

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.12.2020

PRONOUNCED ON : 21.12.2020

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.M.P.Nos.6634 & 7011 of 2020

in Crl.A.Nos.434 & 457 of 2020

1.K.Kumaresan ... Petitioner in Crl.M.P.No.6634 of 2020
in Crl.A.No.434 of 2020

2.Arun Divakar ... Petitioner in Crl.M.P.No.7011 of 2020
in Crl.A.No.457 of 2020

Versus

State Represented by,
The Inspector of Police,
T15, SRMC Police Station,
Porur, Chennai.

... Respondent in both cases

PRAYER in Crl.M.P.No.6634 of 2020 in Crl.A.No.434 of 2020: Criminal Miscellaneous Petition filed under Section 389(1) of the Code of Criminal Procedure, to suspend the sentence imposed on the petitioner/appellant/A-2 herein passed by the learned Court of the Special Judge, I Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai by its Judgment dated 08.10.2020 made in C.C.No.77 of 2019 and enlarge the petitioner on bail pending disposal of the above Criminal Appeal on the file of this Court.

PRAYER in Crl.M.P.No.7011 of 2020 in Crl.A.No.457 of 2020: Criminal Miscellaneous Petition filed under Section 389(1) of the Code of Criminal Procedure, to suspend the sentence imposed on the petitioner in the judgment dated 08.10.2020 in C.C.No.77 of 2019 passed by the Court of the Special Judge, I Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai wherein the Appellant/A3 found guilty for the offence u/s 8(c) r/w 22(c) of the NDPS Act sentenced to undergo 10 years R.I and to pay fine of Rs.1,00,000/- and i/d further undergo R.I for a period of one year. For the offence u/s 8 (c) of the NDPS Act sentenced to undergo 10 years R.I and to pay a fine of Rs.1,00,000/- and i/d further undergo R.I for a period of one year. The above sentence imposed against the appellant/A3 is ordered to run concurrently. The period of detention already undergone by the A3 from 17.12.2018 to 10.04.2019 during the course of investigation and trial shall be set off against the sentence of imprisonment imposed on him as per Section 428 Cr.P.C., and enlarge the petitioner on bail.

For Petitioners : Mr.K.Shanker
Crl.M.P.No.6634 of 2020 in
Crl.A.No.434 of 2020

Mr.S.Suresh
Crl.M.P.No.7011 of 2020 in
Crl.A.No.457 of 2020

For Respondent : Mr.C.Iyyappa Raj,
Government Advocate [Crl. Side]

COMMON ORDER

Both the Criminal Miscellaneous Petitions are filed to suspend the sentence imposed on the petitioners/A2 & A3, by judgment, dated 08.10.2020 in C.C.No.77 of 2019, passed by the learned Special Judge, I Additional Special Court for Exclusive Trial of Cases Under NDPS Act, Chennai.

2.For the sake of clarity, the petitioners, are referred, as per the rank during the trial.

3.The 1st petitioner/A2 was convicted and sentenced by the trial Court as follows:-

- For offence under Section 8(c) r/w 29(1) of the NDPS Act, he was sentenced to undergo Rigorous Imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/-, in default, to undergo one year Rigorous Imprisonment.
- For offence under Section 8(c) r/w 22(c) of the NDPS Act, he was sentenced to undergo Rigorous Imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/-, in default, to undergo one year Rigorous Imprisonment.
- For offence under Section 8(c) r/w 20(b)(ii)(B) of the NDPS Act, he was sentenced to undergo Rigorous Imprisonment for a period of 5 years and to pay a fine of Rs.50,000/-, in default, to undergo 6 months Rigorous Imprisonment.
- For offence under Section 8(c) r/w 22(b) of the NDPS, he was sentenced to undergo Rigorous Imprisonment for a period of 5 years and to pay a fine of Rs.50,000/-, in default, to undergo 6 months Rigorous Imprisonment.
- For offence under Section 8(c) r/w 28 of the NDPS Act, he was sentenced to undergo Rigorous Imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/-, in default, to undergo 1 year Rigorous Imprisonment.

4.The 2nd petitioner/A3 was convicted and sentenced by the trial Court as follows:-

- For offence under Section 8(c) r/w 29(1) of the NDPS Act, he was sentenced to undergo Rigorous Imprisonment for a period of 10

years and to pay a fine of Rs.1,00,000/-, in default, to undergo one year Rigorous Imprisonment.

- For offence under Section 8(c) r/w 22(c) of the NDPS Act, he was sentenced to undergo Rigorous Imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/-, in default, to undergo one year Rigorous Imprisonment.
- For offence under Section 8(c) r/w 28 of the NDPS Act, he was sentenced to undergo Rigorous Imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/-, in default, to undergo 1 year Rigorous Imprisonment.

