



2024:KER:43960

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

FRIDAY, THE 21<sup>ST</sup> DAY OF JUNE 2024 / 31ST JYAISHTA, 1946

BAIL APPL. NO. 1790 OF 2024

CRIME NO.273/2023 OF KOTTARAKKARA POLICE STATION, KOLLAM

PETITIONER:

AMAL,  
AGED 24 YEARS  
S/O FERDINAND, MINI VIHAR,  
JANAKEYYA NAGAR, PATTATHANAM,  
KOLLAM, PIN - 691021

BY ADVS. P.RAHUL  
ABHINA L.

RESPONDENT:

STATE OF KERALA,  
REPRESENTED BY PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA, PIN - 682031

OTHER PRESENT:

SR PP SRI C S HRITHWIK

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON  
21.06.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:



*Dated this the 21<sup>st</sup> day of June, 2024*

## **ORDER**

The application is filed under Section 439 of the Code of Criminal Procedure, 1973, by the first accused in Crime No.273/2023 of the Kottarakkara Police Station, Kollam, which is registered against the accused (five in number) for allegedly committing the offences punishable under Sections 22(c) & 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (*in short, 'NDPS Act'*). The petitioner was arrested on 29.01.2023.

2. The essence of the prosecution case is that: on 29.01.2023, the first accused was found in conscious possession of 106 grams of MDMA at the Kottarakkara private bus stand. The first accused was arrested on the spot with the contraband article. During his interrogation, he confessed that the accused



Nos.2 to 5 had provided financial assistance to him to purchase the contraband, on the assurance that he would give them profit. Thus, the accused Nos.1 to 5 have committed the above offences.

3. Heard: Sri.Rahul P, the learned counsel for the petitioner and Sri. C. S. Hrithwik, the learned Senior Public Prosecutor.

4. The learned counsel for the petitioner submits that the petitioner is totally innocent of the accusations levelled against him. There is no material to substantiate the petitioner's involvement in the crime. The Detecting Officer has deliberately implicated the petitioner as an accused in the case. The petitioner has been in judicial custody since 29.01.2023, the investigation case is complete, and the final report has been laid. On going through Annexure-A1 seizure mahazar, it is apparent that the Detecting Officer has violated Section 52A of the NDPS Act and Rules 3, 5,



8, 9 & 10 of the Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling, and Disposal) Rules, 2022 (*in short, 'Rules*). According to the prosecution case, the contraband was concealed in three packets weighing 93 grams, 13 grams, and 11 grams, respectively, i.e., a total of 117 grams. Indisputably, the Detecting Officer had cut open three covers at the scene of occurrence and transferred the contraband into a single cover which was in his possession, and weighed it and found that the contraband was 106 grams. The above procedure carried out by the Detecting Officer is in violation of the above mentioned provisions and the law laid down by this Court in ***Vaisakh v. State of Kerala*** [2024(2) KHC 446]. Moreover, as per the chemical analysis report submitted by the State Forensic Science Laboratory, Thiruvananthapuram, dated 30.05.2023 only two representative samples were sent for



chemical analysis. This again is in violation of the NDPS Act and Rules. Moreover, now the contraband has turned out to be 'methamphetamine'. It was imperative on the part of the Detecting Officer to have drawn representative samples from each of the packets, that too in the presence of the jurisdictional Magistrate and then, sent the representative samples from each packet for chemical analysis. The entire seizure and drawing of samples are illegal, vitiating the prosecution case. Therefore, the petitioner is entitled to be released on bail.

5. The learned Public Prosecutor opposed the application. He submitted that a commercial quantity of contraband was seized from the conscious possession of the petitioner. Therefore, the rigour under Section 37 of the NDPS Act applies to the facts of the case. Unless the petitioner satisfies the twin conditions under Section 37 of the NDPS Act, he is not



entitled to be released on bail. He placed reliance on the decisions of the Honourable Supreme Court in ***State of Punjab v. Balbir Singh*** [(1994) 3 SCC 299], ***Khet Singh v. Union of India*** [(2002) 4 SCC 380], ***Union of India v. Bal Mukund and Others*** [ (2009) 12 SCC 161] and the decision of this Court in ***Surendran v. State of Kerala*** [2022 (6) KHC 262], to canvass the position that even if there is a violation of the statutory provisions pertaining to the drawing of samples, the question can only be decided after trial. There are incriminating materials to substantiate the petitioner's involvement in the case. Therefore, the application may be dismissed.

