

HIGH COURT OF KERALA**Bench: Mr. Justice C.S. Dias****DATE OF DECISION: 1st March 2024**

BAIL APPLICATION NOS.: 8777 of 2023 and 5877 of 2023

1. **Sirajudheen**
2. **Riyas Puthusseri****Petitioner/Accused**

Versus**State of Kerala** **Respondent****LEGISLATION AND RULES:**

Sections 22(c), 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985

Section 439 of the Code of Criminal Procedure, 1973

Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022

SUBJECT: Bail applications of the 2nd and 3rd accused in a case involving possession of commercial quantity of Methamphetamine.

HEADNOTES:

Criminal Procedure - Bail Application – Narcotic Drugs and Psychotropic Substances Act, 1985 – Application of Section 439 CrPC - The accused applied for bail under Section 439 of the Criminal Procedure Code, 1973, in connection with offences under Sections 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Applications were consolidated due to arising from the same crime. [Para 1]

Prosecution Allegations – Possession of Contraband – MDMA and Methamphetamine – Accusations against the accused included possession

of 499.28 grams of MDMA, later identified as Methamphetamine, a commercial quantity of contraband, seized during a vehicle interception by the authorities. [Para 2, 6]

Defence Contentions – Violation of NDPS Act Provisions and Rules, Prejudice Due to Delay in Sample Analysis – Defence argued innocence and false implication, highlighting procedural violations in the seizure and analysis of contraband under the NDPS Act and related Rules, specifically pointing out delay in forwarding samples to the laboratory, causing prejudice to the accused. [Para 4, 11]

Prosecution's Argument – Substance as Commercial Quantity, Compliance with NDPS Act Requirements – Prosecution contended the involvement of the accused, citing the commercial quantity of the contraband and compliance with procedural requirements under the NDPS Act. Reliance was placed on Supreme Court and High Court precedents emphasizing the irrelevance of detention length in NDPS cases. [Para 5]

Judicial Analysis – Consideration of Rule Violations, Application of Section 37 of NDPS Act – The court noted the allegation of rule violations, but maintained that determination of procedural compliance and resulting prejudice was a matter for trial. The focus was on the applicability of Section 37 of the NDPS Act due to the commercial quantity of the contraband. [Para 7-15]

Decision – Denial of Bail, Application of Section 37 Rigours – Bail was denied considering the nature and gravity of the offence, the commercial quantity of the contraband, and the applicability of Section 37 of the NDPS Act. The court found no reasonable grounds to believe that the petitioners had not committed the alleged offences and noted the potential risk of repetition of offences. [Para 16-21]

REFERRED CASES:

- State of Kerala v. Rajesh [(2020) 12 SCC 122]
- Union of India v. Mohd. Nawaz Khan [(2021) 10 SCC 100]
- Sreejith v. State of Kerala [2024 KHC Online 1048]
- Kalyan Chandra Sarkar v. Rajesh Ranjan [(2004) 7 SCC 528]
- Union of India v. MD Nawaz Khan [2021 KHC 6503]
- Abeesh v. State of Kerala [2022:KER:50902]
- Union of India v. Shiv Shanker Kesari [(2007) 7 SCC 798]

- Prasanta Kumar Sarkar v. Ashis Chatterjee [(2010) 14 SCC 496]

REPRESENTING ADVOCATES:

For Petitioners: T.K. Ajith Kumar, Haritha Haridas, M. Devesh

For Respondent: Advocate General Office Kerala, Addl. Director General of Prosecution (AG-11), Addl. State Public Prosecutor (AG-28), ADGP Sri Grashious Kuriakose, Sr PP Sri C K Suresh

Dated this the 1st day of March, 2024

COMMON ORDER

The applications are filed under Section 439 of the Code of Criminal Procedure, 1973, by the accused 2 and 3 in Crime No.6/2023 of the Excise Range Office, Manjeri, registered against the accused (three in number) for allegedly committing the offences punishable under Sections 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, 'the Act'). As these bail applications arise out of the same crime, they were consolidated and jointly heard and are being disposed of by this common order. B.A No.5877/2023 is filed by the second accused and B.A. No.8777/2023 is filed by the 3rd accused. The petitioners were arrested on 21.2.2023.

2.. The prosecution allegation, in brief, is that: on 21.02.2023 at around 14.45 hours, the accused 1 to 3 had received a courier containing 499.28 grams of MDMA (in short, 'contraband'). The Detecting Officer on getting information, intercepted the car bearing No. KL 14 S 1110 in which the accused were travelling and seized the contraband from the possession of the accused. Thus, the accused have committed the above offences.

3. Heard; Sri.M.Devesh, the learned counsel appearing for the second accused, Sri. T.K. Ajith Kumar, the learned counsel appearing for the third accused and Sri.C.K.Suresh, the learned Special Public Prosecutor.

