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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)

Reserved on	Pronounced on
23.04.2021	30.04.2021

PRESENT

The Hon'ble Mr.Justice G.CHANDRASEKHARAN

CRL OP (MD) No.5270 of 2021

1. P.Kannan
2. M.Sudhakaran

... Petitioners/Accused's 2&3

Vs

The State Rep. by
The Inspector of Police,
Koodalpudur Police Station,
Madurai City.

Crime No.1388 of 2020

... Respondent/Complainant

For Petitioners : Mr.M.A.Manimaran, Advocate.

For Respondent : Mr.Kr.Bharathi Kannan,
Government Advocate (Crl.Side)

PETITION FOR BAIL Under Sec.439 of Cr.P.C.

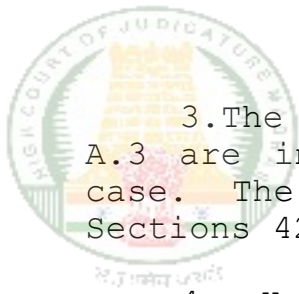
PRAYER :-

For Bail in Crime No.1388 of 2020 on the file of the Respondent Police.

ORDER : The Court made the following order :-

The petitioners, who were arrested on 23.05.2020 for the offences punishable under Sections 8(c) r/w 20(b), (ii) (C) and 29(1) NDPS Act in Crime No.1388 of 2020 on the file of the respondent police, seek bail.

2.The case of the prosecution is that on 05.09.2020 at about 03.00 pm., when the respondent police on their regular patrol at Anaiyur, near Imayam Nagar, first accused was found along with a white gunny bag and more than 15 persons. Police nabbed the first accused and the petitioners. The gunny bag contained 22kg of ganja. Hence, the present case has been registered.



3.The case of the petitioners is that the petitioners/A.2 and A.3 are innocents and they have been falsely implicated in this case. The respondent police not followed the mandatory provision of Sections 42, 50, 52A and 57 NDPS Act.

4. Heard the learned Counsel for the petitioners and the learned Government Advocate(Crl.Side) appearing for the respondent.

5. It is seen from the Statement of Objects and Reasons of NDPS Act that the emphasis is to see that there should be complete avoidance of any kind of offences relating to Narcotic, Psychotropic and controlled substances by prescribing deterrent punishment for violators.

6. Coming to grant of bail, Section 37 of NDPS Act deals with grant of bail and it is relevant hereunder to extract the same:

" Section 37 Offences to be cognizable and non-bailable

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for 2 [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.

7. When considering the grant of bail, the Honourable Supreme Court in **State of Kerala etc., Vs. Rajesh etc.**, reported in **2020 SCC Online SC 81**, held as follows:

19.This Court has laid down broad parameters to be followed while considering the application for bail moved by

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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:

"7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting deathblow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in *Durand Didier v. Chief Secy., Union Territory of Goa* [(1990) 1 SCC 95] as under:

24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.

8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

(i) there are reasonable grounds for believing that the accused is not guilty of such offence; and

(ii) that he is not likely to commit any offence while on bail are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent - accused on bail. Instead of attempting to take a holistic view of the harmful socioeconomic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the



spirit with which Parliament, after due deliberation, has amended."

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 nonobstante 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.

8. As to what is the expression "reasonable grounds" means, the Honourable Supreme Court in **Union of India Vs Rattan Mallik Alias Habul** reported in **(2009)2 Supreme Court Cases**, the Honourable Supreme Court has held as follows:

"13. The expression 'reasonable grounds' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. [Vide Union of India Vs. Shiv Shanker Kesari²] Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.



16. Merely because, according to the Ld. Judge, nothing was found from the possession of the respondent, it could not be said at this stage that the respondent was not guilty of the offences for which he had been charged and convicted. We find no substance in the argument of learned counsel for the respondent that the observation of the learned Judge to the effect that "nothing has been found from his possession" by itself shows application of mind by the Ld. Judge tantamounting to "satisfaction" within the meaning of the said provision. It seems that the provisions of the NDPS Act and more particularly Section 37 were not brought to the notice of the learned Judge."

9. In ***State of M.P. Vs. Kajad*** reported in ***(2001) 7 Supreme Court Cases 673***, the Honourable Supreme Court has held as follows:

"Negation of bail is the rule and its grant and exception under sub clause (ii) of clause (b) of Section 37(1). "

10. The reading of these judgments makes it clear that so far as the offences covered under NDPS Act, jail is the rule and the bail is an exception. Before granting bail, the Court must be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. The reasonable grounds appearing in Section 37(i) of NDPS Act means, something more than *prima facie* ground, it contemplates substantial probable causes for believing that the accused is not guilty of the alleged offences.

11. Learned counsel appearing for the petitioners mainly argued on the proposition that the respondent police have not complied with the mandatory procedures contemplated under sections 42 and 50 of the NDPS Act. Non-compliance of these mandatory procedures cause serious prejudice to the accused and also it give a room for a strong suspicion that the documents prepared by the respondent had been prepared not at the spot but leisurely in the police station to suit their convenience and implicate the persons of their choice as accused.

