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

Date on which reserved : 23/07/2019

Date on which pronounced : 30/07/2019

PRESENT

The Hon`ble Mr.Justice P.RAJAMANICKAM

CRL OP(MD). Nos.8832, 9197 and 9198 of 2019

K.Malaiselvan @ Selvam	... Petitioner/Accused No.4 in Crl.O.P.(MD).8832/2019
Jegan	... Petitioner/Accused No.1 in Crl.O.P.(MD).9197/2019
P.Karthick	... Petitioner/Accused No.3 in Crl.O.P.(MD).9198/2019

Vs

The Superintendent of Customs, Ramanathapuram, Ramanathapuram District. (OR.No.4/2017-18)	... Respondent/Complainant in all Crl.O.Ps
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For Petitioner : M/s.M.Shakul Hameed,
Advocate.
(In all Crl.O.Ps)

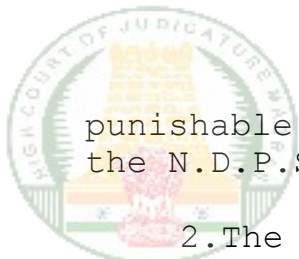
For Respondent : Mr.Arul Vadivel @ Sekar,
Spl. Public Prosecutor
(In all Crl.O.Ps)

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

PRAYER :-

For Bail in OR.No.4/2017 on the file of the Superintendent of Customs, Ramanathapuram District.

COMMON ORDER : The Court Made the following order :-



punishable under Sections 8(c) r/w 20(b) (ii) (C) 23, 28 and 29 of the N.D.P.S Act.

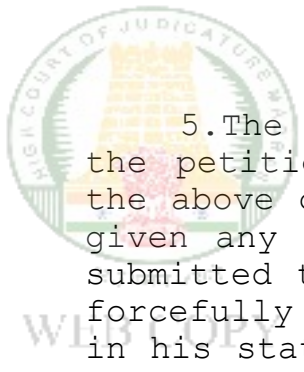
2.The respondent has filed counter affidavits opposing these petitions.

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3.(i)The case of the prosecution is that on the basis of a specific information received on 17.12.2017, the respondent along with his team rushed to Nochiyurani sea-shore, Ramnad District at 18.00 hours and they were on surveillance by hiding themselves inside the bushes. They also took two independent witnesses along with them. On the intervening night of 17/18.12.2017 at about 01.00 hours, the Officers noticed one boat, coming from inside the sea to Nochiyurani sea-shore. At that time, 3 persons came there from one palm tree area, which is opposite side of the sea-shore carrying with 2 gunny bags and one parcel (covered with adhesive tape) over their head and started moving towards the boat. Immediately, the Officers ran towards them and tried to catch the said persons. However, they could apprehend one person, who tried to rush and other two persons escaped in the dark. On interrogation, the said apprehended person stated that his name is P.Karthick, S/o.Pandian (A-3), residing at Irutoorani Village, near Nochiyurani Coast. He also stated that three persons were also involved to smuggle the parcels containing dry ganja to Sri Lanka by a country boat and also learnt that the bags and the parcel (covered with adhesive tape) were containing ganja. The parcels were opened in the presence of two independent witnesses and the accused P.Karthick with the help of torch lights and found that the bags and parcels contained green colour leaves and it appeared to be ganja. The Officers, on the reasonable belief that dry ganja of Indian Origin is attempted to be smuggled from India to Sri Lanka and hence, they were seized. Thereafter, the seized bags and the parcels and the accused were brought to the Divisional Office, Ramnad for further action.

ii)The inventory was taken on seized bags and parcels by drawing an Inventory Mahazar and total quantity of ganja was found to be 42 kgs. Further, a statement was recorded from the said accused P.Karthick under Section 67 of the NDPS Act, 1985 on 18.12.2017 and 19.12.2017, wherein, he had confessed that he has involved in smuggling attempt of dry ganja from India to Sri Lanka. The seized ganja parcels were owned by one Jegan, (A-1), S/o.Chinnraj. The said P.Karthick also confessed that Jegan, Jesudoss and Malaiselvam also involved in the conspiracy of smuggling of said ganja from India to Sri Lanka. Hence, the said accused was arrested and remanded to judicial custody on 19.12.2017.

