



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

Tuesday, the Twenty Seventh day of June Two Thousand and Twenty Three

PRESENT

The Hon`ble Mr.Justice K.MURALI SHANKAR

CRL MP(MD) No.6806 of 2023
in
CRL A(MD) No.293 of 2021

TAMILSELVAN

... Petitioner / Appellant

Vs

THE INSPECTOR OF POLICE
NIB CID UNIT,
THENI,
THENI DISTRICT.
(IN CRIME NO.85/2019).

... Respondent / Respondent

Petition filed praying that in the circumstances stated therein and in the petition filed therewith the High Court may be pleased to suspend the sentence imposed by the Judgement dt.29/6/2021 in CC No.428/2019 passed by the Learned I Additional Special Judge for NDPS Act Cases, Madurai pending disposal of this appeal.

Prayer in CRL A(MD). 293/ 2021 :

To allow this appeal and acquit the appellant from all the charges by setting aside the impugned judgment passed by the Learned I Additional Special Judge for NDPS Act Cases, Madurai in C.C.No.428 of 2019 dated 29.06.2021.

Order : This petition coming up for orders on this day, upon perusing the petition filed in support thereof and upon hearing the arguments of M/S.SELVAM J, Advocate for the petitioner and of Mr.r.MEENAKSHI SUNDARAM, Additional Public Prosecutor on behalf of the Respondent, the court made the following order:-

RESERVED ON	14.06.2023
PRONOUNCED ON	27.06.2023

This Criminal Miscellaneous Petition has been filed to suspend the sentence imposed on the petitioner by the learned Additional District Judge, I Additional Special Court for NDPS Act Cases, Madurai, in C.C.No.428 of 2019, dated 29.06.2021, till the disposal of this Criminal Appeal.



2. The case of the prosecution is that on 05.06.2019 at about 04.00 p.m., on receipt of secret information, the police party conducted a raid at Theni - Cumbum Road, Upparpa Vilakku and that the petitioner/ sole accused was intercepted and found that he was carrying a white colour gunny bag containing 22 kgs of Ganja and the police party, after seizing the contraband, arrested the petitioner and on that basis, FIR came to be registered in Crime No.85 of 2019 for the alleged offences under Sections 8(c) r/w 20(b)(ii)(C) of NDPS Act.

3. The respondent police, after completing the investigation, has filed the final report for the alleged offences under Sections 8 (c) r/w 20(b)(ii)(C) of NDPS Act and the case was taken on file in C.C.No.428 of 2019 and the same was pending on the file of the I Additional Special Court for NDPS Act Cases, Madurai.

4. During trial, the prosecution has examined 4 witnesses as P.W.1 to P.W.4, exhibited 12 documents as Ex.P.1 to Ex.P.12 and marked 3 material objects as M.O.1 to M.O.3. The defence has adduced neither oral nor documentary evidence.

5. The learned trial Judge, upon considering the evidence both oral and documentary and on hearing the arguments of both the sides, has passed the impugned judgment dated 29.06.2021 convicting the petitioner for the offence under Sections 8(c) r/w 20(b)(ii)(C) of NDPS Act and sentenced him to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.1,00,000/-, in default, to undergo 6 months Simple Imprisonment. Aggrieved by the said judgment of conviction and sentence, the accused has come forward with the present criminal appeal.

6. This is the fourth application filed by the petitioner seeking suspension of sentence. Earlier three applications were ordered to be dismissed, lastly on 23.02.2022.

