Susmitha Philip vs State of Kerala

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Court : Kerala

Decided On : Sep-22-2022

Judge : Honourable Mr.Justice Viju Abraham

Appeal No. : Bail Appl./4891/2022

Appellant : Susmitha Philip

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE VIJU ABRAHAM THURSDAY, THE 22ND DAY OF SEPTEMBER 2022 / 31ST BHADRA, 1944 BAIL APPL. NO. 8569 OF 2021 AGAINST THE ORDER/JUDGMENTCRMC 2226/2021 OF II ADDITIONAL DISTRICT COURT,ERNAKULAM CRIME NO.36/2021 OF EXCISE RANGE OFFICE, ERNAKULAM

PETITIONER/9TH ACCUSED: ANFAS SIDHIQUE,AGED 22 YEARS S/O. SIDHIQUE, PUTHUKKADAN HOUSE, VENGOLA, KUNNATHU NADU TALUK, ERNAKULAM DISTRICT, 683 556. BY ADVS. RAJEE P MATHEWS AMRUTHA P S P.VIJAYA BHANU (SR.)

RESPONDENT/COMPLAINANT: STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, 682 031 BY PP SRI M.C.ASHI THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 22.09.2022, ALONG WITH Bail Appl..4581/2022 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE VIJU ABRAHAM THURSDAY, THE 22ND DAY OF SEPTEMBER 2022 / 31ST BHADRA, 1944 BAIL APPL. NO. 479 OF 2022 CRIME NO.36/2021 OF EXCISE RANGE OFFICE, ERNAKULAM PETITIONER/ACCUSED NO.7: SIFAN THAJ,AGED 22 YEARS,S/O THAJUDHEEN, THURUTHIKATTU KUNNUPARAMBIL HOUSE, CHALAKKAPPARA DESOM, KULAYATTIKKARA P.O. AMBALLOOR, ERNAKULAM DISTRICT, PIN-683 315 BY ADV NIREESH MATHEW RESPONDENT/COMPLAINANT: STATE OF KERALA REP BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, PIN-682 031 BY PP SRI.M.C.ASHI THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 22.09.2022, ALONG WITH Bail Appl..4581/2022 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE VIJU ABRAHAM THURSDAY, THE 22ND DAY OF SEPTEMBER 2022 / 31ST BHADRA, 1944 BAIL APPL. NO. 884 OF 2022 CRIME NO.36/2021 OF EXCISE RANGE OFFICE, ERNAKULAM PETITIONER/ACCUSED NO.8: DHEEPESH,AGED 24 YEARS RESIDING AT DOWDEL HOUSE, KARAPPARAMBU VENGERI VILLAGE, KOZHIKODE TALUK KARUVASSERY (PO), KOZHIKODE PIN - 673010 BY ADVS. P.V.ANOOP PHIJO PRADEESH PHILIP M.P.PRIYESHKUMAR

K.V.SREERAJ RESPONDENT/STATE & COMPLAINANT: 1 STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, KOCHI - 682031 2 ASSISTANT COMMISSIONER, EXCISE CRIME BRANCH, ERNAKULAM PIN - 682031 BY SR.PP SRI.C.K.SURESH THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 22.09.2022, ALONG WITH Bail Appl..4581/2022 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE VIJU ABRAHAM THURSDAY, THE 22ND DAY OF SEPTEMBER 2022 / 31ST BHADRA, 1944 BAIL APPL. NO. 991 OF 2022 CRIME NO.36/2021 OF EXCISE RANGE OFFICE, ERNAKULAM PETITIONER/ACCUSED NO.14: SANEESH T S, AGED 24 YEARS, S/O.SANTHOSH, THEVARUPARAMBIL HOUSE, VALLIVATTOM P O THRISSUR DISTRICT, PIN - 680123 BY ADVS. V.JOHN SEBASTIAN RALPH VISHNU CHANDRAN RALPH RETI JOHN APPU BABU SHIFNA MUHAMMED SHUKKUR ANILA T.THOMAS ALBIN ANTO RESPONDENT/COMPLAINANT: STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA ERNAKULAM, PIN - 682031 BY SR.PP SRI.C.K.SURESH THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 22.09.2022, ALONG WITH Bail Appl..4581/2022 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE VIJU ABRAHAM THURSDAY, THE 22ND DAY OF SEPTEMBER 2022 / 31ST BHADRA, 1944 BAIL APPL. NO. 4581 OF 2022 CRIME NO.36/2021 OF EXCISE RANGE OFFICE, ERNAKULAM PETITIONER/ACCUSED NO.21: MUHAMMED SAHAD,AGED 25 YEARS MUSTHIKUND HOUSE,

