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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

(Criminal Jurisdiction)

Reserved on : 26.04.2022

Delivered on : 28.04.2022

PRESENT

The Hon`ble Mr.Justice K.MURALI SHANKAR

CRL OP(MD) . No.6103 of 2022

Karthick @ Valukkai Karthick

... Petitioner/Accused No.2

vs.

The State represented by
The Inspector of Police,
Mathichayam Police Station,
Madurai.

(Crime No.137 of 2021)

... Respondent/Complainant

For Petitioner : Mr.K.Dinesh,
Advocate.

For Respondent : Mr.R.Meenakshi Sundaram,
Additional Public Prosecutor.

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

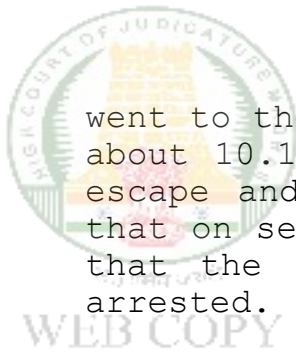
PRAYER :-

For Bail in C.C.No.511 of 2021 on the file of the learned Additional District Judge/Presiding Officer, Ist Additional Special Court for EC & NDPS Act Cases, Madurai (FAC).

ORDER : The Court made the following order :-

The petitioner/A.2, who is facing a case for the offences punishable under Sections 8(c) r/w 20(b)(ii)(C) and 29(1) of Narcotic Drugs and Psychotropic Substances Act, in C.C.No.511 of 2021 on the file of the learned Additional District Judge/Presiding Officer, Ist Additional Special Court for EC & NDPS Act Cases, Madurai (FAC), in Crime No.137 of 2021, on the file of the respondent police, seeks bail.

2.The case of the prosecution is that on 14.04.2021 at about 09.15 a.m., on receiving a secret information, the respondent police



went to the Mathima Mosque and found a old depilated building and at about 10.15 a.m., on noticing the police, two persons had tried to escape and the respondent police had nabbed the said two persons, that on search, they were in possession of 15 kgs of ganja each and that the contraband was recovered and the said two persons were arrested.

3.It is further case of the prosecution that on the basis of the confession statement taken from the said accused, the accused 3 to 6 were added and they were also arrested subsequently.

4.The case of the petitioner is that even according to the prosecution, 15 kgs of ganja alone was allegedly recovered from the petitioner, that since the commercial quantity of ganja was not recovered, the question of invoking Section 37 of NDPS Act does not arise, that the petitioner is innocent and he has not committed any offence as alleged by the prosecution and that the respondent police has falsely implicated the petitioner in the above case.

5.The learned counsel for the petitioner would submit that the petitioner was in Coimbatore at the relevant point of time and he was not at all available at the occurrence place as stated by the prosecution, that the petitioner at the time of remand, had stated before the Judicial Magistrate No.2, Madurai that the respondent police had arrested him on 13.04.2021 at Coimbatore and that he was no way connected with the alleged offence.

6.The learned Additional Public Prosecutor would submit that 30 kgs of ganja was recovered from the petitioner and the other accused, that they were in joint possession of 30 kgs of ganja, that the petitioner is having eight previous cases for the offence under IPC including murder case and for the offence under SC/ST (POA) Act and that the petitioner had actually participated in the transportation, storing and selling of ganja.

7.The learned counsel for the petitioner would further submit that the petitioner is not having any previous cases under NDPS Act.

8.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:-



"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.

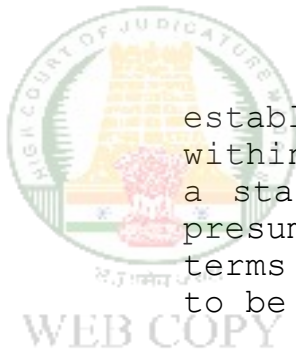
21. It is highlighted that unless the possession was coupled with the requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

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 Mallik* 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."

9. This Court, in batch of cases in ***Crl.O.P. (MD) No.5093 of 2021 etc., 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 observed as follows:-

"18. 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."

10. In the case on hand, it is the specific case of the prosecution that the petitioner and the first accused were arrested at the same place and 30 kgs of ganja was recovered from them.

11. No doubt, the respondent police has prepared the Seizure Mahazar as if 15 kgs of ganja was recovered from the petitioner as well as from the first accused, but the fact remains that they were found in possession of 30 kgs of ganja and the petitioner was arrested along with the first accused.

12. Though the learned counsel for the petitioner has raised a defence of alibi that the petitioner was in Coimbatore at the time of the alleged recovery, the same cannot be gone into at this stage.

13. Moreover, the petitioner has not produced any iota of material to show that he was in Coimbatore at the relevant point of time.

14. As already pointed out, the petitioner is having eight previous cases for the offence under IPC including murder case, but at the same time, the petitioner is not having any previous cases under NDPS Act.

15. Since the petitioner is not having any previous cases under NDPS Act, this Court can very well observe that the petitioner is not likely to commit any such offence, after coming out on bail, but at the same time, since the contraband of 30 kgs of commercial quantity was recovered from the petitioner and the first accused and that the petitioner was arrested along with the first accused at the same place, this Court cannot record a finding that the petitioner is not guilty of such offence. Hence, this Court has no other option, but to dismiss the bail plea of the petitioner.



16. In the result, this Criminal Original Petition is dismissed.
sd/-

28/04/2022

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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.

TO

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

ORDER

IN

CRL OP(MD) No.6103 of 2022

Date : 28/04/2022

SS/SVR/SAR:II/10.05.2022 : 6P/4C