5.The gist of the case is that on 17.12.2018, at about 00.15 hours in front of Osian Chlorophyll Apartment situated at By Pass Service Road, Porur, Chennai, A1 was found in possession of Ecstasy Pills, a Psychotropic Substance, the 1st petitioner/A2 was found in illegal possession of 18 grams of Cocaine, a Narcotic Drug, 8 grams of MDMA, Psychotropic Substance, 9 grams of METH, a Psychotropic Substance and the 2nd petitioner/A3 was found in illegal possession of 20 grams of Ecstasy pills, a Psychotropic Substance. A1 to A3 had conspired to sell the same to third parties and thereby, they committed the offence under the NDPS Act.

6.On 16.12.2018, at about 10 p.m.,PW1 received information that the accused were in possession of Narcotic Drugs for selling, through an informant. PW1 along with PW2 and PW3 proceeded to the scene of occurrence with test kit and laptop and necessary articles at about 10.30 p.m. PW1 recorded the information and sent the same to his superior PW7. PW7/Investigating Officer was informed about information and recorded the same in Ex.P1, proceeded to scene of occurrence. On seeking the police, the accused attempted to flee and they were apprehended. Following the procedure and after giving information to them, the accused were searched, from them, the Narcotic and Psychotropic Substances as stated above were seized. Thereafter, they were taken to the Police Station. The accused and the seized articles were produced before the Investigating Officer/PW7. PW1 gave Special Report to that effect. The accused were produced before the Magistrate along with seized articles and remanded to custody. The articles returned to the police, which was later produced before the Special Court and forwarded the same to the Forensic Lab. PW5, the Scientific Officer examined the contrabands, containing Narcotic and Psychotropic Substances and issued Ex.P9, the Chemical Analysis Report. PW4 and PW6 are the Apartment Maintenance Officer and Watchmen, in whose presence, the Observation Mahazar [Ex.P14] was prepared. PW7 examined the witnesses, recorded their statements, received the report and filed charge sheet before the trial Court. The trial Court on examination of witnesses viz., PW1 to PW7 and collection of documents Exs.P1 to P15 and Material Objects MO1 to MO15, had convicted A1 and the petitioners/A2&A3 as stated above.

7.The learned counsel appearing for the petitioners/A2 & A3 submitted that none of the independent witnesses for the occurrence

proper, were examined. No independent witnesses have signed any of the mandatory documents in this case. PW4 and PW6 are the witnesses for the Observation Mahazar [Ex.P14]. Both stated that at the request of the Police, they have signed in it and with regard to other contents, they were not aware of the same. In this case, the evidence of raiding party/PW1 to PW3 are contradictory to each other. PW1 does not give any reason whether at all he had taken along with him battery operated printer and how Ex.P3 [Recovery Mahazar] which is said to have been prepared in the scene of occurrence is typed and produced. On the other hand, Ex.P2, the Search Notice is hand written. When both the documents are prepared in the scene of occurrence, it had cast doubt in the manner in which Ex.P3 came into existence. The evidence of PW7 is not clear whether at all any permission was granted by PW7 to conduct search and seizure. Further, Section 50 of the NDPS Act has not been complied with in this case. It is admitted that from the body of A1 and A3, the seizure was done. In this case, the contraband has been seized and sent to forensic study only on 24.12.2018. PW7 admitted the same, no explanation given whether the contraband was kept in his custody. The evidence of PW1 to PW3 and PW5 are contrary with each other with regard to contraband containing in the polythene cover, seizure of laptop bag, presence of witnesses in the scene, weighing of numbering the sample and personal search made on the accused

8.The learned counsel for the petitioners further submitted that no denomination of the amount seized from the accused are recorded in the mahazars. The signature of PW7 is found in MO11. The three bundles of small polythene covers which is said to be seized from A2 from the scene of occurrence. When the specific case of the prosecution is that PW7 had not visited the scene of occurrence during search and seizure, his signature found in MO11 creates suspicion in the manner the said seizures has been carried out. PW1 and PW2 are contrary as regards to the test kit taken to the scene of occurrence. PW7 admitted that there is no battery operated printer available in the police station. The specific case is that from laptop bag some of the contrabands were seized. The said laptop bag is not produced as material object. PW1's evidence is that after search and seizure, the accused were taken to the police station, produced before the PW7 and the case came to the registered. PW7/Investigating Officer evidence is otherwise, further the crime number is present in articles seized in the scene of occurrence. It is found that seven articles were seized from the scene of occurrence. The evidence of PW2 and PW3 are not in conformity to the evidence of PW1. The evidence of PW1 and PW7 are highly contradictory to each other. PW4 and PW6 have not supported the case of the prosecution. There is no iota of material to prove that there was any conspiracy between the accused.

