

BAIL APPL. NO. 7238 OF 2023

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR.JUSTICE C.S.DIAS
MONDAY, THE 8TH DAY OF JANUARY 2024 / 18TH POU SHA, 1945
BAIL APPL. NO. 7238 OF 2023
CRIME NO.988/2022 OF Iritty Police Station, Kannur

PETITIONER/S:

JASEER S.M.

[REDACTED]

BY ADVS.
SAM ISAAC POTHYIL
S.SURAJA
MUHAMMED SUHAIR C.A
VIPIN M.V.
ABEY GEORGE
HARISH V.S.
RAMU SUBHASH
ANANTHAKRISHNAN R.

RESPONDENT/S:

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

2 THE STATION HOUSE OFFICER,
IRITTY POLICE STATION, IRITTY, KANNUR DISTRICT., PIN - 670703

OTHER PRESENT:

SRI.C.S HRITHWIK, PUBLIC
PROSECUTOR

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
08.01.2024, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

"C.R"

ORDER

The application is filed under Section 439 of the Code of Criminal Procedure, 1973, by the first accused in Iritty Police Station Crime No.988 of 2022 registered for the commission of the offence punishable under Section 22 (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('Act', for short). The petitioner was arrested on 07.12.2022.

2. The prosecution case, in brief, is that: on 07.12.2022 at about 11.15 PM, the accused 1 and 2 were found in possession of 298.10 grams of methamphetamine in a car on the Iritty – Koottupuzha bridge while transporting the contraband from the State of Karnataka to Kerala. Thus, the accused have committed the above offence.

3. Heard; Sri. Sam Isaac Pothiyil, the learned counsel for the petitioner and Sri.C.S.Hrithwik, the learned Public Prosecutor.

4. The learned counsel appearing for the petitioner strenuously argued that the petitioner is innocent of the accusation levelled against him. The petitioner has been falsely implicated in the crime. The petitioner has been in incarceration since 07.12.2022. The investigation in the case has been completed. The petitioner has no criminal antecedents. Therefore, the petitioner is entitled to bail in the light of the law laid down by this Court in **Fasil V. State of Kerala** [2023 (3) KHC 212]. Hence, the petitioner may be released on bail.

5. The learned Public Prosecutor strongly opposed the application. He contended that the decision in **Fasil (supra)** was rendered in the peculiar facts and circumstances of that case and cannot be treated as a binding precedent in all bail applications, especially considering the rigour under Section 37 of the Act and the declared law in a host of authoritative precedents of the Honourable Supreme Court. Considering the commercial quantity of the contraband involved in the case, the accused may not be let off on bail merely because he has been in judicial custody for the last fourteen months. Only if this Court enters a finding that the petitioner has not committed the alleged offence and is not likely to commit any offence in the future can the rigour under Section 37 be diluted. The

BAIL APPL. NO. 7238 OF 2023

contraband was transported from the State of Karnataka. The petitioner is likely to flee from justice if enlarged on bail. Hence, the application may be dismissed.

6. The prosecution case is that the petitioner and the 2nd accused were found in possession of 298.10 grams of methamphetamine, which is undoubtedly a commercial quantity. The petitioner was arrested on the spot on 07.12.2022.

7. Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985, regulates the grant of bail in cases involving an offence under the Act. It is apposite to extract Section 37, which reads as follows:

“37. Offences to be cognizable and non-bailable.—(1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974),—

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of subsection (1) are in addition to the limitations under the Criminal Procedure Code, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.”

(highlighted)

8. A reading of the above provision indicates that a person accused of an offence under Sections 19, 24 and 27-A of the Act and 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. Therefore, an accused alleged to have committed an offence under the Act is entitled to be enlarged on bail not only subject to provisions under Sec.439 of the Code but also on satisfying the twin conditions contemplated under Sec.37 of the Act.

9. The Honourable Supreme Court in **Union of India v. Shiv Shanker Kesari** [(2007) 7 SCC 798] has interpreted the expression ‘reasonable grounds’ under Section 37 of the Act in the following manner:

“7. The expression used in Section 37(1)(b)(ii) is “reasonable grounds”. The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify

recording of satisfaction that the accused is not guilty of the offence charged”.

10. In **Union of India v. Mohd. Nawaz Khan** [(2021) 10 SCC 100], the Honourable Supreme Court, after referring to a host of judicial precedents on Section 37 of the Act, observed thus:

“23. Based on the above precedent, the test which the High Court and this Court are required to apply while granting bail is whether there are reasonable grounds to believe that the accused has not committed an offence and whether he is likely to commit any offence while on bail. Given the seriousness of offences punishable under the NDPS Act and in order to curb the menace of drug-trafficking in the country, stringent parameters for the grant of bail under the NDPS Act have been prescribed”.

11. The decision in **Fasil** (supra) has been rendered principally relying on three decisions of the Honourable Supreme Court in **Dheeraj Kumar Shukla v. The State of Uttar Pradesh** [2023 KHC 6545], **Rajuram v. State of Bihar** [2023 KHC 6403] and **Mohd Muslim @ Hussain v. State (NCT of Delhi)** [2023 KHC 6336].

12. On an analysis of the facts in the above three decisions, it can be deciphered that in cases of (i) Mohd Muslim @ Hussain’s case, the accused was in custody for seven years and four months, (ii) Rajuram’s case, the accused was in custody for five years, and (iii) Dheeraj Kumar Shukla’s case, the accused was in custody for two and a half years. It was in the above factual background,

BAIL APPL. NO. 7238 OF 2023

especially since the trial had not commenced in all three cases, that the Honourable Supreme Court granted bail to the accused. In Rajuram's and Dheeraj Kumar Shukla's cases, the Honourable Supreme Court has explicitly stated that it was not delving into the merits of the cases. Nonetheless, in Mohd Muslim @ Hussain's case, considering the prolonged custody of the accused for seven years and four months and that the right of the accused to speedy justice guaranteed under Article 21 of the Constitution of India was fettered, he was ordered to be released on bail.

