

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPLICATION (BAIL) NO. 166 OF 2017

Hassan Azadeh,
Aged 34 years, Iranian
national, Presently lodged
under Judicial Custody
at the Colvale Central Jail,
Colvale, Bardez-Goa

... Applicant

Versus

1. Union of India
As represented by
Officer-in-charge,
Narcotics Control Bureau,
Home in the Woods Colony,
Porvorim, Goa.

2. The Spl. Public Prosecutor,
High Court Building,
Altinho, Panaji Goa

... Respondents

Mr. J. P. D'Souza, Advocate for the applicant.

Mr. Vivek Rodrigues, Special Public Prosecutor for the respondents.

CORAM :- NUTAN D. SARDESSAI, J.

Reserved on : 24th August, 2017

Pronounced on : 1st September, 2017.

ORDER :

Heard Shri J. P. D'Souza, the learned Advocate for the
applicant and Shri Vivek Rodrigues, the learned Special Public

Prosecutor on behalf of the respondents.

2. It was the contention of Shri D'Souza, the learned Advocate for the applicant that the applicant was placed under arrest on 26/02/2016 and since then, there has been a change in the circumstances inasmuch as the Chemical Analyzer had been examined in the case and pursuant to whose deposition, it was apparent that the test for cocaine was sensitive even to micrograms. It was alleged on behalf of the respondents that the applicant was found in possession of 109 grams of cocaine which constituted a commercial quantity in terms of the Schedule to the Narcotic Drugs and Psychotropic Substances Act, 1985 (the Act, for short) and amended by the 2001 Act. It was his further contention that the tests were conducted in respect of one pouch stated to contain cocaine and therefore, there was no basis in the case of the respondents that the applicant was in possession of the commercial quantity of cocaine and thus, not entitled to the benefit of bail in view of the bar under Section 37 of the Act. He next submitted that the learned Trial Court had given erroneous finding in her order even though the contents of only one pouch was proved to be cocaine. The rigours of Section 37 of the Act did not apply to his case and therefore, he was entitled to the benefit of bail.

3. Shri J. P. D'Souza, the learned Advocate for the applicant placed on record a brief written synopsis and relied upon (i) **Rajesh Avasti Vs. State of Goa (Criminal Appeal No.1148 of 1999)**; (ii) **Premnath Dukhi Shah Vs. The State of Goa (Criminal Appeal No.4/1997)**; (iii) **State, through its Police Inspector Vs. Monday Odede (Criminal Application (Main) No.122/2017)**; (iv) **State, Through its Police Inspector Vs. Rocky Fernandes (Criminal Application (Main) No.56/2017)**; (v) **Union of India Vs. Omkar Palyekar (Criminal Writ Petition Nos.5 and 6 of 2017)**; and (vi) **Deen Khan Mohamad Vs. State of Goa (Criminal Appeal No.27/1997, with a batch of 3 other appeals)**, in support of his case.

4. Shri Vivek Rodrigues, the learned Special Public Prosecutor at the outset distinguished the judgment in **Premnath Shah** (supra), and submitted that it was delivered on the merits of the case unlike the present case where the applicant was still facing trial and only the Chemical Analyzer was examined alongwith another. The stage of arguments before charge had yet to be reached and at that time, the Trial Court could assess on the material at large whether the quantity of cocaine found with the

applicant was variable quantity or a commercial quantity. He was therefore not entitled to the benefit of bail. It was his next contention that in terms of Section 67 of the Act, the respondents had recorded the statement of the applicant which he had voluntarily tendered and from which prima facie, his involvement in the case was established. The prosecution had examined the expert witness and during whose cross-examination, it was not at all the case put to him on behalf of the applicant that the major contents of the pouches were neutral substances. It was also his contention that there was a presumption of culpable mental state against the applicant in terms of section 35 of the Act and therefore, on all these parameters, he would not be entitled to the benefit of bail.