9.Further, in this case violation and non-compliance of mandatory provision under Sections 42, 50, 52 & 57 of the NDPS Act done. PW1 though stated that the information was recorded in the General Diary, the said General Diary not produced in this case. There is no compliance of Section 42 of NDPS Act. PW1 to PW3 admitted that the personal search was made on A1 and A3. The Hon'ble

Apex Court time and again held that failure in following the mandatory provisions is fatal and the accused are entitled for acquittal on this score alone. It is pertinent to note that in Ex.P2 [Search Notice] the signature of A2 is not found. The lower Court though admitted the same, given a finding that it is only omission and no prejudice could be found in not following the procedure under Sections 41, 42, 43 or 44 of the NDPS Act and Section 52 of the NDPS Act is not mandatory. The delay in sending the contraband for chemical examination is admitted. Likewise, it is observed that since no tampering of seal was found, it has been held that no prejudice caused to the accused. There is a vital contradiction in the report under Section 57 of the NDPS Act. PW1 admitted that the report under Section 57 of the NDPS Act [Ex.P4] was prepared in the Police Station. PW7/Investigating Officer categorically stated that PW1 produced the accused, contraband along with the report under Section 57 of the NDPS Act as PW1 reached Police Station.

10.PW1 stated that the contraband was kept in the suitcase. PW2 stated that it was kept in the kit bag. The trial Court on its own had given explanation that in the Tamil language both mean the same, which is not proper. Likewise the trial Court giving explanation that non production of laptop bag is only a minor lapse is not proper, since it would cut the root of the case of the prosecution. The certain case of the prosecution is that the contraband was kept in the laptop. In such circumstances, the non production of laptop bag cannot be glossed over. The trial Court finding that there is discrepancies in the evidence PW1 and PW3 and brushing aside the same as minor discrepancies is not proper. The securing of independent witnesses and the reason given are not proper. PW1 admitted that there was Tasmac shop near the scene of occurrence and no staff was available. PW7 stated that PW1 informed him that the Tasmac staff present there, refused to act as independent witnesses. Though PW4 and PW6 were present in the scene of occurrence, they were not examined with regard to the occurrence proper and seizure. Thus, the prosecution case right from its inception is highly doubtful and non compliance of mandatory provisions would cut the root of the case. It is brought on record that CCTV recordings were available in the scene of occurrence, but the same were produced in this case. The trial Court has not even adverted to these facts. The trial Court despite finding that there are discrepancies and violation in following provisions, the trial Court on a preconceive notion, convicted the petitioners.

11.The learned Additional Public Prosecutor appearing for the respondent Police filed counter in both the cases and submitted that the respondent Police received secret information. PW1 on receipt of the same, prepared Ex.P1, informed his superior PW7. PW1, PW2 and PW3 along with test kit and requisite materials, proceeded to the place. On seeing them, A1 and A3 attempted to flee, they were apprehended, informed about the search to be made on them and their rights. Since no private witnesses were forthcoming, the search was conducted in presence of PW2 and PW3, seizures were made, mahazars prepared. Thereafter, the accused along with contraband were produced before PW7. The accused were produced before the remanding

Magistrate along with remand report [Ex.P1] and also contraband. Getting orders from the remanding Court, the properties and other documents were later produced before the Special Court, the same were sent to Forensic Department for Chemical examination. The Chemical examination proved that the contraband are Narcotic and Psychotropic substances. The Observation Mahazar [Ex.P14] and Rough Sketch [Ex.P15] were prepared in presence of independent witnesses. On completion of investigation, charge sheet was filed.

12.It is further submitted that the accused were in possession of Narcotic and Psychotropic Substances of commercial quantity. The trial Court on the evidence and materials produced had given a detailed and well reasoned judgment. The points raised by the learned counsel for the petitioners have been dealt by the trial Court in its judgment. The seizure of contraband is proved. The contrabands are Narcotic and Psychotropic substances proved by the Forensic Report. The petitioners were unable to given plausible explanation for possession and being together and at that point of time in a remote place with the contraband. The petitioners are educated persons, who were aware of their act and they were in conscious possession of the contraband. The trial Court on the contentions of the petitioners, in the judgment had extracted relevant evidence and given explanation, referred to the citations and also extracted relevant paragraphs. Further, it is a commercial quantity Section 37 of the NDPS Act comes into play. The petitioner are convicted accused. Hence, the petitioners are not entitled for any suspension of sentence. The points raised by the petitioners can be decided only during the final hearing of the appeal, hence he strongly opposed the bail application.

13.In support of his submissions, the learned Additional Public Prosecutor relied on the citation of the Hon'ble Apex Court in the case of "State of Kerala Versus Rajesh in Criminal Appeal No(s).154-157 of 2020."