MULIYAR MULIYAR P O KASARAGOD, PIN - 671542 BY ADV SAIJO HASSAN RESPONDENT: STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, PIN - 682031 BY SR.PP SRI.C.K.SURESH THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 22.09.2022, ALONG WITH Bail Appl..479/2022, 884/2022 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE VIJU ABRAHAM THURSDAY, THE 22ND DAY OF SEPTEMBER 2022 / 31ST BHADRA, 1944 BAIL APPL. NO. 4891 OF 2022 AGAINST THE ORDER/JUDGMENTSC 378/2021 OF DISTRICT COURT & SESSIONS COURT, ERNAKULAM CRIME NO.36/2021 OF EXCISE RANGE OFFICE, ERNAKULAM

PETITIONER/12TH ACCUSED: SMT.SUSMITHA PHILIP,AGED 40 YEARS D/O.C.G.PHILIP, CHOLAKATH HOUSE, ARAKKEARAMBU ROAD, COCHIN-682002. RP NO. 83/2021, VANITHA JAIL, VIYYUR, THRISSUR. BY ADV P.V.ANIL RESPONDENT: THE STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,ERNAKULAM - 682031 BY SR.PP SRI.C.K.SURESH THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 22.09.2022, ALONG WITH Bail Appl..4581/2022 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE VIJU ABRAHAM THURSDAY, THE 22ND DAY OF SEPTEMBER 2022 / 31ST BHADRA, 1944 BAIL APPL. NO. 6018 OF 2022 CRIME NO.36/2021 OF EXCISE RANGE OFFICE, ERNAKULAM PETITIONER/ACCUSED NO.15:

MASHOOD,AGED 28 YEARS,S/O HAMSAKOYA C.V HOUSE,KAIKKOTTUMPADAM PARAMB OLAVANNA VILLAGE,KOZHIKODE, PIN - 673019 BY ADVS. FRANCIS ASSISI AJEESH S.BRITE STEPHY JOSEPH ANVARSHA SHAMSU RESPONDENT/COMPLAINANT: STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, PIN - 682031 BY SR.PP SRI.C.K.SURESH THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 22.09.2022, ALONG WITH Bail Appl..4581/2022 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

VIJU ABRAHAM, J.

....
.... Dated this the 22nd day of September, 2022

ORDER

These are all regular bail applications arising out of the same crime and therefore they are heard and disposed of together.

2. Petitioners are accused Nos. 9, 7, 8, 14, 21, 12 and 15 in Crime

No. 36/2021 of Ernakulam Excise Range registered alleging commission of offences punishable under Sections 22(c), 25 and 29 of the Narcotic Drug and Psychotropi Substances Act, 1985 (in short, NDPS Act). The prosecution allegation is that on 19.08.2021 at about 1.40 a.m., the Excise Enforcement and Anti Narcotic Special Squad, Ernakulam acting on a tip-off conducted a search in Marhaba Apartment, Vazhakala, and seized 83.896 grams of MDMA illegally kept for sale in an apartment in the 1st floor of C block and arrested accused Nos. 1 to 5.

3. The case of the petitioner in B.A. No. 8569/2021 who is the 9th

accused in the above-said crime is that he has absolutely no connection with the above-said crime. It is also submitted that even going by the prosecution case, the petitioner was not found in possession of any contraband articles or transported or transmitted the same. Other than with the 3rd accused, the petitioner does not have any acquaintance with any of the other accused. An amount of Rs. 2 Lakhs was transferred to the account of the 3rd accused by the petitioner in connection with the purchase of a used car for the petitioner. Petitioner is in custody from 22.09.2021 and that the charge sheet is already

laid. Petitioner has no other criminal antecedents. Though he moved an application before the Sessions Court, the same was rejected as per Annexure B order.

