

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

Present:- Shri. Kamanees K., Judge, Special Court for NIA Cases

Monday, the 19th day of September, 2022 / 28th Bhadra, 1944

Crl.MP. No. 211/2022

in

SC No. 04/2021/NIA/KOC

Petitioner / Accused No. 14 :-

Ahamed Fasly @ Fazly Bhai, aged 47,
S/o. Abdul Hasan, No.38/18,
Ibrahim Sahib Street, II Lane,
Mannady, Chennai, Tamil Nadu – 600001.

By Adv. Sri. Vishnu Babu.

Respondent / Complainant:-

National Investigation Agency, Cochin.
By Shri. Arjun Ambalapatta, Senior Public Prosecutor, NIA

This petition having been heard on 13/09/2022 and the Court on the this day passed the following:-

ORDER

1) The petitioner, initially arrayed as 14th accused, who was arrested on 01.10.2021 alleging offences under sections 7 r/w 25(1AA) of Arms Act, 1959, sections 38, 39 and 40 of the Unlawful Activities (Prevention) Act, is now in remand in Thrissur. He was granted pardon on his application for the same and his statement was recorded. Now the status of the petitioner is neither that of a remand prisoner nor that of a convict and his detention is illegal. Charge sheet

has already been filed against other accused persons in this case. He, a resident of Chennai and having school going children, wants to get enlarged on bail.

2) Objection has been filed by the NIA stating that the petition is liable to be dismissed *in-limine*. Confession statement of the petitioner/A14 was recorded under section 164 Cr.PC on 25.11.2021 and a petition for tendering pardon to accused Nos.3, 8 and 14 were filed on 04.12.2021 as CrI.MP No. 252/2021. The petitioner was examined and tender pardon on 22.07.2022. His evidence is inevitable to prove the guilt of other accused persons. If bail is granted to him, his life will be in danger. The other accused persons, against whom he is proposed to be examined, are very powerful and his life is under threat. Bail cannot be granted to him in view of the embargo under section 306(4)(b) of Cr.PC.

3) The discussions may commence from points wherein both the prosecution and accused are not at variance. Pardon has already been tendered to him on 22.07.2022 and he has accepted the same as per order in CrI.MP No. 252/2021. No bail had been granted to the accused No.14 prior to tender of pardon.

4) Before going into the merits of the bail applications put in by the accused, section 306(4) Cr.PC shall be quoted :-

“(4) Every person accepting a tender of pardon made under Sub-Section (1) -
(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;
(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.”

5) Therefore, there is a statutory embargo containing section 306(4)(b) Cr.PC in his case as he had not been released on bail yet.

6) This position had been dealt with in **Abdul Aziz vs. State of Kerala (MANU/KE/570/2019)**. It was held as follows by the High Court of Kerala :

“27. Therefore, this Court is of the considered opinion that a balanced and harmonious approach should be taken so that extremes from both sides are avoided. To hold that Sec. 306(4) would amount to a total prohibition and absolute fetter to release the approver on bail, is one extreme. On the other hand, to take the view that once an accused is granted pardon, he loses his status of an accused and become a witness and that therefore ordinarily the inherent powers under Sec. 482 of the Cr.P.C. could be exercised to release him on bail, is the other extreme. A realistic and golden middle ground has to be struck and it may not be possible to envisage a strait-jacket formula as to in what manner discretion is to be exercised by the High Court under Sec. 482 of the Cr.P.C. in cases of this nature. No straight jacket formula can be put forward. The basic approach should be that the provisions contained in Sec. 306(4)(b) of the

Cr.P.C. would amount to a general bar but that in rare and exceptional cases, the said provision will not amount to total prohibition and absolute fetter on the High Court in exercising the inherent powers conferred under Sec.482 of the Cr.P.C. to consider the plea of an approver to be released on bail, after weighing in various relevant aspects of the matter.

28. In the light of abovesaid aspects, this Court is of the considered opinion that the provisions contained in Sec. 306 (4) of the Cr.P.C. should be construed as a general bar in releasing the approver on bail, until the conclusion of the trial, if he is not already on bail, but at the same time, a vestige of discretion is available as per the inherent powers conferred on the High Courts as per Sec. 482 of the Cr.P.C. to consider the plea of the approver to be released on bail in rare and exceptional cases, after careful weighing of all relevant and crucial aspects of the case. So, this Court is of the view that the legal position laid down by this Court in Saidevan's Thampis' case (supra), Ismail's Case MANU/KE/10732016 : 2016 (3) KLT 445 : 2016 (4) KHC 26), Shammi Firoz's case (supra) do not require any serious reconsideration.”

7) Considering the facts and circumstances of this case, the volumes of narcotic drugs and arms/ammunitions recovered in this case and aspects of international ramifications involved, the general bar contained in section 306(4) (b) of Cr.PC assumes greater importance. The power to grant bail in such cases lies with the Hon'ble High Court only and this court should not expend its

jurisdiction for grant of bail in such matters.

8) I do not think that going into the merits of the bail shall be appropriate with the facts of this case.

In the result, the petition is dismissed.

Dictated to the Confidential Asst., transcribed and typewritten by her, corrected and pronounced by me in open court this the 19th day of September, 2022.

Appendix : Nil

// True copy //

Sd/-
Kamanees.K
Judge

Id/-
Judge

(By Order)

Sheristadar

Typed by: jcs
Comp.by: skp

CrI.M.P.No. 211/2022
in
SC No. 4/2021/NIA
Order Dated 19/09/2022