



WEB COPY



CrI.O.P.No.25141 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.11.2022

PRONOUNCED ON : 29.11.2022

CORAM

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH
AND
THE HONOURABLE Mr.JUSTICE RMT.TEEKAA RAMAN

CrI.O.P.No.25141 of 2022

State by
The Superintendent of Police
National Investigation Agency
No.10, Millers Road
Chennai 600 010

.. Petitioner

Vs.

Kabilar @ Kabilan

.. Respondent/A-3

Criminal Original Petition filed under Section 482 read with 439(2) Cr.P.C., seeking to direct the re-arrest the Kabilar @ Kabilan, respondent/ A-3 in R.C.No.33/2022/NIA/DLI pending investigation on the file of the petitioner.

For Petitioner : Mr.R.Karthikeyan
Special Public Prosecutor (NIA Cases)

For Respondent : Mr.R.Sankarasubbu



CrI.O.P.No.25141 of 2022

ORDER

P.N.PRAKASH, J.

For the purpose of easy understanding, we are narrating the facts of the case in a chronological order as under :

<i>Dates</i>	<i>Events</i>
19.05.2022	Around 12 noon, while a team of police officers, attached to Omalur Police Station, were conducting regular check, they saw two persons coming by a blue-black colour Honda Shine motorcycle bearing registration No.TN45 AJ 3150, and questioned them. During questioning, they were prevaricating on their identity, which arose a suspicion in the minds of the police. Each of them was having a bag. When the police checked their bags, it was found to contain two country made pistols, ammunitions, gunpowder, etc. Further questioning of the duo showed that they were inspired by the ideology of LTTE and wanted to create an organisation on the lines of the LTTE in Tamil Nadu in order to wage an armed struggle. Therefore, the police registered a case in Omalur P.S. Crime No.302 of 2022 on 19.05.2022 for the offences under Sections 25(1)(a), 25(1AA) and Section 25(1B)(a) of the Arms Act, 1959 and Section 4(a) of the Explosive Substances Act, 1908, against Naveen @ Naveen Chakravarthi (A-1), S/o.Muthu and Sanjai Prakash (A-2), S/o.Jayakumar, both of them were placed under arrest and the fire arms and other materials in their possession were seized by the police. They were produced before the Judicial Magistrate, Omalur on 20.05.2022 at 11.50 a.m. and were sent to judicial custody.
31.05.2022	The Omalur police sought police custody of the duo and



Crl.O.P.No.25141 of 2022

<i>Dates</i>	<i>Events</i>
	accordingly, the learned Judicial Magistrate, Omalur, by order dated 31.05.2022 in Crl.M.P.No.722 of 2022, granted police custody from 31.05.2022 to 02.06.2022. While they were in police custody, they revealed several facts and implicated one Kabilar @ Kabilan, S/o.Anbazhagan. They stated that Kabilar was also part of their group.
01.06.2022	The Omalur police arrested Kabilar at 11.00 hrs. on 01.06.2022, for his involvement in the case and recorded his statement. Later, he was also produced before the learned Judicial Magistrate, Omalur, who remanded him in judicial custody.
03.06.2022	While the Omalur police were proceeding with the investigation on the orders of the Director General of Police, the case was transferred to the file of the Q-Branch CID.
24.06.2022	Pursuant to the transfer, the Inspector of Police, Q-Branch, CID, Salem, re-registered the said case as Q-Branch CID Crime No.1 of 2022 for the offences under Sections 25(1)(a), 25(1AA) and Section 25(1B)(a) of the Arms Act, 1959 and Section 4(a) of the Explosive Substances Act, 1908 and took up the investigation.
22.07.2022	On coming to know of the seizure, the Government of India, intervened and entrusted the investigation to the National Investigation Agency (NIA) by an order in F.No. 11011/61/2022/NIA.
25.07.2022	The NIA, New Delhi, re-registered the original case as RC-33/2022/NIA/DLI for the offences under Sections 25(1)(a), 25(1AA) and Section 25(1B)(a) of the Arms Act, 1959 and Section 4(a) of the Explosive Substances Act, 1908.
29.07.2022	Kabilar filed an application for bail in Crl.O.P.No.17786 of