4. The case of the petitioner in B.A. No. 479/2022 who is the 7th

accused in the above-said crime is that he has been falsely implicated in the above-said crime. Petitioner has never conspired and aided in the commission of the offence and the only allegation against the petitioner is that he has provided financial assistance to procure the contraband and also aided in the commission of the offence. Petitioner got acquainted with the 1st accused who was in possession of a Rot Wheeler dog and had business in the sale of dogs and the petitioner has only acted as an agent for the sale of dogs through the 1st accused. Petitioner has also financially helped the 1st and 5th accused at the time of their marriage. Petitioner is implicated only on the basis of the confession statement of the co-accused which is inadmissible as per the judgment in Tofan Singh v. State of Tamil Nadu, (2021) 4 SCC

1. Petitioner further relies on the judgment in State by (NCB) Bengaluru v.

Pallulabid Ahmad Arimutta and Others, 2022 SCC OnLine SC 47, to contend for the position that bail cannot be denied when the allegation against the accused is only based on financing, call records and confession. The petitioner also relies on the order in B.A. No.79/2022 wherein the accused in another case was granted bail by this court, in a similar circumstance. Petitioner submits that he is in custody from 14.9.2021.

5. The case of the petitioner in B.A. No.884/2022 who is the 8th

accused in the above-said crime is that he has absolutely no connection with the alleged crime and that he has been arrayed as an accused only based on bank transactions with other accused persons and such transactions happened in connection with selling and purchase of second-hand vehicles which is the business of the petitioner. It is further submitted that some of the friends of the petitioner who have no bank account have also used his bank account facility. No contraband was seized from the petitioner. Though the petitioner moved an application for bail, the same was rejected as per Annexure A order by the Sessions Court. Petitioner submits that he is in custody from 20.9.2021.

6. The case of the petitioner in B.A. No. 991/2022 who is the 14th

accused in the above-said crime is that he has absolutely no connection with the alleged crime and that he has been arrayed as an accused only on the basis of call data details and that he has some financial transaction with the other accused. Petitioner is arrested on 21.10.2021. Application for bail moved before this court was rejected as per Annexure A1 and by the Sessions Court on three occasions as is evidenced from Annexure A2 to 4 orders.

7. The case of the petitioner in B.A. No. 4581/2022 who is the 21st

accused in the above-said crime is that he has absolutely no connection with the alleged crime and that he has been arrayed as an accused only on the basis of some alleged financial transaction and further that the petitioner is in custody from 24.11.2021. An earlier application for bail filed before the Sessions Court was rejected by Annexure 1 order.

8. The case of the petitioner in B.A. No. 4891/2022 who is the 12th

accused in the above-said crime is that she has absolutely no connection with the alleged crime. The specific case of the petitioner is that there is not even a single financial transaction between A1 to A11 and the petitioner. Petitioner is in custody from 30.09.2021. The statement of A1 to A5, A8, A9, A10, and A13 does not reveal any role of the petitioner in the alleged crime. The petitioner is a tuition teacher by profession. Though she moved an application for bail before this court, the same was rejected as per Annexure A51 order.

9. The case of the petitioner in BA. No. 6018/2022 who is the 15th

accused in the above-said crime is that the petitioner is totally innocent of the charges levelled against him. The only allegation against him is that he has transferred an amount of Rs. 6000/- to the 1st accused. Petitioners brother is running a textile shop and petitioner is working in that shop. The 1st accused, who is his neighbour, offered to supply dress materials to the shop run by the petitioners brother, and therefore the amount was transferred. Further case of the petitioner is that even though the contraband was originally considered to be MDMA, in the chemical analysis report it was found to be methamphetamine hydrochloride. Further case of the petitioner is that the contraband seized from various places is clubbed together to make it a commercial quantity and further that sample was taken after mixing the contraband, which is against Standing Orders issued in this regard.

