

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPLICATION (BAIL) NO. 70 OF 2016

John Fernandes,
Aged 52 years, Indian
National, H.No.654/3,
Praiswado, Anjuna, Bardez-
Goa presently lodged
Mapusa Judicial Lock up
Mapusa, Bardez-Goa ... Applicant

Versus

1. State
As represented by
Officer-in-charge,
Anti Narcotic Cell
Police Station,
Panaji, Goa.
2. The Public Prosecutor
High Court Building,
Altinho, Panaji, Goa ... Respondents

Mr. J. P. D'Souza and Mr. Kamlakant Poulekar, Advocates
for the applicant.

Mr. S. R. Rivankar, Public Prosecutor for the
respondents.

CORAM :- C. V. BHADANG, J.

Reserved on : 29th April, 2016.

Pronounced on : 3rd May, 2016.

ORDER :

This is an application for bail. The applicant
along with the co-accused Dulal Das is facing
prosecution for the offences under Sections 22(C),

22(b)(ii)(A) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the Act, for short) in Special Criminal Case No.12/2015 before the learned Special Judge at Mapusa.

2. According to the prosecution, the applicant was found in illegal possession of 0.3 Grams of LSD papers and 27 Grams of charas, which were seized during the raid at Anjuna, Bardez, Goa. According to the prosecution, on 31/10/2014 at about 17.30 hours, an information was received by P.S.I. Shitakant Nayak, ANC that one John Fernandes (i.e. the applicant) has stored narcotic drugs in his house No.654-2, Praiswado, Anjuna, Bardez, Goa. He along with his associate Dulal Das is selling drugs to the customers. Accordingly, raid was conducted at the aforesaid house. The applicant was informed that "if he desires", search of his house and his personal search, can be conducted in the presence of a gazetted officer or Magistrate. However, the applicant declined the offer. It is further the case that in the house, there was one bedroom, which was latched from inside. The applicant informed that his wife is sleeping inside. Upon knocking the door, it was opened by one

lady, who gave her name as Jenifer, wife of John Fernandes. She was requested to vacate the room. Apart from other belongings, there was a small steel cupboard on the left side of the bedroom, which was found locked. The raiding officer requested the applicant to hand over the key of the said cupboard when the applicant removed one key from his right hand side pant pocket and handed it over to the raiding officer. On opening the cupboard, apart from the other articles, on the right hand side upper compartment, two transparent polythene packets containing two perforated paper sheets were found. One of the sheets was having 25 square shaped pieces having multi-colour with design print and the other sheet having 5 square shaped pieces having multi-colour design print. A small piece of paper was taken out from the sheet and was tested with drug detection kit and it tested positive for LSD. Both the sheets together weighed 0.3 grams which were sealed and marked Exh.I. In the second autopress polythene packet, 27 grams of charas was detected. For the present purpose, we are concerned with the allegation of recovery of LSD as it is said to be of a commercial quantity which is the principal reason for which the applicant has been denied

bail. According to the prosecution, a personal search of the applicant was also conducted in which a mobile handset was recovered. On completion of investigation, the applicant and the co-accused have been chargesheeted in the aforesaid case.

3. The earlier application for bail being Criminal Application No.200/2015 was rejected by this Court (Wadane, J.) on 16/10/2015. The applicant, thereafter, moved the Hon'ble Supreme Court in CRLMP No.2142/2016 in which the following order is passed on 12/02/2016 :

"Delay is condoned.

We have heard Mr. Colin Gonsalves, learned Senior Counsel appearing for the petitioner.

It appears that a mistake has been cropped up by the trial Court at the time of calculating the total measurement in the matter.

In view of that, we do not intend to pass any order at this stage. However, we are granting liberty to the petitioner to place this fact before the trial Court and apply for bail.

The other points which have been urged by the learned Senior Counsel for the petitioner

before us can also be taken by him at that point of time before the trial Court.

The Special Leave Petition is disposed of in the afore-stated terms."

4. The applicant accordingly moved the Special Court for bail, which application has been rejected on 29/03/2016. In such circumstances, the applicant has approached this Court for bail.

