

Sajith K.V vs the Excise Range Officer

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Court : Kerala

Decided On : Jun-02-2023

Judge : Honourable Mr. Justice a. Badharudeen

Appeal No. : Bail Appl./9994/2022

Appellant : Sajith K.V

Respondent : The Excise Range Officer

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE A. BADHARUDEEN
FRIDAY, THE 2ND DAY OF JUNE 2023 / 12TH JYAISHTA, 1945 BAIL
APPL. NO. 9994 OF 2022 AGAINST THE ORDER/JUDGMENTCRMC
949/2022 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT -
II, KALPETTA NDPS CRIME NO.81 OF 2022 OF SULTHANBATHERY
EXCISE RANGE OFFICE, SULTHANBATHERY
PETITIONER/ACCUSED NO.2: SAJITH K.V AGED 35 YEARS S/O
VASUDEVAN, KANNIPPOYIL HOUSE, KUNNAMANGALAM, P.O.,
KUNNAMANGALAM, VILLAGE, KOZHIKODE TALUK, KOZHIKODE
DISTRICT, PIN - 673570. BY ADVS. SUNNY MATHEW NIKITTA
TRESSY GEORGE RESPONDENTS/COMPLAINANT & STATE: 1 THE

EXCISE RANGE OFFICER EXCISE RANGE OFFICE,
SULTHANBATHERY, WAYANAD, PIN - 673592. 2 THE STATE OF
KERALA REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH
COURT OF KERALA, ERNAKULAM COCHIN, PIN - 682031. SRI P G
MANU, SENIOR PUBLIC PROSECUTOR THIS BAIL APPLICATION
HAVING BEEN FINALLY HEARD ON 24.05.2023, THE COURT ON
02.06.2023 DELIVERED THE FOLLOWING: B.A.No.9994/2023 2

A. BADHARUDEEN, J.

===== B.A.No.9994 of 2023
===== Dated this the 6th day of
June, 2023

ORDER

The 2nd accused in Crime No.81 of 2022 seeks regular bail in this petition filed under Section 439 of the Code of Criminal Procedure.

2. Heard the learned counsel for the petitioner and the learned Public Prosecutor in detail. Perused the report of the Investigating Officer placed by the learned Public Prosecutor.

3. The prosecution case is that at about 9.05 a.m on

17.09.2022, accused 1 and 2 were jointly found in possession of 338 grams of MDMA while they were transporting the same in a KSRTC bus bearing Reg.No.KL 15A 1834, when the bus reached at Muthanga check post. Accordingly, both of them were arrested B.A.No.9994/2023 3 and contraband seized and crime was registered for offences punishable under Sections 22(c) and 29 of Narcotic Drugs and Psychotropic Substances Act, 1987 (hereinafter referred to as 'NDPS Act' for short) and is on investigation.

4. While pursuing regular bail to the petitioner, who has

been in custody from 17.09.2022 onwards, the learned counsel for the petitioner would submit that the petitioner is innocent and nothing recovered from the conscious possession of the petitioner. It is submitted that the petitioner herein sat at the adjacent seat of the 1st accused and contraband was seized from the 1st accused. Therefore, the petitioner has no role in this occurrence and the petitioner got implicated in this crime without any material. Therefore, the petitioner deserves bail.

5. Whereas it is submitted by the learned Public Prosecutor that the prosecution records would suggest that the accused persons herein jointly engaged in transport of 338 grams of MDMA by B.A.No.9994/2023 4

carrying the same in the KSRTC bus and at that time it was found that the mobile phone belonged to the 1st accused was possessed by the 2nd accused. Therefore, the complicity of the 2nd accused is at par with the 1st accused in a case involving offence punishable under Section 29 of the NDPS Act. It is also pointed out that in such a case, grant of regular bail shall be subject to the rider under Section 37 of the NDPS Act.

6. In order to appraise the rival contentions, I have gone

through the documents available. Going by the recovery mahazar, where it is specifically stated that when the police party engaged in checking, inside the vehicle 2 persons sitting together were frightened. Accordingly, they were searched and 338 grams of MDMA possessed by the 1st accused was recovered. On search of the 2nd accused, the mobile phone belonging to the 1st accused also was recovered. Thus it appears that the previous and subsequent conduct of the 2nd accused along with the 1st accused, shows that

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the petitioner/2nd accused also had involvement in the transport of the contraband. It is relevant to note that in such circumstances Section 8 of the Evidence Act has application and the same shall be considered by the trial court during trial. Therefore, it is difficult to hold at this stage that the petitioner is

absolutely innocent and his stature is that of a third party traveller without any complicity in this matter.

7. Since in this matter huge quantity of MDMA of 338 grams is involved, this Court cannot grant bail to the petitioner without satisfying the twin conditions specified under Section 37 of the NDPS Act.

8. When the prosecution alleges possession of commercial quantity of contraband, the rider under Section 37 of the NDPS Act would apply. Section 37 of 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),-- B.A.No.9994/2023 6

(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.

9. On a perusal of Section 37(1)(a)(i), when the Public

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

B.A.No.9994/2023 7 bail.

10. 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.

11. It was further held that the Court while considering the

application for bail with reference to S.37 of the Act is not called 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

B.A.No.9994/2023 8 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.

12. 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. Ahmadaliev 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

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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. Jitendra Giri.

13. 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 specifically referred

B.A.No.9994/2023 10 under Section 37(1)(b) of the NDPS Act, the Court could not grant bail without recording satisfaction of the above twin ingredients.

14. 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 this petition stands dismissed. Sd/- (A. BADHARUDEEN, JUDGE) rtr/
B.A.No.9994/2023 11 APPENDIX OF BAIL APPL. 9994/2022 PETITIONER'S ANNEXURES Annexure A1 A CERTIFIED COPY OF THE ORDER DATED

03.12.2022 IN CRL.M.C. NO. 949/2022 PASSED BY THE COURT OF THE SPECIAL JUDGE NDPS ACT CASES/ADDITIONAL SESSIONS JUDGE-II, KALPETTA, WAYANAD.

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