



IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Criminal Jurisdiction)

Monday, the Twenty Seventh day of September Two Thousand Twenty One

PRESENT

The Hon`ble Mr Justice RMT. TEEKAA RAMAN

CRIMINAL MISCELLANEOUS PETITION No.8336 of 2020

IN CRL.A.NO.615 of 2018

MOHAMED RABEEK

[PETITIONER/APPELLANT/ACCUSED]

Vs

STATE REP.BY

[RESPONDENT/COMPLAINANT]

THE INTELLIGENCE OFFICER,
NARCOTICS CONTROL BUREAU,
CENTRAL ZONE UNIT,
CHENNAI-600 090.
(NCB F.NO.48/1/06/2014 NCB, MDS)

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to

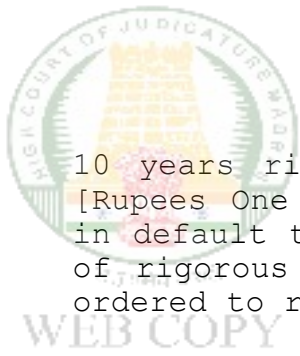
(i) To suspend the sentence imposed in C.C.No.5 of 2015 dated 24.10.2017 passed by the Principal Judge, Under NDPS Act Chennai and enlarge the petitioner on bail pending disposal of the above Crl.A.No.615 of 2018.

Order : This petition coming on for orders upon perusing the petition and the filed in support thereof and upon hearing the arguments of M/S.R.SANKARASUBBU, Advocate for the petitioner, and of M/S.N.P.KUMAR, Special Public Prosecutor, for NCB, Cases, on behalf of the Respondent, the court made the following order:-

The matter is heard through "Video Conference".

The petitioner, who is the third accused, has filed this petition seeking to suspend the sentence imposed by the learned Principal Special Judge, Principal Special Court under EC & NDPS Act cases, Chennai, in C.C.No.5 of 2015, dated 24.10.2017 and grant bail to him pending disposal of the above criminal appeal.

2. The learned Principal Special Judge, Principal Special Court under EC & NDPS Act cases, Chennai, has convicted the petitioner/A.3 for the offences under Sections 8(c) r/w. 29, 8(c) r/w. 21(c), 8(c) r/w. 22(c) and 8(c) r/w. 28 of NDPS Act and sentenced him to undergo



10 years rigorous imprisonment and to pay a fine of Rs.1,00,000/- [Rupees One Lakh only] on each count [Total fine of Rs.4,00,000/-], in default to pay the fine, sentenced to undergo another 2 1/2 years of rigorous imprisonment. The above sentence of imprisonments were ordered to run concurrently.

3. The case of the prosecution, in short, is as follows:-

The petitioner/A.3 along with Sheshathri Rajendran @ Prabhu Seralathan, S/o. Rajendran (A.1), Mohamed Ibrahim @ Raja/A.2 and Vijayakumar @ Viji/A.4 entered into a criminal conspiracy to procure, possess, transport, export and made an attempt to illegally export from India to Kuwait, the seized 1.160 Kg of Heroin and 1.020 Kg of Methamphetamine at Customs examination area of Chennai Anna International Airport and as they committed the offences contravening the provision of Section 8(c) r/w. Sections 21, 22, 23, 28 and 29, they are punishable under Sections 21(C), 22(C), 23(C), 28 and 29 of NDPS Act and were arrested and remanded to custody.

4. After completing the investigation, the complaint was filed before the Special Court for NDPS Act cases at Chennai, against accused Nos.1 to 3 and the same was taken on file in C.C.No.5 of 2015. After framing the charges, seven witnesses were examined, 59 exhibits and 10 material objects were marked.

5. After going through the evidence and documents, the trial Court found the petitioner/A.3 and A.1/Sheshathri Rajendran guilty of offences under Sections 8(c) r/w. 29, 8(c) r/w. 21(c), 8(c) r/w. 22 (c) and 8(c) r/w. 28 of NDPS Act and sentenced them as stated above.

