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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

FRIDAY, THE 2ND DAY OF JUNE 2023 / 12TH JYAISHTA, 1945

CRL.MC NO. 3242 OF 2023

AGAINST THE CMP NO.961/2023 OF THE ADDITIONAL SESSIONS JUDGE-I, THIRUVANANTHAPURAM

PETITIONER/1ST ACCUSED :

SABARINATH
AGED 42 YEARS, S/O THULASEEDHARAN,
VISHAKAM VEEDU, PERUMKUZHY DESOM,
AZHOOR VILLAGE (GA 21/23),
THIRUVANANTHAPURAM DIST., PIN - 695305

BY ADVS.
M.J.SANTHOSH
ARUN ANTONY (K/1053/2011)

RESPONDENTS/COMPLAINANT :

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM,
PIN - 682031

SRI VIPIN NARAYAN, SR. PP

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 02.06.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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"CR"

ORDER

This petition is filed under Section 482 of the Code of Criminal Procedure ("'the Code" for the sake of brevity) challenging the order dated 23.03.2023 in CMP No.961/2023 on the file of the Additional Sessions Judge-I, Thiruvananthapuram. By the order impugned, the learned Additional Sessions Judge allowed the application filed by the learned Public Prosecutor under Section 36A(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act" for brevity) and allowed the detention of the accused for a further period of 180 days.

2. Sri. Santhosh, the learned counsel appearing for the petitioner, submitted that the order passed by the learned Additional Sessions Judge cannot be sustained under law. Relying on the law laid down by the Apex Court in **Sanjay Dutt v State through the C.B.I. Bombay**[1] and **Jigar @ Jimmy Pravinchandra Adatiya v. State of Gujarat**[2], it is submitted by the learned counsel that it was mandatory for the Court of Sessions to inform the accused as regards the filing of an application under Section 36A(4) of the

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1 [(1994) 5 SCC 410]
2 [2022 SCC Online SC 1290]

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NDPS Act for extension of period and also to insist for the presence of the accused at the time when the Court considers the application for extension submitted by the learned Public Prosecutor. According to the learned counsel, it is by now settled by the Apex Court that the accused is entitled to raise his objection with regard to the sustainability of the application filed and also that the application is not in terms of the statutory mandate. It is urged that in the instant case, it is borne out from the order dated 23.3.2023 passed by the learned Additional Sessions Judge that the application for extension was filed on 22.3.2023, which incidentally is the 176th day of remand. It is further submitted that all that is evident from the order is that the request of the Public Prosecutor for extension was informed to the accused through the Jail Superintendent and nothing more. There is no material to suggest that the accused was actually informed of the filing of the application and he was granted an opportunity to furnish a formal objection. Expatiating further, the learned counsel relied on the observation of a Full Bench of the Calcutta High Court in **Subhas Yadav v State of West Bengal**[3], and it is urged that the request for extension of the period of detention must be on the basis of the report of the Public Prosecutor which must record the progress of the

[3] 2023 KLT Online 1409(Jalpaiguri)

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investigation and spell out specific reasons to justify further detention beyond 180 days. This requirement has not been complied with, contends the learned counsel.

3. The learned Public Prosecutor controverted the contentions advanced by the learned counsel appearing for the petitioner with equal vehemence. It is submitted by the learned Public Prosecutor by referring to the order itself that the information as to the filing of the application by the Public Prosecutor was made known to the accused through the jail superintendent. Referring to the principles of law in **Jigar** (supra), it is submitted that the accused is not entitled to a copy of the application for extension. All that the Apex Court had laid down is the fact that an application for extension filed by the Public Prosecutor has to be made known to the accused and nothing more. In the instant case, the said mandate has been complied with, contends the learned Public Prosecutor. It is further submitted that the presence of the accused was virtually procured by the learned Additional Sessions Judge on the date that the order was passed. According to the learned Public Prosecutor, in that view of the matter, the accused cannot claim that any prejudice has been caused to him.

4. I have considered the submissions advanced and have gone

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through the entire records.

5. The limited question before this Court is as regards the legal consequences that may emanate from the failure of the learned Additional Sessions Judge to act in accordance with the provisions of Section 36A(4) of the NDPS Act in extending the period of detention of the accused for a further period of 180 days without appraising the accused about the filing of such application and seeking his objection to the same.

