



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)
RESERVED ON : 21/02/2022
PRONOUNCED ON: 28/02/2022
PRESENT

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The Hon`ble Mr.Justice K.MURALI SHANKAR

CRL OP(MD). Nos.2094 and 2680 of 2022

Nelson ... Petitioner/Accused No.7
In Crl.O.P.(MD)No.2094 of 2022

Nelson ... Petitioner/Accused No.6
In Crl.O.P.(MD)No.2680 of 2022

Vs

The State rep.by
The Inspector of Police,
Subramaniyapuram Police Station,
Madurai City.
(Cr. No. 1453 of 2020). ... Respondent/Complainant
In Crl.O.P.(MD)No.2094 of 2022

The Inspector of Police,
S.S.Colony Police Station, Madurai
(Crime No. 2361 of 2020). ... Respondent/Complainant
In Crl.O.P.(MD)No.2680 of 2022

IN BOTH PETITIONS:

For Petitioner : M/s.VIJAYARAJA.J,
Advocate.
For Respondents : Mr.E.ANTONY SAHAYA PRABHAR,
Additional Public Prosecutor

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

PRAYER In Crl.O.P.(MD)No.2094 of 2022:- For Bail in Cr.No.1453 of 2020 on the file of the Respondent Police.

PRAYER In Crl.O.P.(MD)No.2680 of 2022:- For Bail in Crime No. 2361 of 2020 on the file of the respondent police.

COMMON ORDER : The Court made the following order :-

The petitioner/Accused No.7 in Crl.O.P.(MD)No.2094 of 2022, who was arrested and remanded to judicial custody on 10.11.2020, for the offences punishable under Sections 8(c) r/w 20(b)(ii)(c), 25 and 29(1) of NDPS Act in Crime No.1453 of 2020, on the file of the respondent police, seeks bail.



2. The petitioner/Accused No.6 in Crl.O.P.(MD)No.2680 of 2022, who was arrested and remanded to judicial custody on 16.06.2021, for the offences punishable under Sections 8(c) r/w 20(b)(ii)(c), 25 and 29(1) of NDPS Act in Crime No.2361 of 2020, on the file of the respondent police, seeks bail.

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3. The case of the prosecution in Crl.O.P.(MD)No.2094 of 2022 is that on receipt of secret information on 10.11.2020 at about 14.15 hours, that one Malaisamy and Shanmugaprabhu were bringing ganja from Andhra Pradesh in a lorry bearing Registration No.TN-38-BC-2506, that the police party along with the informant reached Muthupatti to Avaniyapuram road nearby Star Traders shop and at about 15.15hours on that day, intercepted the said lorry and found 14 plastic bags of ganja weighing 332kgs and that they have arrested the said Malaisamy and Shanmugaprabhu. The prosecution's further case is that the first accused Malaisamy gave a voluntary confession statement, wherein he had implicated the involvement of the other accused and that they had seized the ganja and the vehicle.

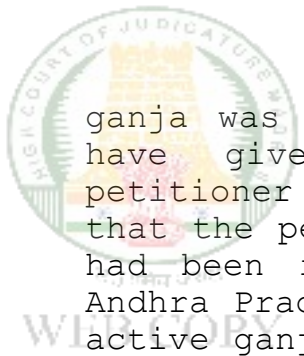
4. The case of the prosecution in Crl.O.P.(MD)No.2680 of 2022 is that on 25.10.2020 at about 14 hours, they have received a secret information that one Dhileep Kumar and PK @ Hariharasudan, as per the instructions of one Saba @ Sabarathinam were bringing ganja in a Maruthi car bearing Registration No.TN-38-AQ-4151, the police party reached Madakulam Kora Vaikkal junction at about 11.30hours to 12.30hours, that they intercepted the said car and found two bags of ganja weighing 22kg of ganja, that the police party had arrested the said Dhileep Kumar and PK @ Hariharasudan and that the said Dhileep Kumar gave a voluntary confession statement implicating the involvement of the other accused and the police party had seized the contraband along with the vehicle.

5. The case of the petitioner is that he is innocent, that he has no connection whatsoever in the alleged occurrence and that he was falsely implicated in the above cases.

