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Crl.M.P.(MD) Nos.10586 and 14218 of 2023

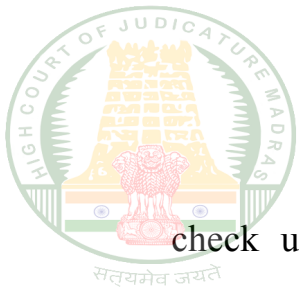
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Crl.M.P.(MD) No.10586 and 14218 of 2023
in
Crl.A.(MD) No.599 and 693 of 2023

VIVEK KUMAR SINGH, J.

The petitioners have filed these Criminal Miscellaneous Petitions praying to suspend the sentence passed against them by the learned I Additional Special Judge for NDPS Act cases, Madurai, in C.C.No.21 of 2020 dated 30.06.2023 and to enlarge them on bail, pending disposal of the Criminal Appeals.

2. The petitioner in Crl.M.P.(MD) No.14218 of 2023 is arrayed as Accused No.1 and the petitioner in Crl.M.P.(MD) No.10586 of 2023 is arrayed as Accused No.2. The case of the prosecution is that on 05.06.2019 at about 9.00 a.m., based on a secret information (Ex.P4) and after obtaining the prior approval of the Deputy Superintendent of Police (P.W.3), the Sub-Inspector of Police (P.W.2) along with the police force went on a raid at Thiruvathavur to Melur Road, near Andipatti TASMACH shop and involved in vehicle inspection. During the vehicle



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check up, P.W.2 intercepted the Pulsar bike in which the the pillion rider (Accused No.1) holds the white colour plastic gunny bag. The rider of the bike (Accused No.2) leaving his mobile phone on the spot escaped from the scene of occurrence. On search, P.W.2 found Ganja in the white colour plastic gunny bag. At about 14.15 hours, P.W.2 brought the A1 along with contraband to the police station and registered a case in Crime No.75 of 2019 for the offences punishable under Sections 8(c) read with 20(b) (ii) (C) and 25 of 'the Narcotic Drugs and Psychotropic Substances Act, 1985)' [hereinafter referred to as 'NDPS Act' for the sake of convenience and brevity]. Thereafter, he was produced before the Court along with the contraband and was remanded to judicial custody. After completion of investigation, the respondent police filed a final report and the same was taken on file in C.C.No.21 of 2020 before the learned I Additional Special Judge for NDPS Act cases, Madurai.

3. During trial, the prosecution has examined 4 witnesses as P.W.1 to P.W.4 and exhibited 12 documents as Ex.P.1 to Ex.P.12 and marked 5 Material Objects as P.M.O.1 to P.M.O.6, whereas, the accused has neither adduced any oral evidence nor produced any documents.



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WEB COPY 4. The learned I Additional Special Judge, upon considering the evidences adduced and on hearing the arguments on both sides, convicted the petitioners/A1 & A2 to undergo ten years Rigorous Imprisonment and to pay a fine of Rs. 1,00,000/- with twelve months Simple Imprisonment in case of default. Challenging the above said conviction and sentence, the petitioners have preferred the present Criminal Appeals along with the above Miscellaneous Petitions seeking suspension of sentence.

5. Learned counsel for the petitioners/accused submitted that A2, who was riding the two-wheeler is a diploma student. It is alleged by the prosecution that A1 and A2 were found with Ganja with the connivance of A3, who is the father of A1. However, A3 got acquitted after trial as he was not present in the scene of occurrence. Learned counsel submitted that A1 and A3 were son and father who could be roped with the offences easily, however, the prosecution failed to prove the nexus between A2 and A1 and A3. Further, there is no clinching evidence let in by the prosecution as to which place A2 gave a lift to A1, who was in possession of the contraband. Even according to the prosecution, while A2 was riding the two-wheeler, it is the other accused A1, who was sitting on the pillion



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holding a bag contained contraband. Furthermore, without any incriminating

circumstantial evidence, the prosecution cannot easily infer and presume that the

rider/A2 was aware of the bag which contained contraband. Learned counsel

submitted that normally, anyone would evade away from the scene of place by

seeing the officers, who would intercept the vehicle and it always does not mean

that they are in the intention to escape from the clutches of law. Though A2

rushed off with the two-wheeler, the respondent police have not investigated so

far with regard to the ownership of the two-wheeler vehicle. Likewise, the

respondent police have not investigated the SIM card and mobile phone which

were seized from the accused creates serious doubt in the line of investigation by

the respondent police. Moreover, the alleged confession statement was recorded

by the respondent police while A1 was in their custody and in addition, the Court

below has considered only a portion of the confession statement given voluntarily

by A1. Even in the confession statement of A1, there is no specific averment

about the involvement of A2 regarding the whole circumstances as alleged by the

prosecution. In this regard, referring the judgment of the Hon'ble Supreme Court

in *Abdul Rashid v. State of Bihar*, reported in *AIR 2001 SC 2422*, learned

counsel submitted that the confession of co-accused in these nature of cases will

not aid to gain any momentum to the prosecution and it is for the prosecution to



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prove the case beyond all reasonable doubt.

