

IN THE HIGH COURT OF JUDICATURE AT MADRAS
(Criminal Jurisdiction)

Tuesday, the Third day of November Two Thousand Twenty
PRESENT

The Hon`ble Mr Justice P. N. PRAKASH
CRIMINAL MISCELLANEOUS PETITION No.5178 of 2020

in Crl.A.No.18 of 2019

1 K.BALA
2 THEMEEM ANWAR
3 MOHAMMAD ZAHIR

[PETITIONERS]

Vs

STATE BY
INTELLIGENCE OFFICER,
NARCOTIC CONTROL BUREAU,
CHENNAI ZONAL UNIT, CHENNAI,
R.R.NO.19 OF 2015 IN N.C.B.
FOLIO NO.48/1/10/2015.

[RESPONDENT]

Petition praying that in the circumstances stated therein and in the Memorandum of Grounds in Crl.A.No.18 of 2019 on the file of the High Court, the High Court will be pleased to suspend the execution of sentence of imprisonment and fine imposed by the Learned 1st Additional Special Judge for NDPS Act Cases, Chennai in C.C.No.28 of 2016 dated 6-12-2018 and enlarge the petitioners/accused on bail pending disposal of the appeal in C.A.No.18 of 2019 in the interest of justice and pass such suitable or other orders.

Order : This petition coming on for orders upon perusing the petition and the Memorandum of Grounds in Crl.A.No.18 of 2019 on the file of the High Court and upon hearing the arguments of M/S. R.VIJAYAKUMAR, Advocate for the petitioner and of MR.N.P.KUMAR, SPECIAL PUBLIC PROSECUTOR FOR NDPS ACT CASES on behalf of the Respondent the court made the following order:-

This is a petition seeking suspension of sentence and bail.

2 The petitioners, viz., Bala (A.1), Thameem Anwar (A.2) and Mohammad Zahir (A.3), faced prosecution along with Jeevan Kumar (A.4) in C.C.No.28 of 2016 in the I Additional Special Court for NDPS Act

Cases, Chennai and vide judgment and order dated 06.12.2018, all the four accused were convicted and sentenced as under:

Accused name	Provision under which convicted	Sentence
Bala - A.1	Section 8(c) r/w Section 29(1), 22(c) and 28 of the NDPS Act	Rigorous imprisonment for a period of 10 years for each of the offences and fine of Rs.1 lakh for each of the offences, in default to undergo 1 year rigorous imprisonment for each of the offences.
Thameem Anwar-A.2 Mohammed Zahir-A.3 Jeevan Kumar-A.4	Section 8(c) r/w Section 29(1) and 28 of the NDPS Act	Rigorous imprisonment for a period of 10 years for each of the offences and fine of Rs.1 lakh for each of the offences, in default to undergo 1 year rigorous imprisonment for each of the offences.

3 Challenging the aforesaid conviction and sentences, Bala (A.1), Thameem Anwar (A.2) and Mohammad Zahir (A.3) have preferred Crl.A. No.18 of 2019 along with the instant criminal miscellaneous petition, seeking suspension of sentence and bail.

4 Heard Mr. R. Vijayakumar, learned counsel for the petitioners and Mr.N.P. Kumar, learned Special Public Prosecutor for NDPS Act Cases appearing for the respondent.

5 The prosecution story, in brief, is as under:

5.1 On information that one Jeevan of Nellore is supplying methamphetamine through Bala (A.1) to Thameem Anwar (A.2) and Mohammed Zahir (A.3), the officers of the Narcotics Control Bureau (NCB) intercepted Bala (A.1) on 21.12.2015 at Koyambedu Omnibus Bus Stand when he was to board a bus to Tuticorin and from his possession, they seized 5.150 kgs. of methamphetamine.

5.2 Bala (A.1), in his statement under Section 67 of the NDPS Act, narrated the sequence of events as to how the drug was handed over to him by Jeevankumar for onward transmission to Thameem Anwar (A.2) and Mohammed Zahir (A.3). As a follow up action, Thameem Anwar (A.2) and Mohammed Zahir (A.3) were located on 22.12.2015 and on 23.12.2015, Jeevankumar (A.4) was located and his statement under Section 67 of the NDPS Act was recorded.

