



Crl.O.P.(MD) No.18999 of 2024

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

WEB COPY

Reserved on	04.12.2024
Delivered on	06.12.2024

CORAM

THE HON'BLE MR.JUSTICE N.ANAND VENKATESH

Crl.O.P.(MD) Nos.18999, 19356, 19473 and 19610 of 2024

Crl.O.P.(MD) No.18999 of 2024

Satham Hussein

... Petitioners/
Accused No.6

Vs.

The State of Tamilnadu,
Rep. by the Inspector of Police,
Prohibition Enforcement Wing,
Madurai City, Madurai.
Crime No.648 of 2024

... Respondent/Complainant

PRAYER : Criminal Original Petition filed under Section 482 of Criminal Procedure Code, to enlarge the petitioner/ Accused No.6 on bail in Crime No.648 of 2024 on the file of the respondent police.

For Petitioner : Mr.Niranjana S.Kumar

For Respondent : Mr.S.Ravi
Additional Public Prosecutor



Crl.O.P.(MD) No.18999 of 2024

Crl.O.P.(MD) No.19356 of 2024

WEB COPY

Ajithkumar

... Petitioner/
Accused No.1

Vs.

The State of Tamilnadu,
Rep. by the Inspector of Police,
Prohibition Enforcement Wing,
Madurai City, Madurai.
Crime No.648 of 2024

... Respondent/Complainant

PRAYER : Criminal Original Petition filed under Section 482 of Criminal Procedure Code, to enlarge the petitioner/ Accused No.1 on bail in Crime No.648 of 2024 on the file of the respondent police.

For Petitioner : Mr.T.Palanisamy

For Respondent : Mr.S.Ravi
Additional Public Prosecutor

Crl.O.P.(MD) No.19473 of 2024

Vivekanandan

... Petitioner/
Accused No.2

Vs.

The State of Tamilnadu,
Rep. by the Inspector of Police,
Prohibition Enforcement Wing,
Madurai City, Madurai.
Crime No.648 of 2024

... Respondent/Complainant

PRAYER : Criminal Original Petition filed under Section 482 of Criminal Procedure

<https://www.hc.madurai.gov.in/judis>



Crl.O.P.(MD) No.18999 of 2024

Code, to enlarge the petitioner/ Accused No.2 on bail in Crime No.648 of 2024 on the
WEB COPY
file of the respondent police.

For Petitioner : Mr.Abudukumar Rajarathinam
for M/s.F.Deepak

For Respondent : Mr.S.Ravi
Additional Public Prosecutor

Crl.O.P.(MD) No.19610 of 2024

Bhuvanendran

... Petitioner/
Accused No.4

Vs.

The State of Tamilnadu,
Rep. by the Inspector of Police,
Prohibition Enforcement Wing,
Madurai City, Madurai.
Crime No.648 of 2024

... Respondent/Complainant

PRAYER : Criminal Original Petition filed under Section 482 of Criminal Procedure

Code, to enlarge the petitioner/ Accused No.4 on bail in Crime No.648 of 2024 on the
file of the respondent police.

For Petitioner : Mr.M.Maran

For Respondent : Mr.S.Ravi
Additional Public Prosecutor



Crl.O.P.(MD) No.18999 of 2024

WEB COPY

COMMON ORDER

The petitioners/accused 1, 2, 4 and 6, who were arrested and remanded to judicial custody for the offences under Sections 8(C) r/w 20(b)(ii)(C), 25, 29(1) of the 'Narcotic Drugs and Psychotropic Substances Act, 1985' (hereinafter referred to as 'the Act'), on the file of the respondent, seek bail.

2.The case of the prosecution is that the Sub-Inspector of Police received a secret information on 27.05.2024 at about 13.00 hours that the accused persons are travelling in a car from Andhra Pradesh after purchasing 'Ganja'. This information was recorded and informed to the superior officer in writing and after obtaining permission and recording the same in the General Diary, the police party proceeded to the spot. The police party surrounded the car around 15.00 hours. The inmates of the car were apprised about their rights available under the Act. On search, the police recovered 22 parcels kept in a travel bag and a shopping bag. On further analysis, it was found that it was ganja and the same was weighed and found to be 21.300 kilograms. A1 to A3 were arrested. A report was submitted under Section 57 of the Act and the case was registered in Crime No.648 of 2024 on 27.05.2024 at about 20.30 hours.

