

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K.HARIPAL

WEDNESDAY, THE 14TH DAY OF JULY 2021 / 23RD ASHADHA, 1943

BAIL APPL. NO. 3850 OF 2021

CRIME NO.26/2020 OF EE & ANSS, MALAPPURAM

PETITIONERS/ACCUSED:

- 1 MIDHUN
AGED 30 YEARS, SON OF PURUSHAN,
KOCHUPARAMBIL HOUSE, PANAYIKULAM, ALANGAD P O,
ERNAKULAM DISTRICT, PIN 683502

- 2 SUJITH P U
AGED 30 YEARS, SON OF UNNI, PUTHANVEETIL, EDAYAR P O,
ERNAKULAM DISTRICT, PIN 686662

BY ADV K.NIRMALAN

RESPONDENTS/STATE:

- 1 STATE OF KERALA
STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, HIGH COURT P O, ERNAKULAM 682 031
ERNAKULAM, PIN - 682031

- 2 INSPECTOR OF EXCISE
INSPECTOR OF EXCISE, ENFORCEMENT AND ANTI NARCOTIC
SQUAD,
MALAPPURAM, REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, HIGH COURT P O, ERNAKULAM

BY PUBLIC PROSECUTOR SMT.SRREJA V.

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
5.07.2021, ALONG WITH CRL.M.C.NOS.2712/2021 AND 2901/2021, THE
COURT ON 14.07.2021 DELIVERED THE FOLLOWING:

CRL.M.C.2712 & 2901 OF 2021
& BAIL APPL.NO.3850 OF 2021

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K.HARIPAL

WEDNESDAY, THE 14TH DAY OF JULY 2021 / 23RD ASHADHA, 1943

CRL.MC NO. 2712 OF 2021

CRIME NO.26/2020 OF EE & ANSS, MALAPPURAM

PETITIONERS/ACCUSED 2 & 3:

- 1 MIDHUN
AGED 30 YEARS
S/O PURUSHAN, KOCHUPARAMBIL HOUSE, PANAYIKKULAM,
ALANGADE P.O.ERNAKULAM DISTRICT-680 502.

- 2 SUJITH P.U,
AGED 30 YEARS
S/O UNNI, PUTHANVEETIL, EDAYAR P.O.ERNAKULAM DISTRICT-
686 662.

BY ADV K.NIRMALAN

RESPONDENT/STATE:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM-682 031.

BY PUBLIC PROSECUTOR SMT. SREEJA V.

THIS CRIMINAL MISC.CASE HAVING COME UP FOR ADMISSION ON
5.07.2021,ALONG WITH BAIL APPLICATION NO.3850/2021 AND
CRL.M.C.NO.2901/2021, THE COURT ON 14.07.2021 DELIVERED THE
FOLLOWING:

CRL.M.C.2712 & 2901 OF 2021
& BAIL APPL.NO.3850 OF 2021

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K.HARIPAL

WEDNESDAY, THE 14TH DAY OF JULY 2021 / 23RD ASHADHA, 1943

CRL.MC NO. 2901 OF 2021

CRIME NO.26/2020 OF EE & ANSS, MALAPPURAM

PETITIONER/ACCUSED:

ALI,
AGED 38 YEARS
S/O.MUHAMMED, PALLIKKARAVALLAPPIL HOUSE, KARUKAPUTHUR
DESOM, THIRUMITTAKKODE VILLAGE, PATTAMBI TALUK,
PALAKKAD DISTRICT.

BY ADV R.RANJITH (MANJERI)

RESPONDENTS/STATE:

- 1 THE STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM, KOCHI, PIN-682 031.
- 2 THE EXCISE INSPECTOR,
EXCISE CRIME BRANCH (NORTH ZONE), KOZHIKODE, PIN-673
020.

THIS CRIMINAL MISC.CASE HAVING COME UP FOR ADMISSION ON
5.07.2021, ALONG WITH BAIL APPLICATION NO.3850/2021 AND
CRL.M.C.NO.2901/2021, THE COURT ON 14.07.2021 DELIVERED THE
FOLLOWING:

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ORDER

These Crl.M.C. Nos.2712/2021 and 2901/2021 are filed under Section 482 of the Code of Criminal Procedure, 1908, the Cr.P.C. for short, seeking to quash the order of the Special Court for trial of NDPS Act cases in Manjery dated 31.03.2021, whereby the learned Special Judge, on the basis of a report made by the Public Prosecutor seeking extension of two months' time for investigation under Section 36A(4) of the Narcotic Drugs and Psychotropic Substances Act, (hereinafter referred to as 'the Act'), was allowed. In both these Crl.M.C.s, the correctness of the order dated 31.03.2021 is under challenge.