6. The prosecution allegation is that the petitioner/first accused was found in conscious possession of 106 grams of MDMA. However, as per the chemical analysis report, it has turned out that the contraband is 'methamphetamine' and not 'MDMA'.



7. On an evaluation of the seizure mahazar, it is evident that the contraband that was allegedly seized from the possession of the petitioner was stored in three separate packets weighing 93 grams, 13 grams, and 11 grams. The Detecting Officer has recorded in Annexure-A1 seizure mahazar that he cut open three packets and transferred the contraband into a single packet at the place of occurrence. Indisputably, the above procedure was not done in the presence of the learned Magistrate as contemplated under Section 52A of the NDPS Act and the Rules referred above.

8. Section 52 A of the Act, which is germane to the case on hand, reads as follows:

**[52-A. Disposal of seized narcotic drugs and psychotropic substances.—** [(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances



or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.]

**(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of—**

- (a) certifying the correctness of the inventory so prepared; or**
- (b) taking, in the presence of such Magistrate, photographs of [such drugs, substances or conveyances] and certifying such photographs as true; or**
- (c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.**

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.





(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.]

[emphasis supplied]

9. By virtue of the power conferred under Section 76 of the NDPS Act, the Central Government has promulgated the Narcotic Drugs and Psychotropic Substances (seizure, storage, sampling and disposal) Rules, 2022, which came into effect from 23.12.2022.

10. It is gainful to refer to Rules 3 and 10 of the said Rules, which reads thus:

“Rule 3. Classification of seized material. – (1) The narcotic drugs, psychotropic substances and controlled substances seized under the Act shall be classified based on physical properties and results of the drug detection kit, if any, and shall be weighed separately.

**(2) If the narcotic drugs, psychotropic substances and controlled substances are found in packages or containers, such packages and containers shall be weighed separately and serially numbered for the purpose of identification.**

(3) All narcotic drugs, psychotropic substances and controlled substances found in loose form shall be packed in tamper proof bag or in container, which shall be serially numbered and weighed and the particular of drugs and the date of seizure shall also be mentioned on such bag or container:



Provided that bulk quantities of ganja, poppy straw may be packed in gunny bags and sealed in such way that it cannot be tempered with: Provided further that seized concealing material such as trolley bags, backpack and other seized articles shall be sealed separately.

(4) The classification, weighing, packaging and numbering referred to in this sub-rule shall be done in the presence of search witnesses (Panchas) and the person from whose possession the drugs and substances was recovered and a mention to this effect shall invariably be made in the panchnama drawn on the spot of seizure.

(5) The detailed inventory of the packages, containers, conveyances and other seized articles shall be prepared and attached to the panchnama.

Rule 10. Drawing the samples. – **(1) One sample, in duplicate, shall be drawn from each package and container seized.**

(2) When the packages and containers seized together are of identical size and weight bearing identical marking and the contents of each package give identical results on colour test by the drugs identification kit, conclusively indicating that the packages are identical in all respects, the packages and containers may carefully be bunched in lots of not more than ten packages or containers, and for each such lot of packages and containers, one sample, in duplicate, shall be drawn:

Provided that in the case of ganja, poppy straw and hashish (charas) it may be bunched in lots of not more than forty packages or containers.

(3) In case of drawing sample from a particular lot, it shall be ensured that representative sample in equal quantity is taken from each package or container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.”

(emphasis supplied)

11. While interpreting Section 52A of the NDPS Act, the Honourable Supreme Court in ***Union of India v. Mohanlal*** [(2016) 3 SCC 379] observed as follows:



“15. It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. **This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.**

**17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise.** This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure”.

(emphasis given)



12. The Honourable Supreme Court has followed the principles laid down in Mohanlal's case in the subsequent cases of identical nature, namely, ***Bothilal v. The Intelligence Officer, NCB*** [2023 SCC OnLine SC 498], ***Simarnjit Singh v. State of Punjab*** [2023 SCC OnLine SC 906] ***Mangilal v. State of Madhya Pradesh*** [2023 SCC OnLine SC 862] and ***Yusuf @ Asif v. State*** [2023 SCC OnLine SC 1328].

13. In ***Yusuf @ Asif's*** case, the Honourable Supreme Court has held that in the absence of any material to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, then the seized contraband and the samples drawn would not be a valid piece of primary evidence in trial. Therefore, the trial will stand vitiated.