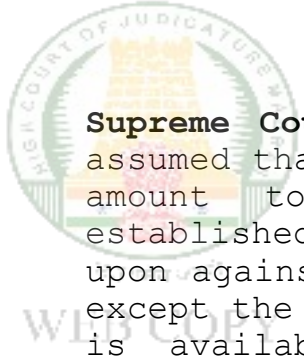
4.As follow-up action, A1-Jegan, A3- Malaiselvam were apprehended and statements under Section 67 of the NDPS Act were recorded and thereafter, A-3 was placed under arrest on 20.12.2017, A-1 was placed under arrest on 23.07.2018 and remanded to judicial custody on the respective dates.



5.The learned counsel for the petitioners has submitted that the petitioners are innocents and they were falsely implicated in the above case. He further submitted that the petitioners have not given any statement voluntarily before the respondent. He further submitted that the signatures of the petitioners have been obtained forcefully in the alleged statements. The Superintendent of Customs in his statement, has stated that he received secret information on 17.12.2017 at about 4.00 p.m. Immediately, he alleges that he requested one Assistant Commissioner to enquire about the information received by him. At that time, it is alleged that they took two mahazar witnesses namely Mari and Sankar and they have signed on 17.12.2017, as if they were at the occurrence place, whereas the date of 18.12.2017 is mentioned as the date of preparing mahazar. Thus, there is clear contradiction in the recording of the statement of witnesses and in the mahazar. He further submitted that on the date of alleged occurrence i.e on 17.12.2017, the statement of the accused No.3 has been recorded and in the said statement, the Superintendent of Customs has signed. In the mahazar also, the Superintendent of Customs signed. This clearly proves the falsity of the complaint and registering the case as against the petitioners. He further submitted that from the above facts, it is clear that the Superintendent of Customs took part in the process of sponsoring the case of the accused to the Assistant Commissioner. The confession statement of the A-3 was attested by the Superintendent of Customs, which is highly illegal. He further submitted that the contraband material was seized and confession statement was recorded in the night hours with the torch light only. As per Section 42 of the NDPS Act, such seizure must take place between sun rise and sun set. He further submitted that the respondent has not followed statutory provisions enumerated under Sections 42, 50 and 67 of the NDPS Act. He further submitted that all the acts of seizure, recording of evidences etc. were done in a most hasty manner without following due process of law. He further submitted that already, investigation has been completed and complaint has been filed and case has been taken on file in C.C.No.32 of 2018.

6.The learned counsel for the petitioners has further submitted that the Honourable Supreme Court in **Tofan Singh Vs. State of Tamil Nadu, (2013) CrI.L.J.4990**, has expressed a view that the ratio of **Kanhaiyalal Vs. Union of India: 2008 (4) SCC 668: AIR 2008 SC 1044** necessitates a relook and hence the matter was referred to a larger Bench for re-consideration of the issue as to whether the Officer investigating the matter under the NDPS Act would qualify as Police Officer or not and sofar, the said matter has not been disposed of and under the said circumstances, no reliance can be placed upon those statements said to have been recorded under Section 67 of the NDPS Act.

7.The learned counsel for the petitioner, relying upon a <https://hcservices.ecourts.gov.in/hcservices/> decision of the Honourable Supreme Court in **Surinder Kumar Khanna Vs Intelligence Officer, Directorate of Revenue Intelligence (2018) 8**



Supreme Court Cases 271 has further submitted that even if it is assumed that the statement recorded under Section 67 of NDPS Act may amount to confession, certain additional features must be established before such a confessional statement could be relied upon against a co-accused. He further submitted that in this case, except the confession statement of the co-accused, no other material is available suggesting involvement of the petitioner in the aforesaid crime. He further submitted that after the dismissal of previous bail applications, the health of the petitioners has become deteriorated and hence, they have to take better treatment. He further submitted that the petitioners are in custody for more than 12 months and the trial court is not likely to conclude the trial in the near future and therefore, he prayed to grant bail to the petitioners.

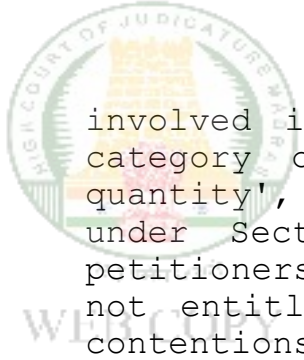
8.The learned counsel for the petitioners also relied upon the following decisions in support of his contentions:-

i)**James Raja Vs The Principal Secretary to Government (H.C.P. (MD).No.1021 of 2016)**, dated 08.12.2016.

ii)**Union of India Vs.Jarooparam (Crl.A.Nos.741-742 of 2011)** on the file of the Honourable Supreme Court of India

iii)**Mohan Lal Vs The State of Punjab (Criminal Appeal No.1880 of 2011)** on the file of the Honourable Supreme Court of India.