5. Shri Vivek Rodrigues, the learned Special Public Prosecutor placed reliance on **Gharban Ali Pour Azadi Vs Intelligence Officer Air Intelligence Unit, Bombay, [(1996)2 Mh. L. J. 839]**, **Khan Rukhsena Banoo Vs B. S. Rawant, Assistant Collector of Customs and another,[(1994)2 Bombay Cases Reporter 414]**, **Chidi Anthony Uzoukwu Vs. Union of India, [2014 SCC Online Bombay 742]**, **Jotham Wangila Wanyama Vs. The Assistant Director (Unreported**

judgment of Justice Chitre dated 29/10/2002), N. R. Mon Vs. Mohd. Nasimuddin, [(2008)6 SCC 721], Union of India Vs. Ram Samujh and another, [(1999)9 SCC 429], Narcotics Control Bureau Vs. Krishan Lal, [1991 AIR 558, Sushant Gupta Vs. Union of India, [2014 SCC Online 1495] and Shashibala Vs. Intelligence Officer, [1990 Mh.L.J. 457], to buttress his case that the applicant was not entitled to bail.

Shri Vivek Rodrigues, the learned Special Public Prosecutor for the respondents in reply submitted that the parameters in the cancellation of bail were different from the grant of bail and in that context, distinguished the judgments relied upon by Shri D' Souza and submitted that they did not at all support his case and pressed for the dismissal of the application.

6. **Premnath Shah** (supra), was in appeal to challenge the judgment of the Special Judge, Mapusa dated 19/11/1996 holding him guilty for the possession of 15.69 grams of charas under section 20(b)(ii) of the Act and sentencing him to suffer Rigorous Imprisonment for 10 years and fine of ₹ 1 Lakh and in default, to suffer Rigorous Imprisonment for two years. It was contended on his behalf that the Junior Scientific Officer had used a

portion from both charas pieces for the purpose of analysis instead of individually testing the said pieces and conducted the test collectively of the portion of two pieces together. He had utilised 2.6 grams of the substance from both the pieces and had admitted in the course of his cross-examination that even a small percentage of active constituent of charas would have given a positive test for charas in the sample drawn by him. In that backdrop, it was contended that the liability in respect of 15.69 grams could not be fastened on the accused since the Junior Scientific Officer had not analysed the portion of the sample taken from the two pieces individually. It was also contended on his behalf that right from the inception, the accused had taken a plea and even in his statement under Section 313 of the Criminal Procedure Code he had stated that he was in possession of only two grams of charas which was meant for his personal consumption and therefore his case would fall within section 27 of the Act.

7. In **Premnath Shah** (supra), the Division Bench of this Court considered the facts that though the appellants had sent both the charas pieces to the Junior Scientific Officer for analysis, the net weight of the two pieces was neither taken by the Police

nor by the Junior Scientific Officer. He took samples from both the charas pieces and instead of conducting individual tests on the said samples, had conducted the test on the two samples and besides opined that even a small percentage of active constituent of charas would have given positive test for charas in the present sample, which was collectively tested. In that context, Their Lordships held that if the two samples had been tested separately and both were tested for charas, then there would be absolutely no difficulty in fastening the liability on the accused for possessing 15.69 grams of charas. Such not being the case, the benefit of the same had to be given to the accused in view of the testimony of the Junior Scientific Officer. In that view of the matter, the conviction of the appellants under Section 20(b)(ii) of the Act was set aside and instead, he was held guilty under Section 27 of the Act. This judgment was delivered on the merits of the case and on a consideration of the factual matrix and therefore, cannot support the case of the applicant, hence, respectful departure.

8. **Gharban Ali** (supra), had petitioned for bail after his application for bail was rejected by the Special Judge for NDPS cases, Bombay. In the brief facts, the case against him was that while he was going to board the Singapore Airlines flight on the

midnight of 2nd / 3rd October, 1994, he was questioned on suspicion by the officers of the Air Intelligence Unit of Customs at the Sahar Airport, who was found in possession of a briefcase and was brought to the office of the Customs Officer on suspicion. The search of the briefcase was taken when it was found to contain 2400 grams of opium which was concealed in the bottom of the briefcase and seized under a panchanama followed by his arrest by the Customs Officer and produced for remand before the learned Magistrate. In the said matter, some comment was made about the delay in sending the sample packets to the Chemical Analyzer and about the discrepancy regarding the weight of the sample, etc. The learned Single Judge of this Court observed at paragraph 8 that these were matters which could not be decided at the stage of bail. It observed that

