

(2011) 08 KL CK 0004

High Court Of Kerala

Case No: B.A. No. 5633 of 2011

Suresh, M. R. and others

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision: Aug. 1, 2011

Acts Referred:

- Arms Act, 1959 - Section 27
- Criminal Procedure Code, 1973 (CrPC) - Section 204, 207, 208, 209, 244
- Kerala Abkari Act, 1077 - Section 55, 57A
- Penal Code, 1860 (IPC) - Section 120B, 201, 302, 326, 326

Citation: (2011) 3 ILR (Ker) 682

Hon'ble Judges: K.T. Sankaran, J

Bench: Single Bench

Advocate: T. Krishnan Unni and Sri P.K. Mohanan Palakkad, for the Appellant; V. Tekchand (Public Prosecutorfor), for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Mr. Justice K.T. Sankaran

1. The question involved in this Bail Application is whether an accused in a case triable exclusively by the Court of Session, who appears before the Magistrate on summons in the committal proceedings, is entitled to bail as of right on the ground that only summons was issued to him, or whether discretion could be exercised by the Magistrate to deny bail to him.

2. The petitioners, who are accused Nos.9, 11 and 14 in Crime No.481/CR/HHW-III/10 for the offences punishable under Sections 302, 326, 328, 120B, 471 and 201 read with Section 34 of the Indian Penal Code and Sections 55(a) and 57A of the Kerala Abkari Act, appeared on 29-6-2011 before the Judicial

Magistrate of the First Class I, Tirur in C.P.Case No. 35 of 2011, in obedience to the summons issued by the learned Magistrate. They moved for bail u/s 437 of the Code of Criminal Procedure. The Bail Application was dismissed by the learned Magistrate by the order dated 30-6-2011. The petitioners filed application for bail u/s 439 of the Code of Criminal Procedure before the Sessions Court, Manjeri. The Sessions Court dismissed the application by the order dated 5-7-2011. Therefore, the petitioners have filed this Bail Application u/s 439 of the Code of Criminal Procedure.

3. The petitioners contended before the learned Magistrate that only summons having been issued to them, the Magistrate had no jurisdiction to remand them to judicial custody. The same contention is raised by the petitioners before this Court, relying on the decisions in [Sreekumar Vs. State of Kerala](#), and [George Varghese Vs. State of Kerala](#), .

4. The prosecution case is the following: On 5-9-2010 at about 6.25 p.m., a dead body of a male aged about 35 years was found at the platform of Kuttippuram Railway Station. Crime No.290 of 2010 was registered at Kuttippuram Police Station for unnatural death. The deceased was identified as Dhanasekharan, a native of Tamil Nadu. The dead body was subjected to post-mortem examination. It was revealed that the deceased died due to consumption of adulterated toddy from a toddy shop at Kuttippuram. Subsequently, it came to the notice of the police that fourteen other persons also died as a result of consumption of adulterated toddy from the toddy shops at Kuttippuram, Beeranchira and Perassannur. The samples of toddy kept in these toddy shops were collected and sent for analysis. The report of analysis showed that the toddy contained methyl alcohol, a noxious substance.

5. Seven Crimes were registered at Kuttippuram Police Station. Six Crimes at Tirur Police Station and one Crime at Kolathur Police Station were also registered. The Deputy Superintendent of Police, Tirur, who conducted the investigation clubbed the crime cases in Kuttippuram and Tirur Police Station. Accordingly, all the cases were brought under Crime No.290 of 2010 of Kuttippuram Police Station and Crime No.668 of 2010 of Tirur Police Station. Considering the gravity of the case, the Crime Branch took over the investigation on 14-9-2010.

6. The investigation revealed that the toddy shops at Kuttippuram, Beeranchira and Perassannur were being conducted by one Dravyan, accused No.1, though the licensees of the toddy shops at Kuttippuram and Perassannur were accused Nos.2 and 3. The salesmen in the toddy shops, the licensees and the persons who conducted the shops were all made accused in the case. The petitioners are the authorized salesmen of the three toddy shops referred to above. The prosecution case is that accused Nos.1 to 18 entered into a criminal conspiracy and they mixed methyl alcohol, a poisonous substance, with toddy, in order to achieve wrongful gain and with the knowledge that such mixture of toddy is harmful to human beings. A total number of fifteen persons died as a result of the hooch tragedy referred to above. Three persons lost their eyesight. It is alleged that toddy mixed

with methyl alcohol was being sold in the shops under two different names as "chethu kallu" and "speed kallu".

