(2009) 10 KL CK 0005

In the High Court Of Kerala

Case No : Bail Application No. 5251 of 2009

K.K. Ashraf — APPELLANT

Vs

State of Kerala — RESPONDENT

Date of Decision : 13-10-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167(2), 439
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 19, 2, 21, 24, 27A

Citation : (2010) CriLJ 3141 : (2009) 4 ILR (Ker) 765 : (2011) 6 RCR(Criminal) 1699

Hon'ble Judges : K.T. Sankaran, J

Bench : Single Bench

Advocate : Babu S. Nair, for the Appellant; C.P. Udayabhanu, Special Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

K.T. Sankaran, J.—This is an application for bail u/s 439 of the Code of Criminal Procedure. The petitioner is the second accused in O.R. No. 2 of 2009 of the Narcotic Control Bureau, Regional Intelligence Unit, Thiruvananthapuram. The petitioner was arrested on 28.7.2009 and he is in judicial custody.

2. The offences alleged against the petitioner are under Sections 8(c) read with 21(c), 27A, 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

3. The prosecution case is that the Intelligence Officer, Narcotic Control Bureau, Thiruvananthapuram received reliable information that one Shanavas of Kottackal, Malappuram District (first accused) was indulging in drug trafficking of heroin between India and Maldives with the help of one Atif alias Kunhappa of Kondotty and a lady by name Sarju, residing at Thiruvananthapuram. He also got information that Shanavas had already procured half a kilogram of heroin from Atif and the same would be delivered to Sarju on 18.7.2009 near the Railway

Crossing Gate at Petta, Thiruvananthapuram. On 18.7.2009, Shanavas was apprehended. It was found that he was carrying 500 grams of heroin. He was arrested.

4. Later, K.K. Ashraf (the petitioner) and two of his friends (Saud Siraj and Mohammad Sajjad) were found near the District Jail premises of Thiruvananthapuram. On satisfying that they were also involved in the offence, summons were issued to them to appear before the Intelligence Officer. The petitioner and others appeared before the Intelligence Officer. Their statements were recorded u/s 67 of the NDPS Act. The statement of the petitioner was recorded with the help of Saud Siraj. However, the petitioner did not sign the statement. He only signed the acknowledgment of having taken certain documents from his possession. The prosecution case is that Atif alias Kunhappa mentioned by Shanavas is none other than the petitioner.

5. The prosecution case is that Shanavas purchased heroin from K.K. Ashraf @ Atif, Kondotty, who in turn purchased the contraband from a person in North India. It would appear that the contraband was purchased from the petitioner by Shanavas for a sum of Rs. 1,80,000/- and it was proposed to be sold to Sarju for a sum of Rs. 2,50,000/-. Sarju was to take the contraband to Maldives for sale.

6. Learned Counsel for the petitioner submitted that the petitioner is entitled to be released on bail since no complaint was filed within sixty days of his arrest as provided in Section 167(2) of the Code of Criminal Procedure. It was contended by the learned Counsel for the petitioner that since the heroin is not proved to be of a commercial quantity, Section 21(c) of the NDPS Act would not apply and only Clause (b) of Section 21 would apply. If Clause (b) of Section 21 applies, it is submitted that Sub-section (4) of Section 36A of the NDPS Act would not apply. If that is so, the petitioner is liable to be released forthwith.

7. Learned Public Prosecutor submitted that a quantity of 500 grams of heroin is involved in the case, which is a commercial quantity. It is not in dispute that heroin (diacetylmorphine) would constitute a commercial quantity within the purview of the Act, if the total quantity exceeds 250 grams. Small quantity is only up to 5 grams and any quantity between 5 grams and 250 grams would attract Section 21(b) of the NDPS Act.

8. For the sake of convenience, the relevant portion of Section 36A(4) is quoted below:

36A. Offences triable by Special courts:

(1)...

(4) In respect of persons accused of an offence punishable u/s 19 or Section 24 or Section 27A or for offences involving commercial quantity the references in Sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days":

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.

9. Section 21 of the Act reads as follows:

21. Punishment for contravention in relation to manufactured drugs and preparations:- Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable,

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;

(c) Where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees;

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

10. Section 27A provides for punishment for financing illicit traffic and harbouring offenders. It reads as follows:

27A. Punishment for financing illicit traffic and harbouring offenders:- Whoever indulges in financing, directly or indirectly, any of the activities specified in Sub-clauses (i) to (v) of Clause (viiia) of Section 2 or harbours any person engaged in any of the aforementioned activities, shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

11. In E. Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau, , the Supreme Court considered whether to constitute commercial quantity it is necessary that the content of the narcotic drug or psychotropic substance itself should satisfy the requirement of commercial quantity or whether it is sufficient if the mixture of narcotic drug or psychotropic substance and the neutral

substances weigh more than the required quantity to constitute commercial quantity. It was held by the Supreme Court thus:

