



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

(Criminal Jurisdiction)

Date : 01/11/2021

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PRESENT

The Hon`ble Mr.Justice B.PUGALENDHI

CRL OP(MD). No.14751 of 2021

S.Ramadhas @ Karuthapandi

... Petitioner/Accused No.6

Vs

State rep by
The Superintendent of Police,
Narcotic Control Bureau,
Madurai Sub Zone,
Madurai.

N.C.B.F.No.48/1/01/2020 NCB/MDU ... Respondent/Complainant

For Petitioner : Mr.G.Karuppasamy Pandian,
Advocate.

For Respondent : Mr.Arul Vadivel @ Sekar
Special Public Prosecutor.

PETITION FOR ANTICIPATORY BAIL Under Sec.438 of Cr.P.C.

PRAYER :-

For Anticipatory Bail in N.C.B.F.No.48/1/01/2020 NCB/MDU on the file of the respondent police.

ORDER : The Court made the following order :-

The petitioner/A6, who apprehends arrest at the hands of the respondent Police for the offence punishable under Sections 8(c), r/w. 20(b)(ii)(C), 25, 28, 29 of NDPS Act in NCBF No.48/1/01/2020 NCB/MDU pending on the file of the respondent, seeks anticipatory bail.

2. The case of the prosecution is that on getting tip off, the team of NCB official had intercepted a lorry bearing Reg.No.TN03 Z 1618. On check-up, it is found that there are 310 parcels containing ganja weigh about 661.55 kgs. The respondent arrested the accused Nos.1 to 5 and confession statements from all the accused were recorded under Section 67 of NDPS Act. During the investigation, the petitioner's role in criminal conspiracy was discovered only on 30.08.2020. Thereafter, statement under Section 67 of NDPS Act was recorded from one Subramanian, who is the father



of the petitioner and the respondent Police recovered the Aadhaar card of the petitioner.

3. The learned counsel for the petitioner submits that the petitioner has not participated in the crime and there was no recovery of contraband from the petitioner. It is not the prosecution case that the petitioner was available in the scene of occurrence and he ran away on seeing the NCB officials and he was absconding.

4. The learned counsel for the petitioner further submits that the investigation in this case is already over and charge sheet has also been filed on 07.08.2020 and the same has been taken cognizance. The only incriminating material available is nothing but the confession statement of the co-accused. No doubt, the confession statement of the co-accused is a very weak piece of evidence against the other co-accused and the prosecution cannot stand alone, based on the confession statement of co-accused in a criminal case.

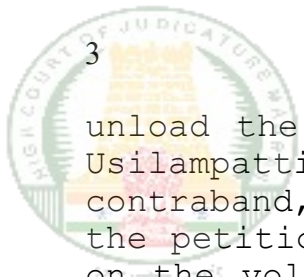
5. The learned counsel for the petitioner further submits that assuming that the criminal conspiracy is true, it needs to be proved by visible or tangible evidence. In this case, except the confession statement of the co-accused, there is no material as against the petitioner.

6. The learned counsel for the petitioner further submits that the question of custodial interrogation of the petitioner would not arise, since the investigation is over and charge sheet has also been filed. Therefore, he prayed for grant of anticipatory bail to the petitioner.

7. The learned counsel for the petitioner also relied upon the decision of the Hon'ble Apex Court in ***Hari Charan Kurmi and others vs. State of Bihar***, reported in ***MANU/SC/0059/1964***, in support of his contentions.

8. The learned Special Public Prosecutor for NCB cases submits that based on the specific information from a reliable source, the officers of NCB seized 661.5 kgs. of ganja at a spot in front of one Kasiveerammal Marriage Hall, Aayakkaranpulam, Vedharanyam Taluk, Nagapattinam District, from the possession of A1-Ramanan, A2-Thavamani, A3-Selvaraj, A4-Iyyappan and A5-Paramanantham, who were found in a truck bearing Reg.No.TN30Z 1618 with the contraband.

9. The learned Special Public Prosecutor further submits that the accused were issued with summons under Section 67 of NDPS Act and their voluntary statements were also recorded. All of them admitted their involvement in the crime. A3-selvaraj in his voluntary statement confessed about the involvement of the petitioner in the Crime. It is evident from the statement that only on the instruction of the petitioner, A3 to A5 went to the spot to



unload the contraband from the truck. A1 and A2 are residents of Usilampatti and they went to Andhra Pradesh and procured the contraband, brought the same to Aayakkaranpulam to hand it over to the petitioner. The contraband was meant for the petitioner. Based on the voluntary statement of A3-Selvaraj, summon under Section 67 of NDPS Act was served on 03.08.2020 to the father of the petitioner, since the petitioner was not available in his residence. The statement of the father of the petitioner was also recorded under Section 67 of NDPS Act on the same day. The father of the petitioner informed that the petitioner did not come to the home from 12.02.2020 (i.e.) the date of seizure and whereabouts of the petitioner was not known to him and he also contacted the petitioner over phone from various numbers.

