IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

TUESDAY, THE 2ND DAY OF JULY 2024 / 11TH ASHADHA, 1946 BAIL APPL. NO. 4941 OF 2024

CRIME NO.1766/2023 OF ATTINGAL POLICE STATION, THIRUVANANTHAPURAM

PETITIONER/3RD ACCUSED:

LIJIN,
AGED 39 YEARS
S/O.SHAKIR, VILAYIL PUTHEN VEEDU, KAYALVARAM DESOM, VAKKOM, THIRUVANANTHAPURAM DISTRICT, PIN - 695308

BY ADV SRI.M.R.RAJESH

RESPONDENT/STATE AND INVESTIGATING OFFICER:

1 **STATE OF KERALA,**
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, PIN - 682031

2 **THE STATION HOUSE OFFICER,**
ATTINGAL POLICE STATION, THIRUVANANTHAPURAM DISTRICT, PIN – 695020

BY SMT.SEETHA S, SR.PUBLIC PROSECUTOR

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 02.07.2024, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

"C.R"

ORDER

Dated this the 02nd day of July, 2024

The third accused in Crime No.1766 of 2023 of the Attingal Police Station, Thiruvananthapuram, which is registered against five accused persons for allegedly committing the offences punishable under Sections 22 (c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('Act', for brevity), is before this Court, for the second time, with this application under Section 439 of the Code of Criminal Procedure, 1973 ('Code', for short).

2. The prosecution case, in brief, is that: on 30.07.2023, at around 04.00 hours, the Detecting Officer and party intercepted a car bearing Registration No.DL-4-CNE-365, in which five persons were travelling, conducted a search of the vehicle, and they seized 89.70 grams of MDMA from the vehicle. The five persons were arrested on the spot with the

contraband article, and are arraigned as accused 1 to 5 in the crime.

3. Heard; Sri.M.R.Rajesh, the learned counsel for the petitioner and Smt.Seetha S, the learned Public Prosecutor.

4. The learned counsel for the petitioner submitted that, the petitioner is innocent of the accusations levelled against him. There is no material to establish the petitioner's involvement in the crime. As the final report has been laid now, there is a change of circumstance after the dismissal of the petitioner's earlier application. The petitioner has been languishing in jail since 30.07.2023. This Court had dismissed the petitioner's earlier application mainly on the ground that the petitioner has criminal antecedents, as he is involved in two crimes in 2013 and 2017. Actually, the crimes have no significance. It is only a recent crime that has any relevance. Additionally, as the petitioner was only a co-passenger in the car, he cannot be attributed to having committed the offences. Hence, the application may be allowed.

5. The learned Public Prosecutor vehemently opposed the application. She submitted that there is no change of circumstance to file the second application. Immediately after the passing of Annexure B order by this Court on 22.01.2024, the petitioner approached the Court of Session, Thiruvananthapuram and filed a fresh application. By Annexure C order, the application was dismissed on 17.02.2024. Then, the petitioner has moved this Court. The petitioner is indulging in forum-shopping by hopping from one Court to the other. The petitioner is a person with criminal antecedents, as he is involved in two other crimes in 2013 and 2017, and there is convincing material to establish the petitioner's involvement in the crime. The application falls within the sweep of Section 37 of the Act. If the petitioner is released on bail, he is likely to commit an offence. Therefore, the application may be dismissed.

6. The prosecution allegation against the petitioner and the other accused is that they were found in conscious possession of 89.70 grams of MDMA.

7. The petitioner had filed B.A.No.182 of 2024 before this Court, which was dismissed by Annexure B order on the findings that there are prima facie materials to substantiate the petitioner's involvement in the crime, the contraband involved in the case is of a commercial quantity and that the petitioner is a person with criminal antecedents.

8. Immediately, thereafter, the petitioner filed an application before the Court of Session, Thiruvananthapuram. By Annexure C order, the application was dismissed on the findings that the petitioner is involved in Crime Nos.803/2013 and 1098/2017 of the Kadakkavur Police Station and that there are incriminating materials to establish his involvement in the crime.

