



CRL M.P.No.11823 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.10.2024
PRONOUNCED ON : 20.12.2024

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.M.P.No.11823 of 2024 in
Crl.A.No.398 of 2023

1.K.Packiyam
2.M.Thirumurugan
3.S.Balamurugan

... Petitioners

Vs.

The State, represented by
Intelligence Officer,
Narcotic Control Bureau,
Chennai Zonal Unit,
Chennai-600 009.

... Respondent

PRAYER: Criminal Miscellaneous Petition is filed under Section 389(1) of Cr.P.C., to suspend the sentence imposed in C.C.No.4 of 2018 dated 27.05.2022 passed by the Court of Special Judge, I Additional Special Court for exclusive trial of cases under NDPS Act, Chennai and enlarge the petitioners on bail, pending disposal of the above Crl.Appeal on the file of the Court.

For Petitioner : Mr.R.Sankarasubbu

For Respondent : Mr.N.P.Kumar,
Special Public Prosecutor.



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ORDER

The petitioners / A1 to A3 in C.C.No.4 of 2018 were convicted by the trial Court, by Judgment dated 27.05.2022, and sentenced as follows:-

Name & Rank of Accused	Offence under Section	Sentence
A1 / K.Packiyam	8(c) r/w 20(b)(ii)(C) of the NDPS Act	R.I. For 10 years and to pay a fine of Rs.1,00,000/- and in default, to undergo R.I. for 3 years.
	8(c) r/w 25 of the NDPS Act	R.I. For 10 years and to pay a fine of Rs.1,00,000/- and in default, to undergo R.I. for 3 years.
A2 / M.Thirumurugan and A3/S.Balamurugan	8(c) r/w 20(b)(ii)(C) of the NDPS Act	R.I. For 10 years and to pay a fine of Rs.1,00,000/- each and in default, to undergo R.I. for 3 years.

2. The case against the petitioners /A1 to A3 is that on 25.07.2017, at about 11.30 hrs., secret information was received by P.W.1, who is an Intelligence Officer of the respondent. The information was that 150 Kgs of Ganja is being illicitly smuggled, transported from Andhra Pradesh in a Toyoto Etios vehicle, bearing Reg.No.TN-06-H-8365 and the consignment is proceeding to Madurai. The car will be crossing near Chennai Vanagaram Toll Plaza at about



13.30 hours. P.W.1, Intelligence Officer, recorded the secret information, submitted to before P.W.3, his superior and thereafter, on his approval along with the Team was mounting surveillance near Vanagaram Toll Plaza.

3. P.W.1 identified a silver colour Toyoto Etios car and found A3 / Balamurugan in the driver seat; A1/K.Packiam next to the driver and A2/Thirumurugan was in the rear seat. The vehicle was stopped. The identify of the officers disclosed. Thereafter, the petitioners / A1 to A3 were informed about the receipt of secret information that they were smuggling Ganja. A1 to A3 admitted the same, thereafter, on compliance with Section 50, search was conducted and in the Boot of the car, 73 identical packages were found. The packages were wrapped with green brown papers and tied with blue and green nylon thread. The contraband seized in the presence of P.W.5 / private witness.

4. P.W.1 took one of the package, cut opened the cover and found a brownish green dry leaves. Took a small bit of it, tested with the Drug Detection Kit and it answered positive of Marijuana. Thereafter, the officer cut opened the remaining 72 square shaped



packets one by one, all tested with Drug Detection Kit and proved positive. Thereafter, the contents of all 73 packets were taken out, mixed well, put in 5 black colour polythene bags, tied with red and white cloth and kept in 5 separate white plastic bags. Three bags weighed 30 Kgs; one bag weighed 29.500 Kgs and another bag weighed 27.950 Kgs. All were packed again after taking samples. In total 147.500 Kgs of Ganja were seized along with the vehicle viz., Toyoto Etios Car.

5. Thereafter, Notice under Section 67 of NDPS Act served, accused accompanied to the respondent office where all the three gave admission statement and they were arrested. Arrest intimated to their relatives. They were produced before the Magistrate along with contraband. Thereafter, P.W.1 submitted 57 report to P.W.3, contraband produced before the concerned Court, which was entrusted again to the respondent to be kept in a godown for safe custody. Sample taken from the seized property sent for Chemical Analysis. P.W.2 analysed the sample, confirmed that the contraband is Ganja, gave her report.

6. Thereafter, Investigation was handed over to P.W.6, who took



up investigation. The Regional Director instructed the Intelligence Officer, Madurai, to conduct a search in the house of A1 to A3. Search was conducted by P.W,4 / Intelligence Officer at Madurai, articles were seized in presence of witnesses. The Bank statement and call detail recorded collected and analysed. On completion of investigation, charge sheet filed.

7. Before the trial Court, on the side of prosecution, P.W.1 to P.W.6 examined. Exs.P1 to P.96 marked. M.Os 1 to M.O.21 marked. Ex.D1 to Ex.D3 marked on the side of the defense. On conclusion the trial, the trial Court convicted the petitioner as stated above.