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6. Learned counsel for the petitioners has also placed his reliance on a decision of this Court dated 11.07.2023 in Crl.M.P.(MD) No.4681 of 2023 in Crl.A.(MD) No.315 of 2022, wherein, this Court, after taking note of the guidelines enunciated by the Hon'ble Supreme Court in *Satender Kumar Antil's* case [*Satender Kumar Antil v. Central Bureau of Investigation & Another*, reported in *2022 LiveLaw (SC) 577*] has granted bail and the relevant paragraph is extracted hereunder:-

“22. Considering the above facts and circumstances and taking note of the guidelines issued by the Hon'ble Supreme Court in Satender Kumar Antil's case and also the fact that the petitioners had already undergone more than half of the sentence imposed on them, this Court is inclined to suspend the sentence imposed on the petitioners.”

7. Learned counsel further submitted that the petitioner/A2 has incarcerated for more than seven months from the date of judgment and he was also granted anticipatory bail during the pendency of trial. Therefore, if the petitioners/accused are released on bail, they are ready to abide any conditions imposed by this Court and thereby, prayed for bail.

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WEB COPY 8. On the other hand, Mr.A.Thiruvadi Kumar, learned Additional Public Prosecutor vehemently contended that the evidence of P.W.1 and P.W.2 are very consistent that A2 was riding the vehicle and A1 was the pillion rider with the gunny bag containing 23 kg of Ganja. When the police party waylaid them, after the pillion rider alighted from the vehicle, A2 fled away from the scene of occurrence with the vehicle. Therefore, the presence of A2 with A1 in the scene of occurrence was proved through the evidence of P.W.1 and P.W.2. With regard to provision of Sections 35 and 54 of the NDPS Act, the accused failed to provide any plausible explanation during the trial to rebut the presumption mandated in the provisions. Moreover, the quantity of contraband is huge (23 kg of Ganja) and it is not in dispute that A1 is a habitual offender and having previous cases under NDPS Act and that A2 also belongs to the same village of A1. Therefore, the burden is on the accused to prove that he was not aware of the contents of the bag, which was in possession of A1.

9. At this juncture, learned Additional Public Prosecutor by placing reliance upon the judgment of the Hon'ble Supreme Court in *Union of India through NCB v. Md.Nawaz Khan*, reported in *2021 (10) SC 100*, has submitted that the

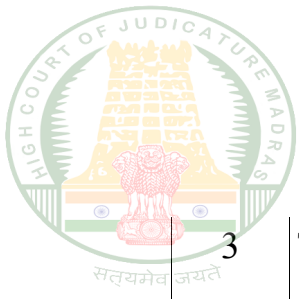


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absence of recovery of the contraband from the accused cannot be a criteria for grant of bail. In the present case, the evidence of P.W.1 and P.W.2 is consistent qua A2, who was riding the vehicle and thereafter, escaped from the scene of occurrence. Similarly, with regard to the contention of learned counsel for the petitioners that there are lapses in the investigation, learned Additional Public Prosecutor submitted that it is a settled legal principle that faulty investigation alone cannot yield benefit to the accused merely citing that there is no investigation qua mobile phone and SIM card which was seized from the scene of occurrence.

10. As regards the petitioner/A1 is concerned, the learned Additional Public Prosecutor submitted that he has involved in three previous cases which are of similar in nature which read as follows:

Sl.No	Police Station	Crime No.	Offences
1	Melur PS	Cr.No.193/2018	8(c) read with 20(b) (ii) (B) of NDPS Act
2	Sellur PS	Cr.No.1589/2017	8(c) read with 20(b) (ii) (C) and 27(A), 29(i) and 25 of NDPS Act (Possession of 225 kg of Ganja)



