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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)

Wednesday, the Twenty Second day of November Two Thousand and Twenty Three

PRESENT

The Hon`ble Mr.Justice K.K. RAMAKRISHNAN

CRL MP(MD) Nos.6113 & 7793 of 2023

IN

CRL A(MD) Nos.70 & 5 of 2023

KUMARAVEL

... APPELLANT/ACCUSED NO.3

IN CRL MP(MD).6113/2023 IN CRL A(MD).70/2023

JEYAMARI

... Appellant / Accused No.4

IN CRL MP(MD).7793/2023 IN CRL A(MD).5/2023

Vs

STATE REP.BY

THE INSPECTOR OF POLICE

KEERAITHURAI POLICE STATION,
MADURAI DISTRICT.

CR.NO.4/2021

... RESPONDENT/COMPLAINANT

IN BOTH CRL MP's

Prayer in CRL MP(MD).6113/2023 :

To suspend the sentence imposed against the petitioner in C.C.No.280/2021 dt 08.11.2022 on the file of the Learned II Additional Special Court for NDPS Act Cases Madurai and enlarge the petitioner on bail pending disposal of above criminal appeal.

Prayer in CRL A(MD).70/2023 :

To call for the records relating to the judgment in C.C.No.280/2021 dated 08.11.2022 on the file of the Learned II Additional Special Court for NDPS Act Cases, Madurai and set aside the same and allow this Criminal Appeal.

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Prayer in CRL MP(MD).7793/2023 :

To suspend the sentence imposed in CC.No.280 of 2021 dated 08.11.2022 on the file of the learned II Additional Special Court for NDPS Act Cases, Madurai till the disposal of the appeal.

Prayer in CRL A(MD) No.5 of 2023:

To call for the records relating to the Judgment passed in C.C.No.280 of 2021 dated 08.11.2022 on the file of the Learned II Additional Special Court for NDPS Act Cases, Madurai and set aside the same and acquit the Appellant / Accused No.4 from the charges leveled against him.

Common Order : These petitions coming up for orders on this day, upon perusing the petitions filed in support thereof and upon hearing the arguments of MR.M.SUBASH BABU, Senior Counsel for M/S.CHANDRA BOSE.M, Advocate for the petitioner in CRL MP(MD).6113/2023 in CRL A(MD).70/2023 and M/S.R.GOWRI SHANKAR, Advocate for the petitioner in CRL MP(MD).7793/2023 in CRL A(MD).5/2023 and of MR.T.SENTHIL KUMAR, Additional Public Prosecutor on behalf of the Respondents in both CRL MP's, the court made the following order:-

Reserved on : 22.09.2023

Pronounced on : 22.11.2023

The petitioners are accused Nos.3 & 4 in C.C.No.280 of 2021 wherein they were convicted for the offence under Sections 8(c) read with 20(b) (ii) (c) of the NDPS Act and sentenced to undergo Rigorous Imprisonment for 10 years each and a fine of Rs.1,00,000/-each, in default to undergo 12 months simple imprisonment.

2. The case of the prosecution is that on 03.01.2021 at 07.00 a.m, the respondent received a secret information regarding the transport of 'Ganja' in Keeraithurai area.

After complying the procedure stated in the NDPS Act, PW.3 communicated the said



information to the Superior and got permission and proceeded towards the occurrence place with the informer. At 8.15 a.m, on the same day, four persons were coming in 2 two wheelers bearing Registration No.TN64U2270 and Registration No.TN59BP7740 and the same was identified by the informer. From the said persons 30 kg of 'Ganja' was recovered. Thereafter, PW.3 registered the case in Crime No.4 of 2021 for the offence under Sections 8(c) read with 20(b) (ii) (c), 25 and 29(1) of the NDPS Act. After registration of the case, the investigation officer conducted the investigation and filed the final report before the II-Additional Special Court for NDPS Act Cases, Madurai.

3. The learned Special Judge took the final report on file in C.C.No.280 of 2021 and on appearance of the accused served the copies under Section 207 Cr.P.C and framed the necessary charges. After framing necessary charges, the charges were read over to the accused and the accused denied the same as false and they pleaded not guilty and stood for trial. Thereafter, the trial was commenced.

4. Before the trial Court, to prove the case, the prosecution examined PW.1 to PW.5, marked Ex.P1 to Ex.P13 and M.O.1 to M.O.8.



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5. Thereafter, the learned trial Judge put the incriminating materials available against the petitioners and questioned under Section 313 Cr.P.C, and they all denied the same as false. Therefore, the learned trial Judge proceeded the trial and no witness was examined on the side of the accused and no documents were marked.

6. The learned trial Judge after considering the detailed argument and the material available on record, convicted the accused Nos.1 to 4 for the above said offences. Challenging the said conviction and sentence, the petitioners filed the present criminal appeals along with the suspension of sentence petitions before this Court.

