

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 23.02.2021

Pronounced on : 05.03.2021

CORAM

THE HONOURABLE MR. JUSTICE **A.D.JAGADISH CHANDIRA**

Crl.O.P.No.15174 of 2020

1.Maruthupandi
2.Aandi

... Petitioners

/versus/

State rep by
The Inspector of Police,
Narcotic Control Bureau,
Chennai Zonal Unit,
Chennai.
(In F.No.48/1/5/2020-NCB-MDO)

.. Respondent

Prayer: Criminal Original Petition is filed under Section 439 of Criminal Procedure Code to enlarge the petitioners on bail in F.No.48/1/5/2020-NCB-MDO on the file of Respondent Police.

For petitioners : Mr.S.Doraisamy, Senior Advocate
For Mr.V.Elangovan

For Respondent : Mr.N.P.Kumar,
Special Public Prosecutor (NCB cases)

ORDER

The petitioners, who were arrested and remanded to judicial custody on 27.02.2020 for the offences punishable under **Sections 8(c) r/w 20(b)(ii)(C), 28 and 29 of NDPS Act**, in F.No.48/1/5/2020-NCB-MDO on the file of the respondent police, seek bail.

2. The case of the prosecution is that the Intelligence Officer, NCB Chennai Zonal Unit had received an information that one Maruthupandi and his associate Aandi have procured about 300 Kgs of Ganja from Vijayanagar, Andra Pradesh and they have intended to transport the same via Chennai in an Ashok Layland Truck bearing Regn.No.TN74 AB 6786 and that they will be crossing Karanodai Toll Plaza, Red Hills, Chennai at around 23:00 hrs. on 25.02.2020 and if the vehicle is checked, the Ganja can be seized. Based on the information, the Intelligence Officer after following necessary formalities, intercepted the vehicle and in the presence of independent witnesses had conducted search on the vehicle and found the petitioners transporting 308 kgs of Ganja in 12 plastic gunny bags along with waste paper. The contraband was seized and the confession statement under Section 67 of the NDPS Act was

recorded from the petitioners and after completion of investigation, the respondent had filed the complaint against the petitioners before the Special Court for NDPS Cases for offence under Sections 8(c) r/w 20(b)(ii)(C), 28 and 29 of NDPS Act.

3. Mr.S.Doraisamy, learned Counsel appearing for the petitioners would submit that the first petitioner is running a Lorry Puncture Vulcanizing Shop at Madurai for past 20 years and he is also running a Transport Service for past ten years. He had purchased a Lorry bearing registration No.TN74 AB 6786 before three months availing loan and on the date of alleged occurrence, the application for transfer of name and registration was pending before the RTO Office. The second petitioner was introduced to the first petitioner and he joined as a driver in the Transport Company of the first petitioner. While so, the lorry was booked by a customer for transporting papers from Vishakapattinam to Thiruvananthapuram. The lorry was loaded with the consignment and the petitioners were handed over with necessary invoices and tax forms. While the petitioners were proceeding from Vishakapattinam to Thiruvananthapuram, a person had approached the petitioners to transport 10 bags from Vishakapattinam to Madurai stating it to be papers. When the petitioners were

nearing Chennai, they were intercepted at Karanodai Toll Plaza and a search was conducted and the bags found to contain 308 kgs of brownish green colour leaves believed to be Ganja were recovered from the lorry. The learned Counsel would submit that the petitioners were not aware of the contents which were in the bags, whereas, the petitioners were falsely implicated in this case as if they illegally transported them. He would submit that the petitioners were enquired while in custody of the respondent and despite the petitioners furnishing necessary documents to show that they were legally running transport business and that the contraband does not belong to them, the respondent arrested them on 26.02.2020 based on the statement recorded from them under Section 67 of the NDPS Act while they were in custody. He would submit that the earlier application for bail in Crl. O.P.No.7638 of 2020 was dismissed on 26.06.2020 and after the dismissal of the earlier application, the respondent have completed the investigation and filed the final report. He would reiterate that the petitioners were not having any intention or mensrea to transport the contraband and they were not conscious of the possession of illegal substances and it had been transported by some one else for transporting to Madurai.