5. I have heard the learned Counsel for the applicant and the learned Public Prosecutor for the respondents.

6. It is submitted on behalf of the applicant that there is no compliance with Section 50 of the Act in this case, as a result of which, the alleged recovery of contraband, becomes suspect. The learned Counsel has submitted that once the prosecution comes with a case of personal search, which is conducted in this case, compliance with Section 50 would be mandatory. The learned Counsel pointed out that the applicant was informed that "if he desires", he can be searched in the presence of the gazetted officer or a Magistrate which

according to the learned Counsel for the applicant is not sufficient compliance with Section 50 of the Act. The learned Counsel submits that the applicant has to be informed of his "right" to be searched in the presence of a gazetted officer or a Magistrate. Reliance is placed on the Constitution bench judgment of the Supreme Court in the case of ***State of Punjab Vs. Baldev Singh***, reported in 1999 SCC (Cri) 1080 and in particular, para 57(7) of the said judgment, in order to submit that the illicit articles seized from the person of the accused during search conducted in violation of safeguards provided under Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband.

7. It is next submitted that the key, which is allegedly handed over by the applicant on request from the raiding officer "cannot be looked at". It is submitted that the alleged act of the applicant handing over the key to the raiding officer cannot be used against him as at that time the applicant was in custody. In any case, the contention is that the key is not shown to be seized and thus, there is no material to

prima facie show exclusive possession of the contraband by the applicant in as much as the cupboard from which the alleged contraband was recovered, was in a bed room, which was latched from inside and there was a lady inside, who is allowed to go. It is submitted that the room cannot be said to be in exclusive possession of the applicant.

8. The learned Counsel has then referred to the evidence of PW1, who is Dr. Deepak Middha, Assistant Director of CFSL, in order to submit that excluding weight of the paper, the weight of the LSD detected cannot be of a commercial quantity. The learned Counsel has also taken exception of placing reliance on Note 4 of the Notification dated 18/11/2009 which reads as under :

"Note-4- The quantities shown in column 5 and column 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."

It is submitted that the Central Government does not derive power under clause (viia) and (xxiia) of Section 2 of the Act, to prescribe that the weight of entire mixture shall be reckoned to decide whether the contraband pertains to a small or a commercial quantity and not "just its pure drug content". It is submitted that two papers are also not shown to be individually tested, which would introduce an element of uncertainty as to which of them was carrying the LSD. The learned Counsel in this regard has placed reliance on the decision of this Court in Criminal Appeal No.4/1997 (**Premnath Shah V. State of Goa**) decided on 12/11/1997. Reliance is also placed on the decision of Hon'ble Supreme Court in the case of **State of Rajasthan Vs. Permanand and another**, reported in AIR (SC) 1384 and **E. Micheale Raj Vs. Intelligence Officer**, reported in 2008 Drugs Cases (Narcotics) 243, in order to submit that there are no "reasonable grounds" for believing that the applicant is guilty of any such offence within the meaning of Section 37(1)(b)(ii) of the Act. The learned Counsel has placed reliance on the decision of this Court in the case of **Lawarance D'Souza Vs. State of**

Maharashtra and another, reported in 1992 CRI.L.J. 399, in order to submit that even at the stage of consideration of the application for bail, the Court would be required to examine whether there is compliance with the provisions of Sections 41 to 58 of the Act and bail cannot be refused on the ground that it can be examined at the trial.

9. On the contrary, the learned Public Prosecutor submits that the trial has already started in which the prosecution has examined the Chemical Analyser. It is submitted that the applicant cannot urge for prejudging the evidence of the prosecution, which can be done at the trial. He submitted that the contraband is not recovered on personal search, but during the search of a cupboard of which the key was handed over by the applicant and as such, the provisions of Section 50 of the Act would not be attracted, although he submits that there is compliance with said Section. The learned Public Prosecutor has pointed out that at the time when the key was handed over by the applicant, he was not in custody and it was only after recovery of contraband that he was arrested. It is submitted that in as much

as the applicant was having the key, he is prima facie shown to be in exclusive possession of the contraband which was recovered from the cupboard. In so far as the challenge to the notification dated 18/11/2009 is concerned, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Union of India Vs. Elphinstone Spinning and Weaving Company Ltd and others** reported in (2001)4 SCC 139 in which the Hon'ble Apex Court has held that all legislative acts are presumed to be within jurisdiction. The learned Public Prosecutor submits that it would not be open for the applicant to stake a challenge to the notification in an application for bail. The learned Public Prosecutor has placed reliance on the decision of the **Delhi High Court in the case of Abdul Mateen Vs. UOI and another**, reported in (2012)194 DLT 425 in which, the challenge to the validity of notification has been negatived. The learned Public Prosecutor points out that the notification is subsequent to the decision of the Hon'ble Supreme Court in the case of **Ansar Ahmad Vs. State**, reported in 123(2005)DLT 563 and **E Micheale Raj** (supra). The learned Public Prosecutor has also submitted that having regard to the said notification,

the total weight can be considered to decide whether the contraband recovered is of commercial quantity or not.