13. This Court reminisces the decision in **State of Kerala and others v. Rajesh and others** [(2020) 12 SCC 122], an appeal arising from a bail order passed by this Court granting bail to a person accused of an offence under the Act, wherein the Honourable Supreme Court went to hold as follows:

"18. This Court has laid down broad parameters to be followed while considering the application for bail moved by the accused involved in the offences under the NDPS Act. In *Union of India v. Ram Samujh* [*Union of India v. Ram Samujh*, (1999) 9 SCC 429 : 1999 SCC (Cri) 1522], it has been elaborated as under:

"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. State (UT of Goa)* [*Durand Didier v. State (UT of Goa)*, (1990) 1 SCC 95 : 1990 SCC (Cri) 65] as under: (SCC p. 104, para 24)

‘24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.’

8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

(i) there are reasonable grounds for believing that the accused is not guilty of such offence; and

(ii) that he is not likely to commit any offence while on bail

are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent-accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended.”

19. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 CrPC, but is also subject to the limitation placed by Section 37 which commences with non obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

20. 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. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

21. We may further like to observe that the learned Single Judge has failed to record a finding mandated under Section 37 of the NDPS Act which is a *sine qua non* for granting bail to the accused under the NDPS Act”.

14. In Fasil’s case, the accused was in custody for one year and 45 days. Accordingly, this court, applying the principles in the above-cited three decisions of the Honourable Supreme Court, has ordered the accused to be released on bail because (i) he had no criminal antecedents (ii) he was in custody for one year and (iii) there was no likelihood of the trial commencing.

15. It is based on the above observation made in Fasil's case, the learned Counsel for the petitioner contended that since the petitioner in the instant case has been in judicial custody for the past fourteen months, is not a history-sheeter and the trial has not commenced, the petitioner is entitled to be enlarged on bail.

16. I am unable to accept the above submission for more reasons than one. Firstly, Section 37 of the Act does not lay down any stipulation that the accused is entitled to be released on bail if the trial does not commence within a particular period. Secondly, Fasil's case was rendered in the peculiar facts and circumstances of that case. Thirdly, there cannot be any rule of thumb or principle of universal application, de hors the procedure prescribed in the statute, laying down the time period within which the trial is to commence and be concluded. Fourthly, it is trite that courts cannot read into a statute any additional grounds which are conspicuously absent. Fifthly, there are several procedural formalities and prescriptions that have to be complied with before the trial under the Act can commence. It is with this objective in mind that the Parliament has incorporated Section 36A in the Act, giving an extended period for completing the investigation and laying final reports for the offences committed

under the Act. Sixthly, the court has to be satisfied that the accused has fulfilled the twin conditions under Section 37 of the Act, in addition to the conditions under Section 439 of the Code before granting an order of bail and lastly but most importantly, when individual liberty is pitted against larger public interest, it is the latter that must prevail over the former.

17. Recently, this Court in **Burhanudheen Hyderali v. State of Kerala** [B.A.No.10730 of 2023] has dismissed a bail application involving a commercial quantity of contraband by declining to follow the principles laid down in Fasil's case.

18. In **Kalyan Chandra Sarkar v. Rajesh Ranjan**, [(2004) 7 SCC 528], the Honourable Supreme Court observed that merely because the accused had undergone a certain period of incarceration (three years) by itself would not entitle the accused to be enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the accused on bail when the gravity of the offence alleged is severe.

19. In addition to the above precedents, in **Prasanta Kumar Sarkar v. Ashis Chatterjee** [(2010) 14 SCC 496], the Honourable Supreme Court has laid down the broad parameters for Courts while dealing with bail applications by holding thus:

“9.xxx xxx xxx However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:

- (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
- (ii) nature and gravity of the accusation;
- (iii) severity of the punishment in the event of conviction;
- (iv) danger of the accused absconding or fleeing, if released on bail;
- (v) character, behaviour, means, position and standing of the accused;
- (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being influenced; and
- (viii) danger, of course, of justice being thwarted by grant of bail”.

20. In the instant case, the petitioner was arrested on 07.12.2022, i.e., he has been in judicial custody for fourteen months. The investigation of the case is completed, and the charge sheet has been laid. The petitioner is alleged to have been in possession of a

BAIL APPL. NO. 7238 OF 2023

commercial quantity of contraband and, therefore, the rigour of Section 37 applies on all fours.

21. On a meticulous scrutiny of the factual matrix for the purpose of bail and the law referred to above, especially the law laid down in **Shiv Shanker Kesari, Muhammed Nawaz Khan and Rajesh and others**, considering the gravity of the accusation levelled against the petitioner, the potential severity of the punishment that can be imposed on him in the event of him being found guilty, the prosecution's concern regarding the element of flight risk, I am at this stage not satisfied that there are reasonable grounds to believe that the petitioner is not guilty of the offence alleged against him and there is no likelihood of him committing any offence if released on bail. I do not find any compelling or cogent grounds to dilute the rigour under Section 37 of the Act. The application lacks merits and is only to be dismissed.

Resultantly, the bail application is dismissed.

SD/-
C.S.DIAS
JUDGE

BAIL APPL. NO. 7238 OF 2023

APPENDIX OF BAIL APPL. 7238/2023

PETITIONER ANNEXURES

Annexure A1

THE TRUE COPY OF THE ORDER DATED 27.12.2022
PASSED BY THE SPECIAL JUDGE (N.D.P.S ACT
CASES) VATAKARA IN CRL, M.P. NO 962/2022 IS
PRODUCED