"It is well settled that a Court cannot conduct a mini trial at the time of considering a bail application. The Investigating Officer may have reasonable explanation for the delay in sending sample packets or for discrepancy regarding weight of sample. All these things will have to be thrashed out during trial. These contentions are too premature to be considered at this stage and the prosecution must have an opportunity to explain these things during trial. It is open to the petitioner to cross-examine the

concerned officers on these points. Then these matters can be urged at the time of final arguments only after regular trial."

9. **Khan Rukhsena Banoo** (supra), was charged for having committed the offences under the NDPS Act and the Customs Act. It was alleged that on 20/01/1989 she had checked in at the Sahar International Airport, Bombay for an air Mauritius flight bound for Durban viz. Mauritius. She had checked in 3 suitcases which were the subject matter of the prosecution and on examination found to contain women's clothing, particularly maxis. She, however, disputed this fact and maintained that she had only one hand baggage and that the owner of the 3 suitcases could not be traced and the officer had falsely alleged that they were checked in by her. Concealed within the folds of these maxis and wrapped in cotton were as many as 49 packages each one containing 1000 tablets of Mandrax. On the suitcases being scanned through the 'X' ray screening machine, the Security Officer noticed large number of tablets in the bags and informed the Customs Superintendent.

10. In **Khan Rukhsena Banoo** (supra), she had revealed in her statement recorded under the Customs Act that she had

come to India for the purpose of praying and fulfilling a vow and one Sham, who was alleged to have been very helpful to her during her period in India, had brought and handed over 3 suitcases with a request that she should carry them to South Africa to which she had agreed as she had no much luggage of her own and she had not found anything wrong in doing so. In that context and considering her statement that she had no knowledge of the objectionable contents of the bags and to indicate that she had knowledge and conscious possession, it was observed by the Division Bench of this Court at paragraph 15 as below :

"15. It is for this reason that the law has made specific provisions under which any person found in possession of substances that come within the ambit of the N.D.P.S. Act shall be presumed to have knowledge of the nature of the contraband and the law presumes such guilty knowledge. This provision is undoubtedly harsh but it is still very necessary because in the absence of this provision in all such cases, the defence would be that the accused is an innocent carrier and that consequently, the Court should go back to the principle of conscious possession. To our mind, that principle which may apply to any other cases would not be applicable here in view of the specific provisions of the present Act."

11. In **N. R. Mon** (supra), the Hon'ble Apex Court considered the judgment in **Collector of Customs Vs. Ahmadalieva Nodira, [(2004)3 SCC 549]**, where it observed at paragraph 7 as below :

"7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present respondent accused is concerned, are: the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case at hand the High Court seems to have completely overlooked the underlying object of [Section 37](#). It did

not take note of the confessional statement recorded under [Section 67](#) of the Act. Description of drug at Serial No. 43 of the Schedule which reads as follows has not been kept in view:

In addition, the report of the Central Revenue Control Laboratory was brought to the notice of the High Court. The same was lightly brushed aside without any justifiable reason.”

and at paragraph 10, considered the judgment in **Union of India Vs. Abdulla; (2004)13 SCC 504**, which noted at paragraph 5 the judgment in **Narcotics Control Bureau Vs. R. Paulsamy; (2000)9 SCC 549**, which held that in the matter arising out of the Act, grant of bail is controlled by Section 37 of the Act and it is mandatory for the Court to hear the Public Prosecutor and come to a prima facie conclusion that there is no material to come to the conclusion that the accused can be held guilty of the charges levelled against him. Since the said conclusion is not recorded by the High Court and is not supported by reasons, we think the impugned order cannot be sustained.