3.1. The learned Counsel would further submit that the entire case of the prosecution rests on the alleged statements recorded from the petitioners under Section 67 of NDPS Act while they were in custody and the statements recorded under Section 67 of the NDPS Act from the other witnesses. He would submit that the respondent had recorded statements of 12 independent witnesses. The perusal of the statements recorded from the witnesses and perusal of the other documents would go to prove that the entire case has been fabricated and that the petitioners are not the owners of the contraband. Perusal of documents would also show that the respondent have not done the investigation in a fair manner. He would submit that the prosecution has relied on 25 documents and there are various discrepancies in the timings and date with regard to the receipt of information, the time of occurrence and registration of the case, search seizure and arrest of the petitioners thereby, creating grave doubt with regard to the prosecution case. He would submit that as per the authorisation, the respondent is alleged to have received the information on 25.02.2020 at 15:00 hrs., whereas, in the summon under Section 67 of the NDPS Act issued to one Rajesh, the date of arrest of the petitioners has been shown as 22.02.2020. Thus, proving the fact that the accused were arrested as early as on 22.02.2020 and that they were kept in illegal detention

for 3 days and thereafter, they were shown to be arrested on 26.02.2020 and remanded to judicial custody on 27.02.2020. He would further submit that insofar as the mahazar is concerned, it was not prepared in the language known to the accused and thereby, the entire proceedings have been vitiated and therefore, the petitioners are entitled for acquittal. He would further submit that as per the authorisation to search under Section 41(2) of the NDPS Act, no mentioning has been made and no material has been produced to show that the Intelligence Officer is empowered to conduct search and seizure and thereby, the authorisation cannot be relied upon. Further, the statements recorded from the petitioners under Section 67 of the NDPS Act while they were in custody can neither be relied nor admissible in the eye of law and thereby there is every possibility of the petitioners being acquitted by the trial Court. Even as per the alleged statements recorded under Section 67 of the NDPS Act, the contraband was stated to have been handed over by one Jayakumar of Madurai to be handed over to one Kasinathan of Thallakulam, Madurai and thereby, the petitioners have no intention of mensrea to trade with the contraband. The learned Senior Counsel would rely on the Judgement of the Hon'ble apex Court in *Tofan Singh Vs. State of Tamil Nadu LNIND 2020 SC 521 : 2020 SCC Online SC 882*, wherein it is held that;

155.we answer the reference by stating'

(i) That the officers who are invested with powers under section 53 of the NDPS Act are “police officers” within the meaning of section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

(ii) That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.

3.2 The learned Senior Counsel would further submit that the first petitioner is a poor transporter and the second petitioner is a driver and that they did not have the ability to commit such a grave offence and thereby, he would seek bail for the petitioners.

4. Per contra Mr.N.P.Kumar, learned Special Public Prosecutor (NCB cases) would submit that it is a case involving seizure of 308 kgs. of Ganja which is a “commercial quantity”. He would submit that in this case, on a specific information that the accused have procured about 300 kgs of Ganja

from Vishakapatnam, Andhra Pradesh and they were transporting it to Madurai, the Intelligence Officer after intimating and getting instructions from the Superior Officers, approached the independent witnesses and requested them to be witness for the search and further proceedings and mounted surveillance at Karanodai Toll Plaza, Chennai. On 25.02.2020 at around 23:30 hrs., the Narcotic Control Bureau, Chennai Team identified the Ashok Leyland Truck bearing Registration No.TN74 AB 6786 entering Karanodai Toll Plaza lane and it was intercepted and the petitioners were identified and enquired. Based on enquiry, 308 kgs. of Ganja packed in 12 plastic gunny bags were seized and recovered from the lorry. Further, the accused have confessed that they had knowledge about the possession and illegal transport of 308 kgs of Ganja. The samples of the contraband was found to be Ganja and after completing the investigation, the respondent has filed the complaint against the accused. He would submit that it is a case of recovery of commercial quantity of Ganja and at this stage, the point to be considered is the jurisdiction of the Court to grant bail as circumscribed by the provisions of Section 37 of NDPS Act. The petitioners are bound to satisfy the Court with regard to the conditions laid down under Section 37 of the NDPS Act with regard to bail. He would submit that the Judgement referred by the learned Counsel for the petitioners