6. The learned Counsel for the petitioner would submit that Saba @ Sabarathinam, who is residing in the same locality of the petitioner, had helped the petitioner to arrange for his release in one case and that thereafter the petitioner was purposely roped in that case for the reasons best known to them and that they have implicated in two other criminal cases which are purely based on the confession statement of the co-accused and they have collected no other material to connect the accused with the alleged offence in question.

7. The respondent has filed a counter affidavit in both the cases and raised serious objections to enlarge the petitioner on bail.

8. The learned Additional Public Prosecutor appearing for the State Government would submit that in both the cases commercial quantity of



ganja was recovered and that the first accused in both the cases have given voluntary confession statements implicating the petitioner and other accused and narrated about their involvement, that the petitioner had close contact with the other co-accused and had been regularly involved in ganja trading from the State of Andhra Pradesh and that the petitioner is a heinous offender and an active ganja seller having close connection with rowdy elements and ganja selling groups all over Tamil Nadu and nearby States. The learned Additional Public Prosecutor would further submit that the petitioner is having two other cases apart from the above case.

9. As rightly contended by the learned Counsel for the petitioner, even according to the prosecution, admittedly there was no recovery from the petitioner in both the cases. It is pertinent to note that only on the basis of the confession statement alleged to have taken from the first accused, the petitioner was implicated in both the cases. Though the respondent has alleged that the petitioner is having two previous cases in both the counter statements filed to the above two cases, totally there are three cases now pending against the petitioner and the one is in Cr.No.165 of 2019, on the file of the Madurai City, D-5 South Gate Police Station, for the offences under Section 109, 114, 120(b), 147, 148, 149, 201, 302 and 506(ii) I.P.C., and other two cases are the cases under the NDPS Act for which the above petitions came to be filed.

10. As rightly contended by the learned Counsel for the petitioner, the respondent has alleged that one other previous case is pending against the petitioner in the above two matters, but admittedly except the above two cases in Cr.No.1453 of 2020, on the file of the Subramaniamapuram Police Station and Cr.No.2361 of 2020, on the file of the S.S.Colony Police Station, no other case under the NDPS Act is pending.

11. This Court in batch of cases in Cr.O.P.(MD)No.5093 of 2021 etc., batch cases in Muruganandham and another Vs. the State represented by the Inspector of Police, Authoor Police Station, Thoothukudi District and Others, dated 23.12.2021, has held as follows:

"8. Section 25 of the Indian Evidence Act contemplates that no confession made to a Police Officer shall be proved as against a person accused of any offence. The very object of Section 25 is to ensure that the person accused of offence would not be induced by threat, coercion or force to make a confessional statement and the Police Officer is to make every effort to collect or gather the evidence with regard to the commission of offence, but not the confession while the accused is under custody.

9. It is settled law that statements made by an accused before Police Officer, which amount to confessional statements, are clearly barred under Section 25 of the Indian



Evidence Act and the only exception is under Section 27 of the Indian Evidence Act, which provides that any portion of the information in the confession statement, which leads to discovery of any new fact or thing can be proved.

10. Applying the legal dictum laid down by the Hon'ble Supreme Court in **Tofan Singh's** case any statement recorded under Section 67 of NDPS Act cannot be treated as a confession statement in the trial for the offence under the provisions of NDPS Act. Since the statement under Section 67 of the NDPS Act cannot be treated and relied as a confession statement in the trial itself, then the very question of considering and deciding the validity of the said confession statement at the trial does not arise at all. Moreover, in the absence of any recovery from the accused, now seeking bail, the confession of co-accused implicating the present accused cannot be relied or looked into, so far as the present accused is concerned.

11. Section 37 of the NDPS Act creates bar for grant of bail whenever the recovery is of commercial in nature and also when the offence is under Section 27-A of the NDPS Act.

Perusal of the provisions of Section 37 of NDPS Act would show that although there is a bar created for grant of bail but a departure can be made in case where the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any offence while on bail, then the Court can always consider the grant of bail in that regard. The Hon'ble Supreme Court in the case of State of **Kerala and another vs. Rajesh and another**, reported in **2020 SCC Online SC 81**, has observed;

"20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with nonobstante clause.

