

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.10.2020

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.M.P.No.5836 of 2020

in Crl.R.C.No.831 of 2020

R.Rajesh @ Kozhikal Rajesh

... Petitioner

Vs.

1.State rep.by

... Respondents

The Inspector of Police, (Law and Order),
S-8, Adambakkam Police Station,
Chennai - 88.

2.The Executive Magistrate-cum-
Deputy Commissioner of Police,
St.Thomas Mount District,
Chennai City.

PRAYER: Criminal Miscellaneous Petition filed under Sections 397(1) r/w 439 of the Code of Criminal Procedure, to suspend the sentence imposed by the 2nd respondent in Misc.Petition No.10/2020 in Na.Ka.No.398/Ni.Se.Na.Ka.Thu.Aa.Pa.Tho.Ma/2019 vide an order dated 24.07.2020 and enlarge the petitioner on bail.

For Petitioner : Mr.S.N.Arunkumar

For Respondents : Mr.C.Iyyappa Raj
Additional Public Prosecutor

ORDER

This Criminal Miscellaneous Petition has been filed to suspend the sentence imposed on the petitioner by the 2nd respondent in M.P.No.10/2020 in Na.Ka.No.398/Ni.Se.Na.Ka.Thu.Aa.Pa.Tho.Ma/2019, dated 24.07.2020.

2.The petitioner has been detained for violation of bond under Section Section 110 Cr.P.C., for which the 2nd respondent passed a detention order under Section 122(1)(b) Cr.P.C., in M.P.No.10 of 2020, in Na.Ka.No.398/Ni.Se.Na.Ka.Thu.Aa.Pa.Tho.Ma/2019, dated 24.07.2020.

3.The learned counsel for the petitioner submitted that the petitioner executed a bond under Section 110 Cr.P.C on 20.11.2019. A case came to be registered against the petitioner in Crime No.757 of

2020 on 26.05.2020 and Cr.No.1108 of 2020 on 10.07.2020 and the petitioner was detained. Thereafter, the PT warrant was issued on 20.07.2020 and the 2nd respondent passed an order under Section 122 (1)(b) of Cr.P.C., against the petitioner for violation of Section 110 Cr.P.C., and detained the petitioner on 24.07.2020. The learned counsel for the petitioner further submitted that the 2nd respondent did not give opportunity to the petitioner to defend his case, make submission and produce any materials. The learned counsel submitted that the Hon'ble Supreme Court had held that the Magistrate to give a legal assistance and also inform the concern about the reason of the proceedings and the rights available to him. In this Case, no such exercise have been done. Further, the 2nd respondent had merely acted on the report of the 1st respondent, without verifying its truthfulness or otherwise. The 2nd respondent, merely, acted as post office in accepting the report of the 1st respondent and mechanically passed an order, thereby detaining the petitioner. The detention of the petitioner cannot be done as a matter of routine, since it affects the fundamental right of the petitioner.

4.The learned counsel for the petitioner further submitted that the power of the Executive Magistrate was introduced in the year 1980 only with regard to Section 110 Cr.P.C., and not for other Section in the Code. Further, in Section 267(2) Cr.P.C., it is stated that if an order under sub-section (1) is made by a Magistrate of the second class, it shall not be forwarded to, or acted upon by, the officer in charge of the prison unless it is countersigned by the Chief Judicial Magistrate, to whom such Magistrate is subordinate. Thereafter, the prison authorities can act upon. Now, it has become routine that the Executive Magistrate-cum-Deputy Commissioner of Police are forwarding and issuing PT warrant under Section 267 Cr.P.C., which has not countersigned by the learned Chief Judicial Magistrate.

5.The learned Additional Public Prosecutor submitted that as per Section 122(1)(b) of Cr.P.C., the order was passed by the 2nd respondent. He further submitted that as per Section 122(3) Cr.P.C., 2nd respondent after examining such proceedings that is the report received from the 1st respondent and on further information or evidence if he thinks necessary and after giving concerned person a reasonable opportunity of being heard and thereafter, only the order has to be passed. He further submitted that in this case, all procedures were followed. Added to it, from the records, it is seen a show cause notice issued to the petitioner under Section 111 Cr.P.C. Therefore, the other points raised by the petitioner are to be decided in the revision. The petitioner being a notorious person and he is a habitual offender.

6.He further submitted that the petitioner was directed to be produced before the 2nd respondent on the strength of warrant under Section 113 Cr.P.C. In Section 113 Cr.P.C., it is stated that if such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is to bring him before the Court.

7.This Court considered the submissions made on either side and perused the materials available on record.