in *Tofan Singh Vs. State of Tamil Nadu* (Supra) with regard to admissibility of the confession recorded under Section 67 NDPS Act, cannot be applied and taken into consideration at this stage. Though, the Apex Court has held that the statements under Section 67 NDPS Act cannot be used as a confession statement in the trial, in this case the present petition is only for bail. He would submit that apart from the statements recorded under Section 67 NDPS Act, there are other materials to connect the accused with this crime. The petitioners were found transporting commercial quantity of Ganja and based on their statements, search and seizure have been effected and thereby, there is every reason to believe that the accused have committed the offence and no reasonable grounds have been made to believe that that accused are not guilty of such offences. With regard to mens rea and intention, the learned Special Public Prosecutor would submit that the presumption under Section 35 and 54 of the NDPS Act operates against the petitioners and it is for the accused to prove the fact that they had no such culpable mental state with respect of the allegations against them,. Further, there are *prima facie* materials to prove that the accused had illegally transported the contraband knowing fully well that it is illegal. In support of his contention, the learned Special Public Prosecutor would rely on the following decisions.

1. *Intelligence Officer vs, Selvi reported in (2013 2 MLJ(Cri) 754 (paragraph 11 to 14)*

2. *(The Superintendent of Narcotics Control Bureau vs R.Paulsamy reported in (2000 9 SCC 549*

3. *State of Kerala etc., Vs. Rajesh etc., reported in (2020 SCC online SC 81*

4. *Satpal Singh vs. State of Punjab reported in (2018 13 SCC 813)*

4.1 The learned Special Public Prosecutor would submit that it is a case where the petitioners were intercepted in the night on 25.02.2020 and they were remanded to custody on the next day and that they were not kept in illegal confinement. Further, no such plea was taken by the petitioners when they were produced before the Magistrate at the time of remand and till date no complaint has been made of illegal detention and no retraction has been made. He would further submit that this Court taking into consideration all the above aspects had dismissed the earlier bail petition and there is no change of circumstances now. He would thereby seek dismissal of the bail application.

5. Heard Mr.Duraisamy, learned Senior Counsel appearing for the petitioners and Mr.N.P.Kumar, learned Special Public Prosecutor for NCB Case.

6. Now referring to the Judgments relied on by the respondent.

In INTELLIGENCE OFFICER VS SELVI reported 2013 2 MLJ(Cri) 754 it has been held (paragraph 11 to 14)

11.At this stage, it would be appropriate to extract Section 54 of NDPS Act, which reads as follows:

“54. Presumption from possession of illicit articles; In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of:-

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specifically designed or any group of utensils specifically adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactory”.

12. A close reading of the above said provision would clearly show that unless and until the contrary is proved, the presumption is that the accused has committed the offence under this Act. Though, in the instant case, the trial Court has rendered a finding that so far as these petitioners are concerned, they ought not to have carried the entire carry bags, the same can be proved only at the time of trial, particularly in the circumstances when the accused have not given the address and identification of the other accused person who have been referred to in their statements. In this regard, a reference could be placed in the judgment *Dharampal Singh v. State of Punjab* (2010) STPL (LE) 44317 (SC) as under:

“15. From a plain reading of the aforesaid it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactory. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the appellants have not been able to account for satisfactory the possession of opium.

16. Once possession is established the Court can presume that the accused culpable mental state and have committed the offence. In somewhat similar facts this Court had the occasion to consider this question in the case of *Madan Lal and Another v. State of H.P.*, (2003) 7 SCC 465, wherein it has been held as follows:

“26. Once possession is established, the person who claims that it was not a conscious possession has to establish, it because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

27. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act''.

13. The dictum laid down in the said judgment is that once possession is established, it is for them to prove at the time of trial that such possession is not a conscious possession. Till such time it has to be presumed that the entire quantity of ganja is received only from the possession of the respondents. At this stage it would be appropriate to extract Section 35 of the NDPS Act, which reads as follows:

''35. Presumption of culpable mental state(1) In any prosecution for an offence under this Act, which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the Act charged as an offence in that prosecution.

(2) For the purpose of this Section, a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability''.

14. A close reading of the above said provision would also show that the accused can prove the fact that he had no culpable mental state with respect to the Act charged as an offence in case he clearly to presume that the respondents had the mental state to carry less than the commercial quantity and till the said statement of the respondents is proved by way of evidence, the said statement has to be construed only as a probable defence. Therefore, in my considered opinion, the bail granted by the trial Court is not legally sustainable.

In **(The Superintendent of Narcotics Control Bureau vs R.Paulsamy reported**

in (2000) 9 SCC 549 it has been held (para 5, 6)

5. This court has laid down the parameters to be followed while considering the application for bail moved by an accused involved in offences under the NDPS Act vide Union of India v. Ram Samujh [(1999) 9 SCC 429: 1999 SCC (Cri) 1522 : JT (1999) 6 SC 397] . It is unnecessary for us to repeat those parameters over again. We have no doubt that learned Single Judge has not followed the aforesaid parameters in this case.

