

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

**THE HONOURABLE MR. JUSTICE B.KEMAL PASHA**

**TUESDAY, THE 10TH DAY OF MARCH 2015/19TH PHALGUNA, 1936**

**Bail Appl..No. 1207 of 2015 ()**

**CRIME NO. 159/2015 OF KADAVANTHRA POLICE STATION, ERNAKULAM DISTRICT**

**PETITIONER/ACCUSED NO.3 :**

**SHINE TOM, AGED 31,  
S/O.CHACKO, CHERUVATHUR HOUSE, MUNDUR  
THRISSUR.**

**BY SENIOR ADVOCATE SRI.B.RAMAN PILLAI  
BY ADVS.SRI.R.ANIL  
SRI.M.SUNILKUMAR  
SRI.SUJESH MENON V.B.  
SRI.T.ANIL KUMAR  
SRI.MANU TOM  
SRI.THOMAS ABRAHAM (NILACKAPPILLIL)  
SRI.M.VIVEK**

**RESPONDENT/COMPLAINANT :**

**STATE,  
REPRESENTED BY THE PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA  
ERNAKULAM.**

**BY DIRECTOR GENERAL OF PROSECUTION SRI.T. ASIF ALI**

**THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 10-03-2015,  
ALONG WITH BA. 1108/2015 & CONNECTED CASES, THE COURT ON THE  
SAME DAY PASSED THE FOLLOWING:**

**Mn**

**B. KEMAL PASHA, J.**

.....  
B.A. Nos.1207, 1108, 1244, 1270  
& 1313 of 2015  
.....

*Dated this the 10<sup>th</sup> day of March, 2015*

**ORDER**

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Petitioners are A1 to A5 respectively in Crime No.159/2015 of Kadavanthra Police Station, Ernakulam registered for the offences punishable under Sections 21(b), 27(a) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act).

2. The prosecution case is that on prior secret information that a smoke party was going on in Duplex Flat No.13F and 14F of Skyline Topaz Apartment, Kadavanthra, the investigating officer along with the police party reached the flat at 00.15 a.m. on 30.01.2015 and found the petitioners present in the flat. They were allegedly enjoying the smoke party. Cigarette buds etc. were seen in the ashtray and some fresh cigarettes were also seen.

According to the prosecution, the investigating officer was satisfied that the petitioners were smoking cigarette smeared with cocaine or some other narcotic drugs. The option to be searched in the presence of a gazetted officer or Magistrate was given to those petitioners, according to the prosecution, and the presence of a gazetted officer was made available and the body search of the petitioners were conducted. Nothing incriminating was recovered from the body search of A3. The women were separated and their body search was conducted through a Woman Police Constable. Nothing incriminating was seized from the body search of A2, A4 and A5 also. At the same time, it is alleged that on the body search of A1, a polythene packet containing 10 other small packets of some white substance was seized from the pocket of the jeans worn by A1. The said white substance was found to be cocaine. All the petitioners were placed under arrest. The contraband has been seized through a mahazar and other legal formalities

were complied with. The petitioners have been in custody for the period from 31.01.2015 onwards.

3. Heard the learned Senior Counsel Sri.B.Raman Pillai, Sri.K.R.Vinod, Sri.P.A.Mujeeb, Sri.Shajin S.Hameed, and Sri.Venkatesh Gopi for the petitioners and learned DGP Sri.Asif Ali.

4. The learned counsel for A1 has argued that A1 was invited by A2 to the flat of A2 and thereby she went over there. It is further argued that nothing was seized from the possession of A1 alone and if at all anything was seized, it could have been seized from all the petitioners or from the Refrigerator at the flat. The argument is that cocaine is a substance which should be kept without any moisture and any moisture content will nullify its effect, and in such case it will cease to be a narcotic drug in its true sense and, therefore, it could not have been believed that cocaine was seized from the pocket of the jeans worn by A1. Another argument forwarded by the learned counsel for A1 is that

there is total non-compliance of Section 50 of the NDPS Act in the matter as no option was given to A1 to be searched in the presence of a gazetted officer or a Magistrate as contemplated under Section 50 of the Act. It has been further argued that there is no reason for detaining A1 any further as the so called supplier of the narcotic drug has been placed under arrest by now. It is also argued that A1 was taken to Goa and investigation was conducted there and presently, the continued detention of A1 in custody is not required for the continued investigation of this case. Lastly, it was argued that at the most, A1 could only be treated as an addict and, therefore, even if a small quantity of narcotic drug was there in her possession, it could only be taken as one for personal consumption and, therefore, the matter has to be viewed lightly.