9.Per contra, the learned Special Public Prosecutor, has submitted that since the mahazar was prepared in the intervening night of 17/18.12.2017, the witnesses have put the date as 18.12.2017 and that does not mean that the said mahazar was falsely prepared. He further submitted that the mahazar was prepared in the presence of one Mr.M.Muniasamy, Superintendant of Customs and the statements under Sections 67 of the NDPS Act also recorded in his presence, but he has not passed any order with regard to detention of the petitioners. Therefore, there is no illegality or irregularity committed on the part of the prosecution. He further submitted that the statements under Section 67 of the NDPS Act was recorded before the petitioners were arrested and therefore, the said statements are admissible as evidence. He further submitted that since the contraband was seized in the open place, the contention of the learned counsel for the petitioners that the respondent has violated the provision of Section 42 of the NDPS Act is not correct. He further submitted that in **in Tofan Singh V. State of Tamil Nadu** (cited supra), the Honourable Supreme Court has referred the matter to a Larger Bench. So far, no decision came from the Larger Bench and under the said circumstances, in view of the decision of the Honourable Supreme Court in **Kanhaiyalal Vs. Union of India** (cited supra), that the 'Officer' under Section 53 of the NDPS Act is not the Police Officer and therefore, the statements recorded by the respondent under Section 67 of the NDPS Act is admissible in evidence. He further submitted that since 42 kgs of ganja was



involved in this case and the said quantity has come under the category of 'Commercial Quantity', in the case of 'commercial quantity', the petitioners have to satisfy the conditions envisaged under Section 37 of the NDPS Act. But, in this case, the petitioners have not satisfied the said conditions. Hence, they are not entitled to get bail. He further submitted that all these contentions were raised by the petitioners in the previous bail applications in CrI.O.P.(MD).Nos.7594/2018, 14642/2018, 1331/2018, 19026/2018, 19734 and 18124/2018, and 1195 and 23012/2018 and this Court, after considering the said contentions, has dismissed the said applications by the orders dated 08.06.2018, 30.08.2018, 10.09.2018, 21.11.2018, 13.12.2018 and 07.02.2019 respectively and after dismissal of the said applications, there is no change of circumstance and on that ground also, the petitions have to be dismissed.

9. In **Tofan Singh V. State of Tamil Nadu (cited supra)**, the Honourable Supreme Court, in paragraph No.38 to 40, has held as follows:

"38. In our view the aforesaid discussion necessitates a re-look into the ratio of Kanhiyalal Case. It is more so when this Court has already doubted the dicta in Kanhaiyalal (supra) in the case of **Nirmal Singh Pehalwan (2011) 12 SCC 298** wherein after noticing both **Kanhiyalal as well as Noor Aga**, this Court observed thus:

"15. We also see that the Division Bench in Kanhaiyalal case; 2008 (4) SCC 668; (2008) 2 SCC (CrI.) 474, had not examined the principles and the concepts underlying Section 25 of the Evidence Act vis.-a-vis. Section 108 of the Customs Act the powers of Custom Officer who could investigate and bring for trial an accused in a narcotic matter. The said case relied exclusively on the judgment in Raj Kumar's case (Supra). The latest judgment in point of time is Noor Aga's case which has dealt very elaborately with this matter. We thus feel it would be proper for us to follow the ratio of the judgment in Noor Aga's case particularly as the provisions of Section 50 of the Act which are mandatory have also not been complied with."

39. For the aforesaid reasons, we are of the view that the matter needs to be referred to a larger Bench for re-consideration of the issue as to whether the officer investigating the matter under NDPS Act would qualify as police officer or not.

40. In this context, the other related issue viz. whether the statement recorded by the investigating officer under Section 67 of the Act can be treated as confessional statement or not, even if the officer is not treated as police officer also needs to be

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referred to the larger Bench, inasmuch as it is intermixed with a facet of the 1st issue as to whether such a statement is to be treated as statement under Section 161 of the Code or it partakes the character of statement under Section 164 of the Code."

