



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)
Reserved on : 07/03/2022
Pronounced on : 14/03/2022

PRESENT

The Hon`ble Mr.Justice K.MURALI SHANKAR

CRL OP(MD). No.2294 of 2022

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Dhivagar

... Petitioner/Sole Accused

Vs

State rep.by
The Inspector of Police,
Thanjavur West Police Station,
Thanjavur District.
(Cr.No.132/2022).

... Respondent/Complainant

For Petitioner : Mr.Henri Thiphange
Advocate.
For Respondent : Mr.S.Ravi,
Additional Public Prosecutor

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

PRAYER :-

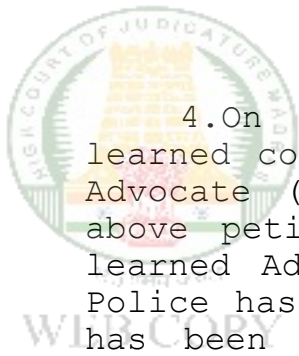
For Bail in Crime No.132 of 2022 on the file of the respondent Police.

ORDER : The Court made the following order :-

The petitioner/Accused, who was arrested on 19.01.2022 for the alleged offence under Sections 8 (C) r/w 20(b)(ii) (B) & 22 (c) of Narcotic Drugs and Psychotropic Substances Act 1985, in Crime No.132 of 2022 on the file of the respondent Police, seeks bail.

2.The case of the prosecution is that on 19.01.2022 at about 11.00 hours, on receiving a secret information, the respondent Police went to the place near Sevappamayakkanvari Periya Aatrupaalam and found the accused in illegal possession of 1.200 kg of Ganja and 550 grams of Diazepam.

3.The petitioner's case is that he is a Social Worker and delivered the food pockets to the needy during the lock-down period, that there was a quarrel between the Police Officials and this petitioner regarding wearing of mask and due to said quarrel, the respondent Police registered a false case against the petitioner, that he is innocent and he has not committed any offence as alleged by the prosecution and that he is hailing from respectable family and he is having high reputation among the people at his locality.



4. On 04.02.2022, considering the submissions made by the learned counsel for the petitioner and also the learned Government Advocate (Criminal Side), this Court has passed an order in the above petition, granting bail to the petitioner. Thereafter, the learned Additional Public Prosecutor appearing for the respondent Police has made a mention on 07.02.2022 that by mistake bail order has been passed without noting that 550 grams Diazepam is a commercial quantity and my learned Predecessor Judge, after recording the submission made by the learned Additional Public Prosecutor and also the submission of the learned counsel for the petitioner that they will not execute the bail order, by observing that it is a mistake or error apparent on the face of record, has *suo motu* recalled the order dated 04.02.2022 and directed the Registry to list the matter before the concerned roster Judge for fresh hearing. In that way the above matter has been listed before this Court.

5. After recalling of the bail order, the learned counsel for the petitioner has filed additional grounds for granting bail and the same are extracted hereunder:

* The petitioner surrendered before the special team attached with South Police Station, Thanjavur on 19.01.2022 at 01.10 pm, that thereafter, he was produced by the special team before the respondent Police at 02.30 pm, and that he was not at all arrested by the respondent Police on 19.01.2022 at 12.30 hours near Sevappamayakkanvari Periya Aatrupaalam in Thanjavur, as alleged by them.

* Since the very arrest itself has been disputed, the theory of following the mandatory provisions of NDPS Act will not arise.

* There are no materials to show that they have seized Dizepam in order to come to a conclusion that the alleged recovered material object is a Dizepam and since the theory of the arrest fails, the entire prosecution constructed on such arrest will fall into ground.

6. The learned Additional Public Prosecutor appearing for the respondent has filed counter affidavit disputing the additional grounds raised by the petitioner and further stated that there was no quarrel between the petitioner and the Police Officials, that it is a case detected through secret information received from informer and on surveillance, the petitioner was intercepted and contraband was recovered from him.

7. The learned counsel for the petitioner would submit that in order to prove that the arrest theory put forth by the prosecution is false, CCTV footage available at the South Police Station and the respondent Police Station may be directed to be produced before this Court and insisted for the production of CCTV footage. But on the



next hearing, the learned Additional Public Prosecutor has shown a written communication sent by the Officials, that the CCTV footage gets automatically erased after a period of 12 days and as such, CCTV footage is not available for the relevant days.

