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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

MONDAY, THE 13TH DAY OF JANUARY 2025 / 23RD POU SHA, 1946

BAIL APPL. NO. 9150 OF 2024

CRIME NO.92/2024 OF Mananthavady Excise Circle Office, Wayanad

AGAINST THE ORDER/JUDGMENT DATED 28.10.2024 IN

CRMP NO.729 OF 2024 OF ADDITIONAL DISTRICT COURT &

SESSIONS COURT - II, KALPETTA

PETITIONER/S:

**RAHUL RAI,
AGED 38 YEARS**

**BY ADVS.
NIRMAL.S
VEENA HARI**

RESPONDENT/S:

**STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR, HIGH
COURT OF KERALA, (STATION HOUSE OFFICER,
SULTHANBATHERY), PIN - 682031**



BY ADV. :

NAUSHAD K.A. -PP

**THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION
ON 13.01.2025, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**



CR

P.V.KUNHIKRISHNAN, J.

BA No.9150 of 2024

Dated this the 13th day of January, 2025

ORDER

This Bail Application is filed under Section 483 of the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023.

2. The petitioner is the accused in Crime No.92/2024 of Mananthavady Excise Circle Office Wayanad. The above case is registered against the petitioner alleging offences punishable under Section 22(c) & 8(c) r/w 20(b)(ii)(A) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'Act 1985'). The petitioner was



arrested on 04.10.2024 and has been in judicial custody since then.

3. The prosecution case in brief is that, on 04.10.2024 at about 01.45 PM, the accused was found in possession and transporting 6.59 gm of Charas, 13.2gm of Ganja, 226gm of Psilocybin contained magic mushroom and 50gm Psilocybin contained magic mushroom capsules, while travelling in the ISUZU V-cross Car bearing registration No.KA.02-MM 3309 at Edayakode Colony, Thrissilery Taluk in contravention of the provisions of Act 1985. Hence, it is alleged that the accused committed the above said offences.

4. Heard Adv. Smt. Veena Hari, the learned counsel appearing for the petitioner and the Senior Public Prosecutor Adv. Sri. Noushad K.A.,



for the State.

5. Adv. Smt. Veena Hari submitted that, even if the entire allegations are accepted, the contraband seized will not come within the purview of “commercial quantity” and hence, Section 22(c) of the Act 1985 is not applicable. Therefore, the counsel submitted that the petitioner is entitled bail. Adv. Veena Hari submitted that the Charas and Ganja alleged to be seized from the petitioner are admittedly small quantities. She also contended that the other contraband seized from the petitioner was magic mushrooms and magic mushroom capsules. It is the case of the counsel that Psilocybin contained magic mushrooms and Psilocybin contained magic mushroom capsules seized from the



petitioner are about 276 gms. The counsel submitted that the Psilocybin contained in these magic mushrooms is not separately quantified by the prosecution. The counsel also relied on an article which is available on the Internet as evidenced by Annexure-A5 and submitted that based on the studies, the average Psilocybin content is 1% per one gram of *Psilocybe cubensis* mushroom. Hence, it is submitted that, even if the entire magic mushroom seized from the petitioner is taken as a whole, it will come within the purview of small quantity and the petitioner is entitled bail. The counsel also submitted that the petitioner is in custody from 04.10.2024 onwards. The counsel submitted that the petitioner is a person who obtained an MS Degree in Computer



Science from Rochester Institute of Technology, United States of America. It is also submitted that the petitioner was working in Dell Computers as a Cyber Security Analyst in the United States of America. The petitioner produced Annexure-A2 and A3 to prove the same. It is the case of the petitioner that, he has come to India in connection with his mother's illness. The petitioner produced Annexure-A4 Discharge Summary of his mother who has renal failure and had a kidney transplant. The counsel also submitted that the petitioner is ready to abide by any conditions that may be imposed by this Court, if bail is granted to him.

6. Adv. Sri. Noushad K.A., the learned Senior Public Prosecutor, seriously opposed the



bail application. The Public Prosecutor took me through serial No.145 of the Table in the Act 1985 and submitted that the small quantity of Psilocybin is 2 gm and commercial quantity is 50gm. The Public Prosecutor also took me through Note 4 below the Table and submitted that the quantities shown in columns No.5 and 6 of the Table relating to the respective drugs shown in Column No.2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content. The Public Prosecutor also relied on



paragraph No.10 of the decision of the Apex Court in **Hira Singh and Another v. Union of India and Another** [2020(2)KHC 551]. The Public Prosecutor also took me through the 'thondi' articles produced before the learned Magistrate and also the seizure mahazar. The Public Prosecutor submitted that, it is a clear case in which the magic mushroom seized is a commercial quantity and Section 22(c) of the Act 1985 is applicable.

