

'Casually Playing With Personal Liberty Of Accused': Madras HC Recommends Criminal Law Training For Executive Magistrates

2022 LiveLaw (Mad) 458

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

K. MURALI SHANKAR; J.

CRL.R.C.(MD).No.712 of 2022; 31.10.2022

Vinoth versus Sub-Divisional Magistrate cum The Revenue Divisional Officer

PRAYER: Criminal Revision Petition has been filed under Section 397 r/w 401 of Cr.P.C, to call for the records pertaining to the order passed in Na.Ka.No.A3/4262/2022 (MC.No.143/2021), dated 13.06.2022 on the file of the first respondent and set aside the same.

For Petitioner : Mr.B.Vinoth Kumar,

For Respondents : Mr.K.Sanjai Gandhi, Government Advocate (Criminal Side)

ORDER

It would be apt to begin the order with the words of the Hon'ble Supreme Court in **Maneka Gandhi vs Union Of India** reported in **AIR 1978 SC 597**.

“Deprivation of one's personal liberty by a procedure, which is 'unreasonable', 'unfair', 'unjust' and 'arbitrary', is against law.”

2. The Criminal Revision Case is directed against the order, dated 13.06.2022 passed by the first respondent/Sub-Divisional Magistrate cum Revenue Divisional Officer, Kulithalai, Karur District, in Na.Ka.No.A3/4262/2022 (MC.No.143/2021) under Section 122(1) (b) of the Code of Criminal Procedure.

3. The first respondent, on the basis of the report of the second respondent, initiated proceedings under Section 110 Cr.P.C, in Letter No.112 of 2021 on 07.10.2021, conducted enquiry and ordered the petitioner to execute a bond under Section 110 Cr.P.C on 07.10.2021. On that basis, the petitioner has been bound over and released, after executing a bond, thereby to maintain good behaviour for a period of one year viz., from 07.10.2021 to 06.10.2022. Subsequently, a criminal case was registered against the petitioner in Crime No.490 of 2022 on the file of the Palladam Police Station for the offences punishable under Section 302 IPC r/w 302, 120(b) and 34 IPC and the petitioner was arrested on 07.05.2022 and remanded to judicial custody on the same day. The second respondent, by alleging that the petitioner violated/breached the bond executed by him, has sent a communication, requesting the first respondent to initiate necessary action under Section 122(1)(b) Cr.P.C. Based on the said report of the second respondent, the first respondent issued a show cause notice to the petitioner and directed the Superintendent of District Prison, Thiruppur to produce the petitioner on 13.06.2022. After serving the notice on the petitioner on 10.06.2022, he was produced before the first respondent on 13.06.2022. The first respondent after enquiry, has passed the impugned order, dated 13.06.2022, cancelling the security bond executed by the petitioner and ordered to detain him in prison till the expiry of the period of bond viz., 06.10.2022. Aggrieved by the said order, the petitioner has preferred the present revision.

4. Heard Mr.B.Vinoth Kumar, learned counsel for the petitioner and Mr.K.Sanjai Gandhi, learned Government Advocate (Criminal Side) appearing for the respondents.

5. The learned counsel for the petitioner would submit that the impugned order has been passed without following the procedure laid down by this Court, that the first respondent has not conducted proper enquiry as prescribed in the law, that the petitioner's right to get legal assistance was denied, that no opportunity was given to the petitioner to get the

documents, that the first respondent has failed to provide all the documents mentioned in the impugned order, that the learned Magistrate has no power to invoke Section 122 (1)(b) of Cr.P.C for violation of the bond executed under Section 110 Cr.P.C and that the personal liberty of the petitioner was seriously affected by the impugned order passed by the first respondent.

6. The learned Government Advocate (Criminal Side) appearing for the State would submit that the petitioner has been continuously and frequently involving in various criminal activities and caused various problem affecting the public peace and tranquillity, that during the pendency of the bond period, the petitioner was involved in an offence for which, FIR came to be registered in Crime No.490 of 2022 on the file of the Palladam Police Station for the offences punishable under Section 302 IPC r/w 302, 120(b) and 34 IPC, that since the petitioner has violated the bond, at the instance of the second respondent, the first respondent has initiated the proceedings, that the first respondent after conducting proper enquiry has passed the order on 13.06.2022, cancelling the security bond and ordered to detain him till the expiry of the bond period, that the petitioner is the habitual offender and two criminal cases are pending against him as of now, that the petitioner was given sufficient opportunity as per the procedure enumerated under Cr.P.C and that therefore, the question of setting aside the order passed by the first respondent does not arise at all.