8. The learned counsel for the petitioner would seriously contend that the very submission of the prosecution that the CCTV footages are not available, is very much against the specific directions of this Court as well as the Hon'ble Supreme Court and he relied on the judgement of **Paramvir Singh Saini Vs. Baljit Singh in SLP (Criminal) No.3543 of 2020, dated 02.12.2020.**

"16. The State and Union Territory Governments should ensure that CCTV cameras are installed in each and every Police Station functioning in the respective State and/or Union Territory. Further, in order to ensure that no part of a Police Station is left uncovered, it is imperative to ensure that CCTV cameras are installed at all entry and exit points; main gate of the police station; all lock-ups; all corridors; lobby/the reception area; all verandas/outhouses, Inspector's room; Sub-Inspector's room; areas outside the lock-up room; station hall; in front of the police station compound; outside (not inside) washrooms/toilets; Duty Officer's room; back part of the police station etc.

17. CCTV systems that have to be installed must be equipped with night vision and must necessarily consist of audio as well as video footage. In areas in which there is either no electricity and/or internet, it shall be the duty of the States/Union Territories to provide the same as expeditiously as possible using any mode of providing electricity, including solar/wind power. The internet systems that are provided must also be systems which provide clear image resolutions and audio. Most important of all is the storage of CCTV camera footage which can be done in digital video recorders and/or network video recorders. CCTV cameras must then be installed with such recording systems so that the data that is stored thereon shall be preserved for a period of 18 months."

and the Judgment of this Court in **S.Sridar Vs. Additional Public Prosecutor CBI and another** in **Crl.OP.(MD)No.12665 and 12666 of 2020, dated 10.11.2020.**

"24. In this regard, this Court is inclined to issue the following directions to the Director General of Police, Mylapore, Chennai-4 :-

.....

(ii) The Director General of Police / Second



Respondent is directed to ensure that C.C.T.V. Cameras are installed in all the Police Stations and C.C.T.V Cameras already installed are in working conditions all the time. The entire premises of the Police Stations are to be covered under C.C.T.V Camera.

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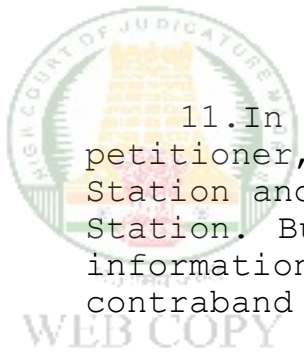
(iv) The Director General of Police / Second Respondent is directed to ensure the proper maintenance of C.C.T.V Cameras in all the Police Stations across the State of Tamil Nadu and repairs, if any noticed, must be rectified by the Station House Officer, within a period of three days.

(v) The Director General of Police / Second Respondent is directed to ensure that C.C.T.V storages must be sent to the higher officials within a stipulated period and the said storages are to be preserved for the period to be stipulated by the Director General of Police in the consolidated instructions.

(vi) The Director General of Police/Second Respondent is directed to state in the Circular/Consolidated Instructions that violations of the instructions/guidelines by any officials must be viewed seriously and appropriate disciplinary actions will be initiated under the Discipline and Appeal Rules."

9. In the case on hand, there is no dispute about the installation of the CCTV cameras in the concerned Police Stations. The Hon'ble Supreme Court has specifically directed that the CCTV Cameras must be installed with such recording systems so that the data that is stored thereon shall be preserved for a period of 18 months and subsequently, the Hon'ble Supreme Court has directed all the States to purchase one which allows storage for the maximum period possible and in any case, not below one year.

