

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

FRIDAY, THE 10TH DAY OF MARCH 2023 / 19TH PHALGUNA, 1944

BAIL APPL. NO. 946 OF 2023

AGAINST THE ORDER/JUDGMENTCRMC 17/2023 OF DISTRICT COURT &
SESSIONS COURT, ERNAKULAM

CRIME NO.788/2022 OF KANNAMALI POLICE STATION, ERNAKULAM

PETITIONER/ACCUSED:

NITHIN
AGED 24 YEARS
KURUPASSERY HOUSE, MUNDAM VELI, RAMESHWARAM,
ERNAKULAM, PIN - 682004.

BY ADV ARJUN S.

RESPONDENT/STATE:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, PIN - 682031

SENIOR PUBLIC PROSECUTOR SHRI P G MANU

THIS BAIL APPLICATION HAVING BEEN FINALLY HEARD ON
23.02.2023, THE COURT ON 10.03.2023 DELIVERED THE FOLLOWING:

“C.R”

A. BADHARUDEEN, J.

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B.A.No.946 of 2023

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Dated this the 10th day of March, 2023

O R D E R

This is an application for regular bail filed by the sole accused in Crime No.788/2022 of Kannamali Police Station, where he alleged to have committed offences punishable under Sections 22(b) and 8(C) of the Narcotic Drugs and Psychotropic Substances Act ('NDPS Act' for short hereinafter).

2. The prosecution allegation is that at about 5.30 p.m on 17.12.2022 the accused was found in possession of 0.9 gram of MDMA for the purpose of sale against the prohibition contained in the NDPS Act and accordingly he was nabbed and contraband was taken into custody. Pursuant to recovery, crime alleging commission of the above offences was registered.

3. While pressing for grant of regular bail, the learned counsel for the petitioner highlighted the progress of the investigation and custody of the petitioner from 17.12.2022. That apart the learned counsel for the petitioner argued that in this matter the mandate of Section 50 of the NDPS Act has been violated. It is specifically pointed out that violation of Section 50 is noticeable on two aspects. The first point argued is that when search was conducted by the C.I of Police as part of the investigation/detection, a police officer holding the rank of C.I, though he is a gazetted officer was present, and such an officer is not a competent gazetted officer to witness search since the same would offend the mandate of Section 50 of the NDPS Act.

4. In addition to that, the learned counsel for the petitioner argued secondly that as per the mandate of Section 50, it is necessary for the empowered officer to inform the right of the person to be searched before a gazetted officer or a Magistrate and if he so requires, he shall be taken before a gazetted officer or a Magistrate for search, and if he so opts, failure to conduct his search before a gazetted officer or Magistrate, that may not vitiate

the trial but would render the recovery of illicit suspect and vitiate conviction and sentence of the accused.

5. Whereas the learned Public Prosecutor zealously opposed bail highlighting the stature of the petitioner as a habitual offender having involvement in multiple crimes, inclusive of 3 crimes under the NDPS Act. The learned Public Prosecutor would submit that if the petitioner will be released on bail, he would repeat the same offences. It is submitted further that a gazetted officer working in the police department is also a competent gazetted officer within the sweep of Section 50 of the NDPS Act. That apart, there is no mandate in law that search of the person shall be by taking the accused before the gazetted officer and the same can be in the converse also. Therefore, the petitioner doesn't deserve bail and he shall be kept in custody till the trial is over.

6. The following are the crimes where the involvement of the petitioner has been pointed out by the learned Public Prosecutor:

(1) Crime 207/16 u/s 279 IPC,

(2) Crime 2017/2021 u/s 151 CrPC,

(3) Crime 363/2022 u/s 151 Cr.P.C

(4) Crime 1038/2017 u/s 279 IPC & 185 of MV Act

(5) Crime 1000/2022 u/s 27(b) of NDPS Act

(6) Crime 320/2021 u/s 27(b) of NDPS Act

(7) Crime 858/2017 u/s 118(e) of KP Act 2011

(8) Crime 938/2017 u/s 323, 324, 294(b), 34 IPC

(9) Crime 1524/2021 u/s 452, 427, 294(b), 506, 143, 147, 148, 149 IPC

(10) Crime 1521/2021 u/s 143, 147, 294(b), 506 IPC & 4(i), (3) of

Kerala Healthcare Institution (Prevention and Violence & Damage Act,

(11) Crime 371/2021 u/s 27(b) of NDPS Act,

(12) Crime 1495/18 u/s 279 IPC & 185 of M.V Act,

(13) Crime 412/2019 u/s 118 (e) of KP Act and 184 of M.V Act

(14) KEDO Act & 118(a) of KP Act.

7. In view of the rival arguments, three vital questions emerge for consideration as under:

i) Whether C.I of police or any other gazetted officer working in the Police Department, in any way, either disqualified or incompetent to be a gazetted officer for the purpose of Section 50 of the NDPS Act?

ii) A gazetted officer, who is part of the detecting or investigating team can be a competent gazetted officer for the purpose of Section 50 of the NDPS Act?

iii) If the investigating/detecting officer not taking the accused to the gazetted officer and the gazetted officer being brought to the place of detection, can the same be held as non-compliance of the mandate of Section 50 of the NDPS Act?