7. The learned counsel appearing for the petitioner would submit that the compliance of Section 42 of NDPS Act is mandatory and the failure to take down the information in writing and sending the report forthwith to the immediate superior officer caused prejudice to the petitioner and in the present case, Section 42 of NDPS Act was not at all complied with and as such, the same vitiates conviction, that there are absolutely no particulars about the petitioner found in Ex.P.1, that non-examination of the informer before the trial Court is fatal to the prosecution, that the mandatory requirements under Section 52A of NDPS Act has been totally neglected and P.W.1 in his evidence would admit that the procedure contemplated under Section 52A was not followed, that though the contraband was seized on 05.06.2019, the same was remanded before the jurisdictional Court only on 10.06.2019, that the prosecution has not offered any acceptable reason or explanation



for the inordinate delay in submitting the contraband and is also delay in sending the samples to the Forensic Science Laboratory and since they have not adduced any evidence to show that where samples were kept before submitting Forensic Science Laboratory, the possibility of tampering the same cannot be ruled out, that the sample of seal was not sent to the Forensic Science Laboratory and that the investigation was shady and perfunctory.

8. The learned Additional Public Prosecutor appearing for the respondent would submit that the P.W.1, who received the secret information, had clearly deposed that while he was in police station on 05.06.2019 at 16.00 hours, he had received the secret information from the informer in person and after informing the same to the superior proceeded to record the same in writing and the same was forwarded to the Inspector from whom the necessary permission was obtained for further action and that thereby, the prosecution has proved that Section 42(2) of NDPS Act has been complied with. He would further submit that all the procedures contemplated under Sections 42 and 57 of NDPS Act were duly complied with. He would further submit that P.W.1 to P.W.4 corroborated the prosecution case, that the prosecution has laid strong evidence against the petitioner and the prosecution has proved the presumption beyond reasonable doubt, but the petitioner has failed to rebut the prosecution evidence, that though the witnesses were cross-examined at length, nothing has been materially elicited in their favour and that the trial Court, considering the entire evidence available on record, has rightly convicted the petitioner.

9. It is pertinent to note that the non-compliance of Sections 42 and 57 of NDPS Act has already been raised by the petitioner in the earlier application for suspension of sentence and the same was dealt with by this Court elaborately and came to the decision that the contention of the petitioner that the provisions under Sections 42 and 57 of NDPS Act were not complied with, cannot be accepted. Moreover, as rightly contended by the learned Additional Public Prosecutor, the points / aspects now canvassed by the learned counsel appearing for the petitioner are certainly matter for consideration in the main appeal.

10. The learned counsel appearing for the petitioner would submit that the petitioner has been in prison from the date of his remand i.e., on 05.06.2019 for the past 4 years and since this appeal is not taken up for final disposal, the petitioner is certainly entitled to get the relief of suspension of sentence and relied on two decisions of Punjab and Haryana High Court, one in **Daler Singh Vs. State of Punjab** reported in **2006 SCC OnLine P&H 1591** and the second one in **Talim Khan Vs. Intelligence Officer in CRM-44634-2021 in CRA-D-932-2019**.

11. In the first case, the accused therein was convicted for



the offences under NDPS Act and was sentenced to undergo Rigorous Imprisonment. The accused, by alleging that he has already served substantive sentence out of the sentence awarded for the offence and he has already undergone more than 7 years, sought for suspension of sentence and the Punjab and Haryana High Court, taking note of the spirit of Article 21 of the Constitution and also the admitted position that the accused has already undergone more than 7 years of substantive sentence, has granted the bail.

12. In the second decision case also, the accused therein was convicted for the offences under NDPS Act. The High Court, taking note of the fact that the petitioner has already undergone 5 and a half years of total custody and more than 2 years of custody after conviction, has granted the relief of suspension of sentence.

13. In the case on hand, as already pointed out, the petitioner has undergone 4 years of imprisonment.

14. The learned counsel appearing for the petitioner has also relied on the recent decision of the Hon'ble Supreme Court in **Mohd Muslim @ Hussain Vs. State (NCT of Delhi)** reported in **2023 LiveLaw (SC) 260**,

"Narcotic Drugs and Psychotropic Substances Act, 1985; Section 37 - Effect of delay in trial - Grant of bail on ground of undue delay in trial not fettered by Section 37 - Imperative of Section 436A of Code of Criminal Procedure Act - Requires inter alia the accused to be enlarged on bail if the trial is not concluded within specified periods - Applicable to offences under the NDPS Act - Held, special conditions as enacted under Section 37 can only be considered within constitutional parameters when the court is reasonably satisfied on a prima facie look at the material on record that the accused is not guilty - A plain and literal would effectively exclude grant of bail altogether - Further held, appellant deserved to be enlarged on bail - Appeal allowed.