7. During the investigation, 20 out of the 24 accused persons were arrested. Accused No.7 has not been arrested so far. It is alleged that the petitioners were absconding. After completing the investigation, charge-sheet was filed in the case on 6-12-2010 before the Court of the Judicial Magistrate of the First Class, Tirur, where it was numbered as C.P.No.35 of 2011. The petitioners appeared before the Magistrate's Court on receipt of summons.

8. The question to be decided is whether the petitioners, who appeared before the Magistrate's Court on summons, were entitled to be released on bail as of right, on the ground that only summons were issued to them. To decide the aforesaid question, it is apposite to refer to Sections 204, 209 and 437 of the Code of Criminal Procedure, relevant portions of which are extracted below:

204. Issue of process.--(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be--

(a) a summons-case, he shall issue his summons for the attendance of the accused, or

(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

209. Commitment of case to Court of Session when offence is triable exclusively by it.-- When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall-

(a) commit, after complying with the provisions of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session.

437. When bail may be taken in case of non-bailable offence.-- (1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested

or detained without warrant by an officer-in-charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but-

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years:

Provided that the Court may direct that a person referred to in Clause (i) or Clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in Clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court:

Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.

9. In [Sreekumar Vs. State of Kerala](#), a learned Single Judge of this Court considered a Criminal Miscellaneous Case filed u/s 482 of the Code of Criminal Procedure filed by an accused to whom summons was issued u/s 204 of the Code of Criminal Procedure in a case where the offence alleged was u/s 326 of the Indian Penal Code and Section 27 of the Arms Act. The petitioner therein approached the High Court apprehending that if he appeared before the learned Magistrate, he would be remanded to judicial custody. The petitioner therein was a cancer patient undergoing treatment for the last several years. He was not arrested by the police during investigation. In Sreekumar's case, it was held thus:

When a court issues summons and not a warrant under S.204 Cr.P.C. in a non-bailable warrant offence, I must assume that the learned Magistrate must have advisedly exercised the discretion under S. 204 Cr.P.C. to issue a summons and not a warrant.....Having chosen to exercise the discretion under S. 204 Cr.P.C. in favour of the petitioner and having issued only a summons to the accused, it appears to me

to be heartless, insensitive and harsh for any court to remand an accused person who has come to court on the invitation extended to him by the court by issuing a summons. That procedure is shockingly unreasonable and should not be pursued by any court. Having exercised the discretion under S. 204 CrI.P.C. to issue only a summons and having led the accused by such conduct to believe that he can safely appear before court on invitation, it would be impermissible for any court thereafter to turn turtle and remand the accused to custody. Issue of summons by exercise of the discretion under S.204 CrI.P.C. does firmly and eloquently convey that the accused person on appearance shall not be detained unnecessarily if he is willing and prepared to offer bail. The courts will have to be careful at the stage of exercising the discretion under S.204 CrI.P.C. and cannot take parties by surprise when they appear before court in response to an innocuous summons issued by the court. This must be so whether the offence is triable by a Magistrate or not and whether the offence is bailable or not.

10. In [George Varghese Vs. State of Kerala](#), another learned Single Judge relied on the decision in [Sreekumar Vs. State of Kerala](#). The question which arose for consideration in [George Varghese Vs. State of Kerala](#), was whether a person to whom summons was issued by a Court could maintain an application for anticipatory bail u/s 438 of the Code of Criminal Procedure. In that case, the offence alleged was u/s 55(a) of the Abkari Act. Summons was issued to the accused in the committal proceedings. The accused filed an application u/s 438 of the Code of Criminal Procedure before the High Court for anticipatory bail. Answering the question, the learned Single Judge held thus:

4. It is clear from the submissions made that though petitioner was absconding, court has chosen to issue only summons to him. Hence, there cannot be any reasonable apprehension of arrest of the accused. S. 438 of the Code of Criminal Procedure can be invoked, only if a person has a reason to believe that he will be arrested on accusation of commission of a non-bailable offence. A reasonable apprehension of arrest is an essential requirement to invoke provision contained in S. 438 of the Code. If there is no such apprehension, S. 438 of the Code has no application. In this case, having issued only summons to accused, there cannot be any apprehension of arrest at all. Anticipatory bail cannot therefore be granted under S. 438 of the Code, if the basic requirement under the provision is not satisfied.