12. In **Ram Samujh** (supra), the only question involved in the appeal was whether the order passed by the High Court of Judicature at Allahabad, Lucknow Bench granting bail to the respondent no.1 Ram Samujh, was required to be set aside on the

ground that the High Court had ignored the provisions of Section 37 of the Act as well as the law laid down by this Court. In the brief facts, it was alleged by the prosecution that on 21/05/1997, a raid was conducted by the authorities of the Narcotics Department at the tubewell house of Ram Samujh and 5 Kilos opium was recovered. The Sessions Judge, by a detail reasoned order, rejected the Bail Application after hearing the Special Public Prosecutor and considering the material on record. The High Court granted bail by a cryptic order dated 20/08/1998 to the effect that the applicant was in jail since 22/05/1997 and the trial had not concluded. He was admitted to bail under Sections 8 and 18 of the NDPS Act on furnishing a Personal Bond and two sureties to the satisfaction of the Special Judge and on condition that he shall report at the Police Station on 1st and 16th day of every month till the trial lasted. The Apex Court observed at paragraph 5 that the jurisdiction of the Court to grant bail is circumscribed by the provisions of Section 37 of the NDPS Act. It can be granted in a case where there are reasonable grounds for believing that the accused is not guilty of such offence and he is not likely to commit any offence while on bail. It is a mandate of Legislature, which is required to be followed while making a reference to Section 37 of the Act, which is apposite making the offence under the Act

cognizable and non-bailable.

13. **Krishan Lal and others** (supra), were arrested for the offences under various Sections of the NDPS Act, refused bail and remanded to custody. They filed Writ Petition and Criminal Miscellaneous Application before the High Court seeking bail under Section 167(2) of the Cr.P.C. on the grounds of belated submission of chargesheet and on account of illness. The matter was referred to the Division Bench, which held that the limitation placed on the Special Court under Section 37(2) of the Act could not be read as fetters on the High Court in exercise of the powers under Section 439 of the Cr.P.C. to grant bail, giving rise to the appeal at the instance of the Narcotics Control Bureau before the Apex Court. The NCB contended that the High Court had no untrammelled powers in the matter granting bail as the provisions of Section 37 of the NDPS Act overrode those of Section 439 of the Cr.P.C. The Apex Court held that the powers of the High Court to grant bail under Section 439 of the Cr.P.C. are subject to limitations contained in the amended section 37 of the Act and the restrictions placed on the powers of the High Court under the said Section are applicable to the High Court also in the matter of granting bail. The non-obstante clause with which Section 37 of the NDPS Act starts,

should be given its due meaning and clearly it is intended to restrict the powers to grant bail. In the case of inconsistency between Section 439 of the Cr.P.C. and Section 37 of the NDPS Act, Section 37 prevails. Consequently, the power to grant bail under any of the provisions of the Cr.P.C. should necessarily be subject to the conditions mentioned in Section 37 of the NDPS Act.

14. In **Sushant Gupta** (supra), it was held that the general provisions of Section 439 of the Cr.P.C. would be required to be read subject to the limitations provided under Section 37 of the Act. Under the purview of Section 37 of the Act, it is the accused, who must show the existence of grounds for belief that he is not guilty to satisfy the condition precedent and lift the embargo on the power to grant bail. The twin conditions under Section 37(1)(b)(ii) of the Act required to be satisfied are cumulative and not alternative.

15. **Shashibala Nair** (supra), was arrested by Narcotic Control Bureau on a charge for possession and export of 5 Kilos of heroin and had been charged for the offences punishable under Section 8(3) read with Sections 21, 23 and 29 of the NDPS Act and she had been in custody since then. Her application for bail before

the learned Sessions Judge was rejected giving rise to the Criminal Application before the High Court of Bombay and also purported to be an application under Section 439 of the Cr.P.C. It was contended on her behalf that as she was in custody for more than 90 days and no chargesheet or complaint was filed, she was, by virtue of the proviso to subsection (2) of Section 167 of the Cr.P.C., entitled to be released on bail irrespective of the fact that the offence was bailable or non-bailable. Quite on the contrary, it was contended on behalf of the NCB that having regard to the amendment to the NDPS Act, the proviso to Section 167 of the Cr.P.C. would have no application and there was no question of granting bail to such an accused person, even though the investigation had not been concluded by them and no complaint had been filed so far. It was observed at paragraph 8 as under :

