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

Reserved on	Pronounced on
23.04.2021	30.04.2021

CORAM:

THE HONOURABLE Mr. JUSTICE G.CHANDRASEKHARAN

Crl.O.P.(MD)Nos.15068 of 2020, 3328 and 5281 of 2021

Crl.O.P.(MD)No.15068 of 2020:

Amaresan

...Petitioner/Accused No.2

Vs.

The State Rep. by
The Inspector of Police,
NIB CID Police Station,
Theni District.
(Crime No.909 of 2020)

...Respondent/Complainant

Crl.O.P.(MD)No.3328 of 2021:

Vijay

...Petitioner/Accused No.5

Vs.

State Rep. by
The Inspector of Police,
Cumbum North Police Station,
Theni District.
(Crime No.909 of 2020)
[Transferred to NIB CID Police Station,
Theni District]
(Crime No.42 of 2020)

...Respondent/Complainant

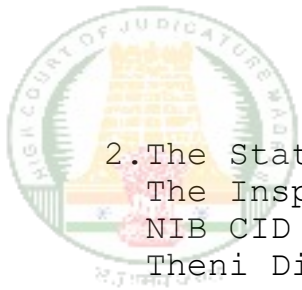
Crl.O.P.(MD)No.5281 of 2021:

Pandeewaran

...Petitioner/Accused No.6

Vs.

1.The State Rep. by
The Inspector of Police,
Cumbum North Police Station,
Theni District.
(Crime No.909 of 2020)
[Now the case has been transferred to NIB CID,
Theni District]
(Crime No.42 of 2020)



2.The State Rep. by
The Inspector of Police,
NIB CID Police Station,
Theni District.

...Respondent/Complainant

COMMON PRAYER: Criminal Original Petitions filed under Section 439 Cr.P.C. praying to enlarge the petitioners on bail in Crime Nos.42 and 909 of 2020 respectively on the file of the respondent police.

For Petitioners: Mr.M.Lingadurai
In All the Petitions
For Respondent : Mr.KR.Bharathi Kannan
Government Advocate (Crl.side)
In All the Petitions

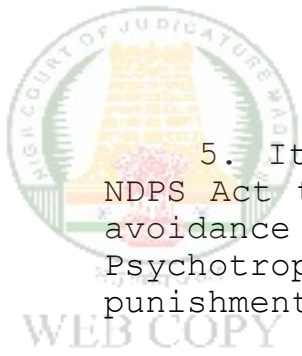
COMMON ORDER : The Court made the following order :-

The petitioners/A2, A5, who were arrested and remanded to judicial custody on 16.06.2020 for the offences punishable under Sections 8(c)r/w 20(b)(ii)(C),25 and 29(1) of Narcotic Drugs & Psychotropic Substances Act and Section 269 IPC, on the file of the respondent police, seek bail. A6 seeks anticipatory bail.

2.The case of the prosecution is that on 16.06.2020 at about 06.00 hours based on secret information, the police party kept a watch over the drug offenders at about 6.45 hours at Kattuvapallivasal Road, Cumbum. Two vehicles (car and two wheeler) bearing Reg.No.TN-60-E-2841 (TATA Indica) and TN 60-V-0419 (Hero Honda Splendor+) came there at about 07.00 hours. Immediately the respondent police intercepted and found four persons in the car and two persons in the two wheeler. On enquiry they came to know that the occupants in the car are Amaithi Kannan, Amaresan, Sivanesh @ Sivaneswaran and Petchiammal. During the enquiry,one Pandeewaran fled away from the scene of occurrence and further they came to know that two wheeler riders are Vijay and Pandeewaran. Sivanesh took two gunny bags from the Car and produced before the respondent. On examination, it is found that the first bag contained 12 kg of Ganja and the second bag contained 11 kg of Ganja, totally 23 kg of Ganja was recovered and hence, the present case has been registered.

3.The case of the petitioners is that even as per prosecution, the alleged contraband said to have been recovered only from A1 and other accused were implicated on the basis of his confessional statement. Mandatory procedures contemplated under Sections 42 and 50 of NDPS Act are not followed and therefore, the petitioners are entitled for bail.