14. On a comprehensive evaluation of the above-referred section, rules, and their interpretations in the above referred judgments, leaves room for no doubt that it is mandatory for the Investigating Officer to prepare an inventory of the seized narcotic drugs/psychotropic substances/controlled substances with all such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars, and then make an application to the Magistrate to permit him to draw the representative samples of such contraband in the presence of the Magistrate so as to certify the correctness of the inventory so prepared. If the contraband is found in packages or containers, such packages/containers shall be weighed separately and serially numbered for the purpose of identification and one sample, in duplicate, shall be drawn from each package/container seized.



15. The word used in the above provisions is 'shall' and not 'may', which establishes that the rule is mandatory and not directory.

16. It is to be remembered that it is after a cleavage of opinion on the interpretation of the Standing Orders/Instructions on the procedure to be followed in the drawal, storage, testing and disposal of samples seized under the Act, that the Central Government has framed the above Rules, making it mandatory to draw representative samples from each seized package/container.

17. Even before the framing of the rules, in ***Khet Singh v. Union of India*** [(2002) 4 SCC 380], the Honourable Supreme Court observed in the following manner:

“10. The instructions issued by the Narcotics Control Bureau, New Delhi are to be followed by the officer-in-charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer-in-charge of the investigation.



18. In cases of a similar nature, where the Detecting Officer mixed the samples contained in different covers and put the contraband in one cover and sent the sample for analysis, the Rajasthan High Court in ***Netram v. State of Rajasthan*** [2014 (2) WLN 394 (Raj).] and the Delhi High Court in ***Edward Khimani Kamau v. The Narcotics Control Bureau*** [2015 SCC OnLine Del 9860] and ***Amani Fidel Chris v. Narcotics Control Bureau*** [2020 SCC OnLine Del 2080] relying on Section 52 A and the Standing Instructions/Orders have held that the mixing of contents and the failure to send representative samples not only lose the sanctity of the case property in the individual cover, but also the evidence of the quantity in each cover, and it causes serious prejudice to the accused. [Read also the decisions in ***Shajahan v. Inspector of Excise*** (2019 SCC OnLine Ker 3685) and



***Kulwinder Kumar v. State of Punjab*** (2018 SCC OnLine P&H 1754)].

19. In this case, irrefutably, the contraband was seized separately by the Detecting Officer from the conscious possession of the petitioner in three separate covers. Thereafter he mixed the contraband without the permission of the Magistrate and put them in one cover without drawing the representative samples from the three packets. From the one single packet, he has drawn two samples and sent them for chemical analysis. This is apparent from the chemical analysis report. As per the chemical analysis report now produced before this Court it has turned out that the contraband is 'methamphetamine' and not 'MDMA'. When the statutory provisions mandate a particular procedure to be followed, it was the bounden duty of the Detecting Officer to have followed the prescribed procedure. No person can assume the nature of the





substance on speculation and conjectures. It is to ensure a fair trial that the legislature has incorporated the above safeguards in the above provisions.

20. Now, the question is whether the above question can be considered in an application filed under Section 439 of the Code.

21. In ***Bharat Chaudhary v. Union of India*** [(2021) 20 SCC 50], a three-judge Bench of the Honourable Supreme Court, in an appeal arising from an order cancelling the bail, has held in the following manner:

“13. In the absence of any clarity so far on the quantitative analysis of the samples, the prosecution cannot be heard to state at this preliminary stage that the petitioners have been found to be in possession of commercial quantity of psychotropic substances as contemplated under the NDPS Act. Further, a large number of the tablets that have been seized by DRI admittedly contain herbs/medicines meant to enhance male potency and they do not attract the provisions of the NDPS Act. Most importantly, none of the tablets were seized by the prosecution during the course of the search conducted, either at the office or at the residence of A-4 at Jaipur, on 16-3-2020. Reliance on printouts of WhatsApp messages downloaded from the mobile phone and devices seized from the office premises of A-4 cannot be treated at this stage as sufficient material to establish a live link between him and A-1 to A-3, when even as per the prosecution, scientific reports in respect of the said devices is still awaited”.



