

[C.R]

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

FRIDAY, THE 8TH DAY OF SEPTEMBER 2021 / 17TH BHADRA, 1943

BAIL APPL. NO. 5747 OF 2021

CRIME NO.91/2021 OF Ernakulam Central Police Station, Ernakulam
AGAINST THE ORDER IN CRMC 1139/2021 OF I ADDITIONAL DISTRICT COURT,
ERNAKULAM,

PETITIONER:

SAMEEER

AGED 31 YEARS

S/O.ABDUL RASSAK, NABEESATH VILLA, PADANNA P.O.,
VADAKKEPURAM, PADANNA VILLAGE, KASARGODE DISTRICT.

BY ADV ANITHA MATHAI MUTHIRENTHY

RESPONDENT:

STATE OF KERALA

REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF
KERALA.

SRI.GRASHIOUS KURIAKOSE, ADGP

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
03.09.2021, THE COURT ON 8.9.2021, DELIVERED THE FOLLOWING:

[C.R]

P.V.KUNHIKRISHNAN, J

B.A.No.5747 of 2021

Dated this the 8th day of September, 2021

ORDER

A short point, ofcourse an interesting point, is raised by Advocate Smt.Anitha Mathai Muthirenthu, the counsel for the petitioner in this bail application. According to the counsel, the petitioner is entitled to statutory bail u/s. 167(2) of the Criminal Procedure Code (for short Cr.P.C) because no complete final report is filed before the court concerned, even after 180 days from the date of detention of the petitioner.

2. The facts are like this:

The petitioner is the 1st accused in Crime No.91 of 2021 of Central Police Station, Ernakulam. The offences alleged against the petitioner are u/s.20(b)(ii)(C), 22(C), and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short NDPS Act). The prosecution case is that the petitioner was residing in an apartment on the 2nd floor of Njarakkattu Residency in Kunnappally Lane in Nettipadam Road, Ernakulam. On 30.1.2021, the police got information that the selling of narcotic drugs is going on in the above apartment. The information was recorded in the C.D by the officer concerned and proceeded to the place after complying with other formalities. When the police party reached the apartment, the 1st accused opened the door. It was found that the 2nd and 3rd accused were also present in the apartment. After performing the legal formalities, the body of the petitioner and the other accused were searched. The apartment was also searched. It is the prosecution case that 44.56 gms of MDMA, 1286.51 gms of Hashish oil, and 340 gms of Ganja were seized. It is also the case of the prosecution that the 2nd accused was found in possession of 1.93 gms of Hashish oil

and the 3rd accused was found in possession of 1.88 gms of Hashish oil. Hence, it is alleged that the accused committed the offence. It is the admitted case of the prosecution and the accused that the final report is filed before the jurisdictional court without the analyst report of the contraband articles seized. It is also an admitted fact that the statutory period of 180 days for completing the investigation is also over. The petitioner was arrested on 30.1.2021 and he was produced before the court concerned on 31.1. 2021. Admittedly, the final report without the analyst report was submitted before the court concerned within 180 days. It is also an admitted case that the Hashish oil and the MDMA seized from the possession of the accused are commercial quantities as per the NDPS Act. According to the petitioner, he is entitled to default bail because an incomplete charge sheet is submitted.

3. Heard the counsel for the petitioner Advocate Smt.Anitha Mathai Muthirenthy and the Additional Director General of Prosecution Sri.Gracious Kuriakose.

4. The counsel for the petitioner raised several contentions. The counsel submitted that there was no seizure from the body of the petitioner. The counsel submitted that simply because some contraband articles are seized from the apartment in which the petitioner was found, the petitioner is not responsible for the same. The counsel also submitted that there is no criminal antecedents to the petitioner. It is also the case of the petitioner that there is no conscious possession of the contraband article seized from the apartment as far as the petitioner is concerned. It is also contended by the counsel that the prosecution submitted a final report without an analyst report. According to the petitioner, in NDPS cases, without analyst report, the prosecution cannot succeed. The counsel submitted that the final report submitted by the investigating officer is without the analyst report and therefore, it is an incomplete final report. The counsel submitted that the incomplete final report is filed to defeat the right of the petitioner to get bail u/s.167(2) Cr.P.C. Therefore, the counsel submitted that the petitioner is entitled bail because there is an incomplete final report filed before the court just

to get over the provision under Section 167(2) Cr.P.C. Hence, the counsel submitted that the petitioner is entitled to default bail. The counsel also relied on the judgment of the apex court in **Rakesh Kumar Paul v State of Assam (2017 (4) KHC 470)** and the judgment of the apex court in **Om Prakash @ Baba v State of Rajasthan (2009 KHC 5198)**. The counsel also relied an unreported judgment of this court dated 12.8.2021 in B.A.No.4910 of 2021. Another decision relied is the judgment of the Karnataka High Court in **Inspector of Customs, Headquarters Preventive Unit, Bangalore v Daphira Wallang (2010 KHC 7257)**.

