

CrI.O.P.(MD)No.19504 of 2024

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on	25.11.2024
Delivered on	27.11.2024

CORAM

THE HON'BLE MR.JUSTICE N.ANAND VENKATESH

CrI.O.P.(MD) No.19504 of 2024

S.Mohan

... Petitioner

Vs.

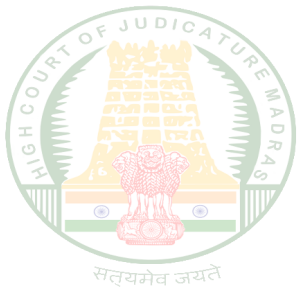
State through
The Inspector of Police,
Kodaikanal Police Station,
Dindigul District.
(Crime No.283 of 2024)

... Respondent/Complainant

PRAYER : Criminal Original Petition filed under Section 482 of Criminal Procedure Code, for bail in Crime No.283 of 2024 on the file of the Respondent Police.

For Petitioner : Mr.J.Selvam

For Respondent : Mr.S.Ravi
Additional Public Prosecutor



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ORDER

The petitioner/accused, who was arrested and remanded to judicial custody on 10.08.2024 for the offences under Sections 8(C) r/w 22(C) of the Narcotic Drugs and Psychotropic Substances Act 1985, on the file of the respondent, seeks bail.

2.The case of the prosecution is that on 10.08.2024, the Sub-Inspector of Police received a secret information about the possession of magic mushroom and it was recorded in the General Diary and communicated to the Inspector. After getting prior permission, the police team went to the spot and found the accused. He was made aware of the rights for being searched in front of the gazetted officer or Judicial Magistrate. Since he did not opt for the same, the police searched him and found that he was in possession of 60 grams of magic mushroom kept in his pant pocket. A report was submitted in this regard under Section 57 of the Narcotic Drugs and Psychotropic Substances Act 1985, and a case was registered.



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3. Heard the learned counsel for the petitioner and the learned Additional Public Prosecutor appearing on behalf of the respondent.

4. The main ground that was urged by the learned counsel for the petitioner is that magic mushroom is a natural product as 'fungi', available in the deep forest. This magic mushroom as such has not been cited under the category of narcotic drug or psychotropic substance. What has been mentioned in the table annexed to the notification is 'psilocybin' at Serial No.145 where 2 grams is considered to be small quantity and 50 grams and above is considered to be commercial quantity. The item that is recovered under the cover of mahazar was not psilocybin but a mushroom and this neither comes within the definition of a narcotic drug nor a psychotropic substance. Hence, mushroom by itself cannot be treated on par with psilocybin.

5. It was further submitted that the FSL report does not specify the percentage of psilocybin in the mushroom and it is assumed that 60 grams of magic mushroom is equivalent of 60 grams of



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psilocybin which is unsustainable.

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6.The next issue that has been raised is that the quantity of the contraband was not serially numbered and weighed and the cloth in which the magic mushroom was kept was weighed along with the magic mushroom which is in violation of the notification dated 23.12.2022.

7.The learned counsel for the petitioner has raised a very important issue in this case. To understand this issue in a proper perspective, this Court has to take note of one of the orders that was passed by this Court in CrI.R.C.No.283 of 2009. In that case, a plant 'khat' contained cathinone. Hence, it was considered as a narcotic drug. While dealing with that issue, this Court held as follows:-

“6. It is the submission of learned Special Public Prosecutor that cathine is listed as a psychotropic substance under item No.171 in the table prepared pursuant to Sub clause vii(a) and xxiii(a) of Section 2 of the NDPS Act. Cathine could be derived from the khat plant and hence offence under the NDPS Act would stand attracted.



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7. *Section 2(xiv) of the NDPS Act, 1985, defines narcotic drug thus:*

“Narcotic drug means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured drugs. Therefore, 'khat' by itself is not a narcotic drug. Section 2(xxiii) of the NDPS Act, 1985, defines psychotropic substance thus:

“Psychotropic substance means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule”

8. *'Khat' admittedly is a plant not falling within the description of narcotic drug. Neither by itself is it a psychotropic substance. The prosecution cannot seek to extend the Act by informing that a psychotropic substance may be obtained through a plant not answering to the definition of Narcotic Drug under Section 2(xiv) of the NDPS Act.*

9. *The charge u/s.135(1)(c) r/w 11 and 113 of the Customs Act, is made only as an incidental one. There is nothing in the Customs Act to indicate that there is any*



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prohibition on export of 'khat'. It is not the prosecution case that 'khat' sought to be exported otherwise escaped any levy. In circumstances where the prime charge of commission of offence under NDPS Act does not stand and no specific offence under the Customs Act is shown to have been committed, this Court would allow the present revision.”

8.The Central Government came up with a separate notification dated 27.02.2018, whereby khat was also added to the TABLE and the small quantity and the commercial quantity was fixed.

9.In the instant case, magic mushroom *per se* does not satisfy the requirement of the narcotic drug under Section 2(xiv) or a psychotropic substance defined under Section 2(xxiii) of the NDPS Act. Magic mushroom *per se* cannot be called contraband and it is construed as a contraband only because it contains psilocybin. The same is evident from the FSL report submitted by the Deputy Director dated 09.10.2024. If that is the case, it cannot be assumed that the entire 60 grams of magic mushroom must be equated to 60 grams of psilocybin. In the absence of satisfying the percentage of psilocybin in the mushroom, it cannot be



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assumed that it is 60 grams. In the absence of any material to come to a definite conclusion as to whether the psylocybin contained in the magic mushroom is a small quantity or a in between quantity or a commercial quantity, the Court cannot assume that it falls within the scope of commercial quantity and apply the rigour under Section 37 of the NDPS Act.

