

(1998) 01 KL CK 0024

In the High Court Of Kerala

Case No : Criminal M.C. No's. 4702, 4709, 4710, 4711, 4712, 4716, 4717 and 4692 of 1997

V.K. Asokan and Others etc.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 19-01-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 293, 439

Kerala Abkari Act, 1077 — Section 41A

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 22, 27A, 37

Penal Code, 1860 (IPC) — Section 465, 47

Citation : (1998) CriLJ 1322 : (1998) 1 KLJ 193

Hon'ble Judges : S. Sankarasubban, J

Bench : Single Bench

Advocate : T.V. Prabhakaran, C.C. Thomas and T.A. Shaji, for the Appellant;
M.K. Damodaran, General, for the Respondent

Judgement

S. Sankarasubban, J.—Excepting Crl. M. C. No. 4695/1997, all the other Crl. M. Cs. are for regular bail, while Crl. M. C. 4695/97 is for anticipatory bail.

2. Crl. M. C. 4710/97 arises out of Crime No. 228/97 of Anthikkad Police Station. Crl. M. C. Nos. 4711/97 and 47 H797 arise out of Crime No. 230/97 of Irinjalakuda Police Station, while Crl. M. C. Nos. 4702/97 and 4716/97 arise out of Excise Crime No. 14/79 of Excise Range Office, Charpu, while Crl. M. C. 4712/97 arises out of Crime No. 29/97 of Excise Range Office, Thrissur, while Crl. M. C. 4709/97 arises out of Crime No. 508/97 of Town East Police Station, Thrissur. The above crimes are registered for offences under the Kerala Abkari Act (hereinafter referred to as "the Abkari Act") and the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as "the NDPS Act"). The petitioners before me are either Abkari contractors who have taken the licence for running toddy shops or the employees in their shops or godowns. On information that toddy is being mixed with noxious substances, the police authorities as well as Excise Authorities raided the godowns of the toddy

contractors as well as their shops and have registered the crimes against the contractors and some of the workers on the ground that the toddy is mixed with noxious substances and also psychotropic substances. All the petitioners had moved the Sessions Court, Thrissur for bail. But, the Sessions Judge did not grant bail. They have approached this Court u/s 439 of the Code of Criminal Procedure. I shall deal with the facts of each case separately.

Crl. M.C. 4710/1997 :

3. Crime No. 228/1997 is of Anthikkad Police Station. The bail application" is filed by accused 1, 3 and 4 in Crime No. 228/97. On 19-7-1997 at 4.30 p.m., a raid was conducted in the godowns of accused No. 1 situated in Manaloor Panchayat. The raid was conducted by the Circle Inspector of Police, Valappad and party as per the directions of the Superintendent of Police, Thrissur. At the time of raid, the third petitioner-one Devassy, one Raghu and one Raju (who are accused) were found to be mixing water, yeast, sugar etc. with toddy. Accused 7 and 8 were found to be mixing and making the above mixture in the rear side portion of the godown. They found about 56,300 litres of toddy in various containers made of wood and plastic. They also found about 21 sacks of sugar and 45 kgs yeast. The police seized the toddy as also the yeast and sugar. According to the prosecution, the samples collected were sent for chemical examination to the Chemical Examination Laboratory, Cochin. The examination result was received from the Laboratory on 6-10-1997. It shows that the toddy seized from the godown contained psychotropic substance like "Diazepam" and "Phenobarbitons". Pursuant to this, a report was filed before the Court and the offences u/s 22 of the NDPS Act were also incorporated. According to the case of the prosecution, during the investigation it was found that the accused were found to be manufacturing toddy artificially and adding narcotic and psychotropic substances to it. The consumption of such an adulterated toddy is injurious to health. According to the prosecution, since psychotropic substances are found, bail can be granted only according to Section 37 of the NDPS Act and for Abkari offences, u/s 41-A of the Abkari Act. It was their case that the offences alleged are very serious one and hence the petitioners should not be enlarged on bail. They also contended that if they are released on bail, there are possibilities of the offences being repeated again.

