



CRL MP(MD) No.5363 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 29.09.2023
PRONOUNCED ON : 03.11.2023

CORAM:
THE HONOURABLE MR. JUSTICE P.DHANABAL

Crl. M.P. (MD) No.5363 of 2019 in Crl. A.(MD) No.475 of 2017

B. Kaliyugakannan

... Petitioner / Accused No.2
(Accused in Jail)

Vs.

State represented by:
The Intelligence Officer,
NCB South Zonal Unit,,
Chennai.

[NCB F. No.48/1/02/2015/NCB-MDU] ... Respondent/Complainant

PRAYER CRL MP(MD)No.5363 of 2019: Criminal Miscellaneous petition has been filed under Section 389(1) of Criminal Procedure Code, praying to suspend the sentence imposed against the petitioner / 2nd accused in C.C. No.131 of 2015 on the file of the learned Additional District and Sessions Judge / Presiding Officer, Special Court for EC&NDPS Act Cases, Pudukottai dated 06.10.2017 and release the petitioner on bail till the disposal of the appeal.

PRAYER IN Crl. A.(MD) No.475 of 2017:

To take this file an appeal call for records relating to judgment in C.C.No.131 of 2015 dated on 06.10.2017 on the file of the Additional District Sessions Judge/Presiding Officer Special Court for E.C. And NDPS Act Case, Pudukkotai and set aside the same and acquit the Appellant from all charges framed against him and thus render justice.

For Petitioner : Mr. S. Murugendran, Advocate
For Respondent : Mr. C. Arulvadivel @ Sekar,
Senior Counsel / Special Public
Prosecutor [for NCB Cases]



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ORDER

This Criminal Miscellaneous Petition in Crl. M.P. (MD) No.5363 of 2019 has been filed by the petitioner / 2nd accused to suspend the sentence imposed against him in C.C. No.131 of 2015 on the file of the learned Additional District and Sessions Judge / Presiding Officer, Special Court for EC&NDPS Act Cases Pudukottai dated 06.10.2017 and release the petitioner on bail till the disposal of the appeal in Crl. A. (MD) No.475 of 2017.

2. The case of the prosecution is that on 24.05.2015, the respondent police had received a secret information and based on that information, on the same day at about 17.00 hours, the NCB Officers went to the place of occurrence along with two independent witnesses. The petitioner along with other accused entered into criminal conspiracy at Virudhunagar and other places in procuring, possessing, transporting, selling and illicit trafficking of Alprazolam, a psychotropic substance covered under NDPS Act. When the accused A1 had transported the Alprazolam in a jute bag and handed over to A2 and A3 to sell the same, they were searched and seized contraband. Thereafter, a Mahazar was prepared and the proceedings were completed at 23.30 hours. Thereafter the accused were arrested and FIR was



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registered. Thereafter, investigation was conducted by the investigating officer and then final report was filed against the accused for the contravention of provisions of Section 8(c) r/w 22, 28 and 29 of the NDPS Act as amended and are punishable under Sections 22, 28 and 29 of the NDPS Act, as amended. The trial court had taken cognizance in C.C. No.131 of 2015 and charges were framed against the accused for the offence under Section 8(c) r/w 22, 28 and 29 of the NDPS Act as amended. Thereafter, the prosecution had examined PW1 to PW7 and marked Ex.P.1 to Ex.P.39 and M.O.1 to 11. Thereafter, the trial court has acquitted the accused A1 to A3 from the charge under Section 8(c) r/w 28 of NDPS Act and further convicted the accused A1 to A3 for the offences under Section 8(c) r/w 22(c) and 29 of NDPS Act 1985 and sentenced to undergo Rigorous Imprisonment for 12 years each and to pay a fine amount of Rs.1,00,000/- each. In default, to undergo Rigorous Imprisonment for three years and the above sentences imposed shall run concurrently.

3. The learned counsel for the petitioner would contend that the petitioner was arraigned as A1 and the trial court has wrongly convicted them for the offence under Section 8(c) r/w 22(c) and 29 of NDPS Act 1985. Ex.P.1, information received by PW1, is highly doubtful. The trial court failed to consider the evidence of PW3, independent witness, who turned hostile. Ex.P.5 Mahazar, was not prepared in the



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place of occurrence and witnesses were included in the Mahazar at later point of time. Further the petitioner was not in possession of contraband at the time of arrest and the petitioner does not have any previous case and further the alleged contraband seized on 24.05.2015 and the same was produced before the Judicial Magistrate on 26.05.2015 with a delay and the same has not been explained by the prosecution and further the petitioner was taken into custody by the police on 24.05.2015 and he was produced before the learned Magistrate on 26.05.2015 and the seized contraband was not weighed in the spot and the same was weighed at the office of the police station. The mandatory provisions of NDPS Act have not been followed by the prosecution and the trial court has failed to consider the above said aspects. Therefore the conviction and sentence imposed by the trial court on the accused are to be set aside and the petitioner is entitled for acquittal and thereby, this Court may be pleased to suspend the sentence in respect of the conviction and sentence passed as against the petitioner/accused till the disposal of the criminal appeal.

