



WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

(Criminal Jurisdiction)

Date : 03/12/2024

PRESENT

The HONOURABLE MR. JUSTICE N.ANAND VENKATESH

CRL OP(MD). No.19589 of 2024

P.Rajkumar

... Petitioner/Petitioner/Sole Accused

Vs

The State of Tamil Nadu Rep,
By, the Inspector of Police,
Kodaikkanal Police Station,
Dindigul District.
(Crime No.286 of 2024).

... Respondent/Respondent/Complainant

For Petitioner : Mr.K.Pragadesh Ganapathy, Advocate

For Respondent : Mr.S.Ravi,
Additional Public Prosecutor

PETITION FOR BAIL Under Sec.483 of BNSS

PRAYER :-

For Bail in Crime No.286 of 2024 on the file of the Respondent Police .



ORDER: The Court made the following order :-

The petitioner / Accused, who was arrested and remanded to judicial custody on 11.08.2024 for the alleged offences under Sections 8(c), 22(c) of NDPS Act, 1985, in Crime No.286 of 2024, on the file of the respondent police, seeks bail.

2. The case of the prosecution is that the petitioner was found in possession of 56 grams of Magic Mushroom. The petitioner was arrested and remanded to judicial custody on 11.08.2024 and the entire contraband has been seized.

3.The learned Additional Public Prosecutor appearing on behalf of the respondent Police submitted that the Police have followed the mandatory requirements under the Act and have seized the contraband from the petitioner. The learned Additional Public Prosecutor further submitted that the quantity in excess of 50 grams is considered to be a commercial quantity.

4.The learned Additional Public Prosecutor further submitted that this Court had an occasion to deal with the issue as to whether the presence of



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Psilocybin must be separately measured or the quantity of the Magic Mushroom must be treated equal to the presence of chemical Psilocybin which has been shown to be a psychotropic substance in the table. To substantiate this submission, the learned Additional Public Prosecutor relied upon the order passed in CrI.O.P(MD) No.15148 of 2024, dated 21.10.2024.

5.The learned Additional Public Prosecutor further submitted that there is one previous case against the petitioner for offence under NDPS Act and the petitioner was also convicted in that case in C.C.No.137 of 2019 by Judgment, dated 10.10.2019 passed by the learned Sessions Judge, Special Court for EC & NDPS Act Cases, Madurai.

6.The learned Additional Public Prosecutor further submitted that the petitioner has not satisfied the twin requirement of Section 37 of NDPS Act and hence, he is not entitled to be enlarged on bail. Accordingly, he vehemently opposed grant of bail to the petitioner.

7.The learned counsel for the petitioner submitted that the petitioner has suffered incarceration in this case from 11.08.2024. The learned counsel further



submitted that the previous case pertains to the year 2019 and thereafter, the
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petitioner was never involved in any offence under NDPS Act.

8.The learned counsel for the petitioner relied upon the order passed by this Court in Crl.O.P(MD) No.19504 of 2024, dated 27.11.2024 and submitted that even though there is presence of Psilocybin, the quantity of Psilocybin that is present in the Magic Mushroom that is said to have been seized has not been independently assessed and therefore, it cannot be presumed that the petitioner was in possession of commercial quantity.

9.This Court has carefully considered the submissions made on either side and the materials available on record.

10.This Court will first go into the order relied upon by the learned Additional Public Prosecutor in Crl.O.P(MD) No.15148 of 2024, dated 21.10.2024. The relevant portions in the order are extracted hereunder:

“5. On the contention of the learned Counsel for the petitioner, this Court had directed the concerned expert to appear before this Court virtually. The expert submitted that it is not possible to weigh the quantity of the concerned chemical which is present in the



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mushroom. According to her, if the mushroom contains the particular chemical, then that will have an hallucinating effect and therefore that would be a psychotropic substances and illegal possession are used thereof would be an offences under the Act.

6. As a matter of fact, prima facie from the informal interaction with the expert at the stage of grant of bail, it can be seen that the particular type of mushroom, namely, the magical mushroom, every cell contains the said chemical. If the produce is a natural produce and every cell of the same contains a chemical, then prima facie I am of the opinion that the entire material has only to be weighed and considered for the purpose of determining whether it is commercial quantity or not. Prima facie, I am not in agreement with the conclusions made by the Karnataka High Court cited supra. The penal statutes has to be considered strictly as such and interpretation need not be made and further explanation need not be added to the penal provisions so as to aid the accused."

11. While considering the above order, this Court also wants to take note of the order passed in CrI.O.P(MD) No.19504 of 2024, dated 27.11.2024. The relevant portions are extracted hereunder:

"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

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that issue, this Court held as follows:-

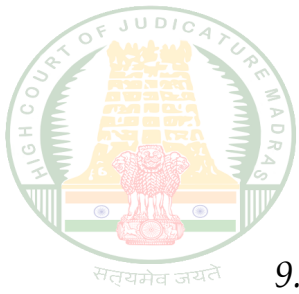
“6. It is the submission of learned Special Public Prosecutor that cathine is listed as a psychotropic substance under item No.171 in the table prepared pursuant to Sub clause vii (a) and xxiii(a) of Section 2 of the NDPS Act. Cathine could be derived from the khat plant and hence offence under the NDPS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

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”

1. '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.