7. This Court considered the contentions of the petitioner and the Public Prosecutor. Admittedly, the contraband seized from the petitioner are the following:

1. 6.59gm of Charas
2. 13.2gm of Ganja



3. 226gm of mushroom containing Psilocybin.
4. 50gm of mushroom capsules containing Psilocybin.

8. Admittedly, the charas and ganja seized from the petitioner are small quantities. The question to be decided is whether the mushroom and magic mushroom capsules together can be considered as commercial quantity.

9. Section 2(viia) of Act 1985 says about 'commercial quantity'. As per Section 2(viia), commercial quantity in relation to narcotic drugs and psychotropic substances means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette. Section 2(xxiiiia) of Act 1985 deals with small quantity. As per the above section, small



quantity, in relation to narcotic drugs and psychotropic substances means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette. As per SO 1055(E) dated 19.10.2001, exercising the powers conferred by clause (viia) and (xxiia) of Section 2 of the Act 1985, Central Government specify the quantity mentioned in columns No.5 and 6 of the Table attached to that order in relation to the narcotic drugs and psychotropic substances mentioned in the corresponding entries in columns No.2 to 4 of the Table as the small quantity and commercial quantity respectively for the purpose of the said proofs of that section. Serial No.145 of the Table says about Psilocybin and the small quantity is



mentioned as 2gm and the commercial quantity is mentioned as 50 gms in the corresponding columns. Admittedly, the mushroom or magic mushroom is not a narcotic drug or psychotropic substance as per the Table. The prosecution case is that the mushrooms seized from the petitioner contain psilocybin. The prosecution also relied on Note 4 of the Table, which is extracted hereunder:

“(4) The quantities shown in column 5 and 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.”

10. The Public Prosecutor also relied on the judgment of the Apex Court in Hira Singh’s



case(supra). Paragraph No.10 of the above case is extracted hereunder:

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

(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;

(II) 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;

(III) S.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;

(IV) 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. Consequently, writ petitions and Civil Appeal No.5218/2017 challenging the aforesaid notification stand dismissed." (Underline supplied)

11. A reading of Note 4 of the Table combined with the decision of the Apex Court in Hira Singh's case (supra), it is clear that in case of seizure of mixture of narcotic drugs or psychotropic substances with one or more neutral substances, the quantity of neutral substances is not to be excluded and to be taken into consideration along with the actual content by weight of the offending drug while determining



the small or commercial quantity of the narcotic or psychotropic substances. Therefore, it is clear that, if a mixture of narcotic drug or psychotropic substance with one or more neutral substance or a solution or any one or more narcotic drug or psychotropic substance of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs including salts of esters, ethers and isomers, wherever existence of such substances is possible and not just its pure drug content, the entire mixture is to be considered while determining 'commercial quantity' or 'small quantity'.

12. What is the meaning of mixture? Mixture is not defined in Act 1985. The simple dictionary meaning of mixture is a combination of



two or more substances that are physically mixed together but not chemically combined. In Hira Singh's case also the meaning of mixture is considered in paragraph No.2.3, which is extracted hereunder:

"2.3. The NDPS Act, as originally enacted in 1985 included in S.2(xx) the definition of 'preparation'. It is submitted that the definition of 'preparation' reveals that preparation means "in relation to NDPS" one or more drugs or substance in dosage or solution or mixture. The 'mixture' is defined as mechanical mixture or two or more substances as distinct from chemical combination or a fluid with foreign substance in suspension or foreign element in a composition. The 'solution' is defined as a liquid or semi liquid preparation obtained by the combination of a solid with the solvent. The 'dosage' means a definite quantity or something regarded as analogous to medicine in use or effect. A bare look at the definitions, it is apparent that a drug or substance can be mixed with one or more substances (mixture) or change its physical state by means of any fluid or solvent (solution) or be divided or apportioned (dosage). In other



words, the NDPS Act as originally enacted dealt not only with the pure content of the drug or psychotropic substance but, its preparation in a mixture, solution or dosage. In the case of E. Micheal Raj (supra), there is no reference to the aforesaid;”.

13. Whether a mushroom can be considered as a mixture?. I am not in a position to accept the contentions of the prosecution that mushroom is a mixture. It is only fungi. The Karnataka High Court in **Saeidi Mozdheh Ehsan v. State of Karnataka** (MANU/KA/0433/2013), considered a similar question. It will be better to extract paragraph No.4 of the above judgment:

“It is not in dispute that insofar as the seized drugs, that is, Cocaine, Opium, Charas and Ganja are concerned, they do not fall under the commercial quantity. According to the respondent police the Magic Mushroom seized from the petitioner weighs 65gms and the same is a commercial quantity. The respondent police subjected this Magic Mushroom for chemical analysis and the Scientific Officer, FSL,



Bangalore confirmed the presence of Psilocin and Psilocybin. Admittedly the Magic Mushroom is not mentioned in the schedule to the NDPS Act. The report submitted by the Scientific Officer, FSL, Bangalore do not specify the percentage of Psilocin and Psilocybin. In the absence of the percentage of the narcotic drug it is manifest that the seized Magic Mushroom is not a commercial quantity. As such the petitioner is entitled for bail.”