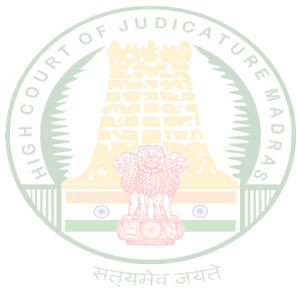
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3	Thallakulam PS	Cr.No.1520/2018	8(c) read with 20(b) (ii) (C) and 25 of NDPS Act (Possession of 78 kg of Ganja)
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11. The main contention of the learned Additional Public Prosecutor is that the prosecution has proved the conscious possession of the contraband ganja beyond reasonable doubt and therefore, bar created under Section 37(1)(b)(ii) of the NDPS Act, applies. Even in two of the aforesaid previous cases (as alluded supra), the petitioner/A1 had involved in possession of contraband which falls within the 'Commercial Quantity'. The embargo contained under Section 37(1)(b) (ii) of the NDPS Act is crucial and the Court has to satisfy the twin condition laid therein. He further submitted that the above provision would apply in the appeal stage also and in this regard, he has placed reliance upon the decisions of the Hon'ble Supreme Court in *Union of India v. Rattan Mallik @ Habul* reported in **2009 (2) SCC 624** and *State of Kerala and others v. Rajesh* reported in **2020 (12) SCC 122**. For useful reference, the relevant paragraph Nos.9 to 17 of *Rattan Mallik's* case (cited supra) are extracted hereunder:-

“9.The broad principles which should weigh with the Court in granting bail in a non-bailable offence have been enumerated in a catena of decisions of this Court and, therefore, for the sake of



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brevity, we do not propose to reiterate the same. However, when a prosecution/conviction is for offence(s) under a (2000) 8 SCC 437 special statute and that statute contains specific provisions for dealing with matters arising thereunder, including an application for grant of bail, these provisions cannot be ignored while dealing with such an application.

10.As already noted, in the present case, the respondent has been convicted and sentenced for offences under the NDPS Act and therefore, while dealing with his application for grant of bail, in addition to the broad principles to be applied in prosecution for offences under the Indian Penal Code, 1860 the relevant provision in the said special statute in this regard had to be kept in view.

11.Section 37 of the NDPS Act, as substituted by Act 2 of 1989 with effect from 29th May, 1989 with further amendment by Act 9 of 2001 reads as follows:

“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 application, the court is satisfied that there are reasonable grounds for believing that he is not



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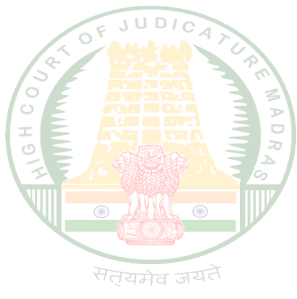
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guilty of such offence and that he is not likely to commit any offence while on bail.

(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 (12 of 1974), or any other law for the time being in force on granting of bail.”

12.It is plain from a bare reading of the non-obstante 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 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 subsection (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



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that the accused is not guilty of the alleged offence. [Vide Union of India Vs. Shiv Shanker Kesari²] Thus, recording of satisfaction on both 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. Bearing in mind the above broad principles, we may now consider the merits of the present appeal. It is evident from the afore-extracted paragraph that the circumstances which have weighed with the learned Judge to conclude that it was a fit case for grant of bail are : (i) that nothing has been found from the possession of the respondent; (ii) he is in jail for the last three years and (iii) that there is no chance of his appeal being heard within a period of seven years. In our opinion, the stated circumstances may be relevant for grant of bail in matters arising out of conviction under the Indian Penal Code, 1860 etc. but are not sufficient to satisfy the mandatory requirements as stipulated in sub-clause (b) of sub-section (1) of Section 37 of the



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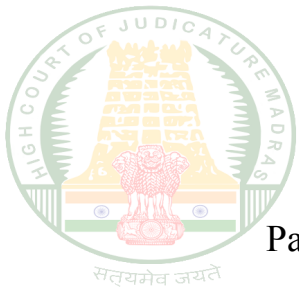


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NDPS Act.

16. Merely because, according to the Ld. Judge, nothing was found from the possession of the respondent, it could not be said at this stage that the respondent was not guilty of the offences for which he had been charged and convicted. We find no substance in the argument of learned counsel for the respondent that the observation of the learned Judge to the effect that “nothing has been found from his possession” by itself shows application of mind by the Ld. Judge tantamounting to “satisfaction” within the meaning of the said provision. It seems that the provisions of the NDPS Act and more particularly Section 37 were not brought to the notice of the learned Judge.