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

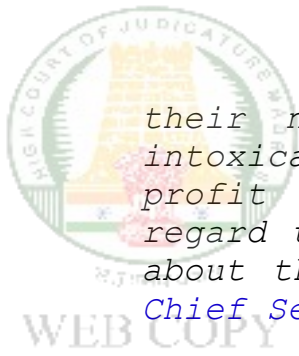
(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(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 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 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.

8. As to what is the expression "reasonable grounds" means, the Honourable Supreme Court in **Union of India Vs Rattan Malik 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)**. "

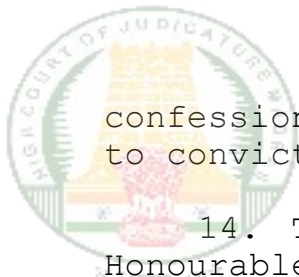
10. The reading of these judgments makes it clear that so far as the offences covered under NDPS Act, jail is the rule and the bail is an exception. Before granting bail, the Court must be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that 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. Next contention is that most of the accused are implicated on the basis of confessional statement of the co-accused. The confession given to the police is not admissible in evidence not only against the maker of the statement but also against the co-accused as well. They relied on the judgment of the Supreme Court in **Mohamed Fasrin V State reported in (2019) SCC 811; Tofan Singh V State reported in AIR 2020 SC 5592**. That apart, the learned Counsel for the petitioners also relied upon the judgment of the the Honourable Mr.Justice N.ANAND VENKATESH in Crl.O.P.Nos.9260 and 9903 of 2019, dated 17.05.2019 and the another judgment, which followed the aforesaid judgment, is the judgment of Honourable Mr.Justice G.R.SWAMINATHAN in Crl.O.P. (MD)No.15707 of 2019 for this proposition.

13. The Hon'ble Supreme Court has held in **Mohamed Fasrin V State reported in (2019) SCC 811 that,**

"It is also well settled that a confessional, especially a confession recorded when the accused is in custody, is a weak piece of evidence and there must be some corroborative evidence. The confession of the co-accused, which was said to be a corroborative piece of evidence, has been discussed above and is of no material value. Therefore, other than the two confessional statements - one of the co-accused and the other of accused, the prosecution has gathered no evidence to link the appellant with the commission of the evidence. As such, without going into the legality of the admissibility of the confession, we hold that even if these



confessions are admissible then also the evidence is not sufficient to convict the accused".

14. This judgment was followed in the judgment of the the Honourable Mr.Justice N.ANAND VENKATESH in Crl.O.P.Nos.9260 and 9903 of 2019, dated 17.05.2019.

15. While answering a reference in **Tofan Singh V State of Tamilnadu**, the Hon'ble Supreme Court has held that,

(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 Indian Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of section 25 of Indian 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."

16. It is further submitted that on the basis of the confessional statement of the one accused recovery of contraband is recorded from co-accused. If individually, taken, the contraband will not fall under the category of commercial quantity, but the police combine the quantities of the contraband seized from all the accused and bring the case under commercial quantity. Even in cases, where the contraband is recovered from different accused from different point of time under separate seizure magazines, which do not constitute commercial quantity, the police take the quantity of contraband seized from all the accused to bring the case under commercial quantity.

17. The learned Counsel for the petitioners relied upon the judgment of this High Court rendered by the Honourable Mr.Justice T.SUDANTHIRAM, in Crl.O.P.No.27308 of 2008, dated 07.11.2008 for the proposition that only the contraband seized from a particular accused should be considered for the purpose of deciding whether the quantity of contraband seized is a commercial quantity or not? and the contraband seized from other accused in a case should not be taken into consideration to determine the commercial quantity. It has been observed in this judgment as follows;

" Learned counsel for the petitioner submits that even according to the prosecution, each of the accused were in possession of 12 kgs of Ganja and of of the accused by name Suresh, had already been granted bail Cr.OP.24874?2008 dated 30.10.2008, observing that separate seizure magazines were prepared and section 37 of NDPS Act does not stand as bar for granting bail"

18. 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. The confession statement of the accused is relevant for the purpose of proving discovery of fact under Section 27 of the Indian Evidence Act. If the involvement of the co-accused is established by the fact discovered, which fact was not known to the investigation officer until it was revealed by the accused making the statement, the co-accused can be prosecuted. 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 Malik 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) 6.State of Punjab V Baldev Singh ((1996) 6 SCC 172)** and also the order made in **Crl.O.P.(MD)No.8950 of 2020, (A.Ganesan Vs. The Inspector of Police, C-2 Subramaniapuram (L&O) Police Station, Madurai) dated 07.09.2020**, in support of his argument and prayed for the dismissal of these petitions.

