



Crl.O.P.Nos.29029, 29136 and 29197 of 2023

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.01.2024

PRONOUNCED ON : 12.01.2024

CORAM

THE HON'BLE MR. JUSTICE C.V.KARTHIKEYAN

Crl.O.P.Nos.26102 & 29155 of 2023

1.S.Surendhar
2023

... Petitioner/A5 in Crl.O.P.No.26102 of

2.Murali
S/o. Govindaraj

... Petitioner/A4 in Crl.O.P.No.29155 of 2023

Vs.

State represented by
The Inspector of Police,
NIB – CID,
Chennai.
Crime No.23 of 2023

... Responder/Complainant in both Crl.O.Ps

PRAYER: These Criminal Original Petitions filed under Section 439 of Cr.P.C., prayed to enlarge the petitioners on bail in Crime No.23 of 2023 on the file of the respondent.



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For Petitioner : Mr. F. Wellington
For Mr.S. Esakkimuthu
(in Crl.O.P.No.26102 of 2023)

For Petitioner : Mr. F. Wellington
(in Crl.O.P.No. 29155 of 2023)

For Respondent : Mr.L.Baskaran
Government Advocate (Crl. Side)
in all Crl.O.Ps

COMMON ORDER

The 4th accused has filed Crl.O.P.No.29155 of 2023 and the 5th accused has filed Crl.O.P.No.26102 of 2023 both in Crime No.23 of 2023 registered under Sections 8(c), 22(c), 25 and 29(1) of NDPS Act, 1985. The petitioners had been remanded to judicial custody on 01.08.2023. They seek bail.

2.It is the case of the respondent that they received information that two persons were going to sell narcotic drug Methaqualone in Room No.104, Rus Ahad Mansion at Pycrofts Road, Triplicane. After following due procedure, the respondent reached the said place and found A1 and A2 and on searching them, they seized 600 grams of Methaqualone from A1 and 18



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kgs of Ephiderine from A2. They also seized cell phones.

3. Thereafter, A1 had given a confession statement and on that basis, the respondent proceeded to Triplicane Pycrofts Road, near Rathna Cafe and secured A3, A4 and A5 at the same time. They were found to be in possession of 550 grams of Methaqualone. The contraband and their cell phones were also seized. The confession statement of A3 was recorded and they were all remanded to custody.

4. It is seen that the seizure of 600 grams of Methaqualone and 18 kgs of Ephiderine from A1 and A2 respectively were commercial quantity under NDPS Schedule No.161 and the 550 grams of Methaqualone seized from A3, A4 and A5 was also commercial quantity also under NDPS Schedule No.161.

5. A counter affidavit had been filed by the respondent stating that investigation is pending for receipt of chemical analysis from the Forensic Laboratory. It had also been stated that there is every possibility of the petitioners absconding and threatening witnesses.



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6.In view of those circumstances, stating that the seized contraband was commercial in nature, the bail petition was opposed.

7.The learned counsel for the petitioners / A4 and A5, however, pointed out that the petitioners had been implicated only on the confession of A1. It had been stated that the said confession is a weak piece of evidence and cannot be relied upon. In this connection, the learned counsel for the petitioner relied on an order granting bail in petition for ***Special Leave to Appeal (Crl.) No.242 of 2022, State by (NCB) Bengaluru Vs. Pallulabid Ahmad Arimutta and Anr*** and petition for ***Special Leave to Appeal (Crl.) No.1569 of 2021, Union of India Vs. Mohammed Afzal***, wherein, the Hon'ble Supreme Court, by an order dated 10.01.2022, on an appeal filed questioning grant of bail, had observed as follows:

“9.Having gone through the records along with the tabulated statement of the respondents submitted on behalf of the petitioner – NCB and on carefully perusing the impugned orders passed in each case, it emerges that except for the voluntary statements of A-1 and A-2 in the



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first case and that of the respondents themselves recorded under Section 76 of the NDPS Act, it appears, prima facie, that no substantial material was available with the prosecution at the time of arrest to connect the respondents with the allegations levelled against them of indulging in drug trafficking. It has not been denied by the prosecution that except for the respondent in SLP (Crl.) No.1569/2021, none of the other respondents were found to be in possession of commercial quantities of psychotropic substances, as contemplated under the NDPS Act.”