6 Investigation was conducted and after gathering sufficient materials, all the four were prosecuted in C.C. No.28 of 2016 before the I Additional Special Court for Exclusive Trial of NDPS Act Cases, Chennai and they were convicted and sentenced as stated in paragraph 2, supra.

7 Mr. Vijayakumar, learned counsel for the petitioners made the following submissions:

- i. according to the prosecution, the conspiracy was hatched on 21.12.2015, but, there are no materials to show as to when and where the accused had met and conspired;
- ii. the Trial Court has acquitted Thameem Anwar (A.2) and Mohammed Zahir (A.3) of the offence of possession under Section 22 of the NDPS Act; the trial Court has also acquitted Thameem Anwar (A.2) and Mohammed Zahir (A.3) of the charge under Section 27-A of the NDPS Act by not placing reliance upon the statement recorded under Section 67 of the NDPS Act and that being so, the trial Court ought not to have relied upon the said statements to convict the petitioners of the other charges;
- iii. in the examination of the petitioners under Section 313 Cr.P.C., the trial Court had failed to put the entire statement recorded under Section 67 of the NDPS Act and hence, the conviction of the petitioners is bad in law.
- iv. for proof of attempt, Thameem Anwar (A.2) and Mohammed Zahir (A.3) should have been in Koyambedu Bus Stand, but, even according to the prosecution, they were not there and therefore, the conviction of the petitioners for attempt cannot be sustained.
- v. the prosecution had failed to examine Ramesh whose name figures in the records; hence, the investigation stands vitiated.
- vi. the statement of Bala (A.1) that the contraband was given by Thameem Anwar (A.2) and Mohammed Zahir (A.3) falsifies the information report.
- vii. A.K. Samy (P.W.4) has not stated in the evidence that Bala (A.1) was to travel by Vivegam Travels Bus though he was an employee of Vivegam Travels.
- viii. A.K. Samy (P.W.4) has stated in the cross-examination that he waited along with the officers for more than half an hour and only then, Bala (A.1) came to board the bus, which was to leave Koyambedu Bus Stand at 8.30 p.m.; from the evidence of A.K. Samy (P.W.4), it is clear that Bala (A.1) had come to board the bus only after 8.30 p.m. which falsifies the prosecution case.

8 Mr. Vijayakumar placed strong reliance upon the judgment of the Supreme Court in Mohammed Fasrin vs. State represented by the Intelligence Officer, wherein, it has been held that the failure of the Investigating Officer to conduct further investigation on the materials disclosed in the confession and collect corroboratory evidence is fatal. He placed further reliance on the judgment of the Supreme Court in Nirmal Singh Pehlwan @ Nimma vs. Inspector, Customs, Customs House, Punjab in support of his contention that a

statement under Section 67 of the Evidence Act is inadmissible in evidence.

9 Per contra, Mr. N.P. Kumar submitted that Thameem Anwar (A.2) had handed over the contraband to Bala (A.1) and had asked him to take it to Tuticorin and while Bala (A.1) was to board the bus, he was intercepted and the contraband seized. He further submitted that all the three were located very quickly by the officers and each one identified the other; therefore, it cannot be stated that there was no meeting of mind amongst them for trafficking the contraband. He placed strong reliance on the judgment of the Supreme Court in State of Punjab vs. Rakesh Kumar, wherein, the Supreme Court had cancelled the suspension of sentence and bail granted to the accused therein by the Punjab and Haryana High Court.

10 This Court gave its anxious consideration to the rival submissions.

11 In Dadu @ Tulsidas, the Supreme Court has held that the appellate Court has the power to grant suspension of sentence and bail under Section 389(1) Cr.P.C., and the prohibition imposed by Section 32-A of the NDPS Act to that extent is unconstitutional. However, the Supreme Court has also categorically held that bail can be granted only if the twin test laid down in Section 37 of the NDPS Act is passed.