4. The learned counsel appearing for the petitioners contended that originally only the offences under the Abkari Act were incorporated. It was only after receiving the certificate from the Chemical Examiner, Cochin that the offence, viz. Section 22 of the NDPS Act, was incorporated. The learned counsel for the petitioners submitted that no psychotropic substance was recovered from the godown of the petitioners. Whatever recovered were yeast and sugar. He contended that the prosecution incorporated the offence u/s 22 in order to see that the petitioners are not enlarged on bail. He attacked the certificate issued by the Chemical Examiner and he has doubted the bona fides of the same.

5. The learned Advocate General, who appeared on behalf of the State,

contended that in the matter of bail the Court cannot appreciate the facts and give a finding. The Court can only take into account the existing facts and find out whether reasonable grounds exist for believing that the petitioners are not guilty of the offences and not likely to commit such offences while on bail. The learned Advocate General contended that there is a presumption regarding the genuineness of the certificate u/s 293 of the Code of Criminal Procedure and unless the presumption is rebutted by evidence, the Court has to accept the certificate as such it stands.

6. u/s 37 of the N.D.P.S. Act, if the Public Prosecutor opposes the bail, bail can be granted only if the Court is satisfied that there are reasonable grounds for believing that (he person accused is not guilty of such offence and that he is not likely to commit any offence while on bail. Thus, the Court can scrutinise the records and if it is prima facie satisfied that reasonable grounds exist to hold the petitioner not guilty of such offence, the petitioner can be granted bail. This gives a freedom to the Court to look into the records and assess the probabilities. Thus, I cannot accept the argument of the learned Advocate General that the Court has to accept the facts as stated in the record. The Court can make prima facie assessment to find out whether any reasonable grounds exist for believing that the petitioner is not guilty of such an offence; otherwise, it will do injustice to the provisions u/s 37(b)(ii) and in no case bail can be granted. In this context, I wish to state that there is a fundamental right for everyone to be free. Of course, in the case of a crime, the accused loses his freedom, but before his freedom is crippled, the Court has to see that there are sufficient grounds exist for that. This Court is very well aware of the fact that the offences under the Abkari Act and NDPS Act are looked with - all seriousness; but even in such serious cases, the freedom of the individual has to be given a due consideration, which will, of course, be subject to the public interest.

7. As the matters stand now, only the certificate of the Chemical Examiner shows that the petitioners are guilty of the offences under the NDPS Act. The question is that how far the certificate is to be accepted at this stage on the facts and circumstances of this case. I make it clear that whatever conclusion I take, may not be taken as a finding as to the final observation and I am making the observations on the basis of the records before me. When a doubt is created, it is the duty of the prosecution to remove that doubt. A perusal of the Case Diary of this case creates a suspicion in the mind of the Court as to whether the certificate given by the Chemical Examiner can be accepted prima facie. From the Case Diary, it is found that the date of occurrence is 19-7-1997 and the crime was registered on 20-7-1997. As already stated, the First Information Report does not contain any offence under the NDPS Act and no psychotropic substance was recovered from the godown. On 28-7-1997, the Circle Inspector of Police forwarded the requisition to the Magistrate for examination of the samples to the Chemical Examiner, Ernakulam and the Forensic Science Laboratory, Thiruvananthapuram. The requisition contained the following details to be ascertained :

- (i) Ascertain the contents of the sample;
- (ii) Whether the samples contain any Chemical or Biological elements;
- (iii) Whether any inedible substance is present in the sample;
- (iv) Whether it is fit for human consumption.

From the records, it is found that the samples were sent to the Chemical Examination Laboratory, Ernakulam and the Forensic Science Laboratory, Thiruvananthapuram. Then it is seen that on 6-8-1997 the Circle Inspector of Police, Thrissur East Police Station made a request to the Judicial Magistrate. In this application, he makes a request for sending the sample to the Cochin University, Agricultural University, Mannuthy and Medical College Hospital, Thrissur. He also sent forwarding letters to forward the samples to the above institutions. From the records, it is also seen that the Superintendent of Police requested the authorities of Forensic Science Laboratory, Thiruvananthapuram to expedite the examination. At page 251 of the Diary, I find a letter from the Public Prosecutor, Thrissur to the Circle Inspector of Police. This letter is dated 18-9-1997. From the letter, it is seen that as on that date, the results of the examination of the samples had not been received. The request for sending the samples for examination to the Cochin University, Agricultural University, Mannuthy and the Medical College Hospital, Thrissur were rejected by the Magistrate. It is also seen from that letter that the report of the Chemical Examination from the Forensic Science Laboratory, Thiruvananthapuram in Crime No. 227/97 was received and it was not favourable to the prosecution. The letter further states that in Crime No. 228/97, the report from neither of the experts have been received. The letter further states as follows :-

If it is felt that the reports of the experts to whom the samples are already forwarded are not reliable, you shall apply before Court for sending the samples to one of the Central Forensic Science Laboratories for Chemical Examination after getting the other reports....