10. The learned Senior Public Prosecutor seriously opposed the

application for bail mainly contending that the investigation revealed that all the petitioners are actively involved in the alleged crime and further that a huge quantity of contraband which is of commercial quantity is seized. It is further submitted that the modus operandi employed by the accused was to travel in high-end vehicles along with women and ferocious dogs so as to escape from the attention of the law enforcement agencies. Earlier applications filed by the 12th accused and the 14th accused were dismissed

by this Court in B.A. No. 9306/2021 and B.A. No. 9496/2021. The investigation revealed that the kingpin behind the alleged crime is the 1st accused who is involved in another NDPS crime, which is now pending trial. The CDR details reveal that all the accused were in constant contact with each other during the relevant point in time.

11. As per the prosecution allegation, the 7th accused funded the

1st accused for procurement of the contraband and investigation revealed that there were monetary transactions between them and also had constant telephonic contacts with the 1st accused and other accused and also obtained contraband from the 1st accused and was actively involved in the sale of the contraband mainly by organizing drug parties, etc. The 7th accused was in constant contact with the 1st accused and there were huge monetary transactions from the account of the 1st accused and that he has funded for procurement of the contraband and also involved in the sale of the contraband and as per the direction of the 1st accused, amounts were transferred in connection with the alleged crime. Call records also reveal that he was in constant contact with many of the accused involved in the alleged crime. The investigation also revealed that the 8th accused had several monetary transactions through bank with the 1st accused and the investigation further revealed that these amounts were transferred for the purchase of contraband and he has funded the 1st accused for procurement of the contraband. It is also revealed in the investigation that he was in constant contact with many of the accused over the phone. The allegation against the 9th accused is that he was also in contact with the 1st accused and he has procured contraband from the 4th accused for the purpose of sale and amounts were transferred to the account suggested by the 4th accused and was part of the conspiracy and was involved in organizing drug parties. Call records reveal that he was in constant contact with many of the accused especially the 4th accused. The investigation also reveals that the amount given by the 4th accused is deposited in the account of the 9th accused and the same was transferred to other accounts as per the direction of the 4th accused. The allegation against the 12th accused is that she along with A1 to A6 organized drug parties for the sale of the contraband and was also actively involved in the conspiracy. The WhatsApp chat details also reveal that the 12th accused was in contact with the other accused. Investigation also revealed that she was in constat contact with many of the accused over phone. The learned prosecutor further contended that the investigation also revealed that the 12th accused provided facility to keep the two ferocious dogs used for the alleged crime and also arranged legal help to accused nos.

1 to 5. The allegation against the 14th accused is that he was actively involved in the conspiracy and has organized drug parties along with the 1st

and other accused. He was actively involved in the retail sale of the contraband and has also transferred amounts from the sale proceeds to the account of the other accused. Investigation revealed that accused no. 14 had account transfers with other accused i.e., 1st, 4th, 11th, and 21st accused. The call records also reveal that he had constant contact with many of the accused involved in the present crime. The allegation against the 21st accused is that he is actively involved in the retail sale of the contraband and also involved in the conspiracy and had monetary transactions with 7th, 9th, 11th, and 14th accused and also had telephonic contacts with many of the accused. As regards accused no. 15, the prosecution case is that he was in constant contact with the 1st accused and has also funded the transaction and had also transferred amounts to various accounts as directed by the 1st accused. The call records also show that he was in constant contact with most of the accused and the bank account details show that there were also monetary transactions with other accused persons. The learned public prosecutor further submitted that other than the confession statement there are sufficient materials to connect the petitioners with the alleged crime and therefore the decisions relied on by the petitioners are not applicable in the

facts and circumstances of the case. As regards the reliance placed by the

petitioner in the order in BA No. 79/2022, it is contended that it is an order

passed in respect of a totally different case.

12. One of the main contention taken by the petitioners in all these

cases is that samples were taken in total violation of the provisions of Standing Order No. 1/89 and therefore it vitiates the case of the prosecution and therefore they are entitled to bail. The petitioners rely on the judgment of the Delhi High Court in Amani Fidel Chris v. Narcotics Control Bureau, 2020 SCC OnLine Del 2080; Noor Aga v. State of Punjab, (2008) 16 SCC 417; Union of India v. Mohanlal, (2016) 3 SCC 379; Gaunter Edwin Kircher v. State of Goa, (1993) 3 SCC 145 and also orders passed by the Madhya Pradesh High Court in MCRC

No. 19405/2022, Telangana High Court in Crl. Pet. No. 4428/2022, Delhi High Court in B.A. No. 3076/2020, Allahabad High Court in Crl. Misc. B. A. No. 18303/2020 to contend for the position that they are entitled to bail when sampling was done in violation of the Standing Orders issued in this regard. It is also contended that the decision in Amani Fidel Chris's case supra was confirmed by the Apex Court in SLP (Crl) No. 5088/2020.