3.Based on the confession of A1 to A3, A4 was arrested on 28.05.2024 and 1.5 kilograms of ganja was seized. Similarly, A6 was arrested on 11.06.2024 and 500



Crl.O.P.(MD) No.18999 of 2024

WEB COPY

grams of ganja was seized. The specific case of the prosecution is that the possession of ganja by the respective accused persons was a concerted effort and in furtherance of a common intention. There are totally seven accused persons in this case and the petitioners have been arrayed as A1, A2, A4 and A6. Out of the seven accused persons, six accused persons have been arrested and A7, who is said to have made the arrangements to sell the ganja from Andhra Pradesh is said to be absconding.

4.Heard Mr.Abudukumar Rajarathinam, learned Senior Counsel appearing on behalf of the petitioner in Crl.O.P.(MD) No.19473 of 2024, Mr.M.Maran, learned counsel appearing for the petitioner in Crl.O.P.(MD) No.19610 of 2024, Mr.Niranjan S.Kumar, learned counsel appearing for the petitioner in Crl.O.P.(MD) No.18999 of 2024, Mr.T.Palanisamy, learned counsel appearing for the petitioner in Crl.O.P.(MD) No.19356 of 2024 and Mr.S.Ravi, learned Additional Public Prosecutor appearing on behalf of the respondent.

5.The learned Senior Counsel appearing on behalf of the petitioner in Crl.O.P.(MD) No.19473 of 2024 made the following submissions:

(i) There was a credible information received by the Sub-Inspector of Police which clearly indicated the commission of a cognizable offence and hence, the respondent police ought to have registered the FIR and thereafter started the investigation. However, the FIR itself came to be registered after the alleged



Crl.O.P.(MD) No.18999 of 2024

WEB COPY

occurrence. This procedure followed by the respondent police is in violation of the judgment of the Apex Court in *Lalita Kumari v. Govt. of U.P. and Ors.*, reported in (2014) 2 SCC 1.

(ii) The contraband that was seized in this case cannot be categorized as a commercial quantity. This is in view of the fact that the weight of the contraband was calculated to be 21.300 kilograms by including the weight of the gunny bag as well as seeds and leaves and accompanied by flowering or fruiting tops. This goes against the definition of 'ganja' under Section 2(iii)(b) of the Act. To substantiate this submission, the learned Senior Counsel mainly relied upon the judgment in *K.V.Ramasamy v. Superintendent of Police*, reported in CDJ 2009 MHC 4409. The learned Senior Counsel also relied upon various orders passed by the other High Courts in this regard.

(iii) There is a mandatory violation of Section 52A of the Act since the contraband was seized without taking proper inventory and the entire 22 separate packets were mixed into a single packet which also goes against the Rule 8 of the 'Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022' (hereinafter referred to as 'the Rules' for brevity). That apart, the 22 packets seized from the car were not weighed separately and serially numbered as mandated under the Rule 3(2) of the Rules. The sample was not taken in



Crl.O.P.(MD) No.18999 of 2024

WEB COPY

the presence of the Magistrate. To substantiate this submission, the learned Senior Counsel relied upon the judgment of the Apex Court in Mohammed Khalid and another v. The State of Telangana, reported in (2024) 5 SCC 393, Securities and Exchange Board of India v. Sunil Krishna Khaitan and Others. reported in (2023) SCC Online SC 862 and the judgment in Amal v. State of Kerala in Bail Application No.1790 of 2024 dated 21.06.2024 apart from the orders passed by the other High Courts.

(iv) There were no independent witnesses and the search and seizure was not recorded in audio – video mode to ensure transparency.

(v) During the 63rd Session of the UN Commission on narcotic drugs held in December 2020, a resolution was adopted to remove cannabis and cannabis resin from Schedule – IV of the Single Convention on Narcotic Drugs, 1961 and to retain the same in Schedule – I. India voted in favour of this decision and a press statement was also given on 02.12.2020. In view of the same, there is an obligation on the part of India to implement the international agreement and to make necessary amendment in the Act. Since the same was not done, legitimate expectation of the accused persons was defeated and it violated Article 21 of the Constitution. It was submitted that there must be procedural fairness and there is also a requirement to uphold substantive legitimate expectation which has been breached in this case. It also



Crl.O.P.(MD) No.18999 of 2024

WEB COPY

violates the substantive due process which is now recognized to be part of Article 21 of the Constitution of India. To substantiate this submission, the learned Senior Counsel relied upon the judgment of the Apex Court in Mohd. Arif @ Ashfaq v. The Registrar, Supreme Court of India and Others, reported in (2014) 9 SCC 737 and Sivanandan C.T. v. High Court of Kerala, reported in (2024) 3 SCC 799.

