



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)
Reserved on : 02.03.2022
Delivered on : 10.03.2022
PRESENT

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The Hon`ble Mr.Justice K.MURALI SHANKAR
CRL OP(MD) . No.2870 of 2022

Vincent Selvaraj @ Thambu
vs.

... Petitioner/Accused No.2

State through,
The Inspector of Police,
Koodal Pudur Police Station,
Madurai City,
Madurai District.
(Crime No.1805 of 2020)

... Respondent/Complainant

For Petitioner : Mr.Niranjan S.Kumar,
Advocate.

For Respondent : Mr.E.Antony Sahaya Prabahar,
Additional Public Prosecutor.

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

PRAYER :-

For Bail in C.C.No.235 of 2021 on the file of the learned II Additional District Judge for NDPS Cases, Madurai.

ORDER : The Court made the following order :-

The petitioner/A.2 is facing a case for the offences punishable under Sections 8(c), 20(b)(ii)(C), 25 and 29(1) of Narcotic Drugs and Psychotropic Substances Act, 1985, in C.C.No.235 of 2021, on the file of the learned II Additional District Judge for NDPS Cases, Madurai, in Crime No.1805 of 2020, on the file of the respondent police, seeks bail.

2.The case of the prosecution is that on 14.12.2020 at about 09.00 p.m., while the respondent police were doing their patrolling duty at Anaiyur BSNL junction point, received a secret information that the accused 1 and 2 were going to sell Ganja in a vehicle near Drainage Bridge and on that basis, the respondent police has found that two persons, by parking Apachi vehicle bearing Registration No.TN-40-D-5592, were holding white colour sack and were separating the contents and on seeing the police party, both of them tried to start the vehicle and escape from the occurrence place and that the police surrounded and arrested them and seized the contraband of 27 kgs of Ganja, a sum of Rs.1,000/- and the two wheeler.



3.The case of the petitioner is that the respondent police has purposely foisted the case as against the petitioner in the very same police station in Crime No.1388 of 2020 for commercial quantity on 05.09.2020, that the petitioner was absconding as on the date of registration of the FIR in Crime No.1805 of 2020, that they have not stated about the petitioner's involvement in the previous case in Crime No.1388 of 2020 in the present FIR and that the petitioner is innocent and he has been falsely implicated in the above case also.

4.The learned counsel for the petitioner would submit that even according to the respondent police, the recovery was made from the first accused and confession was also alleged to have taken from the first accused, that there was absolutely no recovery from the petitioner and no confession was alleged to have taken from the petitioner and that absolutely there was no other material to connect the petitioner with the crime in question.

5.The learned counsel for the petitioner would further submit that in the absence of any other material, the confession of the co-accused is not sufficient enough to connect the person with the alleged offence, that the petitioner was added as an accused only based on the confession alleged to have taken from the first accused, that since the petitioner is not having any previous cases under NDPS Act, except the case registered in Crime No.1388 of 2020, which was, purposely foisted by the very same police and that therefore, the petitioner is entitled to be enlarged on bail.

6.No doubt, as rightly pointed out by the learned counsel for the petitioner, the recovery was allegedly made from the first accused and confession statement was also alleged to have taken from the first accused. But as rightly pointed out by the learned Additional Public Prosecutor, the petitioner was very much available at the occurrence place, that the petitioner and the first accused were separating the contents of white sack by parking the Apachi two wheeler and that both the accused, on seeing the police party had attempted to escape from the scene of occurrence, but the police party had surrounded them and arrested both of them.

7.At this juncture, it is necessary to refer the judgment of the Hon'ble Supreme Court in ***Union of India through Narcotics Control Bureau vs. Nawaz Khan*** in ***Crl.A.No.1043 of 2021*** dated 22.09.2021. In the said decision case, a car, in which, the respondent therein was travelling with the other two accused was intercepted and they have recovered two polythene packets hidden under the place where the wiper is connected to the front bonnet of the car and that since the respondent therein has claimed that there was no recovery from him, the High Court has granted bail holding that the twin conditions under Section 37 of NDPS Act get satisfied. When the same was challenged before the Hon'ble Supreme Court, the Hon'ble Supreme Court has observed as follows:-



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"21. In the present case, the High Court while granting bail to the respondent adverted to two circumstances, namely (i) absence of recovery of the contraband from the possession of the respondent and (ii) the wrong name in the endorsement of translation of the statement under Section 67 of the NDPS Act.