22. In **State of Punjab v. Baldev Singh** [(1999) 6 SCC 172] a Constitutional Bench has observed in the following lines:

“45..... If *Pooran Mal* [(1974) 1 SCC 345 : 1974 SCC (Tax) 114] judgment is read in the manner in which it has been construed in *State of H.P. v. Pirthi Chand* [(1996) 2 SCC 37 : 1996 SCC (Cri) 210] (though that issue did not strictly speaking arise for consideration in that case), then there would remain no distinction between recovery of illicit drugs etc. seized during a search conducted “after” following the provisions of Section 50 of the NDPS Act and a seizure made during a search conducted “in breach of” the provisions of Section 50 of the NDPS Act. Prosecution cannot be permitted to take advantage of its own wrong. Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. Conducting a fair trial is both for the benefit of the society as well as for an accused and cannot be abandoned. While considering the aspect of fair trial, the nature of the evidence obtained and the nature of the safeguard violated are both relevant factors. Courts cannot allow admission of evidence against an accused, where the court is satisfied that the evidence had been obtained by a conduct of which the prosecution ought not to take advantage particularly when that conduct had caused prejudice to the accused. If after careful consideration of the material on record it is found by the court that the admission of evidence collected in search conducted in violation of Section 50 would render the trial unfair then that evidence must be excluded.....”

23. Again in *Khet Singh's* case it is held as follows:

“16. Law on the point is very clear that even if there is any sort of procedural illegality in conducting the search and seizure, the evidence collected thereby will not become inadmissible and the court would consider all the circumstances and find out whether any serious prejudice had been caused to the accused. If the search and seizure was in complete defiance of the law and procedure and there was any possibility of the evidence collected likely to have been tampered with or interpolated during the course of such search or



seizure, then, it could be said that the evidence is not liable to be admissible in evidence”.

24. It may be true that in the present case when the quantity of the contraband allegedly seized from the accused is added, it will fall within the ambit of a commercial quantity as specified in Serial No.159 of the Specification of the Small and Commercial Quantity of Narcotic Drug or Psychotropic Substance (SO 1055 (E) dated 19.10.2001 as amended), and consequentially the rigour under Section 37 of the Act will apply.

25. Section 37 mandates that a person who is accused of an offence under Sections 19, 24 and 27-A of the NDPS Act and also involving commercial quantity shall not be released on bail unless the court is satisfied that there are reasonable grounds to believe that the accused is not guilty and is not likely to commit any offence while on bail.

26. The prosecution does not have a case that the



petitioner has criminal antecedents.

27. In ***Dheeraj Kumar Shukla v. The State of Uttar Pradesh*** [2023 SCC OnLine SC 918], the Hon'ble Supreme Court has held that the second limb under Section 37 of the NDPS Act can be diluted if the accused has no criminal antecedents.

28. On an overall conspectus of the facts, rival submission made across the Bar, the law referred to the afore-cited judgments and my findings rendered above, particularly regarding the infraction of the statutory provisions by the Detecting Officer, which has obviously caused prejudice to the petitioner, and on comprehending the fact that petitioner has no criminal antecedents, I find that there are reasonable grounds to hold that the petitioner has not committed the alleged offence and is not likely to commit the offence. Therefore, the rigour under Section 37 of the NDPS Act stands diluted and the petitioner is entitled to be



released on bail.

In the result, the application is allowed, by directing the petitioner to be released on bail on him executing a bond for Rs.1,00,000/- (Rupees One lakh only) with two solvent sureties each for the like sum, to the satisfaction of the court having jurisdiction, which shall be subject to the following conditions:

- (i) The petitioner shall appear before the Investigating Officer on every Saturday between 9 a.m. and 11 a.m for a period of two months or till the final report is filed, whichever is earlier. He shall also appear before the Investigating Officer as and when required;
- (ii) The petitioner shall not directly or indirectly make any inducement, threat or procure to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any Police Officer or tamper with the evidence in any manner, whatsoever;
- (iii) The petitioner shall not commit any offence while



he is on bail;

- (iv) The petitioner shall surrender his passport, if any, before the court below at the time of execution of the bond. If he has no passport, he shall file an affidavit to the effect before the court below on the date of execution of the bond;
- (v) In case of violation of any of the conditions mentioned above, the jurisdictional court shall be empowered to consider the application for cancellation of bail, if any filed, and pass orders on the same, in accordance with law.
- (vi) Applications for deletion/modification of the bail conditions shall be filed and entertained before the court below.
- (vii) Needless to mention, it would be well within the powers of the Investigating Officer to investigate the matter and, if necessary, to effect recoveries on the information, if any, given by the petitioner even while the petitioner is on bail as laid down by the Hon'ble Supreme Court in ***Sushila Aggarwal v. State (NCT of Delhi) and another***



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..23..

[2020 (1) KHC 663].

Sd/-

**C.S.DIAS,JUDGE**

DST/21.06.24

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P.A. To Judge