5. The Additional Director General of Prosecution (for short the ADGP) opposed the bail application. The ADGP submitted that the petitioner took the apartment on rent and the contraband articles were seized from the apartment. The ADGP also submitted that commercial quantities of Hashish oil and MDMA are seized from the apartment. It is also submitted that a weighing machine and packets to pack the contraband articles were also seized from the apartment. Therefore, the petitioner is primarily responsible for the same and the

petitioner was in conscious possession of the contraband article. The ADGP also submitted that the petitioner is a resident of Kasaragod and he came to Ernakulam for the illegal NDPS business. Therefore, the ADGP submitted that there is ample evidence against the petitioner. The ADGP conceded that the analyst report is not submitted along with the final report. But the ADGP submitted that Hashish oil can be identified by an expert even by sight. The ADGP submitted that the detecting officer identified with the help of the Excise Inspector present at the spot that the contraband is Hashish oil and MDMA. The purpose of the analyst report is only to corroborate the evidence of these witnesses. The investigating officer has already taken steps to send the sample for expert opinion. In such circumstances, simply because the analyst report is not received and before receiving the same the final report is filed, the petitioner is not entitled statutory bail u/s.167(2) Cr.P.C. The ADGP also submitted that a commercial quantity of Hashish oil and MDMA is seized from the apartment. There are only four labs in Kerala to analyse these contraband articles. Because of the workload in these laboratories,

the analyst report is not obtained. It is also submitted that because of the pandemic situation, there was no sufficient staff in the laboratories and therefore, the lab authorities were not able to complete the analysis in time. The definite case of the ADGP is that the petitioner cannot take advantage of the above situation. The ADGP submitted that, since commercial quantities of MDMA and Hashish oil are seized from the petitioner, the petitioner may not be released on bail at this stage.

6. I considered the contentions of the petitioner and the ADGP. The first contention of the petitioner is that he is not responsible for the seizure of the contraband article from the apartment and there is no contraband seized from the physical possession of the petitioner. This can not be accepted while considering this bail application. The prosecution case is that the petitioner took this apartment for rent. When the detecting officers searched the apartment, the petitioner was present. According to the detecting officers, commercial quantities of MDMA and Hashish oil are seized from the apartment which is taken on rent by the petitioner. In such circumstances,

simply because there is no seizure from the body of the petitioner, he cannot escape from the liability at this stage. The burden is on the petitioner to establish that he was not in conscious possession of the contraband articles. While considering a bail application u/s.439 Cr.P.C, this court cannot decide the same. The petitioner is free to raise all those contentions at the stage of trial and I do not want to make any further observation about the same at this stage.

7. The main contention of the petitioner is that the petitioner is entitled statutory bail because there is no complete final report filed before the court concerned within the statutory period prescribed u/s.36A(4) of the NDPS Act. It is an admitted fact that the final report is filed. It is also an admitted fact that the final report is filed without the analyst report and even now it is not received. It is also an admitted fact that the statutory period for completing the investigation is over as of today. In such circumstances, whether the petitioner is entitled to default bail u/s.167(2) Cr.P.C is the point to be decided. For deciding this issue, it will be better to extract Section 167 Cr.P.C.

167. Procedure when investigation cannot be completed in twenty four hours.

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty- four hours fixed by section 57, and there are grounds for believing that the accusation or information is well- founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub- inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that-

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence,

and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter.;

(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage.

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail;

Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person

through the medium of electronic video linkage, as the case may be;

Provided further that in case of woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognized social institution.

(2A) Notwithstanding anything contained in sub- section (1) or sub- section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub- inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section(2);

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify.

8. Section 167(1) Cr.P.C says that whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of 24 hours fixed by Section 57, and there are grounds for believing that the accusation or information is well founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the

rank of Sub Inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries, in the diary and shall at the same time forward the accused to such Magistrate.

9. Section 167(2) proviso says that the Magistrate may authorize the detention of the accused persons otherwise than in the custody of the police beyond the period of 15 days if he is satisfied that adequate ground exist for doing so, but no Magistrate shall authorize the detention of the person in custody under this paragraph for a total period exceeding 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years. As per Section 36A(4) of the NDPS Act, the investigation, in this case, is to be completed within 180 days. If the same is not completed and the final report is not submitted, the petitioner is entitled default bail.