(vi) The restrictions under Section 37 of the Act will not apply to the constitutional Courts. To substantiate this submission, the learned Senior Counsel relied upon the judgment in Ramji Singh v. Directorate of Enforcement, reported in 2023 SCC Online All 831.

(vii) The petitioner is a college going student and he has suffered incarceration for more than 189 days and there is no visibility of the case getting concluded in a near future and therefore, such long incarceration will be violative of Article 21 of the Constitution of India.

6.The learned counsel appearing on behalf of the petitioner in Crl.O.P. (MD) No.18999, 19356, 19473 and 19610 of 2024 submitted that this petitioner has been falsely roped in this case and that this petitioner was residing in Chennai and he was illegally taken from Chennai and brought to Madurai. Insofar as the previous case against this petitioner, there are nine pending cases and all those cases pertains to offence under IPC and these cases pertains to the alleged incidents prior to the year



Crl.O.P.(MD) No.18999 of 2024

2020. What is alleged to have been recovered from this petitioner is only 500 grams and even though the prosecution has come up with the case that this petitioner was in touch with the other accused persons and enabled the purchase of the contraband from Andhra Pradesh, the prosecution is not able to trace even one phone call from the mobile phone of the petitioner and there is also no material to prove that any money transaction has taken place between this petitioner and the other accused persons. The learned counsel adopted the other submissions made by the learned Senior Counsel appearing in Crl.O.P.(MD) No.19473 of 2024.

7.The learned counsel appearing on behalf of the petitioners in the other two bail petitions adopted the arguments of the learned Senior Counsel and also pointed out the specific facts that have been put against these petitioners. It was contended that there are no previous cases as against A1 and A4.

8.Per contra, the learned Additional Public Prosecutor made the following submissions:

(i) The issue of legitimate expectation cannot be gone into while deciding the bail application and ultimately, it is for the Central Government to make the appropriate amendment in the Act and till then, the existing provisions will govern.

(ii) In the instant case, the information received through telephone was a cryptic message and based on the same, an FIR cannot be registered and therefore,



Crl.O.P.(MD) No.18999 of 2024

there is no violation of the judgment in Lalita Kumari's case.

WEB COPY

(iii) In the instant case, the contraband that was seized from the accused persons was accompanied by tops and therefore, the entire contraband has to be weighed and the leaves and the seeds cannot be excluded. To substantiate this submission, the learned Additional Public Prosecutor relied upon the judgment of the Apex Court in Shiv Kumar Mishra v. State of Goa, reported in (2009) 3 SCC 797. The ganja and the gunny bags were weighed separately and it was found that there was 21 kilograms of ganja and the gunny bags weighed 300 grams.

(iv) Section 52A of the Act was complied with and to substantiate the same, the samples taken in the presence of the Magistrate was proved by way of photographs available at page Nos.72 to 74 of the typed set of papers filed on the side of the prosecution.

(v) Taking videograph was not mandatory since the incident had taken place on 27.05.2024 before BNSS came into force but however, photographs have been taken in this case on the search and seizure and the same is in substantial compliance of law.

(vi) The individual seizure made from the respective accused persons was in the course of the same transaction and Section 34 of IPC is attracted and therefore, the total weight of the contraband has to be ascertained only by putting together the



Crl.O.P.(MD) No.18999 of 2024

entire seizure. To substantiate this submission, the learned Additional Public Prosecutor relied upon the judgment of this Court in Mohamed Ali and another v. The State, reported in [2017 (1) L.W. (Crl.) 842].

(vii) A2 travelled in a private car along with A1 and A3 from Madurai to Andhra Pradesh and thereafter back from Andhra Pradesh to Madurai. He cannot take a plea of ignorance and he must also be construed to be in conscious possession of the contraband. To substantiate this submission, the learned Additional Public Prosecutor relied upon the judgment of the Apex Court in Union of India v. Mohd. Nawaz Khan, reported in (2021) 10 SCC 100.