12 Even in respect of offences other than the ones under the NDPS Act, the law relating to the grant of relief of suspension of sentence and bail has been set out by the Supreme Court. In Atul Tripathi vs. State of Uttar Pradesh, the Supreme Court has held that while considering an application for suspension of sentence, the Court should bear in mind the gravity of the offence, the nature of the crime, criminal antecedents of the convict and the impact on public confidence in the justice delivery system, etc.. Likewise, in Sidhartha Vashisht vs. State (NCT of Delhi), the Supreme Court has held that the relief of suspension of sentence is not an automatic one and that the presumption that the accused is innocent, which is normally available for regular bail, is not available in the case of suspension of sentence and that the normal rule is jail and not bail.

13 With regard to the charge of conspiracy, a reading of the charge shows that the date of conspiracy, by itself, was not on 21.12.2015. The seizure date was 21.12.2015, before which, it is alleged that the accused had conspired. Be it noted that a defect in the charge cannot be weighed in a bail application. As to the contention that the entire statement under Section 67 of the NDPS Act was not put to the accused under Section 313 Cr.P.C., this ground also cannot be urged in a bail application as the issue as to whether any prejudice was caused to the accused should be considered only during the final disposal. Attempt to commit an offence depends upon the nature of the substantive offence. Hence, the presence of the accused at the scene of occurrence is not a thumb rule in all cases. Coming to the submission that the confession statement under Section 67 of the NDPS Act is inadmissible, this Court is of the opinion that

the parameters for grant of suspension of sentence and bail even in respect of non-NDPS Act offences have been laid down by the Supreme Court in Atul Tripathi (supra) and Sidhartha Vashisht (supra). This is a serious case where the accused have been convicted for trafficking in 5.150 kgs. of methamphetamine and as pointed out by the Supreme Court in Atul Tripathi (supra), suspension of sentence cannot be granted when the offence is grave and when it will adversely impact public confidence in the justice delivery system. A cursory reading of the trial Court judgment shows that there are reasonable materials to infer that Bala (A.1) was carrying the contraband which was handed over to him by one of the co-accused to be taken to Tuticorin. The alleged discrepancy in the testimony of A.K. Samy (P.W.4) with regard to the timing, falls within the domain of appreciation of evidence, which cannot be undertaken in the instant miscellaneous petition seeking suspension of sentence and bail. Likewise, remissness in investigation will not automatically entail acquittal of the accused, for which proposition, the judgments of the Supreme Court are a legion. Further, just because the petitioners have been in incarceration for the last five years, they will not be entitled to the relief of suspension of sentence and bail automatically, especially, when this Court was ready to take up the case for final disposal even if it was by video conferencing.

14 Coming to the judgments relied upon by the learned counsel for the petitioners, they were all cases that were decided by the Supreme Court during final hearing and not at the stage of hearing the bail application and hence, they cannot be of much avail to the petitioners.

15 In view of the aforemade discussion, this Court is of the view that the case of the petitioners does not pass muster the twin test laid down by Section 37 of the NDPS Act for grant of suspension of sentence and bail. It became imperative for this Court to venture into the aforesaid observations in order to meet the points raised by the learned counsel for the petitioners. It is made clear that the appeal will be heard without in any way being influenced by what is stated above.

In the result, this criminal miscellaneous petitions stands dismissed.

-sd/-

03/11/2020

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

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

TO

1 I ADDITIONAL SPECIAL JUDGE
FOR TRIAL OF CASES UNDER THE NDPS ACT,
CHENNAI

2 THE SPECIAL PUBLIC
PROSECUTOR FOR NDPS CASES,
HIGH COURT, MADRAS.

3 INTELLIGENCE OFFICER,
NARCOTIC CONTROL BUREAU,
CHENNAI ZONAL UNIT, CHENNAI.

4 THE SUPERINTENDENT,
CENTRAL PRISON NO.I, PUZHAL,
CHENNAI

5 THE SUPERINTENDENT,
CENTRAL PRISON, VELLORE.

C.C. to M/S. R.VIJAYAKUMAR Advocate on payment of necessary
charges SR.7201

Order

in
CRL MP.5178/2020

in Crl.A.No.18 of 2019

Date :03/11/2020

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RVR 09/11/2020

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