

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.03.2021

CORAM:

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

CrI.O.P.No.1292 of 2021

1. Ravi
2. Daniel

.. Petitioners

Vs.

State represented by
The Inspector of Police,
M-6 Manali Police Station,
Chennai - 600 068.
(Crime No.2391 of 2020)

.. Respondent

Prayer: Criminal Original Petition filed under Section 439 of Criminal Procedure Code praying to enlarge the petitioners on bail in Crime No.2391 of 2020 pending on the file of the Respondent.

For Petitioners : Mr.J.Kather Hussain

For Respondent : Mrs.M.Prabhavathi
Addl. Public Prosecutor

O R D E R

(The case has been heard through video conference)

The petitioners are A1 and A2. They were arrested on 10.10.2020 and remanded to judicial custody on 11.10.2020, for the offence punishable under Sections 8(c) r/w 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short NDPS Act) for possession of 18.5 kgs of ganja each, thus totaling 37 kgs, in Crime No.2391 of 2020, on the file of respondent police, seek bail.

2. The case of the prosecution is that, based on a secret information that ganja has been smuggled from Andhra Pradesh to Tamil Nadu, the respondent police conducted vehicle inspection, and found the petitioners riding in two bikes, were in possession of two gunny bags. After seeing the police, the petitioners tried to escape, but the police managed to catch them, suspecting that they are carrying ganja, after following mandatory procedure conducted search, in which, they found both the petitioners were having 18.5 kgs of ganja each. Hence, both of them were arrested and registered a FIR in Crime No.2391 of 2020 for offences under Sections 8(c) r/w 20(b)(ii)(B) of NDPS Act and remanded to Judicial Custody on 11.10.2020.

3. Thereafter, the petitioners filed bail application under Section 167(2) of Cr.P.C. r/w Section 36A(4) of NDPS Act, on the ground that since the petitioners were implicated under Sections 8(c) r/w 20(b)(ii)(B) of NDPS Act, for which, the maximum punishment is, imprisonment for a period upto 10 years and fine upto Rupees one lakh, the respondent police ought to have file the final report within a period of 60 days i.e., on or before 10.12.2020, and as they have not filed the final report within the said stipulated time limit, the petitioners are entitled for statutory bail.

4. The said bail application was filed on 11.12.2020, the trial Court ordered notice and when the said bail application was pending, the respondent police filed an alteration report on 07.01.2021, to alter the offence into that of Sections 8(c) r/w 20(b)(ii)(C), 29(1) and 25 of NDPS Act. The trial Court accepted the same and the FIR was altered for offences punishable under Sections 8(c) r/w 20(b)(ii)(C), 29(1) and 25 of the NDPS Act.

5. Thereafter, the bail application came up for hearing on 22.01.2021. It was argued on behalf of the State that, as the offence has been altered into Section 20(b)(ii)(C) and Section 29 of the NDPS Act, and the total quantity seized from the petitioners was 37 kgs, which is commercial quantity, the respondent has got 180 days time limit for filing the final report as per Section 36A(4) of the NDPS Act. Accepting the said contention, the trial Court dismissed the bail application of the petitioners. Therefore, the petitioners have filed the present petition before this Court seeking bail.

6. The learned counsel appearing for the petitioners would submit that originally the crime was registered for offence punishable under Section 20(b)(ii)(B) of the Act. Admittedly, both the petitioners have travelled separately in two bikes and both of them said to have carried 18.5 kgs of ganja and the contraband was seized under two separate seizure mahazar, and FIR was registered under Sections 8(c) r/w Section 20(b)(ii)(B) of the NDPS Act, as it was lesser than the commercial quantity. Therefore, the respondent ought to have filed the final report within a period of 60 days.

7. Admittedly, even after the expiry of 60 days, no final report has been filed. Therefore, immediately after the expiry of 60 days i.e. on 10.12.2020, when the right for default bail accrues to the petitioners, they have filed their bail application on 11.12.2020. Only after filing of the application for bail, the alteration report has been filed by the respondent altering the offence under Sections 20(b)(ii)(C), 29 and 25 of the NDPS Act, stating that both the petitioners conspired together and transported ganja weighing 37 kgs, which is a commercial quantity and therefore the respondent has got 180 days time limit to file the final report.

8. The learned counsel further submitted that admittedly as on the date of filing of the bail application, the petitioners have been implicated only for the offence punishable under Sections 8(c) r/w Section 20(b)(ii)(B) of the NDPS Act. Taking advantage of the pendency of the bail application before the trial Court, only on

07.01.2021, they altered the offence. The petitioners right to get statutory bail under Section 167(2) Cr.P.C. arose on 11.12.2020, and they have also exercised their right immediately after the expiry of the time limit for filing final report. In order to defeat the right of the petitioners to get bail, the respondent has filed alteration report on 07.01.2021 and the trial Court also accepting the same dismissed the bail application of the petitioners.