6. To answer the said question, it would be apposite to refer to Section 36A(4) of the NDPS Act, 1985. Section 36A (4) of the NDPS Act reads thus:

> [36-A. Offenses triable by Special Courts.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973—
>
> (a) xxxxxxxxxxxxx;
> (b) xxxxxxxxxxxxx
> (c) xxxxxxxxxxxxx
> (d) xxxxxxxxxxxxx
> (2) xxxxxxxxxxxxx
> (3) xxxxxxxxxxxxx
>
> (4) In respect of persons accused of an offense punishable under Section 19 or Section 24 or Section 27-A or for offenses involving commercial quantity the references in sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 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

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> reasons for the detention of the accused beyond the said period of one hundred and eighty days.
>
> (5) xxxxxxxxxxxxxxxxx

7. Section 36-A of the NDPS Act prescribes a modified application of the Cr.P.C. as indicated therein. The effect of sub-section (4) of Section 36-A, NDPS Act is to require that investigation into certain offenses under the NDPS Act be completed within a period of 180 days instead of 90 days as provided under Section 167(2) CrPC. Hence the benefit of an additional time limit is given for investigating a more serious category of offenses. This is augmented by a further proviso that the Special Court may extend the time prescribed for investigation up to one year if the Public Prosecutor submits a report indicating the progress of the investigation and giving specific reasons for requiring the detention of the accused beyond the prescribed period of 180 days. (See **M. Ravindran v. Directorate of Revenue Intelligence**, (2021) 2 SCC 485].

8. In the above context , it would be profitable to note that Clause (bb) of sub-Section (4) of Section 20 of the Terrorists and Disruptive Activities (Prevention) Act, 1987 (since repealed), contains a *pari materia* proviso that empowers the Designated Court to extend the period provided in clause (a) of Sub-Section (2) of Section 167 of CrPC.

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9. The said proviso came up for consideration in **Hitendra Vishnu Thakur and Others V State of Maharashtra and Others**[4]. It was held by the Apex Court that the provision is in tune with the legislative intent to have the investigations completed expeditiously and not to allow an accused to be kept in continued detention during an unnecessarily prolonged investigation at the whims of the police. The legislature expects that the investigation must be completed with utmost promptitude, but where it becomes necessary to seek some more time for the completion of the investigation, the investigating agency must submit itself to the scrutiny of the public prosecutor in the first instance and satisfy him about the progress of the investigation and furnish reasons for seeking further custody of an accused. The learned Public Prosecutor is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for an extension of time with a view to enabling the investigating agency to complete the investigation. Thus, for seeking an extension of time under clause (bb), the learned Public Prosecutor, after an independent application of his mind to the request of the investigating agency, is required to make a report to the Designated Court indicating therein the progress of the investigation and

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[4] (1994) 2 SCC 602

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disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation. The Public Prosecutor may attach the request of the investigating officer along with his request or application and report, but his report, as envisaged under clause (bb), must disclose on the face of it that he has applied his mind and was satisfied with the progress of the investigation and considered grant of further time to complete the investigation necessary. The report of the Public Prosecutor, therefore, is not merely a formality but a very vital report because the consequence of its acceptance affects the liberty of an accused, and it must, therefore, strictly comply with the requirements as contained in clause (bb). The request of an investigating officer for an extension of time is no substitute for the report of the Public Prosecutor. Where either no report as is envisaged by clause (bb) is filed, or the report filed by the Public Prosecutor is not accepted by the Designated Court, since the grant of extension of time under clause (bb) is neither a formality nor automatic, the necessary corollary would be that an accused would be entitled to seek bail and the court 'shall' release him on bail if he furnishes bail as required by the Designated Court. Moreover, no extension can be granted to keep an accused in custody beyond the prescribed period *except to* enable the investigation to be completed, and as

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already stated before, any extension is granted under clause (bb), the accused must be put on notice and permitted to have his say so as to be able to object to the grant of extension (emphasis supplied).

10. In **Sanjay Dutt** (supra), the question before the Constitution Bench was whether the notice to the accused of the application for the extension as contemplated by the decision in the case of **Hitendra Vishnu Thakur** (supra) was a written notice. The Constitution Bench answered the issue as under:

> "53. (2)(a) S.20(4) (bb) of the TADA Act only requires production of the accused before the Court in accordance with S.167(1) of the Code of Criminal Procedure and this is how the requirement of notice to the accused before granting extension beyond the prescribed period of 180 days in accordance with the further proviso to clause (bb) of Sub-section (4) of S.20 of the TADA Act has to be understood in the judgment of the Division Bench of this Court in Hitendra Vishnu Thakur. The requirement of such notice to the accused before granting the extension for completing the investigation is not a written notice to the accused giving reasons therein. Production of the accused at that time in the Court informing him that the question of extension of the period for completing the investigation is being considered, is alone sufficient for the purpose."

Their Lordships held that before the grant of extension of detention, no written notice to the accused giving reasons thereon is not contemplated. All

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that is contemplated to safeguard the rights of the accused is the production of the accused in court and the furnishing of information that the question of extension for the period for completing the investigation is being considered.

