

IN THE SPECIAL COURT FOR THE TRIAL OF NIA CASES, ERNAKULAM

Present: Sri. Anil.K.Bhaskar, Judge for NIA Cases

Wednesday the 29th day of September, 2021/ 7th Aswina, 1943

Crl.MP No. 96/2021

in

S C No.01/2020/NIA/KOC

Petitioner:

Union of India represented by National Investigation Agency, Kochi.

**By Sri. Arjun Ambalappatta
Public Prosecutor, NIA**

Accused No.3

C.P. Usman @ Usman @ M. Usman @ Mahesh @ Faizal (A3), S/o. Aboobacker, aged 42 years, House No. 8/226A, Melethil House, Odompatta, Chembarassery, Pandikkad, Malappuram.

By Adv. Sri. Thushar Nirmal Sarathy.

This Criminal M.P coming on for hearing before me on 29.09.2021 and the Court on the same day passed the following:-

ORDER

1. This is an application filed by the National Investigation Agency, Kochi under 43(D)(2)(B) of the Unlawful Activities (Prevention) Act, 1967 in short UA(P) Act, 1967, seeking police custody of A3 Usman for seven days.

2. **Facts and history of the case:** The above case was initially registered by Kerala Police on 01.11.2019, under Section 120B of IPC and Sections 20, 38 and 39 of UA(P) Act, against A1 Allen Shuhaib, A2 Thwaha Fasal and A3 Usman. A1 and A2 were arrested from the spot, A3 fled away from the scene and

absconded. Later the investigation was taken over by NIA. After completing the investigation NIA filed final report against A1 to A3 for the offences punishable under Section 120B of IPC and Sections 38 and 39 of UA(P) Act. In addition to that A2 is charged for the offence under Section 13 of the UA(P) Act. On its basis, this court took cognizance and the above case taken on file against A1 to A3. A1 is on bail, A2 is in judicial custody and coersive steps were taken to secure the presence of A3 who was absconding.

3. Thereafter the investigating officer obtained the permission of this court to conduct further investigation to unearth the role of other suspects behind the larger conspiracy of the case. During the course of further investigation two persons by name Vijith Vijayan and Eldose Wilson were added as additional accused in the above crime. Sri.Eldose Wilson turned approver. After completing further investigation NIA filed supplementary charge sheet before the court, on its basis this court took cognizance and the case against Vijith Vijayan is numbered as SC 1/2021, and is pending consideration before this court. Accused Vijith Vijayan is in judicial custody.

4. While so, A3 Usman was arrested by Anti Terrorist Squad of Kerala on 14.09.2021 in another case and was produced before the District and Sessions Court, Manjeri on 15.09.2021. He was sent to police custody of ATS, Kerala for 10 days and is now in judicial custody of that court detained in High Security Prison, Viyyoor. NIA then filed Crl.M.P. No.94/2021 to allow further investigation in this crime to verify the role played by A3 in this case by taking him into police custody

and also to question the accused pertaining the evidence already collected. That application stands allowed by this court on 27.09.2021.

5. As requested by NIA vide CrI.M.P. No.92/2021, this court issued production warrant requiring the Jail Superintendent, High Security Prison to produce A3 Usman before this court for the purpose of the proceedings against him. Accordingly A3 Usman produced before this court on this day. As permitted by this court Usman was formally arrested by the NIA from the court premises. He is remanded in judicial custody to High Security Prison, Viiyoor till 27.10.2021. Now comes the present custody application. It is accompanied with an affidavit sworn by the investigating officer.

6. The learned Prosecutor would submit that, accused Usman is a full time member or professional revolutionary of CPI(Maoist) party, holding the position of Area Committee Member (ACM) in the proscribed organisation. During the investigation of the case he was absconding. Therefore, as part of the further investigation, his custody is highly necessary to unearth the role played by him in this case and also to question him pertaining to the evidence already collected. Unless he is given in police custody, it will be prejudicial to the prosecution as well as the accused herein since the accused has not been able to speak freely with this agency. It is therefore submitted that custodial interrogation of A3 is highly necessary for a minimum of 10 days.

7. Copy of the petition/affidavit served to Advocate Thushar Nirmal Saradhi appearing for the accused. He opposed the application. It is contended

that no sufficient reason has been placed for getting police custody. It is pointed out that the allegation in Para 9 of the affidavit is contrary to the allegation in the charge sheet already submitted before the court.