7. No doubt, the second respondent in their counter affidavit has listed out two cases pending against the petitioner on the file of the Kulithalai Police Station and Palladam Police Station respectively.

8. The learned Government Advocate (Criminal Side) has relied on the recent decision of the Hon'ble Supreme Court in ***Devadassan Vs.The Second Class Executive Magistrate, Ramanathapuram and others*** reported in [2022 Live Law \(SC\) 260](#), wherein the Hon'ble Apex Court while upholding the order of detention passed by the Executive Magistrate, has explained the scheme of Chapter VIII of the Code of Criminal Procedure, which contains provisions relating to bond for keeping peace and good behaviour and also the consequences emanating from the breach of such bond.

9. In the said decision case, Hon'ble Supreme Court by observing that nothing was brought on record as to how and in what manner the procedure contemplated under Chapter VIII of Cr.P.C. was not followed, has upheld the order passed by the Executive Magistrate, as the same was passed after following the procedure, so prescribed and after affording due opportunity to the accused and thereby dismissed the appeal, confirming the order of High Court.

10. At the out set, it is necessary to refer Section 110 and 122(1)(b) of Cr.P.C.

"110. Security for good behaviour from habitual offenders - When an Executive Magistrate receives information that there is within his local jurisdiction a person who—

(a) is by habit a robber, house-breaker, thief, or forger, or

(b) is by habit a receiver of stolen property knowing the same to have been stolen, or

(c) habitually protects or harbours thieves, or aids in the concealment of disposal of stolen property, or

(d) habitually commits, or attempts to commit, or abets the Commission of, the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter XII of the Indian Penal Code (45 of 1860), or under section 489A, section 489B, section 489C or section 489D of that Code, or

- (e) *habitually commits, or attempts to commit, or abets the Commission of, offences, involving a breach of the peace, or*
- (f) *habitually commits, or attempts to commit, or abets the commission of—*
- (i) *any offence under one or more of the following Acts, namely;*
- (a) *the Drugs and Cosmetics Act, 1940 (23 of 1940);*
- (b) *the Foreign Exchange Regulation Act, 1973 (46 of 1973);*
- (c) *the Employees Provident Funds and Family Pension Fund Act, 1952 (19 of 1952);*
- (d) *the Prevention of Food Adulteration Act, 1954 (37 of 1954);*
- (e) *the Essential Commodities Act, 1955 (10 of 1955);*
- (f) *the Untouchability (Offences) Act, 1955 (22 of 1955);*
- (g) *the Customs Act, 1962 (52 of 1962); or*
- (h) *the Foreigners Act, 1946*
- (ii) *any offence punishable under any other law providing for the prevention of hoarding or profiteering or of adulteration of food or drugs or of corruption, or*
- (g) *is so desperate and dangerous as to render his being at large without security hazardous to the community,*

such Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit.”

Section 122 (1) (b) :

“If any person after having executed a bond without sureties for keeping the peace in pursuance of an order of a Magistrate under section 117, is proved, to the satisfaction of such Magistrate or his successor- in- office, to have committed breach of the bond, such Magistrate or successor- in-- office may, after recording the grounds of such proof, order that the person be arrested and detained in prison until the expiry of the period of the bond and such order shall be without prejudice to any other punishment or forfeiture to which the said person may be liable in accordance with law.”

11. Though originally the Judicial Magistrates were empowered to exercise powers under Sections 106 to 110 Cr.P.C, subsequently Executive Magistrates were also conferred powers to conduct the proceedings under Sections 106 to 110 Cr.P.C.

12. Hon'ble Apex Court in ***Bibhuti Bhusan Chatterjee Vs. State of Bihar*** reported in ***AIR 1960 SC 128***, has specifically held that the proceedings under Section 107 Cr.P.C are undoubtedly judicial.

13. A full Bench of Kerala High Court in ***Thekkittel Gopalankutty Nair Vs. Melepurath Sankunni Ezhuthaseah*** reported in ***AIR 1971 Ker 280***, has observed that a proceeding taken under Section 107 to 110 Cr.P.C, is a judicial proceeding.

14. Though the Executive Magistrates were conferred powers to conduct the proceedings under Sections 106 to 110 Cr.P.C, it is settled law that the said proceedings are judicial in nature.

