

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

FRIDAY, THE 25TH DAY OF AUGUST 2023 / 3RD BHADRA, 1945

BAIL APPL. NO. 3709 OF 2023

CRIME NO.05/2022 OF NARCOTICS CONTROL BUREAU, KOCHI, Ernakulam
AGAINST THE ORDER/JUDGMENT CRMC 966/2023 OF DISTRICT COURT &
SESSIONS COURT, ERNAKULAM

PETITIONER/S:

VIJAY PHILIP
AGED 29 YEARS
S/O JOSEPH PHILIP, OLASSAYIL, NEAR RAILWAY STATION,
FATHIMAPURAM, CHANGANASSERY, KOTTAYAM ., PIN - 686102
BY ADVS.
SALIM V.S.
A.M.FOUSHI
A.B.AJIN

RESPONDENT/S:

NARCOTIC CONTROL BUREAU
COCHIN SUB ZONE, REPRESENTED BY SPECIAL PUBLIC
PROSECUTOR, NARCOTIC CONTROL BUREAU, HIGH COURT OF
KERALA, ERNAKULAM ., PIN - 682031
BY ADV. NAVANEET N. NATH

THIS BAIL APPLICATION HAVING BEEN FINALLY HEARD ON 1.8.2023,
THE COURT ON 25.08.2023 PASSED THE FOLLOWING:

ORDER

The petitioner is the accused in OR No 5 of 2022 of Narcotics Control Bureau, Kochi, Ernakulam. The offense alleged are under sections 8(C) r/w sections 21(b), 22 (c), 23(b), 23(c) and 28 of the NDPS Act, 1985, as amended.

2. The prosecution case is as follows: On 30.11.2022 at around 10.00 hrs, The Intelligence Officer, NCB, Kochi, received information from the Postal Appraising Department, Ernakulam, about a suspicious parcel from the sender named Anajleena, from a foreign country to one Vijay Philip, the petitioner herein. Thereupon, the officers of the NCB went to the Postal Appraising Department, after complying with the legal formalities in this regard and in the presence of the witnesses, inspected the said parcel. Thereupon it was found that on the envelope of the same, the description of contents was shown as LEGO TOYS. The address of

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the recipient was mentioned as that of the petitioner herein, and the phone number was also that of him. On examination of the contents of the said parcel, it was revealed that it contained 51.32 gms of MDMA and 7.23 gms of Cocaine.

3. Thereafter, as instructed by the officers of the NCB, the petitioner was contacted over the phone by the Erroor Post Officer, from where the parcel was supposed to be delivered to the addressee. Thereupon, the petitioner attended the said call and informed that he was at Changanasserry, which is his native place, and he would collect the parcel on 2.12.2022. Accordingly, on 2.12.2022, the petitioner reached the Post Office, and he was apprehended by the officers of the NCB. On questioning, he admitted that he placed an order for the contraband articles with the foreign seller through the dark net, and he came to the post office to receive the same. The residential apartment of the petitioner was searched, but no other contraband articles

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were recovered. Thereafter, a statement of the petitioner under section 67 of the NDPS Act was recorded, wherein the petitioner admitted that, during his Engineering College days, he got introduced to drugs such as LSD and Ganja through friends. With regard to the articles seized, he stated that he had placed the order for the drugs through the 'Wickr Me' App, which is a facility to carry out transactions through the dark net by maintaining the identity in anonymity. Through the said App, he could identify the sellers of drugs with the names 'Reddington UK' and "Drugs Cartel'. The payment was made through cryptocurrency through the Binance cryptocurrency trading App, using Monero (XMR) currency. The snapshot of the transactions he made through the Binance App was also supplied by him from his mobile phone, and the same was seized. Accordingly, the petitioner was arrested and has been in judicial detention since then. The mobile phone seized by the NCB has already been sent for scientific analysis and the

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report is awaited. In the chemical analysis report of the contraband articles, it was confirmed that the articles recovered from the petitioner were MDMA and Cocaine. The bail application submitted by the petitioner before the Sessions Court was dismissed. In the meanwhile, the NCB completed the investigation and submitted a complaint before the Principal Sessions Court Ernakulam. This application for regular bail is submitted in such circumstances.

4. Heard Sri V.S Salim, learned Counsel for the petitioner and Sri Navaneet N Nath, learned Counsel for the respondent.

5. The learned counsel for the petitioner submits that the materials available on record are not sufficient to establish the involvement of the petitioner. Apart from the statement under section 67 of the NDPS Act and the fact that the parcel was addressed in his name, there is absolutely nothing to indicate his role. As far as the statement under section 67 of the Act is

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concerned, it was pointed out that, in the light of the decision in **Tofan Singh v. State of TN, [2021 (4) SCC 1]**, the said statement is not admissible in evidence. It was further contended that, even though it was alleged that the petitioner carried out the transactions through Wickr Me App and Binance App, the prosecution could not collect any materials to prove such transactions. It was pointed out that, even though the investigating officer required the details of the transactions from the said Apps, they could not collect ample materials to link the petitioner with the transactions. According to the learned counsel, as there are no materials to establish the petitioner's involvement, the petitioner is entitled to bail.