Crl.O.P.No.25141 of 2022

<i>Dates</i>	<i>Events</i>
	2022, in which, a learned Single Judge of this Court, by order dated 29.07.2022, granted bail in Q-Branch Crime No.1 of 2022 for the offences under Sections 25(1)(a), 25(1AA) and Section 25(1B)(a) of the Arms Act, 1959 and Section 4(a) of the Explosive Substances Act, 1908. Pursuant to the above, Kabilar executed the necessary sureties and was physically released from the prison on 12.08.2022.
08.08.2022	The Chief Investigating Officer of the NIA altered the penal sections by adding Sections 13, 17, 18, 18-B, 20, 38 and 39 of the Unlawful Activities (Prevention) Act, 1967 and Sections 121, 121-A, 122 and 123 IPC, 1860. Since NIA had taken over the investigation of the case, the case papers from the file of the Judicial Magistrate, Omalur, was transferred to the Special Court for NIA Cases, Poonamallee and therefore, the Chief Investigating Officer, NIA, filed the alteration report there.
10.08.2022	The Special Public Prosecutor, NIA filed a petition under Section 43(d)(2) for extension of remand, from 90 to 180 days and the same was ordered by the learned Special Judge, NIA Cases on 16.08.2022 for Naveen (A-1) and Sanjai Prakash (A-2) as only they were in judicial custody and not Kabilar (A-3).
23.08.2022 to 30.08.2022	Police custody of Naveen (A-1) and Sanjai Prakash (A-2) was taken by the NIA.
10.09.2022	Since Kabilar (A-3) was released on bail on 29.07.2022, the NIA has filed the present petition to re-arrest him, based on the judgment of the Supreme Court in <i>Pradeep Ram Vs. State of Jharkhand and Another (2019) 17 SCC 326</i> .

2. It may be pertinent to state here that when the bail application of



Crl.O.P.No.25141 of 2022

Kabilar (A-3) in Crl.O.P.No.17786 of 2022 came up for hearing before the learned Single Judge on 29.07.2022, only the State Additional Public Prosecutor appeared and it was not brought to the notice of the learned Single Judge that the case has been transferred on 22.07.2022 to the NIA and the NIA has re-registered the case on 25.07.2022. In short, since the NIA was not a party before the learned Single Judge, the State Additional Public Prosecutor prayed for posting the matter again under the caption “for being mentioned”. At his request, the learned Single Judge posted the matter “for being mentioned” on 18.10.2022, in which, the following order was passed :

“

2. The learned Additional Public Prosecutor submitted that the petitioner was granted bail in Crime No.1 of 2022 on the file of the respondent/police registered for the offences under Sections 25(1)(a), 25(1)(AA), 25 (1-B)(a) of Arms Act, 1959 and Section 4(a) of Explosive Substances Act, 1908. Even before the order passed by this Court, on 22.07.2022, the Ministry of Home Affairs passed order that the matter to be investigated by National Investigation Agency. Accordingly, the National Investigation Agency, Chennai registered FIR in RC.No.33 of 2022 for the very same offences. During the investigation, the National Investigation Agency altered the offences into Section 120B of IPC r/w Section 25(1)(a), 25(1AA), 25 (1B)(a) of the Arms Act, 1959, Section 4(a) of the Explosive Substances Act, 1908 and Sections 13, 17, 18, 18-B, 20, 38, 39 of Unlawful Activities (Prevention) Act, 1967 and Sections 121,



Crl.O.P.No.25141 of 2022

121A, 122 and 123 of IPC, 1860. In pursuant to the alteration report, the National Investigation Agency filed petition to re-arrest the petitioner in Crl.OP.No.25141 of 2022 before the Hon'ble Division Bench of this Court, which is now pending.

3. However, the same was not brought to the knowledge of this Court on 29.07.2022 and the offences were altered only on 08.08.2022.

4. Therefore, it is made clear that no further orders are required in this petition.”

3. In this case, on notice, Mr.R.Sankarasubbu, Advocate, entered appearance for Kabilar (A-3) and filed a counter affidavit on 01.11.2022, stating *inter alia* that, after Kabilar (A-3) was released on bail, he was summoned to the office of the NIA for interrogation; he appeared before the NIA for interrogation at their office; he was tortured by the NIA, for which, he took treatment at the Government Hospital, Salem, on 01.10.2022; he is innocent; he lost contact with Naveen (A-1) and Sanjai Prakash (A-2), six months back and had severed all relationship with them; he is not a terrorist: his mobile phone got damaged on 16.08.2022 when it accidentally fell from the bus, while he was travelling from Chengalpet to Poonamallee.