9. The learned counsel appearing for the petitioners further submitted that the petitioners right to get statutory bail is indefeasible right as it also involves the fundamental right conferred upon them under Article 21 of the Constitution of India, and it cannot be frustrated by the prosecution by filing alteration report subsequent to the accrual of the right upon the petitioners to get bail.

10. In support of his above contentions, the learned counsel appearing for the petitioners strongly relied upon the judgement of the Hon'ble Supreme Court in M.Ravindran v. The Intelligence Officer, Directorate of Revenue Intelligence, reported in (2021) 2 SCC 485.

11. Per contra, the learned Additional Public Prosecutor appearing for the respondent would submit that, though the FIR was registered for offence punishable under Sections 8(c) r/w Section 20 (b)(ii)(B) of the NDPS Act, after investigation, it came to light that both the petitioners jointly purchased the contraband (ganja) from Andhra Pradesh and transported the same to Tamil Nadu for jointly selling it here. Hence the FIR was altered, and total quantity seized is 37 kgs which is commercial quantity. In the said circumstances, the respondent has got 180 days, for filing the final report, and 180 days is yet to over therefore the petitioners are not entitled to get statutory bail. Considering the said fact the trial Court has rightly dismissed the bail application filed by the petitioners and there is no illegality or infirmity in the same.

12. I have considered the rival submissions.

13. The allegation against the petitioners is that they have transported 18.5 kgs of ganja each in two separate motorcycles and they were arrested and FIR was registered for offence under Sections 8(c) r/w 20(b)(ii)(B) of NDPS Act and remanded to judicial custody on 11.10.2020. Thereafter, the petitioners applied for default bail on 11.12.2020. The FIR was registered for the offence under Sections 8 (c) r/w 20(b)(ii)(B) of NDPS Act, which is punishable with rigorous imprisonment for a term which may extend to 10 years and with fine which may extend to Rupees one lakh. As per Section 167(2) Cr.P.C. r/w Section 36A(4) of NDPS Act, the respondent ought to have completed the investigation within a period of 60 days. On the expiry of the statutory period of 60 days for completing investigation, which falls on 10.12.2020, admittedly, no final report has been filed. The petitioners filed the bail application on 11.12.2020, immediately after the right for default bail accrues to the petitioners and notice was ordered to the respondent.

14. When the bail application was pending with the trial Court, on 07.01.2021, the respondent police filed an alteration report altering the FIR for offence under Sections 8(c) r/w Section 20(b) (ii) (C), 29(1) and 25 of the NDPS Act. The Court below dismissed the bail application on 22.01.2021, holding that the offence has been altered into Sections 20(b)(ii)(C) and 29(1) of NDPS Act, the respondent has 180 days time to file the final report, therefore the petitioners are not entitled to get default bail.

15. Admittedly, the alteration report was filed by the respondent only on 07.01.2021, subsequent to the filing of the application seeking bail. Subsequent alteration of offence cannot defeat the petitioners indefeasible right to get default bail, which was accrued earlier, especially the accused exercise their right and sought for bail. The Hon'ble Supreme Court, in number of its pronouncements, has clearly held that the Proviso to Sub-Section (2) of Section 167 is a beneficial provision for curing the mischief of prolonging the investigation indefinitely, which ultimately affects the liberty of a citizen. Right for bail under Section 167(2) is a indefeasible right and it cannot be frustrated by the prosecution. The Court cannot extend the period within which the investigation must be completed on any reason, in the absence of any provision empowering the Court to extend the period. After expiry of the statutory period prescribed under Section 167(2) of the Code of Criminal Procedure, the accused cannot be detained in custody.

16. The Hon'ble Supreme Court in Achpal Alias Ramswaroop and Another versus State of Rajasthan reported in (2019) 14 SCC 599 has held as follows:

"20. We now turn to the subsidiary issue, namely, whether the High Court could have extended the period. The provisions of the Code do not empower anyone to extend the period within which the investigation must be completed nor does it admit of any such eventuality. There are enactments such as the Terrorist and Disruptive Activities (Prevention) Act, 1985 and the Maharashtra Control of Organised Crime Act, 1999 which clearly contemplate extension of period and to that extent those enactments have modified the provisions of the Code including Section 167. In the absence of any such similar provision empowering the Court to extend the period, no court could either directly or indirectly extend such period."

