

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 13TH DAY OF APRIL 2023 / 23RD CHAITHRA, 1945

BAIL APPL. NO. 3849 OF 2022

CRIME NO.112/2022 OF MALAPPURAM POLICE STATION, MALAPPURAM

PETITIONER/ACCUSED NO.1:

FASIL

AGED 32 YEARS

S/O. ABDUL GAFORR, PADIPPURA HOUSE, THARIS POST,
KARUVARAKUNDU, MALAPPURAM DISTRICT, PIN - 676523

BY ADV P.K.ANIL(K/000587/1989)

RESPONDENTS/STATE:

- 1 THE STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM - 682031.
- 2 THE STATION HOUSE OFFICER, MALAPPURAM
MALAPPURAM POST, MALAPPURAM DISTRICT - 676505.
BY ADVS.
ADVOCATE GENERAL OFFICE KERALA
ADDL.DIRECTOR GENERAL OF PROSECUTION(AG-11)
PUBLIC PROSECUTOR SRI S.SANGEETH RAJ

THIS BAIL APPLICATION HAVING BEEN FINALLY HEARD ON 10.03.2023
ALONG WITH B.A.NO.5099/2022, THE COURT ON 13.04.2023
DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

FRIDAY, THE 13TH DAY OF APRIL 2023 / 23RD CHAITHRA, 1945

BAIL APPL. NO. 5099 OF 2022

CRIME NO.112/2022 OF MALAPPURAM POLICE STATION, MALAPPURAM

AGAINST THE ORDER/JUDGMENTCMP 656/2022 OF SPECIAL COURT

(ATROCITIES AGAINST SC/ST), MANJERI

PETITIONER/ACCUSED NO.2:

RASHAD, AGED 28 YEARS
S/O MUHAMMAD HUSSAIN,
KURUKKAN HOUSE, THARIH P.O.,
MAMPATTA, KARUVARAKUNDU,
MALAPPURAM DISTRICT - 676523.
BY ADV Sojan Micheal Micheal

RESPONDENTS/STATE & COMPLAINANT:

- 1 STATE OF KERALA
REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM, PIN - 682031.
- 2 STATION HOUSE OFFICER
MALAPPURAM POLICE STATION,
MALAPPURAM DISTRICT-676519,
THROUGH PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM-682031.

PUBLIC PROSECUTOR SRI S.SANGEETH RAJ

THIS BAIL APPLICATION HAVING BEEN FINALLY HEARD ON
10.03.2023 ALONG WITH BAIL.APPLI.NO.3849/2022, THE COURT ON
13/04/2023 DELIVERED THE FOLLOWING:

“C.R”

A. BADHARUDEEN, J.

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B.A.Nos.3849 of 2022

and

5099 of 2022

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Dated this the 13th day of April, 2023

ORDER

These are bail applications filed by accused 1 and 2 in Crime No.112 of 2022 of Malappuram Police Station, Malappuram, under Section 439 of the Code of Criminal Procedure.

2. Heard the learned counsel for the petitioners and the learned Public Prosecutor in detail. Perused the case diary and report of the Investigating Officer placed by the learned Public Prosecutor.

3. The prosecution case is that at about 22.05 hours on 16.02.2022, when the Sub Inspector of Police, Malappuram Police Station, was engaged in vehicle checking, it was found that ganja

was transporting in a TATA Tiago car bearing Registration No.KL 71 F 6107. Accordingly, the vehicle was searched and 22.125 kg. of ganja was seized. Pursuant to recovery, accused Nos.1 and 2 were arrested and crime alleging commission of offences punishable under Section 20(b)(ii)C and 29 of the Narcotic Drugs and Psychotropic Substances Act ('NDPS Act' for short hereinafter) was registered.

4. The learned counsel for the petitioner pressed for grant of bail on the submission that the petitioners have no criminal antecedents and they have been in custody from 16.02.2022 onwards on the allegation that they had possessed 22.125 kg. of ganja, just above intermediate quantity. It is submitted by the learned counsel for the petitioners that even though investigation of this crime was completed, trial not yet started and there is no likelihood to complete the trial within a reasonable time. Further, the petitioners have no criminal antecedents. Therefore, the petitioners may be released on bail, diluting the rigour under Section 37 of the NDPS Act.

5. Whereas the learned Public Prosecutor strongly opposed grant of bail on the submission that commercial quantity of

contraband was seized from the petitioners and in such a case, this Court cannot grant regular bail to the petitioners, without satisfying the twin conditions provided under Section 37 of the NDPS Act. In this case, red-handed recovery of 22.125 kg. of ganja could be seen, *prima facie*. Therefore, definitely, the rigour under Section 37 would apply.

6. In this connection, the learned counsel for the petitioners placed 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. It is submitted by the learned counsel for the petitioners that 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. Therefore, applying the same ratio, Section 37 of the NDPS Act may be diluted in this case and the petitioners, who are first time offenders, may be released on bail.

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.”

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.”

9. 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.”

10. 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 long time, at least a period more than one year (say for eg. about fourteen months in the instant case).

(3) the impossibility of trial within a reasonable time (for this purpose, the Court granting bail should ensure that trial could not be completed at least within a period of six months).

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 just 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.

11. In this matter, the petitioners have been in custody from 16.02.2022 and now one year and 1 ½ months have been elapsed and trial has not yet started. The petitioners have no criminal antecedents. Further, there is no possibility to complete the trial within a reasonable time. Thus the three parameters can be found in favour of the petitioners. In addition to that, the quantity of the contraband they possessed is only 22.125 kg. which is just above the intermediate quantity. So, by applying the ratio of the Apex Court decisions referred above, I am of the view that the petitioners can be enlarged on bail satisfying the rigour under Section 37 of the NDPS Act.

12. Accordingly, these petitions stand allowed and the petitioners can be enlarged on bail on the following conditions:

i. Accused/petitioners shall be released on bail on their executing bond for Rs.50,000/- (Rupees Fifty Thousand Only) each with two solvent sureties each for the like amount to the satisfaction of the jurisdictional court concerned.

ii. Accused/petitioners shall not intimidate the witnesses or tamper with evidence. They shall co-operate with the investigation and shall be available for trial. They 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/petitioners shall not leave India without prior permission of the jurisdictional court.

iv. The petitioners shall surrender their passports, if any, within 7 days from the date of their release, before the trial court. If they have no passports, they shall file an affidavit in this regard on the date of execution of the bond or within 3 days thereafter.

v. Accused/petitioners 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)

rtr/