Right to speedy trial - Laws which impose stringent conditions for grant of bail, may be necessary in public interest; yet, if trials are not concluded in time, the injustice wrecked on the individual is immeasurable - Incarceration has further deleterious effects - where the accused belongs to the weakest economic strata; immediate loss of livelihood, and in several cases, scattering of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in the event of an acquittal, the damage to the accused is irreparable), and ensure that



trials - especially in cases, where special laws enacted stringent provisions, are taken up and concluded speedily."

15. In the above case, the trial is in part-heard stage.

16. At this juncture, it is necessary to refer the judgment of the Hon'ble Supreme Court in **Narcotic Control Bureau Vs. Lokesh Chadha reported in 2021 SCC Online SC 178,**

"9.Where the trial has ended in an order of conviction, the High Court, when a suspension of sentence is sought under Section 389(1) of CrPC, must be duly cognizant of the fact that a finding of guilt has been arrived at by the Trial Judge at the conclusion of the trial. This is not to say that the High Court is deprived of its power to suspend the sentence under Section 389(1) of CrPC. The High Court may do so for sufficient reasons which must have a bearing on the public policy underlying the incorporation of Section 37 of the NDPS Act. At this stage, we will refer to the decision of a two-Judge Bench of this Court in Preet Pal Singh v State of Uttar Pradesh³ where Justice Indira Banerjee, speaking for the Court, observed as follows:

"35. There is a difference between grant of bail under Section 439 of the CrPC in case of pre-trial arrest and suspension of sentence under Section 389 of the CrPC and grant of bail, post-conviction. In the earlier case there may be presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the courts may be liberal, depending on the facts and circumstances of the case, on the principle that bail is the rule and jail is an exception, as held by this Court in Dataram Singh v. State of U.P. and Anr. (supra).

However, 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) of the Cr.P.C."

10. The principles which must guide the grant of bail in a case under the NDPS Act have been reiterated in several decisions of this Court and we may refer to the decision in *State of Kerala v Rajesh*⁴. The High Court unfortunately, in the present case, has not applied its mind to the governing provisions of the NDPS Act. On the basis of the material which emerged before the learned Special Judge and which forms the basis of the order of conviction, we are of the view that no case for suspension of sentence under Section 389(1) of CrPC was established. The order granting suspension of sentence under Section 389(1) of CrPC is unsustainable and would accordingly have to be set aside."

17. As rightly contended by the learned Additional Public Prosecutor, Section 37 of NDPS Act is very much applicable to the appeal cases.

18. It is pertinent to note that the petitioner is having 4 previous cases under NDPS Act. In the case on hand, 22 kgs of Ganja was recovered from the petitioner.

19. As rightly contended by the learned Additional Public Prosecutor, since the contraband was recovered from the petitioner and that the petitioner is having 4 previous cases, this Court has no hesitation to hold that the petitioner has miserably failed to satisfy the twin conditions contemplated under Section 37 of NDPS Act.

20. Considering the seriousness and gravity of the offence allegedly proved against the petitioner and the petitioner's failure to satisfy the twin conditions contemplated under Section 37 of NDPS Act, this Court is not inclined to suspend the sentence imposed on the petitioner at this point of time.

21. In the result, this Criminal Miscellaneous Petition is dismissed.

sd/-
27/06/2023

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/07/2023
Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.



To

1.The I Additional Special Judge for NDPS Act Cases,
Madurai.

2.The Inspector of Police,
NIB CID Unit,
Theni, Theni District.

3.The Superintendent,
Central Prison, Madurai.

4.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

ORDER

IN

CRL MP (MD) No.6806 of 2023

in

CRL A (MD) No.293 of 2021

Date :27/06/2023

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