"8. Under section 37, sub-section (2), what is stated is that the limitation on granting of bail as provided under Clause (b) of sub-section (1) are in addition to the limitation under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail. These are words of limitation and not of any expansion. They circumscribe the scope of the considerations for granting bail. Under the Act, bail can be granted only on the grounds mentioned under section 37, sub-section (1) and subject to such

limitations as may have been provided under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail. The Proviso to sub-section (2) of section 167, Cr.P.C. is not a limitation for the purpose of grant of bail, but only a technical lever enabling the release of an accused person where a chargesheet has not been filed within 90 days, if the offence is punishable with life sentence or sentence of ten years or above, irrespective of the fact whether investigation is still pending or not. In my opinion, if one reads the provisions of section 36-A and section 37 together and, particularly, sub-section (2) thereof it becomes clear that the proviso to subsection (2) of section 167 of the Code of Criminal Procedure will have no application in such cases where a person had been charged under any of the offences falling within the scope of the NDPS Act."

16. In the facts of that case, the petitioner had left Bombay by flight on 08/03/1989 for Amsterdam with two pieces of checked in baggage. When she reached Amsterdam, the authorities found that her passport was fake and deported her to India on 10/03/1989. She left behind her baggage at Amsterdam. She arrived at Bombay on 10/03/1989 and was handed over to the Sahar Police Station who arrested her for the violation of the passport laws and subsequently produced her before the

Magistrate at Andheri. On 14/03/1989, when the suitcases were opened, they found 5 kilos of heroin concealed in the false top and bottom of the two suitcases, which had been carried by her from India and had been left behind by her in Amsterdam. This was how she had been charged under the NDPS Act also. The High Court observed that as far as its power were concerned and wherever the offences were committed under the Act, the Court had to take a serious view of the matter. In any case, it could not exercise the powers under Section 439 of the Cr.P.C. to defeat the object of the Act and a technical plea, would not be a ground for undeserving liberty under the Act. The learned Single Judge held that the offence committed by her was very serious and any sympathy would be entirely misplaced and in that view of the matter, dismissed her petition for bail.

17. In **Rajesh Awasti** (supra), relied upon on behalf of the applicant, it was merely recorded that the matter was mentioned before the Hon'ble Apex Court for hearing and he was ordered to be released on bail. No reasons were assigned in that context. **Monday Odede** (supra), was an application of the State, seeking cancellation of bail granted to Monday where the learned Single Judge held that no case was made out for interference, particularly

in view of the fact that the trial was at an advanced stage and dismissed the application. In **Rocky Fernandes** (supra) too, the State sought for the cancellation of bail to him, where again the learned Single Judge held similarly and dismissed the application. **Union of India** (supra), too sought for the cancellation of bail granted to the respondent, where again the learned Single Judge did not find any infirmity with the order passed by the learned Judge and dismissed the petitions.

All these petitions were for the cancellation of bail granted to each of the respondents and where the parameters are completely different than for the grant of bail in exercise of powers under Section 439 of the Cr.P.C. read with Section 37 of the Act. These judgments are therefore, clearly distinguishable and cannot support the case of the applicant for his enlargement on bail.

18. In **Deen Khan Mohammad** (supra), a batch of four appeals were decided together regarding their conviction by the Special Judge, NDPS Court, Mapusa for the possession of brown sugar in the stated quantities. The Division Bench of this Court allowed the appeal inasmuch as the prosecution had failed to prove convincingly and conclusively by leading positive evidence that the

substance recovered from the persons were contraband and prohibited under the NDPS Act. The reason for coming to this conclusion was that the evidence of the Chemical Analyzer could not be relied upon authentically. He had neither in his deposition nor in his report revealed what kind of tests were conducted by him and what he had observed in the materials at the time of conducting such tests. In that context, their Lordships found that the opinion of the expert bereft of the grounds on which such opinion is formed, is worthless and is of no help or value to the Court. The report or the deposition had not set out clearly and unambiguously the methods/ experiments/ tests applied and the chemical data collected from such methods/ experiments/ tests and in the absence of relevant data and the reasons for reaching that conclusion that the substances analysed were contraband; such evidence could not be said to have convincingly and conclusively established that the substance recovered was contraband and prohibited under the NDPS Act. Their Lordships also deprecated the practice of the Public Prosecutor, who had failed in discharging her duty in eliciting proper information from the Chemical Analyzer. Even if the report of the Chemical Analyzer had not set out the details of the tests/ experiments/ methods applied by him and the chemical data found during such tests/