17. Thus, in our opinion, the impugned order having been passed ignoring the mandatory requirements of Section 37 of the NDPS Act, it cannot be sustained. Accordingly, the appeal is allowed and the matter is remitted back to the High Court for fresh consideration of the application filed by the respondent for suspension of sentence and for granting of bail, keeping in view the parameters of Section 37 of the NDPS Act, enumerated above. We further direct that the bail application shall be taken up for consideration only after the respondent surrenders to custody. The respondent is directed to surrender to custody within two weeks of the date of this order, failing which the High Court will take appropriate steps for his arrest.”



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Paragraph Nos.17 to 25 of **Rajesh's** case (cited supra) read as follows:-

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“17.The jurisdiction of the Court to grant bail is circumscribed by the provisions of Section 37 of the NDPS Act. It can be granted in case there are reasonable grounds for believing that accused is not guilty of such offence, and that he is not likely to commit any offence while on bail. It is the mandate of the legislature which is required to be followed. At this juncture, a reference to Section 37 of the Act is apposite. That provision makes the offences under the Act cognizable and nonbailable. It reads thus: “37. Offences to be cognizable and nonbailable.—(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 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 subsection (1) are in addition to the limitations under the Code of



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Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail.” (emphasis supplied)

18.This Court has laid down broad parameters to be followed while considering the application for bail moved by the accused involved in offences under NDPS Act. In Union of India Vs. Ram Samujh and Ors. 1999(9) SCC 429, it has been elaborated as under:

“7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting deathblow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in Durand Didier v. Chief Secy., Union Territory of Goa [(1990) 1 SCC 95)] as under:

24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to



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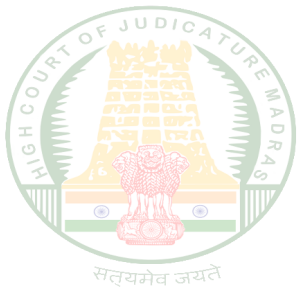
effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.

8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

(i) there are reasonable grounds for believing that the accused is not guilty of such offence; and

(ii) that he is not likely to commit any offence while on bail are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent accused on bail. Instead of attempting to take a holistic view of the harmful socioeconomic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended.”

19. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an



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opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

20. The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

21. We may further like to observe that the learned Single Judge has failed to record a finding mandated under Section 37 of the NDPS Act which is a sine qua non for granting bail to the accused under the NDPS Act.

22. The submission made by learned counsel for the respondents that in Crime No. 14/2018, the bail has been granted to the other accused persons(A1 to A4), and no steps have been taken by the prosecution to challenge the grant of postarrest bail to the other accused persons, is of no consequence for the reason that the consideration prevailed upon the Court to grant bail to the other



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accused persons will not absolve the act of the accused respondent(A-5) from the rigour of Section 37 of the NDPS Act.

23. The further submission of the learned counsel for the respondents that they have been falsely implicated in Crime No. 19/2018 for the reason that the batchmates of the excise official, Babu Varghese was convicted in the corruption case on the trap being laid down by the respondentShajimon(A1) is only a conjecture of selfdefence, and no inference could be drawn of false implication, more so when in Crime No. 19/2018 and 14/2018, chargesheets have been filed after investigation and the matter is listed before the learned trial Judge for framing of the charge where the accused respondents certainly have an opportunity to make their submissions.

24. That apart, in the application which was filed before the learned Single Judge of the High Court by the appellant under Section 482 CrPC, the learned Single Judge has also prima facie accepted that error has been committed in granting bail to the accused respondents as observed in para 16 of the impugned judgment as under:-

“ On going through the orders granted on 10.5.2019 allowing bail applications of A1 and A3 on the one hand and 5th accused on the other hand in NDPS crime Nos. 19/2018 and 14/2018 respectively, I find that the bail was granted by the Court after being cognizant of the principles laid down in Section 37 of the Act whether it ultimately turned out to be right or wrong. May be as regards 3rd accused was concerned, order was passed under misconception of facts. Likewise, the criminal antecedents concerning the first accused did not fall to the notice of this Court. What could at the most be said



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of the order passed by this Court is that it was erroneous or it did not involve application of mind. But then the question arises is whether the same court could under law reconsider the facts invoking Section 482 of the Code. I am of the opinion that the remedy of the State lay in challenging the orders of this Court, if it was really aggrieved, before a superior forum and not before the same court. Therefore, accepting the argument of the learned counsel for the accused, I hold that none of the applications seeking to recall the order of this Court is maintainable under law.” (emphasis supplied)

25.In the result, the appeals are allowed and the impugned order passed by the High Court releasing the respondents on bail is hereby set aside. Bail bonds of the accused respondents stand cancelled and they are directed to be taken into custody. The trial Court is directed to proceed and expedite the trial.”