8. Heard both sides.

9. One legal question to be answered is that whether, at post cognizance stage, police custody of an accused person who was absconding till that time can be granted in aid of further investigation to ascertain the involvement of this particular accused. In other words, at post cognizance stage, process can only be issued to the person accused thereof to compel them to face the trial.

10. This question has been answered in the affirmative by the Hon'ble Apex Court in the State through CBI v. Dawood Ibrahim Kaskar and others [2000(10) SCC 438]. In Paragraph 11 of the said case the Hon'ble Apex Court held as follows:-

“There cannot be any manner of doubt that the remand and the custody referred to in the first proviso to the above sub-section are different from detention in custody under Section 167. While remand under the former relates to a stage after cognizance and can only be to judicial custody, detention under the latter relates to the stage of investigation and can initially be either in police custody or judicial custody. Since, however, even after cognizance is taken of an offence the police has a power to investigate into it further, which can be exercised only in accordance with Chapter XII, we see no

reason whatsoever why the provisions of Section 167 thereof would not apply to a person who come to be later arrested by the police in course of such investigation. If section 309(2) is to be interpreted - as has been interpreted by the Bombay High Court in Mansuri (supra) - to mean that after the Court takes cognizance of an offence it cannot exercises its power of detention in police custody under Section 167 of the Code, the Investigating Agency would be deprived of an opportunity to interrogate a person arrested during further investigation, even if it can on production of sufficient materials, convince the Court that his detention in its (police) custody was essential for that purpose. We are therefore of the opinion that the words "accused if in custody" appearing in Section 309(2) refer and relate to an accused who was before the Court when cognizance was taken or when enquiry or trial was being held in respect of him and not to an accused who is subsequently arrested in course of further category is concerned he can be remanded to judicial custody only in view of Section 309(2), but he who come under the second category will be governed by Section 167 so long as further investigation continues. That necessarily means that in respect of the latter the Court which has taken cognizance of the offence may exercise its power to detain him in police custody, subject to the fulfillment of the requirements and the

limitation of Section 167”.

Therefore the application for police custody is legally maintainable.

11. Back to the facts the allegations against the accused are of serious nature. Accused Usman is booked in many number of cases with regard to his alleged association with terrorist outfit Communist Party of India Maoist. The definite case of the prosecution is that the police arrested the other two accused while they were deliberating with A3 Usman and as and when the police spotted them A3 fled away. Till recently he was absconding. He was arrested by the ATS of Kerala Police. ATS had obtained his custody for almost ten days. To unearth the role played by A3 Usman in this particular case, police custody is highly required.

12. The investigating officer had placed an affidavit setting out in detail the prior history of the investigation and the purpose for which the investigating agency is seeking the custody of Usman. Upon perusing the affidavit sworn by the investigating officer and the case records, I am satisfied that there is good ground for granting A3 Usman to NIA custody. On evaluation of facts, I find it necessary to grant seven days custody of the accused from today till 5th of October 2021.

In the result, the petition allowed as follows:-

a) I hereby authorise the detention of accused A3 Usman remanded in High Security Prison, Viyyoor in the custody of NIA for seven days from 2 p.m. on 29.09.2021 till 2 p.m. on 05.10.2021.

b) The investigating officer Sri. Abhilash M.J, Inspector of Police, NIA,

Kochi, is personally present before this court. He is permitted to take custody of accused Usman from the court.

c) The accused Usman shall not be ill treated during the period of custody. Further there shall not be any inducement, threat or promise from the side of NIA.

d) The accused Usman should be subjected to medical examination by a Doctor of Government service every 48 hours during his detention in NIA custody.

e) The accused Usman may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

f) The accused Usman shall be produced before this court before 2 p.m. on 05.10.2021 together with medical certificates issued by the Doctor in Government Service.

Dictated to the Confidential Asst., typewritten by her directly to computer system, corrected and pronounced by me in open court on this the 29th day of September, 2021.

Sd/-
Anil.K.Bhaskar
Judge, Special Court for NIA Cases

Appendix: Nil.

Id/-
Judge, Special Court for NIA Cases
(By Order)

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Sd/-
Sheristadar