2. The petitioners in Crl.M.C.No.2712/2021 are accused Nos.2 and 3 in crime No.26/2020 of the Excise Enforcement and Anti-Narcotics Special Squad, Malappuram. Now the investigation of the case is in progress and the accused are in custody.

3. Bail Application No.3850/2021 is an application under Section 439 of the Cr.P.C. moved by the petitioners in Crl.M.C.No.2712/2021 seeking

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their release on bail. They contend that they are in judicial custody from 03.10.2020 onwards, that for over the last more than eight months they are in judicial custody, that the investigation has progressed considerably and therefore, their continued detention is unnecessary.

4. Crl.M.C.No.2901/2021 is an application filed by the 4th accused in the crime seeking quashment of the order dated 31.03.2021, whereby the period of investigation stood extended by two months.

5. Meanwhile, the application for bail moved by the petitioner in Crl.M.C.2901/2021 by name Ali stood dismissed by the order dated 16.06.2021. Anyhow, he also challenges the validity of the order dated 31.03.2021.

6. I heard the learned counsel for the petitioners as well as the learned Senior Public Prosecutor.

7. According to the learned counsel for the petitioners, these petitioners are in judicial custody from 03.10.2020 onwards, after the period of 180 days, since the prosecution could not complete investigation and lay the final report, a report was filed before the court on 31.03.2021 seeking extension of time for investigation. However, the impugned order was passed

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by the learned Special Judge without giving copy of the report or the copy of the application moved by the Investigating Officer. They were not aware of the said motion made by the Investigating Officer or the report given by the Public Prosecutor. The said order dated 31.03.2021 was passed without informing them and without affording them opportunity to oppose the application.

8. The learned counsel placed reliance on the decision reported in **Hitendra Vishnu Thakur and others v. State of Maharashtra and others [(1994) 4 SCC 602]**, which is followed in **Sanjay Kumar Kedia @ Sanjay Kedia v. Intelligence Officer, Narcotics Control Bureau and another [(2009) 17 SCC 631]**. The learned counsel also referred to an unreported decision of this Court in B.A.No.4204/2020. According to the learned counsel, everything was done without taking them into confidence and, that they should not have been kept in the darkness before passing the order.

9. On the other hand, the learned Senior Public Prosecutor strongly opposed the application.

10. According to the learned Public Prosecutor, the said order dated 31.03.2021 was passed after proper application of mind, taking into account

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the report given by the Special Public Prosecutor and also the submission of the Investigating Officer detailing the reasons for seeking extension of period of investigation. The Public Prosecutor also submitted that the said extended period of investigation expired on 31.05.2021 and even thereafter another extension was granted for two more months. Without challenging that order, now they have moved this Court challenging the order dated 31.03.2021 alone, which is bad. According to the learned Public Prosecutor, now, in the light of the subsequent developments, the order dated 31.03.2021 has become infructuous and therefore, both the Crl.M.Cs are liable to be dismissed.

11. Turning to the bail application moved by accused Nos.2 and 3, the learned Public Prosecutor submitted that they were part and parcel of the commission of the crime. This is a case in which 167.5 kgs of ganja was seized while transporting in a pick-up lorry, KL-41-G 7479, driven by the first accused; larger conspiracy is involved in the whole episode. Accused numbers 5 and 6, who are the brain behind the crime are still at large; there are other matters also to be enquired into and therefore, she prayed for rejecting the application seeking bail.

12. At the out set, it must be stated that the contention of the learned

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Public Prosecutor, that the Crl.M.Cs have become infructuous as much as the subsequent order granting extension of period of investigation has been granted, cannot be accepted in right earnest. The petitioners have specific case that the impugned order dated 31.03.2021 was passed without alerting or informing them. Therefore, the court has to consider the vires of that order and, if that will not meet the requirements of law, it would collapse and as a necessary corollary, the subsequent order cannot have independent existence.

