

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 8<sup>TH</sup> DAY OF DECEMBER 2022 / 17TH AGRAHAYANA, 1944

CRL.MC NO. 8404 OF 2022

AGAINST THE ORDER DATED 18.10.2022 IN CRL.M.P.N.3053/2022 ON THE

FILE OF THE FIRST ADDITIONAL SESSIONS JUDGE, THRISSUR

CRIME NO.470/2022 OF KUNNAMKULAM POLICE STATION

PETITIONER/ACCUSED NO.3:

MUHAMMED AJMAL  
AGED 22 YEARS  
S/O.ABDUL SALAM, VALIYAKATHU HOUSE,  
ALAMKODE (P.O), CHANGARAMKULAM,  
MALAPPURAM DISTRICT., PIN - 679575  
BY ADV NIREESH MATHEW

RESPONDENT/COMPLAINANT/STATE:

STATE OF KERALA  
REPRESENTED BY PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA, PIN - 682031  
BY ADV PUBLIC PROSECUTOR  
BY SRI.RENJIT GEORGE, SR.PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON  
08.12.2022, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**CR**

**ORDER**

Dated this the 8<sup>th</sup> day of December, 2022

This is a petition filed under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred as 'Cr.P.C.' for convenience) to quash Annexure 4 order dated 18.10.2022 in CrI.M.P. No.3053/2022, whereby the learned First Additional Sessions Judge, Thrissur extended the statutory period of detention of the petitioner, who is the third accused in crime No.470/2022 of Kunnamkulam police station.

2. Heard the learned counsel for the petitioner as well as the learned Public Prosecutor.

3. The prosecution allegation is that, the petitioner herein who is arrayed as accused No.3 in Crime No.470 of 2022 of the Kunnamkulam Police Station along with the other accused committed offences punishable under

Sections 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act' for convenience). The specific allegation is that at about 10.35 p.m, on 03.04.2022, accused Nos.1 and 2 were found possessing and transporting 10.80 grams of MDMA on a motorbike bearing registration No.KL-54-E-3809 and they were intercepted and contraband taken into custody. Subsequently, they were arrested. The allegation against the petitioner is that he had procured the contraband article from the fourth accused and had handed over the same to accused Nos.1 and 2. The petitioner was arrested on 04.04.2022 and he has been in custody thereafter.

4. The petitioner was arrested based on the confession of accused Nos.1 and 2 and has been detained in custody. Since the prosecution failed to file Final Report within 180 days, the Investigating Officer filed Annexure 4 petition (Crl.M.P.No.3053 of 2022) for extension of time. At

the same time, the petitioner filed statutory bail application.

5. The learned Special Judge under the NDPS Act, Thrissur allowed Annexure 4 order and thereby extended the period of detention for a period beyond 180 days. Similarly, it is submitted that the statutory bail application moved by the petitioner was dismissed in view of the extension granted as per Annexure 4.

6. The learned counsel for the petitioner pointed out two anomalies while pressing for reversal of the said orders.

7. While assailing these orders, the learned counsel for the petitioner argued that in order to get extension of the period of investigation beyond 180 days, by resorting to Section 36-A(4), it is mandatory that the Public Prosecutor to file a report/petition indicating the progress of investigation and the specific reasons for the detention of the accused beyond the said period of 180 days. According to the learned

counsel for the petitioner, Annexure 4 order was passed by the learned Special Judge, acting on a petition in the form of a report filed by the Investigating Officer/the Inspector of Police, Kunnamkulam Police Station, copy of which produced as Annexure 3 herein, and the same does not contain the progress of investigation, though there are reasons for the detention of the accused beyond the said period of 180 days. Accordingly, it is argued that the Special court went wrong in allowing Annexure 3 and dismissing the statutory bail plea of the petitioner, which is an indefeasible right of the petitioner, guaranteed by the Constitution. He has given emphasis to the decisions reported in **Hitendra Vishnu Thakur and others v. State of Maharashtra** [1994 SCC (4) 602], **Sanjay Kumar Kedia @ Sanjay Kedia Vs.Intelligence Officer, Narcotic Control Bureau & Another** [(2009) 17 SCC 631], Unreported Crl.M.C.No. 5412/2022, **Appukuttan vs. State of Kerala** (2013 KHC

3669), Unreported B.A.No.3850/2021 and **Nayantara Gupta**

**V. State of Maharashtra** [2020 SCC Online Bom 873] in support of his contention.

8. It is relevant to note that, the learned Public Prosecutor, who supported the orders impugned, submitted that, Annexure 3 petition dated 27.09.2022 is one filed by the Investigating Officer and not by the Public Prosecutor.