6. Aggrieved by the order of conviction and sentence passed by the learned Principal Special Judge, the petitioner has filed the above criminal appeal and also filed a petition in CrI.M.P.No.8148 of 2019 seeking suspension of sentence and this Court, vide order dated 09.08.2019, dismissed the said petition as the petitioner/A.3 has not satisfied the conditions mentioned in Section 37 of the NDPS Act.

7. Heard the learned counsel for the petitioner and the learned Special Public Prosecutor appearing for the respondent and perused the records.

8. Mr.R.Sankarasubbu, learned counsel for the petitioner/A.3 would contend that the substantial part of sentence has been served by the petitioner/A3 and relied upon a decision of the Hon'ble Supreme Court reported in **(2001) 4 SCC 355 [Akhtari Bi (SMT) Vs. State of M.P.]**. It is further contended that the statement recorded under Section 67 of the NDPS Act is not a basis for conviction, since it is equal to Section 25 of the Indian Evidence Act and relied upon a decision of the Hon'ble Supreme Court reported in **(2021) 4 SCC 1 [Tofan Singh Vs. State of Tamil Nadu]**.



9. Per contra, Mr.N.P.Kumar, learned Special Public Prosecutor appearing for the respondent would contend that in order to secure the suspension of sentence, the criteria fixed under Section 37 of the NDPS Act is essential. In support of his contention, he has relied upon a decisions of the Hon'ble Supreme Court reported in [i] **(2009) 1 SCC 482 [Ratan Kumar Vishwas Vs. State of Uttar Pradesh and another]**; [ii] **2018 (0) Supreme SC 1202 [State of Punjab Vs. Rakesh Kumar]** in Crl.A.No.1512 of 2018 (Arising out of SLP No.4762 of 2018), decided on 03.12.2018 and [iii] **2021 (0) Supreme SC 360 [The State (GNCT of Delhi) Narcotics Control Bureau Vs. Lokesh Chandha]**, in Criminal Appeal No.257 of 2021 (Arising out of SLP (Crl.) No.670 of 2021, decided on 02.03.2021. It is stated by the learned Special Public Prosecutor that the petitioner/A.3 has been served the sentence for seven years out of ten years awarded by the trial Court.

10. In the decision reported in **2015 (4) MLJ (Cri) (SC) 486 [Baldev Singh Vs. State of Haryana]**, the Hon'ble Apex Court has held as under:-

"The evidence on record amply establishes physical possession of the contraband by the appellant. The appellant being the driver of the vehicle by all probabilities must have been aware of the contents of the bags transported in the trolley attached to the tractor. Once the physical possession of the contraband by the accused has been proved, Section 35 of the NDPS Act comes into play and the burden shifts on the appellant-accused to prove that he was not in conscious possession of the contraband and since the burden is not discharged, there is no infirmity in convicting the appellant-accused."

11. In the decision reported in **(2000) 8 SCC 437 [Dadu alias Tulsidas Vs. State of Maharashtra]**, the Hon'ble Apex Court has categorically held that in respect of cases under NDPS Act, the relief of suspension of sentence and bail can be granted by the Appellate Court only if the twin test laid down as per Section 37 of the NDPS Act are satisfied.

12. In this case, the seized contraband is commercial quantity viz., 1.160 Kg of Heroin and 1.020 Kg of Methamphetamine and hence, Section 37 of the NDPS Act is applicable and the petitioner, who seeks bail, has to satisfy the conditions laid down in Section 37 of the NDPS Act.

13. On a perusal of records, it is seen that the charges against the petitioner/A.3 are under Sections 8(c) r/w. 29, 8(c) r/w. 21(c), 8(c) r/w. 22(c) and 8(c) r/w. 28 of NDPS Act. After trial, A.4 was acquitted by the learned Principal Special Judge, Chennai. On information, the NCB officers went to Anna International Airport, apprehended A.1 and recovered the contraband. On enquiry of A.1, the involvement of A.2 to A.4 was ascertained and A.2 to A.4 were also brought inside the Airport by the NCB officials and hence, the learned Principal Special Judge, framed the charges against the accused as stated above.