10. Admittedly, so far no decision came from the larger Bench with regard to the issue as to whether the statement recorded by the Investigating Officer under Section 67 of the NDPS Act can be treated as a confessional statement or not. Under the said circumstances, this Court is of the view that there is no bar to rely upon the decision in **Kanhaiyalal Vs. Union of India** (cited supra). In the said case, the Honourable Supreme Court has held that the Officer under Section 53 of the NDPS Act is not a Police Officer and as such, the statement recorded under Section 67 of the NDPS Act is not hit by the provisions of Section 25 of the Evidence Act.

11. In **Surinder Kumar Khanna Vs Intelligence Officer, Directorate of Revenue Intelligence** (cited supra), the Honourable Supreme Court, after referring to the decision of the Honourable Supreme Court in **Tofan Singh V. State of Tamil Nadu** (cited supra), has observed in paragraph Nos. 8 and 9 as follows:

"8. Thus the issue whether statement recorded under Section 67 of the NDPS Act can be construed as a confessional statement even if the officer who recorded such statement was not to be treated as a police officer, has now been referred to a larger Bench.

9. Even if we are to proceed on the premise that such statement under Section 67 of the NDPS Act may amount to confession, in our view, certain additional features must be established before such a confessional statement could be relied upon against a co-accused. It is noteworthy that unlike Section 15 of Terrorist and Disruptive Activities Act, 1987 which specifically makes confession of a co-accused admissible against other accused in certain eventualities; there is no such similar or identical provision in the NDPS Act making such confession admissible against a co-accused. Similarly: Section 18 of Maharashtra Control of Organised Crime Act, 1999 accused. The matter therefore has to be seen in the light of the law laid down by this Court as regards general application of a confession of a co-accused as against other accused."

12. In this case, the prosecution not only relied upon the confession statement of co-accused, but also the confession statement given by the petitioners themselves. Further, the respondent team has noticed the presence of the accused persons in the place of occurrence and only on seeing the said team, except one accused (A-3), all other accused escaped from the scene of



occurrence. After arresting A-3/Karthick, through A-3, the respondent got the names of other accused persons. Under the said circumstances, this court is of the view that the aforesaid decisions will not help the petitioners.

13. In **James Raja Vs The Principal Secretary to Government (cited supra)**, a Division Bench of this Court, while dealing with HCP, in paragraph Nos.42 and 43 has observed as follows:

"42. In the subject cases, it is clear that the Commissioner of Police actively took part in the process of sponsoring the case of the detenus for detention. The affidavits of the sponsoring officers were attested by the Commissioner of Police by sitting in the arm-chair of the Detaining Authority. He was, therefore, in the know of things, even before the commencement of statutory proceedings for detention. In short, the Commissioner of Police himself was part of the team of complainants otherwise called as sponsoring authorities. Thereafter, he turned the chair and acted in a different capacity as the Detaining Authority. The sponsoring authority and Detaining Authority are practically one and the same in all these matters.

43. The active participation of the Detaining Authority in the process of sponsoring the name of the detenus for detention would go to the root of the matter and, therefore, is sufficient to set aside the orders of detention on the ground of pre-determination. We are, therefore, of the view that the detention orders are unsustainable in law."

14. In this case, in the presence of Mr. Muniyasamy, Superintendant of Customs, seizure mahazar has been prepared and statement of the accused persons have been recorded. But, he has not passed any detention order and therefore, the aforesaid decision will not apply to the facts of this case.

15. In **Union of India Vs. Jarooparam (cited supra)**, the Honourable Supreme Court, taking into consideration of the fact that P.Ws.1 & 2, who are the independent witnesses have turned hostile and it did not support the prosecution case and also the fact that the Narcotics Officer (P.W.5), a key prosecution witness, had admitted in his evidence that the statement of the accused was recorded, while, he was in his custody and time was not mentioned in his statement and dismissed the appeal filed by the Union of India and confirmed the judgment of acquittal passed by the High Court.

16. In this case, the mahazar witnesses, so far not examined before the trial court. As per the prosecution case, the statement under Section 67 of the NDPS Act was recorded before the accused



persons were arrested. Therefore, the aforesaid decision will not help the petitioners.

17. In **Mohan Lal Vs The State of Punjab (cited supra)**, the Honourable Supreme Court has held as follows: para 25

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".....It is therefore held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded....."