14. Similarly, the Madurai Bench of the Madras High Court also considered the same question in **S. Mohan v. State through The Inspector of Police, Kodaikanal Police Station** [2024 Supreme (Online) (MAD) 41077]. The Madras High Court after referring Hira Singh’s case (supra), considered the same point. The relevant portion is extracted hereunder:

“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 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;

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, tails 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'."

15. I am in perfect agreement with the decisions of the Karnataka High Court and Madras High Court. Mushroom or magic mushroom cannot be treated as a mixture. Therefore, Note 4 of the Table dealing with the small quantity and commercial quantity is not applicable as far as Mushroom or magic mushroom is concerned. Admittedly, the mushroom or magic mushroom is not a scheduled narcotic or psychotropic substance.

16. This Court also perused Annexure-A5, which is an article published by the Faculty of Department of Medicine, University of British Columbia titled "Therapeutic use of Psilocybin:



Practical consideration for dosing and administration”. The relevant portion of the Annexure-A5 article is extracted hereunder:

“Outside of research or medical access settings (such as Health Canada SAP), a common source of psilocybin is from dried "magic" mushrooms. This requires a conversion to determine the estimated weight of dried mushrooms to consume in order to arrive at the intended psilocybin dose. Based on several studies, the average psilocybin content is ~1% psilocybin per one gram of dried Psilocybe cubensis mushroom; therefore, a 25 mg psilocybin fixed dose is approximately 2.5 grams of dried Psilocybe cubensis mushroom. However, it is important to note, there is intra- and inter-species variability of psilocybin content 53, 54). In psilocybin-naive patients using dried mushrooms, it is good clinical practice to start at a lower dried mushroom weight in the event that the actual psilocybin content is higher in any given batch. The variability in psilocybin content can range on average from 0.5-2% dried mushroom weight based on species (53, 54).”



17. From the above it is clear that the Psilocybin content in mushrooms will be 1% per one gram of dried *Psilocybe cubensis* mushrooms. This Court also perused the analyst report in this case. A perusal of the same would not show the weight of the psilocybin contained in the mushrooms and mushroom capsules alleged to be seized from the petitioner is separately shown. In such circumstances, I am of the considered opinion that, there are no materials as of today to find that the petitioner was in possession of commercial quantity of psilocybin. If commercial quantity is not applicable, the rigour under Section 37 of the NDPS Act is not applicable. No criminal antecedents are also alleged against the petitioner. The petitioner is in custody for about



90 days. In such circumstances, I think, the petitioner can be released on bail after imposing stringent conditions.

18. Moreover, it is a well accepted principle that the bail is the rule and the jail is the exception. The Hon'ble Supreme Court in **Chidambaram. P v. Directorate of Enforcement** [2019 (16) SCALE 870], after considering all the earlier judgments, observed that, the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial.

19. Moreover, in **Jalaluddin Khan v. Union of India** [2024 KHC 6431], the Hon'ble Supreme



Court observed that:

“21. Before we part with the Judgment, we must mention here that the Special Court and the High Court did not consider the material in the charge sheet objectively. Perhaps the focus was more on the activities of PFI, and therefore, the appellant's case could not be properly appreciated. 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 denying bail in deserving cases, it will be a violation of the rights guaranteed under Art.21 of our Constitution. (underline supplied)

20. In **Manish Sisodia v. Directorate of Enforcement** [2024 KHC 6426], also the Hon'ble Supreme Court observed that:

“53. The Court further 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 our experience, we can say that it appears that the trial courts and the High Courts attempt to play safe in matters of grant of bail. The principle that bail is a 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, this 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 should recognize the principle that "bail is rule and jail is exception".”



21. Considering the dictum laid down in the above decisions and considering the facts and circumstances of this case, this Bail Application is allowed with the following directions:

1. *Petitioner shall be released on bail on 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 jurisdictional Court.*
2. *The petitioner shall appear before the Investigating Officer for interrogation as and when required. The petitioner shall co-operate with the investigation and 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.

3. *Petitioner shall not leave India without permission of the jurisdictional Court.*
4. *Petitioner shall not commit any offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected.*
5. *If any of the above conditions are violated by the petitioner, the jurisdictional Court can cancel the*



bail in accordance with law, even though the bail is granted by this Court. The prosecution is at liberty to approach the jurisdictional court to cancel the bail, if there is any violation of the above condition.

nvj

**Sd/-
P.V.KUNHIKRISHNAN
JUDGE**