15. It is pertinent to note that the criminal jurisprudence mandates that a person, who is charged with an offence must be given an opportunity, which should be meaningful and fair in terms of Article 21 of Constitution of India. This basic concept is very much applicable to an enquiry contemplated under Sections 106 to 110 Cr.P.C, which are triable by the Executive Magistrates. In ***Maneka Gandhi's*** case, the Hon'ble Supreme Court has categorically held that although there are no positive words in the statute requiring that the party shall be heard, yet-the justice of the common law will supply the omission of the

legislature. The principle of *audi alteram partem*, which mandates that no one shall be condemned unheard, is the primary notion of rule of nature justice.

16. It is necessary to refer the following decision of this Court in ***P.Sathish @ Sathish Kumar Vs. State rep. by the Inspector of Police and another*** reported in **2019 (2) MWN (Crim) 136**, wherein the learned Judge of this Court, after referring to the various decisions of the Hon'ble Supreme Court and this Court and on considering the suggestions and guidelines given by the counsels therein, has formulated the following legal principles;

"1. Notice to be sent to the person by the Executive Magistrate to show cause as to why action under Section 122(1)(b) of Cr.P.C should not be taken for breach of the bond executed under Section 117 Cr.P.C on a date fixed.

2. At the enquiry, the Executive Magistrate should furnish the person the materials sought to be relied upon, including statements of witnesses, if any, in the vernacular (if the person is not knowing the language other than his mother tongue).

3. If the person wishes to engage an Advocate to represent him at the enquiry, an opportunity to have a counsel of his choice should be provided to him.

4. The Executive Magistrate shall inform the person about his right to have the assistance of a lawyer for defending him in the enquiry.

5. The enquiry shall be conducted by the Executive Magistrate on the notified date or such other date as may be fixed and the person should be allowed to participate in the same.

6. At the enquiry, an opportunity should be given to the person to :(i) Cross-examine the official witnesses, if any and (ii) produce documents and witnesses, if any, in support of his case.

7. Such Executive Magistrate or his successor in office, should then, apply his mind on the materials available on record, in the enquiry, and pass speaking order.

8. An order under Section 122(1)(b) of Cr.P.C should contain the grounds upon which the Executive Magistrate is satisfied that the person has breached the bond.

9. A copy of the order should be furnished to the person along with the materials produced at the enquiry.

10. The enquiry, as far as possible shall be completed within 30 days and at no circumstances, the enquiry shall be adjourned unnecessarily. The advocates, who appear on behalf of the persons concerned, are expected to co-operate with the enquiry process for its expeditious completion."

17. The learned Judge has specifically observed that the guidelines are integral part of Articles 21 & 22 of the Constitution of India and also inconsonance with Section 39-A of the Direct Principles of State Policy and the relevant passage is extracted hereunder :

"14. Moreover, the guidelines are integral part of Articles 21 & 22 of the Constitution of India and also inconsonance with Section 39-A of the Direct Principles of State Policy. No doubt, the State may have practical difficulties and may confront glitches in completing the enquiry in furtherance of exercise of power under Section 122(1)(b) of Cr.P.C., nevertheless, the Constitutional mandate, as provided under Articles 21 & 22 of the Constitution is paramount and supreme and the same has to be followed under all circumstances, notwithstanding the difficulties to be faced by the administration. When the liberty of an individual is sought to be affected and curtailed, the State is bound to provide legal assistance and also provide meaningful and fair opportunity to the persons concerned. In the absence of such opportunity, as aforementioned, the orders to be passed by the Executive Magistrates is prone to interference as being unconstitutional and contrary to the legal principles laid down by this Court. When a State is governed by a written Constitution and when the Constitution reigns supreme in our polity, it is the bounden duty of the State to protect the personal liberty of the citizen by following the constitutional mandate and the personal liberty cannot be made a casualty on the basis of administrative expediency. That alone

can uphold the rule of law. When the personal liberty of a person is sought to be taken away by condemning him into prison for an unexpired period of bond, it is statutorily and constitutionally imperative that the person concerned must be given the benefit of meaningful, real and fair opportunity, as that alone would be the safeguard for the citizens against misuse of the provisions of Cr.P.C., by the Executive Magistrates concerned."