10. The learned Special Public Prosecutor further submits that the investigation revealed that the petitioner was in continuous contact with A3 to A5 through mobile phone. The call details collected during investigation also revealed that the petitioner was in continuous contact with A3 to A5 from January 2020 till the date of seizure. There were lot of phone calls among them between 11.02.2020 and 12.02.2020.

11. With regard to the grounds raised by the learned counsel for the petitioner that there was no recovery of contraband from the petitioner, the learned Special Public Prosecutor submits that there need not be any physical possession as claimed by the petitioner and the possession can also be a constructive possession having power and control over the property. Insofar as NDPS Act is concerned, Section 18 of the Act has a reference to the concept of conscious possession. The 'word possession' refers to mental state as is noticeable from the language employed in Section 35 of the Act (Presumption of Mental State).

12. The learned Special Public Prosecutor further submits that the petitioner's name was found place in the secret information, which is the earliest document recorded under Section 42 of NDPS Act. Further, the voluntary statement of the co-accused coupled with the call details collected during investigation would clearly prove the involvement of the petitioner in Crime.

13. In support of his contentions, the learned Special Public Prosecutor relied upon the following judgments:

(i) 1991 (1) SCC 705 - Narcotics Control Bureau vs. Kishan Lal and others;

(ii) 2004 (3) SCC 549 - Collector of Customs, New Delhi vs. Ahmadalieva Nodira;

(iii) 2005 (12) SCC 480 - Narcotics Control Bureau vs. Karma Phuntsok and others;

(iv) 2008 (6) SCC 721 - N.R.Mon vs. Mohd. Nasumuddin;

(v) 2011 (11) SCC 347 - Ram Singh vs. Central Bureau of Narcotics,
<https://hcservices.ecourts.gov.in/hcservices/>

(vi) 2015 (17) SCC 36 - Union of India vs. Mukesh Singh;



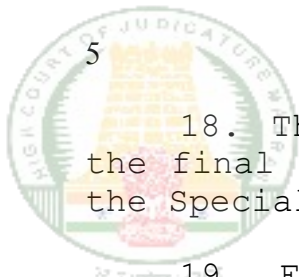
- (vii) 2020 (12) SCC 122 - State of Kerala and others vs. Rajesh and others;
- (viii) 2021 (5) SCC 430 - Union of India vs. Prateek Shukla;
- (ix) 2021 SCC online SC 178 - Narcotics Control Bureau vs. Lokesh Chadha;
- (x) 2021 SCC Online Del 2880 - Edwin Emeka Igbokwe vs. Narcotics Control Bureau;
- (xi) Judgment in CrI.O.P.No.9954 of 2021 dated 23.06.2021;
- (xii) Judgement in Special Leave (CrI.) Appeal No.526/2021 dated 24.08.2021 (Ashish vs. State of Maharashtra);
- (xiii) 2003 (7) SCC 465 - Madanlal and another vs. State of H.P.;
- (xiv) 2010 (4) SCC 445 - Bahadur Singh vs. State of Haryana;
- (xv) 2015 (6) SCC 222 - Mohanlal vs. State of Rajasthan;
- (xvi) 2015 (6) SCC 674 - Kulwinder Singh and another vs. State of Punjab.

14. The learned Special Public Prosecutor also relied upon Sections 10 and 30 the Indian Evidence Act and submits that the confession of the co-accused can be used as a corroborative evidence, if they are jointly tried.

15. This Court paid its anxious consideration to the rival submissions made and also perused the materials placed on record.

16. The petitioner is apprehending arrest in the case registered by the respondent Police. The respondent Police has recovered 661.5 kgs. of ganja from a truck on 12.02.2020 and has arrested the accused Nos.1 to 5, who were found in the truck along with contraband. The statement of the accused were recorded under Section 67 of NDPS Act and as per the statement of A3, the contraband is meant for the petitioner. Based on the statement of A3, the respondent searched for the petitioner, but, he was not available and therefore, summon was issued to the petitioner's father under Section 67 of NDPS and his statement was also recorded. The father of the petitioner has stated that this petitioner went absconding from 12.02.2020, i.e. on the date of seizure of the contraband in this case. The petitioner's father further stated that whereabouts of the petitioner was not known to him and he also contacted the petitioner over phone from various numbers.

