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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 30<sup>TH</sup> DAY OF JANUARY 2025 / 10TH MAGHA, 1946

BAIL APPL. NO. 8769 OF 2024

CRIME NO.1/2022 OF NARCOTICS CONTROL BUREAU, KOCHI, ERNAKULAM

BAIL APPL. NO.7182 OF 2023 OF HIGH COURT OF KERALA

PETITIONER/ACCUSED NO.2:

SHUAIB.A.S,  
AGED 29 YEARS  
S/O.ABDUL VAHEED, RESIDING AT BISMI MANZIL,  
KABARADI, KOITHOORKONAM P.O., KEEZHTHONNAKKAL  
VILLAGE, THIRUVANANTHAPURAM TALUK OF  
THIRUVANANTHAPURAM DISTRICT, PIN - 695584  
BY ADVS.  
J.R.PREM NAVAZ  
MUHAMMED SWADIQ

RESPONDENTS/STATE & COMPLAINANT:

- 1 STATE OF KERALA,  
REPRESENTED BY PUBLIC PROSECUTOR,HIGH COURT OF  
KERALA, ERNAKULAM, PIN - 682031
- 2 THE NARCOTIC CONTROL BUREAU,  
SUB ZONE, COCHIN, ERNAKULAM DISTRICT, REPRESENTED  
BY THE STANDING COUNSEL., PIN - 682011  
R1 BY PUBLIC PROSECUTOR SRI.JIBU.T.S  
R2 BY ADV.R.VINU RAJ, SPL.PUBLIC PROSECUTOR,  
NARCOTIC CONTROL BUREAU

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON  
13.1.2025, THE COURT ON 30.01.2025, PASSED THE FOLLOWING:

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*B.A. No.8769 of 2024*

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*Dated this the 30<sup>th</sup> day of January, 2025****O R D E R***

This is the third application for regular bail filed by the petitioner, who is the 2<sup>nd</sup> accused in Occurrence Report No.1 of 2022 of Narcotics Control Bureau, Kochi, Ernakulam.

2. Heard the learned counsel for the petitioner as well as the learned Special Public Prosecutor appearing for the Narcotics Control Bureau (‘NCB’ for short). Perused the records.

3. The prosecution case in brief is that, 80 grams of MDMA was seized from the possession of the 1<sup>st</sup> accused, at about 12.30 pm on 09.11.2021. Thereafter, the 1<sup>st</sup> accused was arrested and has been detained in custody. Further investigation revealed the involvement of accused Nos. 2 to 7 in this crime. The

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specific allegation of the prosecution against the 2<sup>nd</sup> accused is that, the 2<sup>nd</sup> accused had arranged a lodge to the 1<sup>st</sup> accused to collect the contraband which was seized from his possession and also he had paid rent for the said room. That apart, the petitioner also effected payment of money to the other accused, in the matter of purchase of the contraband. The petitioner was arrested on 29.01.2022 on the basis of the said allegations. In this matter, prosecution alleges commission of offences punishable under Sections 8(c) r/w 22(c) and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short), by accused Nos.1 to 7.

4. The learned counsel for the petitioner submitted that, the prosecution materials are quite insufficient to connect the petitioner in this crime. Merely, relying on the confession statement of the other accused, he was booked and detained in custody. It is also argued that, in the confession statement, given by the 1<sup>st</sup> accused, as on 22.11.2021 or thereafter, on 13.01.2022, nothing stated as to

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involvement of the 2<sup>nd</sup> accused, though he had referred the names of certain other accused in this crime. Referring to the confession statement of the 1<sup>st</sup> accused, the learned counsel for the petitioner placed plea of absolute innocence in so far as the petitioner is concerned and also submitted that confession statement is inadmissible in evidence. While pressing for grant of regular bail, on the above substratum, it is submitted that in the facts of the given case, the rigor under Section 37 is not applicable.

5. It is submitted by the learned counsel for the petitioner that, 2 earlier applications for bail filed by the petitioner were dismissed by this Court, on the *prima facie* finding that the petitioner also has involvement in this crime and on holding that the rider under Section 37 of the NDPS Act could not be diluted in the instant case, where commercial quantity of contraband, to the tune of 80 grams of MDMA, was seized. But the learned counsel for the petitioner pointed out the change in circumstances to take a

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different view in this matter. According to the learned counsel for the petitioner, as per Annexure-A1 order (order in B.A.No.7182/2023 dated 17.11.2023), this Court directed the Special Court to dispose of the case without fail, with liberty to the petitioner to apply for bail again, in case the trial could not be completed within a period of six months from 28.10.2023. According to the learned counsel for the petitioner, even though trial started, the same not so far completed. It is submitted that, after completion of the prosecution evidence, the prosecution side produced additional witnesses with the prayer to summon them also. But the trial court disallowed the same. Challenging the said order, Crl.M.C.No.8400/2024 has been filed and Annexure A2 stay order has been passed therein. It is submitted further that even though Crl.M.C.No.8400/2024 was disposed of on 06.01.2025, the direction was to reconsider the prayer in a fresh application to be filed under Section 311 of Cr.P.C and nothing beyond that. It is

