

IN TH E SU P R E M E COUR T OF INDI A
 CRIM I N A L A P P E L L A T E JUR I S D I C T I O N
 CRIM I N A L AP P E A L NO.1 3 6 8 OF 2 0 0 8
 [Arising out of SL P (Criminal) No.2 1 4 3 of 2 0 0 7]

NA RCOT I C S CONT R O L BUR E A U & ANR.Appellant(s)

VER SUS

USMA N @ USMA N HA J I & ORS.Respondent(s)

O R D E R

Delay condoned.

Leave granted.

This appeal is directed against the orders dated 21.8.2006 and 26.9.2006 passed in Bail Application No.3597 of 2006 and 5636 of 2006 respectively, by which the learned Single Judge of the High Court of Kerala has granted bail to the Respondents in a NDPS case in which they were found in illegal possession of 7.785 Kgs. of Heroin.

It may be pertinent to mention that the High Court, only a few months ago, had dismissed the two bail applications by reasoned orders.

Brief facts which are necessary to dispose of this appeal
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are recapitulated as under:-

Narcotics Control Bureau, Chennai Unit on 15.3.2006 intercepted K. P. Abdul Raza k and Moideen Kutty at Shornur Junction Railway Station, Palghat, when they were on their way to Chennai. During their personal search, 7.785 Kgs. of Heroin, concealed in false bottom of two suitcases, were seized.

Hence,

both the accused were arrested under Sections 8(C), 21(C), 27A, 28 and 29 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act").

Moideen Kutty was to carry the seized Heroin to Jeddah by a Saudi Airlines flight from Chennai. The said respondent in his statement under Section 67 of the ND P S Act deposed that another person by the name of Usman Haji (respondent No.1 herein) was also involved in the said crime. Accordingly, K. P . Abdul Raza k was arrested on the same day and his statement was recorded under Section 67 of the ND P S Act. Further investigation revealed that K. P . Abdul Raza k procured 7.785 kgs. of Heroin from one Vas antlal P atida r and transported the same through one Ra mu to Ker al a and was planning to illegally send it to Saudi Arabia through Moideen Kutty and Usman. After completion of investigation, Narcotics Control Burea u, Thiruvan anth apu r a m , filed a complaint before the Sessions Court, P al a k k a d, under Section 36(A)(a)(d) of the ND P S Act for offences under Section 8(C) read with Section 21(C), 27A, 28 and 29 of the ND P S Act, 1985 against all the aforesaid three accused persons- respondents.

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Usman @ Usman Haji filed a bail application (Crl. M.P . No.1145 of 2006) before the Sessions Court, P a ll a k k a d. By an order dated 27th March, 2006, the Sessions Judge, P a ll a k k a d, rejected the said bail application. Thereafter, Usman @ Usman Haji filed a bail application (Bail Application No.2326 of 2006) before the High Court of Ker al a. By an order dated 5th May, 2006, the said bail application was dismissed by a detailed order by the learned Single Judge of High Court of Ker al a. The order dated 5th May, 2006 reads as under:-

"O R D E R

In this petition filed under Section 439 Cr. P.C. the petitioner who is the third accused in O.R. No.1/06 of Narcotic Control Bureau, RIU, Thiruvan a nth apu r a m seeks his enlargement on bail. He was arrested on 15 / 03 / 2006 .

2. Learned counsel for the petitioner made the following submissions in support of his request for bail:-

3. The contraband Heroin was admittedly seized from accused 1 and 2 and not from the petitioner. There are only confession statements from accused 1 and 2 to the fact that it was the petitioner who had procured the contraband substance. Barring that there is no material to connect the petitioner with the offence. He has been in custody for 51 days.

4. The learned Special Public Prosecutor representing the Narcotic Control Bureau opposed the application.

5. The petitioner is stated to be the kingpin of the racket behind the clandestine drug trafficking. He is

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alleged to have procured 7.785 kgs. of Heroin through the first accused by financing the operation. It was at a time when the first accused was about to handover the contraband substance to second accused that the seizure and the arrest was made. Subsequently, on the strength of the confession statements given by Accused 1 and 2, the petitioner was also arrested. The petitioner has also confessed his role behind the financing of the operation drug traffic. Under these circumstances I am not inclined to hold both the grounds enumerated under Section 37(1)(b)(ii) of the N.D.P.S. Act are present in this case, so as to release the petitioner on bail.

This petition is accordingly dismissed.