8. The contention of the learned counsel for the petitioners is that in this case, there is violation of statutory conditions under Sections 50, 52-A, 41(2) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act" for short). The prosecution case entirely proceeds on the 67 Statement recorded by the officials of the respondent. After the Judgment in the **Topan Sing's case**, the 67 statement become inadmissible and it can be relied only to the limited extent of recovery as of Section 27 of the Evidence Act. Further, in this case, there have been total violation of Section 100(4) of Cr.P.C.,



during the search. The trial Court failed to consider that the only private witness in this case examined as P.W.5, not supported the case of the prosecution, treated hostile. Out of witnesses examined, P.Ws, 1, 3, 4 and 6 are from the NCB and P.W.2 is from the Custom House Laboratory, which is not approved laboratory as per the Ministry of Home guidelines. He further submitted that the request for call details and bank statements obtained to prove the fact that the call details were called from the service providers and from Bank, but non from service provider and bank examined.

9. The further contention of the learned counsel is that the Toyoto Etios car in which the contraband seized and projected is that of A1, but no RTO examined to prove the ownership. Mere production of the documents will not be sufficient. Likewise, the case projected is that the accused brought the Ganja from Andhra Pradesh and were proceeding to Madurai, but no investigation in the State of Andhra Pradesh conducted. In this case, admittedly, all the petitioners were arrested and remanded on 26.07.2017 from then on, they are still in prison as under trial prisoners for more than 5 years and after conviction, for more than a year in total, the petitioners are in prison from almost 7 years, which is more than 50 % period of conviction.



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10. He further submitted that in this case, the respondent marked exhibits, the letter received from the Inspector, Silaiman Police, Inspector / Anna Nagar Police Station, Madurai, NIB to show that the 1st petitioner has several cases pending against her. As regards A2 and A3, no case pending against them. The trial Court failed to consider the explanation given by A2 and A3 that they were working in a Fabrication Shop, doing welding work and A1 being a relative, called and informed them that the temporary driver of the car left and she is stranded and called them and asked for help. Since A2 and A3 already planned to travel to Madurai, they took this opportunity to travel by car to Madurai and there is no evidence and materials to show that A2 and A3 had knowledge about the car loaded with Ganja. These facts not considered by the trial Court. The trial Court for the charge of conspiracy and other charges had acquitted the petitioner hence ought to have acquitted the petitioners from other case. The petitioners were not in conscious possession of contraband. The only private witness in this case is P.W.5, who not supported the case of the prosecution. Further, the female officer Divya, who conducted the search on first petitioner a lady not examined as witness.



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11. In view of the same, search, seizure and compliance of Section 50 not complied. The samples not taken in the presence of the Magistrate as per ***Mohanlal's case*** and hence, there is clear violation of Sections 50 and 52 in this case, which fact the trial Court failed to consider. He further submitted that the petitioners are in prison for more than 50% of the period of conviction. He further submitted that A1 falsely implicated in the cases of Ganja, since some of her relatives earlier arrested under NDPS Act cases and hence, she is implicated. The case in C.C.No.311 of 2007 against the 1st petitioner / A1 for the offence under Section 8(c) r/w 20(b)(ii)(B) of NDPS Act and the case ended in acquittal by Judgment dated 11.03.2024. The petitioner is defending the other cases foisted against her. As regards the petitioners 2 and 3/A2 and A3, it is not in dispute and admitted by the respondent and recorded by the trial Court that they have no bad antecedents and no case pending against them. The explanation of A2 and A3 not considered. In such circumstances, keeping the petitioner in jail for more than 7 years is against the Fundamental Right guaranteed under Article 21 of the Constitution.

12. The learned counsel, in support of his contentions, relied



upon the decision reported in ***Shaheen Welfare Association Vs. Union of India and Others*** reported in ***(1996) 2 SCC 616*** for the point that even in serious offence cases when a person detained for more than five years then bail has to be considered. He relied upon the Judgment in the case of ***Kashmira Singh Vs. The State of Punjab*** reported in ***1977 AIR 2147*** wherein the Apex Court held that it would be traversity of justice to keep a person in jail, when the court is not in a position to dispose of the appeal within a reasonable period of time. He relied upon the Judgment in the case of ***Union of India Vs. K.A.Najeeb*** reported in ***SLP (Crl.)No.11616 of 2019***, wherein the Apex Court held that the Courts to keep in mind the length of the period spent by the accused in custody and the likelihood of the case ought to be completed anytime soon. Further, he referred to the Judgment of the Supreme Court in ***Rabi Prakash Vs. State of Odisha*** reported in ***2023 SCC Online SS 1109*** for the principle that prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the condition liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act. Further relied upon the order of this Court in ***Crl.O.P.No.5082 of 2023*** in ***R.Westly v. The Intelligence Officer,***



NCB, Madras, wherein this Court has granted bail considering the prolonged incarceration. Lastly, he relied upon the Judgment of the Apex Court in the case of **Kalvakuntla Kavitha Vs. Directorate of Enforcement**, in **SLP(Crl)No.10778 of 2024** wherein the Apex Court granted bail to a woman, since woman who are likely to be more vulnerable, may sometimes be misused by the unscrupulous elements. In this case, some of the petitioners family members earlier had an NDPS case for which the 1st petitioner/A1 being an woman falsely implicated and penalised.

