



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)
Reserved on: 20.02.2023
Pronounced on: 03.03.2023
PRESENT

The Hon`ble Mr.Justice A.D.JAGADISH CHANDIRA
CRL OP(MD) . Nos.22851 and 22852 of 2022

WEB COPY

Ajesh

... Petitioner/Accused No.1
in Crl.O.P(MD) No.22851 of 2022

1. P.Santhosh Kumar
2. G.Sujeesh

... Petitioner/Accused NO.2 & 3
in Crl.O.P(MD) No.22852 of 2022

Vs

State Rep.by
The Inspector of Police,
Cumbum North Police Station,
Theni District
(Crime No.712 of 2021).

... Respondent/Complainant
in both petitions

IN BOTH PETITIONS

For Petitioner : M/s.V.Kathirvelu, Senior Counsel
for M/s.Sakthikumaran.T, Advocate.
For Respondent : Mr.T.Senthilkumar,
Additional Public Prosecutor

PETITIONS FOR BAIL Under Sec.439 of Cr.P.C.

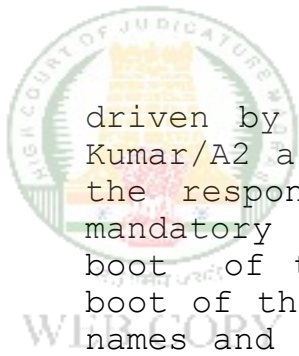
COMMON PRAYER :-

For Bail in Crime No.712 of 2021 on the file of the respondent police.

COMMON ORDER : The Court made the following order :-

The petitioners /A1 to A3 who were arrested and remanded to judicial custody on 21.11.2021 for the offences under sections 8(c) r/w.20(b)(ii)(C) and 29(1) and 25 of NDPS Act in Crime No.712 of 2021 on the file of the respondent police seeks bail.

2. The case of the prosecution is that on 21.11.2021 at about 06.45 hrs based on the secret information when the respondent police along with police party mounted on surveillance and involved in vehicle check up at New Bye pass road on Cumbum to Cumbum Mettu Junction at that time two cars bearing Reg.Nos.KL 39 A 9011 (Volkswagen) driven by A1/Ajesh and KL 49 D 7711(Maruthi Swift)



driven by A3/Sujeesh in which the owner of the said Car sh Kumar/A2 also travelled were intercepted and searched. On search by the respondent police after compliance of all the procedures as mandatory under NDPS Act they found 20kgs of ganja concealed in boot of the Volkswagen car and 22 Kgs of ganja was concealed in boot of the Maruthi Swift car, on enquiry they have disclosed their names and confessed that they have jointly purchased 42kgs of ganja in Vijayawada, Andhrapradesh for selling it for a higher price at Kerala. They were arrested at the spot at 9.30 am., and the case was registered at 10.00 am.

3. The learned senior counsel appearing for the petitioner would submit that petitioner in Crl.O.P(MD) No.22851 of 2022 is arrayed as A1 and the petitioners in Crl.O.P(MD) No.22852 of 2022 are arrayed as A2 and A3. As per the prosecution A1 was driving the Volkswagen car bearing Reg.No.KL 39 A 9011, in which the officials found 20kgs of contraband(ganja) and the accused 2 and 3 are alleged to have been driving Maruthi Swift car bearing Reg.No. KL 49 D 7711 and in which the officials alleged to have found 22 kgs of contraband(Ganja) He would further submit that the petitioners are innocent and the respondent police have fabricated a false case against them. The petitioner in Crl.O.P(MD) 22851 of 2022 and the petitioners in Crl.O.P(MD)22852 of 2022 have no nexus at all, whereas the respondent police have fabricated case in such a way as if all of them were travelling together. As per the prosecution the petitioners were stated to have been arrested at 9.00 a.m., and brought to the police station and the case was registered thereafter, but strangely the crime number of the case was found in the arrest memo thereby reflecting that the entire case was fabricated. He would further submit that the case has been registered by the Sub Inspector of Police who is not the authorised officer under the Act to register the case. He would further submit that the petitioners are also entitled for bail on merits on the ground that the respondent has not complied with the mandatory provisions under section 42 and 50 of the NDPS Act regarding search, arrest and seizure. He would further submit that the petitioners are in judicial custody from 21.11.2021 and that they do not have any bad antecedents, hence he seek bail.

4. The respondent police has filed a detailed counter. The learned Additional Public prosecutor would submit that it is a case where on specific information the respondent police intercepted two vehicles driven by the accused persons. The first accused was driving a Volkswagen car bearing Reg.Nos.KL 39 A 9011, in which the officials found 20kgs of contraband which was also recovered and A3 was driving Maruthi Swift car bearing Reg.No. KL 49 D 7711 and in that car they found 22 kgs of contraband(Ganja), in which A2 was the co passenger. It is a case of recovery of commercial quantity. Further he would submit that this is the second application for bail and the earlier applications for bail was dismissed as withdrawn on 04.11.2022 in Crl.O.P(MD) Nos.13198 of 2022 and 13179 of 2022.