10. In the case on hand, as already pointed out, according to the prosecution, the recordings in CCTV footage gets automatically erased after 12 days. As rightly contended by the learned counsel for the petitioner, the concerned Police Stations have not been installed with such recording system for preserving the recordings for a period specified by the Hon'ble Supreme Court. But the fact remains that the concerned Police Station or the Station House Officer therein are not in a position to install such recording system by themselves and it is only for the Government to purchase and supply to the Police Stations. Since the directions of the Hon'ble Supreme Court and this Court are not followed by the Government Officials, the Officials for such lapses are to be made liable, but that is different matter. Just because CCTV footages are not available for a particular day, in the absence of any other materials, this Court cannot infer or presume that whatever things alleged to have held on that particular day, as put forth by the



11.In the case on hand, as already pointed out, according to the petitioner, he surrendered voluntarily before the South Police Station and from that Station, he was taken to the respondent Police Station. But according to the prosecution, on receiving the secret information, the petitioner was found in possession of the contraband near Sevappamayakkanvari Periya Aatrupaalam.

12.As rightly pointed out by the learned Additional Public Prosecutor, the above additional grounds were not at all taken in the original petition nor before this Court while moving the bail for the first time nor at the time of re-calling of the bail order.

13.The learned counsel for the petitioner would further contend that contraband allegedly seized from the petitioner had not been produced before the jurisdictional Court for more than 20 days after seizure, that the respondent has not shown any reason or ground for the inordinate delay in producing the contraband before the concerned Court and also there is no material to show as to where the contraband was kept from the date of seizure till the production before the concerned Court. He would further submit that the contraband was allegedly recovered in the presence of Police Officials and not in the presence of individual witnesses and that the above aspects have created a strong doubt about the alleged recovery theory projected by the prosecution.

14.The learned counsel for the petitioner has relied on the following decisions of this Court :

(i) **Danraj Vs. State rep.by the Inspector of Police K.6, T.P.Chathiram Police Station, Chennai** reported in **CDJ 2019 MHC 826** :

"17.Among other grounds, since the learned counsel for the appellant / accused vehemently contended and raised the ground of delay in producing the contraband before the trial Court and also raised the issue that, between the date of occurrence and the date of production of the contraband at the trial Court, there is absolutely no guarantee that, the contraband had been kept in safe custody and therefore there every chance of substitution is possible at the hands of the respondent police and in this regard, the learned counsel since has relied upon number of Judgments of this Court as well as other High Courts and in this case also, there is no evidence to show that, on 15.09.2009, the contraband had been produced before the trial Court and also there is no record to show that, between the date of occurrence and the date of production of the contraband at the trial Court, it had been kept in safe custody either at the police station or at any specific safe meant for this purpose, ..."



(ii) Mathi Alias Mathiyalagan Vs. State rep.by the Inspector of Police, Ariyamangalam Police Station, Trichy District in Crl.A. (MD) No.53 of 2008, dated 04.03.2010.

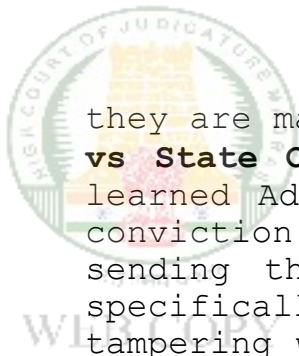
"6.On coming to the present case on hand, since there is a delay in reaching the contraband to the Court the non-examination of the Head Constable who took the contraband to the Court has created doubt in the case of the prosecution. As per the case of the prosecution, the contraband was seized on 14.11.2003, and it appears that it was reached the Court only on 17.11.2003. Though no specific question was put to the Investigating Officer with regard to the delay, it appears explicitly to the Court that it affects the very root of the case of the prosecution."

(iii) Karnam Thakka Babu Vs. State reported in 2013 (1) CLT (Cri) 291.

"7.Though it is not mandatory that seizure should be made by the Police only in the presence of independent witness, wherever it is possible, the police must secure independent witness in respect of seizure made by them and must let in evidence to gain the confidence of the Court. In this case, though PW2 had gone to the occurrence spot along with her team, on reaching the occurrence spot, she has not taken any effective steps to procure independent witness. Even if no independent witness was available and even if the accused has opted to search in the presence of police witness, PW2 could have taken the accused before a gazetted officer or Magistrate and seizure could have been made in the presence of such officer, in the absence of any independent witness. Thus, the manner in which the seizure was made in the present case by the police officials does not inspire the confidence of this Court and no sufficient evidence is let in by the prosecution. Merely because huge quantity of contraband is seized, the Court cannot jump to a conclusion that the contraband was seized only in the manner alleged by the prosecution. As the punishment is more stringent, the standard of proof required also is more."