13. The impugned order was passed on the basis of a report given by the Investigating Officer, the Excise Circle Inspector, Excise Crime Branch Southern Range. He has raised numerous grounds for granting extension of time beyond 180 days for continuing the investigation. Firstly, he said that even though he had moved the Chief Judicial Magistrate for recording the statement of one of the witnesses, Ali S/o. Abdul Majeed, under Section 164 Cr.P.C., that could not yet be recorded. Secondly, accused Nos.5 and 6, whose role in the commission of the crime is very patent, are not yet arrested. The said accused persons had moved along with the first accused in close proximity, they had resided together in Andhra Pradesh from where the contrabands were procured. Similarly, accused Nos. 2 and 3 had financial

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deals with the 5th accused and therefore, the arrest of accused Nos.5 and 6 is very important. Thirdly, it is stated that 167.5 kgs of ganja was arranged by one Ramesh Naidu from Andhra Pradesh. Accused Nos.5 and 6 had close association with the said Ramesh Naidu. As the Crime Branch had taken over investigation after the period in which the first accused could be interrogated in custody, he was not taken into custody by the investigating agency and therefore, if only the said Ramesh Naidu is traced, further materials will be obtained against the culprits. Moreover, it is stated that before the contraband was taken in a pick-up lorry KL-41/G-7479, the first accused had taken it through lorry KL-51/F-7891, which is somewhere in Andhra Pradesh, which has to be traced. Similarly, it is also stated that the entire deal was financed by one Sajeev of Allapra in Perumbavoor, that further investigation has to be done to locate him. It is further stated that being the Investigating Officer in charge of about ten such NDPS cases, he is very much pre-occupied and that he could not concentrate more on this case. On these grounds he sought the intervention of the court for granting extension of time. The Special Public Prosecutor endorsed the request and placed it before the Special Judge on 31.03.2021.

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14. After hearing the parties, this Court felt that., for passing orders, the records that led to the impugned order dated 31.03.2021 and subsequent orders granting further time for investigation are required to be perused. Thus, the Registrar (Judicial) of this Court was directed to call for the records. The Registrar (Judicial) has placed before me copy of certain records of the Special Court which were already summoned in May 2021 in connection with B.A.No.3594/2021, which was moved by the 4th accused. It is evident that by order dated 16.06.2021, that bail application stands dismissed. Whatever it may be, the 4th accused has filed separate Crl.M.C. seeking to quash the order dated 31.03.2021. That means the copy of relevant records were already obtained by this Court. I have gone through the records.

15. Now it is evident that accused persons were arrested on 03.10.2020 and by 02.04.2021 the statutory period of 180 days, which was available to the Investigating Officer, was to expire. Before that, on 29.03.2021, the Investigating Officer moved the designated court through the Public Prosecutor seeking extension of time for investigation. That was endorsed by the Public Prosecutor, which led to the passing of the impugned order dated 31.03.2021.

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16. Validity of the order dated 31.03.2021 has been challenged on twin grounds. Firstly, it is stated that the Special Public Prosecutor had endorsed the request of the Investigating Officer without application of mind. Secondly, it was urged that the order was passed without informing them. After assessing the materials, I find that both the contentions are really formidable.

17. It is true that the Investigating Officer had placed a detailed request before the Public Prosecutor. The Public Prosecutor in turn has merely observed that the reasons stated are acceptable and convincing to him. Clause (bb) to sub-section (4) of Section 20 of the TADA Act is *pari materia* with sub-section (4) of Section 36A of the Act. In **Hitendra Vishnu Thakur's** case, quoted supra, while dealing with Section 20(4)(bb) of the TADA Act, the Hon'ble Supreme Court has stated in clear terms the role of the Public Prosecutor, in a given situation, thus:

“23. 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

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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 sub-section (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*

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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.”

18. As held by the Apex Court in **Hitendra Vishnu Thakur**, a Public Prosecutor is an important officer of the State and is appointed under the Cr.P.C.; he is not part of the investigating agency, but 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; he is not a post office or a forwarding agency. He is expected to give his assessment about the progress of investigation before giving the recommendations. In fact, it is his report that should come to the fore. Perhaps he may annex the request of the Investigating Officer to the report. The court is expected to act only upon the report of the Public Prosecutor. But from the report of the Public Prosecutor dt. 31.03.2021, it cannot be inferred that he had applied his mind, while endorsing the request for extension of the period of investigation.

19. The second ground impugning the order dated 31.03.2021 is that it was passed behind their back. Going by authoritative pronouncements, it is

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quite clear that while considering an application under Section 36A(4) of the Act, the four conditions that required to be gone into by the designated court are:

- (1) a report of the Public Prosecutor
- (2) which indicates the progress of investigation
- (3) specifies the compelling reasons for seeking the detention of the accused beyond the period of 180 days, and
- (4) after notice to the accused.