12. In response to the submission of the learned counsel for the petitioners/accused, who has referred the order of this Court dated 11.07.2023, the learned Additional Public Prosecutor drew attention of this Court to paragraph No.21 of the same order, wherein this Court has held as under:-

“21.It is not the case of the prosecution that the petitioners are having previous or pending cases under NDPS Act.”

However, in the case on hand, the petitioner/A1 is having three previous cases under the NDPS Act, that too, in two cases, the quantity of contraband

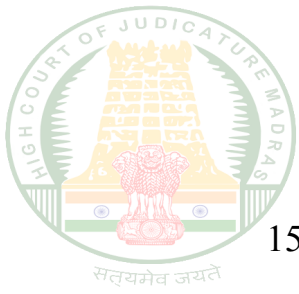


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seized were commercial quantity and hence, the factual aspects of the instant case are not similar to the order of this Court dated 11.07.2023 as relied by the learned counsel for the petitioners/accused. Even in *Satender Kumar's* case, the Hon'ble Supreme Court categorically held that Section 436-A is aimed only on under-trial prisoners, whereas in the present case, after conducting a detailed investigation and trial, charges were framed against the petitioners/accused and therefore, on this point, the order of *Satender Kumar's* case will not come to the aid of the petitioners/accused.

13. Learned Additional Public Prosecutor further submitted that it is also an admitted fact that the petitioner/A2 has not remitted the fine amount of Rs.1,00,000/- as imposed by the trial Court and that there are enough materials available on record as against the petitioners/accused and hence, he strongly opposed to grant suspension of sentence to the petitioners.

14. This Court considered the rival submissions made on either side and perused the materials available on record.



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15. In the present case on hand, the petitioner/A1 along with other accused had indulged in illegal transportation of commercial quantity of ganja and the petitioner/A1 is also having three previous cases, which are of similar in nature. The petitioner/A1 was in possession of commercial quantity of ganja in two of the aforesaid cases. In the present case, the petitioner/A1 was found in possession of 23 kg of ganja along with A2, who has driven the two-wheeler and therefore, the statutory embargo created under Section 37(1)(b)(ii) of NDPS Act.

16. It is also seen from the records that the petitioner/A1 had raised a similar plea before the Hon'ble Supreme Court in Special Leave to Appeal (Crl.) No.1362 of 2023, wherein the Hon'ble Apex Court vide its order dated 13.04.2023, has given liberty to the petitioner/A1 to file a fresh application for bail in case if the trial is not completed within a period of one year and even before one year, if there is any change in material circumstanes.

17. Therefore, insofar as the petitioner/A1 is concerned, this Court is not inclined to enlarge the petitioner/A1 on bail by taking into consideration of his antecedents and the quantity of contraband involved in this case i.e., 23 kgs of ganja.



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WEB COPY 18. Insofar as A2 is concerned, who being a student, presumption of innocence is one of the fundamental principles of criminal jurisprudence which axiomatically enunciates that an accused is presumed to be innocent until proven guilty. This fundamental principle is underpinned by the maxim "*semper necessitas probandi incumbit ei qui agit*": the necessity of proof lies with the person who levels the charges.

19. Section 35 of the NDPS Act, deals with presumption of culpable mental state of an accused requiring the Court to presume the existence of such mental state for a prosecution under the Act. Furthermore, an explanation is provided in the provision which states-

“In this section “culpable mental state” includes intention motive, knowledge of a fact and belief in, or reason to believe, a fact.”

This essentially means that a person charged with an offence under the NDPS Act would have to rebut the presumption against him and the burden of proof would lie on him to show that he has not committed the act constituting an offence.

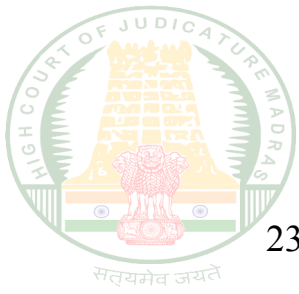


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WEB COPY 20. In *Naresh Kumar alias Nitu v. State of Himachal Pradesh* reported in (2017) 15 SCC 684, it was held by the Supreme Court that the presumptions against the accused of culpability under Section 35 and under Section 54 of the Act to explain possession satisfactorily, are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt.