19. 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.

20. 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.

21. 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."

22. 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



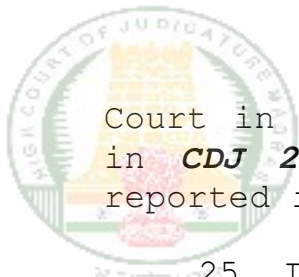
under **Section 54** of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the court, that the requirements of **Section 50** were duly complied with."

"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."

23. 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.

24. So far as the implication of the accused on the basis of the confessional statement of the co-accused, the judgments relied on by the learned Counsel for the petitioners, in Crl.O.P.Nos.9260 and 9903 of 2019, dated 17.05.2019; in Crl.O.P.(MD)No.15707 of 2019 and in **Tofan Singh Vs. State of Tamil Nadu** reported in **AIR 2020 SC 5592** show that these judgments considered the admissibility of statement recorded under Section 67 of the NDPS Act. These judgments have not considered the import and purpose of Section 27 of the Indian Evidence Act. Since the facts of the case is not discussed in the judgment of this High Court rendered by the Honourable Mr.Justice T.SUDANTHIRAM, in Crl.O.P.No.27308 of 2008, dated 07.11.2008, it is not certain as to the whether the seizures in that case were made in the course of same transaction or not. It is relevant here to refer to the judgments of the Honorable Supreme



Court in **Mehboob Ali & Another Versus State of Rajasthan** reported in **CDJ 2015 SC 860** and in **Raju Manjhi Versus State of Bihar** reported in **CDJ 2018 SC 799** in this regard.

25. In **Raju Manjhi Vs. State of Bihar**, reported in **CDJ 2018 SC 799**, the Honourable Supreme Court has held as follows:

"13. In the case on hand, before looking at the confessional statement made by the accused-appellant in the light of Section 27 of the Evidence Act, may be taken into fold for limited purposes. From the aforesaid statement of the appellant, it is clear that he had explained the way in which the accused committed the crime and shared the spoils. He disclosed the fact that Munna Manjhi was the Chief/head of the team of assailants and the crime was executed as per the plan made by him. It is also came into light by his confession that the accused broke the doors of the house of informant with the aid of heavy stones and assaulted the inmates with pieces of wood(sticks). He categorically stated that he and Rampati Manjhi were guarding at the outside while other accused were committing the theft. The recoveries of used polythene pouches of wine, money, clothes, chains and bangle were all made at the disclosure by the accused which corroborates his confessional statement and proves his guilt. Therefore, the confessional statement of the appellant stands and satisfies the test of Section 27 of the Evidence Act."

26. In **Mehboob Ali and another Vs. State of Rajasthan** reported in **CDJ 2015 860**, the Honourable Supreme Court has held as follows:

"12. **Section 25** of the Evidence Act provides that no confession made to a Police Officer shall be proved as against a person accused of any offence. **Section 26** provides that no confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. **Section 27** is in the form of a proviso, it lays down how much of an information received from accused may be proved.

13. For application of **section 27** of Evidence Act, admissible portion of confessional statement has to be found as to a fact which were the immediate cause of the discovery, only that would be part of legal evidence and not the rest. In a statement if something new is discovered or recovered from the accused which was not in the knowledge of the Police before disclosure statement of the accused is recorded, is admissible in the evidence.

17. In **State of Maharashtra v. Damu Gopinath Shinde & Ors.** [AIR 2000 SC 1691] the statement made by the accused that the dead body of the child was carried up to a particular spot and a broken glass piece recovered from the spot was



found to be part of the tail lamp of the motorcycle of co-accused alleged to be used for the said purpose. The statement leading to the discovery of a fact that accused had carried dead body by a particular motorcycle up to the said spot would be admissible in evidence.