17. The Hon'ble Supreme Court, in another judgment in Rakesh Kumar Paul versus State of Assam reported in (2017)15 SCC 67, has held that if the charge sheet is not filed within the prescribed time, the right of the accused for 'default bail' has ripened into the status of indefeasible right and it cannot be frustrated. The relevant paragraph reads as follows:

"38. This Court also dealt with the decision rendered in Sanjay Dutt, (1994) 5 SCC 410 and noted that the principle laid down by the Constitution Bench is to the effect that if the charge sheet is not filed and the right for "default bail" has ripened into the status of indefeasibility, it cannot be frustrated by the prosecution on any pretext. The accused can avail his liberty by filing an application stating that the statutory period for filing the charge sheet or challan has expired and the same has not yet been filed and therefore the indefeasible right has accrued in his or her favour and further the accused is prepared to furnish the bail bond."

18. In yet another judgement, the Hon'ble Supreme Court in Criminal Appeal No.452 of 2020 (Arising out of SLP (Crl.) No.2433/2020) [S.Kasi Vs State through the Inspector of Police, Samayanallur Police Station, Madurai District], decided on 19.06.2020, after considering the various other judgments, has held that an accused cannot be detained by the police beyond the maximum period prescribed under Section 167 of the Code of Criminal Procedure. It is relevant to extract the relevant paragraph of the said judgment, which reads thus:

"14. The scheme of Code of Criminal Procedure as noticed above clearly delineates that provisions of Section 167 of Code of Criminal Procedure gives due regard to the personal liberty of a person. Without submission of charge sheet within 60 days or 90 days as may be applicable, an accused cannot be detained by the Police. The provision gives due recognition to the personal liberty."

19. In the instant case admittedly offence has been altered subsequent to the expiry of the statutory period for completion of investigation, by the time the right to get default bail accrues to the petitioners, they have also exercised their right seeking bail and the subsequent alteration of offence cannot defeat the right accrued to the petitioners. Even though the bail application was filed in time, the trial Court without passing any order kept the matter pending, which enabled the prosecution to alter the offence. The Hon'ble Supreme Court in M.Ravindran v. The Intelligence Officer, Directorate of Revenue Intelligence, reported in (2021) 2 SCC 485 in has held in paragraph 20(1) has follows:

"20(1). The observations made in Hitendra Vishnu Thakur (supra) and Sanjay Dutt (supra) to the effect that the application for default bail and any application for extension of time made by the Public Prosecutor must be considered together are, in our opinion, only applicable in situations where the Public Prosecutor files a report seeking

extension of time prior to the filing of the application for default bail by the accused. In such a situation, notwithstanding the fact that the period for completion of investigation has expired, both applications would have to be considered together. However, where the accused has already applied for default bail, the Prosecutor cannot defeat the enforcement of his indefeasible right by subsequently filing a final report, additional complaint or report seeking extension of time."

20. Without considering the same, the trial Court has dismissed the bail application filed by the petitioners, and this Court is of the considered view that the petitioners are entitled for bail under Section 167(2) Cr.P.C. r/w Section 36A(4) of the NDPS Act.

21. In the above said circumstances, this Court is inclined to grant bail to the petitioners subject to certain conditions:

(a) Accordingly, the petitioners are ordered to be released on bail on condition to execute a separate bond for a sum of Rs.10,000/- (Rupees Ten Thousand only) with two sureties each for a like sum to the satisfaction of the learned Judicial Magistrate, Thiruvottiyur, and on further conditions that:

(b) the sureties shall affix their photographs and Left Thumb Impression in the surety bond and the learned Magistrate may obtain a copy of their Aadhar Card or Bank Pass Book to ensure their identity;

(c) the petitioners, on their release from prison, shall report before the respondent police as and when required for interrogation;

(d) the petitioners shall not commit any offences of similar nature;

(e) the petitioners shall not abscond either during investigation or trial;

(f) the petitioners shall not tamper with evidence or witness either during investigation or trial;

(g) on breach of any of the aforesaid conditions, the learned Judicial Magistrate/Trial Court is entitled to take appropriate action against the petitioners in accordance with law as if the conditions have been imposed and the petitioners released on bail by the learned Magistrate/Trial Court himself as laid down by the Hon'ble Supreme Court in P.K.Shaji vs. State of Kerala [(2005)AIR SCW 5560];

(h) if the accused thereafter absconds, a fresh FIR can be registered under Section 229A IPC.

22. With the above directions, this Criminal Original Petition is ordered.

-sd/-
17/03/2021

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 JUDICIAL MAGISTRATE,
THIRUVOTTIYUR.

2 THE CHIEF JUDICIAL MAGISTRATE
THIRUVALLUR [FOR INFORMATION]

3 THE SUPERINTENDENT,
CENTRAL PRISON, PUZHAI.

4 THE PUBLIC PROSECUTOR
HIGH COURT, MADRAS.

5 THE INSPECTOR OF POLICE,
M-6, MANALI POLICE STATION,
CHENNAI - 600 068.

+1CC to M/S.G.B.MOTCHAM Advocate on payment of necessary charges SR NO.3547

CRL OP.1292/2021

Date :17/03/2021

MK:22/03/2021