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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

(Criminal Jurisdiction)

Reserved on : 23.08.2022

Delivered on : 25.08.2022

PRESENT

The Hon`ble Mr.Justice K.MURALI SHANKAR

CRL OP(MD) . No.14781 of 2022

1. A.Selvam
2. A.Mujip

... Petitioners/Accused 1 & 2

Vs

The State through represented by
The Inspector of Police,
Mangalmedu Police Station,
Perambalur District.
(Crime No.208 of 2021)

... Respondent/Complainant

For Petitioners : Mr.R.Venkateshwar, Advocate.

For Respondent : Mr.T.Senthil Kumar,
Additional Public Prosecutor.

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

PRAYER :-

For Bail in C.C.No.27 of 2022 before the learned Additional District and Sessions Judge, Special Court for EC and NDPS Act Cases, Pudukkottai, in Crime No.208 of 2021 on the file of the Respondent Police.

ORDER : The Court made the following order :-

The petitioners/A.1 & A.2 are facing a case for the offences punishable under Sections 8(c), 20(b)(ii)(C) and 25 of NDPS Act, in C.C.No.27 of 2022 on the file of the learned Additional District and Sessions Judge, Special Court for EC and NDPS Act Cases, Pudukkottai, in Crime No.208 of 2021, on the file of the respondent police, seek bail.

2. The case of the prosecution is that on 19.04.2021, when the defacto complainant, who is working as a conductor in Government bus, along with driver took a bus from Velur, at about 01.00 p.m.,



seven passengers boarded on the bus and out of seven passengers, two passengers, who are the petitioners herein, acted in suspicious manner, due to that, the defacto complainant searched the petitioners' bag and they have found that the petitioners were in possession of 28 kgs of ganja. Hence, the complaint.

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3. The learned counsel for the petitioners would submit that the petitioners are innocents and they have not committed any offence as alleged by the prosecution and that they have been falsely implicated in the above case.

4. The learned Additional Public Prosecutor would submit that the entire contraband of 28 kgs of ganja was recovered from the petitioners and that the petitioners are not having any previous cases under NDPS Act.

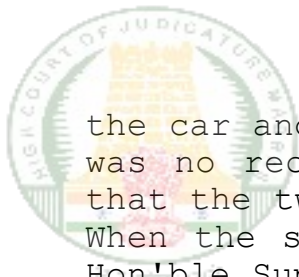
5. No doubt, the petitioners' earlier application for bail in CrI.O.P.(MD)7432 of 2022 was dismissed by this Court and subsequent application in CrI.O.P.(MD)No.12259 of 2022 was ordered to be dismissed as withdrawn vide order dated 25.07.2022.

6. The learned counsel for the petitioners has relied on the decision of the High Court of Andhra Pradesh at Amaravati in **Arun Kumar Mahipal Singh vs. State in Criminal Petition No.2436 of 2022** and the decision of the **High Court of Orissa at Cuttack in Kishore Bira vs. State of Odisha in BLAPL No.9629 of 2021**.

7. In **Arun Kumar Mahipal Singh's case**, though the contraband involved is of commercial quantity, the High Court, without considering as to whether the petitioner/accused has satisfied the twin conditions contemplated under Section 37 of NDPS Act, by taking note of the facts that the accused was in jail for more than 240 days and that charge sheet was also filed, has granted bail.

8. In **Kishore Bira's case**, a commander jeep was intercepted and on seeing the police party, the owner of the vehicle ran away from that place, that the police had arrested the driver and the petitioner therein and taking note of the fact that the petitioner was hired as a labourer for loading and unloading of the bags and he was fully ignorant about the materials in the bags, the High Court by observing that Section 20 of NDPS Act is not attracted and that keeping a person in custody for such a long time without any trial is not justified and violative of his fundamental right, has granted bail.

9. 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 CrI.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.



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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."

10. 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."

11. It is settled law that the twin conditions contemplated under Section 37 of NDPS Act are to be considered as conjunctive and not alternative.

12. In the case on hand, as already pointed out, even according to the prosecution, the petitioners are not having any previous cases under NDPS Act and hence, this Court can very well record a finding that the petitioners are not likely to commit any such offence, after coming out on bail, but at the same time, considering the fact that the entire contraband of 28 kgs of ganja, which is of commercial quantity, was recovered from the petitioners, this Court cannot record a finding that there are reasonable grounds for believing that the petitioners are not guilty of such offence.

13. Considering the above, this Court has no hesitation to hold that the petitioners have failed to satisfy the twin conditions contemplated under Section 37 of NDPS Act and as such, the petitioners are not entitled to be enlarged on bail and hence, this petition is liable to be dismissed.

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

Sd/-
25/08/2022

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Sub-Assistant Registrar (C.S.II)
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 ADDITIONAL DISTRICT AND
SESSIONS JUDGE, SPECIAL COURT FOR EC AND
NDPS ACT CASES, PADUKKOTTAI.
2. THE INSPECTOR OF POLICE,
MANGALMEDU POLICE STATION,
PERAMBALUR DISTRICT.
3. THE SUPERINTENDENT,
CENTRAL PRISON, TRICHY.
4. THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT,
MADURAI.

ORDER

IN

CRL OP (MD) No.14781 of 2022

Date :25/08/2022

SP/JM/SAR II/26/08/2022/7P/5C