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18. *In Ismail v. Emperor* [AIR 1946 Sind 43] it was held that where as a result of information given by the accused another co-accused was found by the police the statement by the accused made to the Police as to the whereabouts of the co-accused was held to be admissible under [section 27](#) as evidence against the accused.

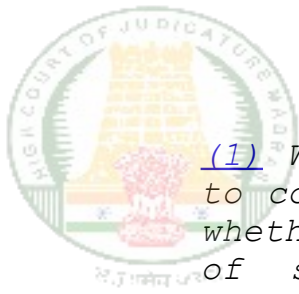
19. *In Subedar & Ors. v. King-Emperor* [AIR 1924 All. 207] it was held that a statement made by the accused implicating himself and others cannot be called 'first information report'. However it was held that though it could not be treated as first information report but could be used as information furnished under [section 27](#) of Evidence Act.

20. Considering the aforesaid dictums, it is apparent that there was discovery of a fact as per the statement of Mehmood Ali and Mohd. Firoz. Co-accused was nabbed on the basis of identification made by the accused Mehboob and Firoz. He was dealing with fake currency notes came to the knowledge of police through them. Recovery of forged currency notes was also made from Anju Ali. Thus the aforesaid accused had the knowledge about co-accused Anju Ali who was nabbed at their instance and on the basis of their identification. These facts were not to the knowledge of the Police hence the statements of the accused persons leading to discovery of fact are clearly admissible as per the provisions contained in [section 27](#) of the Evidence Act which carves out an exception to the general provisions about inadmissibility of confession made under police custody contained in [sections 25 and 26](#) of the Evidence Act."

27. 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.

28. 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:

<https://hcservices.ecourts.gov.in/hcservices/>



" 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."

29. 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.

30. 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.

31. 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."

32. 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.

33. 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;

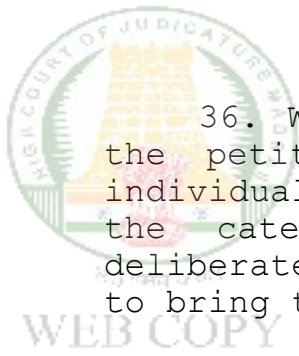
(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(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.]
"

34. 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.

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



36. With regard to the submission of the learned Counsel for the petitioners that if the recovery of contraband from the individual accused is taken independently, that will not come under the category of commercial quantity, but the police have deliberately combined the contraband seized from all the accused, to bring the case under the category of commercial quantity.

37. When a similar question had arisen, in a judgment in **Subhash Vs. the Inspector of Police, Kalamassery and others** reported in **2013 SCC Online Kerala 15001**, the Kerala High Court held that merely for the reason that the revision petitioner was found in possession of small quantity, the act committed by him cannot be separated from the act of the other accused, when the act committed by all the accused cumulatively forms a single transaction, which gives rise to a single offence. The test to be applied is whether the alleged acts of each accused related to one another in point of purpose so as to constitute a single transaction. It further held that as per Section 223 Cr.P.C., persons accused of the same offence committed in the course of the same transaction can be charged and tried together. The allegation of either abetting or conspiracy are not a condition precedent for prosecuting more than one accused together under a single charge.

38. In CrI.O.P.(MD)No.8950 of 2020, dated 07.09.2020, this Court has held as follows:

"7. The Hon'ble High Court of Kerala in the case of **Subash .Vs. The Inspector of Police**, reported in **2013 SCC Online Kerala 15001** had held that the physical presence together with the contra-band in hand in and around the same car go a long way to rope them under the same transaction and on the same fabric.

8. In this case, four accused were found in two two wheelers, at the same time; all of them were arrested at the same spot and at the same time, one gunny bag weighed 11 kgs and other bag weighed 10 kgs. of Ganja. Therefore, prima facie I am of the view that the respondent cannot be found fault with for having clubbed both.

