

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K.HARIPAL

THURSDAY, THE 22ND DAY OF JULY 2021 / 31ST ASHADHA, 1943

BAIL APPL. NO. 4002 OF 2021

CRIME NO. 274/2021 OF ANTHIKKAD POLICE STATION, THRISSUR

APPLLCANT/ACCUSED NO. 2:

SARATH
AGED 27 YEARS
S/O.SYAM,MACHINGAL HOUSE,
KUTTUMUKKU DESOM,
VILVATTAM VILLAGE,
THRISSUR-680631.

BY ADVS.
P.M.RAFIQ
M.REVIKRISHNAN
VIPIN NARAYAN
AJEESH K.SASI
POOJA PANKAJ
SRUTHY N. BHAT

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM-682031.

BY SRI. SANTHOSH PETER, SENIOR PUBLIC PROSECUTOR

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
22.07.2021, ALONG WITH Bail Appl.No.4033/2021, THE COURT ON THE
SAME DAY DELIVERED THE FOLLOWING:

Bail Appl.Nos.4002 &

4033 OF 2021

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K.HARIPAL

THURSDAY, THE 22ND DAY OF JULY 2021 / 31ST ASHADHA, 1943

BAIL APPL. NO. 4033 OF 2021

CRIME NO. 274/2021 OF ANTHIKKAD POLICE STATION, THRISSUR DISTRICT
PETITIONER/1ST ACCUSED:

ASHISH
AGED 26 YEARS
S/O.ANILKUMAR,
KALLATTUPARAMBIL HOUSE,
KUTTUMUKKU DESOM,
VILVATTOM VILLAGE,
P.O.RAMAVARMAPURAM,
THRISSUR-680 022.

BY ADVS.
M.R.VENUGOPAL
DHANYA P.ASHOKAN

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.

BY SRI. SANTHOSH PETER, SENIOR PUBLIC PROSECUTOR

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
22.07.2021, ALONG WITH Bail Appl.No.4002/2021, THE COURT ON THE
SAME DAY DELIVERED THE FOLLOWING:

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ORDER

These are applications for bail moved by accused Nos. 2 and 1 respectively in Crime No. 274/2021 of Anthikkad Police Station, which was registered alleging offence punishable under Sections 22(c) and 29 of the Narcotic Drugs And Psychotropic Substances Act, hereinafter referred to as the Act.

2. Earlier the applications were heard on 07.07.2021. After hearing counsel on both sides, the order was pronounced in open court, granting bail to the petitioners imposing certain conditions. At that time, all the parties including the counsel for the petitioners and also the learned Public Prosecutor were under the impression that the contraband involved was 0.110 mg of LSD stamp irrespective of the question that Sections 22(c) and 29 of the Act were invoked by the prosecution. It was also highlighted by the learned counsel that the quantity involved is only 0.110 mg, which is a small quantity and that the accused persons were in custody for more than 72 days and on that consideration, the

petitioners were directed to be released on bail.

3. Later during the afternoon session, the learned Public Prosecutor submitted that the actual quantity involved is 0.110 gram and not 0.110 mg, as inferable from the prosecution records. According to the learned Public Prosecutor, it was a mistake on the part of the officials to record the quantity as 0.110 mg, which is a small quantity, despite the fact that the offence under Sections 22(c) and 29 of the Act were invoked. On that basis, since the counsel for the petitioners were not present at that time, this Court directed not to release the order. Thus, the applications were again posted for hearing on 15.07.2021 and I heard learned counsel on both sides. The case diary was also made available for perusal.

4. The crime was detected on 17.04.2021 by the Junior Sub Inspector of Anthikad Police Station. The records indicate that on 17.04.2021 at 15.45 hours, he was engaged in usual patrol duty along with the police party; the party was proceeding from Peringottukara towards eastern nada of Thriprayar, observing vehicles and other passengers. At 16.30 hours, in

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front of Santhi Palace Auditorium, they happened to notice two persons sitting on a motor cycle – Royal Enfield Himalaya, No. KL-08-BR-844 - which was kept on the stand, on the side of the road. Seeing the police party, they became perplexed and their addresses were asked; then both of them related their names as Ashish K. Ramesh and Sarath. In order to ascertain whether they were carrying any weapon, their body was searched in the presence of independent witnesses and he confirmed that they did not carry any weapon with them. Further, going by the seizure mahazar, for ascertaining the correctness or confirming the identity disclosed by them, they were asked to open the purses carried by them. At first they refused and when he insisted them to open the purse, at first, the first accused opened the purse which carried some currency notes, ATM card, election identity card etc., besides a plastic cover. Sub Inspector had previous experience in Excise Department and that plastic cover contained a triangular card like material with some designs; immediately he could understand that it is LSD stamps. On questioning, the first accused told him that it was arranged

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for his consumption. Similarly, when the purse of the second accused was opened, it contained smoking papers. Thus the accused were arrested, the items and the motor cycle were seized under a mahazar and after reaching back the police station, the crime was registered. That is the sum and substance of the sequences of events that led to the registration of the crime.