18. The learned Judge in the said decision has further directed that the principles laid down therein are to be followed by all the Executive Magistrates and in order to infuse uniform approach by all the Executive Magistrates, the learned State Public Prosecutor was directed to circulate the said decision to the Government and the Government shall act upon the principles as laid down above and issue necessary instructions to all the designated Executive Magistrates to follow the principles strictly while exercising their power under Section 122 (1) (b) of Cr.P.C.

19. After sitting in the criminal revision portfolio for a period of three months, I am constrained to say that the Executive Magistrates are not aware of the above principles laid down by this Court, nor the authorities have taken steps to instruct the Executive Magistrates to follow the said principles. Though the learned Government Advocate (Criminal Side) would submit that as per the directions of this Court in **P.Sathish's** case, necessary instructions have been issued, I found that the compliance to the above principles, is totally nil. During the said period, I have disposed of 41 revision cases, challenging the orders passed by the Executive Magistrates under Section 122(1)(b) Cr.P.C, out of which, except one case, in all other cases, the orders of Executive Magistrates were ordered to be set aside and the accused therein were directed to be released forthwith unless their custody is required in connection with any other case.

20. It is pertinent to note that in 40 cases, the orders of the Executive Magistrates were set aside only on the ground that they have not followed the legal principles laid down by this Court and also the basic principles of natural justice.

21. In one case, the Executive Magistrate, after conducting enquiry, without passing any order, has only issued a warrant of detention on breach of bond for maintaining good behaviour and that therefore, this Court was constrained to set aside the order and the matter was remanded back to the Executive Magistrate to conduct enquiry afresh and pass orders in accordance with law.

22. Now coming to the case on hand, it is pertinent to note that the Executive Magistrate has nowhere whispered about the enquiry allegedly conducted by her.

23. No doubt, the first respondent in the impugned order has stated that in pursuance of summons issued to the petitioner, he was produced before her on 13.06.2022 and she conducted enquiry directly with the petitioner. In the impugned order, it has been stated that though the petitioner has stated that he was arrested wrongly by alleging that himself and his friends had murdered one Gopal, husband of Susila, the petitioner was remanded to judicial custody as there were materials and that therefore, she has come to a decision that the petitioner had violated and breached the bond.

24. As rightly contended by the learned counsel for the petitioner, the first respondent has not even stated as to whether any summons for the production of witnesses were issued; whether any witnesses were examined; whether the petitioner was given an opportunity to cross examine the prosecution witnesses and whether the petitioner was given an opportunity to adduce his side evidence.

25. As rightly contended by the learned counsel for the petitioner, it is not known as to whether the petitioner was informed by the first respondent about his right to have the

assistance of a lawyer for defending him in the enquiry, that he was given an opportunity to have a counsel of his choice and that the petitioner was informed about his entitlement to have the assistance of a legal aid counsel.

26. It is pertinent to note that the first respondent has not stated that after the examination of the witnesses, the petitioner was permitted to cross examine the said witnesses. Moreover, as rightly pointed out by the learned counsel for the petitioner, the impugned order does not say as to whether the copies of records relied on by the prosecution were supplied to the petitioner.

27. Regarding the nature of the proceedings and the necessity to pass a reasoned order, it is necessary to refer the following decisions:

(i) **Selvam @ Selvaraj Vs. The Executive Magistrate cum Deputy Commissioner of Police (Law & Order, Crime & Traffic), Tiruppur**, reported in **CDJ 2017 MHC 4350** :

“43. From the reading of the aforesaid Judgment, which infact was issued on similar facts and circumstances as that of the present one, it is imperative that the Executive Magistrate before passing the detention order cancelling the bond executed by the detenu u/s 117 of Cr.P.C, has to record the grounds of proof that the petitioner/detenu has violated the bond conditions. In this regard, the Executive Magistrate shall record the reasons as to on what basis the Magistrate has come to a conclusion that the detenu has violated the bond conditions. Also an opportunity of hearing must be given to the detenu. When the detenu is present before the Magistrate, he should be supplied with the materials which are going to be utilised against him for arriving at a just conclusion that he has violated the bond conditions. On supplying such materials in vernacular, (if the detenu is not knowing the language other than his mother tongue), his explanation should be obtained. In this regard, if the petitioner / detenu wishes to engage a lawyer on his side to plead on his behalf, to give a satisfactory explanation on the materials supplied to him, for seeking explanation by the Magistrate, such an opportunity to have a counsel by his choice, also to be provided to him.”