14.This Court considered the rival submissions and perused the materials available on record.

15.It is seen that in this case, there are totally three accused A1 to A3. A1 is a Nigerian, the petitioners were found along with A1 at the late hours on the date of occurrence. PW1 received information regarding the same, left the police station along with PW2 and PW3 with test kit and requisite materials. PW1 to PW3 reached the scene of occurrence, apprehended the accused, following the procedures made search on them and seized the contraband. Thereafter, they were taken to the Police Station produced before PW7/Investigating Officer. On the next day, they were produced for remand along with Ex.P1 and the seized contraband. The contention of the petitioner of violation of mandatory provision have been elaborately discussed by the trial Court. Though the trial Court accepts there are certain discrepancies, according to the petitioner, the discrepancies are not minor, it amounts to violation of mandatory provisions. The evidence of the witnesses are contradictory to each other. At this stage, this Court cannot express its views on the

contention of both sides. The points raised by the petitioners are to be decided only during hearing of the appeals.

16. In view of the same, this Court is not inclined to grant a relief of Suspension of Sentence. Both the Criminal Miscellaneous Petitions are, accordingly, dismissed. Considering force in the contention of the learned counsel for the petitioners and the petitioners are in confinement, Registry is directed to call for records and prepare typed set and list the appeals for final hearing.

-sd/-

21/12/2020

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

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

TO

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

2 THE PUBLIC PROSECUTOR,
HIGH COURT, MADRAS.

3 THE INSPECTOR OF POLICE, सत्यमेव जयते
T15, SRMC POLICE STATION,
PORUR, CHENNAI.

4 THE SUPERINTENDENT,
CENTRAL PRISON,
PUZHAL, CHENNAI

5 THE SUPERINTENDENT,
CENTRAL PRISON- I,
PUZHAL, CHENNAI

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CRIMINAL SECTION,
HIGH COURT, MADRAS.

C.C. to M/S. K.SHANKER Advocate on payment of necessary charges

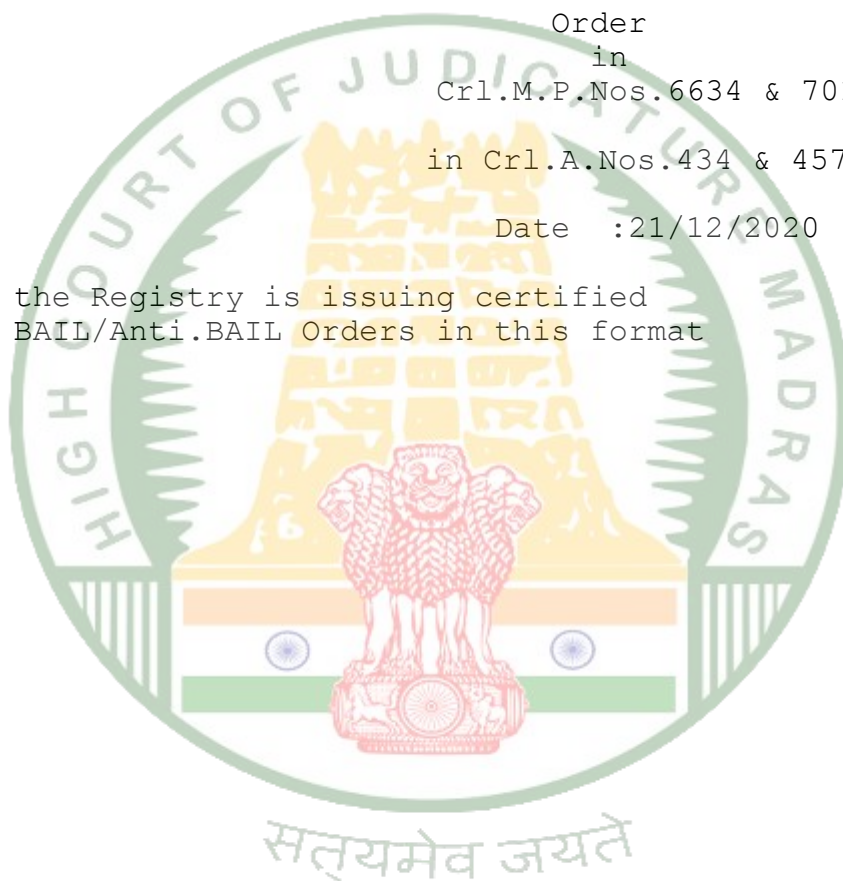
C.C.to M/S.S.SURESH Advocate on payment of necessary charges SR.8608

Order
in
Crl.M.P.Nos.6634 & 7011 of 2020
in Crl.A.Nos.434 & 457 of 2020

Date :21/12/2020

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RVR 25/01/2021



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