10.In ***Hira Singh and another v. Union of India***, reported in **2020 (20) SCC 272**, the three member Bench of the Apex Court was answering some of the issues that were referred. It will be relevant to extract paragraph No.12 of the judgment hereunder:-

“12. In view of the above and for the reasons stated above, Reference is answered as under:

12.1. The decision of this Court in the case of E.Micheal Raj (Supra) taking the view that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight



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of the offending narcotic drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, is not a good law;

12.2. In case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the “small or commercial quantity” of the Narcotic Drugs or Psychotropic Substances;

12.3. Section 21 of the NDPS Act is not stand-alone provision and must be construed along with other provisions in the statute including provisions in the NDPS Act including Notification No.S.O.2942(E) dated 18.11.2009 and Notification S.O 1055(E) dated 19.10.2001;

12.4. Challenge to Notification dated 18.11.2009 adding “Note 4” to the Notification dated 19.10.2001, fails and it is observed and held that the same is not ultra vires to the Scheme and the relevant provisions of the NDPS Act.”



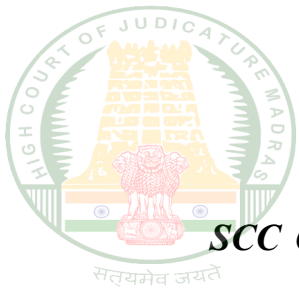
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11.The magic mushroom cannot be considered as a 'mixture'

of narcotic drugs or psychotropic substance with one or more neutral substance. Even if it is assumed as a mixture, mushroom is a fungi and it is the natural produce and as such, the same does not fall under the term 'mixture' as found in Section 2(xx) of the NDPS Act which defines the term 'preparation'.

12.In the instant case, Section 52A of the Act is also said to have been violated since the samples were not drawn and certified by the Magistrate in compliance with Sub-section 2(i)(3) of Section 52A of the Act.

13.This Court cautiously does not want to deal with the grounds raised by the learned counsel for the petitioner in detail since it will have an impact/bearing while the case is decided before the trial Court. This Court must only satisfy itself that the requirement under Section 37 of the NDPS Act is satisfied. To arrive at such a satisfaction, it will be relevant to take note of the judgment of the Apex Court in ***Mohd. Muslim @ Hussain v. State (NCT of Delhi)*** reported in **2023**



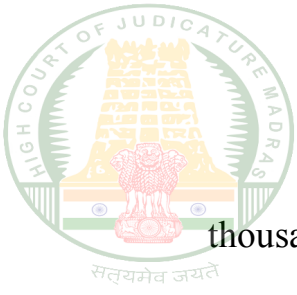
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SCC Online SC 352. The Apex Court has held that the standard to be considered is one where the Court would look at the material in a broad manner and reasonably see whether the accused guilt may be proved. It is not necessary for the Court to record that the accused may not be guilty and it does not require a meticulous examination of the materials collected during investigation. Hence, the only manner in which such conditions can be considered is that the Court is satisfied on the *prima facie* look at the material on record that the accused is not guilty.

14.Considering the grounds that have been raised by the learned counsel for the petitioner and also considering the fact that there are no previous cases against the petitioner and the petitioner has suffered incarceration from 10.08.2024 and it will take a long time for the trial to commence and the proceedings to come to an end, this Court is inclined to enlarge the petitioner on bail subject to the following conditions:

15. Accordingly, the petitioner is ordered to be released on bail on his executing a bond for a sum of Rs.10,000/- (Rupees ten

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(thousand only) with two sureties, each for a like sum to the satisfaction of the Principal Special Court for EC and Narcotic Drugs and Psychotropic Substances Act Cases, Madurai and on further conditions that:-

[a] the sureties shall affix their photographs and Left Thumb Impression in the surety bond and the Magistrate may obtain a copy of their Aadhar card or Bank pass Book to ensure their identity.

[b] the petitioner shall report before the respondent police daily at 10.30 a.m., for a period of four weeks and thereafter, every Friday at 5.30 p.m. till the police report is filed;

[c] the petitioner shall not tamper with evidence or witness either during investigation or trial.

[d] the petitioner shall not abscond either during investigation or trial.



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[e] On breach of any of the aforesaid conditions, the learned Magistrate/Trial Court is entitled to take appropriate action against the petitioner in accordance with law as if the conditions have been imposed and the petitioner released on bail by the learned Magistrate/Trial Court himself as laid down by the Hon'ble Supreme Court in **P.K.Shaji vs. State of Kerala [(2005)AIR SCW 5560]**.

[f] If the accused thereafter absconds, a fresh FIR can be registered under Section 269 of B.N.S.2023.

27.11.2024

NCC : Yes
Index : Yes
Internet : Yes
PKN



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- 1.The Inspector of Police,
Kodaikanal Police Station,
Dindigul District.
- 2.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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N.ANAND VENKATESH,J.

PKN

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Dated: 27.11.2024