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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

(Criminal Jurisdiction)

Date : 11.02.2024

PRESENT

The Hon`ble Mr.Justice G.R.SWAMINATHAN

CRL OP(MD). No.2228 of 2024

S.Gurumoorthi

..Petitioner/ Accused No.3

Vs

State represented by
The Sub Inspector of Police,
Theppakulam Police Station,
Madurai District.
(In Crime No.264 /2023).

... Respondent/Complainant

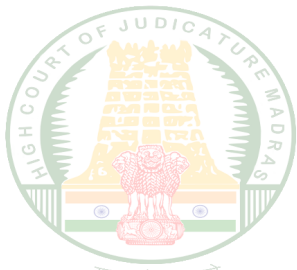
For Petitioner : Mr.S.S.Sundarapandian
Advocate.

For Respondent : Mr.P.Kottaichamy
Government Counsel (Crl.Side)

PETITION FOR BAIL Under Sec.439 of Cr.P.C

PRAYER :-

To enlarge the petitioner/ Accused on interim Bail in Crime No.264/2023 on the file of the respondent police.



ORDER : The Court made the following order :-
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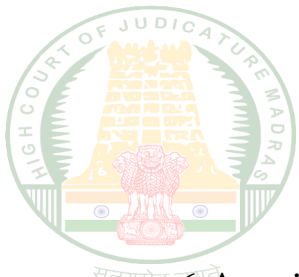
Heard both sides.

2.The petitioner was arrested and remanded to judicial custody on 13.06.2023 for the offences under Sections 20(b)(ii)(C), 29(1) and 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 in Crime NO.264 of 2023 on the file of the respondent police.

3.The petitioner's father passed away on 10.02.2024. The petitioner wanting to participate in the funeral rites seeks interim bail.

4.Considering the urgency of the situation, the Hon'ble Administrative Judge had directed me to hold special sitting and dispose of this petition.

5.The learned counsel appearing for the petitioner relies on the order dated 04.02.2024 made in CrI.O.P.(MD)No.1793 of 2024 and submits that in similar situation, interim bail was granted. I am not persuaded by the said submission.

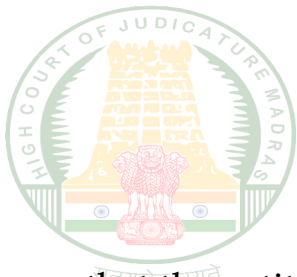


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6. As rightly pointed out by the learned Government Advocate (Crl.Side) appearing for the respondent, the Court while granting bail in cases involving commercial quantity will have to bear in mind the parameters laid down under Section 37 of the NDPS Act, 1985. Section 37(1)(b)(ii) of the NDPS Act states that the Court must be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offence in question and that he is not likely to commit any offence while on bail. Of course, this restriction will be applicable only if the offences involved are Sections 19, 23, 27(A) or if the offence involves commercial quantity. In this case, the petitioner was allegedly found in possession of 24 KG of Ganja. It is a commercial quantity and hence Section 37(1)(b)(ii) of NDPS Act will come into play.

7. Of course this restriction has to be borne in mind only if the Government Advocate (Crl.Side) opposes the application and not otherwise. In this case, the learned Government Advocate (Crl.Side) categorically states that he is opposing the petitioner's application. He points out that the petitioner is having two previous cases in Crime No.116 of 2022 for the offences under Sections 294(b), 323, 324 and 506(ii) IPC on the file of the Manamadurai Town Police Station and in Crime No.43 of 2022 for the offence under Section 8(C) r/w 20(b)(ii)(B) of NDPS Act on the file of the Mandamadurai Town Police Station. Therefore, this Court cannot render any finding



that the petitioner is not likely to commit any offence while on bail.

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8. Section 37 of the NDPS Act applies not only for grant of bail but also for grant of interim bail. In other words, even while granting interim bail, the Court concerned will have to be mindful of the restrictions set out under Section 37 of the NDPS Act. I therefore reject the petitioner's request for grant of interim bail.

9. Though I decline the petitioner's request for grant of interim bail, I have to be mindful of the petitioner's fundamental rights. His father had passed away. This fact is not denied by the respondent. As a son, the petitioner will have to participate in the final rites of his father.