13. Mr.N.P.Kumar, the learned Special Public Prosecutor filed his counter and strongly opposed the petitioners contention and submitted that as regards the 1st petitioner, she is a notorious person having several cases of similar nature. The apex Court had time and again held that Section 32-A is subject to Section 37. The Apex Court though struck down held that Section 32 does not have an embargo on the higher Courts and constitutional Courts to grant bail to the convicted accused in NDPS cases, but it clearly held that the suspension of sentence is subject to the petitioner satisfy Section 37. As against the 1st petitioner / A1 in Silaiman Police Station Crime No.260 of 2011 for offence under Section 20(b)(ii)(c) NDPS Act



registered for petitioners involvement in 25 kgs of Ganja, a commercial quantity. She is also facing Crime No.119/11 under Section 20(b)(2)(B) NDPS Act for possession of 1-1/4 kgs of Ganja and Crime No.244 of 2012 under Section 20(b)(A) and 8(c) of NDPS Act for possession of 1.25 Kgs Ganja facing the case. With NIB -CIB Crime No.57 of 2016 under Section 8(c) r/w 20(b)(ii)(B) NDPS Act pending in C.C.No.295 of 2016 before the First Additional NDPS Act cases, Chennai and Crime No.114/2013 under Section 8(c) r/w 20(b)(ii)(B) is pending. With Anna Nagar Police Station one more case is pending against A1.

14. As regards A2 and A3, he fairly submitted no case is pending against them before any police station, but for the above case. He fairly submitted that as regards C.C.No.295 of 2016, the trial Court by Judgment dated 19.01.2023 convicted the 1st petitioner and sentenced the petitioner to three years and to pay a fine of Rs.10,000/- in default two weeks S.I. He further submitted that only in case of under trial prisoners, the Apex Court extended some concessions when it is found that they are in prolonged incarceration of more than 5 to 6 years and not in a case of convicted accused. Even in convicted accused, Section 37 has to be complied with. In



view of the previous cases pending and conviction of A1, A1 fails to satisfy Section 37. Further, relied on the Judgment of Supreme Court in ***Legal Aid Committee Representing Undertrial Prisoners Vs. Union of India and Others*** reported in **(1994 6 SCC 731)**; ***Dadu alias Tulsidas Vs. State of Maharashtra*** reported in **2000 SCC (Crl.) 1528**. In the case of ***Ratan Kumar Vishwas Vs. State of U.P*** reported in **2009 (1) SCC 546**. ***NCB Vs. Lokesh Chadha*** reported in **2021 Supreme (SC) 316** for the point that long incarceration of more than 5 to 6 years is to be considered only to under trail prisoners and not to convicts. Even in the case of convicts, only if the appeal cannot be taken within a short period, thereafter, the suspension of sentence can be considered, provided, they satisfy Section 37. In this case, the appeal is of the year 2023 and the appeal can be taken shortly.

15. The High Court, being an appellate Court can suspend the sentence of the appellants subject to conditions spelt out in Section 37 of the NDPS Act. The condition spelt out in Section 37 is that the Court must be satisfy that there are reasonable grounds for believing that the appellant is not guilty of such offence and the appellant is not likely to commit any offence while on bail. A1 regularly indulging in



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NDPS cases and dealing with Ganja is confirmed by the record. In this case, the contraband seized is around 140 Kgs. Further, it is proved that M.O.7 / Toyoto Etios car in which the contraband of 140 Kgs transported belongs to A1. In view of the same, this petition for suspension of sentence as against A1 is dismissed.

16. As regards the petitioners / A2 and A3, they are in prison from the date of remand ie., from 26.07.2017, in total for more than 7 years having no bad antecedents hence, this Court grants bail to the petitioners 2 and 3 /A2 and A3 alone on condition that they should execute sureties each for Rs.10,000/- (Rupees Ten Thousand only) to the satisfaction of the learned Special Judge, I Addl.Special Court for exclusive Trial of Cases under NDPS Act, Chennai, and they are directed to report before the Principal Special Court for NDPS Act Cases, Madurai, on the second Monday of every month at 10.30 a.m., until further orders.

20.12.2024

Speaking Order/Non Speaking Order
Index : Yes/No
Internet : Yes
mpk



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To

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- 1.The Special Judge,
I Additional Special Court for Exclusive Trial of Cases
under NDPS Act,
Chennai.
- 2.The Intelligence Officer,
Narcotic Control Bureau,
Chennai Zonal Unit,
Chennai-600 009.
- 3.The Principal Special Court for NDPS Act Cases,
Madurai.
- 4.The Central Prison,
Puzhal, Chennai.
- 5.The Special Public Prosecutor,
Madras High Court.



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M.NIRMAL KUMAR, J.

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PRE-DELIVERY ORDER MADE IN

CRL M.P.No.11823 of 2024 in

CRL A.No.398 of 2023

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