12. The learned Government Advocate (Crl.Side) appearing for the respondent submitted that in pursuance of the conspiracy, the accused concerned in this case had performed various roles and each and every one of them are jointly and severally liable for their actions. Each and every act had been performed by each and every accused in the course of same transaction towards a common purpose i.e., procurement, transportation and storage for the purpose of selling. Non-compliance of mandatory procedures cannot be agitated now. It is a matter for trial. He relied on the following



judgments **1.State of Kerala etc. V Rajesh (2020 SCC Online 81)**
2.Union of India V Rattan Mallik Alias Habul ((2009) 2 Supreme Court cases 3.Karnail Singh V State of Harayana ((2009) 8 SCC 539)
4.Vijaysingh Chandubha Jadeja V State of Gujarat (2011 (1) SCC 609)
5.State of M.P. V Kajad ((2001) 7 SCC 673) and 6.State of Punjab V Baldev Singh ((1996) 6 SCC 172) in support of his argument and prayed for the dismissal of this petition.

13. So far as the non-compliance of the mandatory procedures contemplated under Sections 42 and 50 of NDPS Act is concerned, the learned Counsel for the petitioners reiterated that it is the statutory right provided to the accused under NDPS Act. If those mandatory provisions or procedures have not been followed, there is every possibility that the police and other authorities responsible for implementing and preventing the offences under the NDPS Act would implicate the innocent persons as accused. The NDPS Act is a draconian act providing for stringent punishment by way of imprisonment and fine. Therefore, the special provisions are made to safeguard the innocent public from wrongful prosecution. If those mandatory procedures are not followed, it has to be presumed that there is every possibility of creating, fabricating and manipulating the documents to suit the case of the prosecution and frame any innocent in the case.

14. No doubt, the arguments advanced by the learned Counsel for the petitioners deserve appreciation and acceptance. However, the point to be considered is whether this technical aspect can be decided at the time of considering the bail petition. Dealing this question, the Honourable Supreme Court in **Karnail Singh Vs. State of Haryana** reported in **(2009)8 Supreme Court Cases 539**, has held as follows:

If the statutory provisions under Section 41(2) and 42 (2) of the Act of writing down the information is interpreted as a mandatory provision, it will disable the haste of an emergency situation and may turn out to be in vain with regard to the criminal search and seizure. These provisions should not be misused by the wrongdoers/offenders as a major ground for acquittal. Consequently, these provisions should be taken as discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug-peddlers.

Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above



position got strengthened with the amendment to section 42 by Act 9 of 2001."

It is seen from this judgment that the compliance of the procedures under Section 42 of the NDPS Act whether adequate or substantial, it is a question that has to be decided in each and every case.

15. Similarly when considering the compliance of the procedures under Section 50 of the NDPS Act, the Honourable Supreme Court in **Vijaysinh Chandubha Jadeja Vs. State of Gujarat** reported in **2011(1) SCC 609**, has held as follows:

"Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of (1974) 2 SCC 33 the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."

16. Earlier in **State of Punjab Vs. Baldev Singh** reported in **(1999)6 Supreme Court Cases 172**, the Honourable Supreme Court has held as follows:

"It is, however, not necessary to give the information to the person to be searched about his right in writing. It is sufficient if such information is communicated to the concerned person orally and as far as possible in the presence of some independent and respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the empowered officer had conveyed the information to the concerned person of his right of being searched in the presence of the Magistrate or a Gazetted Officer, at the time of the intended search. Courts have to be satisfied at the trial of the case about due compliance with the requirements provided in Section 50. No presumption under Section 54 of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the court, that the requirements of Section 50 were duly complied with."

"The question whether or not the safeguards provided in Section 50 were observed would have, however, to be



determined by the court on the basis of the evidence led at the trial and the finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish at the trial that the provisions of Section 50, and particularly, the safeguards provided in that section were complied with, it would not be advisable to cut short a criminal trial."

"(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut-short a criminal trial."

17. It is clear from the decisions of the Honourable Supreme Court that the compliance or non-compliance; adequate compliance or substantial compliance of the mandatory procedures under Sections 42 and 50 of the NDPS Act can be considered only in the trial, not at the stage of considering the bail petition. Therefore, this Court is of the considered view that the compliance or non-compliance; adequate or substantial compliance of the mandatory procedures contemplated under Sections 42 and 50 of the NDPS Act cannot be now considered and this question has to be decided only at the time of trial.

18. One more submission made by the learned Counsel for the petitioners is that no contraband was recovered from the accused. In **Union of India vs. Ratan Mallik @ Habul**, reported in **(2009) 2 SCC 624**, it is held that merely because nothing was recovered from the accused, it could not be stated at this stage that the accused was not guilty of the offence.

19. This Court would like to quote Section 29 of the NDPS Act which provides for punishment for abetment and criminal conspiracy. It is relevant to extract hereunder Section 29 of the NDPS Act:

" 29. Punishment for abetment and criminal conspiracy.?