Finally, it is seen that the prosecution received the report of the Chemical Examiner, Cochin. This is at page 277 of the Case Diary. From the certificate, it is seen that the samples were received on July 29,1997. But certificate is issued only on 28-9-1997. The certificate does not conform to the request made in the forwarding letter. Diazepam was detected in 11 samples while it was not detected in three samples. Phenobarbitone was detected in 7 samples, while it was not detected in 7 samples. The Case Diary is silent as to what happened to the result from the Forensic Science Laboratory; Thiruvananthapuram. This I mention because in Crime No. 227/97 as in this case, samples were sent to the Chemical Examiner, Ernakulam and the Forensic Science Laboratory, Thiruvananthapuram. There the examination of the Chemical Examination Laboratory, Ernakulam showed the presence of psychotropic substances while the certificate issued by the Forensic Science Laboratory, Thiruvananthapuram did not show the presence of any such substance. The result of that examination was, some of the samples

contained Sucrose, Saccharin, Yeast and 5 % Ethyl alcohol. This certificate is dated 30-8-1997. The samples were sent almost at the same time in both cases. Prosecution was not able to give me sufficient information as to what happened to the certificate of the Forensic Science Laboratory, Thiruvananthapuram. If, as a matter of fact, there is a report from the Forensic Science Laboratory, Thiruvananthapuram, it goes beyond one's comprehension as to why that was not produced. This raises suspicion.

8. The next ground on which I do not rely the certificate now is that according to books on the subject, for detection of Diazepam and Phenobarbitone, certain tests are to be conducted. Only on such tests being conducted it can be ascertained with certainty that such substances are present. In this case, the test conducted for Phenobarbitone and Diazepam are the "Thin Layer Chromatography Test". The book "Indian Pharmacopoeia 1996" published by the Controller of Publications, Delhi, Government of India, Ministry of Health and Family Welfare, at page 240, five tests are given for identification of Diazepam:-

- A. The infra red absorption spectrum;
- B. Measure the absorbances in subdued light immediately after preparation of the solution;
- C. Measure the absorbance in subdued light immediately after preparation of this solution;
- D. Carry out the oxygen-flask method;
- E. Melts between 131° and 135°.

The learned author states that Test A may be omitted if Tests, B, C, D and E are carried out. Tests B, C and D may be omitted if Tests A and E are carried out. Thus, I find that at least two tests are to be conducted for identifying the presence of Diazepam.

9. The same is the case with Phenobarbitone also. This is at page 579. There also five tests are given. They are :

- A. The infra-red absorption spectrum;
- B. Determine the melting point;
- C. Complies with the test for identification of barbiturates;
- D. Dissolve about 20 mg in 5 ml of ethanol, add a drop of cobalt chloride solution and drop of dilute ammonia solution, a violet colour is produced.
- E. Gives the reaction of non-nitrogen substituted barbiturates.

From the certificate, it is seen that only one test has been conducted, Of course, at this stage, I can only say that it may not be possible to act on the certificate issued by the Chemical Examiner without any further evidence and on the basis

of the certificate, it cannot be said that the petitioner is guilty of the offence. Hence, I am of the view that no reasonable grounds exist now to hold that the petitioners are guilty of the offences u/s 22 of the NDPS Act.

10. Further I find, the certificates do not mention as to what were the ingredients of the sample examined. It appears that the tests - have been conducted for finding out the presence of Diazepam and Phenobarbitone. In the Kerala Excise Manual, Volume II, there is a Chapter of "Toddy", i.e. Chapter X. The chemical composition of toddy is given at page 58. This is as follows :-

Further, toddy appears as an item of beverage-alcoholic under the Prevention of Food Adulteration Act. It is under A. 29.01. It states as follows :-

Toddy means the sap from coconut, date, toddy palm tree or any other kind of palm trees which has undergone alcoholic fermentation. It shall be white cloudy in appearance which sediments on storage and shall possess characteristic flavour deprived from the sap and fermentation without addition of extraneous alcohol.

