

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

WEDNESDAY, THE 12TH DAY OF APRIL 2023 / 22ND CHAITHRA, 1945

BAIL APPL. NO. 2816 OF 2023

SC NO.778/2021 ON THE FILE OF THE ADDITIONAL SESSION'S COURT-I,
NORTH PARAVUR IN CRIME NO.890/2020 OF KALLOORKAD POLICE STATION

PETITIONER/5TH ACCUSED:

JIJENDRAN C.M.
AGED 33 YEARS, S/O G. CHANDRAN,
R/AT MAHESHWARI NIVAS, TC 12-960,
VANCHIYOOR VILLAGE, KUNNUKUZHI KARA,
THIRUVANANTHAPURAM DISTRICT, PIN - 695035
BY ADVS.
S.JIJI
M.M.BABY

RESPONDENT/STATE:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM,
PIN - 682031
BY ADV PUBLIC PROSECUTOR
P G MANU - SR PP

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
12.04.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

'C.R'

ORDER

Dated this the 12th day of April, 2023

This is a petition filed under Section 439 of the Code of Criminal Procedure, seeking regular bail and the petitioner is the 5th accused in crime No.890/2020 of Kallookad Police Station, where the prosecution alleges commission of offences punishable under Sections 8(C), 20(b)(ii)(C), 27(A), 29, 31(1) of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred as 'NDPS Act').

2. Heard the learned counsel for the petitioner as well as the learned Public Prosecutor. Perused the detailed report and the case diary as such, placed by the learned Public Prosecutor.

3. The prosecution case is that, on 25.11.2020 the detecting officer got reliable information about concealment of large quantity of ganja at building bearing number XI/38 of Ayavana grama panchayat, owned by one Shiju George which

was leased out to the 1st accused in this crime. Thus the Officer and party proceeded to the place in the morning, but that building was found locked. Thus the said Shiju George, the owner of the building, was summoned and using the duplicate key provided by him, the building was opened and 39.845 kilogram of ganja in 17 packets were seized. Pursuant to recovery, crime alleging commission of the above offences was registered. Thereafter accused Nos.1, 3 to 5 were arrested. The second accused, who is a close associate of the 1st accused, obtained anticipatory bail from this Court so that he was not arrested. The petitioner, who is the 5th accused, was arrested on 28.03.2021 and he has been in judicial custody thereafter, seeks regular bail in this case.

4. The learned counsel for the petitioner would submit that, the petitioner is innocent and he has been in custody for the last more than two years. Further, the petitioner has no criminal antecedents and all other accused in this crime were released on bail. Highlighting the petitioner's custody from 28.03.2021 and also on the submission that the trial could not be materialized within a reasonable time, the learned counsel

for the petitioner pursued the relief of regular bail to the petitioner.

5. Whereas the learned Public Prosecutor strongly opposed grant of bail on the submission that commercial quantity of contraband was seized from the petitioner and therefore this Court cannot grant regular bail to the petitioner, without satisfying the twin conditions provided under Section 37 of the NDPS Act.

6. In this connection, an unreported decision of the Apex Court in Special Leave Appeal (Crl.) No.6690/2022 [***Dheeraj Kumar Shukla v. The State of Uttar Pradesh***] dated 30.05.2022, assumes significance. In the said case, the Apex Court diluted the rigour under Section 37 of the NDPS Act on the ground that accused had no criminal antecedents and also taking note of the custody of the accused therein for a period of 2 ½ years.

7. In para.3 of the above order, the Apex Court held as under:

"3. xxx xxx xxx *It is true that the quantity recovered from the petitioner is commercial in nature and*

the provisions of Section 37 of the Act may ordinarily be attracted. However, in the absence of criminal antecedents and the fact that the petitioner is in custody for the last two and a half years, we are satisfied that the conditions of Section 37 of the Act can be dispensed with at this stage, more so when the trial is yet to commence though the charges have been framed.”

8. In a recent decision of the Apex Court reported in [(2023) 1 Supreme 670], **Rajuram v. State of Bihar**, the Apex Court granted bail to an accused involved in possession of commercial quantity of contraband. In the said case, the Apex Court diluted the rigour under Section 37 of the NDPS Act on the ground that the petitioner/accused therein had no criminal antecedents and he had been in custody from 28.12.2017 onwards. In para.6 it has been held as under:

“6. It is true that trial has commenced and out of 8 witnesses, 2 witnesses have reportedly been examined by the Trial Court. However, the conclusion of trial will still take some time. The petitioner has no criminal antecedents. The period which the petitioner has already spent in custody is sufficient to exempt the rigours of Section 37 of Narcotic Drugs and Psychotropic Substances Act, 1985.”

