IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

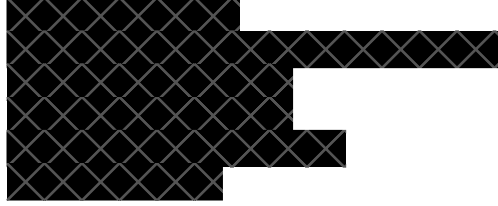
MONDAY, THE 15TH DAY OF JANUARY 2024 / 25TH POUSHA, 1945

BAIL APPL. NO. 9813 OF 2023

CRIME NO.314/2023 OF PEECHI POLICE STATION, THRISSUR

PETITIONER/ACCUSED NO.3:

AZHARUDHEEN,



BY ADV NIREESH MATHEW
VIVEK VENUGOPAL

RESPONDENT/COMPLAINANT:

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

OTHER PRESENT:

SR PP SMT SEETHA S

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 15.01.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"CR"

Dated this the 15th day of January,2024

O R D E R

Is an oral application sufficient to release an accused on statutory bail? Is the point posed for consideration in the bail application?

2. The application is filed under Section 439 of the Code of Criminal Procedure, 1973 by the third accused in Crime No.314/2023 registered by the Peechi Police Station, Thrissur, against four persons for allegedly committing the offence punishable under Section 20 (b) (ii) (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 *('Act' for short)*. The petitioner was arrested on 26.05.2023.

3. The essence of the prosecution case is that, on 26.05.2023 around 12.30 a.m., acting on a secret information, the detecting officer intercepted the vehicle bearing Reg. No.KL-43/A-3874 and the accused

were found travelling in the vehicle. In the search that was conducted, 49.300 kilograms of Ganja was seized from the vehicle. The accused were arrested on the spot for being in possession of and transporting the contraband article in contravention of the provisions of the Act. Thus, the accused have committed the above offence.

4. Heard Sri. Vivek Venugopal, learned counsel appearing for the petitioner and Smt. Seetha S., the learned Senior Public Prosecutor.

5. The learned counsel for the petitioner zealously argued that, notwithstanding the several grounds that have been raised in the bail application, the petitioner is entitled to be released on statutory bail since the final report has not been laid within the statutory time period mandated under Section 36 A of the Act. He submitted that since the petitioner was arrested on 26.05.2023, his indefeasible right for

compulsive bail had accrued on 22.11.2023, i.e., on the 181st day of his remand. Hence, the petitioner is entitled to be released on statutory bail. He placed reliance on the Constitutional Bench decision of the Hon'ble Supreme Court in ***Sanjay Dutt v. State through C.B.I., Bombay*** [(1994) 5 SCC 410] and the decision in ***Rakesh Kumar Paul v. State of Assam*** [(2017) 15 SCC 67] to reinforce his contentions.

6. The learned Public Prosecutor firmly opposed the application asserting that the application was filed before the expiry of the statutory period and the petitioner has not filed a separate application under Section 36A of the Act read with Section 167 of the Code to be released on statutory bail as held by the Hon'ble Supreme Court in ***Ravindran v. Intelligence Officer, Directorate of Revenue Intelligence*** [2020(6) KLT 127]. As the final report was laid on 24.11.2023 and the petitioner failing to file a separate

application at the relevant time, his statutory right was extinguished. She also highlighted that, since the contraband is of commercial quantity, the petitioner is not entitled to be released on statutory bail in view of the rigour under Section 37 of the Act. She urged the application to be dismissed. Nevertheless, she conceded to the facts that the statutory period for filing the final report had expired on 22.11.2023, that the final report was filed only on 24.11.2023 and the Public Prosecutor had not filed any report as prescribed under the proviso to Sub-Section (4) of Section 36 A of the Act, to extend the time period to complete the investigation.

7. The petitioner filed the instant bail application on 01.11.2023. As discernible from the proceedings, the application came up for admission on 02.11.2023 and was adjourned to 10.11.2023 for the instructions of the Public Prosecutor. On 10.11.2023,

this Court adjourned the application for the report of the Investigating Officer. Again, on 10.11.2023, the application was adjourned to 22.11.2023, then to 29.11.2023 and to the subsequent dates for the report of the Investigating Officer.

8. The learned counsel for the petitioner emphatically submitted that when the application came up for consideration on 22.11.2023, he specifically drew the attention of this Court to the fact that the petitioner was entitled to be released on statutory bail due to the non-filing of the final report even after the 181st day. Nonetheless, this Court adjourned the application to 29.11.2023 without considering the request. The learned Public Prosecutor did not dispute the above submission but contended that the petitioner had lost his right to be released on default bail since the final report was filed on 24.11.2023.