4. The learned counsel for the petitioners in unison submitted that the petitioners are totally innocent of the accusation levelled against them. They

have been falsely implicated in the crime. The alleged contraband was received by the first accused. There is no material to establish that the accused 2 and 3 have any complicity in the matter. The learned Counsel also submitted that the Investigating Officer has violated the provisions of Sections 40, 50 and 52 of the Act and the Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 (in short, Rules). Even though the contraband was allegedly seized from the accused on 21.2.2023 and the inventory was prepared by the jurisdictional Magistrate on 22.2.2023, the samples were forwarded to the Chemical Examiner's Laboratory Department, for analysis only on 7.3.2023. The inordinate delay on the part of the court in sending the samples to the laboratory has caused serious prejudice to the petitioners, and is in flagrant violation of Rule 13 of the Rules. In addition to the above contention, the petitioners have been languishing in jail for the last one year. The petitioners have no criminal antecedents. Therefore, the rigour under Section 37 of the Act stands diluted. Furthermore, the petitioners were released on interim bail for the reason that there was violation of Rule 13 of the Rules. Subsequently, by order dated 26.2.2024, this Court directed the petitioners to surrender before the jurisdictional Jail Superintendent and the petitioners have complied with the said directions. The petitioners' continued detention is unnecessary, especially since the investigation is complete and the complaint/final report has been laid. Hence, the applications may be allowed.

5. The learned Public Prosecutor strenuously opposed the applications. He contended that there are incriminating materials to substantiate the involvement of the petitioners in the above crime. Even though, it has turned out that the contraband is Methamphetamine having a quantity of 499.28 gram, the same is a commercial quantity. Hence, the rigour under Section 37 of the Act applies to the facts of the case. He placed reliance on the decision of the Honourable Supreme Court in **State of Kerala and others v. Rajesh and others** [(2020) 12 SCC 122] and **Union of India v. Mohd. Nawaz Khan** [(2021) 10 SCC 100], and the decision of this Court in **Sreejith v. State of Kerala** [2024 KHC Online 1048] to contend that the length of detention is totally immaterial so far as the offence committed under the Act is concerned, where the rigour under Section 37 of the Act applies. He also placed reliance on the the decision in **Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav and another** [(2004) 7 SCC 528], to fortify his contention. He further submitted that the

allegation regarding the infraction of Sections 40 and 52 and Rules is a matter of trial as laid down by the Honourable Supreme Court in **Union of India v. MD Nawaz Khan** [2021 KHC 6503] followed by this Court in **Abeesh v. State of Kerala** [2022:KER:50902]. He submitted that the applications are meritless and are only liable to be rejected at the very threshold.

6. The prosecution allegation against the accused is that, they were found in possession of 499.28 grams of MDMA on 21.2.2023. The materials reveal that the contraband was seized from the possession of the accused. It has now turned out that, as per the chemical analysis report of the Regional Chemical Examiner's Laboratory Department, Kozhikode dated 19.7.2023, the contraband is Methamphetamine and not MDMA. Even then the contraband is of a commercial quantity in view of the specification given in Sl.No.159 of the Specification of the Small and Commercial quantity of Narcotic Drugs of Psychotropic Substance order dated 19.10.2001.

7. One of the cardinal contentions raised by the learned counsel for the petitioner is that there is a infraction of Rule 13 of the Rules committed by the Investigating Officer because as per the materials on record, the sample was produced before the Judicial First Class Magistrate -I, Manjeri on 22.2.2023, but the same was forwarded to the laboratory only on 7.3.2023.

8. When the bail applications came up for consideration on 12.10.2023, this Court has called for a report from the learned Magistrate to ascertain the reason for the delay in forwarding the samples to the laboratory. Initially, the learned Magistrate, by communication dated 20.10.2023, informed this Court that the samples were received on 22.2.2023 and the certificate was issued in Form V on the very same date after completing the inventory proceedings. Subsequently, the learned Magistrate, by communication dated 19.12.2023, informed this Court that since the contraband involved is of a commercial quantity, the inventory proceedings under Annexures 1 and 2 of the Act along with the samples were forwarded to the Special Court for NDPS cases, Manjeri with a covering letter dated 25.2.2023 and the same was despatched by the said court on 27.2.2023. The learned Magistrate annexed a copy of the despatch cum stamp account register to establish that the samples were received on 27.2.2023.

9. In the meantime, by orders dated 12.10.2023 and 20.12.2023, this Court released the petitioners on interim bail for the reason that there

was total absence of any mention regarding the preparation of inventory form by the learned Magistrate.

10. Subsequently, when the bail applications came up for consideration on 26.02.2024, this Court after perusing the chemical analysis report, found that the samples were received by the laboratory from the Special Judge of the Special Court on 07.03.2023 and the samples were analyzed and turned out to be Methamphetamine. Accordingly, this Court directed the petitioners to surrender before the jurisdictional Jail Superintendent on or before 28.02.2024. The said order has been complied with by the petitioners.