6. The learned counsel for the respondent opposed the said application by highlighting that there are ample materials to establish the role of the petitioner. The learned counsel for the respondent made available a copy of the complaint

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along with the supporting documents for perusal and contended that the materials produced are sufficient to establish the complicity of the petitioner. It was further pointed out that as per the Chemical Analysis report, the contraband article was identified as MDMA, and since the quantity thereof is 51.5 gms, it is commercial quantity, to which, the rigour under section 37 of the NDPS Act is applicable. Therefore, the dismissal of the application was sought.

7. I have carefully gone through the records. Even though the learned counsel for the petitioner vehemently contended that there are absolutely no materials to establish the complicity of the petitioner, I am not inclined to accept the said contention for the reasons hereinafter mentioned.

8. The contention of the petitioner is that the petitioner cannot be proceeded against, based on the statement under section 67 of the NDPS Act. However, in this case, apart from the said statement, several other materials are there,

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which would establish the admission made by the petitioner in the statement. The specific case of the prosecution is that the petitioner carried out the payment for the contraband article through the Binance App, and while questioning, the investigating officer could recover the snapshot of the transactions he made using the said App. It is discernible from the said snapshot that, altogether there were five transactions, and the total value of the said transactions was identified as 687.8339498 BUSD (Binance US dollars), which was equivalent to 687.81 US dollars and the corresponding value of the same is Rs 55,000/-. It is to be noted that the Binance App is a payment wallet, where the party can keep amounts in the wallet and make payments from the same without reflecting the same in his bank accounts. The information the NCB could collect from the Bainance App is that the five transactions referred to in the snapshot are withdrawal transactions made to non Binance

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subscribers, and therefore, the details of the recipients cannot be obtained. However, it is to be noted that the said transactions took place on 7.11.2022 and 8.11.2022, i.e. immediately before the parcel was sent to the address of the petitioner. The information regarding the parcel was received by the NCB on 30.11.2022.

9. With regard to the Wickr Me App, through which the petitioner allegedly placed the order for the drugs, the crucial aspect to be noticed is that, in section 67 statement, he had stated that he logged out from the said App. He does not remember the password for logging in. Therefore, the investigating officer could not collect the details of the transactions in the Wickr Me App. The peculiar nature of the Wickr Me App is that, it is a free App that provides end-to-end encryption of text, picture, audio, video messages, etc. The encrypted messages in all the forms are stored temporarily in the server of the service providers, and once the messages are

downloaded by the recipient, the same would get automatically deleted without any trace. Thus, it is an App that provides absolute secrecy to the transactions.

10. The specific contention put forward by the learned counsel for the petitioner is that as there is nothing on record to show the details of the person with whom the petitioner had transactions and the purpose of the said transactions, etc., the transactions reflected in the snapshot collected from the mobile phone of the petitioner cannot form the sole basis of his detention. However, I am not inclined to accept the said contention. It is to be noted that such meticulous analysis of the materials is required to be made only at the time of the trial. Now, the question before this court is whether the petitioner is to be granted bail, for which the only considerations are the stipulations in section 37 of the NDPS Act coupled with the conditions and circumstances mentioned in section

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438 of the Cr.P.C. As per section 37(1) (ii), the court has to be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offence and that he is not likely to commit the offence while on bail. In **Narcotics Control Bureau v. Mohit Agarwal [AIR 2022 SC 2444]**, it was observed as follows:

"15. We may clarify that at the stage of examining an application for bail in the context of the Section 37 of the Act, the Court is not required to record a finding that the accused person is not guilty. The Court is also not expected to weigh the evidence for arriving at a finding as to whether the accused has committed an offence under the NDPS Act or not. The entire exercise that the Court is expected to undertake at this stage is for the limited purpose of releasing him on bail. Thus, the focus is on the availability of reasonable grounds for believing that the accused is not guilty of the offences that he has been charged with and he is unlikely to commit an offence under the Act while on bail."

11. Similarly, in **Mohd Muslim @ Hussain v. State (NCT of Delhi) 2023(3) KLT 504 (SC)**, it was observed by the Honourable Supreme Court that,

" 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, 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 the investigation(as held in Union of India v. Rattan Malik (2009) 2 SCC 624)....."

