

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT

THE HONOURABLE MR. JUSTICE GOPINATH P.

WEDNESDAY, THE 23RD DAY OF MARCH 2022 / 2ND CHAITHRA, 1944
BAIL APPL. NO. 8788 OF 2021

CRIME NO.196/2021 OF VIDYA NAGAR POLICE STATION, KASARGOD

AGAINST THE JUDGMENT IN SC 493/2021 OF ADDITIONAL DISTRICT
COURT & SESSIONS COURT - II, KASARAGOD / II ADDITIONAL MACT,
KASARAGODE

PETITIONER/ACCUSED NO.1:

MOHAMMED SAFWAN, AGED 31 YEARS
S/O.ABBAS, AYSHA MANZIL, T.V.STATION ROAD,
ANANGOOR, KASARGOD DISTRICT.

BY ADVS.SUNNY MATHEW
SONU AUGUSTINE

RESPONDENTS/COMPLAINANTS & STATE:

1 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT
OF KERALA, ERNAKULAM, COCHIN - 682 031.

2 THE INSPECTOR OF POLICE
VIDYANAGAR POLICE STATION,
KASARGOD DISTRICT - 671 121.

SMT. SEETHA.S. (SR.P.P)

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
23.03.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER

This is an application for regular bail.

2. The petitioner is the one of the accused in Crime No.196/2021 of Vidyanagar Police Station alleging commission of offences under Sections 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substance Act, 1985 (hereinafter referred to as 'the NDPS Act').

3. The allegation against the petitioner is that the petitioner was found in possession of 21 Kgs of Ganja while travelling on a scooter bearing Registration No.KL-14W 5963 along with the 1st accused.

4. The learned counsel for the petitioner submits that the petitioner is absolutely innocent in the matter. It is submitted that the alleged recovery of contraband from the petitioner cannot be sustained. It is submitted that even according to the prosecution records, the contraband in question was packed in two different bags and the total quantity cannot be taken into consideration for the purposes of determining whether the contraband was in commercial quantities or not. It is not disputed that if the total quantity of contraband is taken into consideration, the same adds up to commercial quantities. It is submitted that since two different packets were recovered, the total quantity cannot be taken into consideration especially since Section 29 of the NDPS Act has not been invoked in the case. It is submitted that the provisions of Section 37 of the NDPS Act do not apply in the matter as the quantity of contraband recovered from the petitioner alone is not in

commercial quantity. It is submitted that the petitioner has been in custody since 24.5.2021 and his continued detention is not necessary for the purposes of any investigation, as a final report has already been filed in the matter and the matter is now pending as S.C.No.493/2021 before the Sessions Court, Kasaragod.

5. The learned Public Prosecutor opposes the grant of bail. It is submitted that the records clearly reveal that there was the recovery of contraband from the possession of the petitioner and the other accused in the case. It is submitted that all legal procedures contemplated by law have been followed in the matter and no specific violation has been pointed out by the petitioner. It is submitted that Section 29 of the NDPS Act needs to be invoked only if a conspiracy is alleged. It is submitted that in this case, both the accused were found in possession of contraband. It is submitted that for the purposes of determining whether the contraband was in commercial quantities or not, the provisions of Section 29 of the NDPS Act need not be invoked. It is submitted that in cases like these where there is the recovery of contraband from the joint possession of two or more accused, each of them will have to be considered as being in possession of the total quantity of contraband and there cannot be any artificial splitting up of the quantities for the purposes of determining whether the contraband in question is in commercial quantities or not. It is submitted that the provisions of Section 37 of the NDPS Act clearly apply in this case and the petitioner is not entitled to bail.

6. I have considered the contention and perused the case diary. The facts of the case are that while the Sub Inspector of Police, Vidyanagar Police Station and party were engaged in checking the vehicles, they found two youngsters approaching them on a scooter. On seeing the Police party, these youngsters attempted to turn the scooter around and flee from the place. However, the scooter overturned and the petitioner and the other accused ran away from the spot. However, they were intercepted and it was found that the packets they were carrying on the scooter contained Ganja, the total weight of which comes to 21 Kilograms. The contention of the learned counsel for the petitioner that only the quantity which was allegedly in possession of the petitioner can be factored for the purposes of determining whether the contraband was in commercial quantities or not, must fail. In the facts and circumstances of the case, the petitioner along with the other accused was travelling on the scooter carrying a total quantity of 21Kg of Ganja. Notwithstanding the fact that Section 29 of the NDPS Act has not been invoked, the total quantity of contraband can be considered as recovered from the joint possession of the petitioner and the other accused and there cannot be any artificial splitting up of the quantities for the purposes of determining whether the contraband was in commercial quantities or not. That being the position, the provisions of Section 37 of the NDPS Act apply. The petitioner is not entitled to bail unless the twin conditions specified in Section 37 of the NDPS Act are cumulatively satisfied. The petitioner has criminal antecedents. Apart from stating that the recovery from the petitioner and the other accused

is bad in law, no specific violation of any provisions of the NDPS Act has been pointed out. I have, therefore, no reasons to believe that the petitioner is not guilty of the offences alleged against him. Considering the criminal antecedents of the petitioner, I have also no reason to believe that the petitioner is not likely to engage in similar activities if released on bail. Thus, both the conditions in Section 37 of the NDPS Act are not satisfied and the petitioner is not entitled to bail. Though the learned counsel for the petitioner refers to the judgment of the Division Bench of this Court in ***Muthu Kumar & ors. v. Station House Officer, Kottakkal Police Station, 2008 (2) KLJ 379*** to contend that the total quantity of Ganja cannot be taken into account for determining whether the contraband was in commercial quantities or not, I am of the opinion that, that decision is no longer good law in the light of the Judgment of the Supreme Court in ***Union of India v. Mohd. Nawaz Khan, (2021) 10 SCC 100***, where it has been held: -

“ 29. In line with the decision of this Court in Rattan Mallik [Union of India v. Rattan Mallik, (2009) 2 SCC 624 : (2009) 1 SCC (Cri) 831] , we are of the view that a finding of the absence of possession of the contraband on the person of the respondent by the High Court in the impugned order does not absolve it of the level of scrutiny required under Section 37(1)(b)(ii) of the NDPS Act.”

Therefore, even if no quantity of contraband was recovered from the possession of the petitioner, he cannot contend that he cannot be proceeded against under the provisions of the NDPS Act or that the provisions of Section 37 do not apply. In the facts and circumstances of this case merely because the total quantity of contraband was split into different packets and was being held by the accused separately, it cannot be held that the offence of Section 20(b)(ii) (C) of the NDPS Act is not committed. The Bail Application stands dismissed.

Sd/-

**GOPINATH P.
JUDGE**

acd