10. I have considered the rival circumstances and the submissions made.

11. At the outset, it is necessary to mention that the trial has already started in which the prosecution has examined the Assistant Director from CFSL, Hyderabad. Although in the case of **Lawarence D'Souza**, (supra), this Court has held that even at the stage of consideration of an application for bail, the Court can look into whether there is compliance with Sections 41 to 58 of the Act, that examination would be essentially limited to see whether there is prima facie such compliance or not. Section 37 comes into play when the prosecution alleges recovery of commercial quantity of the contraband and there is embargo placed on the powers of the Court to release the accused on bail in such a case, unless the Court is satisfied that there are "reasonable grounds for believing" that the applicant is

not guilty of such offence and that he is not likely to commit any such offence while on bail. Thus, it has to be shown that there are reasonable grounds for believing that the applicant is not guilty of such offence namely of being found in possession of a commercial quantity of the contraband.

12. The material contention is based on non-applicability of Section 37 which is in turn based on two aspects namely, the vulnerability of the notification dated 18/11/2009 and the fact that the excluding weight of the paper, the quantity cannot be said to be commercial quantity. There is also a contention about the two papers (one having 25 square pieces and the other having 5 square pieces) not having been tested individually. It would be necessary to consider the argument based on the notification first. The original notification dated 19/10/2001 prescribes that in so far as LSD is concerned any quantity in excess of 0.1 gram is a commercial quantity. The total weight of the two papers was 0.3281 grams and out of which the weight of the paper is said to be 0.32 grams. The contention is that the net weight of the LSD would

be 0.0081 grams which is less than the commercial quantity which is prescribed. The principal question is about the effect of the notification dated 18/11/2009 on the basis of which it is claimed that the quantity recovered is commercial quantity. In this regard, it is necessary to mention that the challenge to the notification as being beyond the powers conferred on the Central Government under Section 2(viia) and 2(xxiiia) of the Act cannot be examined in an application for bail. The Division Bench of Delhi High Court in the case of **Abdul Mateen** (supra), has declined to uphold the challenge to the notification as being ultra vires the provisions of the Act. Incidentally, the question is also whether the presence of LSD on the paper can be said to be a mixture. The Special Court, in this regard, has considered the definition of mixture as under :

*"18. In **Wikipedia, the free Encyclopedia**, the definition of MIXTURE is given as under :*

*"In chemistry, a **mixture** is a material system made up of two or more different substances which are mixed **but are not combined chemically**. A mixture refers to*

*the physical combination of two or more substances **on which the identities are retained.**"*

As per Collins English Dictionary - Complete & Unabridged 2012 Digital Edition, the term "Mixture" is a noun, and it means the act of mixing or state of being mixed or something mixed.

*The dictionary meaning of a mixture is that it is **a product of mixing** or any combination or blend of different elements, kinds, qualities etc.*

*In chemistry or, physics, it means an aggregate of two or more substances **that are not chemically united** and that exist in no fixed proportion to each other."*

13. Thus, the mixture would essentially differ from a solution. While in the case of former, the individual substances retain their identities, in the later, it is not so. PW1 has stated in his evidence that the LSD and the paper retained their independent identity. The said witness has also stated as to the reason why LSD is sold and consumed in the form of LSD paper which are essentially blotter/ absorbent papers having small perforated pieces. He states that LSD blotter is

preferred over the liquid form which facilitates the consumption of LSD in controlled dosages which may not be possible with liquid LSD, which may at times turn fatal to the recipient. He has stated that blotter is a medium to carry LSD. Prima facie although the blotter/absorbent paper may be used as a carrier, it cannot be equated, for instance, with just a bottle containing a liquid. This is because a bottle may not be necessary for consumption of LSD while the blotting paper facilitates its consumption in controlled dosages. I would hasten to add that it is neither necessary nor appropriate at this stage to express any final opinion on the issue, as the trial is still pending before the Special Judge. The discussion is essentially to show that these are some of the questions which would arise for determination at the trial and *prima facie* at this stage, it cannot be accepted that the quantity recovered was not the commercial quantity and consequently, it is not possible to accept that the provisions of Section 37 would not apply in this case. To put it otherwise the effect of the notification cannot be brushed aside at this stage.

