SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Faris vs State of Kerala

Faris vs State of Kerala

SooperKanoon Citation : sooperkanoon.com/1406023

Court : Kerala

Decided On : Feb-28-2023

Judge : Honourable Mr. Justice a. Badharudeen

Appeal No. : Bail Appl./9947/2022

Appellant : FARIS

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE A. BADHARUDEEN TUESDAY, THE 28TH DAY OF FEBRUARY 2023 / 9TH PHALGUNA, 1944 BAIL APPL. NO. 9947 OF 2022 AGAINST THE JUDGMENT IN SC 1074/2022 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT - VIII, ERNAKULAM CRIME NO.18 OF 2022 OF MATTANCHERRY EXCISE RANGE OFFICE, ERNAKULAM PETITIONER/ACCUSED NO.1: FARIS AGED 31 YEARS S/O ABU, 13/436, CHERIYAPPILLI (H), CHULLIKKAL- DESOM, THOPPUMPADI-VILLAGE, KOCHI-TALUK, ERNAKULAM DISTRICT, PIN 682005 NOW R/AT IV/637, KADAYAPPARAMBIL (H), MATTANCHERRY BASAR ROAD-DESOM, MATTANCHERRY- VILLAGE, KOCHI-TALUK, ERNAKULAM-DISTRICT,

PIN - 682002. BY ADVS. BIJU ANTONY ALOOR K.C.SANTHOSH K.P.PRASANTH VISHNU DILEEP ARCHANA SURESH JINSON JACOB RESPONDENTS/COMPLAINANT: 1 STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM - 682031. 2 THE ASST. EXCISE COMMISSIONER, EXCISE RANGE OFFICE, (ENFORCEMENT), ERNAKULAM, ERNAKULAM DISTRICT, PIN - 682018. T V NEEMA(SENIOR PUBLIC PROSECUTOR) THIS BAIL APPLICATION HAVING BEEN FINALLY HEARD ON 13.02.2023, THE COURT ON 28.02.2023 DELIVERED THE FOLLOWING: B.A.No.9947/2022 2 C.R

A.BADHARUDEEN, J.

========== B.A.No.9947 of 2022 ========== Dated this the 28th day of February, 2023

ORDER

This is a petition filed under Section 439 of the Code of Criminal Procedure and the petitioner, who is the 1st accused in Crime No.18/2002 of Mattanchery Excise Range Office, Ernakulam, seeks regular bail.

2. Heard the learned counsel for the petitioner as well as the learned Public Prosecutor. Perused the case diary as such placed by the learned Public Prosecutor.

3. The prosecution case is that at 5.45 p.m on 08.08.2022,

accused Nos.1 and 2 were found in possession of 94.74 grams of MDMA for the purpose of sale, while the said contraband was carrying on a scooter bearing Registration No.KL-43-M-3295. B.A.No.9947/2022 3

Accordingly they were nabbed and the contraband was taken into custody. Thereafter, the accused were arrested from the spot. On this premise, the prosecution alleges commission of offences punishable under Section 22(c), 25

r/w 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as `the NDPS Act' for short).

4. While pressing for grant of regular bail to the petitioner, who alleged to be involved in possession of commercial quantity of contraband, the learned counsel for the

petitioner highlighted the innocence of the petitioner. It is submitted by the learned counsel for the petitioner that though the prosecution alleged possession of 94.74 grams of MDMA by the petitioner, when the commercial analysis report was obtained, it was found that the contraband was `Methamphetamine Hydro Chloride not Methylenedioxy-methamphetamine (MDMA). According to the learned counsel for the petitioner, `Methamphetamine Hydro Chloride is not a scheduled item under the NDPS Act, coming under the category of Narcotic B.A.No.9947/2022 4

Drugs and Psychotropic Substances. Therefore, the learned counsel for the petitioner submitted that the allegation of the prosecution as to possession of narcotic drugs and psychotropic substances by the petitioner and commission of the offences alleged are prima facie unsustainable. Therefore, the rider under Section 37 of the NDPS Act will not attract in this case and the petitioner is liable to be released on bail.

5. Whereas the learned Public Prosecutor would submit

that even though the prosecution recovered the contraband finding the same as MDMA, as per the chemical analysis report, the same was found to be Methamphetamine Hydro Chloride. However, it is pointed out by the learned Public Prosecutor that in the order in B.A.No.8183/2022 dated 01.11.2022, this Court considered a similar contention relying on a decision of the Madras High Court in Sadiq Basha v. State represented by the Intelligence Officer, Narcotic Control Bureau, Chennai, i.e. Crl.O.P.No.8070/2016, in which an identical situation was considered. In the said decision, it has been held that as per the

B.A.No.9947/2022 5 table appended to Section 2 (xxiii) of the Act, in Sl.No.239 it is stated that any mixture or preparation that of with or without a neutral material,

of any of the above drugs.

6. Relying on the said narration, the Madras High Court

held that the said contention required to be decided in the course

of trial. After extracting the relevant paragraphs of the decision of the Madras High Court in paragraphs 17 and 18, this Court dismissed the bail application filed by the petitioner in B.A.No.8183/22 negativing the contention at the instance of the petitioners' counsel therein that Methamphetamine hydrochloride is not a narcotic substance.

7. In the case at hand, in the chemical analysis report, the expert categorically stated that Methamphetamine hydrochloride' comes under the definition of narcotic drugs and psychotropic substances (NDPS).