9. Having heard as argued, it is necessary to refer the statutory wordings, and then to the decisions highlighted by the learned counsel for the petitioner.

10. Section 36-A provides as under:

**“36-A.Offences triable by Special Courts.-**

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974).

2. xxxx

3. xxxx

4. In respect of persons accused of an offence punishable under section 19 or section 24 or

section 27-A or for offences involving commercial quantity the references in subsection (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) thereof to “ninety days”, where they occur, shall be construed as reference to “one hundred and eighty days”:

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year **on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused** beyond the said period of one hundred and eighty days.”

11. In **Hitendra Vishnu Thakur’s** case (supra), paragraph No.23 dealt with Section 20(4)(bb) of the Terrorist and Disruptive Activities (Prevention) Act, 1987, (hereinafter referred as ‘TADA’ for convenience) and it was held as follows:

“23. .... on a plain reading of clause (bb) of sub-section (4) of Section 20, point out that the Legislature has provided for seeking extension of time for completion of investigation on a report of the public prosecutor. The Legislature did not purposely leave it to an investigating officer to make an application for seeking extension of time from the court. This provision is in tune with the legislative intent to have the investigations

completed expeditiously and not to allow an accused to be kept in continued detention during unnecessary prolonged investigation at the whims of the police. The Legislature expects that the investigation must be completed with utmost promptitude but where it becomes necessary to seek some more time for completion of the investigation, the investigating agency must submit itself to the scrutiny of the public prosecutor in the first instance and satisfy him about the progress of the investigation and furnish reasons for seeking further custody of an accused. A public prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation. In that event, he may not submit any report to the court under clause (bb) to seek extension of time. Thus, for seeking extension of time under clause (bb), the public prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court



indicating therein the progress of the investigation and disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation. The public prosecutor may attach the request of the investigating officer along with his request or application and report, but his report, as envisaged under clause (bb), must disclose on the face of it that he has applied his mind and was satisfied with the progress of the investigation and considered grant of further time to complete the investigation necessary. The use of the expression "on the report of the public prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period" as occurring in clause (bb) in Subsection (2) of Section 167 as amended by Section 20(4) are important and indicative of the legislative intent not to keep an accused in custody unreasonably and to grant extension only on the report of the public prosecutor. The report of the public prosecutor, therefore, is not merely a formality but a very vital report, because the consequence of its acceptance affects the liberty of an accused and it must, therefore, strictly comply with the requirements as contained in clause (bb). The request of an investigating officer for extension of time is no substitute for the report of the public prosecutor. Where either no report as is envisaged by clause (bb) is filed or the report filed by the public prosecutor is not accepted by the Designated Court, since the grant of extension of time under clause (bb) is neither a formality nor automatic, the necessary corollary would be that an accused would be entitled to seek bail and the court 'shall'

release him on bail if he furnishes bail as required by the Designated Court.”

12. Again, it was held that,

“The courts are expected to zealously safeguard his liberty. Clause (bb) has to be read and interpreted on its plain language without addition or substitution of any expression in it. We have already dealt with the importance of the report of the public prosecutor and emphasised that he is neither a ‘post office’ of the investigating agency nor its ‘forwarding agency’ but is charged with a statutory duty. He must apply his mind to the facts and circumstances of the case and his report must disclose on the face of it that he had applied his mind to the twin conditions contained in clause (bb) of sub-section (4) of Section 20.”

13. Again, it was held that,

“even the mere reproduction of the application or request of the investigating officer by the public prosecutor in his report, without demonstration of the application of his mind and recording his own satisfaction, would not render his report as the one envisaged by clause (bb) and it would not be a proper report to seek extension of time. In the absence of an appropriate report the Designated Court would have no jurisdiction to deny to an accused his Indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail bonds as directed by the court.”

