganja therein. Subsequently, it was weighed and its weight is found to be 21.1/2 kgs. Since independent witnesses were not available, the police team seized the said contraband in the presence of police witnesses at 17.00 hours and took samples. Thereafter, on enquiry, the respondent came to know that the persons, who were in possession of the said contraband were i) Murugan s/o. Kittappa ii) Prabhu iii) Jothi S/o. Rajamanickam and a case was registered in Thirupananthol Police Station at 19.00 hours in Cr.No.247/2018 under Sections 8(c) r/w 20 (B) (ii) (C) of NDPS Act. Subsequently, on 27.12.2018, the petitioner herein was arrested and remanded to judicial custody.

3. The learned Senior Counsel for the petitioner has submitted that there is no evidence to link the petitioner herein with the aforesaid crime. He further submitted that no recovery has been made from the petitioner and no confession has been recorded. He further submitted that even if it is assumed that three accused persons were in possession of 2 gunny bags with ganja in two motor cycles, it cannot be said that the entire quantity of the ganja was in joint possession of all the three accused. He further submitted that though the respondent has filed a charge-sheet stating that all the three accused were in joint possession of 21 kgs of ganja, the learned Trial Judge has taken cognizance of the case under Sections 8(c) r/w 20(b) (ii) (B) of NDPS Act, 1985 and it shows that the trial court has treated the possession as only separate possession and as such, the said quantity would not come under the category of commercial quantity. He further submitted that the petitioner is in custody from 27.12.2018 i.e. for the past 160 days. He further submitted that the petitioner herein was arrested in this case on 02.01.2019 by getting P.T warrant and no confession has been recorded and no previous case of the similar nature is pending against the petitioner. Therefore, he prayed to grant bail to the petitioner.

4. Per contra, the learned Additional Public Prosecutor appearing for the respondent has submitted that it was found that all the three accused were in possession of two gunny bags totally containing 21.1/2 bags of ganja. He further submitted that already, 3 cases are pending against the petitioner. He further submitted that already, charge-sheet has been filed. In the said circumstances, if the petitioner is released on bail, he may not appear and co-operate for trial. Therefore, he strongly opposed this petition.

5. Though the learned Trial Judge has taken the case on file in C.C.No.6 of 2019 under Section 8(c) r/w 20(b) (ii) (B) of the NDPS Act, 1985, he dismissed the bail application filed by the petitioner herein in CrI.M.P.No.125 of 2019, stating that the petitioner was in joint possession of commercial quantity of ganja along with two other accused persons. Further, he has stated that the petitioner is already having 3 previous cases. So, it is clear that the trial court has mistakenly taken the case on file under



Sections 8(c) r/w 20(b) (ii) (B) of the NDPS Act, 1985, in stead of under Sections 8(c) r/w 20(b) (ii) (C) of the NDPS Act, 1985. Further, at the time of framing the charges, the charges can be framed under the proper provisions of law. Therefore, merely because the trial court has taken the case on file under Sections 8 (c) r/w 20(b) (ii) (B) of the NDPS Act, 1985, it cannot be said that the trial court treated the quantity as intermediate quantity.

6.The learned Counsel for the petitioner, relying upon a decision in **Union of India Vs Mohanlal and another, reported in 2016 (2) Crimes 25 (SC)**, has submitted that the samples have not been taken before the Judicial Magistrate, as contemplated under Section 52(A) (ii) of the NDPS Act and therefore, there is a suspicion with regard to the seizure of the contraband and taking of samples. In the said decision, the Hon'ble Supreme Court in paragraph No.13 has observed as follows:

"13. It is manifest from Section 52A (2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn. Sub-section (3) of Section 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 the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. 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 sub-section (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. Be that



as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction."

7. From the aforesaid decision, it is clear that already, the Central Government had issued a Standing Order No.1 of 1989, dated 13th June, 1989 which prescribes the procedure to be followed for seizure, sampling, safe keeping and disposal of the seized drugs, Narcotics and Psychotropic Substances. It is also clear that a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident, when the two are placed in juxtaposition. It is also clear that the Honourable Supreme Court has held that the Central Government has to re-examine the matter and take suitable steps in the above direction. But, it appears that the Central Government has not issued any directions withdrawing the aforesaid Standing Order. Therefore, in the said circumstances, this Court is of the view that the petitioner is not entitled to rely upon Section 52(A) of the NDPS Act.

8. The learned counsel for the petitioner relying upon the decision in **Noor Aga Vs State of Punjab and another reported in (2008) 16 SCC 417** contended that the element of possession of contraband was essential so as to shift the burden on accused. In that case, the accused was convicted by the trial court and that the appeal filed by the accused was also dismissed by the High Court. The accused filed further appeal to the Hon'ble Supreme Court with S.L.P. The Hon'ble Supreme Court after appreciating the entire evidence held that if the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the NDPS Act, the *actus reus* which is possession of contraband by the accused cannot be said to have been established. Further, it has held that the element of possession of the contraband was essential so as to shift the burden on the accused. In this case, as per the prosecution case, the police team has seen the accused persons with the contraband, but on seeing the police, the accused persons after leaving the contraband, they escaped through two motor cycles, it's further case is that only in ascertaining the name of the accused persons enquiry was conducted. The aforesaid facts are matter for appreciation of evidence at trial.

9. Whereas for granting bail, in respect of the case, where commercial quantity is involved, the Hon'ble Supreme Court in **State of Madhya Pradesh Vs. Kajad, AIR 2001 SC 3317** has held that the



Court must on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offence, which he is charged and further that he is not likely to commit any offence. While on bail, as contemplated under Section 37(1)(b)(ii) of the NDPS Act. In this case, the petitioner is having three previous cases. Under the said circumstances, if the petitioner is released on bail, he may commit offence, while on bail.

10.It is also to be pointed out that already, the co-accused namely Periyavan @ Murugan had filed a bail petition in Crl.O.P.(MD).No.2864 of 2019 before this Court and this Court, after considering the rival submissions, has dismissed the said petition, on 25.02.2019 with a direction that the trial court has to expedite the trial and dispose of the case within a period of 6 months. Hence, this Court is of the view that the case of the petitioner herein is in noway differed from the case of the co-accused namely Periyavan @ Murugan. Under the said circumstances, it would not be proper to grant bail to the petitioner.

11.In the result, this Criminal Original Petition is dismissed. The trial court is directed to dispose of the case in C.C.No.6 of 2019 within the time stipulated by this Court in Crl.O.P.(MD).No.2864 of 2019, uninfluenced by the observations made by this Court in this order.

sd/-

18/06/2019

/ TRUE COPY /

Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

TO

1.THE INSPECTOR OF POLLICE
THIRUPANANTHAL POLICE STATION,
THANJAVUR DISTRICT.

2.THE SUPERINTENDENT, CENTRAL PRISON, TRICHY

3.THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

+1. CC to M/S.B. JAMEEL ARASU Advocate SR.No.9938

ORDER IN

CRL OP(MD) No.7116 of 2019

Date :18/06/2019