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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

THURSDAY, THE 3RD DAY OF AUGUST 2023 / 12TH SRAVANA, 1945

BAIL APPL. NO. 5596 OF 2022

CRIME NO.26/2021 OF EXCISE ENFORCEMENT & ANTI NARCOTIC SPECIAL

SQUAD, ERNAKULAM

PETITIONER/ACCUSED NO.2:

NANDAKUMAR N
AGED 27 YEARS
S/O.NARAYANA SWAMI, CHITRA HOUSE, KUNNATHURMEDU P.O,
VENAM COLONY, CHIRAKKAD, PALAKKAD DISTRICT.,
PIN - 678013

BY ADV NIREESH MATHEW

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN - 682031

BY ADV PUBLIC PROSECUTOR

SRI.C.S.HRITHWIK-SR.PP

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
03.08.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER

The petitioner is the 2nd accused in Crime No.26/2021 of Excise Enforcement & Anti Narcotic Special Squad, Ernakulam. The offences alleged against the petitioner are under Sections 20(b)(ii)C, 25 and 29 of the NDPS Act.

2. The prosecution case is that, on 28.04.2021 at about 3.15 a.m., the accused Nos.1 and 2 were found transporting 140 KG of Ganja in a pickup van with Registration No.KL-09/AF-2210 through Vallarpadam Container Road near Anavathil Junction, Eloor. The petitioner was arrested on the same day, and since then, he has been under judicial detention. This application for regular bail is submitted in such circumstances.

3. Heard Sri.Nireesh Mathew, learned counsel for the petitioner and Sri.C.S. Hrithwik, learned Public Prosecutor for the State.

4. The learned counsel for the petitioner submits that the petitioner is innocent of all the allegations. It is pointed out that the petitioner has been in judicial custody for the past more than two years, and the chances of completing the trial in the near future are remote. The petitioner has no criminal antecedents, and therefore, there is no purpose in keeping the petitioner under detention. The learned counsel for the petitioner also places reliance upon the decision rendered by the Hon'ble Supreme Court in **Rajuram v. State of Bihar** [(2023) I Supreme 670], **Dheeraj Kumar Shukla v. The State of**



Uttar Pradesh [2023 KLT OnLine 1398 (SC)], **Mohd Muslim @ Hussain v. State (NCT of Delhi)** [2023 (3) KLT 504 (SC)] and also on the decision rendered by this Court in **Fasil v. State of Kerala & Anr.** [2023 (3) KHC 212].

5. On the other hand, the learned Public Prosecutor opposes the said application by pointing out that the petitioner was found along with contraband articles. As per the prosecution case, the petitioner was driving the vehicle at the relevant time, and 140 KG of Ganja was found concealed along with the boxes of mangoes kept in the said vehicle. It is also contended that, merely because of the reason that the petitioner has been in custody since 28.04.2021, he cannot be granted bail, as the quantity involved is the commercial quantity, and the rigour under Section 37 of the NDPS Act is applicable.

6. I have carefully gone through the records. As far as the allegations raised against the petitioner are concerned, it can be seen that ample evidence could be collected by the prosecution indicating the role of the petitioner. He was driving the said vehicle, and as pointed out by the learned Public Prosecutor, the contraband article, which is in huge quantity, was found concealed in the vehicle among the boxes of mangoes. Since the quantity is voluminous, under normal circumstances, the same cannot be transported without the knowledge of the person driving the vehicle. Besides the same, there is a confession statement from the petitioner. Indeed, the confession



statement by itself cannot be relied on in the light of the decision rendered by the Honourable Supreme Court in **Tofan Singh v. State of Tamil Nadu [(2021) 4 SCC 1]** . However, if there are other materials indicating the role of the petitioner and the same corroborates the admissions in the confession statement, such materials can be relied on. In this case, the facts that the petitioner was found driving the vehicle at the relevant time, and in the said vehicle, the contraband article in huge quantity (140 KG) was found concealed are crucial circumstances, showing the role of the petitioner. Since such quantity makes out a voluminous package, it would be very difficult to conclude that such transportation was made without the knowledge of the person driving the vehicle. Thus, from the materials placed on record, a strong prima facie case as to the involvement of the petitioner is made out, and there is nothing to believe that the petitioner is not involved in the offence and he would not commit the offence in future.