8.The consistent view of this Court is that for violation of bond executed under Section 110 Cr.P.C., for good behaviour, Section 122(1)(b) cannot be invoked, which has been clearly dealt by this Court in several cases viz., "**Malar @ Malarkodi Versus the Sub-Divisional Magistrate cum Revenue Divisional Officer, Udayarpalayam Taluk, Perambalur District in Crl.R.C.No.1791 of 2002**", "**Karthigayan @ Pallukarthik Versus The Sub-Divisional Magistrate cum Revenue Divisional Officer, Thanjavur reported in 2015 SCC OnLine Mad 2417**" and "**Balamurugan Versus State and Ors. reported in MANU/TN/2058/2016.**"

9.This Court in the case of "**Vadivel @ Mettai Vadivel Versus The State in Crl.R.C.982 of 2012, dated 24.11.2018**" disposed a batch of revision cases, wherein referred to the said earlier judgments and took a contra view and observed that Section 122(1)(b) Cr.P.C., would attract Section 110 Cr.P.C and requested the Registry of this Court, to place the matter before the Hon'ble The Chief Justice, to constitute a larger bench, to decide the issue as framed in paragraph No.19 and the same is extracted hereunder:-

"As regards the execution of bond for good behaviour under Section 108 and 109 Cr.P.C., the framers of law could not have intended the Sections, to loosely hang in the statutory hanger, as execution of bond entails enforcement of the same. May be it was an accidental omission, which can be supplemented by purposive interpretation of the statutory scheme as a whole. From the scheme of the Chapter under consideration, this Court could safely infer that there was no intentional omission by the Parliament to render the said provision impotent or ineffective and in such situation, the Courts can play a supplementary role in giving effect to otherwise the intention of the framers so as to give force and life to the intention of the legislature, as expressed by Lord Denning, J.

10.Though the learned Single Judge deferred, he held that the notice has to be given to the detainee as well, to be heard before order is passed against him under Section 122(1)(b) Cr.P.C. These exercises to be done by after reasonable application of mind.

11.The other learned Single Judge of this Court in "**Devi Versus The Executive Magistrate-cum-Deputy Commissioner of Police, St.Thomas Mount District**" in Crl.R.C.No.78 of 2020, by order dated 25.09.2020, had deferred with the findings given in Crl.R.C.No.982 of 2018, dated 24.11.2018 and held in paragraph No.20 as follows:-

"42 Since this Court respectfully differs from V. Parthiban J. on the issue of applicability of Section

122(1) (b) Cr.P.C. to a good behaviour bond under Section 110(e), the Registry is directed to place this matter before the Hon'ble Chief Justice for appropriate orders.

43 Further, as this Court is not in agreement with the view propounded by another learned single judge of this Court in **Balamurugan** (supra), the following question is framed with a direction to the Registry to place the same before the Hon'ble Chief Justice with a request to constitute a Bench of appropriate strength for an authoritative pronouncement:

Whether G.O.Ms.No.659, Home (Cts. VIA) Department dated 12.09.2013 and G.O. Ms.No.181, Home (Cts.VIA) Department dated 20.02.2014 violate the scheme of separation of powers and are ultra vires the proviso to Section 6 of the Tamil Nadu District Police Act, 1859 (Central Act XXIV of 1859)?"

12.Now, both the learned Single Judges have referred the issues to be placed before the Hon'ble The Chief Justice for constituting a larger bench with regard to applicability of Section 122(1) (b) Cr.P.C., with Section 110 Cr.P.C., for other connected issues.

13.In view of the above issues to be decided would take sometime, this Court is inclined to suspend the sentence imposed on the petitioner with the following conditions:-

- The petitioner shall execute own bond for a sum of Rs.10,000/- (Rupees Ten Thousand Only) before the Superintendent, Central Prison, Puzhal, Chennai.
- The petitioner shall appear before the 1st respondent Police every Monday i.e., from 02.11.2020 at 10.00 a.m., until further orders.

14.Hence, the Criminal Miscellaneous Petition is ordered. The Superintendent Central Prison, Puzhal, Chennai, is directed to set at liberty the petitioner, if his further detention is no longer required in connection with any other case or proceedings.

-sd/-

28/10/2020

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

TRUE COPY

TO

1 THE INSPECTOR OF POLICE (LAW AND ORDER),
S-8, ADAMBAKKAM POLICE STATION,
CHENNAI-88.

2 THE EXECUTIVE MAGISTRATE-CUM-
DEPUTY COMMISSIONER OF POLICE,
ST.THOMAS MOUNT DISTRICT,
CHENNAI CITY.

3 THE PUBLIC PROSECUTOR
HIGH COURT, MADRAS.

4 THE SUPERINTENDENT,
CENTRAL PRISON, PUZHAI, CHENNAI.

5 THE SECTION OFFICER,
CRIMINAL SECTION,
HIGH COURT, MADRAS.

C.C. to M/S.S.N.ARUNKUMAR Advocate on payment of necessary
charges

Order

in
CRL MP.5836/2020

in
CRL RC.831/2020

Date :28/10/2020

From 7.2.2001 the Registry is issuing certified
copies of the BAIL/Anti.BAIL Orders in this format

TA-29/10/2020

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