(viii) The applicability of Section 37 of the Act has not been taken away from the constitutional Courts and therefore, while considering the bail application, the twin requirements under Section 37 of the Act is mandatory. To substantiate this submission, the learned Additional Public Prosecutor relied upon the judgment of the Apex Court in Union of India v. Mohd. Nawaz Khan, reported in (2021) 10 SCC 100.

(ix) Insofar as the scope of Section 37 of the Act, the learned Additional Public Prosecutor relied upon the judgment in State of Kerala and others v. Rajesh and others, reported in (2020) 12 SCC 122 and Narcotics Control Bureau v. Mohit Aggarwal, reported in (2022) 18 SCC 374.

(x) The investigation has been completed and charge sheet was filed



Crl.O.P.(MD) No.18999 of 2024

within the statutory period and the same has been taken on file by the Special Court
in C.C.No.421 of 2024.

WEB COPY

9.This Court has carefully considered the submissions made on either side and the materials available on record.

10.The issue with regard to legitimate expectation and the agreement that was signed by India in the 63rd Session of UN Commission on Narcotic Drugs in December 2020, mandates India to carry out the necessary amendment in the NDPS Act. The decision was taken to the effect that cannabis and cannabis resin will be deleted from Schedule - IV and it will be retained in Schedule - I of the 1961 Convention. It is contended that this agreement signed by India gave a legitimate expectation to the accused persons that the domestic law namely the NDPS Act will be amended accordingly and the severity of the punishment will be brought down. This issue, strictly speaking cannot be given gone into in a bail application. While dealing with the bail application, this Court can only look into the existing provision as is available in the statute book. This Court can only emphasize the fact that the Government of India must adhere to the agreement signed and implement the same since Sections 2(ix), 3 and 70 of the Act emphasize on the adherence to the convention and its amendments. Similarly, Article 51(c) also obligates India to respect international law and treaties. The statement of objects and reasons of the NDPS Act



Crl.O.P.(MD) No.18999 of 2024

also reiterates the commitment of India to implementing international obligations.

WEB COPY

Thus, this Court is hopeful that the Government of India will act upon the resolution which was supported by India and accordingly deal with cannabis and cannabis resin.

11.Insofar as the contention that the judgment of the Apex Court was violated in Lalita Kumari's case, this Court holds that a message received through telephonic conversation unless satisfies the requirements of a First Information Statement (FIS) cannot automatically be made as a basis for registration of the FIR. There are many messages received by the police from different sources and the police cannot be expected to register FIR whenever they receive such messages without testing the genuineness of such a message. Hence to ensure that a proper procedure is followed, the NDPS Act itself provides for a procedure where such information is recorded and intimated to the higher level officer and permission is obtained and it is also entered in the General Diary. In many cases, the police will not have the time to register an FIR and they may have to immediately leave to the spot to apprehend the accused persons and the contraband. Therefore, the respondent police not registering an FIR after receiving the telephonic message, cannot be held to be a violation of the judgment of the Apex Court in Lalita Kumari's case.

12.It was contended that the seizure was made on 27.05.2024 and whereas,



Crl.O.P.(MD) No.18999 of 2024

WEB COPY

it was produced before the Magistrate only on 15.07.2024 after 1 ½ months. This Court went through the case diary and it is seen that the contraband was produced before the Magistrate under Form - 91 on 28.05.2024 and based on the directions issued by the Magistrate, it was deposited in MALCANA, Madurai. Thereafter, the samples have been taken on 01.07.2024 in the presence of the Magistrate. Therefore, there is no delay in producing the contraband before the Magistrate as was sought to be projected by the accused persons.

13.The prosecution has taken a specific stand based on the materials collected in the course of investigation that there was a continuous seizure from the accused persons in the course of the same transaction. To substantiate the same, the bank account details and the CDR is relied upon. For the present, this Court can only look at the prima facie case and considering the judgment of this Court in Mohamed Ali case referred supra, this Court prima facie holds that Section 34 of IPC can be relied upon since the expression used under Section 34 of IPC is “Criminal Acts” and not “Offence”. This expression gives Section 34 a wider scope and that apart, Section 34 is only a rule of evidence and not a substantive penal provision.