17. The Investigating Agency has also collected call details of the petitioner and other accused and those call details reveal that this petitioner was in continuous contact with A3 to A5 from January 2020 till the date of seizure. The call details record and the statement of the petitioner's father recorded under Section 67 of NDPS Act are placed before this Court. The respondent Police has completed the investigation and filed the final report as against the accused for the offences under Section 8 (c) r/w. 20(b)(2)(c), 25, 28 and 29 of NDPS Act and the same was taken on file by the Special Court for NDPS Act cases, Thanjavur, on 07.08.2020 in C.C.No.23 of 2020.



18. The learned counsel for the petitioner claims that since the final report has been filed, the petitioner would appear before the Special Court under Section 88 of Cr.P.C.

19. For granting bail in the case of commercial quantity, Section 37 of the NDPS Act insists upon two conditions for enlarging an accused on bail. The first condition is that the Court should be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and the second condition is that the Court should satisfy that the accused is not likely to commit any offence while on bail.

20. In the case of **Union of India vs. Rattan Mallik**, reported in **(2009)2 SCC 624**, the Hon'ble Apex Court has observed as under:

"12. It is plain from a bare reading of the non-obstante clause in the Section 37 of NDPS Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".

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 Kesari [(2007) 7 SCC 798 : (2007) 3 SCC (Cri) 505]]. 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."



21. No doubt, the petitioner was not present in the place of occurrence, when the contraband was seized and he was implicated only based on the confession statement of the co-accused. However, it can be constructed as a constructive possession as held by the Hon'ble Apex Court in the case of **Mohanlal vs. State of Rajasthan**, reported in **2015 6 SCC 222**. The relevant portion is extracted hereunder:

11. When one conceives of possession, it appears in the strict sense that the concept of possession is basically connected to "actus of physical control and custody". Attributing this meaning in the strict sense would be understanding the factum of possession in a narrow sense. With the passage of time there has been a gradual widening of the concept and the quintessential meaning of the word possession. The classical theory of English law on the term "possession" is fundamentally dominated by Savigny-ian "corpus" and "animus" doctrine. Distinction has also been made in "possession in fact" and "possession in law" and sometimes between "corporeal possession" and "possession of right" which is called "incorporeal possession". Thus, there is a degree of flexibility in the use of the said term and that is why the word possession can be usefully defined and understood with reference to the contextual purpose for the said expression. The word possession may have one meaning in one connection and another meaning in another.

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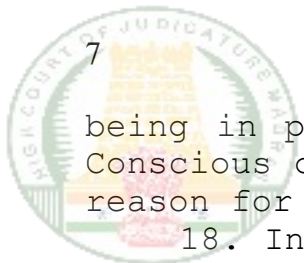
16. Coming to the context of Section 18 of the NDPS Act, it would have a reference to the concept of conscious possession. The legislature while enacting the said law was absolutely aware of the said element and that the word "possession" refers to a mental state as is noticeable from the language employed in Section 35 of the NDPS Act. The said provision 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.

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."

17. On a perusal of the aforesaid provision, it is plain as day that it includes knowledge of a fact. That apart, Section 35 raises a presumption as to knowledge and culpable mental state from the possession of illicit articles. The expression "possess or possessed" is often used in connection with statutory offences of



being in possession of prohibited drugs and contraband substances. Conscious or mental state of possession is necessary and that is the reason for enacting Section 35 of the NDPS Act.

18. In *Noor Aga v. State of Punjab*, reported in 2008 16 SCC 417 : 2010 3 SCC (Cri.) 748, the Court noted Section 35 of the NDPS Act which provides for presumption of culpable mental state and further noted that it also provides that the accused may prove that he had no such mental state with respect to the act charged as an offence under the prosecution. The Court also referred to Section 54 of the NDPS Act which places the burden to prove on the accused as regards possession of the contraband articles on account of the same satisfactorily. Dealing with the constitutional validity of Section 35 and 54 of the NDPS Act, the Court ruled thus:-

"55. The provisions of Section 35 of the Act as also Section 54 thereof, in view of the decisions of this Court, therefore, cannot be said to be ex facie unconstitutional. We would, however, keeping in view the principles noticed hereinbefore, examine the effect thereof vis--vis the question as to whether the prosecution has been able to discharge its burden hereinafter."

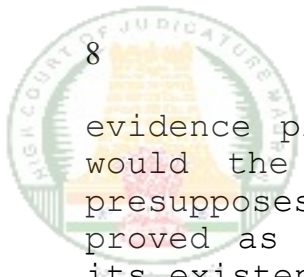
And thereafter proceeded to state that:-

"58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt."