10. Even a dead person must be deemed to possess certain rights. Of course this expression 'rights' will have to be understood contextually. A dead person is entitled to a dignified cremation/burial. This would of course mean that close relatives can participate in the ceremony. This issue can be approached from another perspective also. The right to practise one's religion is a guaranteed fundamental right under Article 25 of the Constitution. The petitioner is a Hindu. As a son, he has to discharge certain religious obligations. He has to offer what is known as 'Pinda'. If one is the



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eldest son, it is he who alone can light the pyre. These are matters of religion and the Court has to necessarily have due regard for the same. While I cannot grant bail, I can certainly issue direction by invoking the inherent power under Section 482 of the Code of Criminal Procedure.

11. The existence of the right has been authoritatively settled by a learned Judge of the Madras High Court [ABDUL QUDDHOSE, J.] in the decision reported in 2021 (3) MLJ 479 [Anandhi Simon Vs. State of Tamil Nadu, Rep., by Chief Secretary to Govt. & Others]. It was held therein as follows:

“17. In *Ashray Adhikar Abhiyan vs. Union of India* reported in 2002 (2) SCC 227, the Hon-ble Supreme Court held that it is the obligation of the State to give a decent burial to a deceased person as per their Religious beliefs. The Madras High Court in the case of *S.Sethuraja vs. Chief Secretary* (W.P.MD.No.3885 of 2007) delivered on 28.10.2007 has also held that in our tradition and culture, the same human dignity (if not more) with which a living human being is expected to be treated is also extended to a person who is dead.

18. Trespassing a burial place, places of worship and place of



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sepulcher is a cognizable offence under Section 297 of the Indian Penal Code which clearly prohibits irreverence to dead bodies. Section 297 of the Indian Penal Code reads as follows:

“Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or on any place of sculpture, or any place set apart from the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.” Thus, the right to decent burial is protected under the Indian Penal Code as well. Infact, in the instant case, anti-social elements have been booked by the police for preventing a decent burial for Dr.Simon Hercules at Kilpauk cemetery.

19. The Division Bench of this Court in a Public Interest Litigation

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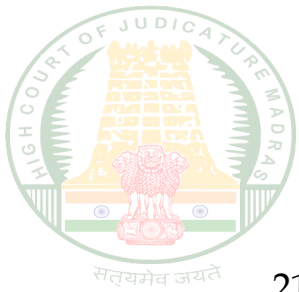


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involving the very same Dr.Simon Hercules, has also observed in its order dated 20.04.2020 in Suo Motu W.P.No.7492 of 2020 that the scope and ambit of Article 21 of the Constitution of India includes the right to have a decent burial and the Division Bench has also invoked and highlighted Section 297 of the Indian Penal Code in the said order.

20. Section 404 of the Indian Penal Code deals with dishonest misappropriation of a dead man-s property. Section 404 of the Indian Penal Code reads as follows:

“404.Dishonest misappropriation of property possessed by deceased person at the time of his death Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.”
The Object behind Section 404 of IPC is to afford protection of a property belonging to a deceased person.



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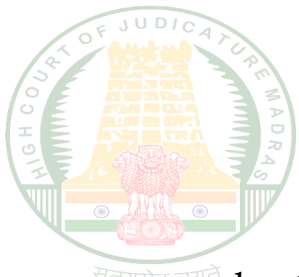
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21. Section 499 of the Indian Penal Code which deals with defamation, also defines that libel or slander against a dead person also contributes the offence of defamation.

22 Section 503 of the Indian Penal Code which deals with criminal intimidation, also includes threatening a person with injuring the reputation of a dead person dear to him as an offence.