11. The learned counsel for the petitioners submitted that since Rule 13 of the Rules mandate that the Magistrate has to forward the samples to the laboratory without any delay and as the samples in the case on hand were seized on 21.02.2023, and produced before the learned Magistrate on 22.02.2023, but the same were only received by the laboratory only on 07.03.2023, there is infraction of Rule 13. Similarly, the chemical analysis report reveals that the quantity of the samples certified by the special court is not the same as that has been received by the laboratory, which proves that the sampling procedure adopted is erroneous. These acts have caused prejudice to the petitioners. Hence, the petitioners are entitled to the benefit of doubt and may be released on bail.

12. In dealing with an identical situation, the Hon'ble Supreme Court in **Md Nawaz Khan's** case, has observed in the following lines:

“28. Further, it was held that the issue of whether there was compliance of the procedure laid down under Section 42 of the NDPS Act is a question of fact. The decision in Karnail Singh (supra) was recently followed by this Court in Boota Singh v. State of Haryana.”

13. The above view has followed by this Court in **Abeesh's case** as thus:

“8. It is true that in the judgments relied on by the petitioners it was held that when there is violation of the procedures as mandated under the Act it will definitely affect the prosecution case. Here is a case where the prosecution contends that in the investigation so far conducted the role of the petitioner is clearly revealed and the matter

is pending investigation. The specific case of the prosecution is that procedure under Section 42 in the matter of recording of information and also the ground of belief and consequential intimation of the same to the superior officer as provided under Section 42 (2) has been complied with. In the said circumstance, whether there is substantial compliance of the provisions of Section 42 or not, I prima facie feel, cannot be looked into at the time of consideration of the bail application in as much as it is not a case of total non-compliance of the said provision. In Sajan Abraham's case supra, it was held that provisions of Section 42 cannot be said to be violated merely due to nonrecording of information and non-communication to the superior officer. In Nawas Khan's case supra, the Apex Court has recently held that the question as to whether there is substantial compliance with Section 42 or not is not a matter which could be looked into at the time of consideration of a bail application and the said question is one that should be raised in the course of the trial. In the said judgment it was also held that a finding of the absence of possession of contraband on the person of the accused does not absolve it the level of scrutiny required under Section 37 of the NDPS Act."

14. Therefore, whether the procedure contemplated under the Sections 42 and 50 of the Act and also the Rules have been scrupulously complied with or not and whether there is any justification on the part of the learned Magistrate in forwarding the samples to the Special Court, and the Special Court then forwarding the same to the laboratory etc., has caused prejudice to the petitioners is a matter that can only be decided after the conclusion of the trial and not at the nascent stage of these bail applications.

15. The petitioners assert that there has been a delay in forwarding the samples to the laboratory by the courts below, which the prosecution justifies by stating that only the court of competent jurisdiction could have forwarded the samples, since the contraband is of a commercial quantity, and the said aspect can only be decided after the culmination of trial.

16. The fact remains that the contraband that was seized from the petitioners is of a commercial quantity. Therefore the first limb of Section 37 of the Act applies to the facts of the case. Since the petitioners do not have any criminal antecedents, probably they may get the benefit of the second limb, but the provision has to be conjunctively read with.

17. Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985, regulates the grant of bail in cases involving offences under the Act. It is profitable 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 sub-section (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.”

18. A plain reading of the above provision demonstrates that a person accused of an offence under Sections 19, 24 and 27-A of the 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. Therefore, the power to grant bail to a person accused of committing an offence under the Act is subject to provisions contained under Sec.439 of the Code and parameters referred to above and on the accused satisfying the twin conditions under Sec.37 of the Act.

19. While interpreting ‘reasonable grounds’

prescribed under Section 37 of the Act, the Honourable Supreme Court in **Union of India v. Shiv Shanker Kesari** [(2007) 7 SCC 798] held as follows: “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”.

20. 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 that:

“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”. 10. It is also wellsettled that in addition to applying the rigour under Section 37 of the Act, the courts are also bound to follow the general parameters under Section 439 of the Code, while considering a bail application.

21. 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 as follows:

“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”.

After bestowing my anxious consideration to the facts, the materials placed on record, the rival submissions made across the Bar and the findings rendered above and on comprehending the nature, seriousness and gravity of the accusations levelled against the petitioners, that the contraband is of a commercial quantity, the potential severity of the punishment that is likely to be imposed on them, I do not find any reasonable ground to hold that the petitioners have not committed the offences alleged against them and that they are not likely to commit the offence of a similar nature, if they are enlarged on bail. Therefore, I hold that the rigour under Section 37 of the Act applies to the facts and circumstances of the cases. The applications are devoid of any merit and are only liable to be rejected. Needless to mention that, any observations made in this order is only for the purpose of considering the bail applications. The jurisdictional courts shall decide the case on its merits, untrammelled by any observation made in this order.

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