15. It appears from the Statement of Objects and Reasons of the amending Act of 2001 that the intention of the legislature was to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentence, the addicts and those who commit less serious offences are sentenced to less severe punishment. Under the rationalised sentence structure, the punishment would vary depending upon the quantity of offending material. Thus, we find it difficult to accept the argument advanced on behalf of the respondent that the rate of purity is irrelevant since any preparation which is more than the commercial quantity of 250 gm. and contains 0.2% of heroin or more would be punishable u/s 21(c) of the NDPS Act, because the intention of the legislature as it appears to us is to levy punishment based on the content of the offending drug in the mixture and not on the weight of the mixture as such. This may be tested on the following rationale. Supposing 4 gm. of heroin is recovered from an accused, it would amount to a small quantity, but when the same 4 gm. is mixed with 50 kg. of powdered sugar, it would be quantified as a commercial quantity. In the mixture of a narcotic drug or a psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance. It is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute small quantity or commercial quantity. The intention of the legislature for introduction of the amendment as it appears to us is to punish the people who commit less serious offences with less severe punishment and those who commit grave crimes, such as trafficking in significant quantities, with more severe punishment.

...

19. ...We are of the view that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance(s), for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration.

12. In E. Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau, the Supreme Court considered the statement of objects and reasons concerning the Amendment Act of 2001 and also the rationalisation of sentence structure and providing strict bail provisions in respect of offenders who indulge in serious offences. In view of the judgment in E. Micheal Raj''s case, the prosecution has to establish that the narcotic drug or psychotropic substance constitutes the commercial quantity in order to attract Section 21(c) of the Act. In the present case, though the sample was sent for quantitative analysis within few days of seizure, report is not obtained so far. This Bail Application was being adjourned on several occasions providing maximum time to the prosecution to make

available the FSL report. Till now the report is not obtained. Therefore, there is no material before the court to come to the conclusion that the contraband involves commercial quantity.

13. Learned Public Prosecutor submitted that the requirement of proof that the content of the narcotic drug in the contraband constitutes commercial quantity arises only at the trial stage and it has no relevance while considering the Bail Application. I am not inclined to accept this contention in view of the specific provisions in the Act. In order to attract Section 21(c) of the Act, there must be material to show that commercial quantity is involved. Such material could normally be provided after a quantitative analysis is made. Of course, when the quantity involved is so large that even without any quantitative analysis it could be inferred that the contraband constitutes a commercial quantity, the position may be different. But in the present case, the quantity involved is only 500 grams. It cannot be inferred that the content of the narcotic drug in the contraband constitutes commercial quantity. That there occurs delay in getting the quantitative analysis report is not a ground to invoke Sub-section (4) of Section 36A of the Act on the ground that the contraband involves commercial quantity. Unless there are materials to indicate that commercial quantity is involved, the court cannot apply Sub-section (4) of Section 36A of the Act simply because an allegation is made without any material that commercial quantity is involved.

14. When the law is clear and it has been interpreted by the Supreme Court in E. Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau, it is not a consolation at all to the accused who has been incarcerated in jail that the report from FSL is not received. When the law provides severe punishment for drug trafficking and allied offences, there must be sufficient infrastructural facilities for implementing the Act and the provisions therein. The freedom of citizen cannot be denied only on the ground that we do not have the sufficient infrastructural facilities to prove before Court without delay that the contravention involves commercial quantity of the narcotic drug.

15. Learned Public Prosecutor submitted that Section 27A is involved in the case and therefore it does not matter whether the quantity involved is commercial quantity or not. The rigor u/s 37(1)(b) of the Act would apply if Section 27A is alleged, submits the prosecution. Section 37 reads as follows:

37. Offences to be cognizable and non-bailable:- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974):

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

(b) no person accused of an offence punishable for offences u/s 19 or Section 24 or Section 27A 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, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.

16. The Supreme Court interpreted the provisions of Section 37(1)(b) in Union of India (UOI) Vs. Rattan Mallik @ Habul, , wherein it was held thus:

13. It is plain from a bare reading of the non-obstante clause in the Section and Sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed u/s 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by Sub-clause (b) of Sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds". The expression ''reasonable grounds'' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. (Vide Union of India (UOI) Vs. Shri Shiv Shanker Kesari, . Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