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submitted further that the accused, though alleged to be involved in a very serious crime, has been in custody from 29.01.2022 onwards, where trial could not be completed because of the laches of the prosecution in citing the necessary witnesses to prove the prosecution case. The learned counsel also argued that, as per the evidence already given, the involvement of the petitioner is in no way established. He has placed reliance on a decision of the Apex Court in *Ankur Choudhary v. State of Madhya Pradesh*, SLP(Crl.).No.4648/2024 dated 28.05.2024, where the Apex Court considered a case, and granted bail to the accused therein, where commercial quantity of contraband was involved.

6. Whereas the learned Special Prosecutor would submit that the specific allegations against the petitioner in this crime are that the 2<sup>nd</sup> accused had arranged a lodge to the 1<sup>st</sup> accused, who collected the contraband which was seized from his possession, and also he had paid rent for the said room. That apart, the petitioner

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also offered payment of money to the other accused in the matter of purchase of contraband.

7. According to the learned Special Public Prosecutor, the evidence given by PW4, who is the manager of AAFA Tower hotel, was that the 1<sup>st</sup> and 2<sup>nd</sup> accused reached the hotel and demanded room for 4 days and room was provided for them @ Rs.500/- per day as rent. According to PW4, the 1<sup>st</sup> and 2<sup>nd</sup> accused together booked the room, though he did not notice any other persons visiting them. Further he deposed that Rs.1,000/- each was paid earlier as advance on two occasions and the remaining amount was given through GPay by the 2<sup>nd</sup> accused and he identified accused 1 and 2 at the dock.

8. Coming to the decision highlighted by the learned counsel for the petitioner, in the said case the allegation against the accused was that he had committed offences punishable under Section 8 r/w Sections 22 and 29 of the NDPS Act. Earlier, the

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accused approached the Apex Court and as per order dated 15.05.2023 his bail plea was not entertained by the Apex Court. However, liberty was granted to him to approach the trial court for bail after examining the panch witnesses. Panch witnesses, according to the accused, viz., PW3 and PW4, were examined and they did not support the prosecution. In such circumstance, when bail was applied for before the trial court, the trial court rejected the application on the pretext that the Investigating Officer to be examined also to be a panch witness. Therefore, his bail application was rejected. The High Court also rejected the bail application affirming the findings of the trial court. When the accused therein approached the Apex Court again, the Apex Court found that the panch witnesses did not support the prosecution case and it was found by the Apex Court that the Investigating Officer could not be considered as a panch witness. Thereafter it was observed that *“failure to conclude the trial within a reasonable*



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*time resulting in prolonged incarceration militates against the precious fundamental right guaranteed under Article 21 of the Constitution of India, and as such, conditional liberty overriding the statutory embargo created under Section 37(1)(b) of the NDPS Act may, in such circumstances, be considered”* and finally bail was granted. Reading the ratio of the above case, in the said decision, the Apex Court released the accused on bail mainly holding that the panch witnesses did not support the prosecution case and no evidence brought against the petitioner, from the panch witnesses. It is further held that failure to conclude the trial within a reasonable time resulting in prolonged incarceration militates against the precious fundamental right guaranteed under Article 21 of the Constitution of India and the conditional liberty overriding the statutory embargo created under Section 37(1)(b) of the NDPS Act to be considered. Here, the petitioner also produced the copy of deposition of PW4 to contend that no evidence so far

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forthcoming against the petitioner so as to apply the ratio in *Ankur Choudhary*'s case (*supra*).

9. In this matter, the prosecution allegation as to involvement of the petitioner in this crime by arranging lodge to the 1<sup>st</sup> accused and stayed along with him during the relevant period of purchase of the contraband, is supported by the evidence of PW4, the hotel manager. His involvement by entrusting money to the 1<sup>st</sup> accused to purchase the contraband is the other allegation. In such a case, it could not be held that the available evidence gives a clean chit to the petitioner similar to the case dealt by the Apex Court.