6. In the light of Section 37 of the Act no accused can be released on bail when the application is opposed by the Public Prosecutor unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. It is unfortunate that matters which could be established only in offence regarding compliance with Sections 52 and 57 have been pre-judged by the learned Single Judge at the stage of consideration for bail. The minimum which learned Single Judge should have taken into account was the factual presumption in law position that official acts have been regularly performed. Such presumption can be rebutted only during evidence and not merely saying that no document has been produced before the learned Single Judge during bail stage regarding the compliance with the formalities mentioned in those two sections.

In State of Kerala etc., Vs. Rajesh etc., reported in (2020 Supreme(SC) 69,

the Apex court has held at (para 18 to 21)

18. The jurisdiction of the Court to grant bail is circumscribed by the provisions of Section 37 of the NDPS Act. It can be granted in case there are reasonable grounds for believing that accused is not guilty of such offence, and that he is not likely to commit any offence while on bail. It is the mandate of the legislature which is required to be followed. At this juncture, a reference to Section 37 of the Act is apposite. That provision

makes the offences under the Act cognizable and non-bailable. It reads thus:-

19. This Court has laid down broad parameters to be followed while considering the application for bail moved by the accused involved in offences under NDPS Act. In Union of India Vs. Ram Samujh and Ors. 1999(9) SCC 429, it has been elaborated as under:-

20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

21. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail. Its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

In SATPAL SINGH Vs. STATE OF PUNJAB reported in (2018 13 SCC 813) a three Judges of bench of the Apex Court has held (para 3)

3. Under Section 37 of the NDPS Act, when a person is accused of an offence punishable under Section 19 or 24 or 27-A and also for offences involving commercial quantity, he shall not be released on bail unless the Public Prosecutor has been given an opportunity to oppose the application for such release, and in case a Public Prosecutor opposes the application, the court must be satisfied that there are reasonable grounds for believing that the person is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. Materials on record are to be seen and the antecedents of the accused is to be examined to enter such a satisfaction. These limitations are in addition to those prescribed under CrPC or any other law in force on the grant of bail. In view of the seriousness of the offence, the lawmakers have consciously put such stringent restrictions on the discretion available to the court while considering application for release of a person on bail. It is unfortunate that the provision has not been noticed by the High Court. And it is more unfortunate that the same has not been brought to the notice of the Court.

6. This Court perused the entire materiel on record including the statements under Section 67 of NDPS Act recorded from the petitioners and the witnesses. This Court also carefully considered the Judgements relied on by the learned Counsel appearing for the petitioners as well as the learned Special Public Prosecutor appearing for the respondent police.

7. This is a case where a commercial quantity of 308 kgs. of Ganja has been seized from the accused. On a specific information, the respondent had kept a watch and intercepted the lorry bearing Regn.No.TN74 AB 6786 and thereafter, based on enquiry and confession recorded under Section 67 of NDPS Act, 308 kgs of Ganja was seized from the lorry. Though, the learned Counsel appearing for the petitioners submitted that the confession recorded under Section 67 of NDPS Act is not admissible, this Court is of the opinion that the reliability and admissibility of the said statements can be decided only at the time of trial when evidence is adduced. Further, the discrepancies pointed out in the documents are also subject matter of trial.

8. As stated above, the evidentiary value of the confession statement recorded from the accused and its admissibility can be decided at the time of trial while letting evidence and as of now, the presumption under Section 35 and 54 are against the petitioners and that the petitioners have not satisfied the Court with regard to the requirement under Section 37 of the NDPS Act that there are reasonable grounds for believing that they are not guilty for offences at this stage.

9. In view of the reasons stated above, this Court is not inclined to grant bail to the petitioners. It is made clear that the observations made in this bail order are for the purpose of deciding bail application and they till not have any bearing on the trial.

10. Accordingly, this Criminal Original Petition stands dismissed.

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05.03.2021



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To

1.The Inspector of Police,
Narcotic Control Bureau,
Chennai Zonal Unit,
Chennai.

2.The Public Prosecutor,
High Court, Madras.



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A.D.JAGADISH CHANDIRA, J.
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Pre-delivery Judgment made in

Crl.O.P.No.15174 of 2020

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