21. In *Noor Aga v. State of Punjab and Ors. [2008 (16) SCC 417]*, it was held that Section 35 and 54 of the NDPS Act which imposes a reverse burden on the accused is constitutional as the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution.

22. Further, in *Abdul Rashid Ibrahim Mansuri v. State of Gujarat* reported in *AIR 2000 SC 821*, where an accused admits that narcotic drugs were recovered from bags that were found in his possession at the time of his apprehension, in terms of Section 35 of NDPS Act, the burden of proof is then upon him to prove that he had no knowledge that the bags contained such a substance.



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23. Conscious Possession:-

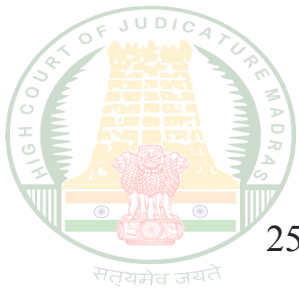
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The term 'conscious possession' has not been explicitly mentioned in NDPS Act keeping it apart from the term 'possession', but various judicial enactments from the Hon'ble Supreme Court and High Courts have evolved the term 'conscious possession' according to the needs and circumstances of the respective case.

24. According to Section 35 of NDPS ACT, 1985:

(i) In any prosecution for an offence under this Act which requires a culpable state of mind of the accused, the Court shall presume the presence of such state of mind but it shall be a defense for the defendant to prove the fact that he had no such state of mind concerning the act charged as an offence in that prosecution. In this section, the culpable state of mind includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(ii) For this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of possibility.



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25. Thus, we can infer that conscious possession means a mental state of possession that is bound to be considered along with physical possession of the illicit material. Just like in criminal law, 'Actus Reus' and 'Mens Rea' are two essential ingredients to constitute a criminal offence, the same goes for the NDPS Act where physical, as well as mental possession of drugs, are essential elements to constitute an offence under the same law.

26. The principle of innocent until proven guilty is a cardinal rule of criminal justice administration. An accused is presumed to be innocent and it is the burden of the prosecution to prove any wrongdoing beyond any reasonable doubt. The burden is heavy and entails that after all the prosecution evidence has been appreciated, the only conclusion which the court can draw is the guilt of the accused and no other conclusion can be drawn. However, offences relating to peddling, possessing, consuming or dealing in any manner with narcotic drugs is a grave offence which adversely affects the social fabric of the society by injecting dangerous and addictive substances into the veins of young and impressionable youth. In addition to the direct consequences, it also affects the financial security of the nation and more seriously contributes to anti national or terroristic activities by providing funds to terrorist and unlawful organizations. It



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is a necessary evil that the criminals involved in grave offences are not allowed to take advantages of the law and benefit from the provision meant for innocents.

However, it also has to be ensured that an innocent is protected from some adverse interpretations of the law. The rule of conscious possession, thus provides a balance between strict enforcement of law on one hand and protecting the rights of the accused on the other.

27. NDPS Act has been enacted with the object of meeting the unprecedented challenge of illicit traffic in narcotic drugs and psychotropic substances. Drug abuse has been recognized as the single most powerful social offender in recent times creating unimaginable extent of damages in frighteningly large sections of the Society.

28. It is the admitted fact that the two-wheeler was ridden by the petitioner/A2 and A1 was on pillion carrying the bag containing contraband. However, the reason given by the learned counsel for the petitioners that it is normal for the young person who will be afraid of the police when they were intercepted by the police is not convincing. When the police party intercepted the accused and the petitioner/A2 was not aware of the fact that A1 is in possession



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of contraband, then he would have stopped the two-wheeler, however in the present case, without any reason, the petitioner/A2 escaped from the scene of occurrence. Therefore, the petitioner/A2 failed to satisfy this Court that there are reasonable grounds for believing that he is not guilty of such offence and hence, he is not entitled for the relief sought for.

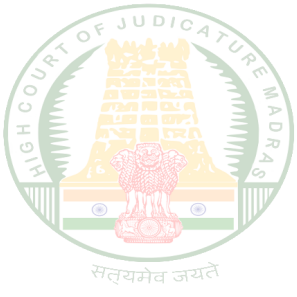
29. For the foregoing reasons stated above, these Criminal Miscellaneous Petitions are dismissed.

22.02.2024

Index : Yes
Internet : Yes
Neutral Citation : Yes
PKN

Note:

- 1. Registry is directed to forthwith upload this order in the official website of this Court.**



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VIVEK KUMAR SINGH, J.

PKN/DP

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