The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates."

12. Bearing the above legal position in mind, let us consider the bail applications, now under consideration.

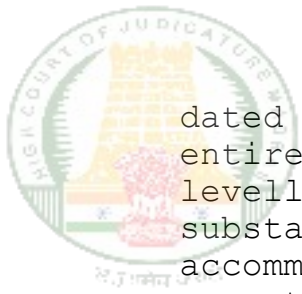


13. The learned Counsel for the petitioner has relied on a recent decision of the Hon'ble Supreme Court in **State by (NCB) Bengaluru Vs. Pallulabid Ahmad Arimutta and another** reported in **2022 Live Law SC 63**. The Hon'ble Apex Court, by relying the judgment in **Tofan Singh Vs. State of Tamil Nadu** has upheld the bail orders granted by the Karnatak High Court with respect to some accused and confirmed the order with respect to one accused from whom the recovery was made and the relevant passages are extracted hereunder:

"9. Having gone through the records alongwith the tabulated statement of the respondents submitted on behalf of the petitioner-NCB and on carefully perusing the impugned orders passed in each case, it emerges that except for the voluntary statements of A-1 and A-2 in the first case and that of the respondents themselves recorded under Section 67 of the NDPS Act, it appears, prima facie, that no substantial material was available with the prosecution at the time of arrest to connect the respondents with the allegations levelled against them of indulging in drug trafficking. It has not been denied by the prosecution that except for the respondent in SLP (Crl.) No. 1569/2021, none of the other respondents were found to be in possession of commercial quantities of psychotropic substances, as contemplated under the NDPS Act.

10. It has been held in clear terms in Tofan Singh Vs. State of Tamil Nadu⁶, that a confessional statement recorded under Section 67 of the NDPS Act will remain inadmissible in the trial of an offence under the NDPS Act. In the teeth of the aforesaid decision, the arrests made by the petitioner-NCB, on the basis of the confession/voluntary statements of the respondents or the co-accused under Section 67 of the NDPS Act, cannot form the basis for overturning the impugned orders releasing them on bail. The CDR details of some of the accused or the allegations of tampering of evidence on the part of one of the respondents is an aspect that will be examined at the stage of trial. For the aforesaid reason, this Court is not inclined to interfere in the orders dated 16th September, 2019, 14th January, 2020, 16th January, 2020, 19th December, 2019 and 20th January, 2020 passed in SLP (Crl.) No@ Diary No. 22702/2020, SLP (Crl.) No. 1454/2021, SLP (Crl.) No. 1465/2021, SLP (Crl.) No. 1773-74/2021 and SLP (Crl.) No. 2080/2021 respectively. The impugned orders are, accordingly, upheld and the Special Leave Petitions filed by the petitioner-NCB seeking cancellation of bail granted to the respective respondents, are dismissed as meritless.

11. However, the evidence brought before us against Mohammed Afzal [A-2], respondent in SLP (Crl.) No. 1569/2021, subject matter of the second case i.e., NCB Case FN No. 48/01/07/2019/BZU, who was granted bail vide order

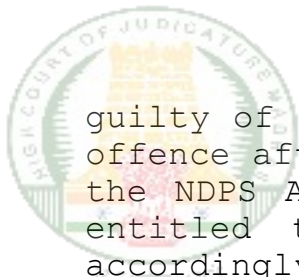


dated 08th January, 2020, will have to be treated on an entirely different footing. There are specific allegations levelled against the said respondent regarding recovery of substantial commercial quantities of drugs from a rented accommodation occupied by him pursuant to which he was arrested on 16th June, 2019. This aspect has been completely overlooked while passing the order dated 08th January, 2020 wherein, the only reason that appears to have weighed with the High Court for releasing him on bail is that his case stands on the same footing as A-1, A-3 and A-4 who had been enlarged on bail vide orders dated 11th October, 2019, 16th September, 2019 and 09th September, 2019, in connection with the second case registered by the Department. We are of the firm view that A-2 cannot seek parity with the aforesaid co-accused and no such benefit could have been extended to him in view of Section 37 of the Act when he was found to be in conscious possession of commercial quantity of psychotropic substances, as contemplated under the NDPS Act. That being the position, the petitioner-NCB succeeds in SLP (CrI.) No. 1569/2021. The bail granted to the respondent-Mohammed Afzal [A-2] is cancelled forthwith at this stage and he is directed to surrender before the Sessions Court/Special Judge (NDPS) within a period of two weeks, for being taken into custody."