experiments/ methods and the grounds and the reasons for forming the opinion, the Public Prosecutor conducting trial on behalf of the prosecution, could have elicited requisite details at the time of deposition of the concerned Chemical Analyzer and in view thereof allowed the appeals and ordered their release, if not required in any other case. This judgment too was delivered on the merits of the case and, therefore, cannot find any parity with the case at hand where the trial is still in progress and the applicant is before this Court, seeking its indulgence and discretion to set him at large, on bail.

19. Coming to the core issue, the sheet anchor of the applicant's case is that Chemical Analyser, who had examined the contraband had not given the details of the tests conducted by him in his report and moreover, as per his admission, the tests were sensitive to the presence of micrograms of cocaine and drawn in the absence of such details and the tests being sensitive to micrograms of cocaine, there was no warrant for the Court to take notice that all the substances so attached contained cocaine and in any event, there was no material to establish that it was commercial quantity of cocaine found with the applicant. However, the question whether the details of the tests carried out by the

Chemical Analyser had not been disclosed by him in his deposition or in his report, is a matter, which the Special Judge would consider while deciding the case on the merits as has been the trend and also looking to the judgment in **Deen Mohammad and others** (supra).

20. The learned Special Judge was conscious of the fact that the Chemical Analyser had taken individual weightage of each of the substances and thereafter, he had mixed the powders from all the pouches and weighed them. The assertion of the Chemical Analyser that his tests were sensitive even to the presence of micrograms of cocaine, does not lead to an irresistible conclusion that only certain fraction of the substance was cocaine and the rest was some neutral substance. Besides, the learned Special Judge had taken note of the fact that the Chemical Analyser had taken all the powders from the packets and pouches, mixed by him before analysis and thereafter, subjected them to the tests. She had clearly observed that it was also not the case of the applicant that any of these powders contained neutral substance, which was not cocaine nor was any suggestion put to the Chemical Analyser regarding the same. The long and short of the discussion would come down to the fact that it is rather premature or early in the

day to hastily to conclude that only a sample content had tested positive for cocaine and the rest was not. That aspect is open to the applicant to pursue before the learned Special Judge at the trial and on the merits of the case.

21. Besides, the Chemical Analyser had stated the weight of the powders taken by him from the packets and found to be more than 100 grams, which he had mixed and weighed and thereafter repacked them after carrying out the tests. Moreover, at this stage, the rigour of Section 37 of the Act shall clearly apply to the case of the applicant, which bars his release on bail on being found in possession of commercial quantity of cocaine, prima facie. Besides, there has been strong resistance to the application for bail and moreover, there are reasonable grounds to believe that he is guilty of the offence, which acts as deterrent to allow him the benefit of bail. Furthermore, in terms of Section 35 of the Act, there is a presumption of culpable mental state of the accused in a prosecution for the offences under this Act, though it is another matter that it shall be a defence for the accused to prove that he had no such mental state with respect to the act charged for an offence in that prosecution. Last but not the least, the statement of the applicant recorded in terms of Section 67(c) of the Act is

also a material circumstance against him. In that view of the matter and once there is a prima facie finding that the accused has been found in possession of cocaine, which is a commercial quantity, the rigour of Section 37 of the Act would come into play, thereby disentitling the applicant to any favourable order. Last but not the least, it is always open to the Prosecutor to recall and re-examine the Chemical Analyser and get the details of the tests carried out by him on the said contraband. It would not tantamount to filling in the lacunae if the Chemical Analyser had made appropriate notes while conducting such tests. The judgments relied upon on behalf of the applicant nowhere support his case for his release on bail. There is no merit in his application, which is hereby dismissed.

NUTAN D. SARDESSAI, J.

SMA