

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPLICATION (MAIN) NO. 56 OF 2017**

State, Through its Police Inspector/
Investigation Officer

... Applicant

Versus

Mr. Rocky Fernandes

... Respondent

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

Ms. Caroline Collasso, Advocate for the Respondent.

CORAM:- C.V. BHADANG, J.

DATE:- 13th JUNE, 2017.

ORAL ORDER:

This is an application under Section 439(2) read with Section 482 of Cr.P.C., seeking cancellation of bail granted to the respondent.

2. The respondent (accused) is facing prosecution for the offence punishable under Section 22(c) read with Section 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act, for short), for having found in illegal possession of 24 pieces of paper smeared with LSD. According to the prosecution, the total amount of LSD recovered from the respondent is 0.2562 grams, which is a commercial quantity.

3. The learned Sessions Judge, during the course of the trial, by an order dated 17.12.2016 and on placing reliance on the evidence of PW-1, Shri Sudhakar, the Junior Scientific Officer from CFSL, Hyderabad, has released the respondent on bail.

4. I have heard Shri Rivankar, the learned Public Prosecutor for the applicant and Ms. Collasso, the learned Counsel appearing for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the evidence of PW-1, Shri Sudhakar and the impugned order passed.

5. It is submitted by the learned Public Prosecutor that all the 24 pieces, which were seized from the respondent were tested by PW-1 and there is clear evidence that 0.2562 grams of the contraband LSD was recovered from the possession of the respondent, which is a commercial quantity. It is submitted that in such circumstances, Section 27 of the NDPS Act was attracted and the learned Sessions Judge could not have released the respondent on bail, unless, the Court was satisfied that there were reasonable grounds for release and that the respondent was not guilty of such an offence.

6. The learned Public Prosecutor has strenuously urged that there is no cross examination of PW-1 to suggest that the remaining quantity, if any, was not LSD. In other words, it is submitted that there is no specific suggestion given to PW-1 in cross examination that 24 pieces contained anything other than LSD. It is submitted by the learned Public Prosecutor that it is for the respondent/accused to establish the foundation in the cross examination and in the absence of the same, the learned Sessions Judge was in error in concluding that no case of the respondent having found in possession of commercial quantity of LSD, is made out.

7. The learned Public Prosecutor submits that the judgment of the Hon'ble Supreme Court in the case of **Gaunter Edwin Kircher Vs. State of Goa, (1993) 3 SCC 145** and the decision of the Division Bench of this Court in the case of **Firdous Ahmed Vs. Union of India, CDJ 2007 BHC 1290**, on which reliance is placed by the learned Sessions Judge, are distinguishable on facts.

On behalf of the applicant, reliance is placed on the decision of the Division Bench of this Court in the case of **Nandlal Shyamdas Vs. State of Goa**, passed in Criminal Appeal No. 39/2009, decided on 12.08.2011, in order to submit

that in the absence of any foundation in the cross examination, the learned Sessions Judge could not have held that a case of possession of commercial quantity, is not made out. He submitted that strong circumstances are required for grant of bail, which are not existing in the present case.

8. On the contrary, it is submitted by the learned Counsel for the respondent that there is sufficient cross examination of PW-1 in order to *prima facie* show that the entire material cannot be said to be LSD. The learned Counsel pointed out that although, all the 24 pieces were tested, they were tested jointly by putting them in the same solution and thus, the learned Sessions Judge was justified in finding that, there was a possibility that some of the pieces may not contain LSD. The learned Counsel pointed out that the trial is at the fag end, in which only the Investigating Officer is left to be examined and the trial will be concluded in a short while.

9. I have carefully considered the rival circumstances and the submissions made. *Prima facie*, according to the prosecution, 24 pieces of perforated paper were seized from the respondent. *Prima facie*, it appears from the evidence of PW-1 that 24 square shape thick paper pieces, having different shapes

and designs were received for analysis. The Chemical Analyser found the total weight of the 24 pieces as 0.2562 grams. The Chemical Analyser has thereafter gone on describing the various tests, which he had conducted leading to the conclusion that 24 pieces were containing LSD. In the cross examination, of this witness, it has come that all the 24 pieces were dipped in an organic solvent and that solvent was then tested for LSD. A suggestion was given to this witness that whatever he has stated is false, which the witness has denied. It has come in the evidence that the tests, which are conducted are sensitive to the presence of micrograms of the quantity, but not to nanograms of the contraband.

10. It can thus *prima facie* be seen that although, according to PW-1, all the 24 pieces were tested for the presence of LSD, the manner in which the testing is done is all the 24 pieces were dipped together in an organic solvent, which was then tested for LSD. At least, *prima facie*, at this stage, there is a possibility of some of the pieces not containing LSD and this has prompted the learned Sessions Judge to exercise discretion, in favour of the respondent.

11. In the case of **Nandlal Shyamdas** (supra) on which

strong reliance is placed on behalf of the applicant, the appellant-accused was convicted for an offence punishable under Section 8(c) read with Section 20(b)(ii)(C) of the Act, for having found in illegal possession of 1.125 kg. of charas. One of the grounds raised on behalf of the appellant was that the Chemical Analyser has deposed that the substance "contains charas" and had not stated that the substance "is charas". The Division Bench while refuting such argument, inter alia held that normally such an Expert would state about the substance contains the contraband and from the evidence of the Chemical Analyser, it cannot be said that there was any other substance or impurities, in the sample. In the facts of that case, the Division Bench held that there was no cross examination of the Chemical Analyser to suggest that, on behalf of the appellant-accused, it was claimed that the substance which was tested contained any other substance. It is evident that the question in such a case would depend upon facts and circumstances of each case. This is not the stage where the evidence on record can be examined in depth, so as to record a final and binding opinion. This is because trial is still pending and is stated to be at an advanced stage. It needs to be mentioned that, evidence of any witness has to be read as a whole including the cross examination. As noticed earlier, *prima facie*, it has come in the cross examination

of PW-1 that all the pieces were dipped in an organic solvent, which solvent was then tested for presence of LSD. In my considered view, therefore, no exception can be taken, to the conclusion drawn by the learned Sessions Judge.

12. A claim for cancellation of bail can arise in two situations, firstly, there may be a case where there are allegations that the bail has been misused, which is not so in the present case and secondly, when the prosecution can come with a case that bail has been wrongly granted. The present case belongs to the later category. On having carefully gone through the evidence of the Chemical Analyser, I do not find that a case for interference is made out, particularly, in view of the fact that the trial is at an advanced stage and is likely to be concluded in a short time. The application is accordingly dismissed. It is however made clear that the learned Sessions Judge shall neither be influenced by the observations made in the impugned order nor with the observations made in this order and the learned Sessions Judge shall decide the trial on its own merits. With this, the Criminal Application is disposed of.

C.V. BHADANG, J.

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