9. More than anything else the ruling of Madras High Court in the case of Intelligence Officer, NCB Vs. Selvi reported in 2013 (2) MLJ (Cri) 754 is on the point. In the said case, the accused was granted bail by independently considering the weight of bags containing ganja recovered from that accused. Cancelling the said bail, the Madras High Court held that when the accused has travelled with two other persons, the respective cases cannot be split up. Therefore, I have no hesitation to reject the contention raised by the petitioner."

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

<https://hcservices.ecourts.gov.in/hcservices/>



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.If the confessional statement of the co-accused is relevant under section 27 of Indian Evidence Act for the discovery of fact, which led to the implication of the co-accused.

3.If it is established that the contrabands were recovered from multiple accused concerned in a case in the course of same transaction, it can not be split up individually and the entire contraband seized from one or several accused have to be taken into consideration for determining whether the quantity seized is commercial quantity or not.

4.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.

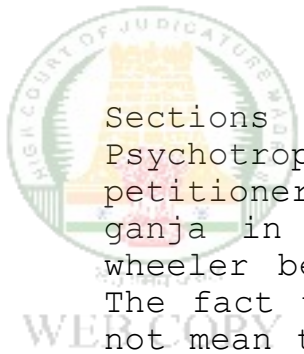
5.Section 54 makes it imperative for the accused to account for the possession of any narcotic drug or psychotropic substance or controlled substance otherwise it can be presumed that the accused has committed an offence relating to the things aforesaid.

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

(i) The petitioners are A.2, A.5 and A.6 in this case. The allegations against the petitioners is that on prior intimation, when TATA India car bearing Registration No.TN-60-E-2841 (TATA Indica) and two wheeler bearing TN 60-V-0419 were intercepted by police party on 16.06.2020 at about 07.00 a.m. Amaresan/A.2 was found sitting in the front seat. Petitioner Vijay/A.5 was the rider of the aforesaid two and petitioner Pandeewaran/A.6 was a pillion rider. The police party introduced themselves to the accused and after observing the mandatory procedures, the car was searched. Two white plastic gunny bags were found and on verification, one gunny bag contained 12 kg of ganja and another gunny bag contained 11 kg of ganja. Pandeewaran escaped from the place, however, others were nabbed by the police. There is a direct evidence so far as the second accused is concerned that he was found sitting in the car with ganja. Other two petitioners viz., Vijay and Pandeewaran were also intercepted by the police at the place of interception.

(ii) The learned Counsel for the petitioners Vijay and Pandeewaran submitted that the petitioners are falsely implicated in this case. There is no recovery from. Therefore, there is no material to incriminate them in this case.

(iii) However, this case was registered for the offences under



Sections 8(c)r/w 20(b)(ii)(C), 25 and 29(1) of Narcotic Drugs & Psychotropic Substances Act and Section 269 IPC. The role of the petitioners in abetting, conspiring and aiding in transportation of ganja in the car bearing Registration No. TN-60-E-2841 and two wheeler bearing No. TN-60-V-0419 will be known only in the trial. The fact that there was no recovery of contraband from them, does not mean that they are not involved in this case. The involvement of the petitioners has to be established by the prosecution only in the trial. There is a prima facie material to presume that the petitioners also involved in the offence of illegal transportation of ganja for the sale. The ganja seized in this case is of a commercial quantity. The petitioners/ A.2, A.5 and A.6 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.

41. In this view of the matter, this Court is not inclined to grant bail to the petitioner in Crl.O.P.(MD)No.15068 of 2020 and Crl.O.P.(MD)No.3328 of 2021 and this Court is not inclined to grant anticipatory bail to the petitioner in Crl.O.P.(MD) No.5281 of 2021.

sd/-

30/04/2021

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

TO

- 1 THE SUPERINTENDENT, CENTRAL PRISON, MADURAI.
- 2 THE INSPECTOR OF POLICE,
NIB CID POLICE STATION, THENI DISTRICT.
- 3 THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

ORDER IN

Crl.O.P.(MD)Nos.15068 of 2020,
3328 and 5281 of 2021

Date :30/04/2021

SSL

PK/VR/SAR-IV/18.05.2021 : 17P/4C