11. In [Kapil Shoukath Ali Vs. The Perinthalmanna Co-Operative Agricultural and Rural Development Bank](#), the question which arose for consideration in a batch of cases was whether the petitioners therein, against whom offence u/s 55 of the Abkari Act was alleged, could be released on bail by the committing court. The petitioners therein filed Criminal Miscellaneous Cases invoking Section 482 of the Code of Criminal Procedure for issuing direction to the committing court to release them on bail on their surrender or appearance before the committing court. The

accused persons therein could not be arrested either because they were not available at the scene of occurrence or because they escaped from the place. Final reports were filed stating that the accused were not on bail or they absconded. The Magistrate's Court issued summons to the accused in most of the cases. Interpreting Section 209 of the Code, it was held in Sukumari's case thus:

6. The above provision "subject to the provision of this Code relating to bail" in Clause (a) & (b) of S. 437(1) would make it clear that the committal court is fully empowered to enlarge the accused on bail subject to the provisions regarding the grant of bail. Thus when a bail application is filed by an accused appearing in pursuance to a summons, the Magistrate has to pass a judicial order on the bail application, as he is discharging a judicial function while committing the case. When a judicial order has to be passed, the Magistrate has to apply his mind and pass an order and he is not expected to pass a mechanical order without going into the merits of the case, but has to pass an order in accordance with the law regarding the grant of bail. Thus a distinction has to be drawn between an accused who is "produced before Court" and "appears before Court", and the same standard of approach cannot be made in remanding the accused to the custody. In cases where the accused appears in pursuance to a summons the bail application has to be considered and disposed of in accordance with the law regarding the grant of bail.

....Thus the Magistrate has the discretion to judge the materials on record and grant bail even if the offence is a non-bailable one or exclusively triable by a Court of sessions.

.....In view of the provisions under the Code, the committing court is fully competent to grant bail to those persons who are alleged to have committed offences under S. 55 of the Abkari Act and those who are not arrested and are not on bail. In fact the non arrest of the petitioner during the crime stage and till the charge had been laid before the Court, itself can be one of the plus points in favour of granting bail, along with other circumstances. The appearance before the Court immediately after the receipt of the summons and the acceptance of summons shortly after the issue from the court are circumstances not in support of prosecution allegation that the accused was absconding.....A consideration of the entire circumstances would reveal that the committal court has to consider the bail application in accordance with the merits of the case and it cannot be rejected on the ground of lack of jurisdiction and the court is fully empowered to consider the bail application and to grant bail in appropriate cases.

12. u/s 204 of the Code of Criminal Procedure, the Magistrate taking cognizance of an offence shall issue summons for the attendance of the accused in a summons case. In a warrant case, the Magistrate may issue either a warrant or a summons for causing the accused to be brought or to appear at a certain time before the Magistrate, as the case may be. Section 209 of the Code of Criminal Procedure deals with commitment of a case to the Court of Session when the offence is triable

exclusively by the Court of Session. In the proceedings u/s 209, the Magistrate shall remand the accused to custody (a) until such commitment has been made; or (b) during, and until the conclusion of the trial. The power to remand the accused to custody is subject to the provisions of the Code relating to bail. The relevant provision relating to bail applicable in the case before the Magistrate is Section 437 of the Code of Criminal Procedure. Section 437 applies where the accused (1) is arrested or detained without warrant by an officer in-charge of a police station; or (2) appears before Court; or (3) is brought before Court. The Court referred to in Section 437 is a Court other than the High Court or Court of Session. Clauses (i) and (ii) of sub-section (1) of Section 437 CrI.P.C. provide that such person as is referred to in Section 437 shall not be released in the contingencies mentioned in the clauses. As per clause (i) of sub-section (1) of Section 437, a person shall not be released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. Clause (ii) deals with a situation where the accused was previously convicted of an offence of the nature mentioned therein. The first and second provisos to sub-section (1) of Section 437 are provisos to clauses (i) and (ii) of sub-section (1). Even if there appear reasonable grounds for believing that the person has been guilty of an offence punishable with death or imprisonment for life, he may be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm, as provided in the first proviso. Appearance by an accused on summons is also covered by Section 437 of the Code of Criminal Procedure. It is clear from Sections 204, 244 and 251 of the Code of Criminal Procedure that the expression "appears" would apply when the Court issues summons to an accused and in compliance thereof he appears before Court. The expression "appears" would also apply to cases where an accused surrenders or when an accused who was released on the execution of non-bailable warrant, appears before Court. Section 209 specifically mentions that remand of the accused to custody is "subject to the provisions of this Code relating to bail". Section 204 provides only for the issue of process. What should happen after the accused appears on process is not dealt with u/s 204. The question of granting bail on appearance of the accused or production of the accused before Court pursuant to the process u/s 204, would be subject to Section 209 and Section 437 of the Code of Criminal Procedure. In a case exclusively triable by the Court of Session, where an accused appears before the Magistrate in committal proceedings on summons, the Court is not powerless to remand the accused to judicial custody invoking the power u/s 209 read with Section 437 of the Code of Criminal Procedure. Simply because the Court issuing process does not think it fit to issue a warrant, but issues only summons, it cannot be said that the power of the Court to remand the accused u/s 209 CrI.P.C, subject to the provisions of Section 437 CrI.P.C, is taken away or is not available. The question whether the accused should be remanded or whether he should be granted bail depends upon the discretion of the Court after his appearance before Court or on his production before Court, in a case exclusively triable by the Court of Session. The parameters to be taken note of to consider the