9. Then, the petitioner has moved the third application before this Court.

10. The sheet anchor of the learned counsel for the petitioner is that, as the final report has been laid, there is a change of circumstance, and the two crimes are not of the

recent past. Therefore, the second limb of Section 37 of the Act is not attracted.

11. Before adverting to the above contentions, it is germane to point out that, in **Jayaraj A. v. State of Kerala** [2009 (3) KHC 577], this Court has emphatically held when the superior Court has refused to grant bail to an accused on merits of the case and that order remains in force, judicial discipline and propriety warrants the subordinate criminal Court not to entertain an application for bail from such accused unless the superior Court has either permitted the accused to move again before the subordinate criminal Court or, the case is one covered by sub-cl. (a) of the proviso to Section 167 (2) of the Code.

12. Recently, in **Bipin Sunny v. State of Kerala** [2023 (5) KHC 125], this Court has held that to maintain judicial discipline, where the High Court has rejected a bail application, the subsequent application pointing out a change of circumstance, has to be filed before the High Court and not before the Court of Session.

13. Undoubtedly, this Court and the Court of Session have concurrent jurisdiction to deal with applications filed under Sections 438 and 439 of the Code, and the accused has the right to elect the Court of his choice. Nonetheless, the Honourable Supreme Court in **Shahzad Hasan Khan v. Ishtiaq Hasan Khan and another** [(1987) 2 SCC 684] has observed that to maintain judicial discipline and due to the longstanding convention, it is obligatory to place the subsequent bail application filed in the same crime before the learned Judge who had passed the earlier order. It is apposite to quote the relevant portion of the decision, which reads in the following lines:

> **"5.** …… The convention that subsequent bail application should be placed before the same Judge who may have passed earlier orders has its roots in principle. It prevents abuse of process of court inasmuch as an impression is not created that a litigant is shunning or selecting a court depending on whether the court is to his liking or not, and is encouraged to file successive applications without any new factor having cropped up. If successive bail applications on the same subject are permitted to be disposed of by different Judges there would be conflicting orders and a litigant would be pestering every Judge till he gets an order to his liking resulting in the credibility of the court and the confidence of the other side being put in issue and there would be wastage of courts' time. Judicial discipline requires that such matters must be placed before the same Judge, if he is available for orders……".

14. Lately, the Honourable Supreme Court has reiterated the view in Shahzad Hasan Khan's case in **Rajpal v. State of Rajasthan** [2023 Livelaw (SC) 1066] and **Kusha Duruka v. State of Odissa** [2024 Livelaw (SC) 47]. The courts are directed to ensure that the complete details of the crime are stated in the application with all the supporting materials.

15. In the light of the above authoritative enunciation of law, the learned Sessions Judge ought to have relegated the petitioner to move the second application before this Court, rather than considering the application on its merits.

16. This Court perceives the petitioner's action of shuttling from one court to the other is a deliberate attempt of bench-hunting, which has no legal sanction and no sanctity. If such practices are permitted, they will usher in anarchy and shake the faith in the justice delivery system. The petitioner cannot be inspired by the tenacity of King Bruce and the spider, when it comes to repeatedly filing bail applications before different Courts in violation of the settled principles of law.

17. In **Jagmohan Bahl v. State (NCT of Delhi)** [2014 (160 SCC 501), the Honourable Supreme Court has observed that, an Advocate appearing in matters has a duty to adhere to judicial decorum and professional ethics as he is an officer of the Court and has a bounden duty towards the Court of law.

18. Now, coming back to the contentions raised in the present application.

19. By Annexure B order, this Court has held that, as the contraband involved in the case is of a commercial quantity, the same was seized from the conscious possession of the accused and since the petitioner is involved in two other crimes, there are reasonable grounds to presume that the petitioner has committed the offence and he is likely to commit an offence if he is released on bail.