10. Therefore, the point to be decided is whether the investigation is completed or not within the period mentioned. The investigation is defined in Section 2(h) of Cr.P.C. Section 2(h) says that "investigation includes all the proceedings under this Code for the

collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf". Therefore, the investigation includes all the proceedings under the Code for the collection of evidence. In this case, the investigating officer has already taken proceedings to get the analyst report by submitting requisition before the court concerned and it is already reached the laboratory. Therefore, it cannot be said that simply because the analyst report is not received from the laboratory, the investigation is not complete. Therefore, if the investigating officer reported that the requisition for getting the analyst report is already submitted before the authority concerned, and the lab report is awaited, it cannot be said that the investigation is incomplete. But if the investigating officer is mainly relying upon a lab report to prove his case, and even in such a situation, a final report is filed without the report, it cannot be said that it is a final report as contemplated under law. Section 173 of the Criminal Procedure Code says about the submission of the final report. Section 173 Cr.P.C says that, after the conclusion of the investigation, the officer in charge of the police

station shall forward the report in the form prescribed with the details mentioned therein. If the investigating officer after the investigation concluded that the offence alleged against the petitioner is maintainable based on the documents submitted before the Court, it can be treated as a complete report u/s.173 Cr.P.C. In such a situation, the investigating officer can submit before the Court that the analyst report is not received and that is a supplementary evidence or corroborative evidence to prove the charge sheet. In such circumstances, it cannot be said that the final report submitted before the court concerned is a defective final report. But in cases where the prosecution cannot prove a case without the aid of the analyst report and if a final report is filed in such cases without the analyst report, it can only be treated as an incomplete final report and in such situation, it cannot be said that the petitioner is not entitled default bail at that stage. Therefore, the entitlement of default bail u/s.167 Cr.P.C is to be decided based on the facts of each case. If the prosecution is relying the analyst report as a corroborative piece of evidence, it cannot be treated that if the final report is submitted

without analyst report, that is an incomplete report. It cannot be said in such a situation that the investigation is not complete especially because Section 2(h) of the Cr.P.C states that the investigation includes all the proceedings under the court for the collection of evidence. If the investigating officer already completed the proceedings to get an analyst report by submitting appropriate requisition before the court and the court concerned forwarded the same to the laboratory, it cannot be said that simply because the analyst report is not produced, the investigation is not completed. What is necessary to get default bail u/s.167 (2)Cr.P.C is the failure to complete the investigation within the time prescribed for investigation. Once the investigating officer after completing the investigation and sending the requisition to the authority concerned to get the analyst report, submitted the final report, it cannot be said that there is an incomplete final report unless it is a case in which the entire prosecution case is relying solely based on the analyst report. In this background, the present bail application is to be considered.

11. Admittedly, Hashish oil and MDMA seized from the apartment are commercial quantities. The detecting officer specifically stated that the identification of Hashish oil and MDMA are confirmed through the Excise Inspector. Whether the Excise Inspector is competent or an expert to identify the contraband as Hashish oil or MDMA is a matter of evidence. While considering a bail application u/s.439 Cr.P.C, this court cannot go into such questions and conclude that the Excise Inspector who identified the article as MDMA and Hashish oil is not an expert or a competent authority. In this case, admittedly the requisition for getting the analyst report is already submitted and the matter has already reached the lab concerned. The ADGP also submitted that the report will be obtained within two weeks. In this case even though the prosecution is relying the analyst report, they rely on the same to corroborate the oral evidence already collected. Hence it cannot be said that the final report submitted in this case is incomplete and the petitioner is entitled default bail.

12. At this stage, this court has to consider one disturbing fact. The ADGP submitted that there are only four authorized laboratories

in Kerala to analyze the contraband article like this. If there is delay in getting analyst report, that may affect the prosecution case itself. Certain urgent steps are to be taken by the State Government. The ADGP submitted that the Government is taking every step to increase the number of labs in this State. The ADGP submitted that the laboratories can be established only with the permission of the Central Government. The State Government should take appropriate immediate steps to consult with the Central Government for establishing adequate number of labs in the State of Kerala, so that there is no delay in getting analyst report. The registry will send a copy of this judgment to the Chief Secretary for taking appropriate steps.

13. In the light of the discussion stated above, the petitioner is not entitled default bail. The allegations against the petitioner are very serious. It is the case of the prosecution that commercial quantity of Hashish oil and MDMA is seized from the petitioner and other accused. In such circumstances, I am not in a position to release the petitioner on bail at this stage. The court concerned will

take immediate steps to complete the trial as expeditiously as possible.

In the light of the above discussion, the following orders are passed.

- 1) The bail application is dismissed.
- 2) The trial court will take every endeavour to dispose of the case itself immediately after getting the analyst report.
- 3) The registry will forward a copy of this judgment to the Chief Secretary, State of Kerala for taking appropriate steps to establish sufficient number of laboratories as mentioned in paragraph No.12.

Sd/-

P.V.KUNHIKRISHNAN, JUDGE

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P.S.to Judge