5. Perusal of the case diary shows that the crime was registered on 17.04.2021 under Sections 22(c) and 29 of the Act, after seizing 0.110 mg of LSD from the accused persons two in number. Till 06.07.2021, the police proceeded as though the quantity of contraband is 0.110 mg. Of course, possessing 0.110 mg of LSD will not attract an offence under Section 22(c) of the Act. So the quantity shown in the FIR and other prosecution records and the section of law invoked cannot go together. Now, on 06.07.2021, a statement has been incorporated in the case diary stating that it was a mistake on the part of the Sub Inspector and other police party to show the quantity of contraband as 0.110 mg, the actual quantity is 0.110 gram which alone would attract offence under Section 22(c) of the Act.

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6. The screen shot of weighing of the contraband also is available in the case diary, which indicates that it is 0.110 gram. In other words, I have no doubt in my mind that the quantity involved is 0.110 gram, which prima facie attracts offence under Section 22(c) of the Act. It seems, it was a mistake on the part of the officials in showing the quantity as 0.110 mg instead of 0.110 gram, which is the quantity involved.

7. That means, prima facie offence under Section 22(c) and 29 of the Act is attracted against the petitioners. But at this juncture, both the counsel for the petitioners urged that the crime was registered without following the procedural formalities. Even though the body of both the petitioners were searched by the Sub Inspector, no attempt was made to follow the mandatory directives under Section 50 of the Act. I have gone through the mahazar dated 17.04.2021 prepared by the Junior Sub Inspector. The perusal of the mahazar and other records will clearly indicate that the submission made by the learned counsel is correct. It is seen that the police officials were moving in their official vehicle attending routine patrolling work; they came

across the petitioners who were standing near the motor cycle in front of the said Santhi Palace Auditorium. Seeing the persons, they stopped the vehicle and asked their names and then the Sub Inspector searched their body for the purpose of ascertaining whether they carried any weapon of offence; nothing was found out; they disclosed their names, their names and addresses were noted and then, in order to confirm whether the identity stated by them were correct, the Sub Inspector wanted them to open their purses and at that time, LSD stamp was found from the purse of the first accused and smoking papers were found from the purse of the second accused. That was how the crime was registered. From the sequences of events inferable from the mahazar prepared on 17.04.2021, it is patently clear that before searching the body of the petitioners, no attempt was made to comply with the provisions under Section 50 of the Act.

8. It is salutary that mandate under Section 50 of the Act has to be strictly followed. In numerous decisions, the Hon'ble Supreme Court has held that failure to comply with the provisions would render the recovery of the illicit articles

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suspect and vitiate conviction, if the same is recorded only on the basis of the recovery of the illicit articles from the person or the accused during such search. The learned counsel also relied on decisions reported in **Sk. Raju @ Abdul Haque @ Jagga v. State of West Bengal [2018 KHC 6660]** and **State v. Vidya Devi and etc.**, a full bench decision of the Himachal Pradesh High Court reported in **1993 KHC 2500**. Reliance was also placed on **State of Punjab v. Balbir Singh [AIR 1994 SC 1872]**.

9. It is true that the detection of the crime was not the direct result of the body search conducted by the Sub Inspector. As noticed earlier, he had searched the body of the petitioners immediately on seeing them, for the purpose of ascertaining whether they carried any arms or weapons with them. At that time, slightest doubt was not there to suspect that they had carried any offensive articles like narcotic drug or other substances. They had readily related their name and addresses and only when the Sub Inspector wanted to ascertain or counter check the addresses that they were asked to open their purses.

Anyhow, absolutely no attempt has been made to comply with Section 50 of the Act. Before conducting the body search, the right of the petitioners to be searched in the presence of a gazetted officer or a Magistrate should have been conveyed to them, which was not done. As noted earlier, that would vitiate the very search and seizure and therefore, the said mahazar prepared should be taken as non est.

10. This is only at the stage of investigation and court is considering their application for bail. Now the question is whether this Court should consider and go to such an extent. I have no doubt that, if the very search and seizure are bad and vitiated that would cut the very root of the prosecution case and therefore, such an aspect can be considered at this stage. Therefore, without going into the other aspects of the matter, the petitioners can be released on bail, subject to the following conditions:-

- i) The petitioners shall execute bond for Rs.1,00,000/- (Rupees One lakh Only) each with two solvent sureties each for the like sum to the satisfaction of the jurisdictional court; one of the sureties shall be a near

relative of each petitioner;

- ii) They shall not try to contact or influence the witnesses or tamper with the evidence;
- iii) They shall not leave the country without permission of the jurisdictional Court;
- iv) They shall not involve in any crime during the bail period;
- v) They shall appear before the Investigating Officer/jurisdictional court as and when required;
- vi) The petitioners shall strictly follow the various guidelines issued by the State and Central Governments with respect to keeping of social distancing in the wake of Covid 19 pandemic;
- vii) If any of the above conditions are violated by the petitioners, the jurisdictional Court will be at liberty to cancel the bail in accordance with law.

11. It is made clear that after conclusion of investigation, if the police proceeds to file a charge sheet against the accused and the petitioners are made to face the trial, the above observations made by this court, shall not stand on the way of making independent assessment of the evidence by the trial court. In other words, it is made clear that the above observations are made purely for the purpose of disposing of the

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bail applications.

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The bail applications are allowed.

Sd/-

K. HARIPAL

JUDGE

DCS/19.07.2021