9. The relevant provision dealing with the above

question is Section 36 A of the Act, which reads as follows:

> "**36A. Offences triable by Special Courts**.—
>
> (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—
>
> (a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;
>
> (b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:
>
> Provided that in cases which are triable by the Special Court where such Magistrate considers—
>
> (i) when such person is forwarded to him as aforesaid; or
>
> (ii) upon or at any time before the expiry of the period of detention authorised by

him, that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to an accused person in such case who has been forwarded to him under that section;

(d) a Special Court may, upon perusal of police report of the facts constituting an offence under this Act or upon complaint made by an officer of the Central Government or a State Government authorised in his behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 (2 of 1974), and the High Court may exercise such powers including the power under cluase (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted under section 36.

(4) In respect of persons accused of an offence

punishable under section 19 or section 24 or section 27A 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":

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.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily.]

(emphasis given)

10. Section 36 A modifies the application of Section 167 of the Code of Criminal Procedure in cases involving offences punishable under Sections 19, 24 and 27 A or for offences of commercial quantity under the Act by permitting the investigation in the cases

involving the above offences to be completed within a period of 180 days with the further proviso that the Special Court is empowered to extend that period up to one year if it is satisfied that it is not possible to complete the investigation within the said period of 180 days, 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 180 days. This gives rise to the right of the accused to be released on default bail on expiry of the said period of 180 days or the extended period to complete the investigation within the time allowed.

11. While dealing with an analogous provision under the Terrorist and Disruptive Activities (Prevention) Act, 1987, the Constitutional Bench in ***Sanjay Dutt's*** case held as under:

> "48. We have no doubt that the common stance before us

of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4) (*bb*) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 CrPC ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4) (*bb*), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled

> by Constitution Bench decisions that a petition seeking the writ of *habeas corpus* on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order. (See *Naranjan Singh Nathawan* v. *State of Punjab* [(1952) 1 SCC 118] ; *Ram Narayan Singh* v. *State of Delhi* [1953 SCR 652] and *A.K. Gopalan* v. *Government of India* [(1966) 2 SCR 427] .)"

12. The Honourable Supreme Court in ***Rajnikant Jivanlal v. Intelligence Officer, Narcotic Control Bureau,*** [(1989) 3 SCC 532], while considering a challenge against an order for cancellation of bail in a matter under the Narcotic Drugs and Psychotropic Substances Act, made the following observation:

> "13. An order for release on bail under proviso (a) to Section 167(2) may appropriately be termed as an order-on-default. Indeed, it is a release on bail on the default of the prosecution in filing charge-sheet within the prescribed period. **The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all.** In fact, the Magistrate

has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds".

(emphasis given)

13. In the majority judgment of the three-Judge Bench of the Honourable Supreme Court in ***Uday Mohanlal Acharya v. State of Maharashtra***[(2001) 5 SCC 453], it was held thus:

"*13.* ... ... In the aforesaid premises, we are of the considered opinion that an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. In our view, such interpretation would subserve the purpose and the object for which the provision in question was brought on to the statute-book. In such a case, therefore, even if the application for consideration of an order of being released on bail is posted before the court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting a formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at that stage will not take away the right of the

accused. Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody up to a maximum period as indicated in the proviso to sub-section (2) of Section 167, any further detention beyond the period without filing of a challan by the investigating agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution. There is no provision in the Criminal Procedure Code authorising detention of an accused in custody after the expiry of the period indicated in proviso to sub-section (2) of Section 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail. ... But so long as the accused files an application and indicates in the application to offer bail on being released by appropriate orders of the court then the right of the accused on being released on bail cannot be frustrated on the off chance of the Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and a challan is filed in interregnum. This is the only way how a balance can be struck between the so-called indefeasible right of the accused on failure on the part of the prosecution to file a challan within the specified period and the interest of the society, at large, in lawfully preventing an accused from being released on bail on account of inaction on the part of the prosecuting agency. On

the aforesaid premises, we would record our conclusions as follows:.....”

14. In a case of identical facts arising under the Prevention of Corruption Act, 1988, again the majority judgment of the three-judge Bench of the Honourable Supreme Court in ***Rakesh Kumar Paul v. State of Assam*** [(2017) 15 SCC 67] dealt with the question of releasing the accused on default bail on an oral application in the following manner:

“1. In *Measure for Measure* the Duke complains (in the given situation): “And liberty plucks justice by the nose.” [Act 1, Scene III, lines 20-32] The truth is that personal liberty cannot be compromised at the altar of what the State might perceive as justice — justice for one might be perceived as injustice for another. We are therefore unable to agree with the learned counsel for the State that the petitioner is not entitled to his liberty through what is commonly referred to as “default bail” or that the justice of the case should persuade us to decide otherwise. xxx xxx xxx