5. The learned counsel for A2 has disowned the fact that the flat belongs to A2. According to the learned counsel for A2, A2 has not invited anybody there. At the same time,

there is no explanation as to how A2 happened to be there at the flat. It is argued that nothing was seized from the possession of A2 and if at all any contraband was seized, that was seized from the possession of A1 and, therefore, the continued detention of A2 is not required for any purpose at all.

6. Learned Senior counsel for A3 has pointed out that if at all any narcotic drug was seized in the case, as the seizure was out of a body search of A1 alone, A3 cannot be fastened with any liability. Learned Senior counsel for A3 has argued that the case of A3 has to be considered differently and should be viewed in another angle than from the case of all the other accused, especially, A1. It is argued that if at all a small quantity of contraband was seized from the possession of A1 being an addict, its liability cannot be extended to A3. It has been further pointed out that A3 is a film actor, who was engaged during the period of incident in the busy shooting schedule of a film. It is the case of A3

that he was invited to the flat for having a discussion with regard to a fresh film project and it was on that account alone he happened to reach there even amidst his busy schedule, from the shooting location of the other film. It is also argued that the producer of the film, the shooting of which has almost reached the completion stage of 80%, is put to very serious financial burden on account of the continued absence of A3 for the continued shooting. The learned Senior counsel has argued that the only ground on which the prosecution had earlier opposed the application seeking bail of A3 was that the source from where the narcotic drug had reached the petitioners could not be ascertained. Presently, as the person allegedly supplied the narcotic drug has been placed under arrest, there cannot be any argument from the part of the prosecution to oppose the enlargement of the petitioner on bail.

7. It has also been argued that the mere presence of A3 at the flat, when such a quantity of narcotic drug was

allegedly seized from the possession of A1, alone cannot create an offence on the part of A3. The argument is that there were no specific allegations to bring out an offence under Section 29 of the NDPS Act in the matter. It is also argued that a person, who was present along with a person who possessed the narcotic drug could be arrested only from a public place, as per Section 43(1) of the Act.

8. The learned counsel for A4 has argued that A4 was offered a chance to show her face in a film by A2 and that was the only reason by which she happened to reach the flat. It is also argued that the provisions contained under Section 50 of the NDPS Act have not been complied with and, therefore, the so called search and seizure are illegal. It is further argued that if at all any contraband substance was seized in the search and seizure, the seizure was from A1 alone, liability of which cannot be extended to A4.

9. The learned counsel for A5 has also resorted to almost the very same argument resorted to by the learned

counsel for A4. It is argued that A5 could not have been clothed with any liability for any such seizure of the contraband.

10. *Per contra*, the learned DGP has argued that the seizure of the contraband through a body search of A1 in this case cannot be treated as a seizure from her alone, whereas its liability squarely falls on all the other persons who were present along with her. According to the learned DGP, there was a smoke party in which all the petitioners have participated. All the petitioners were having the knowledge that sufficient quantity of contraband was present in the possession of A1. It is also argued that the flat at which the petitioners were present for the smoke party is the one belongs to a person named Nisham, who, according to the learned DGP, is a notorious criminal. The learned DGP has pointed out that any of the petitioners has no proper explanation with regard to his/her presence at the flat in the odd hours. It is also argued that it could not have been

believed that A3 was present at the flat for any discussion of any film project, whereas they were enjoying the smoke party that was going on there. Further, it has been argued that there is sufficient compliance of Section 50 of the Act in the matter from the part of the investigating officer, who conducted the search and seizure.

11. It is also argued that it were A1 and A2, who had gone to the South Railway Station, Ernakulam and picked up the Nigerian citizen named Ockova Shigocy Collins, who is an ill famed drug peddler, who has brought cocaine from Goa to Kochi and supplied it to A1 and A2 for the use of the petitioners. It is also argued that the CC TV footage of the railway station also proves the presence of A1 and A2 along with their driver at the railway station for picking up the aforesaid Nigerian citizen. Presently, the said Ockova Shigocy Collins is arraigned as A6 in the crime. According to the learned DGP, the investigation is fast progressing and now a days, drug peddlers have been making use of Kochi

as a narcotic and psychotropic substances hub and, therefore, continued investigation is required to trace out as to how the narcotic drug reached the hands of A6. The source has to be traced out. It is argued that all these petitioners are highly influential and if they are enlarged on bail, the investigation may not reach anywhere.