14. In **Sanjay Kumar Kedia's** case (supra), the Apex court considered the scope and ambit of Section 36-A(4) of the NDPS Act read with Section 167(2) of Cr.P.C. In this decision, the Apex Court considered the decision in **Hitendra Vishnu Thakur's** case (supra), and held that Section 36-A(4) of the NDPS Act is parimateria with Section 20(4) of the TADA. In paragraph 10, it has been observed as under:

“10. The question to be noticed at this stage is as to whether the two applications for extension that had been filed by the public prosecutor seeking an extension beyond 180 days met the necessary conditions. We find that the matter need not detain us as it is no longer res integra and is completely covered by the judgment of this Court in Hitendra Vishnu's case (supra). In this case, the Bench was dealing with the proviso inserted as clause (bb) in Subsection (4) of Section 20 of TADA, which is parimateria with the proviso to Sub-section (4) of Section 36-A of the Act. This Court accepted the argument of the accused that an extension beyond 180 days could be granted but laid a rider that it could be so after certain conditions were satisfied.”

15. In the said decision also, the duty of the Public Prosecutor has been extensively discussed while holding that proviso to sub-section (4) of Section 36-A has to be construed in relation to the subject matter covered by the said section. In an unreported decision of this Court in Crl.M.C.No.5412/2022, this Court granted default bail, on the finding that the learned Public Prosecutor did not seem to have applied his mind to the report of the Investigating Officer. In **Appukuttan's** case (supra), this Court while dealing with impact of Section 36-A(4) of the NDPS Act, followed the ratio in **Hitendra Vishnu Thakur's** case (supra) and **Sanjay Kumar Kedia's** case (supra) by reiterating the principles. In the other decisions pointed out by the learned counsel for the petitioner also, the same legal position has been reiterated.

16. Thus, the law emerges is that, as per Section 36-A(4) of the NDPS Act, in respect of persons accused of an

offence punishable under Sections 19 or section 24 or section 27-A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) thereof to “ninety days”, where they occur, shall be construed as reference to “one hundred and eighty days”. If it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year acting on the report of the Public Prosecutor.

17. In this context, the interesting question arises is as to whether an Investigating Officer is competent to file a petition under Section 36-A(4) of the NDPA Act? On a plain reading of proviso to Section 36-A(4) makes it emphatically clear that the said power is of the Public Prosecutor and of nobody else. Therefore, it has to be held that the Investigating Officer has no power or right to file a petition

under Section 36-A(4) of the NDPS Act. It is relevant, rather shocking to note that the Public Prosecutor who was appointed by the State to conduct serious cases of this nature, even not cared at least to read Section 36-A(4) and its proviso, before filing the report of the Investigating Officer pressing for extension of detention of the accused beyond the period of 180 days. Whether Public Prosecutor of this Stature, who is empowered to deal with very serious criminal cases, can protect the interest of the State is a matter of serious concern. The Home Secretary, State of Kerala, Thiruvananthapuram, The District Collector, Thrissur and the Director General of Prosecution have to address the issue. It is pertinent to note that the learned Ist Additional Sessions Judge, Thrissur, being the Special Judge under the NDPS Act, acted and passed order on the report/petition in the form of report filed by the Investigating Officer. In fact, the Special Judge also lost sight of the statutory wordings in

Section 36-A(4) of the NDPS Act. It cannot also be said that the Special Judge mistakenly acted on the report/petition of the Investigating Officer deeming it as one filed by the Public Prosecutor, since the first sentence in the order is “*This is an application filed by the investigating officer to extend the period for completion of investigation and for filing final report*”. Indubitably, it is held that, the report/petition filed by the Investigating Officer cannot be considered as a report/petition envisaged under Section 36-A(4), since the Investigating Officer has no such right. So every bit in the matter of extension is void abinitio. For the said reason alone, Annexure A4 is unsustainable in law.

18. Coming back, the proviso to Section 36-A(4) categorically states that the Public Prosecutor, while making an application for extension of time, shall indicate two aspects on applying his mind, viz., (a) the progress of the investigation and (b) the specific reason for the detention of

the accused beyond the said period of 180 days and failure to narrate either of the twin aspects, that is, both aspects together would make the said application outside the ambit of the proviso to Section 36-A(4) of the NDPS Act and in such an application, extension of time cannot be granted.

19. The 2<sup>nd</sup> point argued by the learned counsel for the petitioner is that, non issuance of notice with opportunity of hearing to the petitioner at the time when the petition filed under Section 36-A(4) was considered. It is submitted by the learned counsel for the petitioner that the accused was not produced at the time of passing Annexure 4 order. It is to be noted that, as early in the year 1994, the Constitution Bench of the Apex Court in a decision reported in **Sanjay Dutt Vs. State through CBI, Bombay** [1994 (5) SCC 410], [AIR (SCW), 3857], in paragraph No.47, referring to **Hitendra Vishnu Thakur Vs. State of Maharashtra** [1994 (4) SCC 602], considered the requirement of notice to the accused



before grant of extension of time under Section 20(4)(b)(b) of the TADA Act, and held that, notice is the requirement of law.