13. Per contra, learned Senior Public Prosecutor relied on the

judgment of the Apex Court in Sumit Tomar v. State of Punjab, (2013) 1

SCC 395; Supdt., NCB Chennai, v. R. Paulsamy, (2000) 9 SCC 549; Union of India v. Ram Sumujh and another, (1999) 9 SCC 429; NCB v. Kishan Lal, (1991) 1 SCC 705; and also the judgments of this court in Sameer v. State of Kerala, 2021 (5) KHC 338 and Chandran v. State of Kerala, 2008 (2) KLT 513 to contend for the position that petitioners are not entitled to bail on a contention that sampling was not done in accordance with Standing Orders and there is procedural violation.

14. Now let me consider the contention of the petitioners in the light

of the Standing Order and the judgments/orders relied on by them. The petitioners specifically refer to Clause 2.4 of Circular No.1/1989 under the head General Procedure for Sampling, Storage, etc. Clause 2.4 reads as follows:- In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than one package/container. (underline supplied)

15. The petitioners rely on the judgment in Amani Fidel Chriss

case supra which has also referred to Circular No. 1/89 and held in the said case that drawing of sample neither confirmed to the procedure prescribed under Section 52-A of the NDPS Act nor under the Standing Order and acquitted the accused therein. The specific contention in Amani Fidel Chriss case supra is violation of the procedure prescribed under the Standing Order. Firstly, that is a decision in an appeal against conviction, and going through the judgment it is seen that acquittal was granted taking into consideration other aspects including non-examination of independent witnesses and further that though the prosecution alleged two different recoveries, the first recovery was disbelieved by the trial court. Further, it is to be seen that relevant provision in the said Standing Order which is applicable to the facts of the present case is Clause 2.4 which only says that normally, it is advisable to draw one sample from each packet/container in case of seizure of more than one package/container and the learned Public Prosecutor contended that even by a mere reading of the said Clause, it does

not appear to be made mandatory. Another important aspect to be considered is that even though the appeal against the said judgment was dismissed, the Apex Court has consciously left open the question of law and therefore, the judgment in Amani Fidel cannot be treated as final and conclusive.

16. Reliance is placed on Noor Agas case supra which is also an

appeal against the order of conviction which was decided taking into consideration various other aspects. Essentially the question decided is that the procedure taken by the Customs Department in destroying the case property was found to be irregular and it is in the said context it was said that the physical evidence being the property of the court should be disposed of strictly in accordance with the law.

17. Mohanlals case supra was dealing with a case where the court

was considering a conflict between the statutory provisions governing taking of samples and the Standing Order issued by the Central government and the court only directed that the Central Government to re-examine the matter and take suitable steps so as to avoid confusion in the minds of the authorities while discharging their official duty and in the operative portion of the judgment it was has held that in the matter of seizure and sampling the court should comply with Section 52-A of the Act which mandates the sampling shall be done under the supervision of the learned Magistrate. I feel that the judgment did not consider the question that is mooted by the petitioner herein.

18. Gaunter Edwin Kirchers case supra heavily relied on by the

counsel for the petitioners was also an appeal against conviction. In the said case, two cylindrical pieces of Charas having 7 gms and 5 gms respectively were seized and sample was taken only from the cylindrical piece having 5 gms and sent for chemical examination whereas no sample was taken from the cylindrical piece having 7 gms of Charas and the Apex Court held that as no sample was taken from one portion, it cannot be held that petitioner therein was in possession of 12 gms of Charas and can be punished only for having in possession of small quantity. I am of the opinion that the facts of the present case are not similar to that being considered in the said

judgment.

19. Learned counsel for the petitioners also relied on orders of the

various High Courts whereby bail was granted on the ground of taking samples in violation of the Standing Orders in this regard. Most of the orders were passed relying on the judgment in Noor Agas case supra, Gaunter Edwin Kirchers case supra and Amani Fidel Chris's case.