(ii) **M.Ang Kumar Vs. The Executive Magistrate cum Deputy Commissioner of Police, Law and Order, Madurai** reported in **CDJ 2017 MHC 7784**.

“15. In this case on hand, supplying the documents and getting the views or reply from the husband of the petitioner / detenu would not have happened prior to passing of the impugned order. An opportunity of hearing must be given to the petitioner. When the detenu is present before the Magistrate, he should be supplied with materials, which are going to be utilized against him for arriving at a just conclusion that he has violated the terms of the bond. Since the order of detention made by the Executive Magistrate by cancelling the bond under Section 122(1)(b) of Cr.P.C., is an order without charge, without trial and without judgment, the same cannot be without due procedures to be followed in this regard. Since it is a personal liberty of an individual, which is to be infringed it can only be done under the procedures established under law within the meaning of Article 21 of the Constitution of India.

16. As per Section 122(1)(b) of Cr.P.C., the Executive Magistrate must record his grounds of satisfaction and he must say whether sufficient cause has been established. On perusal of the impugned order, he did not do so. The detention order has been passed mechanically. It is complete non- application of mind. The impugned detention order has not been passed in accordance with law. The impugned order suffers from legality, propriety and it is vitiated. No sufficient opportunity was given to the detenu on 04.07.2017 or prior to that to go through the statements of witnesses. No materials was furnished to face the enquiry conducted by the first respondent to the detenu prior to passing of the impugned order. The previous cases against the detenu referred to by the learned Additional Public Prosecutor at the time of hearing this Revision is outside the scope of the enquiry under Section 122(1)(b) of Cr.P.C. Previous cases are also not mentioned in the impugned order. The impugned order is passed only on the basis of the report submitted by the 4th respondent and the statements of the witnesses. This Court

finds in the impugned order that there is no subjective satisfaction of the Executive Magistrate / first respondent to conclude the violation of the bond condition and also for the detention of the detenue.

28. In the case on hand also, the first respondent has allegedly conducted the enquiry and passed the impugned order on the same day, as shown in the above decisions.

29. Moreover, the first respondent has not even shown the list of witnesses examined and the list of documents exhibited in the impugned order. But, it is evident from the records that the first respondent has not chosen to examine any witness nor marked any document and as such, this Court is at loss to understand, in the absence of any evidence, as to how the first respondent has come to the impugned decision.

30. Considering the above, this Court has no hesitation to hold that the impugned order is not good in law and the same is liable to be set aside. Before parting with this case, this Court is constrained to say that the Executing Magistrates, without knowing/understanding the basic concepts of criminal justice delivery system and by conducting some sort of enquiry as per their whims and fancies, are playing with the personal liberty of the accused, casually and mechanically.

31. The Police after losing their cases before the regular Courts are now attempting to punish the accused and detain them in prison through back door method by invoking the provisions of Chapter VIII.

32. In pursuance of the directions of this Court, the Sub Divisional Magistrate cum Revenue Divisional Magistrate, who passed the impugned order was present before this Court and on enquiry, she informed that she was promoted as Revenue Divisional Officer recently and she has not conducted any such enquiry before. More importantly, she was not aware of the principles laid down by this Court and nature of the enquiry to be conducted in the proceedings under Section 122(1)(b) Cr.P.C.

33. It is very much shocking to notice that the Executive Magistrates have been passing orders under Section 122(1)(b) Cr.P.C, detaining the accused for a period between six months to one year in a very casual manner and more importantly, affecting the personal liberty, which is guaranteed under Article 21 of the Constitution of India.

34. It is right time for the Government to take appropriate steps to conduct Training or Refresher courses to the newly appointed or promoted Executive Magistrates about the basic concepts of criminal law, how to conduct enquiry and how to pass reasoned orders.

35. The learned State Public Prosecutor and the Government are directed to comply with the directions issued in **P.Sathish's case** again and the directions given in the present order. Moreover, the Executive Magistrates, who are not following the principles laid down by this Court and are passing the orders recklessly and mechanically are to be dealt with severely and necessary departmental action should be initiated.

36. In the result, the Criminal Revision is allowed and the impugned order dated 13.06.2022 passed by the first respondent/ Sub-Divisional Magistrate cum The Revenue Divisional Officer, Kulithalai, Karur District, in Na.Ka.No.A3/4262/2022 (MC.No.143/2021), is hereby set aside.

37. For reporting compliance, Post the matter before this Court on 10.01.2023.