11. In **Jigar** (supra), the Hon'ble Apex Court reiterated the principles with regard to ensuring the presence of the accused and in informing the filing of the application for extension of detention by observing as follows:

> 29. As noted earlier, the only modification made by the larger Bench in the case of Sanjay Dutt, 1994 (5) SCC 410 to the decision in the case of Hitendra Vishnu Thakur, 1994 (4) SCC 602 is about the mode of service of notice of the application for extension. In so many words, in paragraph 53(2)(a) of the Judgment, this Court in the case of Sanjay Dutt, 1994 (5) SCC 410 held that it is mandatory to produce the accused at the time when the Court considers the application for extension and that the accused must be informed that the question of extension of the period of investigation is being considered. The accused may not be entitled to get a copy of the report as a matter of right as it may contain details of the investigation carried out. But, if we accept the submission of the respondents that the accused has no say in the matter, the requirement of giving notice by producing the accused will become an empty and meaningless formality. Moreover, it will be against the mandate of clause (b) of the proviso to sub-section (2) of S.167 of CrPC. It cannot be accepted that the accused is not entitled to raise any objection to the application for extension. The scope of the objections may be limited. The accused can always point out to the Court that the prayer has to be made by the Public

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Prosecutor and not by the investigating agency. Secondly, the accused can always point out the twin requirements of the report in terms of proviso added by sub-section (2) of S.20 of the 2015 Act to sub-section (2) of S.167 of CrPC. The accused can always point out to the Court that unless it is satisfied that full compliance is made with the twin requirements, the extension cannot be granted.

30. The logical and legal consequence of the grant of extension of time is the deprivation of the indefeasible right available to the accused to claim a default bail. If we accept the argument that the failure of the prosecution to produce the accused before the Court and to inform him that the application of extension is being considered by the Court is a mere procedural irregularity, it will negate the proviso added by sub-section (2) of S.20 of the 2015 Act and that may amount to violation of rights conferred by Art.21 of the Constitution. The reason is the grant of the extension of time takes away the right of the accused to get default bail which is intrinsically connected with the fundamental rights guaranteed under Art.21 of the Constitution. The procedure contemplated by Art.21 of the Constitution which is required to be followed before the liberty of a person is taken away has to be a fair and reasonable procedure. In fact, procedural safeguards play an important role in protecting the liberty guaranteed by Art.21. The failure to procure the presence of the accused either physically or virtually before the Court and the failure to inform him that the application made by the Public Prosecutor for the extension of time is being considered, is not a mere procedural irregularity. It is gross illegality that violates the rights of the accused under Art.21.

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12. After considering all past precedents, the Apex Court has encapsulated the law as under :

a) It is mandatory to produce the accused at the time when the Court considers the application for extension, either physically or virtually, and the accused must be informed that the question of extension of the period of investigation is being considered.
b) The accused may not be entitled to get a copy of the report as a matter of right as it may contain details of the investigation carried out.
c) The accused would be entitled to raise his objection to the application for an extension though the scope of objection may be limited.
d) While raising his objections, it would be possible for the accused to point out that the prayer that has been made by the public prosecutor is without proper application of mind and also that the prosecutor has merely parrotted the version of the investigating officer. The accused can also urge that the Public Prosecutor has not indicated the progress of the investigation and he has not specifically stated the reason for extending the period of detention of the accused beyond 180 days. The accused can point out to the Court that unless it is satisfied that full compliance is made with the twin requirements, the extension may not be granted.
e) The failure to procure the presence of the accused either physically or virtually before the Court and the failure to inform him that the application made by the Public Prosecutor for the extension of time is being considered is not a mere procedural irregularity. It is a gross illegality that violates the rights of the accused under Art.21.
f) The Court considering the application for extension is also to bear in mind that the procedure contemplated by Article 21 of the

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> Constitution, which is required to be followed before the liberty of a person is taken away, has to be a fair and reasonable procedure.

13. In light of the principles above, the facts of the instant case can be appreciated.

14. In the order passed by the learned Additional Sessions Judge in paragraph no.2, it has been stated thus.

> "In these circumstances, the accused are entitled to know this factum of the report filed by the learned Public Prosecutor. Hence, the request of the Prosecutor has informed the accused through the Jail Superintendent."(sic)

15. Since the contention of Sri. Santhosh, the learned counsel, was that the application was filed on 22.03.2023 and that the matter was heard on 23.03.2023, and his assertion was that neither the accused nor his counsel was made aware of the filing of the application for extension, a report was called for as to whether the assertions made by the learned counsel for the petitioner are true to facts and also the manner in which the accused was informed as regards the pendency of the application under Section 36A(4) of the NDPS Act.