The first three conditions are based on the provisions of law itself, whereas the last condition that it should be done after notice to the accused is based on the authoritative pronouncements of the Apex Court.

20. Again, in **Hitendra Vishnu Thakur's** case, the court accepted the argument of the accused that an extension beyond 180 days could be granted but placed a rider that it could be done only after certain conditions are satisfied. The Hon'ble Supreme Court observed thus:

“It is true that neither clause (b) nor clause (bb) of sub-section (4) of S.20 TADA specifically provide for the issuance of such a notice but in our opinion the issuance of such a notice must be read into these provisions both in the interest of the accused and the prosecution as well for doing complete justice between the parties. This is a requirement of the principles of natural justice

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and the issuance of notice to the accused or the public prosecutor, as the case may be, would accord with fair play in action, which the Courts have always encouraged and even insisted upon. It would also strike a just balance between the interest of the liberty of an accused on the one hand and the society at large through the prosecuting agency on the other hand. There is no prohibition to the issuance of such a notice to the accused or the public prosecutor in the scheme of the Act and no prejudice whatsoever can be caused by the issuance of such a notice to any party.”

That means, the last condition that it should be done after giving notice to the accused, though not in the statute, is part of a judge-made law. The Hon'ble Supreme Court has, in various decisions, insisted upon this requirement and that has become the law of the land and, therefore, is binding on all Courts.

21. The perusal of records made available from the designated court indicates that the said order was passed on the same day of filing of the report by the Public Prosecutor. Of course, it is shown that the Public Prosecutor was heard before passing the order. The specific complaint of the petitioners/accused is that, that was done behind their back, they were not given opportunity to oppose the application, that they became aware of the order only on subsequent point of time. I find considerable force in this

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argument. That order was passed behind the back of the petitioners and without notifying to the accused or their counsel.

22. It has also come out from the copy of records made available from the Special Court that such an order was passed not in the presence of the accused persons either, because the period of extension of time was not expiring on 31.03.2021. That means, at that point of time, that is on 31.03.2021, there was no occasion for the accused to be produced, who are in judicial custody. The order was passed without alerting the respective counsel for the accused also. In other words, they did not get opportunity to make any submission or objection against the application moved for extension of time for investigation. In **Sanjay Dutt v. State through CBI, Bombay [(1994) 5 SCC 410]**, the Hon'ble Supreme Court has held that even though such a notice is necessary, it is not necessary that the notice should be in writing, production of the accused at the time in the court informing that the question of extension of the period for completing the investigation is being considered, is sufficient for the purpose. Here, no one has a case that even the counsel for the accused persons were intimated, even orally, about the report given by the Special Public Prosecutor before the Special Court or the request of the Investigating Officer seeking

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further extension of time. In other words, they were kept completely in darkness with regard to the report for extension of time and also the order dated 31.03.2021, which is bad.

23. I have no doubt that such an order should have been passed after properly alerting the accused persons; at least oral notice should have been given to the respective counsel appearing for the accused or while passing the orders, accused should have been brought before court. Therefore, the order dated 31.03.2021 cannot stand and is liable to be quashed. It is quashed.

Resultantly, the petitioners, who are accused Nos.2, 3 and 4, are entitled to be released on bail. All of them will be released on bail on the following conditions:-

- i) They shall execute bond for Rs.1,00,000/- (Rupees One lakh only) each with two solvent sureties each for the like sum to the satisfaction of the Special Judge; one of the sureties shall be a near relative of the petitioners;
- ii) They shall appear before the Investigating Officer/Special Court, as and when necessary;
- iii) Shall not leave the jurisdiction of Malappuram revenue district, without leave of the Special Court;
- iv) Shall surrender their passport before the Court within 10

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days of release; If they do not possess passport, affidavits shall be filed to that effect;

- v) Shall not try to contact or influence the witnesses or tamper with the evidence;
- vi) Shall not involve in any crime during the period on bail;
- vii) Shall strictly follow the various guidelines issued by the Central/State Government for following covid protocol;
- viii) If any of the above conditions are violated, the jurisdictional court will be at liberty to cancel the bail in accordance with law.

Sd/-

K.HARIPAL
JUDGE

nkr/okb/7.7.21

//True copy// P.S. to Judge