12. The learned DGP has made available the CD for the perusal of this Court. Some of the statements contained in the CD clearly point towards the complicity of all the petitioners in the matter. It seems that at first, when each and every persons were interrogated, everybody had disowned with regard to the presence of any narcotic drug with them. It is shown that, ultimately it was A3 who had directed A1 to take it out and hand it over. Even then, it was not taken out by A1, whereas it was seized through a search and seizure.

13. The contents of the CD *prima facie* reveal the complicity of the petitioners. At present, it cannot be said

that A2 to A5 were not aware of the presence of narcotic drug in the possession of A1. The present scenario and the records presently available *prima facie* reveal that a smoke party was going on at the flat and all these persons gathered together. They together enjoyed the smoke party in which the cigarettes were allegedly smeared with cocaine; of course, it is a matter yet to be proved.

14. When all the petitioners were together enjoying the smoke party, it is not easy for A2 to A5 to disown the liability of the possession of the narcotic drug by A1 in the case. When allegedly they were making use of cocaine and when 7 grams of cocaine was seized from the possession of A1, it is too early to contend that the other accused had no knowledge with regard to the possession of cocaine by A1.

15. The argument forwarded by the learned counsel for A1 that cocaine could be kept in Refrigerator only, is devoid of merits. Drug peddlers are frequently transporting cocaine and the same are not being transported by

enclosing it in refrigerators.

16. Regarding the non-compliance of Section 50, learned counsel for A1 has relied on the decisions in ***Myla Venkateswarlu Vs. State of Andhra Pradesh*** [AIR 2012 SC 1619], ***Narcotics Central Bureau Vs. Sukh Dev Raj Sodhi*** [AIR 2011 SC 1939], ***Gurjant Singh Vs. State of Punjab*** [2013 KHC 4854] and ***State of Rajasthan Vs. Ram Chandra*** [2014 KHC 4138]. By pointing out the said decisions, the learned counsel for A1 has argued that the seizing officer ought to have made A1 aware of her right to have her body searched in the presence of a nearest Magistrate or gazetted officer and that in this particular case, evidently, the only option allegedly given by the seizing officer to A1 was her right to be searched in the presence of a gazetted officer alone and, therefore, there was deliberate non-compliance of Section 50 of the Act in this case.

17. The learned DGP has pointed out that through

the amendment of the NDPS Act, 1985, the rigors of Section 50 have been substantially watered down by the incorporation of sub-sections 5 and 6 to Section 50. It is clear that Section 50 mandates an option to be given by the seizing officer to the accused regarding his eligibility to get searched in the presence of a nearest Magistrate or gazetted officer. Can it be said that it is an unbridled option to the accused to select among the Magistrate or a gazetted officer to have his/her body searched?

18. On going through the wordings of Section 50, it seems that even if without giving an option or making them aware of their right to be searched in the presence of a nearest Magistrate or gazetted officer, if the search is conducted in the presence of a Magistrate or gazetted officer in order to ensure transparency and for avoiding any planting of the contraband, it would not violate the provisions of Section 50. The said provision is incorporated in Section 50 of the Act in order to preserve and protect the

chance of false implication or planting of narcotic and psychotropic substances on an accused for implicating him in a false accusation. This is a case wherein evidently, an option was given to the accused in the presence of a gazetted officer. It is true that some of the prosecution records reveal that the option given was an opportunity to be searched in the presence of a gazetted officer. At the same time, some other documents show that an option was given for the search to be conducted in the presence of a Magistrate or a gazetted officer.

19. Even if it is considered that the option given to A1 was the one for a search in the presence of a gazetted officer only, I do not think that there was blatant violation of the provisions of Section 50 in the case. It is evident that such an option was given and the search was conducted in the presence of a gazetted officer. Even if both the options to be searched in the presence of a Magistrate or a gazetted officer were given and A1 wanted her to be searched in the

presence of a Magistrate only, could it be said that the search conducted in the presence of a gazetted officer was vitiated? The answer will be an emphatic '*no*'. The accused cannot have an option to choose either a Magistrate or a gazetted officer for a search. What is contemplated is the presence of a Magistrate or a gazetted officer of any of the description contained in the Act, for a search. When the search was conducted in the presence of a gazetted officer, at present, it cannot be said that the search itself was vitiated.