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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 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 assumed that it is 60 grams. In the absence of any material to come to a definite



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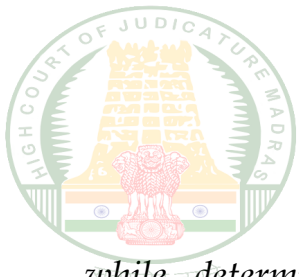
conclusion as to whether the psilocybin contained in the magic mushroom is a small quantity or a in between quantity or a commercial quantity, the Court cannot assume that it falls within the scope of commercial quantity and apply the rigour under Section 37 of the NDPS Act.

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 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;

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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."

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



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*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 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.*

12.To start with, even when the earlier order was passed by me on 27.11.2024 in Crl.O.P(MD) No.19504 of 2024, I was aware of the earlier order passed in Crl.O.P(MD) No.15148 of 2024, dated 21.10.2024. I respectfully did not agree with the earlier order passed on 21.10.2024 by Hon'ble Mr.Justice D.Bharatha Chakravarthy, since that order was passed after the Hon'ble Judge had an informal intraction with an Expert through Video Conferencing platform. The Expert seems to have informed the Court that it is not possible to separately weigh the chemical Psilocybin, which is present in the Magic Mushroom. Based on the opinion given by the Expert, the Hon'ble Judge came to a conclusion that the total weight of the



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Magic Mushroom must be considered equivalent to the total weight of chemical
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Psilocybin.

13.This Court, while exercising bail jurisdiction, must look into the language that is used in the Enactment and decide the case accordingly. When the informal opinion was sought for by Hon'ble Mr.Justice D.Bharatha Chakravarthy, there was no chance for the accused person to cross-examine the Expert. The Court cannot decide the language used in the legislation and the purport of the provision of Act, based on informal opinion rendered by the Expert. At the end of the day, such an opinion given is not binding on the Court and at the best, it can only be considered to be a relevant fact.

14.At the stage of deciding the bail application by taking note of Section 37 of NDPS Act, the Court must only be satisfied on the overall circumstances and the point of law that has been raised and the Court must look at the material in a broad manner and *prima facie* satisfy itself that there is a reasonable chance of the accused to be held not guilty. It is not necessary for the Court to undertake a meticulous examination of the materials collected during the investigation. That is the reason why when the earlier order was passed in CrI.O.P(MD) No.19504 of 2024, this Court merely went by the language used in the Enactment and *prima facie* gave a finding that Magic Mushroom cannot be either called as a Narcotic drug or a



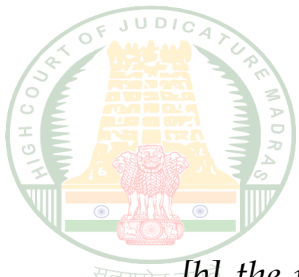
psychotropic substance in its natural form. The reasons have also been assigned in
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the earlier order.

15.It must be made very clear that this is only a *prima facie* view and the finding should not be taken to be final. It is always left open for the prosecution to raise this issue before the trial Court and put forth their grounds.

16.In the light of the above discussion, considering the fact that the petitioner has suffered incarceration from 11.08.2024 and the contraband has already been seized from the petitioner and considering the fact that the investigation is already complete and the petitioner has satisfied the twin requirement of Section 37 of NDPS Act and also considering the previous case against the petitioner, which is of the year 2019, this Court is inclined to grant bail to the petitioner subject to the following conditions:

17.Accordingly, the petitioner is ordered to be released on bail on his executing a bond for a sum of Rs.10,000/- (Rupees ten thousand only) with two sureties, each for a like sum to the satisfaction of the learned *Sessions Judge, Principal Special Court for EC and NDPS Cases, Madurai*, and on further conditions that:-

[a] the sureties shall affix their photographs and Left Thumb Impression in the surety bond and the Judge 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 05.30 p.m., until further orders.

[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.

*[e] On breach of any of the aforesaid conditions, the learned Judge/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 Judge/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 BNS, 2023.

sd/-
03/12/2024

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03/12/2024

Sub-Assistant Registrar()
Madurai Bench of Madras High Court,
Madurai - 625 023.

PNM
TO

1 THE SESSIONS JUDGE,
PRINCIPAL SPECIAL JUDGE FOR EC AND NDPS CASES,
MADURAI.



2 DO-THROUGH :

THE CHIEF JUDICIAL MAGISTRATE, DINDUGAL DISTRICT.

3 THE OFFICER INCHARGE,
DISTRICT JAIL, DINDIGUL.

4 THE INPSECTOR OF POLICE,
KODAIKANNAL POLICE STATION,
DINDUGUL DISTRICT.

5 THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

+1 CC to M/s.K.PRAGADEESH GANAPATHY, Advocate (SR-14843[I] dated 03/12/2024)

ORDER

IN

CRL OP(MD) No.19589 of 2024

Date :03/12/2024

SS/SAR- /03/12/2024/ 14P/7C

Madurai Bench of Madras High Court is issuing certified copies in this format from 17/07/2023