18. In this case, it is not the case of the petitioners that the said Mr. M. Muniasamy was an informant and also Investigating Officer. Further, it would be relevant to refer to the decision in **Varinder Kumar Vs. State of Himachal Pradesh (Crl. Appeal Nos. 2450-2451 of 2010 dated 11.02.2019)**, wherein, the Hon'ble Supreme Court in paragraph No. 18 has held as follows:-

"18. The criminal justice delivery system, cannot be allowed to veer exclusively to the benefit of the offender making it uni directional exercise. A proper administration of the criminal justice delivery system, therefore requires balancing the rights of the accused and the prosecution, so that the law laid down in Mohan Lal (supra) is not allowed to become a spring board for acquittal in prosecutions prior to the same, irrespective of all other considerations. We therefore hold that all pending criminal prosecutions, trials and appeals prior to the law laid down in Mohan Lal (supra) shall continue to be governed by the individual facts of the case."

19. In this case, the occurrence said to have taken place on 17.12.2017. In **Mohan Lal Vs The State of Punjab** (cited supra), the Honourable Supreme Court has passed judgment on 16.12.2018. Therefore in view of the decision in **Varinder Kumar Vs. State of Himachal Pradesh** (cited supra), the law laid down in **Mohan Lal Vs The State of Punjab** (cited supra) will not apply to this case.

20. Under Sub-section (i) of Section 42 of the NDPS Act, the Officer under the said Act, for the purpose of seizing the contraband, can enter into any building, conveyance or enclosed place and made search between sun rise and sun set, whereas in this case, as per the prosecution case, the contraband was seized in the open place (sea-shore). Therefore, the contention of the learned counsel for the petitioners that the respondent has violated the provisions of Section 42 of the NDPS Act cannot be accepted.

<https://hcservices.courts.gov.in> 21. Since the mahazar was prepared in the intervening night of 17/18.12.2017, in the mahazar, it is stated that the same has been prepared on 17.12.2017, but the witnesses have put their signatures



by mentioning the date as '18.12.2017' and hence, this Court is of the view that there is no discrepancy in the aforesaid facts.

22. In **Union of India Vs Shiv Shanker Kesari (2007) 7 Supreme Court Cases 798**, the Honourable Supreme Court has observed in paragraph No.7 as follows:

"7. The expression used in Section 37 (1)(b) (ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged."

23. In **State of Madhya Pradesh Vs Kajad A.I.R 2001 Supreme Court 3317**, the Honourable Supreme Court in paragraph No.5, has observed as follows:

"5. The purpose for which the Act was enacted and the menace of drug trafficking which intends to curtail is evident from its scheme. A perusal of Section 37 of the Act leaves no doubt in the mind of the court that a person accused of an offence, punishable for a term of imprisonment of five years or more, shall generally be not released on bail. Negation of bail is the rule and its grant and exception under subclause (ii) of clause (b) of Section 37(1). For granting the bail 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 offences with which he is charged and further that he is not likely to commit any offence while on bail. It has further to be noticed that the conditions for granting the bail, specified in clause (b) of subsection (1) of Section 37 are in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail. Liberal approach in the matter of bail under the Act is uncalled for."

24. In this case, after dismissal of the earlier bail applications in CrI.O.P.(MD).No.7594/2018, dated 08.06.2018, CrI.O.P.(MD).No.14642/2018, dated 30.08.2018, CrI.O.P.(MD).No.1331/2018, dated 10.09.2018 CrI.O.P.(MD).No.19026/2018, dated 21.11.2018, CrI.O.P.(MD).No.19734 and 18124/2018, dated 13.12.2018 and CrI.O.P.(MD).Nos.1195 and 23012 /2018, dated 07.02.2019, the petitioners have not pointed out any change of circumstance.

25. Taking into consideration of all the facts, this Court is of the view that the petitioners have not satisfied the



conditions envisaged under Section 37(i)(b)(ii) of the NDPS Act. Therefore, these petitions are liable to be dismissed.

26. Accordingly, these petitions are dismissed.

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

TO

1. THE SUPERINTENDENT OF CUSTOMS,
RAMANATHAPURAM, RAMANATHAPURAM DISTRICT.
2. THE OFFICER INCHARGE, DISTRICT PRISON,
RAMANATHAPURAM.
3. THE SPECIAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

+1. CC to M/S.M.SHAKUL HAMEED Advocate SR.No.78751
+2CC TO Mr.A.ARUL VADIVEL @ SEKAR, Advocate, SR No.12603 & 12604

ORDER IN
CRL OP(MD). Nos.8832, 9197 and
9198 of 2019
Date :30/07/2019

MS/VR/SAR-1/02.08.2019/10P.7C