14. In the case on hand, admittedly, there was no recovery of contraband from the petitioner in both the cases. Moreover, the petitioner was implicated only on the basis of the confession statement alleged to have taken from the co-accused in the respective cases. Except the alleged confession taken from the co-accused, the prosecution has not produced any material or evidence to connect the petitioner with the alleged recovery or the crime in question.

15. The prosecution has been alleging in both the cases that one previous case for similar offence is pending, by showing the other case and vice versa. Admittedly in both the cases, there was no recovery from the petitioner and he was implicated only on the basis of the confession statement alleged to have taken from the co-accused. Hence, the same cannot be considered as previous case under the NDPS Act, so as to prevent the petitioner from showing that the second is satisfied. If the petitioner is having another case under the NDPS Act in which the recovery of contraband was made from the petitioner, then this Court cannot record a finding that the petitioner is not likely to commit any such offence while on bail. In Cr.No.1453 of 2020, after investigation, a charge sheet has been laid and the case is taken on file in C.C.No.244 of 2021 and the same is pending on the file of the Special Court.

16. Considering the above, this Court is satisfied that there are no grounds for believing that the petitioner is not



guilty of such offence and that he is not likely to commit any such offence after coming out on bail as contemplated under Section 37 of the NDPS Act. Hence, this Court concludes that the petitioner is entitled to get the bail and both the petitions are allowed accordingly subject to the following conditions:

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17. Accordingly, the petitioner is ordered to be released on bail on his executing a bond for a sum of Rs.50,000/- (Rupees Fifty Thousand only) **each for two cases** with two sureties each for a like sum to the satisfaction of the learned Principal District Judge, i/e for Additional District Judge for NDPS Cases, Madurai.

(i) the sureties shall affix their photographs and left thumb impression in the surety bond and the Magistrate/concerned court may obtain a copy of their Aadhar card or Bank Pass Book to ensure their identity;

(ii) the petitioner shall report before the Special Court daily at 10.30 a.m., in all working days, until further orders.

(iii) the petitioner shall not tamper with evidence or witness.

(iv) the petitioner shall not abscond during trial.

(v) On breach of any of the aforesaid conditions, the learned Magistrate/Trial Court is entitled to take appropriate action against the petitioners in accordance with law as if the conditions have been imposed and the petitioners released on bail by the learned Magistrate/Trial Court himself as laid down by the Hon'ble Supreme Court in ***P.K.Shaji vs. State of Kerala [(2005)AIR SCW 5560]***.

(vi) If the accused / petitioners thereafter abscond, a fresh FIR can be registered under Section 229A IPC.

sd/-

28/02/2022

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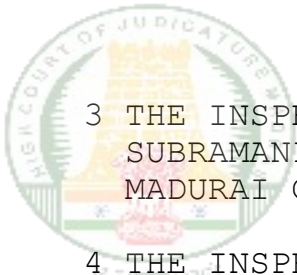
Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

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

TO

1 THE PRINCIPAL DISTRICT JUDGE FOR ADDITIONAL DISTRICT JUDGE
FOR NDPS CASES, MADURAI

2 THE SUPERINTENDENT
CENTRAL PRISON, MADURAI.



3 THE INSPECTOR OF POLICE,
SUBRAMANIPURAM POLICE STATION,
MADURAI CITY.

4 THE INSPECTOR OF POLICE,
S.S.COLONY POLICE STATION,
MADURAI

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

+1. CC to M/S.VIJAYARAJA.J Advocate SR.No.1611(Crl.OP(MD) .
2094/2022)

ORDER

IN

CRL OP(MD) . Nos.2094 and
2680 of 2022

Date :28/02/2022

SA/VR/SAR.4/02.03.2022/8P/7C