20. The learned DGP has invited the attention of this Court to the decision of the Constitution Bench of the Apex court in ***State of Punjab Vs. Baldev Singh*** [AIR 1999 SC 2378], wherein the parameters to be observed in a search as contemplated under Section 50 are dealt with in detail. It was clearly held therein that whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of evidence led

at the trial. It has been held by another Constitution Bench of the Apex court in ***Vijaysinh Chandubha Jadeja Vs. State of Gujarat*** [2011 (1) SCC 609] that, in a way, the rigors of the unamended provisions of Section 50 of the Act have been watered down substantially in the amendment.

In ***Vijaysinh Chandubha Jadeja*** (*supra*), it was held,

*“Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of S.50 had been met, is a matter of trial.”*

It depends on the facts and circumstances of each case to decide whether Section 50 has been complied with or not. The prosecution can adduce evidence during trial that Section 50 was duly complied with. It is too premature at present to have a threadbare examination as to whether all the parameters of Section 50 were complied with or not. On a *prima facie* view, it seems that Section 50 has been complied with in this case. It is during trial, the matter

requires a threadbare examination.

21. It is also argued that the analysis of the blood sample of the petitioners did not reveal the presence of cocaine in the blood, and therefore the prosecution case cannot be believed. The learned DGP has pointed out that in order to scrutinise the presence of cocaine in the blood, the test to be conducted is 'High Precision Liquid Chromatographic Test'. There is no facility for such a test at the Regional Chemical Laboratory at Kakkanad, and such a test is available at the Central Chemical Laboratory, New Delhi only.

22. Regarding the presence of A3 in the flat, even though the learned Senior counsel has pointed out that it was for the purpose of a discussion with regard to a future film project, '*Lookout*'. Such an explanation that during such odd hours he was present with four other females in that flat for the discussion of a future film project named '*Lookout*', it is not palatable or digestible at present. The learned Senior

counsel has pointed out that the script of the film was also present at the flat and the same has been deliberately suppressed by the seizing officer. When the seizing officer, if as a matter of fact, was satisfied that the party was a smoke party and not a serious film project discussion, if at all that script was present at the flat, he would not have seized it as it was not in any way connected with the case in hand. Any such script, if at all present, would not have constituted an incriminating material in the matter.

23. The circumstances pointed out by the learned DGP requires serious consideration. It seems that A1 was not co-operating with the investigation. She had to be taken to Goa. Even then, no fruitful purpose could be achieved in the investigation. It seems that the records in the CD reveal that the investigating officer was in some way deliberately misled by A1. It may be pointed out that the accused is not bound to make any such disclosure and it is for the investigating officer to investigate it properly and to

bring out the truth. It may be said that the provision contained in Section 161(2) Cr.P.C, which has come into existence in the back drop of Article 20(3) of the Constitution, gives the right to an accused to refrain from answering those questions, the answers of which would incriminate the accused. Can such right based on the right to silence be extended to the privilege of misleading the investigating officer? Under the guise of right to silence, the petitioner is not permitted in the system to go to the extent of misleading the investigating officers and to play a cat and mouse game. It seems that the matter requires thorough investigation.

24. The learned DGP has pointed out that last year, 550 narcotic cases were registered in Kochi city alone and all together 648 accused were booked in those cases. It seems that Kochi is now slowly becoming a hub for drug peddlers and within no time, it would be accompanied by other serious crimes also. It may be true that the prospects

of a film actor is being adversely affected on account of this case. At the same time, that cannot be a concern at present when considering the magnitude of the matter involved. He ought to have avoided such a situation. When the matter has to be investigated further, it is too premature at present to think about enlarging the petitioners on bail. Matters being so, these bail applications are devoid of merits and are only to be dismissed and I do so.

In the result, these bail applications are dismissed. It is made clear that this is not the end of the road, and the petitioners may be able to approach this Court again when investigation progresses further.

Sd/-  
**(B.KEMAL PASHA, JUDGE)**

aks/10/03

*// True Copy //*

*PA to Judge*