14. Regarding the recovery of contraband and the seizure of contraband, it is seen that in the trolley bag brought by the Air Arabia staff, the NCB officers found the luggage tag bearing number G90514656868, wherein the name of A.1 is printed. The luggage tag is pasted in the Air ticket of A.1 which was marked as Ex.P.5. Moreover, all the witnesses uniformly deposed that only A.1 opened the bag and handed over the contraband.

15. The prosecution proved the recovery through the luggage tag wherein the name of A.1 is printed. It is pertinent to note that A.1 had only one trolley bag and only from that bag, the contraband was seized. Therefore, it is crystal clear that the contraband was seized only from the travel bag of A.1 and as per Section 35 of the NDPS Act, the burden rests upon A.1 to explain how he came in to possession of the contraband and absolutely, no evidence is available on the side of A.1.

16. As far as Section 50 of NDPS Act is concerned, the prosecution proved that the right conferred under Section 50 of the NDPS Act is explained to the accused. Since the recovery is made from the trolley bag and from the body of A.1, Section 50 of the NDPS Act need not be complied in this case. A.1 carried only one luggage and from that luggage only NCB officers seized the contraband.

17. Based upon the judgment of this Court in ***Criminal Appeal No.561 of 2000 [Shanmughavadivel @ Kannan Vs. State]***, decided on **29.04.2003**, the report of the scientific expert is to be marked by the examining expert. P.W.2 is examining to find out the nature of the contraband and who had issued Ex.P.15-Chemical Analysis Report as to the nature of the material seized and hence, the nature of the material seized from the possession of A.1 trolley bag is as discussed supra. After discussion, the learned Principal Special Judge has observed that the part of A.4 was not established by the prosecution and hence, A.4 was acquitted. The finding of the trial Court is that A.1 is only a carrier and A.3 arranged the illegal transport. But the real beneficiary out of this illegal export is A.2. Accordingly, laid the conviction and sentence as stated supra.

18. Based upon the statement of A.1 recorded under Section 67 of the NDPS Act coupled with that of A.2, the trial Court rendered a finding that A.3 contacted A.2 and arranged for the illegal transport of contraband by A.1. The defence plea was considered in proper perspective and after negating the defence plea, the reasoning assigned by the learned Principal Special Judge to arrive at the overt act against the petitioner/A.3 appears to be positive and reasonable and hence, I find that the essential ingredients of Section 37 of the NDPS Act are not satisfied by the learned counsel for the petitioner during the arguments and hence, the petitioner/A.3 has not made out a case for granting suspension of sentence and to enlarge him on bail. Besides, the prosecution also apprehends that the petitioner/A.3 may jump bail and flea the country and as the petitioner/A.3 has not made a case for granting suspension of sentence as per Section 32(A) of the NDPS Act, I am not inclined to grant the relief of suspension of sentence to the petitioner.



19. Accordingly, the above miscellaneous petition, seeking suspension of sentence, is dismissed.

-sd/-

27/09/2021

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 PRINCIPAL SPECIAL
JUDGE, UNDER NDPS, ACT CHENNAI.

2 THE SUPERINTENDENT,
CENTRAL PRISON, COIMBATORE DISTRICT.

3 THE SPECIAL PUBLIC PROSECUTOR FOR NCB CASES,
HIGH COURT, MADRAS.

4 THE INTELLIGENCE OFFICER,
NARCOTICS CONTROL BUREAU,
CENTRAL ZONE UNIT,
CHENNAI-600 090.

C.C. to M/S.R.SANKARASUBBU Advocate on payment of necessary charges

Order

in
CRL MP.8336/2020
in
CRL A.615/2018

Date :27/09/2021

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TA-28/09/2021