It shows that the toddy should also conform to the following standards :-

- (a) Alcoholic content....Not less than 5 percent (viv).
- (b) Total acid as tartaric acid (expressed in terms of 100 litres of absolute alcohol....Not more than 400 grams.
- (e) Volatile acid as acetic acid (expressed in terms of 100 litres of absolute alcohol)....Not more than 100 grams.

The examination also does not reveal that the sample conform to this standard. First, the Analysts should have given as to the ingredients of the sample. This has not been given. This is also an additional ground on the basis of which I do not rely the certificate.

11. It is admitted now that after the registration of the crime, the licence of the contractors for running the toddy shops have been cancelled and the godowns were sealed. Hence, the petitioners will not be able to conduct the business in toddy, which is to be licensed by the Government. Hence, I feel that in this case the repetition of the offence is not likely to be committed. In the above view of the matter, the petitioners are entitled to be enlarged on bail.

Crl. M.C. No. 4711 and 4717 of 1997 :

12. These two Crl. M. Cs. are bail application in Crime No. 230/1997 of Irinjalakuda Police Station. The petitioners in both the cases are joint licensees of the toddy shops in Irinjalakuda Range. On 19-7-1997 at about 4.30 in the evening, the Superintendent of Police, Thrissur conducted a search in the Toddy depot of Irinjalakuda Range and Porathussary. During the investigation, 35000 litres of adulterated and illicitly manufactured toddy was seized along with 16 bags of sugar, 20 Kgs. of yeast and 2 bottles of liquid ammonia. The manager of

the depot and three office employees who were actually found preparing the illicit toddy were arrested. According to the prosecution, the samples were sent for Chemical analysis. The report shows that the toddy seized from the depots of the petitioners contains Phenobarbitone. The report from the Assistant Chemical Examiner, Ernakulam shows the presence of Diastopam and Phenobarbitone. In both these cases, originally only the offences under the Abkari Act were incorporated. Subsequent to the report of the analyst, the offence under the NDPS Act was incorporated. The case was registered on 20-7-1997. It was sent for analysis to the Regional Chemical Examiner's Laboratory, Ernakulam and the Forensic Science Laboratory, Thiruvananthapuram. In this case also, I find, requests were made to the Magistrate to send the samples for analysis to the Agricultural University, Mannuthy, Cochin University and Medical College Hospital, Thrissur. Of course, in this case I find the Director, Forensic Science Laboratory, Thiruvananthapuram as well as the Chemical Examiner, Ernakulam have sent reports. The report of the Director of Forensic Science Laboratory, Thiruvananthapuram shows that in Item 3 to 26 of the samples, Phenobarbitone was found. But, the certificate does not give any details of the analysis made excepting stating that experts were using the standard chemicals for analysis. The certificate of the Chemical Examiner, Ernakulam shows that only one test was conducted. Hence, from the reasons stated regarding Crime 228/97, the reports cannot be acted upon now. Hence, I am of the view that there is reasonable ground exists now for the petitioners to be enlarged on bail. As in the other cases dealt in supra, in these cases also the licence of the contractors for running the toddy shops have been cancelled and the godowns were sealed. Therefore, if the petitioners are enlarged on bail, there cannot be any repetition of the offence. In the above view of the matter, the petitioners are entitled to be enlarged on bail.

Crl. M.C. Nos. 4702/97 and 4716/97:

13. These two cases arise from Crime No. 14/97 of Excise Range Office, Cherpu. On 5-9-1997, the Circle Inspector of Excise, Thrissur inspected the toddy godown of Cherpu Range and took samples of toddy for chemical examination. According to the prosecution, on chemical analysis, it is found that the samples contained Diazepam. Originally the case was registered under the Abkari Act. On receipt of the report of the chemical analysis, the case was registered u/s 22 of the NDPS Act. In this case also, the only basis for incorporating Section 22 is the result of the certificate of the Chemical Examiner. The report of the Chemical Examiner is found in the Case Diary. It also shows that only one test has been conducted for detection of Diazepam. Hence, on account of the reasoning in the previous cases, the certificate cannot be accepted at present. In these cases also, the fact is that the licence of the contractors for running the toddy shops have been cancelled and the godowns were sealed. Therefore, there cannot be any repetition of the offence. In such circumstances, the petitioners are entitled to be enlarged on bail.