8. The relevant question poses is; whether `Methamphetamine Hydro Chloride is a narcotic drug and psychotropic substance, under the NDPS Act? B.A.No.9947/2022 6

9. In this context, it is relevant to note that

`Methamphetamine Hydro Chloride as such is not a scheduled item in the table appended in the NDPS Act. But as per Section 2(xxiii) of the Act, in Sl.No.239 any mixture or preparation that of with or without a neutral material, of any of the above drugs

also is a narcotic drug and psychotropic substance. In this context, it is relevant to note that item No.159 in the table is Methamphetamine and the same is a narcotic drug and psychotropic substance. Since Sl.No.239 of the table provides that `any mixture or preparation that of with or without a neutral material, of any of the above drugs' also a psychotropic

substance. In view of the description in Sl.No.239, Methamphetamine mixed with hydrochloride also to be held as a narcotic drug and psychotropic substance. Therefore, there is no reason to hold at this sage that Methamphetamine

hydrochloride is not a narcotic drug and psychotropic substance and further to hold that the petitioner did not commit any offence under the NDPS Act. Even going by the quantity, as Methamphetamine, the

B.A.No.9947/2022 7 same also is commercial quantity as per the schedule.

10. Therefore, Section 37 of the NDPS Act interdicts grant of bail to an accused in a crime involving commercial quantity of contraband. Section 37of the NDPS Act provides as under: 37. Offences to be cognizable and non-bailable.--

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 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 27A 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 Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

11. On a perusal of Section 37(1)(a)(i), when the Public B.A.No.9947/2022 8

Prosecutor opposes bail application of a person involved in a crime, where commercial quantity of the contraband was seized, the Court can grant bail only after satisfying two conditions: viz;

(1) There are reasonable grounds for believing that the accused is not guilty of such offences and (2) he will not commit any offence while on bail.

12. The Apex Court considered the meaning of

reasonable grounds in the decision reported in (2007) 7 SCC 798, Union of India v. Shiv Shankar Kesari and held that the expression reasonable grounds 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.

13. It was further held that the Court while considering the application for bail with reference to S.37 of the Act is not called B.A.No.9947/2022 9

upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the Court

has not to consider the matter as if it is pronouncing a judgment

of acquittal and recording a finding of not guilty.

14. While considering the rider under Section 37 of the

NDPS Act, the same principles have been reiterated, in the decisions reported in Superintendent, Narcotics Central Bureau v. R.Paulsamy [2000 KHC 1549: AIR 2000 SC 3661: (2000) 9 SCC 549: 2001 SCC (Cri) 648: 2001 Cril LJ 117], Customs, New Delhi v. Ahmadalieva Nodira [2004 KHC 505: AIR 2004 SC 3022:2004(3) SCC 549: 2004 SCC (Cri) 834: 2004 (110) DLT 300: 2004 Cri LJ 1810: 2004 (166) ELT 302], Union of India v. Abdulla [2004 KHC 1992: 2004(13) SCC 504: 2005 Cri LJ 3115: 2005 All LJ 2334], N.R.Mon v. Md.Nasimuddin [2008 KHC 6547: 2008(6) SCC 721: 2008(2) KLD 316: 2008(2) KLT 1022:

2008(9) SCALE 334: AIR 2008 SC 2576:2008 Cri LJ 3491: 2008(3) SCC (Cri) 29], Union of India v. Rattan Malik [2009 KHC 4151: 2009(2) SCC 624: 2009(2) KLT SN 83: 2009 (1) SCC (Cri) 831:2009 Cri LJ 3042: 2009 (4) ALL LJ 627: 2009(2) SCALE 51], Union of India v. Niyazuddin [2017 KHC 4465: AIR 2017 SC 3932: 2018 (13) SCC 738], State of Kerala v. Rajesh [2020(1) KHC 557: AIR 2020 SC 721: 2020(1) KLJ 664: 2020(2) KLT SN1 : ILR 2020(1), Ker.848]. Latest decision on this point is [2023 Cri LJ 799], Union of India v. Jitentra Giri.

15. On a plain reading of Section 37(1) (b) and 37(1)(b)(ii)

of the NDPS Act, within the ambit of the Settled law, it has to be understood that two ingredients shall be read conjunctively and not disjunctively. Therefore satisfaction of both conditions are sine qua non for granting bail to an accused who alleged to have been committed the offences under Section 19 or Section 24 or Section 27A and also for the offences involving commercial quantity as provided under Section 37(1)(b) of the NDPS Act. Unless Section 37 is not amended by the legislature in cases

B.A.No.9947/2022 11 specifically referred under Section 37(1)(b) of the NDPS Act, the Court could not grant bail without recording satisfaction of the above twin ingredients.

16. On evaluation of the prosecution materials on par with

the arguments tendered by the learned counsel for the petitioner and the learned Public Prosecutor, this Court cannot satisfy that there are reasonable grounds for believing that the petitioner is innocent and he will not commit any offence while on bail. Therefore, this application for regular bail at the instance of the petitioner must fail.

Hence the petition stands dismissed. Sd/- (A. BADHARUDEEN, JUDGE) rtr/ B.A.No.9947/2022 12 APPENDIX OF BAIL APPL. 9947/2022 PETITIONER'S ANNEXURES Annexure1 TRUE COPY OF THE CHEMICAL ANALYSIS REPORT DATED 15/03/2022 Annexure2 TRUE COPY OF THE ORDER IN CRL.M.C NO.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com