8. In this case the learned counsel for the petitioner placed decision of the Apex Court reported in [(2014) 5 SCC 345], ***State of Rajasthan v. Premanand & anr.*** to contend that failure to conduct search before a gazetted officer as mandated under Section 50 of the Act is fatal to the investigation and non compliance of the same is a serious matter to be adjudged in favour of the petitioner. The learned counsel also highlighted the Constitutional Bench decision reported in [(1994) 3 SCC 299], ***State of Punjab v. Balbir Singh***, wherein also it was held that compliance of Section 50 of the NDPS Act is mandatory.

9. In this connection, reference to Section 50 of the NDPS Act is apposite. Section 50 provides as under:

“50. Conditions under which search of persons shall be conducted.

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973.

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

10. Even on meticulous reading of Section 50 of the NDPS Act, the argument advanced by the learned counsel for the petitioner as regards to incompetence of the police officer as a gazetted officer could not be understood rather inferred. In fact,

Section 50(5) provides that *when an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973.*

Thus Section 50 imbibes presence of gazetted officer or a Magistrate at the time of body search of an accused or a suspect and it is not safe to hold that a police officer being a gazetted officer is either disqualified or incompetent to witness a search in terms of Section 50 of the NDPS Act. Therefore, it has to be held that any police officer being a gazetted officer is a qualified and competent gazetted officer for search of a person as stipulated in Section 50 of the NDPS Act.

11. However, an exception is carved out as per the decision in *State of Rajasthan v. Premanand & anr. (supra)*, to the effect that when the gazetted officer is an officer forming part of the

detecting or investigating team, he is not a competent officer since he cannot be held as an independent officer to ensure search without false implication.

12. Coming to the second question, going by the statutory wording under Section 50 of the NDPS Act, which provides that if the person who wants to be searched, if requires, takes such person without unnecessary delay to the nearest gazetted officer of any of the Departments mentioned under Section 42 or to the nearest Magistrate, it could not be held that when the search was conducted in the presence of a gazetted officer after ensuring his presence at the place of recovery, after safeguarding the measures of false implication under Section 50 of the NDPS Act. The point argued by the learned counsel for the petitioner is that in tune with the mandate of Section 50 of the NDPS Act, it is necessary for the investigating officer to take the person or accused to the nearest gazetted officer or before a Magistrate and search conducted by securing the presence of the gazetted officer at the place of search would offend the mandate of Section 50 of the NDPS Act. On perusal of the statutory wording in Section 50(1) of the NDPS Act,

it is provided that the officer shall *take such person* before the gazetted officer or the Magistrate and as per Section 50(2) of the NDPS Act, if such requisition is made (by the person to be searched), the officer may detain the person until he *can bring* him before the gazetted officer or the Magistrate referred to in sub section (1). Similarly, Section 50(3) also provides that a gazetted officer or the Magistrate *before whom* any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

13. Although the statutory wordings would give rise to an inference that the person to be *taken/bring before* the gazetted officer or the Magistrate, no hard and fast interpretation to be given to lay a proposition that if search was conducted in the presence of the gazetted officer or before the Magistrate by securing their presence at the place of search, the search is either vitiated or the same is against the mandate of Section 50 of the NDPS Act. To put it differently, when search is before a competent gazetted officer or the Magistrate, within the sweep of Section 50 of the NDPS Act, either by taking the person to be searched before the gazetted

officer or the Magistrate or securing the presence of the gazetted officer or the Magistrate to the place of search, it has to be held that the mandate of Section 50 stands complied. Therefore, the second challenge at the instance of the learned counsel for the petitioner also cannot be accepted.

14. Coming to the crux of the case, 0.9 gram of MDMA was seized from the accused on 17.12.2022, the same is intermediate quantity. Therefore, there is no rider in the form of Section 37 of the NDPS Act in this matter. However, the aggravating factors are the involvement of the petitioner in 14 crimes prior to this occurrence. Out of which, 3 are under Section 27(b) of the NDPS Act, but many of the antecedents are pertaining to minor offences, to be foreseeable from the list extracted herein above. Adverting to the facts discussed, noting the progress of investigation and the custody of the petitioner from 17.12.2022, by imposing stringent conditions, the petitioner can be enlarged on bail and one amount the conditions is that the petitioner shall not involve in any other offence during the currency of bail and any such event, if reported

or came to the notice of this Court, the same alone shall be a reason to cancel the bail hereby granted.

15. Accordingly, the petition stands allowed and the petitioner can be released on bail on the following conditions:

i. Accused/petitioner shall be released on bail on his executing bond for Rs.60,000/- (Rupees Sixty Thousand Only) with two solvent sureties each for the like amount to the satisfaction of the jurisdictional court concerned.

ii. Accused/petitioner shall not intimidate the witnesses or tamper with evidence. He shall co-operate with the investigation and shall be available for trial. He shall visit the Investigating Officer on every Monday in between 9 a.m and 12 noon for a period of two months and also appear before the Investigating Officer as and when directed.

iii. Accused/petitioner shall not leave India without prior permission of the jurisdictional court.

iv. The petitioner shall surrender his passport, if any, within 7 days from the date of their release, before the trial court. If he has

no passports, he shall file an affidavit in this regard on the date of execution of the bond or within 3 days thereafter.

v. Accused/petitioner shall not involve in any other offence during the currency of bail and any such event, if reported or came to the notice of this Court, the same alone shall be a reason to cancel the bail hereby granted.

Sd/-

(A. BADHARUDEEN, JUDGE)

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