10. Anyhow, as of now, CrI.M.C.No.8400/2024 filed by the NCB seeking to examine certain witnesses, was disposed on 06.01.2025 by another learned Single Judge. As per the order, even though the learned Single Judge found the reason for dismissal of the earlier petition, viz., CrIM.P.No.4651/2024, without assigning

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reasons for summoning the additional witnesses was to be justified, one more opportunity was given to the prosecution to file a fresh 311 petition clearly stating the reasons for examining the additional witnesses in consideration of the seriousness of the offences and this Court also observed that the time limit for disposal issued by this Court in the earlier bail application of the accused need not deter the court from exercising the power under Section 311 of Cr.P.C. As of now, the Special Court has to consider a fresh 311 petition to be filed within one week from 06.01.2025 to proceed further in this matter. It is worthwhile to note that Section 37 of the NDPS Act is a special provision which would deal with grant of bail to the accused persons where commercial quantity of contraband was involved. But as per the decision cited by the Apex Court, it was observed that, failure to conclude the trial within a reasonable time resulting in prolonged incarceration militates against the precious fundamental right guaranteed under Article 21

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of the Constitution of India and as such conditional liberty overriding the statutory embargo created under Section 37(1)(b) of the NDPS Act be considered. Going by the observation of the Apex Court, in cases where prolonged incarceration militates against the precious fundamental right guaranteed under Article 21 of the Constitution of India, it overrides Section 37(1)(b) of the NDPS Act. In order to hold that Article 21 of the Constitution of India overrides Section 37(1)(b) of the NDPS Act, the delay in trial at the instance of the prosecution is the 'decisive factor'. That is to say, the delay should be the sole contribution of the prosecution and the accused has no role in getting the matter prolonged, in any manner. In cases, where dilatory tactics even in remote possibility, negligible liability, bare minimum or mere impossibility is the volition, hand out or benefactum of the accused, it could not be held in such cases that personal liberty under Article 21 of the Constitution of India overrides Section 37(1)(b) of the NDPS Act.

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Thus in cases where commercial quantity of contraband is involved and the accused continues in custody for years, say for example, for more than 3 years in the instant case, where the laches on the part of the prosecution alone is the reason in finalising the trial, continuous incarceration shall be addressed so as to protect liberty of an individual embodied under Article 21 of the Constitution, which overrides the embargo created under Section 37(1)(b) of the NDPS Act. That is to say, in a case where trial could not be completed due to the absolute laches on the part of the prosecution, bail plea at the instance of the accused on the said ground is liable to be considered in suppression of the rider under Section 37(1)(b) of the NDPS Act, in tune with Article 21 of the Constitution of India.

11. In the instant case, it is emphatically clear that the prosecution failed to incorporate all the necessary witnesses in the report and after having examined all the witnesses already cited,

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the prosecution filed a petition under Section 311 of Cr.P.C to summon additional witnesses, without showing the purpose of their examination. The same was dismissed by the trial court holding so, as the prime ground. This Court also was not inclined to interfere with the finding of the Special Court, though in the said order, one more opportunity was provided to the prosecution to file a fresh petition under Section 311 of Cr.P.C with reasons in consideration of the gravity of the offences alleged to be committed. Thus it is evident that the lethargy on the side of the prosecution is the reason for non disposal of the matter as directed by this Court within the time frame and the petitioner in no way has played anything which would stand in the way of trial even on remote possibility or mere impossibility. In such a case, in consideration of the personal liberty of the petitioner guaranteed under Article 21 of the Constitution of India which overrides the effect of Section 37(1)(b) of the NDPS Act, the petitioner, who has been in custody from

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29.01.2022 is liable to be released on bail.

12. In the result, this petition stands allowed. The petitioner is enlarged on bail on the following conditions:

- i. The 2<sup>nd</sup> accused/petitioner shall be released on bail on executing bond for Rs.75,000/- (Rupees seventy five thousand only) with two solvent sureties each, for the like sum to the satisfaction of the jurisdictional court concerned.
- ii. The 2<sup>nd</sup> accused/petitioner shall not intimidate the witnesses or tamper with evidence.
- iii. The 2<sup>nd</sup> accused/petitioner shall co-operate with the trial and shall appear before the court, during trial.
- iv. The 2<sup>nd</sup> accused/petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of this case, so as to dissuade him from disclosing such facts to the court.

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- v. The 2<sup>nd</sup> accused/petitioner shall not leave India without prior permission of the jurisdictional court.
- vi. The 2<sup>nd</sup> accused/petitioner shall surrender his passport, if any, on the date of his release, before the trial court. If he has no passport, he shall file an affidavit in this regard on the date of execution of the bond.
- vii. The 2<sup>nd</sup> accused/petitioner shall not involve or indulge in any other offence during the currency of bail and any such event, if informed or came to the notice of this Court, the same alone shall be a reason to cancel the bail hereby granted.

However, the learned Special Judge is directed to expedite the trial in this case within a period of two months from the date of receipt of a copy of this order, without fail and to report compliance.

It is specifically made clear that the observation in the order



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regarding the evidence of PW4 is only for the purpose of considering the bail plea and the same has no binding effect on the trial court. The trial court shall appreciate the evidence independently to take a decision on merits.

*Sd/-****A. BADHARUDEEN, JUDGE***

rtr/