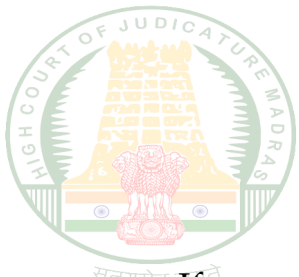
23. In a recent decision, the Division Bench of the Calcutta High Court in the case of Vineet Ruia vs. Principal Secretary, Ministry of Health and Family Welfare, Government of West Bengal and Others reported in AIR 2020 Cal 308 involving the disposal of dead bodies of Covid-19 victims after giving due consideration to the various decisions of the Hon-ble Supreme Court as well as other High Courts recognized the fundamental right of any family member to perform the funeral rites for a Covid-19 victim. The relevant portions of the said judgment are extracted hereunder:

“ 20.By and large, whether it is for a theist or atheist, freedom of conscience and free profession and practice of religion is protected under Clause (1) of Article 25 of the Constitution. The term “religion” in that Clause need not necessarily be linked to any particular religion as is



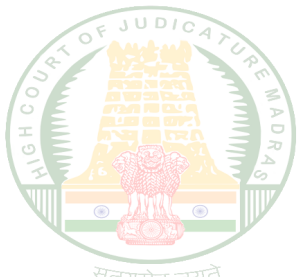
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understood as a religious denomination. It is a matter of faith and of one's own conscience which could trigger the profession and practice of what may be religion in the larger sense to a particular individual. With this concept in mind, it needs to be delineated that it is not the religious practices of the different religious denominations which matter in such instances. It is a matter of connectivity with the person who has died and the near relatives may be in whatever degree of relationship. Fundamentally, human relationship between the parent and child, husband and wife, grandparent and grandchild, etc. is not based on any religious tenet. It is a matter of faith and conscience of every individual. If such a person is to take recourse to any practice and free profession on the foundation of freedom of conscience in terms of Clause (1) of Article 25 of the Constitution of India, it could get abridged only by the reciprocal covenant that such activity should be subject to public order, morality and health and to other provisions of Part III of the Constitution. This is the inbuilt mode of controlling such activities even in terms of Clause (1) of Article 25. The eligibility of a person to perform the funeral rites, be it connected to cremation or burial, may be sometimes guided by factors which may be akin to accepted practice even in religious denominations.



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If we were to look at the varied practices among the Hindus as a whole or different denominations of Hindus, one thing is clearly certain; the facility to provide ritualistic offerings by way of water, flowers or even certain grains are quite often seen as fundamentally for the satisfaction of the person making such offer to the dead before burial/cremation, as the case may be. Post cremation rites including, receiving the mortal remains in the form of ashes and bones which are treated as sacred to the near relatives of the departed and further handling of those materials in accordance with faith and belief also stands accepted in such communities (profitable reading in this regard can be had from Garuda Purana, Vishnu Purana and other ancient Hindu texts and scriptures). In so far as Christians are concerned, if one were to look at different denominations, it can be seen that there are practices, which may with slight variations, generally provide for prayers before the dead bodies are disposed of by burial and by offering prayers even after disposal on different dates and times depending upon the faith, belief and practice in different Churches. A perusal of canons would show that different ritualistic processes are delineated for such matters. We have mentioned it only to indicate that there are different practices available. In so far as the Muslims are

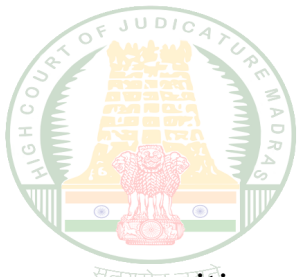


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concerned, whatever be the difference in beliefs and practices among the Hanafis, who are treated as a majority group of Sunnis in India, on one hand, and the Shias on the other hand, one clear thread of connectivity is the faith and belief that the disposal of human remains is a must as well as post Kabar (Burial) rituals (Certain passages from Al~Bahr~ur~Raiq will buttress this aspect). The family also intends to have its own practices carried forward to the extent it relates to their faith and belief. We refer to all these only to demonstrate that by and large the Indian community always has the desire for intricate practices in the form of rituals with the participation of near relatives of a deceased, following what could be permissible under given circumstances.

...