Further even if the quantity recovered from both the persons are taken separately it will also make out recovery of commercial quantity. The case has been registered by the Sub Inspector of Police. As per G.O.Ms.No.161, Prohibition and Excise (VII) Department dated 18.08.92, the Sub Inspector of Police is the authorised officer for the purpose of section 42 and 67 of the Act. In this case the petitioners were found to be in conscious possession of commercial quantity of contraband from their respective vehicles. In such circumstances compliance of section 50 will not be applicable and presumption under Sections 35 and 54 of the NDPS Act operates as against the petitioner. He would further submit that the documents relied on by the petitioners are only arrest intimation which are sent to the relatives of the accused after their arrest and registration of the case and the presence of crime number in the arrest intimation does in no way vitiate or affect the case of the prosecution. He would further submit that the petitioners were arrested for having found in conscious possession of 42kgs of ganja which is a commercial quantity and in such circumstances even assuming that there had been any discrepancy at the time of registration it cannot be agitated at the time of consideration of bail and it can be raised at the stage of trial. In support of his contention the learned Additional Public Prosecutor relied on the judgment of the Hon'ble Apex Court in the case of **Union of India through Narcotics Control Bureau , Lucknow . vs.MD. Nawazkhan** reported in **(2021)10 SCC 100**.

5. Heard. Perused the materials available on record including the First Information Report.

6. It is the case where the car driven by the first accused was intercepted and 20kg of contraband was recovered and from the car of A2 bearing Reg. No. KL 49 D 7711, in which A3 was the co-passenger and in that car 22kgs of contraband was seized. Even it is the case of the learned counsel for the petitioner that there was no nexus between A1 and A2 and A3. However even taking into consideration the contraband was segregated seized are commercial quantity.

7. It is the case of the learned Senior Counsel for the petitioner that the Sub Inspector of Police is not the authorised officer under the Act to register the case and arrest the accused. In this regard it is relevant to extract G.O.Ms.No.161, Prohibition and Excise (VII)Department dated 18.08.92, which reads as follows:

GOVERNMENT OF TAMIL NADU

ABSTRACT

ACTS AND RULES-Narcotic Drugs and Psychotropic Substances Act,1985- Delegation of powers under sub section (1)of Section 42 to the State Police, Revenue, Excise, Drug Control, Administration and Forest Department Officials -



Notification -Issued
PROHIBITION AND EXCISE (VII) DEPARTMENT
G.O.MS.No.161 Dated 18.08.92

Read:

1. G.O.Ms.No.1278, Home, Prohibition and Excise, dated 09.02.85
2. From the Inspector of General of Police, Madras, Letter C.No.63/NIB/88, dated 15.02.89 and C.No.20/TNNIB/91, dated 21.03.91

....

ORDER

The following Notification will be published in the Tamil Nadu Government Gazette
NOTIFICATION

Under Sub Section (1) of section 42 and section 67 of the Narcotic Drugs and Psychotropic substances Act, 1985 (Central Act 61 of 1985), the Governor of Tamil Nadu hereby empowers and respectively authorises the officers specified below for the purposes of the said sections 42 and 67 of the said Act.

Officers:

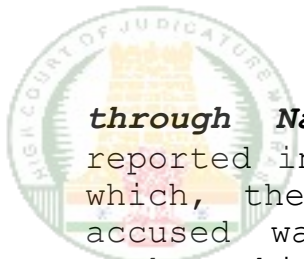
- (1) Police Officer not below the rank of the Head Constable in the State Police Department
- (2) Revenue Officer not below the rank of the Revenue Inspector in the State Revenue Department
- (3) Excise Officer not below the rank of an Excise Inspector in the State Excise Department
- (4) Forest Officer not below the rank of a Forester in the State Forest Department

(BY ORDER OF THE GOVERNOR)

K.MALAISAMY
SECRETARY TO GOVERNMENT

8. Further it is also the case of the petitioners that the crime number was found in the arrest memo thereby creating suspicion with regard to the arrest, recovery and registration of the case. However it is the case of the prosecution that it is only the arrest intimation which has been prepared at the station after the arrest and registration of the case and not the arrest memo.

9. In this case though the contraband is stated to be recovered from two cars and even if it is taken separately both quantities are commercial quantities. The contraband were recovered from the two cars in which the accused were travelling and there is conscious possession. At this juncture, it is necessary to refer the judgment of the Hon'ble Apex Court in the case of **Union of India**



through Narcotics Control Bureau , Lucknow .vs.MD. 1 in
reported in (2021)10 SCC 100. 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.