Sd/-
V. Ramkumar
Judge"

Usman @ Usman Haji- Respondent No.1 herein, moved another bail application (Bail Application No. 2911 of 2006) before the High Court of Kerala. By an order dated 22nd May, 2006, a learned Single Judge of the High Court of Kerala dismissed the said bail application. The said order reads as under:-

"O R D E R

This is an application under Section 439 of the Code of Criminal Procedure. The Petitioner is the third accused O.R. No.1/ 2006 of Narcotic Cell Bureau, RIU, Thiruvananthapuram for the offence under Section 8(C), 21(C), 27A, 28 and 29 of the N.D.P.S. Act with respect to seizure of 7.785 Kgs. of Heroin from A1 and A2 on 15.3.2006. The accused petitioner is in custody from 15.3.2006. The case is that it is the third accused who had masterminded the operation and that the consignment was intended to be sent to Saudi Arabia. The contention of the petitioner is that there is violation of Section 42 of the Act. The application is strongly opposed by the counsel appearing for the Narcotic Bureau. I find that the investigation is only on initial stages. Considering the bulk

quantity of heroin involved, I find that the petitioner is not entitled to be released on bail at present. The bail application is dismissed.

Sd/-
K.R . Udaya Bhanu,
Judge."

Usman @ Usman Haji- Respondent No.1, filed yet another bail application (Bail Application No.3 5 9 7 of 2 0 0 6) before the High Court after two months of the dismissal of the earlier bail applications. By an order dated 2 1 . 8 . 2 0 0 6 , a learned Single Judge of the High Court allowed the bail application and directed release of Usman @ Usman Haji subject to certain conditions. The said order reads as under:-

"O R D E R

The Petitioner is the third accused in O.R. No.1/ 2 0 0 6 of Narcotic Control Bureau, Regional Intelligence Unit, Thiruvananthapuram, for the offence under Section 8(c) and punishable under Sections 2 1(c), 2 7 A, 2 8 and 2 9 of the Narcotic Drugs and Psychotropic Substances Act. There are four accused. They were found in illegal possession of 7.7 8 5 Kgs. of heroin. It is alleged that accused Nos. 1 and 2 were transporting the same from Rajasthan for sending it to Jeddah in Saudi Arabia, through the Saudi Airlines flight, at Chennai. It was due to the intelligence information that the officials of the Narcotic Control Bureau, went to accused Nos. 1 and 2, at platform No.2/ 3 , at Shornur Railway Station. Accused Nos. 1 and 2 were apprehended and contraband articles were seized from both of them, which were kept hidden in the false bottom of their suitcases. Both of them were arrested. The third accused, the petitioner herein, was arrested on 1 5 / 0 3 / 2 0 0 6 . He remains in judicial custody, thereafter. Hence, this application for bail.

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2. The Learned Special Public Prosecutor submitted that as 1 8 0 days are not complete, the prayer for bail may be rejected.

3. The Learned Counsel for the Petitioner submitted that the Petitioner is suffering from various ailments and has undergone treatment in the jail.

4. I have accordingly, directed the Special Public Prosecutor, to get the correct statement of facts from the jail.

5. The Special Public Prosecutor submitted that the Petitioner was having seasonal ailments and fever and no other serious ailments are reported.

6. Considering that the petitioner remains in judicial custody from 1 5 / 0 3 / 2 0 0 6 as well as the progress of the

investigation, I grant bail to the petitioner and release him from jail, imposing the following conditions:-

i. The Petitioner shall execute a bond for Rs. 50,000 / - , with two solvent sureties each for the like sum, to the satisfaction of the Sessions Court, Palakkad.

ii. The Petitioner shall report before the Superintendent of Police, Palakkad , once in a week, on every Monday, between 10 a.m. and 11 a.m., starting from 28 / 08 / 2006 , till the filing of the final report by the Investigating Officer. Thereafter, on the first working day of every month, between the same timings, till the final trial and disposal of the sessions case.

iii. The Superintendent of Police shall maintain the report of the Petitioner's reporting and his conduct, and shall forward the same, to the Investigating Officer of Narcotic Control Bureau, Regional Intelligence Unit, Thiruvananthapuram .

iv. The Petitioner shall not leave the State of Kerala, until the final trial and disposal of the sessions case, by the competent court of law.

v. The Petitioner shall surrender his passport, if any, in his possession, to the Investigating Officer. If there is no passport, he shall file an affidavit to that effect, stating the said fact.

vi. The Petitioner shall not interfere with the investigation or attempt to influence the witnesses or cause

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any hindrance, to the smooth conduct of the prosecution case.

Sd/-
(J.M. James)
Judge"

After grant of bail to Usman @ Usman Haji (respondent No.1 herein), Respondent Nos.2 and 3, namely, K. P . Abdul Raza k and Moideen Kutty respectively, also filed bail application (Bail Application No.5636 of 2006) before the High Court. By an order dated 26.9.2006 , a learned Single Judge of the High Court allowed their bail application and directed their release subject to certain conditions.