19. In *Bhola Singh Vs. State of Punjab* reported in 2011 11 SCC 653 : 2011 3 SCC (Cri) 454, the Court, after referring to the pronouncement in *Noor Aga* (supra), concurred with the observation that only after the prosecution has discharged the initial burden to prove the foundational facts, then only Section 35 would come into play. While dislodging the conviction, the Court stated:-

"11. it is apparent that the initial burden to prove that the appellant had the knowledge that the vehicle he owned was being used for transporting narcotics still lay on the prosecution, as would be clear from the word "knowingly", and it was only after the



evidence proved beyond reasonable doubt that he had the knowledge would the presumption under Section 35 arise. Section 35 also presupposes that the culpable mental state of an accused has to be proved as a fact beyond [pic]reasonable doubt and not merely when its existence is established by a preponderance of probabilities. We are of the opinion that in the absence of any evidence with regard to the mental state of the appellant no presumption under Section 35 can be drawn. The only evidence which the prosecution seeks to rely on is the appellant's conduct in giving his residential address in Rajasthan although he was a resident of Fatehabad in Haryana while registering the offending truck cannot by any stretch of imagination fasten him with the knowledge of its misuse by the driver and others."

20. Having noted the approach in the aforesaid two cases, we may take note of the decision in Dharampal Singh v. State of Punjab (2010 9 SCC 608 : 2010 3 SCC (Cri) 1431), when the Court was referring to the expression "possession" in the context of Section 18 of the NDPS Act. In the said case opium was found in the dicky of the car when the appellant was driving himself and the contention was canvassed that the said act would not establish conscious possession. In support of the said submission, reliance was placed on Avtar Singh v. State of Punjab (2002 7 SCC 419 : 2002 SCC (Cri) 1769) and Sorabkhan Gandhkhan Pathan v. State of Gujarat (2004 13 SCC 608 : 2006 1 SCC (Cri) 508. The Court, repelling the argument, opined thus:-

"12. We do not find any substance in this submission of the learned counsel. The appellant Dharampal Singh was found driving the car whereas appellant Major Singh was travelling with him and from the dicky of the car 65 kg of opium was recovered. The vehicle driven by the appellant Dharampal Singh and occupied by the appellant Major Singh is not a public transport vehicle. It is trite that to bring the offence within the mischief of Section 18 of the Act possession has to be conscious possession. The initial burden of proof of possession lies on the prosecution and once it is discharged legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence. Offences under the Act being more serious in nature higher degree of proof is required to convict an accused.

13. It needs no emphasis that the expression "possession" is not capable of precise and completely logical definition of universal application in the context of all the statutes. "Possession" is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18 of the Act once possession is established the accused, who claims that it was not a conscious possession has to establish it because it is within his special knowledge.



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 satisfactorily. 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 satisfactorily account for the possession of opium.

16. Once possession is established the court can presume that the accused had culpable mental state and have committed the offence. In somewhat similar facts this Court had the occasion to consider this question in *Madan Lal v. State of H.P.* (2003 7 SCC 465 : 2003 SCC (Cri) 1664), wherein it has been held as follows: (SCC p. 472, paras 26-27)

"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."

22. The investigating agency has also collected the call details and other materials to substantiate the case as against the petitioner and that can be decided only during the trial. The final report has been filed in this case on 07.08.2020 and Non-Bailable Warrant of arrest is pending as against the petitioner from 23.11.2020.

23. The learned Special Public Prosecutor submits that the petitioner is a very influential person and is hiding in Forest area and their attempts to arrest the petitioner also ended in vain, because of some Forest officials in the forest check post. Therefore, this Court feels that this is not a fit case for grant of anticipatory bail to the petitioner. Further, the petitioner has not made out a case by satisfying the conditions under Section 37 of NDPS Act.

24. Accordingly, the Criminal Original Petition is dismissed.

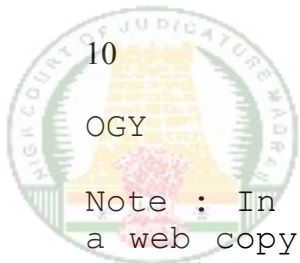
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Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.



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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 OF POLICE,
NARCOTIC CONTROL BUREAU,
MADURAI SUB ZONE,
MADURAI.

2. THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

+1 CC to M/s.C.ARUL VADIVEL@SEKAR, Advocate (SR-7765[I] dated 01/11/2021)

ORDER
IN
CRL OP (MD) . No.14751 of 2021
Date : 01/11/2021

VB/JM/SAR-IV/01.12.2021/10P/4C