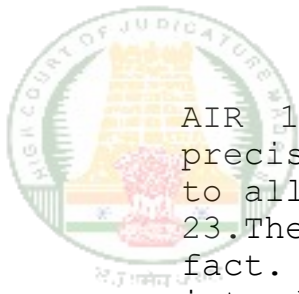
22.We shall deal with each of these circumstances in turn. The respondent has been accused of an offence under Section 8 of the NDPS Act, which is punishable under Sections 21, 27A, 29, 60(3) of the said Act. Section 8 of the Act prohibits a person from possessing any narcotic drug or psychotropic substance. 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 Pradesh¹⁶ 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 precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

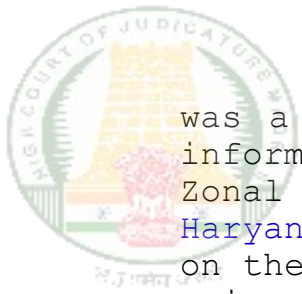
23. The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended. [...]

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

10. Further it is also stated by the prosecution that documents filed in the typed set are only arrest intimation and not arrest memo. This court after perusing the CD file found that the documents relied on by the counsel for the petitioners are only arrest intimation and not arrest memo. Sections 35 and 54 of the NDPS Act raises the presumption as against the petitioner. With regard to the non-compliance of the mandatory provisions and recording of information the Hon'ble Apex Court in the very same judgment referred supra *has held as follows:*

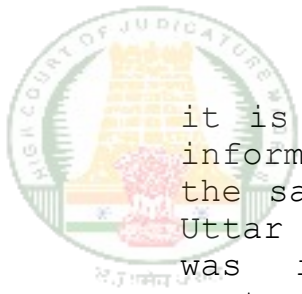
"31. Another submission that has been raised by the counsel for the respondent both before the High Court and this Court is that due to non-compliance of the procedural requirement under [Section 42](#) of the NDPS Act 20, the respondent should be granted bail. [Section 42](#) provides that on the receipt of information of the commission of an offence under the statute, the officer will have to write down the information and send it to a superior officer within 72 hours. It has been submitted by the respondent that though the information was received by the Zonal Director, the information was put down in writing by an officer who



was a part of the team constituted on the receipt of information. The written information was then sent to the Zonal Director. This Court [Karnail Singh v. State of Haryana](#) 21 held that though the writing down of information on the receipt of it should normally precede the search and seizure by the officer, in exceptional circumstances that warrant immediate and expedient action, the information shall be written down later along with the reason for the delay:

35. [...] (c) In other words, the compliance with the requirements of [Sections 42\(1\)](#) and [42\(2\)](#) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency. While total non-compliance with requirements of subsections (1) and (2) of [Section 42](#) is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with [Section 42](#). To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of [Section 42](#). But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of [Section 42](#) of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of [Section 42](#) of the Act. Whether there is adequate or substantial compliance with [Section 42](#) or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to [Section 42](#) by Act 9 of 2001.

32. Further, it was held that the issue of whether there was compliance of the procedure laid down under [Section 42](#) of the NDPS Act is a question of fact. The decision in [Karnail Singh](#) (supra) was recently followed by this Court in [Boota Singh v. State of Haryana](#)



it is alleged that at about 1400 hours on 26 March 2022 information was received that between 1500-1700 hours on the same day, the three accused persons would be reaching Uttar Pradesh. The complaint states that the information was immediately reduced to writing. Therefore, the contention that Section 42 of the NDPS Act was not complied with is prima facie misplaced. The question is one that should be raised in the course of the trial".

11. In the opinion of this Court the alleged discrepancies with regard to arrest intimation is a question of fact to be decided at the stage of trial and not at the time of hearing the bail petition.

12. Further taking into consideration the facts and submissions of the case, this Court is of the view that the petitioners have not satisfied the conditions as required under section 37 of the NDPS Act for grant of bail, hence the petitions are liable to be dismissed.

13. In view of the same, these Criminal Original Petitions stand dismissed.

sd/-

03/03/2023

/ TRUE COPY /

/03/2023

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

AAV

TO

1 THE SUPERINTENDENT, CENTRAL PRISON, MADURAI.

2 THE INSPECTOR OF POLICE CUMBUM NORTH POLICE STATION,
THENI DISTRICT.

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

+1 CC to M/s.T.SAKTHI KUMARAN, Advocate (SR-3381[I] dated
03/03/2023)

ORDER IN

CRL OP(MD). Nos.22851 and 22852 of 2022

Date :03/03/2023

RS//SAR-3(08.03.2023) 8P 5C