7. Earlier, their bail petitions were dismissed on merits apart from taking into consideration of the fact that they are involved in the previous cases. Thereafter, the petitioners collected materials to show that there is no previous case against the petitioners. Hence, they filed the present petitions stating that the earlier disclosure of antecedents is false and also claiming number of points were omitted before this Court in the earlier suspension of sentence petitions.

8. The learned Senior Counsel Mr.M.Subash Babu appearing for the petitioner/A3 submitted that during hearing of the earlier bail petition, the investigating agency furnished false particular regarding the previous antecedents of the petitioners. Apart from that the learned Senior Counsel mainly argued the case on

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the followings judgments of the Hon'ble Supreme Court:

1. CrI.A.No.1443 of 2023[Simarnjit Singh v. State of Punjab]

2.2023 Live Law (SC) 549 [Mangilal vs. The State of Madhya Pradesh]

3.CrI.A.No. 3191 of 2023 [Yusuf @ Asif v. State]

4.Bail Application No.4125 of 2021 of Bombay High Court[Santosh Pandurang Parte v. Amar Bahadur Maurya and another]

5.CrI.M(Bail)1324 of 2012 in CrI.A.No.338 of 2021 before Delhi High Court [Ms.Betty Rame v. Narcotics Control Bureau].

9. On the basis of the above judgments, the learned Senior Counsel stated that Section 52A of the NDPS Act is not complied in this case and hence, he seeks for suspension of sentence. He further submitted that the Hon'ble Supreme Court in the above cases acquitted the accused after considering the entire evidence that Section 52 A of the NDPS Act is not complied with.

10. The learned Additional Public Prosecutor on instructions, submitted that the respondent raised a point for non-compliance of Section 52A of the NDPS Act on the basis of the latest judgment is not applicable to the present case. He further submitted that they raised new plea regarding the non-compliance of Section 52A of the NDPS Act. He also submitted that after the earlier bail petitions were dismissed, subsequently as per the direction of this Court typeset was made ready and the



appeals are ready for final hearing before this Court. The learned Senior Counsel's submission is linked with the factual aspect, the said plea is new one. He requested this Court to take up the main appeals and also he specifically stated that there is no new point to entertain the bail petitions. In this case, the appellants are convicted by the trial Court for their possession of 30 Kg of 'Ganja' which is more than commercial quantity and as per the Hon'ble Supreme Court judgment, the appellants are entitled to acquittal for the non-compliance of Section 52 A of the NDPS Act to be decided in the course of the hearing of the criminal appeals, more particularly, in the light of the fact that the entire contraband is produced before the Court and sample also produced before the Court and the same was identified by the witnesses. The learned Additional Public Prosecutor further submitted that there is difference between the grant of bail and bail during the pendency of appeal preferred against the conviction. He seeks for dismissal of these bail petitions. He also placed reliance on the judgements of the Hon'ble Supreme Court where it is stated that Section 52A of the NDPS Act is not mandatory and also the applicability of Mohanlal Case for the present case is to be considered at the time of final hearing.

11. This Court has considered the rival submissions made by either side and perused the precedents relied upon by them.



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12. The learned Senior Counsel relied the judgment of the Hon'ble Supreme Court reported in Simarnjit Singh case. In the said judgment, the Hon'ble Supreme Court considered the special circumstances that the entire contraband were not produced before the Court. In the said circumstances, the non-compliance of the Mohanlal case is fatal. The next judgment of the Hon'ble Supreme Court in Mangilal case where the Hon'ble Supreme Court has considered the fatal aspect of the case where it is stated that the entire recovered contraband was not produced and independent witnesses turned hostile and also recording of the confession itself was doubtful and in addition to that the seized articles produced before the police station and one of the witnesses specifically stated that the contraband was in the police station. Considering the above factual circumstances and non-production of the contraband the Hon'ble Supreme Court acquitted the accused. The judgment of the Hon'ble Supreme Court in Yusuf @ Asif case, there is no primary evidence to prove the seizure and the production of contraband and hence, the Hon'ble Supreme Court on appreciation of the facts acquitted the accused. In this case, the petitioners relied the above judgment and seek the acquittal and also seek to grant bail during the pendency of the appeals.

13. Section 32A of the NDPS Act reads as follows:

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awarded under this Act.?Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force but subject to the provisions of section 33, no sentence awarded under this Act (other than section 27) shall be suspended or remitted or commuted.”