20. In a latest decision of the Apex Court reported in **Jigar @ Jimmy Pravinchandra Adatiya Vs. State of Gujarat** [2022 LiveLaw (SC) 794], it has been held, following the ratio in **Sunjay Dutt's** and **Hitendra Vishnu Thakur's** case (supra) that, it is mandatory to produce the accused at the time when the court considers the application for extension filed under Section 36-A(4) of the NDPS Act and the accused must be informed that, the question of extension of period of investigation is being considered by the court.

21. On perusal of the orders impugned or otherwise, no application even filed by the Public Prosecutor as mandated under Section 36-A(4) of the NDPS Act. Thus, it

has to be held that the application as Annexure 3 put by the Investigating Officer is not in terms of the mandate of proviso to Section 36-A(4) of the NDPS Act and therefore, the same cannot be allowed. Further, the accused also not produced before hearing the extension petition with notice of the said fact. the Thus, it is held that the learned Special Judge went wrong in allowing Annexure 3 application and denying the statutory bail plea of the petitioner herein/the accused.

22. To the contrary, it is held that the statutory bail, an indefeasible right of the petitioner is liable to be granted since the petition for extension is not in accordance with the statutory mandate and the order was passed without the production of the accused before the Special Court with notice of the said aspect. In such a case, the involvement of the petitioner in five more cases of serious nature including one under the NDPS Act will not stand as a bar to grant

statutory bail. But, no doubt the prosecution can seek cancellation of bail in the earlier cases, highlighting the involvement of the accused in subsequent crimes as a reason for cancellation of bail.

23. Accordingly, Annexure 4 order stands set aside and consequently, the statutory bail plea of the petitioner stands allowed. The accused shall be released on statutory bail, on the following conditions:

1) The petitioner/accused shall be released on bail, on executing bond for Rs.1,00,000/- (Rupees one lakh only) each by himself and by two solvent sureties to the satisfaction of the Special Judge.

2) The petitioner/accused shall surrender his passport, if any, before the Special Court on the date of execution of bond, or within a period of three days thereafter, after getting exemption in this regard from the Special Court. If he has no

passport, he shall file an affidavit stating so, on the date of execution of bond or within three days' thereafter.

3) The petitioner/accused shall cooperate with the investigation and he shall be made available for interrogation by the Investigating Officer, as and when directed, till the investigation is complete.

4) The petitioner/accused shall not leave India without prior permission of the Special Court.

5) The petitioner/accused shall not commit any offence during the currency of this bail and any such involvement is a reason to cancel the bail hereby granted.

Registry is directed to forward a copy of this order to the 1) Home Secretary, Home Department, Government Secretariat, Thiruvananthapuram, 2) The District Collector, Thrissur and the Director General of Prosecution for

information and further steps, if any, in view of the observations in paragraph 18 of the order.

**Sd/-**

**A. BADHARUDEEN**

**JUDGE**

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APPENDIX OF CRL.MC 8404/2022

**PETITIONER ANNEXURES**

- Annexure 1** TRUE PHOTO COPY OF THE BAIL APPLICATION DATED 06.10.2022 FILED BY THE PETITIONER UNDER SECTION 167(2)(a) (i) OF THE CODE OF CRIMINAL PROCEDURE, CRL.MP.NO.3142/2022
- Annexure 2** FREE COPY OF THE ORDER DATED 18.10.2022 PASSED BY THE FIRST ADDL. SESSIONS JUDGE, THRISSUR IN CRL.M.P NO. 3142/2022
- Annexure 3** TRUE PHOTO COPY OF THE PETITION FILED BY THE PUBLIC PROSECUTOR UNDER SECTION 36A(4) OF THE NDPS ACT DATED 27.09.2022 BEFORE THE I ADDL. SESSIONS COURT, THRISSUR
- Annexure 4** CERTIFIED COPY OF THE ORDER DATED 18.10.2022 IN CRL.M.P. NO. 3053/2022 PASSED BY THE I ADDL. SESSIONS COURT, THRISSUR
- Annexure 5** TRUE PHOTO COPY OF THE ORDER DATED 10.11.2022 PASSED BY THIS HON'BLE COURT IN CRL.M.C NO. 6559/2022 PASSED BY THIS HON'BLE COURT.