14. This takes me to the contention about non-compliance with the provisions of Section 50 of the Act. A Constitution Bench of the Hon'ble Supreme Court in the case of **Baldev Singh** (supra) has reached the following conclusions in para 57 of the judgment :

"On the basis of the reasoning and discussion above, the following conclusions arise :

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing;

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;

(3) That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his

search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act;

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the

effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards 50 have by Section 50 at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut- short a criminal trial;

6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and

unsustainable in law;

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search;

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act.

9) That the judgment in Pooran Mal's case cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search;

(10) That the judgment in Ali Mustaffa's case correctly interprets and distinguishes the judgment in Pooran Mal's case and the broad observations made in Pirthi Chand's case and Jasbir Singh's case are not in tune with the correct exposition of law as laid down in Pooran Mal's case. The above conclusions are not a summary of our judgment and have to be read and considered in the light of the entire discussion contained in the earlier part."

(Emphasis supplied).

The Hon'ble Apex Court has thus held that failure to conduct search in breach of Section 50 of the Act, if demonstrated, may not vitiate the trial, but would render the seizure of the illicit articles suspect and vitiate the conviction and sentence of the accused, where the conviction has been recorded only on the basis of possession of illicit article "recovered from his person". It has further been held in para 57(5) above that whether or not the safeguards provided under Section 50 have been duly observed, would have to be determined by the Court on the basis of the evidence led at the trial and the finding on that issue one way or the other would be relevant for recording an order of conviction or acquittal and without giving an

opportunity to the prosecution to establish at the trial that the provisions of Section 50 and in particular, the safeguards provided therein were duly complied with or not, it would not be permissible to cut short the criminal trial. Lastly, under para 57(7), it has been held that the illicit article seized from the person of an accused during the search conducted in violation of safeguards provided in section 50 of the Act, cannot be used as evidence of proof of unlawful possession of the contraband by the accused, though any other material recovered during that search may be relied upon by the prosecution in other proceedings. A perusal of the para 57(6) would further show that the Hon'ble Supreme Court has not expressed any opinion whether the provisions of Section 50 are mandatory or directory and has held that failure to inform the person concerned of his right emanating from subsection (1) of Section 50 may render the recovery of contraband suspect and conviction and sentence of an accused bad and unsustainable in law.

15. It is necessary to mention that the trial is still pending and the present consideration is only whether the applicant can be enlarged on bail ? *Prima*

facie, I find that the contraband has not been recovered on personal search. *Prima facie*, it can be seen the contraband was recovered from a cupboard of which the key was handed over by the applicant before he was arrested. That apart, the only contention about non-compliance with Section 50 is on the basis of use of words, "if he desires" and the applicant not being informed about his "right". The consideration and determination of the question whether there is proper compliance with the provisions of Section 50 of the Act thus, will have to be gone into at the trial. For these reasons, *prima facie*, it is not possible to accept the submissions based on non-compliance with Section 50 of the Act.

16. The decision in the case of ***Parmanand and another*** (supra) turned on its own facts, in which the accused, apart from being informed that the accused has right to be taken to the nearest Magistrate or a gazetted officer, was also asked whether the accused wants to be searched before the Superintendent, who was part of the raiding party and as such, was found to be not an independent officer.

17. The case of **Premnath** (supra) also arose out of a conviction in which there were two pieces of charas seized and it had come in the examination of the Chemical Analyser that portion from both the pieces were taken for testing. This Court found that it was not disclosed as to how much portion was taken from each piece and it was further found that both the pieces were tested collectively and not individually.

18. *Prima facie*, at this stage, the evidence of PW1 does not show that the two paper sheets were analysed together, although PW1 has stated that he had received two paper sheets which he had analysed and on which LSD was detected.

19. For these reasons, I do not find that discretion can be exercised in favour of the applicant. Consequently, the application is hereby rejected.

20. It is made clear that the learned Special Court

shall not be influenced by any of the observations made
herein, at the trial.

C. V. BHADANG, J.

SMA