14. The said provision is partly struck down by the Hon'ble Supreme Court in the judgment reported in 2000 (8) SCC 437 in the case of Dadu v. State of Maharashtra, the Hon'ble Supreme Court after striking down the portion of Section 32A of the NDPS Act held as follows:

“28. This Court in Union of India v. Ram Samujh [(1999) 9 SCC 429 : 1999 SCC (Cri) 1522] held that the jurisdiction of the court to grant bail is circumscribed by the aforesaid section of the Act. The bail can be granted and sentence suspended in a case where there are reasonable grounds for believing that the accused is not guilty of the offence for which he is convicted and he is not likely to commit any offence while on bail and during period of suspension of the sentence. The Court further held: (SCC pp. 431-32, paras 6-8)

“6. The aforesaid section is incorporated to achieve the object as mentioned in the Statement of Objects and Reasons for introducing Bill



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No. 125 of 1988 thus:

‘Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985, the need to amend the law to further strengthen it, has been felt.’

(emphasis supplied)

7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a 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 the

NDPS Act, has succinctly observed about the adverse effect of such



activities in *Durand Didier v. Chief Secy., Union Territory of Goa* [(1990) 1 SCC 95 : 1990 SCC (Cri) 65] as under: (SCC p. 104, para 24)

‘24. 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 proportions 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, Parliament in its 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, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

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



(1) Section 32-A does not in any way affect the powers of the authorities to grant parole.

(3) Nevertheless, a sentence awarded under the Act can be suspended by the appellate court only and strictly subject to the conditions spelt out in Section 37 of the Act, as dealt with in this judgment.

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precedents relied by them. The said case Hon'ble Supreme Court acquitted the accused after analysis the evidence in the appeal against conviction. At this stage, this Court feels that there is no reason to disagree with the finding of the learned trial Judge by going deep into the appreciation of the entire facts of the case. That is beyond the jurisdiction of this Court under Section 389 Cr.P.C r/w 32 A of the NDPS Act as held by the Hon'ble Supreme Court in Preet Pal Singh v. State of U.P., reported in (2020) 8 SCC 645.

15.1. Preet Pal Singh v. State of U.P., (2020) 8 SCC 645:

35. in case of post-conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception attracted, once there is conviction upon trial. Rather, the court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong compelling reasons for grant of bail, notwithstanding an order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in

Section 389(1) CrPC.



38. In considering an application for suspension of sentence, the appellate court is only to examine if there is such patent infirmity in the order of conviction that renders the order of conviction prima facie erroneous. Where there is evidence that has been considered by the trial court, it is not open to a court considering application under Section 389 to reassess and/or re-analyse the same evidence and take a different view, to suspend the execution of the sentence and release the convict on bail.

16. In this aspect, it is relevant to note that the Hon'ble Supreme Court in the following judgments specifically stated the yardstick to follow in grant of bail is different from grant of the suspension of sentence after conviction.

16.1. *Satender Kumar Antil v. CBI*, (2022) 10 SCC 51:

55. 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.”



16.2. State of Punjab v. Deepak Mattu, (2007) 11 SCC 319:

“7..... Possible delay in disposal of the appeal and that there are arguable points by itself may not be sufficient to grant suspension of a sentence.”

16.3.Sidhartha Vashisht v. State (NCT of Delhi), (2008)5SCC230:

“29. The other consideration, however, is equally important and relevant. When a person is convicted by an appellate court, he cannot be said to be an “innocent person” until the final decision is recorded by the superior court in his favour.”

17. In this case, the learned trial Judge found that the recovery was made after complying of the formalities in the NDPS Act. The correctness of the said finding can be decided only at the time of the final hearing of the appeal. Further, according to the petitioners, they are confined in the prison from 03.01.2021. The learned trial Judge granted 10 years rigorous imprisonment for each accused. Hence, they are not even entitled to the benefit of Section 436 A of the amended Criminal Procedure Code. Further, this Court is prepared to take the prisoners' appeals in preference to the other appeals and papers also are ready, but the learned counsel insisted to consider the suspension petition without arguing the main appeals. In the said



circumstances, this Court finds no new grounds to entertain the second petition for suspension of sentence. Accordingly, these petitions are dismissed.

sd/-
22/11/2023

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/11/2023
Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

PJL
TO

- 1 THE II ADDITIONAL DISTRICT JUDGE,
ADDITIONAL SPECIAL COURT FOR NDPS ACT CASES, MADURAI.
- 2 THE INSPECTOR OF POLICE
KEERAITHURAI POLICE STATION, MADURAI DISTRICT.
- 3 THE SUPERINTENDENT,
CENTRAL PRISON, MADURAI.
- 4 THE COMMISSIONER OF POLICE,
MADURAI CITY, MADURAI DISTRICT.
- 5 THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

ORDER
IN
CrI.M.P.(MD)Nos.6113 and 7793 of 2023
in
CrI.A.(MD)Nos.70 and 5 of 2023
Date :22/11/2023

PKP/DD/SAR- /24.11.2023/ 15P/ 6C
Madurai Bench of Madras High Court is issuing certified
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