23. We are of the firm view that the right of the family of a Covid-19 victim to perform the last rites before the cremation/burial of the deceased person is a right akin to Fundamental Right within the meaning of Article 21 of the Constitution of India. While exercising their power to impose restrictions on citizens in their way of life in the wake of outbreak of an endemic like Covid-19, a fine balance must be struck by the State and the local self~government institutions so that the aforesaid right of a



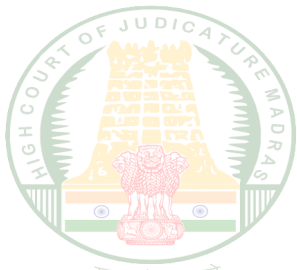
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citizen to perform the obsequies of his near and dear ones does not stand abridged or abrogated excepting for very compelling reasons. Having given our anxious consideration to the issue in hand, we have come to the conclusion that the immediate family members of Covid-19 victims be permitted to perform the funeral rites of the deceased subject to them following certain precautionary guidelines to eliminate/minimize the risk of them becoming infected by the deadly virus which has caused devastation in the form of loss of countless lives across the world.”

24. From the aforesaid decisions, it is clear that the law has recognized the fundamental right of a dead person to have a decent burial.....”

12. Article 25 of the Constitution can be invoked by any person. It makes no distinction between citizen and non-citizen, subject to restrictions set out in the Article. There cannot be any distinction between free persons and prisoners either. Prisoners including under-trials can invoke this right under Article 25 of the Constitution. Right to participate in the funeral ceremony of the parent/spouse/child will fall within the sweep of the right under Article 25. Of course, this cannot be an absolute right. The Court will uphold this right subject to the prevailing situation.



Unless there are exceptional circumstances, this right will not be denied by the Court.

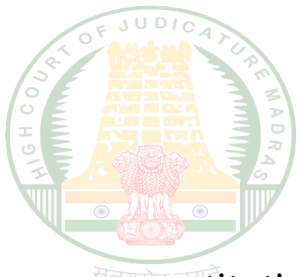
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In this case, there are no such special circumstances warranting denial of the right.

13.It is stated by the learned counsel appearing for the petitioner that the cremation is to take place this evening. Even while rejecting the petitioner's request for grant of interim bail, I direct the Superintendent, Central Prison, Madurai to make appropriate arrangements, so that the petitioner can take part in the final rites of his father.

14.It shall be ensured that the petitioner is taken out from the prison before 04.30 pm., today (ie., 11.02.2024). It is the duty of the prison authorities to make appropriate escort arrangements. The petitioner shall be brought back to the Central Prison, Madurai by tomorrow (ie., 12.02.2024) evening 06.00 pm., The petitioner shall also be permitted to participate in the 16th day ceremony. On the 16th day, the petitioner will be taken out from the prison at 06.00 am., and brought back to the prison before sun set. The cost of escort shall be borne by the State.

15.I come across cases where the prisoner taken out on escort escapes and as a result, the escort team is placed under suspension. Handcuffing has been held to be



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unconstitutional by the Hon'ble Supreme Court. Therefore, the escort team is under real pressure. I am conscious of the same. Since the petitioner's father is no more, the petitioner may have to console and be consoled. Therefore, the escort team shall maintain reasonable distance and also respect the privacy of the petitioner.

16. Registry is directed to upload this order immediately so that the Superintendent, Central Prison, Madurai can very well act on the basis of the web copy. The learned Government Advocate (Crl.Side) is also directed to communicate this direction to the Superintendent, Central Prison, Madurai.

17. With the above directions, this Criminal Original Petition is disposed of.

sd/-
11/02/2024

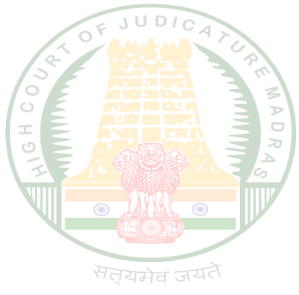
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11/02/2024
Sub-Assistant Registrar (Judicial)
Madurai Bench of Madras High Court,
Madurai - 625 023.

MM

TO

1.The Superintendent of Central Prison,
Madurai.



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2. The Sub Inspector of Police,
Theppakulam Police Station,
Madurai District.
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
4. The Registrar (Judicial),
Madurai Bench of Madras High Court,
Madurai.
(Emergency Case taken on 11.02.2024)

ORDER
IN
CRL OP(MD) No.2228 of 2024
Date :11/02/2024

RK (11/02/2024) 15P / 5C
Madurai Bench of Madras High Court is issuing certified copies in this format from
17/07/2023