15. There is no dispute about the position of law reiterated in the above decisions. But at the same time, the above judgments were rendered in the criminal appeals challenging the conviction and sentence imposed on the accused.

16. As rightly contended by the learned Additional Public Prosecutor, the above aspects cannot be gone into at this stage and



they are matter for trial. The Hon'ble Supreme Court in **Hardip Singh vs State Of Punjab** reported in (2008) 8 SCC 557 relied on by the learned Additional Public Prosecutor in the appeal challenging the conviction and sentence imposed on the accused, when the delay in sending the contraband was given importance by the defence, has specifically held that since it has been proved that there was no tampering with the seals in the samples at any stage, the delay of about 40 days in sending the samples did not and could not have caused any prejudice to the appellant and thereby rejected the said defence.

17.As rightly contended by the learned Additional Public Prosecutor, even for sending the samples to the Forensic Laboratory, the delay occurred cannot be given any weightage or importance, if the defence has not shown that the accused was prejudiced by the said delay.

18.It also settled that the compliance or non compliance; adequate compliance or substantial compliance of the mandatory procedures contemplated under Sections 42 and 50 of the NDPS Act can only be gone into and decided only at the Trial stage and not at the Bail stage.

19.The learned counsel for the petitioner would submit that the personal liberty of an individual cannot be taken lightly and the respondent Police has purposely and wantonly registered the case falsely implicating the petitioner, that the petitioner is not having any previous case either under the NDPS Act or under IPC or any other laws, that he is a Social Worker and that it is the duty of the Courts most particularly the Constitutional Courts to ensure that the criminal law does not become a weapon in the hands of the Police for registering the cases at their whims and fancies and relied on the observations of the Hon'ble Supreme Court in **Arnab Manoranjan Goswami Vs. State of Maharastra and other** in **Crl.A.No.742 of 2020**, dated 27.11.2020.

"60.Human liberty is a precious constitutional value, which is undoubtedly subject to regulation by validly enacted legislation. As such, the citizen is subject to the edicts of criminal law and procedure. Section 482 recognizes the inherent power of the High Court to make such orders as are necessary to give effect to the provisions of the CrPC "or prevent abuse of the process of any Court or otherwise to secure the ends of justice". Decisions of this court require the High Courts, in exercising the jurisdiction entrusted to them under Section 482, to act with circumspection. In emphasising that the High Court must exercise this power with a sense of restraint, the decisions of this Court are founded on the basic principle that the due enforcement of criminal



law should not be obstructed by the accused taking recourse to artifices and strategies.....

The writ of liberty runs through the fabric of the Constitution. The need to ensure the fair investigation of crime is undoubtedly important in itself, because it protects at one level the rights of the victim and, at a more fundamental level, the societal interest in ensuring that crime is investigated and dealt with in accordance with law. On the other hand, the misuse of the criminal law is a matter of which the High Court and the lower Courts in this country must be alive.....

Courts must be alive to the need to safeguard the public interest in ensuring that the due enforcement of criminal law is not obstructed. The fair investigation of crime is an aid to it. Equally it is the duty of courts across the spectrum - the district judiciary, the High Courts and the Supreme Court - to ensure that the criminal law does not become a weapon for the selective harassment of citizens. Courts should be alive to both ends of the spectrum - the need to ensure the proper enforcement of criminal law on the one hand and the need, on the other, of ensuring that the law does not become a ruse for targeted harassment. Liberty across human eras is as tenuous as tenuous can be. Liberty survives by the vigilance of her citizens, on the cacophony of the media and in the dusty corridors of courts alive to the rule of (and not by) law. Yet, much too often, liberty is a casualty when one of these components is found wanting."

20. At this juncture, it is necessary to refer the judgment of Hon'ble Supreme Court in **(1999) 9 SCC 429 (Union of India Vs. Ram Samujh and another)** relied on by the learned Additional Public Prosecutor. The Hon'ble Supreme Court, while considering the addition of Section 37 of the NDPS Act, has observed thus :

"6. The aforesaid Section is incorporated to achieve the object as mentioned in the Statements of Objects and Reasons for introducing the Bill No. 125 of 1988 thus:

"Even though the major offences are non-bailable by virtue of the level of punishment, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of **NDPS Act, 1985** the need to amend the law to further strengthen it has been felt."

