

Nayim Ali Khan vs State Of Kerala on 3 October, 2024

Author: C.S.Dias

Bench: C.S.Dias

2024:KER:73344

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BAIL APPL. NO. 7339 OF 2024
IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

THURSDAY, THE 3RD DAY OF OCTOBER 2024 / 11TH ASWINA, 1946

BAIL APPL. NO. 7339 OF 2024

CRIME NO.350/2019 OF Koduvally Police Station, Kozhikode

PETITIONER/S:

NAYIM ALI KHAN,
AGED 30 YEARS
S/O SAID ALI KHAN, POSHADI KHADI VILLAGE, POLISHAR
DISTRICT, BANGLADESH, PIN - 8200

BY ADVS.
K.REEHA KHADER
HASEENA HASSAN
ANJITHA SUDHAKARAN

RESPONDENT/S:

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

SR.PP SRI.C.S HRITHWIK

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
03.10.2024, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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BAIL APPL. NO. 7339 OF 2024

C.S.DIAS,J

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BA No.7339 of 2024

Dated this the 3rd day of October, 2024

ORDER

The application is filed under Section 483 of the Bharatiya Nagarik Suraksha Sanhita ('the BNSS' for short) 2023, by the first accused in Crime No. 350/2019 of the Koduvally Police Station, Kozhikode, which is registered against the accused persons, for allegedly committing the offences punishable under Sections 457 and 398 read with Sec.34 of the Indian Penal Code, Sec.5 read with Sec.25 (l) (a) of the Arms Act and Sec.14A(b) of the Foreigners Act. The petitioner was arrested and remanded to judicial custody on 24.7.2019.

2. The prosecution case, in brief, is that: on 14.7.2019, at around 19:35 hours, the accused, in 2024:KER:73344 BAIL APPL. NO. 7339 OF 2024 furtherance of their common intention, trespassed into a jewellery named 'Shadi Gold' at Omassery and committed robbery of 12.5 sovereigns of gold. Thus, the accused have committed the above offences.

3. Heard; Smt.Reeha Khader.K, the learned counsel appearing for the petitioner and Sri.C.S Hrithwik, the learned Senior 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 substantiate the petitioner's culpability in the crime. The petitioner has been implicated in the crime solely on the basis of suspicion. In any given case, the petitioner has been in judicial custody from 24.7.2019, which is more than five years, and the maximum punishment that can be imposed on the petitioner for the predicate offence under Sec.14A(b) of the Foreigners Act is eight years. Therefore, the petitioner has undergone more than half the period of the 2024:KER:73344 BAIL APPL. NO. 7339 OF 2024 possible sentence that can be imposed on him. In view of Sec.436A of the Code of Criminal Procedure, the petitioner is entitled to be released on bail on his personal bond with or without sureties. There is no justification in the Trial Court rejecting the petitioner's application for bail. The petitioner does not have any criminal antecedents. The petitioner is willing to abide by any stringent condition that may be imposed by this Court. Hence the application may be allowed.

5. The learned Public Prosecutor seriously opposed the application. He contended that the petitioner is a Bangladeshi national. If the petitioner is enlarged on bail, he will flee from justice. Thereafter it would be difficult to trace out the petitioner and secure his presence for trial. Since the provisions under the Foreigners Act is alleged against the petitioner, the petitioner cannot be enlarged on bail. He would have to be detained in a detention centre, as he does not have valid travel documents to stay in 2024:KER:73344 BAIL APPL. NO. 7339 OF 2024 India. Therefore, the application may be dismissed, notwithstanding the fact that the petitioner has undergone more than half the period of sentence that can be imposed on him.

6. When the application came up for consideration on 24.9.2024, this Court directed the petitioner as well as the Investigating Officer to produce the records pertaining to identity and address of the petitioner so as to establish his nationality. But, neither the petitioner nor the Investigating Officer has produced any records to prove the nationality of the petitioner.

7. Subsequently, on 27.9.2024, this Court taking note of the fact that the petitioner has already undergone five years imprisonment as an undertrial prisoner, the mandate under Sec.436A of the Code and the law laid down by the Hon'ble Supreme Court in Hussainara Khatoon (I) v. Home Secy., State of Bihar [(1980) 1 SCC 81], directed the petitioner to 2024:KER:73344 BAIL APPL. NO. 7339 OF 2024 furnish his permanent address in India and the details of the persons who are willing to stand as his sureties.

8. Today, the learned counsel appearing for the petitioner filed a memo furnishing the address where the petitioner proposes to reside and the details of his two sureties. The same is accepted on record.

9. The prosecution case is that, the petitioner along with another accused had illegally trespassed into 'Shadi Gold Jewellery' at Omassery and committed robbery of 12.5 sovereigns of gold ornaments.

10. Admittedly, the petitioner was arrested and remanded to judicial custody on 24.7.2019, which is more than five years now. The predicate offence alleged against the petitioner is under Sec.14A(b) of the Foreigners Act, which imposes a maximum punishment of imprisonment for eight years. Therefore, undoubtedly, the petitioner has already undergone one half of the maximum period of 2024:KER:73344 BAIL APPL. NO. 7339 OF 2024 imprisonment specified for the predicate offence. Thus, the petitioner has an indefeasible right to be enlarged on bail.