12. The Honourable Supreme Court in **State of Kerala v. Rajesh [2020 (12) SCC 122]** in paragraph No.21 it was observed as follows:

"21. 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....."

13. When the materials in this case, are considered in the light of the above principles, the following aspects are seen;

I) The parcel was sent from a foreign country to the address and showing the phone number of the petitioner herein. Upon being informed of the same, the petitioner reached the post office to collect the same. Of course, under normal circumstances, the conduct on the part of the petitioner in reaching the Post Office to collect the parcel by itself cannot be treated as something incriminating, but the fact that the parcel was addressed in his name, with his phone number is a factor which is very much relevant.

ii) The snapshots of the transactions through

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Binance App recovered from the mobile phone of the petitioner reflecting five transactions immediately before the parcels were sent, i.e. the transactions were on 7.11.2022 and 8.11.2022, whereas, as per the endorsements in the parcel, it was sent on 17.11.2022.

iii) Even though the traces of the Wickr Me App are there on his mobile phone, the petitioner stated in Section 67 statement that he had already logged out of the said App and he does not remember the password. The mobile phone has already been sent for the scientific examination, and the test report is awaited

iv) The more important aspect is the absolute secrecy maintained by the petitioner about his transactions. Right from the inception, he was using modern technological advancements to ensure that the transactions carried out by him remained untraced. The eagerness to maintain secrecy is something very crucial at this stage and relevant for considering the "reasonable grounds" as contemplated under section 37 of the NDPS Act. The dependence of the petitioner upon the Apps that enabled him to have transactions without any trace and silence maintained by him as to the

purposes of such transactions is one of the crucial circumstances. Indeed, the petitioner has no obligation to divulge the details of the said transactions, as he has every right to remain silent, and the burden is on the prosecution to establish the complicity of the petitioner. However, in my view, when trying to find out the reasonable grounds to satisfy the dual conditions in section 37 of the Act, those aspects have some crucial importance.

14. In this regard, one of the crucial aspects to be considered is the purpose for which the stringent provisions in the NDPS Act are incorporated. It is to be noted that, even for offences under section 302 of the IPC, for which capital punishment is prescribed, the conditions for bail as contemplated under section 37 are not prescribed. This is presumably because of the serious impact of the offences under the NDPS Act, on society as a whole. In the case of murder, the impact is mostly confined to an individual or his family; whereas the impact of drug abuse and drug trafficking mainly affects the young generation, thereby causing its impact on the growth of the

country as such. While considering the rigour of the statutory stipulation in Section 37 of the NDPS Act, it was observed by the Honourable Supreme Court in **Union Of India v. Ram Samujh and Others**[1999 (9) SCC 429] in the manner as follows:

"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 death-blow 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:

15. Thus, while deciding the question of bail, the aforesaid principles have to be kept in mind. When considering the issues involved in this case, in the light of the above observations, it can be seen that new methods are seen devised as an attempt to defeat the process of law by making use of advanced technology, and if such attempts are not nipped in the bud, the purpose behind the

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stringent provisions of the NDPS Act, would get defeated thereby preventing the achievement of the very objects behind the enactment. This is an offence which does not warrant any leniency and is required to be dealt with strictly.

In such circumstances, I do not find any merits in this application; accordingly, the same is dismissed.

Sd/-
ZIYAD RAHMAN A.A.
JUDGE

pkk

APPENDIX OF BAIL APPL. 3709/2023

PETITIONER ANNEXURES

- Annexure1 TRUE COPY OF THE INFORMATION REPORT DATED 30.11.2022 UNDER SECTION 42 OF NDPS ACT..
- Annexure2 TRUE COPY OF THE MAHASSAR DATED 30.11.2022 SHOWING THE SEIZURE OF THE CONTRABAND..
- Annexure3 TRUE COPY OF THE OR 05/2022 OF NCB, SUB-ZONE, COCHIN DATED 01.12.2022.
- Annexure4 TRUE COPY OF THE LIST OF MATERIALS OBJECTS DATED 01.12.2022 PRODUCED BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT-II, ERNAKULAM.
- Annexure5 TRUE COPY OF THE SUMMONS DATED 02.12.2-22 UNDER SECTION 67 OF NDPS ACT.
- Annexure6 TRUE COPY OF THE STATEMENT OF THE PETITIONER UNDER SECTION 67 OF THE NDPS ACT ALLEGEDLY RECORDED BY THE NCB.
- Annexure7 TRUE COPY OF THE REMAND APPLICATION DATED 03.12.2022 OF THE PETITIONER PREPARED BY THE INVESTIGATING OFFICER.
- Annexure8 ORDER DATED 27.04.2023 SESSIONS (VACATION) COURT, ERNAKULAM IN CR. MC NO.966/2023.