4. Further, the learned counsel for the petitioner has argued that the petitioner has served half of the sentence imposed upon him and thereby he is entitled for the benefit of Section 436(A) of Cr.P.C.



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5. The learned Special Public Prosecutor / Senior counsel appearing for the respondent would submit that the A1 have transported Alprazolam contraband in a jute bag and handed over the same to A2 and A3 to sell the said contraband and thereby they have charged for the offence under Section 8(c) r/w 22, 28 and 29 of NDPS Act. After full trial, the trial court has convicted the accused for the offence under Section 8(c) r/w 22(c) and 29 of NDPS Act 1985 and sentenced to undergo Rigorous Imprisonment for 12 years each and to pay a fine amount of Rs.1,00,000/- for each charge. In default, to undergo Rigorous Imprisonment for three years and further acquitted the accused from the charge under Section 8(c) r/w 28 of NDPS Act. As far as the grounds raised by the petitioners that it is well settled law that the Courts must be circumspect while drawing adverse inference against the accused in cases pending trial and under investigation, however, the attitude of the prosecution witnesses in turning hostile, after deposing clearly in chief corroborating the oral and documentary evidence, necessitates this Court to deviate from the well accepted judicial thinking and traverse on a different line, as the need of the hour necessitates a different way of thinking for the benefit of the society at large. Hence the mere fact that the independent witness has turned hostile is not a ground for acquittal. As far as the compliance of Section 42 of NDPS Act is concerned, in the instant case, Section



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42 of NDPS Act, is not applicable and only Section 43 of NDPS Act would be applicable as the seizure and arrest took place in the public place. In this context, PW1 has categorically deposed about the place of seizure and arrest. Therefore there is no violation of procedures under Section 43 of NDPS Act. The prosecution witnesses have categorically deposed about the secret information received from the informant and then the police party went to the place, searched the accused and seized the contraband and thereafter the accused were arrested and after arrest and seizure of property, a detailed report was sent to the higher authorities and thereby, the prosecution has followed the mandatory procedures under the NDPS Act and there is no violation of the procedures.

6. As far as the application of Section 436(A) of Cr.P.C. is concerned, the petitioner is not entitled to the benefit of Section 436(A) of Cr.P.C. As per Section 436 (A) of Cr.P.C., it is applicable only to the under-trial prisoners and not to the convicts and further, the petitioner/accused is a convict and he has been convicted for the offence under Section 8(c) r/w 29 of NDPS Act. In this case, the trial court has awarded punishment of 12 years and now the petitioner has completed 8 years and 3 months. The maximum punishment prescribed in the said Act is 20 years and therefore the petitioner's case cannot be considered under Section 436(A) of Cr.P.C.



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7. Heard both sides and perused the entire materials available on record.

8. In this case, the trial Court has acquitted the accused A1 to A3 from the charge under Section 8(c) r/w 28 of NDPS Act and further convicted the accused A1 to A3 for the offences under Section 8(c) r/w 22(c) and 29 of NDPS Act 1985 and sentenced to undergo Rigorous Imprisonment for 12 years each and to pay a fine amount of Rs.1,00,000/- each. In default, to undergo Rigorous Imprisonment for three years. Aggrieved over the same, the petitioner has preferred appeal in Crl. A. No.475 of 2017 and the same are pending.

9. The main contention of the learned counsel appearing for the petitioner is that there are prima facie grounds made out to acquit the accused and thereby, sentence imposed on the petitioners may be suspended till disposal of appeals. Whereas the contention of the respondent is that already in the main appeals, the cases are posted for arguments and now the petitioners have commenced their arguments. Already the petitioner is in custody for around 9 years and now at the verge of final disposal of main appeals, this petition has been filed by the petitioner and therefore this petition is liable to be dismissed.



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10. The learned counsel for the petitioner submitted that the petitioner was convicted for the offence under Section 8(c) r/w 22(c) and 29 of NDPS Act 1985 and sentenced to undergo Rigorous Imprisonment for 12 years each and to pay a fine amount of Rs.1,00,000/- each and he had already served more than 8 years and thereby, he is entitled for the benefit under Section 436(A) of Cr.P.C. In order to support his contention, the learned counsel for the petitioner has relied upon the following judgment in:

Satender Kumar Antil v. Central Bureau of Investigation and another reported in 2022 LiveLaw (SC) 577 -

Wherein, the Hon'ble Supreme Court in Para Nos.42, 43, 44, 45, 46 and 64, has held as follows:-

“42. Section 389 of the Code concerns itself with circumstances pending appeal leading to the release of the appellant on bail. The power exercisable under Section 389 is different from that of the one either under Section 437 or under Section 439 of the Code, pending trial. This is for the reason that “presumption of innocence” and “bail is the rule and jail is the exception” may not be available to the



appellant who has suffered a conviction. A mere pendency of an appeal per se would not be a factor.