The Narcotics Control Bureau, aggrieved by the aforesaid two orders, has preferred this appeal by way of special leave petition before this Court. Pursuant to the notice issued by this Court, Respondent Nos. 1 to 3 are represented through their counsel.

Mr. A. Shar a n, learned Additional Solicitor General, UOI appearing for the appellant Bureau submitted that the impugned orders granting bail to the respondents are against the provisions of Section 3 7 of the ND P S Act. According to him, there is clear embargo of the Statute and the High Court has gravely erred in granting the bail to the respondents. The

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impugned orders have led to serious miscarriage of justice.

Section 3 7 of the ND P S Act reads as under:-

"3 7 . Offences to be cognizable and non-bailable. - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1 9 7 3 (2 of 1 9 7 4) , -

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 1 9 or section 2 4 or section 2 7- A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless -

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the Court is satisfied 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.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1 9 7 3 (2 of 1 9 7 4) or any other law for the time being in force, on granting of bail."

Mr. Shar a n, learned Additional Solicitor General also submitted that apart from the statutory embargo under section 37 of the ND P S Act even otherwise also there was no justification in granting bail to the respondents in a case in which such a huge quantity of Heroin has been recovered from their possession.

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Mr. Shar a n also pointed out that, only a few months ago, the two bail applications of the respondents were rejected by

reasoned orders of the High Court. Admittedly, the court did not have any fresh material or new circumstance justifying grant of bail to the respondents. He further submitted that even in cases of lesser magnitude the court would not be justified in releasing the accused on bail where the accused's earlier bail applications were dismissed only a few months ago.

According to Mr. Sharada, the respondents are involved in a very serious crime and granting bail to such accused is not only contrary to the statutory provisions but would be dangerous for the entire society.

Mr. Sharada submitted that the impugned orders are entirely erroneous, illegal and, even from the point of view of propriety, the impugned orders are totally unsustainable.

The learned counsel for the respondents submitted that once the discretion is exercised by the High Court, it would not be proper for this court to interfere with the same. He also submitted that since in the impugned orders no reasons for grant of bail have been provided, therefore, this case be remitted to the High Court with the direction that their bail applications be decided de-novo by a reasoned order.

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We have heard the learned counsel for the parties at length and perused the relevant records. According to section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the NDPS Act), there is statutory embargo in granting bail. Under Section 37 of the NDPS Act, the court would be justified in granting bail only in extremely exceptional and extraordinary circumstances. One of the important parameters as laid down in section 37 is where the court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any

offence while on bail. In the impugned order, the High Court has failed to give any reason justifying grant of bail. The impugned orders are entirely contrary to Section 37 of the NDPS Act.

We also do not see any propriety in granting bail to the respondents, particularly when their earlier bail applications were rejected only a few months ago. The court did not have any fresh material or any extraordinary circumstance justifying grant of bail.

This Court, in *Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav and Another* (2004) 7 SCC 528, has clearly laid down that there is further onus on the court to

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consider the subsequent application for grant of bail by noticing the grounds on which earlier bail applications had been rejected.

The Parliament was of the opinion that the earlier Central Acts namely, the Opium Act, 1857, the Opium Act, 1878 and the Dangerous Drugs Act, 1930 were inadequate to deal with serious cases of illicit drug trafficking and drug abuse at national and international level. Therefore, the Parliament in its wisdom enacted a comprehensive legislation namely The Narcotic Drugs and Psychotropic Substances Act, 1985 to deal with serious cases of illicit drug trafficking. The problem of drug trafficking is indeed a very serious problem of our country. This is not only adversely affecting our economy but is responsible for ruining our younger generation. Keeping all these factors in view, the NDPS Act 1985 was enacted.

The impugned orders are also contrary even from the point of view of propriety and discipline of the court. The court ought to have realized that the onus on the court was much greater, particularly when earlier bail applications were rejected

only a few months ago. The court admittedly did not have any fresh material or extraordinary circumstance justifying grant of bail particularly when the same High Court while rejecting the bail application in this case on 5 th May, 2 0 0 6 observed that "the petitioner (respondent no.1 herein) is stated to be the kingpin of

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the racket behind the clandestine drug trafficking.

The High Court in the impugned orders has ignored the ratio of number of judgments of this court dealing with the cases of illegal trafficking of narcotic drugs and psychotropic substances. This court in *Durand Didierv. Chief Secretary, Union Territory of Goa* 199 0 (1) SCC 9 5 expressed grave concern about the impact of narcotic drugs and psychotropic substances on the society. The court observed as under:-

"With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, the Parliament in its wisdom, has made effective provisions by introducing this Act 8 1 of 198 5 specifying mandatory minimum imprisonment and fine."