8.It must be pointed out that, it had been further observed that since there has been no recovery from the respondents in petition for Special Leave to Appeal (Crl.) No.242 of 2022, that appeal was dismissed but since there was recovery of contraband of commercial quantity from the respondent in petition for Special Leave to Appeal (Crl.) No.1569 of 2021, that appeal was allowed.

9.The learned counsel for the petitioners also relied on the order of the Hon'ble Supreme Court in ***Criminal Appeal No.3795 of 2023, Sahnwas Shaikh Vs. The State of West Bengal***, wherein, there was recovery of 45



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grams of heroin from the appellant, which was below commercial quantity and on consideration of all factors, particularly that “*barring statement of the co-accused, there is no other material to connect the appellant with seizure of the larger quantity of heroin from three other co-accused persons,*” the Hon'ble Supreme Court held that the appellant was entitled for bail.

10.A careful analysis of the two orders would reveal that, if there is recovery of commercial quantity then, the provision under Section 37(2) of NDPS Act, 1985 will have to be applied and if on the basis of confession of co-accused, there has been arrest but no recovery, then, the Hon'ble Supreme Court had granted bail to the accused.

11.In the instant case, the petitioners had been arrested on the confession of A1 but from A3, A4 and A5 totally 550 grams of Methaqualone, which is commercial quantity under NDPS Schedule No.161, had been seized. Thus, since there has been recovery of commercial quantity, the confession of A1 pales into insignificance. It will now have to be examined whether the possession of A3, A4 and A5 is conscious possession or not.



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12. In view of the stipulations under Section 37 of the NDPS Act, before granting bail for an offence under NDPS Act, twin conditions as provided under Section 37(1)(b) (i) and (ii) have to be satisfied. Section 37 of the N.D.P.S. Act is quoted herein below:

"37. Offences to be cognizable and non-bailable. -

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the



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application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

13. The Hon'ble Supreme Court had examined the expression 'reasonable grounds' as found in Section 37(1)(b)(ii) of NDPS, Act.

14. In ***Union of India Vs. Rattan Mallik @ Habul, 2009 (1) SCC (Crl) 831***, the Hon'ble Supreme Court has settled the expression "reasonable grounds". The relevant paragraphs Nos.12, 13 and 14 are extracted below:

"12. It is plain from a bare reading of the nonobstante clause in the Section and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject



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to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".

13. The expression 'reasonable grounds' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. [Vide Union of India Vs. Shiv Shanker Kesari, 2007(7) SCC 798] Thus, recording of satisfaction on both



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the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail."

15. The Hon'ble Supreme Court while dealing with the question of possession and application of Section 50 in the case of **Megh Singh Vs. State of Punjab, 2003 CRI. L.J. 4329**, held that word 'possession' includes conscious possession. Relevant paragraph nos. 9 to 13 are extracted below:



"9. 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 *Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors.* (AIR 1980 SC 52), to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

10. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

11. As noted in ***Gunwantlal v. The State of M.P.*** (AIR 1972 SC 1756) possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.

12. The word 'possession' means the legal right to possession (See ***Health v. Drown*** (1972) (2) All ER 561 (HL)). In an interesting case it was observed that where a



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person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See Sullivan v. Earl of Caithness (1976 (1) All ER 844 (QBD)).

13. 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 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. This position was highlighted in Madan Lal and Anr. v. State of Himachal Pradesh (2003 (6) SCALE 483)."

16. The Hon'ble Supreme Court in the case of ***Dehal Singh vs. State of Himanchal Pradesh, 2011 (72) ACC 661***, has again considered the concept of "conscious possession". In the said case, two accused persons were travelling in a car and they knew each other. From the windows/door of the said car, recovery of 27 Kgs. 800 gms. of charas was made, which were found concealed between the shields and doors of the car. The Hon'ble



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Supreme Court in the said case, taking into consideration the provisions of Sections 35 and 54 of the N.D.P.S. Act, had held that the accused was not only in possession, but conscious possession of the recovered contraband also.

17. It is thus seen that the Hon'ble Supreme Court had expanded the term possession to also include not just physical possession and constructive possession but also conscious possession.

18. In the instance case also, all the three accused namely, A3, A4 and A5 of whom A4 and A5 have applied for bail in these petitions were in conscious possession of commercial quantity of 550 grams of Methaqualone.

19. In view of the these reasons, I am not inclined to grant bail to the petitioners. Accordingly, these Criminal Original Petitions stand dismissed.

12.01.2024

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C.V.KARTHIKEYAN, J.

smv

To

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2. The Public Prosecutor,
High Court of Madras.

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