Crl. M.C. No. 4712/97:

14. This is with regard to Crime No. 29/97 of Excise Range Office, Thrissur. The petitioners were accused 1 to 3 in the above crime. The crime is registered on the basis of the chemical examination report from the Assistant Chemical Examiner, Ernakulam. Samples of toddy from shop No. 62 of Thrissur Range were taken by the Excise Inspector, Thrissur. On an analysis, it is found to contain Diazepam. Hence the offence u/s 22 of the NDPS Act was also included. The certificate is found at page 93 of the Case Diary. It is found that only one test has been conducted for finding out Diazepam. In view of my reasoning in the cases dealt with supra, the certificate cannot be accepted as such now. Further, the licence for the shop has been cancelled. Hence, there is no possibility of the repetition of the crime. Hence the petitioners are entitled to be enlarged on bail.

Crl. M.C. No. 4709/1997 :-

15. This Crime, No. 508/1997 of Town East Police Station, Thrissur, is connected with Crime No. 230/97. The crime was registered on 17-10-1997 upon the report filed by the Circle Inspector of Police, Valappad Police Station, who is investigating Crime No. 230/97 of the Iringalakuda Police Station. The petitioner, who is involved in Crime No. 230/97, along with the first accused there, created a Power of Attorney and made use of it for the purpose of getting the Municipal Rest House, Thrissur and thereby the petitioner was held by the first respondent-Radhakrishnan and committed offence u/s 27A of the NDPS Act and Sections 465 and 47(f) of I.P.C. Section 27-A of the NDPS Act is for punishment for financial illicit traffic and harbouring offenders. Since in Crime No. 230/97 I have taken the view that reasonable grounds exist for holding the accused was not guilty of the offence under the NDPS Act, it cannot be said now that the petitioner is guilty of the offence u/s 27A of the NDPS Act. In this view, the petitioner is entitled to be enlarged on bail.

Crl. M.C. No. 4695/1997 :-

16. This is a petition for anticipatory bail. The petitioner is an accused in Crime No. 227/1997 of Anthikkad Police Station. He is an Abkari contractor and he is having a licence under the Abkari Act for sale of toddy. As in the other cases, toddy was seized from his business premises and it was sent for analysis to Forensic Science Laboratory, Thiruvananthapuram and Chemical Examination Laboratory, Ernakulam. The certificate issued by the Forensic Science Laboratory, Thiruvananthapuram did not contain the presence of psychotropic substance in the sample, while the certificate issued by the Chemical Examination Laboratory, Ernakulam showed that certain sample contained Diazepam and certain samples contained Phcnobarbitone. Thus, there is a conflict with regard to the certificates issued. Further, the certificate issued by the Chemical Examination Laboratory, Ernakulam is vitiated by the same defects as pointed out earlier. Hence, I am of the view that the petitioner is entitled to anticipatory bail. Hence I order as follows :

Crl. M.C. Nos. 4710, 4711, 4717, 4702, 4716, 4712 and 4709 of 1997:

In the above Crl. M.Cs., the petitioners are enlarged on bail on the following conditions :-

- (i) Each of the petitioners shall execute a bond for Rs. 50,000/- (Rupees fifty thousand only) with two solvent sureties for the like amount to the satisfaction of the Sessions Judge, Thrissur.
- (ii) They shall not directly or indirectly involve in the business of toddy or any other form of liquor under the Abkari Act till the trial of the cases are over.
- (iii) They shall co-operate with the investigating officer and shall appear before him as and when required.

In so far as Crl. M.C. 4695 of 1997 is concerned, the petitioner, if arrested in connection with Crime No. 227/1997 of Arifhikkad Police Station, shall be released on bail on his executing a bond for Rs. 50,000/ (Rupees fifty thousand only) with two solvent sureties for the like amount to the satisfaction of the investigating officer. He shall also not directly or indirectly involve in the business of toddy or any other form of liquor under the Abkari Act till the trial of the case is over. He shall appear before the investigating officer as and when required.

The Crl. M.Cs. are disposed of as above.