This court again in *Union of India v. Ram Samujh & Anr.* (19 9 9) 9 SCC 4 2 9 had an occasion to examine the impact of narcotic drugs and psychotropic substances on the society. The court expressed grave concern about the impact of these offences on society and particularly on innocent young victims. According to court, these offences are even more heinous than murder cases. The court in para 7 observed as under:-

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"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."

This court in the case of *Babu alias Tazmul Hossein v.*

State of Orissa (2001) 2 SCC 566 has observed that those who are involved in cases pertaining to narcotic drugs and psychotropic substances deserve no leniency or indulgence. The courts have to balance between the liberty of a citizen with the interest of society. The court observed that validity of section 37(1)(b) has been upheld. Therefore, it would be in the interest of society to keep persons involved in serious cases of NDPS Act behind bars. In this case the court observed as under:-

"In view of Section 37(1)(b) of the Act unless there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail alone will entitle him to a bail. In the present case, the petitioner attempted to secure bail on various grounds but failed. But those reasons would be insignificant if we bear in mind the scope of Section 37(1)(b) of the Act. At this stage of the case all that could be seen is whether the statements made on behalf of the prosecution witnesses, if believable, would result in conviction of the petitioner or not. At this juncture, we cannot say that the accused is not guilty of the offence if the allegations made in the charges are established. Nor can we say that the

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evidence having not been completely adduced before the Court that there are no grounds to hold that he is not guilty of such offence. The other aspect to be borne in mind is that the liberty of a citizen has got to be balanced with the interest of the society. In cases where narcotic drugs and psychotropic substances are involved, the accused would indulge in activities which are lethal to the society. Therefore, it would certainly be in the interest of the society to keep such persons behind bars during the pendency of the proceedings before the court, and the validity of Section 37(1)(b) having been upheld, we cannot take any other view."

In the instant case 7.785 kgs. of heroin has been recovered from the respondent nos.2 & 3, the value of which is

several crores in the international market.

Even releasing the respondents in this case may have disastrous consequences. In all probability the respondents would continue their nefarious activities of trafficking of narcotic drugs and psychotropic substances in a clandestine manner. The reason is obvious because of large scale profit involved in this business. In the instant case the court on the bail application on 5 th May, 2 0 0 6 specifically observed that the petitioner (respondent no.1 herein) is stated to be kingpin of the racket behind clandestine trafficking. In the facts of this case we are amazed how the High Court could grant bail to the respondents without having any fresh material on record or any extraordinary circumstance justifying grant of bail. Nothing is reflected in the impugned orders.

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On consideration of the totality of the facts and circumstances of the case, the impugned orders are clearly contrary to the provisions of law and unsustainable.

In this view of the matter, we are left with no option except to set aside the impugned orders. Consequently, the orders granting bail to respondent nos. 1 to 3 (Usman Haji, K. P. Abdul Raza k and Moideen Kutty respectively) are cancelled. The respondents shall be taken into custody forthwith. The appeal is accordingly allowed.

..... J.
(Dalveer Bhanda ri)

..... J.
(Harjit Singh Bedi)

New Delhi;
August 2 9, 2 0 0 8

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R E C O R D O F P R O C E E D I N G S

Petition(s) for Special Leave to Appeal (Crl) No(s).2 1 4 3 / 2 0 0 7

(From the judgment and order dated 2 1 / 0 8 / 2 0 0 6 in BA No. 3 5 9 7 / 2 0 0 6 & BA No. 5 6 3 6 / 2 0 0 6 of The HIGH COUR T OF K E R A L A AT E R N A K U L A M)

N A R C O T I C S C O N T R O L B U R E A U & A N R .

Petitioner(s)

V E R S U S

U S M A N @ U S M A N H A J I & O R S .

Respondent(s)

(With appln(s) for c/delay in filing S L P , stay and office report)
[F O R F I N A L D I S P O S A L]

Date: 2 9 / 0 8 / 2 0 0 8 This Petition was called on for hearing today.

C O R A M :

H O N ' B L E M R . J U S T I C E D A L V E E R B H A N D A R I
H O N ' B L E M R . J U S T I C E H A R J I T S I N G H B E D I

For Petitioner(s) Mr. A. Shar a n, ASG
Ms. Rajni Singh, Adv.
Ms. Sush m a Suri, Adv.

For Respondent(s) Mr. A. Raghun ath, Adv.

UPON hearing counsel the Court made the following

O R D E R

Delay condoned.

Leave granted.

The appeal is allowed in terms of the signed order.

(K.K. Chawla)
Court Master

(Neeru Bal a Vij)
Court Master

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[Signed order is placed on the file]