40. In the present case, it was also argued by the learned counsel for the State that the petitioner did not apply for “default bail” on or after 4-1-2017 till 24-1-2017 on which date his indefeasible right got extinguished on the filing of the charge-sheet. Strictly speaking, this is correct since the petitioner applied for regular bail on 11-1-2017 in the Gauhati High Court — he made no specific application for grant of “default bail”. However, the application for regular bail filed by the accused on 11-1-2017 did advert to the statutory period for filing a charge-sheet having expired and that perhaps no charge-

sheet had in fact being filed. In any event, this issue was argued by the learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of maintainability but on merits. **Therefore it is not as if the petitioner did not make any application for default bail — such an application was definitely made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for "default bail" or an oral application for "default bail" is of no consequence. The court concerned must deal with such an application by considering the statutory requirements, namely, whether the statutory period for filing a charge-sheet or challan has expired, whether the charge-sheet or challan has been filed and whether the accused is prepared to and does furnish bail.**

41. We take this view keeping in mind that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical. The history of the personal liberty jurisprudence of this Court and other constitutional courts includes petitions for a writ of habeas corpus and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the Court.

xxx xxx xxx

43. This Court and other constitutional courts have also taken the view that in the matters concerning personal liberty and penal statutes, it is the obligation of the court to inform the accused that he or she is entitled to free legal assistance as a matter of right.

xxx xxx xxx".

(emphasis supplied)

15. Recently, in ***Satender Kumar Antil v. Central Bureau of Investigation*** [(2022) 10 SCC 51], the Hon'ble Supreme Court has dealt with the compulsive bail in the following manner:

> "39. S.167(2) was introduced in the year 1978, giving emphasis to the maximum period of time to complete the investigation. This provision has got a laudable object behind it, which is to ensure an expeditious investigation and a fair trial, and to set down a rationalised procedure that protects the interests of the indigent sections of society. This is also another limb of Art.21. Presumption of innocence is also inbuilt in this provision. An investigating agency has to expedite the process of investigation as a suspect is languishing under incarceration. Thus, a duty is enjoined upon the agency to complete the investigation within the time prescribed and a failure would enable the release of the accused. The right enshrined is an absolute and indefeasible one, inuring to the benefit of suspect.
>
> 40.Such a right cannot be taken away even during any unforeseen circumstances, such as the recent pandemic, as held by this Court in M. Ravindran v. Directorate of Revenue Intelligence [(2021) 2 SCC 485]……………….."

16. For the purpose of emphasis, the facts are reiterated i.e., the petitioner was arrested on 26.05.2023. The 180-day period stipulated under Section 36 A to complete the investigation expired on

21.11.2023, yet the final report was not filed. Undoubtedly, the bail application was filed on 01.11.2023 and was listed for admission on 02.11.2023. The application was then adjourned to 10.11.2023 for the instructions of the Public Prosecutor. On 10.11.2023, the application was again adjourned to 22.11.2023 and then to 29.11.2023 for the report of the Investigating Officer.

17. In the light of the submission made by the learned counsel for the petitioner that he had specifically drawn the attention of this Court to the petitioner’s accrued right for default bail on 22.11.2023, which is not disputed by the learned Public Prosecutor, I accept the above submission on its face value.

18. In ***Aslam Babalal Desai v State of Maharashtra*** [(1992) 4 SCC 272], a three-Judge Bench of the Hon'ble Supreme Court observed thus:

> "15. Even where two views are possible, this being a matter belonging to the field of criminal justice involving the liberty of an individual, the provision must be construed strictly in favour of individual liberty since even the law expects early completion of the investigation. The delay in completion of the investigation can be on pain of the accused being released on bail. The prosecution cannot be allowed to trifle with individual liberty if it does not take its task seriously and does not complete it within the time allowed by law. It would also result in avoidable difficulty to the accused if the latter is asked to secure a surety and a few days later be placed behind the bars at the sweet will of the prosecution on production of a charge-sheet."

19. On a survey of the law referred to above and the fact that the present application is pending consideration since 01.11.2023, I am definitely of the view that the oral application made by the learned Counsel for the petitioner on 22.11.2023 is sufficient to release the petitioner on statutory bail due to the failure of the Investigation Officer to file the final report on time and the Public Prosecutor not seeking for extension of time as provided under Section 36 A of the Act. Therefore, I hold that the petitioner is entitled to be released on bail under Section 36 A of the Act,

read with Section 167(2) of the Code.

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 jurisdictional Court, which shall be subject to the following conditions:

(i) The petitioner shall 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 jurisdictional Court 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 jurisdictional Court 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 moved and entertained by the court below.

C.S.DIAS,JUDGE

DST/15.01.24

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P.A. To Judge