4. At this juncture, it may be relevant to state here that the NIA has



CrI.O.P.No.25141 of 2022

filed a final report on 11.11.2022 in the Special Court for NIA Cases, Poonamallee, against Naveen (A-1), Sanjai Prakash (A-2) and Kabilar (A-3) and has also filed a petition under Section 173(8) Cr.P.C. to conduct further investigation.

5. Heard Mr.R.Karthikeyan, learned Special Public Prosecutor for NIA Cases and Mr.R.Sankarasubbu, learned counsel for Kabilar (A-3).

6. It is the submission of the NIA that after they took police custody of Naveen (A-1) and Sanjai Prakash (A-2) from 23.08.2022 to 30.08.2022, several facts came to light relating to the active involvement of Kabilar (A-3) in the manufacture of fire arms and for floating an organisation akin to LTTE.

7. To be more specific, in paragraph 9 of this criminal original petition, signed by the Superintendent of Police, NIA, Chennai, it is stated as under :



CrI.O.P.No.25141 of 2022

“9.It is further submitted that the petitioner obtained police custody of A-1 and A-2 from the Hon'ble Special Court from 23.08.2022 to 30.08.2022 and further evidences were collected. During the course of this investigation the respondent/A-3 was summoned on 20.08.2022 and during his enquiry on that date he was asked to produce his mobile phone activated by him on 13.06.2018 on the next enquiry date on the next day on 21.08.2022 for subjection his mobile phone to forensic examination, however till date he has been evading the production of that mobile phone and has been claiming that it has been damaged due to falling down and that he has since been using a new basic mobile phone. Pertinently the respondent/A-3 has not given the details as to where the mobile phone fell down and got damaged and why he is not producing the damaged mobile either for investigation. But further investigation and collection of CDR date from the mobile operator revealed that the respondent/A-3 has called his sister at about 16.21 p.m. on 16.08.2022 from the very same mobile phone. Thus the respondent from his very own statements has admitted to tampering of and causing disappearance of material evidence in the case and his bail is liable for cancelled on this ground alone for violation of bail conditions.”

8. The learned Special Public Prosecutor also submitted the Case Diary to us for perusal.

9. *Per contra*, Mr.Sankarasubbu placed strong reliance on the following judgments, in support of his plea that re-arrest of Kabilar (A-3) is not required :



WEB COPY

- i. Miranda Vs. Arizona [384 U.S.436(1966)]
- ii. Thwaha Fasal Vs. Union of India [2021 SCC OnLine SC 1000]
- iii. Raghubir Singh & Others Vs. State of Bihar (1986) 4 SCC 481
- iv. Joginder Kumar Vs. State of U.P. and Others (1994) 4 SCC 260

He further submitted that since the charge sheet has been filed on 11.11.2022, the present petition filed by the NIA has become infructuous and nothing survives.

10. We carefully considered the rival submissions.

11. We propose to examine the last contention of Mr.Sankarasubbu, to wit, whether on the filing of the final report, the present petition filed by the NIA has become infructuous or not. The answer to this question is available in the judgment of the Supreme Court in *Pradeep Ram (supra)*. The facts in that case are almost similar to the facts that obtaining in this case. For ready reference, paragraph 4 of *Pradeep Ram (supra)* is extracted below :

"4. The learned counsel for the appellant submits that investigation against the appellant in PS Case No. 2 of 2016 having been completed and charge-sheet having been submitted by the investigating agency on 10-3-2016, NIA could not have registered second FIR on 16-2-2018 being FIR No. RC-06/2018/NIA/DLI. It is submitted that the Special Judge



CrI.O.P.No.25141 of 2022

committed error in passing the order dated 25-6-2018 remanding the appellant to judicial custody under Section 167 CrPC. When cognizance has already been taken on 11-3-2016, order could have only been passed under Section 309 CrPC. It is submitted that by re-registration of the FIR, NIA cannot carry on any reinvestigation into the offence incorporated in the FIR dated 10-3-2016. It is further submitted that the appellant having been already granted bail on 10-3-2016, he cannot be re-arrested by virtue of addition of new offences under Sections 16, 17, 20 and 23 of the Unlawful Activities (Prevention) Act, 1967. The only course open for the NIA was to file an application for cancellation of the bail dated 10-3-2016. It was only after cancellation of the bail that the appellant could have been re-arrested or taken into judicial custody.”