20. Now let me consider the judgments relied on by the prosecution

in support of their contention. The learned prosecutor relied on the judgment

in Sumit Tomars case supra in which the Apex Court was considering the effect of taking samples after mixing the contraband and held that merely because different punishments have been prescribed depending on the quantity of the contraband, mixing of two bags will not cause any prejudice to the appellant therein and rejected the contention taken by the appellant therein that police should have taken two samples each from the two bags. The prosecutor also relies on the judgment in Mohanlals case supra to contend that the Apex Court has held that soon after the seizure is made further proceedings as contemplated under Section 52A of the Act should be followed and the Apex Court has only said that the

Central Government should take necessary steps since the Standing Order in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of duties. He further relies on judgment in Chandrans case supra, though one under the Abkari Act, which held that when several bottles were seized, it is not necessary that sample need be taken from each bottle. The learned public prosecutor further relies on the

judgment in Sameers case supra wherein the contraband was identified by

an Excise Official who is an expert and therefore drawing of samples from each packet is not necessary and the question as to whether Excise Official who has identified the article is an expert or a competent authority cannot be looked into while considering a bail application and that can only be considered at the time of trial. Relying on the judgment in Paulsamy's case supra it was contended that whether there was procedural irregularity etc cannot be looked into at the time of grant of bail. Learned public prosecutor also relies on the judgment in Ram Samujh's case supra to contend for the position that the specific reason for incorporating Section 37 of the NDPS Act was to avoid drug offenders being released on bail on technical grounds and therefore an accused in an NDPS case could be released on bail until and unless the mandatory conditions provided in Section 37 are satisfied. Prosecutor also relies on the judgment in Kishan Lals case supra and contended that bail can be granted only subject to the limitation contained in Section 37 of the NDPS Act.

21. It is seen that the judgment of the Apex Court in Sumit Tomars

case supra was rendered subsequent to Gaunter Edwin Kirchers case supra by a bench of co-equal strength which specifically considered a similar issue and rejected the contentions taken that the investigating agency should have taken two samples each from the two bags without mixing. The Apex Court was considering the effect of taking samples after mixing the contraband and held that merely because different punishments have been prescribed depending on the quantity of the contraband, mixing of two bags will not cause any prejudice to the appellant therein and rejected the contention taken by the appellant therein that police should have taken two

samples each from the two bags. The Division Bench of this court in Chandrans case supra, though in a matter arising out of the provisions in the Abkari Act, considered a similar question after referring to the judgment in Gaunter Edwin Kirchers case supra held that checking of sample from one bottle will be enough to confirm the value of the articles in all the bottles and that if a large number of similarly labelled bottles purported to contain same type of article are seized, the chemical examination can be done by taking one bottle or a certain number of bottles selected at random. In these batch of cases other contentions raised are regarding having no conscious possession of the contraband, violation of the Standing Orders, and also that the bail cannot be denied when the allegation against the accused is only based on financing, call records and confession and to substantiate their contention petitioners rely on the judgments referred above including Tofan Singh's case and Pallulabid Ahmad Arimuttas case supra and the other cases cited supra. Though Amani Fidel Chris's case supra considered the issue regarding sampling, it was in an appeal filed against conviction. Further, though the SLP filed against the said judgment was dismissed by the Apex Court, the question of law decided in Amani Fidel Chris's case supra was left open. Further, prima facie I find considerable force in the contention taken by the learned public prosecutor that in the Standing Order relied on by the petitioners in the matter of sampling when various packets are seized, the circular only says that it is advisable to draw samples from each packet and therefore it cannot be considered as mandatory and violation if any cannot be looked into at the time of bail and could be raised only at the time of trial. I am