20. The first contention is that the petitioner is entitled to be enlarged on bail as the final report has been laid. The above position is no longer res-integra in the light of the ratio in **Narcotics Control Bureau v. Mohit Aggarwal** [2022 KHC

Online 6720], wherein the Hon'ble Supreme Court has pithily held that merely because the final report has been laid, the same is not a change of circumstance to enlarge an accused on bail. Thus, the said contention is only to be rejected at the threshold.

21. The next contention is that, as Crime Nos.803/2013 and 1098/2017 of the Kadakkavoor Police Station are old crimes, they have no relevance or significance to hold that the petitioner is a person with antecedents.

22. It is profitable to refer to Section 37 of the Act, which reads thus:

> "**37. Offences to be cognizable and non-bailable.**—(1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974),—
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> (a) every offence punishable under this Act shall be cognizable;
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> (b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—
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> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
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> **(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 subsection (1) are in addition to the limitations under the Criminal Procedure Code, 1973 (2 of 1974) or any other law for the time being in force on granting of bail."
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> (highlighted)

23. A reading of the above provision indicates that a person accused of an offence under Sections 19, 24 and 27-A of the Act and involving commercial quantity shall not be released on bail unless the court is satisfied that there are 'reasonable grounds' to believe that the accused is not guilty and is not likely to commit any offence while on bail. Therefore, an accused alleged to have committed an offence under the Act is entitled to be enlarged on bail not only subject to provisions under Sec.439 of the Code but also on satisfying the twin conditions contemplated under Sec.37 of the Act.

24. Interpreting the second limb of Section 37, the Hon'ble Supreme Court in **Dheeraj Kumar Shukla v. The State of Uttar Pradesh [2023 KHC 6545]** has held that to dilute the second limb of Section 37, the accused should not have committed any offence at the time of filing the bail application.

25. Admittedly, the petitioner is an accused in the above mentioned two crimes. Neither in Section 37 of the Act nor in **Dheeraj Kumar Shukla's** case it is held that only if it is a recent crime the second limb will get attracted. The undisputed fact is that the petitioner is an accused in two crimes and his status will continue until and unless he is acquitted in the two cases. Therefore, this Court cannot assume that the petitioner will not commit an offence if he is released on bail. Hence, the said contention is also to be rejected.

26. This Court recollects the decision of the Honourable Supreme Court in the **State of Kerala and others v. Rajesh and others** [(2020) 12 SCC 122], wherein it is held as follows:

> "18. This Court has laid down broad parameters to be followed while considering the application for bail moved by the accused involved in the offences under the NDPS Act. In *Union of India* v. *Ram Samujh* [*Union of India* v. *Ram Samujh*, (1999) 9 SCC 429 : 1999 SCC (Cri) 1522] , it has been elaborated as under:
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> > "7. 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, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in *Durand Didier* v. *State (UT of Goa)* [*Durand Didier* v. *State (UT of Goa)*, (1990) 1 SCC 95 : 1990 SCC (Cri) 65] as under: (SCC p. 104, para 24)

'*24*. 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, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.'

8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

(*i*) there are reasonable grounds for believing that the accused is not guilty of such offence; and

(*ii*) that he is not likely to commit any offence while on bail

are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent-accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended."

19. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 CrPC, but is also subject to the limitation placed by Section 37 which commences with non obstante clause. The operative part of the said section is in the negative form

prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

20. The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

27. On an overall consideration of facts, the rival submissions made across the Bar and the findings rendered above, and on comprehending the nature, gravity and seriousness of the accusations levelled against the petitioner, the prima facie materials that establish the petitioner’s involvement in the crime and that the petitioner has criminal antecedents, I am not convinced that there are reasonable grounds to hold that the petitioner is not guilty of the offence alleged against him and that he is not likely to commit an offence if he is enlarged on

bail. The application is meritless and is only to be dismissed. The Court of Session is directed not to entertain any further bail application of the petitioner in the present crime. The Registrar (District Judiciary) shall forward a copy of this order to the learned Sessions Judge.

Resultantly, the application is dismissed.

SD/-

NAB **C.S.DIAS, JUDGE**