7. While taking a decision on the application for bail in a case involving commercial quantity of the contraband article, the crucial aspect to be looked into is the rigour under section 37 of the NDPS Act, in the form of the conditions in subsection(1) (b) (ii) thereof, namely, the satisfaction of the court while granting bail 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. The purpose of such a stipulation for the grant of bail is also to be kept in mind while considering the said issue. The non-obstante clause in section 37 of the Act makes it clear that the said conditions are in addition to the conditions for bail contemplated under section 439 of the Cr.P.C. In this regard, one of the crucial aspects to be noticed is that even for the offence under Section 302 of the IPC, to which the death penalty is prescribed as the maximum punishment, no conditions as contained in section 37 of the NDPS Act are stipulated for grant of bail. This indicates the care and caution taken by the legislature while prescribing the procedure to deal with the offences under the NDPS Act. This is evidently because of the huge impact of drug abuse and drug trafficking on Society as a whole, as the said impact is not confined to any individual or individuals or his/their family. It is something affecting the society as a whole, by corrupting the minds of the young generation. The consumption of drugs, trafficking thereof and their ill effects are like a contagious disease eating up the youth of the country, thereby causing severe adverse impacts on the potential of the country as such. There is a rampant increase in drug trafficking cases nowadays, and not a single day passes without reports of the detection of drug trafficking cases. This court cannot ignore the fact that the substantial number of the bail applications coming up before this court are related to the offences under the provisions of the NDPS Act, in which most of the accused are young



and bright citizens of our country, who are expected to contribute to the future growth and the well being of the country. Therefore the strict implementation of the provisions of section 37 of the NDPS Act is the need of the hour, and any relaxation thereon will have serious and irreparable ramifications. A message, which is loud and clear, as to the stringent provisions of the NDPS Act, and its strict implementation is required to the sent. In this case, the contentions raised by the petitioner are to be dealt with, with that object in mind.

8. The learned counsel for the petitioner, places reliance upon the decision of the Hon'ble Supreme Court in **Rajuram's case** and **Dheeraj Kumar Shukla's case**, cited supra, wherein the Honourable Supreme Court, taking note of the period of detention undergone, the rigour under Section 37 of the NDPS Act was dispensed with. However, it is to be noted that the aforesaid orders were passed by the Hon'ble Supreme Court, presumably invoking the powers under Articles of 142 of the Constitution of India, which is exclusively available for the Hon'ble Supreme Court. It is to be noted in this regard that, both the above decisions were rendered by the benches consisting of two judges, whereas in **Narcotics Control Bureau v. Mohit Aggarwal [2022 (4) KLT OnLine 1011(SC)]**, it was observed by a three judges bench of the Honourable Supreme Court as follows: “..... *The length of the period of his custody or the fact that the charge sheet 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.”

9. Thus, as Section 37 of the NDPS Act specifically stipulates certain conditions to be satisfied for the purpose of granting bail, I am of the view that the same cannot be ignored by this Court while exercising the powers under Section 439 of Cr. P.C, merely because some time is elapsed since the date of the arrest of the accused. Even in **Mohd Muslim @ Hussain’s** case, the observations made by the Hon’ble Supreme Court are with regard to the manner in which the rigour under Section 37 of the NDPS Act is to be considered, and there is absolutely no observation therein that the conditions in section 37 can be ignored as such. Indeed, in the said decision, the Honourable Supreme Court made certain observations with respect to the circumstances under which the prolonged incarceration of the accused can be a ground for granting bail. However, the said observations were mainly with reference to the stipulations in section 436A of the Cr.P.C, which provides for the release of the accused on bail upon he undergoes imprisonment for one-half of the maximum period of imprisonment prescribed for the said offence. In this case, the period of incarceration is nowhere near the said period.

10. When it comes to the observations made by this Court in **Fasil’s**



case, it can be seen that, in the said decision, this court referred to certain circumstances, if existed, the rigour under section 37 of the Act would get diluted. The observations therein were made by this court after placing reliance upon the decisions rendered by the Hon'ble Supreme Court in **Rajuram's case**, and **Dheeraj Kumar Shukla's** cases referred to above. However, **Fasil's** was a case in which the quantity involved was just above the commercial quantity, whereas in this case, the quantity is seven times the commercial quantity fixed as per the schedule. Besides the same, in **Fasil's** case, the only observation is that, in certain circumstances referred to therein, the rigour of Section 37 can be diluted, and this would not mean that such rigour can be avoided altogether. The factual circumstances of the case, such as the role of the accused, criminal antecedents, the quantity involved etc., are relevant factors to be taken note of, for deciding whether the rigour is to be diluted or not. In other words, it would only mean that, in certain circumstances, the intensity of the rigour would be lesser, and under no circumstances the rigour as such can be avoided.

11. When coming to the facts and circumstances of the case, it is to be noted that I have already found that there is nothing on record which would enable this court to record the satisfaction of the twin conditions contemplated under section 37 of the NDPS Act. In such circumstances, I am of the view that this is not a fit case in which bail can be granted to the petitioner.



12. Earlier, when the matter came up for consideration, a report was called for by this Court from the First Additional Sessions Court, Ernakulam, as to the probable time within which the trial of the said case can be completed. In response to the same, a report dated 15.06.2023 was placed on record by the learned Sessions Judge, wherein it was mentioned that the trial could be completed within a period of ten months from 16.06.2023. In the facts and circumstances of the case, I do not find the said period unreasonable.

In such circumstances, I am not inclined to grant bail to the petitioner, and this application is disposed of directing the learned Sessions Judge to make every endeavour to complete the trial of said case within the period mentioned in the report dated 15.06.2023.

Sd/-
ZIYAD RAHMAN A.A.
JUDGE