11. It is well settled in Hussainara Khatoon (supra) that merely because an accused does not have roots in a particular State, the same shall not be treated as a ground to deny bail to him. The Courts are bound to look into the length of residence of an accused in the community, the identity of the responsible members of the community who will vouch for his reliability, and also the petitioner's reputation, character and monetary condition.

12. Recently, in Manish Sisodia v.

Directorate of Enforcement [2024 INSC 595] the Honourable Supreme Court has observed that, over a period of time, the trial courts and the High Courts have forgotten a very well-settled principle of law that bail is not to be withheld as a punishment. From its experience, it appears that the trial courts and the 2024:KER:73344 BAIL APPL. NO. 7339 OF 2024 High Courts attempt to play safe in matters of grant of bail. The principle that bail is the rule and refusal is an exception is, at times, followed in breach. On account of non-grant of bail even in straight forward open and shut cases, the Honourable Supreme Court is flooded with huge number of bail petitions thereby adding to the huge pendency. It is high time that the trial courts and the High Courts recognize the principle that "bail is the rule and jail is an exception.

13. Similarly, in *Jalaluddin Khan v Union of India*, [2024 INSC 604] the Honourable Supreme Court has observed in the following lines:

"21. xxxxx When a case is made out for a grant of bail, the Courts should not have any hesitation in granting bail. The allegations of the prosecution may be very serious. But, the duty of the Courts is to consider the case for grant of bail in accordance with the law. "Bail is the rule and jail is an exception"

is a settled law. Even in a case like the present case where there are stringent conditions for the grant of bail in the relevant statutes, the same rule holds good with only modification that the bail can be granted if the conditions in the statute are satisfied. The rule also means that once a case is made out for the grant of bail, the Court cannot decline to grant bail. If the Courts start 2024:KER:73344 BAIL APPL. NO. 7339 OF 2024 denying bail in deserving cases, it will be a violation of the rights guaranteed under Article 21 of our Constitution. "

14. In *Prabir Purkayastha v. State (NCT of Delhi)*[2024 SCC OnLine SC 934], the Honourable Supreme Court has observed as follows:-

"21. The Right to Life and Personal Liberty is the most sacrosanct fundamental right guaranteed under Articles 20, 21 and 22 of the Constitution of India. Any attempt to encroach upon this fundamental right has been frowned upon by this Court in a catena of decisions. In this regard, we may refer to following observations made by this Court in the case of *Roy V.D. v. State of Kerala*[(2022) SCC OnLine SC 929] "7. The life and liberty of an individual is so sacrosanct that it cannot be allowed to be interfered with except under the authority of law. It is a principle which has been recognised and applied in all civilised countries. In our Constitution Article 21 guarantees protection of life and personal liberty not only to citizens of India but also to aliens."

15. On a careful analysis of the facts, the rival submissions made across the Bar and the materials placed on record, particularly on considering the fact that the petitioner has been in judicial custody for a period of more than five years for committing the predicate offence 2024:KER:73344 BAIL APPL. NO. 7339 OF 2024 punishable for a period of eight years, that the trial in the case is not complete, that the petitioner does not have any criminal antecedents, I am of the firm view that the petitioner's further detention is unnecessary. Hence, I am inclined to allow the application, but subject to stringent condition.

In the result, the application is allowed, by directing the petitioner to be released on bail on him executing a bond for Rs.1,00,000/- (Rupees One Lakh only) with two solvent sureties each, for the like sum, to the satisfaction of the court having jurisdiction, who shall be the persons referred to in the memo dated 2.10.2024 filed before this Court. The owner of the building where the petitioner is permitted to reside shall also file an affidavit before the Trial Court undertaking that he will permit the petitioner to reside in the said premises till the conclusion of the trial in SC No.10/2020, which shall be subject to the following conditions: .

(i) The petitioner shall appear before the 2024:KER:73344 BAIL APPL. NO. 7339 OF 2024 Investigating Officer on every second and fourth Saturday between 9 a.m. and 11 a.m till the conclusion of the trial in SC No.10/2020.

(ii) The petitioner shall not directly or indirectly make any inducement, threat or procure to any person acquainted with the facts of the case so as to dissuade them from disclosing such facts to the court or to any Police Officer or tamper with the evidence in any manner, whatsoever;

(iii) The petitioner shall not commit any offence while he is on bail;

(iv) The petitioner shall surrender his passport, if any, before the court below at the time of execution of the bond. If he has no passport, he shall file an affidavit to the effect before the court below on the date of execution of the bond;

(v) In case of violation of any of the conditions mentioned above, the jurisdictional court shall be empowered to consider the application for cancellation of bail, if any filed, and pass orders on the same, in accordance with law.

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(vi) The petitioner shall not leave the territorial jurisdiction of the Court of Session, Kozhikode, till the conclusion of trial in SC No.10/2020 without previous permission of the said Court.

(vii) Applications for deletion/modification of the bail conditions shall be moved and entertained by the court below.

(viii) Needless to mention, it would be well within the powers of the Investigating Officer to investigate the matter and, if necessary, to effect recoveries on the information, if any, given by the petitioner even while the petitioner is on bail as laid down by the Hon'ble Supreme Court in Sushila Aggarwal v. State (NCT of Delhi) and Another [2020 (1) KHC 663].

sd/-

C.S.DIAS JUDGE sks/3.10.2024