14.The main issue on which this Court has to bestow its attention is on the quantity of contraband that was seized by the respondent police. The quantity of contraband becomes very vital since the commercial quantity for a ganja is 20



Crl.O.P.(MD) No.18999 of 2024

WEB COPY

kilograms and above and what has been seized in this case is 21 kilograms which is 1 kilogram above the commercial quantity prescribed for ganja. If it is a commercial quantity, the Court has to necessarily look at the twin requirements prescribed under Section 37 of the Act. If this Court ultimately answers this issue in favour of the accused persons, it is not necessary for this Court to go into the other issue raised on the side of the petitioners that a constitutional Court is not bound by the limits provided under Section 37 of the Act. On the other hand, if this issue does not go in favour of the accused persons, this Court will take up that issue also and answer the same.

15.The specific case of the prosecution is that they found 22 parcels kept in a travel bag and a shopping bag which was available in the car boot carrying registration No.TN-59-CJ-1969. In the FIR, the description of the contraband is explained as follows:

““கார் டிக்கியில் **Adventure 70+5L** என்ற டிராவல் பேக்கும் மற்றும் கோலம் பொன்னி என்ற பெயர் அச்சிட்ட கட்டைப்பையில் 22 பார்சல்கள் இருந்தது. அந்த பார்சல்களை பிரித்து பார்த்த போது அதில் இலை பூ விதைகளுடன் கூடிய நெடிய வாயுடன் இருந்த பொருள்களை எடுத்து பார்த்த போது அது கஞ்சா என்ற போதைபொருள் என தெரியவந்தது.”

16.The description of the contraband as found in the forensic examination report is that there was a polythene cover containing dry, greenish, brown leaves along with flowering tops, seeds and broken leaves. Having understood the status of

<https://www.mhc.tn.gov.in/judis>



Crl.O.P.(MD) No.18999 of 2024

WEB COPY

the contraband that was sent to the forensic science laboratory, this Court has to look into the definition of ganja. Section 2(iii)(b) of the NDPS Act defines 'ganja' as follows:

“(b) ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated; and”

17.The above definition has been considered by this Court in the judgment in K.V.Ramasamy case referred supra. The relevant portions are extracted hereunder:

“18.The first thing to be noted is that as per the report, apart from flowering top, seeds, leaves, stem was found in the samples. The definition of Ganja excludes the seeds and leaves when not accompanied by the tops. Therefore, when the Ganja is seized, with the flowering or fruiting tops. seeds and leaves, totally it has to be taken as Ganja. If the seeds and leaves are separate, not accompanied with the flowering or fruiting tops, they could not be termed as Ganja. This makes it clear that mainly the flowering or fruiting tops of the cannabis plant is a ganja. As far as the stem is concerned, it is doubtful whether it could be regarded as ganja. Normally, the plant includes stem and therefore the cannabis plant must be with stem and also with other parts such as flowering or fruiting tops, seeds and leaves. Therefore, when a cannabis plant is seized, if it contains flowering or fruiting tops, seeds and leaves



Crl.O.P.(MD) No.18999 of 2024

being accompanied, it is not necessary to mention separately, it contains stem also.

WEB COPY

As mentioned above stem also is part of the plant. At the same time, like seeds and leaves, stem is not accompanying the flowering top and broken stem is available, it could not be termed as ganja. The stem may be long or short, normally it is long thin part of the plant."

18.It is clear from the above judgment that when ganja is seized with flowering or fruiting tops, seeds and leaves must also be taken into account. The flowering or the fruiting tops of the cannabis plant is called as ganja. If the same is not accompanied with the stem, the whole thing put together can be termed as ganja. If it is accompanied with the stem, the stem has to be removed and only the remaining must be weighed.

19.It will also be relevant to take note of the judgment of the Apex Court in Shiv Kumar case referred supra. The relevant portions are extracted hereunder:

"12.Section 2(iii)(b) of the NDPS Act defines "ganja" as follows:

"2.(iii)(b) ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated;"

13.An attempt has been made on behalf of the appellant to convince us that the seized Ganja was not accompanied by flowering or fruiting tops and hence the



Crl.O.P.(MD) No.18999 of 2024

WEB COPY

weight of the seeds and the leaves would have to be excluded on account of the said definition, which would reduce the weight of the seized Ganja considerably so as to exclude it from the definition of commercial quantity and attract a much lesser sentence than when the seized commodity was treated to be of commercial quantity.