16. Report of the learned Additional Sessions Judge has been placed before this Court by the Registry. The said report reads thus:

> " With respect to the above reference, I may submit that the report

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> filed by the Additional Public Prosecutor U/s. 36A(4) of the NDPS Act was taken on file as CMP961/2023 on the file of this Court. It came up for hearing before my learned Predecessor in Office on 22.03.2023. As per the records it is seen that no notice of the report was directly served on the accused or their counsel. It is also not discernible from the record as to the manner in which the accused were informed as regard the pendency of the application U/s 36A(4). The present bench clerk is also not aware of the same. On 22.3.2023, it was ordered to produce the accused persons via Video Conference to give the notice of the report filed by the Public Prosecutor. Accordingly, on 23.03.2023 the accused were produced through video conference and the said application of the prosecutor was allowed. In this respect, my learned predecessor in office has relied on the decision of the Hon'ble Calcutta High Court in Subash Yadav and Others vs. State of West Bengal (MANU/WB/0138/2023) wherein it was held that no written notice or copy of report of Public Prosecutor required to be served upon the accused or his counsel but the accused or his counsel must be present personally or through video linkage at the time of consideration of the application. Accused and/or his counsel must be aware of such consideration and may raise objection, if any, with regard to compliance of mandatory requirements of law."

17. It is not borne out from the impugned order that the accused was actually informed about the filing of the application by the Public Prosecutor on 22.3.2023. All that is stated is that the accused was informed through the Jail Superintendent. Though it is stated in the order that the accused was virtually present on the next day, it is not discernible whether the accused was actually informed about the application for extension and he was asked whether he had any objection to offer. The learned Additional Sessions Judge, in his

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report, has stated that there are no records to substantiate whether notice of the report was directly served on the accused or their counsel. The application, which was filed on the 176th day, was taken up on the next day itself, and orders were passed by the learned Additional Sessions Judge. There was no tearing hurry to dispose of the matter as few more days were left to reach the cutoff date of 180 days. The order passed by the learned Additional Sessions Judge extending the period of investigation is rendered illegal on account of the failure of the Court to inform the accused as regards the filing of the application and also the failure to inform him of his right to object. The failure of the Court to give oral notice, as contemplated in **Sanjay Dutt** (supra), vitiates the entire proceedings. The mere fact that the presence of the accused was secured virtually will not serve any purpose as the accused was not made aware of the filing of the application and there are no materials to suggest that the accused was granted an opportunity to formally raise his objections to the application for extension of detention. In that view of the matter, the impugned order cannot be sustained under law. I find that after allowing the application for extension of detention, the application for statutory bail filed by the accused was taken up and the same was dismissed by order dated 31.3.2023 in Crl.M.P.No. 1039 of 2023. Having regard to the findings

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recorded above, the order passed by the learned Sessions Judge rejecting the application for statutory bail cannot be sustained under law.

18. In the result, this petition will stand allowed. The order dated 23.3.2023 in CMP No.961/2023 and the Order dated 31.3.2023 in Crl M.P. No 1039/2023 refusing statutory bail will stand quashed. Crl M.P. No.1039/2023 will stand allowed. The petitioner shall be enlarged on default bail under sub-section (2) of Section 167 of Cr.P.C on the following conditions:

(a) The petitioner shall furnish a bail bond of Rs.2,00,000/- with appropriate sureties as may be decided by the Additional Sessions Judge.

(b) The petitioner shall not enter the limits of Thiruvananthapuram Revenue District except for appearing before the Investigating Officer or the jurisdictional Court. If any variation of the condition is required, he may move the court having jurisdiction.

(c) The petitioner shall surrender his passport to the learned Additional Sessions Judge. If he is not holding a passport, or if the same has been surrendered in any proceeding, an affidavit to that effect shall be filed.

(d) The petitioner shall not interfere in any manner with the investigation, if any, and shall not make any effort to influence the prosecution witnesses;

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(e) The petitioner shall appear before the Investigating Officer as and when required as may be ordered by the Additional Sessions Judge; and

(f) The petitioner shall not involve in any crime while on bail.

Violation of any of the conditions above will entitle the investigating officer to move an application for cancellation of bail before the learned Additional Sessions Judge, and if any such application is filed, the same shall be considered and appropriate orders shall be passed on its merits.

RAJA VIJAYARAGHAVAN V,
JUDGE

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APPENDIX OF CRL.MC 3242/2023

PETITIONER ANNEXURES :

Annexure-A1	THE CERTIFIED COPY OF REPORT OF LEARNED PUBLIC PROSECUTOR U/S 36A(4) OF NDPS ACT IN CRL.M.P. NO.961/2023 DATED 22/03/23.
Annexure-A2	THE CERTIFIED COPY OF ORDER IN CRL.M.P. NO.961/2023 DATED 23/03/2023.
Annexure-A3	THE CERTIFIED COPY OF BAIL ORDER IN CRL.M.P. NO.1039/23 DATED 31/03/23