(1) Whoever abets, or is a party to a criminal conspiracy to commit an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in section 116 of the Indian Penal Code (45 of 1860), be punishable with the punishment provided for the offence.



(2) A person abets, or is a party to a criminal conspiracy to commit, an offence, within the meaning of this section, who, in India abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which?

(a) would constitute an offence if committed within India; or

(b) under the laws of such place, is an offence relating to narcotic drugs or psychotropic substances having all the legal conditions required to constitute it such an offence the same as or analogous to the legal conditions required to constitute it an offence punishable under this Chapter, if committed within India."

20. This provision implies that whoever abets, or is a party to the criminal conspiracy to commit an offence punishable under this Chapter, whether such offence is committed or not in consequence of such abetment or in pursuance of such criminal conspiracy is punishable with the imprisonment provided for the offence.

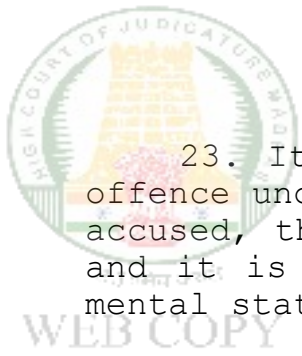
21. The question of abetment and criminal conspiracy cannot be gone into at the time of considering the bail petition. It is too early to consider the question of abetment and criminal conspiracy while considering the bail petition. These aspects have to be considered on the basis of oral and documentary evidences that would be adduced during the trial of the case.

22. Another important provision is Section 35 of the NDPS Act with regard to the presumption of culpable mental state. It is relevant hereunder to extract the same:

"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. Explanation.?In this section ?culpable mental state? includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(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."



23. It is clear from this Section that 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 and it is for the accused to deny and prove that he had no such mental state.

24. Yet another important provision in this Act is that Section 54, which deals with presumption from possession of illicit articles. It is relevant to extract hereunder the same:

"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;

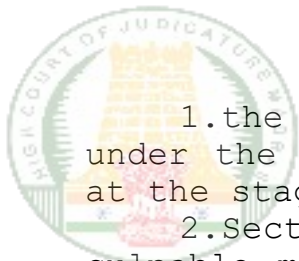
(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(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 satisfactorily.]"

25. It is clear from this Section that in a trial under this Act, that unless and until the contrary is proved, it may be presumed that the accused has committed an offence under this Act in respect of any narcotic drug or psychotropic substance or controlled substance for the possession of which he fails to account satisfactorily.

26. These provisions are incorporated in this Act only with a view to see that the offences under NDPS Act should not go unpunished.

27. The aforesaid pronouncement of the High Courts and the Hon'ble Supreme Court makes it clear that,



1.the issue relating to compliance of mandatory procedures under the NDPS Act can be gone into only in the trial and not at the stage of considering the bail

2.Section 35 permits the court to presume the existence of culpable mental state and it is for the accused to prove that he had no such mental state.

3.Section 54 makes it imperative for the accused to account for the possession of any narcotic drug or psychotropic substance or controlled substance otherwise it can be presumed that the accused has committed an offence relating to the things aforesaid.

28. Applying this settled proposition of law on the subject and the legal provisions, the findings in this case are given as follows:

(i) It is seen from the submissions made that the petitioners are A.2 and A.3 in this case. When the police party conducted a raid, they found at about 15 hours on 05.09.2020 near the house of the first accused Prakash @ Prakatheeswaran, he was having white colour gunny bag and there were more than 15 persons near him. On seeing the police, except the petitioners, the first accused and others escaped from the scene. The police introduced themselves and found that the gunny bag contained 22kg of ganja.

(ii) It is seen from the allegations made in the FIR that there is a prima facie case made out against the petitioners/A.2 and A.3 to show that they were found in possession of 22kg of ganja along with other accused. The ganja seized in this case is of a commercial quantity. Non-compliance of mandatory procedures is subject matter for trial. The petitioners/A.2 and A.3 have not satisfied the twin conditions for granting bail under Section 37 of the NDPS Act ie., there are reasonable grounds for believing that they are not guilty of such offence and that they are not likely to commit any offence while on bail.

29. In this view of the matter, this Court is not inclined to grant bail to the petitioners/A.2 and A.3 Accordingly, this Criminal Original Petition is dismissed.

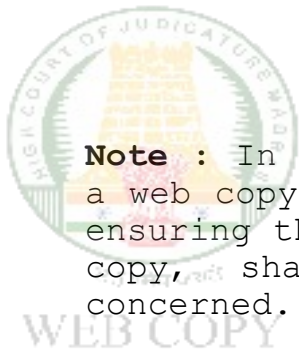
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30/04/2021

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Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.



Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

TO

1. THE SUPERINTENDENT,
CENTRAL PRISON, MADURAI.
2. THE INSPECTOR OF POLICE,
KODALPUDUR POLICE STATION,
MADURAI CITY.
3. THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT,
MADURAI.

ORDER
IN
CRL OP(MD) No.5270 of 2021
Date :30/04/2021

SSL
TE/MNR/SAR-I : 19/05/2021 : 12P/4C