The above submission has been repelled by the Supreme Court in the following words in paragraph 44 :

“Before proceeding further, we may notice few features of the present case, which are necessary to be noticed. As noticed above, a charge-sheet in Case Crime No. 2 of 2016 was submitted by the investigating agency on 10-3-2016 and cognizance was taken on 11-3-2016. The offences under the Unlawful Activities (Prevention) Act, 1967 were added on 9-4-2017. Charges were framed on 19-9-2016, offences under the Unlawful Activities (Prevention) Act, 1967 were added for the first time on 9-4-2017, thus, there was no occasion for investigation of offences under the Unlawful Activities (Prevention) Act, 1967 prior to April 2017. The charge-sheet dated 10-3-2016 and charges framed on 19-9-2016 were not with respect to the offences under the Unlawful Activities (Prevention) Act, 1967, thus, when the Central Government directed the NIA to investigate the offence under scheduled offences, NIA was fully competent to investigate the offences and submit a supplementary report. Present is not a case where any charges for the offences punishable under the Unlawful Activities (Prevention) Act, 1967 were available prior to April 2017, thus, NIA was fully competent to investigate further in the case as per the directions issued by the Central Government vide Order dated 13-2-2018.”

12. Thus, it can be seen that, though certain facts in *Pradeep Ram*



CrI.O.P.No.25141 of 2022

(supra) are similar to the ones in this case, we find that in *Pradeep Ram* (supra), the local police had filed the charge sheet even before the NIA re-registered the case and took up investigation, despite which, the Supreme Court held that such a re-registration does not fall foul of the law laid down in *T.T.Antony Vs. State of Kerala [(2001) 6 SCC 181]* and other judgments, and that, the NIA was fully competent to investigate the offence under the UAP Act, which was not included in the final report that was filed by the local police. Whereas, in this case, even while the local police was conducting the investigation, the NIA took over the case, included the offences under the UAP Act, filed an alteration report before the competent Court, called Kabilar (A-3) for investigation, he did not co-operate with them for recovering his mobile phone that is said to contain incriminating materials and therefore, they have filed the present petition for placing him under arrest.

13. Only during the pendency of the present petition, with the available materials, the NIA has filed the charge sheet on 11.11.2022.



CrI.O.P.No.25141 of 2022

Therefore, the submissions of Mr.Sankarasubbu that the filing of the charge sheet, would *ipso facto*, make this petition infructuous, cannot be countenanced.

14. Coming to the *Miranda rule*, our Supreme Court, in *Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid Vs. State of Maharashtra [(2012) 9 SCC 1]*, has rejected the same, holding that the principles laid down therein are not applicable in Indian context.

15. Placing reliance on *Joginder Kumar (supra)*, Mr.Sankarasubbu submitted that just because the police have the power to arrest, it is not necessary that in every case, they should exercise the said power and that there should be a justification for exercising the same and in this case, there is no justification. One can have no quarrel with the proposition of law advanced by Mr.Sankarasubbu, but, on facts, in this case, the NIA gave a long rope to Kabilar (A-3), by summoning him for interrogation and he failed to appear on 28.09.2022, 01.10.2022, 06.10.2022 and 14.10.2022.



CrI.O.P.No.25141 of 2022

WEB COPY

Even when he appeared, he refused to co-operate with them, for recovering his mobile phone and instead, took a stand that the mobile phone fell from the bus, while he was travelling from Chengalpet to Poonamallee. He did not even disclose the date on which this has happened. According to the NIA, the mobile phone contains a gold mine of information about the activities of the group, which is essential, in order to find out the involvement of others, so that their activities could be nipped in the bud.