9. It is true that in ***Dheeraj Kumar Shukla v. The State of Uttar Pradesh*** (supra), the Supreme Court diluted the rigour under Section 37 in a case involving commercial quantity of narcotic substance on the ground that the accused had no criminal antecedents and he was in custody for 2 ½ years and also taking note of the fact that the trial could not be materialized within a reasonable time. Somehow, similar is the observation of the Apex Court in ***Rajuram v. State of Bihar***'s case (supra). In a recent judgment rendered by the Apex Court, in SLP (Crl) 915/2023, [2023 LiveLaw (SC) 260, OnLine] ***Mohd Muslim @ Hussain v. State (NCT of Delhi)***, the Apex Court considered a case involving commercial quantity of contraband. The facts of the case as stated in paragraph 17 is as under:

"17. The facts in this case reveal that the recovery of ganja was made on 28.09.2015, from the four co-accused, including Nitesh Ekka. The present appellant was arrested at the behest, and on the statement of this Nitesh Ekka. The prosecution has relied on that statement, as well as the confessional statement of the present appellant; in addition, it has relied on the bank statements of Virender Singh @ Beerey, who allegedly disclosed that money used to be transferred to the

appellant. As against this, the prosecution has not recovered anything else from the appellant; its allegation that he is a mastermind, is not backed by any evidence of extensive dealing with narcotics, which would reasonably have surfaced. The prosecution has not shown involvement of the appellant, in any other case. Furthermore, he was apparently 23 years of age, at the time of his arrest. It is an undisputed fact that two co-accused persons (who also, were not present at the time of raid and from whom no contraband was recovered) – the accused (Virender Singh @ Beerey) who allegedly transferred money to the appellant's account as payment for the ganja, and the accused (Nepal Yadav @ Tony Pahalwan) from whom the original insurance papers and registration certificate of the car from which contraband was seized, was recovered – have both been enlarged on bail. The appellant has been in custody for over 7 years and 4 months. The progress of the trial has been at a snail's pace : 30 witnesses have been examined, whereas 34 more have to be examined.”

10. While adjudicating the bail plea at the instance of the accused in the above case, the Apex Court discussed the manner in which the conditions provided under Section 37 of the NDPS Act can be considered within the constitutional parameters and it

was held in paragraph Nos.19, 20 and 21 as under:

"19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

20. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this Court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India v. Rattan Malik

[(2009) 2 SCC 624]. Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.

21. Before parting, it would be important to reflect that laws which impose stringent conditions for grant of bail, may be necessary in public interest; yet, if trials are not concluded in time, the injustice wrecked on the individual is immeasurable. Jails are overcrowded and their living conditions, more often than not, appalling. According to the Union Home Ministry's response to Parliament, the National Crime Records Bureau had recorded that as on 31st December 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the country. Of these 122,852 were convicts; the rest 4,27,165 were undertrials."

11. Epitomizing the parameters laid down by the Apex Court in the decisions herein above discussed, the following parameters clubbed together can be considered to dilute the rigour under Section 37 of the NDPS Act:

(1) the accused should not have any criminal antecedents.

(2) the accused has been in custody for a pretty long time, at least more than one year, (say for eg. two years and 15 days in the instant case).

(3) the impossibility of trial within a reasonable time, i.e. at least within a period of six months, after completion of his custody for a period of more than one year (for this purpose, the Court granting bail should ensure that trial could not be completed at least within a period of six months, from the date of consideration of the plea of bail).

12. Yet another aspect to be added in the list, in my view, is the quantity of the contraband. That is to say, when the quantity of contraband is something above the intermediate quantity and the same is not a huge or sizable quantity, the same also can be considered after satisfying the above 3 parameters stated herein above, for diluting the rigour under Section 37 of the NDPS Act.

13. In this matter, the petitioner has been in custody from 28.03.2021 and now more than two years have been elapsed and trial has not yet started. The petitioner has no criminal

antecedents. Further, there is no possibility to complete the trial within a reasonable time, at least within a period of six months. Thus, the three parameters can be found in favour of the petitioner. Therefore, I am of the view that the petitioner can be enlarged on bail satisfying the rigour under Section 37 of the NDPS Act.

14. Accordingly, this petition stands allowed and the petitioner can be enlarged on bail on the following conditions:

i. Accused/petitioner shall be released on bail on his executing bond for Rs.50,000/- (Rupees Fifty 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 trial and shall be available for trial.

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 his release, before the trial court. If he has no passport, 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 or indulge 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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