14. The submissions made by learned Counsel for the appellant are not convincing since from the evidence on record it has been established that the seized Ganja consisted of a greenish brown colour leafy and flowery parts of the plant (in moist condition) which, in terms of the definition of the expression "Ganja", would include the seeds and leaves of the cannabis plant since the seized Ganja was accompanied by the flowery parts of the plant."

20.The judgment of the Apex Court makes it clear that where the seized ganja is accompanied by flowering tops, it can be included with the seeds and leaves of the cannabis plant and all put together will fall within the definition of ganja. The orders passed by the other Courts are also on similar lines.

21.The description of the contraband in the FIR and in the report of the forensic laboratory prima facie satisfies the requirement. Having rendered the above finding, the next issue to be gone into is as to whether the samples were taken in accordance with Section 52A read with the relevant Rules. As stated supra, 22 parcels are said to have been seized from the car apart from 1.5 kilograms seized from A4



Crl.O.P.(MD) No.18999 of 2024

and 500 grams seized from A6. The prosecution is relying upon the photographs available at page Nos.72 to 74 to substantiate that the sample was taken before the Magistrate in compliance with Section 52A of the NDPS Act and Rule 9 of the Rules. It will be relevant to take note of Rules 3 and 10 of the Rules, which are extracted hereunder:

“3. Classification of seized material. – (1) The narcotic drugs, psychotropic substances and controlled substances seized under the Act shall be classified based on physical properties and results of the drug detection kit, if any, and shall be weighed separately.

(2) If the narcotic drugs, psychotropic substances and controlled substances are found in packages or containers, such packages and containers shall be weighed separately and serially numbered for the purpose of identification.

(3) All narcotic drugs, psychotropic substances and controlled substances found in loose form shall be packed in tamper proof bag or in container, which shall be serially numbered and weighed and the particular of drugs and the date of seizure shall also be mentioned on such bag or container:

Provided that bulk quantities of ganja, poppy straw may be packed in gunny bags and sealed in such way that it cannot be tempered with:

Provided further that seized concealing material such as trolley bags, backpack



Crl.O.P.(MD) No.18999 of 2024

and other seized articles shall be sealed separately.

WEB COPY

(4) The classification, weighing, packaging and numbering referred to in this sub-rule shall be done in the presence of search witnesses (Panchas) and the person from whose possession the drugs and substances was recovered and a mention to this effect shall invariably be made in the panchnama drawn on the spot of seizure.

(5) The detailed inventory of the packages, containers, conveyances and other seized articles shall be prepared and attached to the panchnama.

10. Drawing the samples. – (1) One sample, in duplicate, shall be drawn from each package and container seized.

(2) When the packages and containers seized together are of identical size and weight bearing identical marking and the contents of each package give identical results on colour test by the drugs identification kit, conclusively indicating that the packages are identical in all respects, the packages and containers may carefully be bunched in lots of not more than ten packages or containers, and for each such lot of packages and containers, one sample, in duplicate, shall be drawn: Provided that in the case of ganja, poppy straw and hashish (charas) it may be bunched in lots of not more than forty packages or containers.

(3) In case of drawing sample from a particular lot, it shall be ensured that



Crl.O.P.(MD) No.18999 of 2024

representative sample in equal quantity is taken from each package or container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.”

22. At this juncture, it will be relevant to take note of the judgment of the Apex Court in *Union of India v. Mohanlal and another*, reported in (2016) 3 SCC 379. The relevant portions are extracted hereunder:

“15. It is manifest from Section 52A (2)(c) (*supra*) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw



Crl.O.P.(MD) No.18999 of 2024

WEB COPY

representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17.The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.”

23.The above judgment has been cited with approval in the subsequent judgments in Mohammed Khalid case referred supra and Mangilal v. State of Madhya Pradesh, reported in 2023 SCC Online SC 862. It is mandatory on the part of the investigation officer to prepare an inventory of the seized narcotic drugs with all details relating to the description and if the contraband is found in packets, each packet should be weighed separately and serially numbered for the purpose of



Crl.O.P.(MD) No.18999 of 2024

identification and one sample in duplicate should be drawn from each packet seized.