43. A suspension of sentence is an act of keeping the sentence in abeyance, pending the final adjudication. Though delay in taking up the main appeal would certainly be a factor and the benefit available under Section 436A would also be considered, the Courts will have to see the relevant factors including the conviction rendered by the trial court. When it is so apparent that the appeals are not likely to be taken up and disposed of, then the delay would certainly be a factor in favour of the appellant.

44. Thus, we hold that the delay in taking up the main appeal or revision coupled with the benefit conferred under Section 436A of the Code among other factors ought to be considered for a favourable release on bail.

45. However, we hasten to add that if the court is inclined to release the appellant on bail, it has to be predicted on his own bond as facilitated by Sub-Section(1).

Section 436A of the Code

436A. Maximum period for which an undertrial prisoner can be



detained – Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation.____ In computing the period of detention under this Section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded.



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46. Section 436A of the Code has been inserted by Act 25 of 2005. This provision has got a laudable object behind it, particularly from the point of view of granting bail. This provision draws the maximum period for which an undertrial prisoner can be detained. This period has to be reckoned with the custody of the accused during the investigation, inquiry or trial. We have already explained that the word 'trial' will have to be given an expanded meaning particularly when an appeal or admission is pending. Thus, in a case where an appeal is pending for a long time, to bring it under Section 436A, the period of incarceration in all forms will have to be reckoned, and so also for the revision.

64. We do not wish to deal with individual enactments as each special Act has got an objective behind it, followed by the rigor imposed. The general principle governing delay would apply to these categories also. To make it clear, the provision contained in Section 436(A) of the Code would apply to the Special Acts also in the absence of any specific provision. For example, the rigor as provided under Section 37 of the NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person. We do feel that more



the rigor, the quicker the adjudication ought to be. After all, in these types of cases number of witnesses would be very less and there may not be any justification for prolonging the trial. Perhaps there is a need to comply with the directions of this Court to expedite the process and also a stricter compliance of Section 309 of the Code”.

11. On Careful perusal of the above said judgment, it is clear that Section 436 (A) of Cr.P.C. would apply to the Special Act also in the absence of any specific provisions. Further the word trial will have to be given an expanded meaning particularly when an appeal or admission is pending for a long time, to bring under Section 436(A), the period of incarceration in all forms will have to be reckoned, and so also for the revision. Further as per Section 436(A) of Cr.P.C., the petitioner has to complete half of the punishment prescribed for a particular offence. Maximum punishment for the offence under Section 8(c) r/w 22(c) of NDPS Act is 20 years. In this case, the petitioner is a convict and the trial court has awarded 12 years of Rigorous Imprisonment for the offence under Section 8(c) r/w 22(c) of NDPS Act and 12 years of Rigorous Imprisonment for the offence under Section 8(c) r/w 29 of NDPS Act and both the sentences shall run concurrently. Even according to the Section 436 (A) of Cr.P.C., half of the period of sentence has to be served by the under-trial



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prisoner. Here the maximum sentence prescribed for the offence under Section 22(c) of NDPS Act is 20 years and the petitioner has completed only around 9 years and thereby, the contention of the learned counsel appearing for the petitioner that he is entitled for the benefit of Section 436(A) of Cr.P.C., is not an acceptable one. However the case is pending for more than 8 years and the petitioner also filed this application for suspension of sentence in the year 2019 and the same is pending for more than 4 years. The petitioner has served sentence period around 9 years ie., $\frac{3}{4}$ period of sentence awarded by the trial court and no previous cases are pending against this petitioner.

12. Considering the above said aspects and considering the fact that the petitioner has already served sentence for around 9 years and considering the facts and circumstances of the case, this Court is inclined to suspend the sentence imposed on the petitioner.

13. In the result, these Criminal Miscellaneous Petition is allowed. Accordingly, the sentence imposed on the petitioner alone is hereby suspended and bail is granted on the following conditions:.



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13(a) The petitioner shall execute a bond for a sum of Rs.1,00,000/- (Rupees One Lakh only) with two sureties each for a like sum to the satisfaction of the Court of Additional District and Sessions Judge / Presiding Officer, Special Court for EC&NDPS Act Cases, Pudukottai District.

13(b) The petitioner shall appear before the trial court on all working days at 10.30 a.m. until further orders.

sd/-

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

mjs

To

- 1.THE ADDITIONAL DISTRICT AND SESSIONS JUDGE / PRESIDING OFFICER,
SPECIAL COURT FOR EC&NDPS ACT CASES, PUDUKOTTAI
- 2.THE INTELLIGENCE OFFICER,
NCB SOUTH ZONAL UNIT,,
CHENNAI.
- 3.THE SUPERINTENDENT,
CENTRAL PRISON,
MADURAI.



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

ORDER
IN
CRL MP(MD) No.5363 of 2019
IN
CRL A(MD) No.475 of 2017
Date :03/11/2023

RK (09/11/2023) 15P / 5C

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