22. We shall deal with each of these circumstances in turn. The respondent has been accused of an offence under Section 8 of the NDPS Act, which is punishable under Sections 21, 27A, 29, 60(3) of the said Act. Section 8 of the Act prohibits a person from possessing any narcotic drug or psychotropic substance. The concept of possession recurs in Sections 20 to 22, which provide for punishment for offences under the Act. In **Madan Lal and Another v. State of Himachal Pradesh**¹⁶ this Court held that

"19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record are that all the accused persons were travelling in a vehicle and as noted by the trial court they were known to each other and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

21. It is highlighted that unless the possession was coupled with the requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

22. The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Supdt. & Remembrancer of Legal (2003) 7 SCC 465* Affairs, *W.B. v. Anil Kumar Bhunja [(1979) 4 SCC 274 : 1979 SCC (Cri) 1038 : AIR 1980 SC 52]* to work out a completely logical and precise definition of



"possession" uniform[ly] applicable to all situations in the context of all statutes.

23.The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended.

26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles."

What amounts to "conscious possession" was also considered in **Dharampal Singh v. State of Punjab**¹⁷, where it was held that the knowledge of possession of contraband has to be gleaned from the facts and circumstances of a case. The standard of conscious possession would be different in case of a public transport vehicle with several persons as opposed to a private vehicle with a few persons known to one another. In **Mohan Lal v. State of Rajasthan**¹⁸, this Court also observed that the term "possession" could mean physical possession with animus; custody over the prohibited substances with animus; exercise of dominion and control as a result of concealment; or personal knowledge as to the existence of the contraband and the intention based on this knowledge.

23.We have referred to the above precedents to reiterate the governing principles. At this stage of the proceedings, it needs only to be clarified that the trial is to take place this Court where evidence will be adduced.

24.As regards the finding of the High Court regarding absence of recovery of the contraband from the possession of the respondent, we note that in **Union of India v. Rattan Malik**¹⁹, a two-judge Bench of this Court cancelled the bail of an accused and reversed the finding of the High Court, which had held that as the contraband (heroin) was recovered from a specially made cavity above the cabin of a truck, no contraband



was found in the 'possession' of the accused. The Court observed that merely making a finding on the possession of the contraband did not fulfil the parameters of Section 37(1)(b) and there was non-application of mind by the High Court."

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8.The above decision is squarely applicable to the case on hand. Hence, this Court is not satisfied with the twin conditions under Section 37 of NDPS Act.

9.Admittedly, the petitioner is having three previous cases, in which, two cases were for the offence under Section 397 IPC and one case under the NDPS Act. The petitioner, even in his petition, has specifically stated that he was implicated as an accused in Crime No.1388 of 2020 for commercial quantity of 22 kgs of Ganja on the file of the very same police.

10.The learned counsel for the petitioner would submit that there was no recovery from the petitioner and he was implicated only based on the confession statement taken from the co-accused in Crime No.1388 of 2020 and that therefore, the said case cannot be considered as a previous case under the NDPS Act. He would further submit that the petitioner has already been granted bail in Crl.O.P. (MD)No.2882 of 2022 dated 22.02.2022 in connection with the Crime No.1388 of 2020 on the file of the same police station.

11.Even assuming for arguments sake, that the contention of the learned counsel for the petitioner can be accepted and consequently, if it is taken that the second condition gets satisfied, as per the settled legal position, the twin conditions contemplated under Section 37 of NDPS Act are to be considered as conjunctive and that since the first condition is not satisfied, this Court has no other option, but to reject the bail plea. Hence, this Court is not inclined to grant bail to the petitioner.

12.In the result, this Criminal Original Petition is dismissed.

sd/-

10/03/2022

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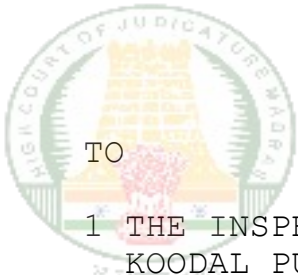
/ /2022

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

CSM

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
KODAL PUDUR P.S MADURAI CITY,
MADURAI DISTRICT.
- 2 THE SUPERINTENDENT,
CENTRAL PRISON, MADURAI.
- 3 THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

COPY TO:

THE II ADDITIONAL DISTRICT JUDGE FOR NDPS CASES,
MADURAI

+1. CC to M/S.NIRANJAN.S.KUMAR Advocate SR.No.1948

ORDER

IN

CRL OP(MD) No.2870 of 2022

Date :10/03/2022

SS/PN/SAR:IV/16.03.2022 : 6P/6C