WEB COPY

If in case the investigation officer mixes the samples contained in different packages and puts the contraband in one cover and sends the sample for analysis, it is in violation of the Rule and it causes serious prejudice to the accused persons. It is quite evident from the report of the forensic science laboratory that what has been received by the forensic science laboratory, is only a single packet (polythene cover) weighing 50 grams. This is in clear violation of the Rules and it clearly puts the accused persons to serious prejudice.

24.Consolidating all the packets together without dealing with each packet separately as mandated under the Rules, will also have a bearing on the total weight of the contraband. This fact assumes significance in this case since the total weight of the contraband is stated to be 21 kilograms and it is only one kilogram above the commercial quantity. Therefore, the violation of the Rule will also have an impact on the total quantity of the contraband and it must also be seen that if the Rule had been followed, whether the total weight of the contraband would have reached commercial quantity. This issue will also enure in favour of the accused persons.

25.To substantiate the above view, this Court takes note of the judgment of the Kerala High Court in Amal case referred supra and the relevant portions are extracted hereunder:



Crl.O.P.(MD) No.18999 of 2024

WEB COPY

“14. On a comprehensive evaluation of the above- referred section, rules, and their interpretations in the above referred judgments, leaves room for no doubt that it is mandatory for the Investigating Officer to prepare an inventory of the seized narcotic drugs/psychotropic substances/controlled substances with all such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars, and then make an application to the Magistrate to permit him to draw the representative samples of such contraband in the presence of the Magistrate so as to certify the correctness of the inventory so prepared. If the contraband is found in packages or containers, such packages/containers shall be weighed separately and serially numbered for the purpose of identification and one sample, in duplicate, shall be drawn from each package/container seized.

15. The word used in the above provisions is 'shall' and not 'may', which establishes that the rule is mandatory and not directory.

16. It is to be remembered that it is after a cleavage of opinion on the interpretation of the Standing Orders/Instructions on the procedure to be followed in the drawal, storage, testing and disposal of samples seized under the Act, that the Central Government has framed the above Rules, making it mandatory to draw representative samples from each seized package/container.

17. Even before the framing of the rules, in *Khet Singh v. Union of India*



Crl.O.P.(MD) No.18999 of 2024

[MANU/SC/0205/2002 : 2002:INSC:158 : (2002) 4 SCC 380], the Honourable

WEB COPY

Supreme Court observed in the following manner:

"10. The instructions issued by the Narcotics Control Bureau, New Delhi are to be followed by the officer-in-charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer-in-charge of the investigation."

18. In cases of a similar nature, where the Detecting Officer mixed the samples contained in different covers and put the contraband in one cover and sent the sample for analysis, the Rajasthan High Court in *Netram v. State of Rajasthan* [MANU/RH/1912/2013 : 2014 (2) WLN 394 (Raj).] and the Delhi High Court in *Edward Khimani Kamau v. The Narcotics Control Bureau* [MANU/DE/1748/2015] and *Amani Fidel Chris v. Narcotics Control Bureau* [MANU/DE/0803/2020 : 2020:DHC:1695] relying on Section 52A and the Standing Instructions/Orders have held that the mixing of contents and the failure to send representative samples not only lose the sanctity of the case property in the individual cover, but also the evidence of the quantity in each cover, and it causes serious prejudice to the accused. [Read also the decisions in *Shajahan v. Inspector of Excise* (MANU/KE/5074/2019 : 2019:KER:68337) and *Kulwinder Kumar v. State of Punjab* (MANU/PH/0559/2018)]"



Crl.O.P.(MD) No.18999 of 2024

WEB COPY

26. Even the photographs that have been placed before this Court shows that the 22 packets have been bundled into one and one single packet has been drawn and sent for chemical analysis. This legal issue will certainly enure in favour of the accused persons since it is in violation of Section 52A read with the relevant Rules and it is also in violation of the law that has been settled by the Apex Court and which has been followed by various High Courts.

27. While dealing with a bail application in the light of Section 37 of the NDPS Act, the Court must only see if the prosecution was given an opportunity to oppose the application and the Court must be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offence. Reasonable grounds will mean that the facts and circumstances of the case are sufficient for the Court to prima facie come to the conclusion that the accused will not be found guilty due to a mandatory violation. The Court must only see if there is a credible and plausible ground which makes the Court to believe that the accused persons will get the benefit of the non-compliance of mandatory provisions which will result in their acquittal.