7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered and followed. It should be borne in mind that in murder case, accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instruments in causing death or in inflicting death blow to number of



innocent young victims, who are vulnerable: it causes deleterious effects and 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 *NDPS Act*, has succinctly observed about the adverse effect of such activities in *Durand Didien v. Chief Secretary, Union Territory of Goa*. [1990] 1 SCC 95 as under:

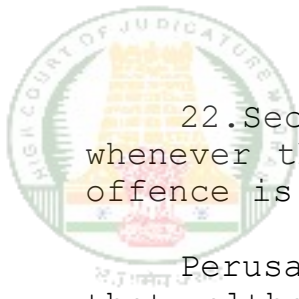
"With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportion 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, the Parliament in the 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, the Parliament has provided that the person accused of offences under the *NDPS Act* should not be released on bail during trial unless mandatory conditions provided in *Section 37*, namely,

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

(ii)that he is not likely to commit 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 socio-economic consequences and health hazards which would accompany trafficking illegally in the dangerous drugs, the Court should implement the law in the spirit with which the Parliament, after due deliberation, has amended."

21.When the personal liberty of an individual is pitted against the interest of society at large, various High Courts and the Hon'ble Apex Court have repeatedly reiterated the position that the interest of the society will always outweigh the personal liberty of an individual.



22. 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.

23. The Hon'ble Supreme Court while considering the scope of the expressions 'reasonable grounds', in **State of Kerala and others Vs. Rajesh and others** reported in (2020) 12 SCC 122, has observed that ;

"19. 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.

21. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence...."

24. It is also necessary to refer the decision of Hon'ble Supreme Court in **Collector of Customs, New Delhi Vs. Ahmadalieva Nodira** reported in (2004) 3 Supreme Court Cases 549 :

"7....The satisfaction contemplated regarding the accused being not guilty has to be based for reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable



belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. ..."

25. In the case on hand even according to the prosecution, the petitioner is not having any previous case under the NDPS Act. It is not the case of the prosecution that the petitioner is having bad antecedents. Considering the above, this Court can very well observe that there are reasonable grounds to believe that the petitioner is not likely to commit such offence, after coming out on bail.

26. Regarding the first condition, it is the specific case of the prosecution that the entire contraband of commercial quantity of Dizepam and 1.200 k.grams of Ganja was recovered only from the petitioner. In order to satisfy the first condition, the *prima facie* ground alone is not sufficient and the accused is duty bound to show something more than *prima facie* ground. To put in other way, as observed by the Hon'ble Supreme Court, the accused has to show the substantial probable causes for believing that he is not guilty of the alleged offence.

27. As already pointed out, though the petitioner side has disputed the arrest and recovery theory, put forth by the prosecution, they have not shown any materials, even to satisfy the existence of *prima facie* grounds to doubt the prosecution case. It is settled law that the twin conditions contemplated under Section 37 of NDPS Act are conjunctive and not alternative.

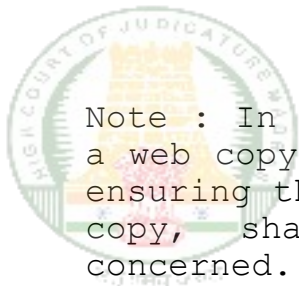
28. Considering the above, since the petitioner has not satisfied the first condition contemplated under Section 37 of NDPS Act, this Court has no other option but to reject the bail plea of the petitioner. Hence, this Court concludes that the petitioner is not entitled to be enlarged on bail.

29. Accordingly, the Criminal Original Petition is dismissed.

sd/-
14/03/2022

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/ /2022
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.

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TO

- 1.The Inspector of Police,
Thanjavur West Police Station,
Thanjavur District.
- 2.The Superintendent,
Central Prison,
Trichy.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.HENRI TIPHAGNE, Advocate (SR-2001[I] dated 14/03/2022)

ORDER
IN
CRL OP(MD) No.2294 of 2022
Date :14/03/2022

RS/VR/SAR.1 (22.03.2022) 12P-5C