17. Apart from mentioning Section 27A as an offence which is alleged to have been committed by the accused, there is no factual foundation for an allegation that they have committed an offence u/s 27A of the Act. There is no allegation that the petitioner indulged in financing, directly or indirectly, any of the alleged activities. There is also no allegation that the petitioner has harboured any person engaged in such activities. The materials on record show that the first accused Shanavas purchased the heroin from the petitioner (second accused) for a sum of Rs. 1,80,000/- and some amount is due to the petitioner. That means the consideration was not paid in full to the petitioner. What is the balance amount due is not forthcoming. The question is whether sale of narcotic drug to a person reserving a part of the price to be paid by the purchaser later would amount to "financing" within the meaning of Section 27A of the Act. The

expression "financing" is not defined in the Act. In Blacks Law Dictionary, the verbal meaning of "finance" is shown as "to raise or provide funds". In Chambers Dictionary, the meaning of "finance" is shown as "to manage financially; to provide or support with money". If a person has sold narcotic drugs or psychotropic substances on credit, could it be said that he has indulged in financing? If the full amount is realised by such sale, it cannot be said that he has indulged in financing. What difference it would make if a part of the consideration is reserved to be paid at a later point of time? To my mind, it cannot be said that receipt of part payment of the sale consideration of the contraband reserving the balance to be paid at a later point of time would attract the offence of "financing" within the meaning of Section 27A of the Act. Sale of a narcotic drug on credit is different from financing the activity of sale of a narcotic drug. It cannot be said that a person who did not receive the value in full of the drug would be in a more disadvantageous position than a person who got the full price of the same. The expression "financing" is not related to the payment of the value of the narcotic drug. On the other hand, it involves an activity other than sale or purchase of the narcotic drug, in which a person invests or provides funds or resources for facilitating the activities mentioned in Sub-clauses (i) to (v) of Clause (viiia) of Section 2 of the NDPS Act. "Financing" involves the presence of a party who is not a party to the sale of the drug. "Illicit traffic" is defined in Section 2(viiia) of the Act. Activities under Sub-clauses (i) to (v) of Clause (viiia) of Section 2 are referred to in Section 27A. Section 27A deals with persons who indulge in financing, directly or indirectly, any of the aforesaid activities. It is relevant to note that the expression "illicit traffic" as defined in Clause (viiia) of Section 2 includes financing, directly or indirectly, any of the activities mentioned in Sub-clauses (i) to (v). Clause (viiia) of Section 2 reads as follows:

2. Definitions:-...

(viiia) "illicit traffic", in relation to narcotic drugs and psychotropic substances, means:

(i) cultivating any coca plant or gathering any portion of coca plant;

(ii) cultivating the opium poppy or any cannabis plant;

(iii) engaging in the production, manufacture, possession, sale, purchase, transportation, warehousing, concealment, use or consumption, import inter-State, export inter-State, import into India, export from India or transhipment, of narcotic drugs or psycho-tropic substances;

(iv) dealing in any activities in narcotic drugs or psychotropic substances other than those referred to in Sub-clauses (i) to (iii); or

(v) handling or letting out any premises for the carrying on of any of the activities referred to in Sub-clauses (i) to (iv);

other than those permitted under this Act, or any rule or order made, or any condition of any licence, term or authorisation issued, thereunder, and includes:

(1) financing, directly or indirectly, any of the aforementioned activities;

(2) abetting or conspiring in the furtherance of or in support of doing any of the aforementioned activities; and

(3) harbouring persons engaged in any of the aforementioned activities;

18. Thus it is clear that in order to attract Section 27A, there must be an allegation of financing or harbouring as mentioned therein. There is no such allegation against the petitioner. Since no allegation of financing or harbouring is made, prima facie, I am of the view that Section 27A is not attracted and therefore the bar u/s 37(1)(b) would not be available in favour of the prosecution.

19. For the aforesaid reasons, I am of the view that the petitioner is entitled to be released on bail.

20. The petitioner shall be released on bail on his executing bond for Rs. 50,000/- with two solvent sureties for the like amount to the satisfaction of the Sessions Court, Thiruvananthapuram, subject to the following conditions:

a) The petitioner shall report before the Intelligence Officer, Narcotic Control Bureau, Thiruvananthapuram between 9 A.M. and 1 P.M. on alternate Mondays, till the final report is filed or until further orders;

b) The petitioner shall surrender his passport, if any, before the Sessions Court, Thiruvananthapuram;

c) The petitioner shall not leave the State of Kerala without prior permission from the Sessions Court, Thiruvananthapuram;

d) The petitioner shall not try to influence the prosecution witnesses or tamper with the evidence;

e) The petitioner shall not commit any offence or indulge in any prejudicial activity while on bail;

f) In case of breach of any of the conditions mentioned above, the bail shall be liable to be cancelled.

The Bail Application is allowed as above.

It is made clear that if the FSL report shows that the contravention involves commercial quantity, the investigating officer would be at liberty to take recourse to appropriate steps under law for the re-arrest of the petitioner.