28. The Court can also see if there are any previous cases against the accused persons and the period of incarceration suffered by the accused persons and also the probability of the case not getting disposed of in a near future. In a recent



Crl.O.P.(MD) No.18999 of 2024

judgment of the Apex Court, it was held that the High Courts cannot put pressure on the trial Courts to dispose of cases within a time frame without understanding the pendency of the cases and to get over the fact that an accused person is staying in the jail for a relatively long period.

29.In the case in hand, A1, A2 and A4 do not have previous cases. A1 and A2 are suffering incarceration from 27.05.2024 and A4 is suffering incarceration from 28.05.2024. Insofar as A6 is concerned, he is suffering incarceration from 11.06.2024 and it has now come to light that there are nine pending cases against A6 all involving IPC offences alleged to have been committed up to the year 2020. That apart, the only material that is available against A6 is the confession of the co-accused and what has been seized from A6 is 500 grams of ganja. The investigation has been completed and the trial is yet to commence in this case. Therefore, the possibility of disposing of the case in the near future is highly doubtful.

30.As a result of the above findings, it is not necessary for this Court to go into the last issue as to whether the twin conditions under Section 37 of the Act ties the hands of a constitutional Court while exercising its bail jurisdiction. This issue can be reserved for an appropriate case and dealing with this issue in this case will only be an academic exercise.

31.In the result, this Court is inclined to enlarge the petitioners on bail



Crl.O.P.(MD) No.18999 of 2024

subject to the following conditions:

WEB COPY

32. Accordingly, the petitioners are ordered to be released on bail on his executing a bond for a sum of Rs.10,000/- (Rupees ten thousand only) with two sureties, each for a like sum to the satisfaction of the Principal Special Court for Narcotic Drugs and Psychotropic Substances Act Cases, Madurai and on further conditions that:-

[a] the sureties shall affix their photographs and Left Thumb Impression in the surety bond and the Magistrate may obtain a copy of their Aadhar card or Bank pass Book to ensure their identity.

[b] the petitioners shall report before the Principal Special Court for Narcotic Drugs and Psychotropic Substances Act Cases, Madurai, daily at 10.30 a.m., until further orders including the day on which the case is posted for hearing;

[c] the petitioners shall not tamper with evidence or witness either during investigation or trial.

[d] the petitioners shall not abscond either during investigation or trial.

[e] On breach of any of the aforesaid conditions, the learned Magistrate/Trial Court is entitled to take appropriate action against the petitioners in accordance with law as if the conditions have been imposed and the petitioners released on bail by the learned Magistrate/Trial Court himself as laid down by the



Crl.O.P.(MD) No.18999 of 2024

Hon'ble Supreme Court in P.K.Shaji vs. State of Kerala [(2005)AIR SCW 5560].

WEB COPY

[f] If the accused thereafter absconds, a fresh FIR can be registered under

Section 269 of B.N.S.2023.

sd/-
06/12/2024

/ TRUE COPY /

06 / 12 / 2024

Sub-Assistant Registrar
Madurai Bench of Madras High Court,
Madurai - 625 023.

PKN

TO

1. THE JUDGE,
PRINCIPAL SPECIAL COURT FOR NARCOTIC DRUGS AND PSYCHOTROPIC
SUBSTANCES ACT CASES, MADURAI.

2 THE INSPECTOR OF POLICE,
PROHIBITION ENFORCEMENT WING,
MADURAI CITY, MADURAI.

3. THE SUPERINTENDENT, CENTRAL JAIL, MADURAI.

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

+1. CC to T. PALANISAMY Advocate SR.No.15049(I) dated 06/12/2024

+1. CC to DEEPAK .F Advocate SR.No.14994 (I) dated 06/12/2024



WEB COPY



Crl.O.P.(MD) No.18999 of 2024

ORDER
IN

Crl.O.P.(MD) Nos.18999, 19356,
19473 and 19610 of 2024
Date :06/12/2024

PSP/ /SAR /06.12.2024/ 30P/ 7C

Madurai Bench of Madras High Court is issuing certified
copies in this format from 17/07/2023