question whether bail should be granted to such an accused need be considered only at the time when the accused appears or is brought before Court. Such a question need not necessarily be looked into while issuing process u/s 204 of the Code of Criminal Procedure. The fourth proviso to sub-section (1) of Section 437, which provides that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under the sub-section without giving an opportunity of hearing to the Public Prosecutor, is clearly an indicator that the Court while issuing the process u/s 204 is not expected to consider the question of granting bail on the appearance of the accused or production of the accused on such process. The question of granting bail in the cases covered by the fourth proviso to sub-section (1) of Section 437 should be considered only after giving an opportunity of hearing to the Public Prosecutor. At the time of issuing process u/s 204 of the Code of Criminal Procedure, no such hearing of the Prosecutor is contemplated. The presence of the accused also would not be there at the time of issuing process u/s 204 of the Code of Criminal Procedure. Therefore, it is clear that the question of granting bail to a person accused of an offence of the nature mentioned in the fourth proviso to sub-section (1) of Section 437 would arise only at the stage when the accused appears or is brought before Court and not at a stage prior to that. This also would clearly lead to the conclusion that the mere fact that the Court chose to issue only summons does not give a right to the accused to claim bail as of right on his appearance before Court on summons, particularly in a case triable exclusively by the Court of Session.

13. In [Sreekumar Vs. State of Kerala](#), and in [George Varghese Vs. State of Kerala](#), , no reference is seen made to the decision in Sukumari v. State of Kerala 2001 (1) KLT 22. In [Sreekumar Vs. State of Kerala](#), , the power to be exercised by the Court u/s 209 of the Code of Criminal Procedure did not arise for consideration. In that case, the scope of Section 204 of the Code of Criminal Procedure was mainly considered. In [George Varghese Vs. State of Kerala](#), , though the offence was exclusively triable by the Court of Session, the question for consideration was whether an accused who received summons for appearance could invoke Section 438 of the Code of Criminal Procedure for anticipatory bail. Therefore, I do not think that the petitioners are entitled to rely on the decisions in Sreekumar v. State of Kerala and George v. State of Kerala, to contend that the learned Magistrate should have granted bail to them on the ground that only summons were issued to the accused.

14. Now the question to be considered is whether bail can be granted to the petitioners u/s 439 of the Code of Criminal Procedure. The scope of Section 439 is wider than the scope of Section 437 of the Code of Criminal Procedure. In the present case, the final report has been filed. All the accused except accused No.7 appeared before court. The petitioners are in judicial custody since 29-6-2011. The allegation is that they were the salesmen in the toddy shops. The petitioners appeared on summons before Court promptly. As held in Sukumari v. State of

Kerala 2001 (1) KLT 22, the appearance of the petitioners on summons is a circumstance not in support of the allegation that they were absconding. Taking into account the facts and circumstances of the case, the fact that the petitioners were the salesmen in the toddy shops and also taking into account the fact that final report was filed, I am inclined to grant bail to the petitioners on stringent conditions.

15. The petitioners shall be released on bail on their executing bond for Rupees Fifty thousand each with two solvent sureties for the like amount to the satisfaction of the Judicial Magistrate of the First Class I, Tirur, subject to the following conditions: (1) The petitioners shall report before the Deputy Superintendent of Police, Crime Branch CID, HHW III, Kozhikode Sub Unit, on alternate Mondays till the trial of the case is over or until further orders; (2) The petitioners shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence; (3) The petitioners shall not commit any offence or indulge in any prejudicial activity while on bail; and (4) In case of breach of any of the conditions mentioned above, the bail shall be liable to be cancelled.

The Bail Application is allowed as above.