not inclined to accept the contention of the petitioners based on the judgment

in Gaunter Edwin Kirchers case supra, Amani Fidel Chris's case supra and other orders of the various High Courts relied on by the petitioner, especially in view of a judgment of the Supreme Court in Sumit Tomars case supra which was rendered subsequent to Gaunter Edwin Kirchers case supra and also the judgment relied on by the public prosecutor in Chandrans case supra. Further in Sameers case supra, Paulsamy's case supra, and Ram Samujh's case supra the court has held that procedural irregularity, etc, if any, cannot be looked into at the time of grant of bail. This position has been reiterated by the Apex Court in Union of India v Md. Nawas Khan, 2021 (10) SCC 100 and held that when the issue is as to whether the procedure laid down under the NDPS Act is complied or not, the same cannot be looked into at the time of grant of bail and can only be decided at the time of trial, as the same is a question of fact. At this point, this court cannot evaluate the evidence on record while exercising discretion under Section 439 Cr.PC Likewise, the question as to whether there was conscious possession and whether financing, call records and confession could be reasons that could be considered at the time of considering the bail application, the same was answered in Md. Nawas Khan's case supra in which it was further held that absence of possession of contraband on the person will not absolve them of the level of scrutiny required under Section 37 of the NDPS Act. It was further held that whether the accused were traveling along with the co-accused, CDR analysis of the mobile phones which show regular touch with the other accused, etc are relevant considerations at the time of consideration of bail application. In the present case, I am of the prima facie opinion that other than the confession statement of the co-accused there are other materials to connect the accused with the alleged crime, though of course, the veracity and acceptability of those materials are all matters to be considered at the time of trial.

22. The Apex Court recently in the Narcotics Control Bureau v. Mohit Aggarwal, 2022 SCC OnLine SC 891, after referring to Tofan Singhs case (supra) held as follows:

17. Even dehors the confessional statement of the respondent and the other co-

> accused recorded under Section 67 of the NDPS Act, which were subsequently retracted by them, the other circumstantial evidence brought on record by the appellant-NCB ought to have dissuaded the High Court from exercising its discretion in favour of the respondent and concluding that there were reasonable grounds to justify that he was not guilty of such an offence under the NDPS Act. We are not persuaded by

the submission made by learned counsel for the respondent and the observation made in the impugned order that since nothing was found from the possession of the respondent, he is not guilty of the offence for which he has been charged. Such an assumption would be premature at this stage.

18. In our opinion the narrow parameters of bail available under Section 37 of

the Act, have not been satisfied in the facts of the instant case. At this stage, it is not safe to conclude that the respondent has successfully demonstrated that there are reasonable grounds to believe that he is not guilty of the offence alleged against him, 'or him to have been admitted to bail. The length of the period of his custody or the fact that the chargesheet has been filed and the trial has commenced are by themselves not considerations that can be treated as persuasive grounds for granting relief to the respondent under Section 37 of the NDPS Act.

It is also profitable to extract the observation of the Apex Court while considering the impact of Section 37 when deciding a bail application in Union of India v. Ram Samujh, (1999) 9 SCC 429, which reads as follows:

7. It is to be borne in mind that the aforesaid legislative mandate is required to

be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death- blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved.

23. The offence alleged against the petitioners are very grave and

serious in nature. Earlier applications filed by the 12th and 14th accused were rejected by this court. Since the quantity involved is a commercial one, the rigor of Section 37 of the NDPS Act will come into play. Petitioners could not substantiate by cogent reasons that the twin conditions in Section 37 of the Act are satisfied so as to grant bail.

24. Taking into consideration the fact that the final report is already filed and the fact that petitioners are in custody for a long, there will be a direction to the trial court to expedite the trial of the case.

25. It is also made clear that these prima facie observations are made for the limited purpose of deciding this bail application and the above opinion expressed shall not be regarded as opinion on merits, during trial.

26. As per the latest statistics discernable from the paper report etc.,

the trafficking and trade in narcotics have assumed serious and alarming proportions in recent times, affecting a sizeable section of the public, particularly adolescents and students. Before parting with the case, this court expresses its great concern about the present situation. Though it is commendable that the Government has taken various steps in this regard, including educating the student community about the dangerous effect of the use of drugs, the authorities should take every step for continued surveillance, especially nearby the schools and colleges so as to save the new generation from its dreadful impact. There will be a direction to the State Government and the Law Enforcing Agencies including the Police and Excise Department to be more vigilant to curb the menace of drug trafficking and deal with it with an iron hand.

Registry is directed to forward a copy of this order to the Chief Secretary to the Government, Kerala for information and appropriate action. All these bail applications are accordingly dismissed. Sd/- VIJU ABRAHAM JUDGE cks