16. The call detail records collected by the NIA show that with the said mobile phone, he has been in contact with his sister and therefore, the story that he had lost the mobile phone, did not cut ice with them. Of course, to arrest or not to arrest, is a decision that has to be taken by the Investigating Officer and this Court cannot act as an appellate authority to review such decisions, which are required to be taken by the Investigating Officers in criminal cases frequently. In fact, the NIA has taken a specific ground that non-cooperation for investigation, by itself, violates the conditions of bail, for which also, the bail that was granted to Kabilar (A-3),



Crl.O.P.No.25141 of 2022

WEB COPY

is liable to be cancelled.

17. In the light of the law laid down by the Supreme Court in *Pradeep Ram (supra)*, there is no great scope for further expatiation in this case. The Supreme Court has raised the following issue :

“From the submissions of the learned counsel for the parties and the pleadings on the record, following are the issues, which arise for consideration in these appeals:

(i) Whether in a case where an accused has been bailed out in a criminal case, in which case, subsequently new offences are added, is it necessary that bail earlier granted should be cancelled for taking the accused in custody?”

and answered as under in paragraph 31 :

“31. In view of the foregoing discussions, we arrive at the following conclusions in respect of a circumstance where after grant of bail to an accused, further cognizable and non-bailable offences are added:

31.1. The accused can surrender and apply for bail for newly added cognizable and non-bailable offences. In event of refusal of bail, the accused can certainly be arrested.

31.2. The investigating agency can seek order from the court under Section 437(5) or 439(2) CrP C for arrest of the accused and his custody.

31.3. The court, in exercise of power under Section 437(5) or 439(2) CrP C, can direct for taking into custody the accused who has already been granted bail after cancellation of his bail. The court in exercise of power under Section 437(5) as well as Section 439(2) can direct the person who has already been granted bail to be arrested and commit him to custody on addition of graver and non-bailable offences which may not be necessary always with order of cancelling of earlier bail.



WEB COPY



CrI.O.P.No.25141 of 2022

31.4. In a case where an accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the accused, but for arresting the accused on such addition of offence or offences it needs to obtain an order to arrest the accused from the court which had granted the bail.”

In this case, Kabilar (A-3) had the opportunity to surrender before the Special Court and seek bail, in terms of paragraph 31.1. of *Pradeep Ram (supra)*, which he had not chosen to do.

18. It is trite that grant of bail is offence-centric and where new offences are added, the order of bail that was granted earlier, would not automatically enlarge and cover them also, which is evident from paragraph 19 of *Pradeep Ram (supra)* reads as follows :

“19. This Court in *Hamida v. Rashid @ Rasheed and Others [(2008) 1 SCC 474]* held that an accused after addition of serious non-bailable offence is required to surrender and apply for bail for newly added offences. It is, thus, clear that the bail granted to an accused earlier to addition of new non-bailable offence shall not enure to the benefit of the accused insofar as newly added offences are concerned and he is required to surrender and obtain a bail with regard to newly added offences to save him from arrest.” (emphasis supplied)

19. Finally, on a perusal of the case diary submitted by the NIA, we observe that Kabilar (A-3) is also attempting to tamper a protected witness, by going over to his house on 18.09.2022. Kabilar (A-3), in his counter



Cr.O.P.No.25141 of 2022

affiadvit, has stated that he appeared before the NIA on 27.09.2022 and on that day, he was assaulted, for which, he took treatment at the Government Hospital, Salem, on 01.10.2022. Even according to Kabilar (A-3), for the alleged assault on 27.09.2022, he took treatment only on 01.10.2022 and therefore, his assertion that he was assaulted, appears contrived.

20. The present petition has been filed under Section 482 read with 439(2) Cr.P.C., for a direction to re-arrest Kabilar (A-3) by the NIA. In our opinion, the NIA has made out a case for re-arrest of Kabilar (A-3) and accordingly, in terms of para 31.4 of *Pradeep Ram (supra)*, we are passing an order to arrest Kabilar (A-3).

In the result, this Criminal Original Petition is ordered accordingly.

[P.N.P., J.] [T K R, J.]

29.11.2022

gya

P.N.PRAKASH, J.
AND



WEB COPY



Crl.O.P.No.25141 of 2022

RMT.TEEKAA RAMAN, J.

gya

Crl.O.P.No.25141 of 2022

29.11.2022