

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPLICATION (BAIL) NO. 75 OF 2018

1. Mr. Serguis Victor Manka,
31 years of age,
Son of Mr. Darius Manka,
German National resident of street
Schwarzenbachstr 8,
Zip 72379
City Hechingen,
Presently housed in Colvale Jail
2. Mr. Sebastian Steinmuller,
25 years of age,
Son of Mr. Markus Steinmuller,
German National,
Resident of Street Konigsberstrasse 12,
Zip 72411,
City Bodelshausen
Presently housed in Colvale Jail

Both represented through
Next friend Mr. Robert Moses,
48 years, r/o Witmen Hospital Y,
District Satara,
Maharashtra

.... Applicants

Versus

1. STATE,
Through in-charge Pernem Police Station,
Pernem Goa.
2. Public Prosecutor,
High Court,
Panaji-Goa.

.... Respondents

Mr. Aman Preeth Singh Rahi Advocate with Adv. Pulkit Bandodkar
for the Applicants.

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

CORAM: C. V. BHADANG, J.

DATE: 21st March, 2018.

ORAL ORDER:

This is an application for bail. The applicants have been arrested in connection with investigation of Crime No.177/2017 of P.S. Pernem for the offence punishable under section 22 (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act, for short).

2. The prosecution case is that; there was a raid conducted, on prior information, at house no.378, Madhalawada, Arambol Pernem, Goa on 12/12/2017 between 1.35 hours to 3.30 hours where both the applicants were present. It is the material case that in the house search 64 grams of liquid LSD worth Rs.64.00 lakhs was recovered and seized under a panchanama along with cash of Rs.27,500/- and some other articles including a mobile phone. On the basis of a complaint lodged by the Raiding Officer an offence came to be registered under section 22 (c) of the NDPS Act which is presently under investigation.

3. The learned Special Judge has refused to release the applicants on bail

mainly on the ground that the quantity involved is a commercial quantity where the rigors of section 37 of the NDPS Act would be applicable.

4. I have heard the learned counsel for the applicant and Shri Rivankar, the learned Public Prosecutor for the Respondent State. Perused case diary.

5. It is submitted by the learned counsel for the applicant that the applicant had bought 50 'miniature mouth freshener' bottles of a substance called 'Lupin' and the bottles were not containing any LSD. It is submitted that there is non compliance with the provisions of section 42 . It is submitted that the substance allegedly recovered was not tested with the help of a field kit nor there is a report of the chemical analyzer to show that the substance seized is LSD. It is submitted that on the say of the prosecution itself the CSFL, Hyderabad has refused to accept the sample for the reason that the standard LSD material for testing is not available. It is submitted that the very basis of the offence under section 22(c) of the NDPS Act is not made out and the rigors of section 37 of the NDPS Act would not be applicable.

Reliance is placed on the decision of the Andhra Pradesh High Court in the case of **Mike Kamminga S/O Drik Klass Kamminga Vs. State of Telangana Repr. By its Public Prosecutor, High Court, Hyderabad and anr. CRLP No.11313 of 2017** decided on 5/12/2017. It is submitted that in

several similar cases various High Courts have exercised discretion in favour of the accused in view of the non availability of the CFSL report. The learned counsel for the applicant in all fairness submits that in the event this Court is inclined to grant bail, the same will be subject to any modification/cancellation in the event the CFSL report is obtained.

6. Shri Rivankar, the learned Public Prosecutor submits that it was the applicants who informed during the course of the raid that the substance was LSD. It is submitted that the report of the Medical officer who examined the applicants also shows that there was substance abuse by the applicants and thus there is every possibility that the applicants were possessing LSD which is of a commercial quantity. The learned Public Prosecutor however in all fairness submitted that at present there is no report from the CFSL or any evidence that the substance was tested with the help of a field kit and was found to be LSD. The learned Public Prosecutor has pointed out the practical difficulty faced by the prosecution particularly in case of recovery of LSD. It is submitted that the prosecution is facing difficulty in getting the report of the Chemical Analyzer on account of non availability of the standard material and every effort is being made to see that the issue is sorted out. It is submitted that the prosecution is resending the samples to the CFSL Hyderabad or to Delhi and expects to get the CFSL report in due course.

7. I have given my anxious consideration to the rival circumstances and the submissions made. In a prosecution under the NDPS Act the report of the Chemical Analyzer finding that the substance recovered is one of the contrabands covered by the NDPS Act, is the very basis of the offence. Here is a case where at this stage till date there is no report from the Chemical Analyzer to show that the substance recovered is LSD. Prima facie it is not possible to accept the contention on behalf of the prosecution that it was the applicant's who disclosed to the raiding officer that the substance was indeed LSD. Such a statement even if allegedly made, would be hit by section 25 of the Evidence Act. This Court is conscious of the fact that the prosecution is encountering practical difficulty in getting the substance analyzed and obtaining the report of the CFSL for reasons which are beyond the control of the prosecution. However, at the same time, it cannot be lost sight that the matter also involves the issue about the personal liberty of the applicant. It was submitted on behalf of the prosecution that the applicants being German nationals may not be available for investigation or trial in the event they are released on bail. In this regard it is significant to note that the passports of both the applicants have already been seized by the raiding officer. Thus there is no possibility that the applicants can flee the country.

8. The Andhra Pradesh High Court in the case of **Mike Kamminga (supra)** had released the applicant/accused on bail on the ground that there is no report or any scientific analysis to show that the contraband seized was Dimethyle Tryptamine.

9. Now coming to the provisions of section 37 of the Act, it is apparent that section 37 does not create an absolute embargo on the powers of the Court to release the accused on bail, where the quantity seized is a commercial quantity. The applicability of section 37 of the Act depends upon the condition where the Court is satisfied that there are reasonable grounds for believing that the applicant is guilty of such offence. Prima facie the absence of a CFSL report or evidence about testing with the help of a field kit, would show that there are reasonable grounds, at least at this stage, for believing that the applicants are not guilty of such offence, within the meaning of section 37 (1) (b) (ii) of the NDPS Act. Considering the overall circumstances, I find that this is a case where discretion can be exercised in favour of the applicants subject to strict conditions. In the result the following order is passed:

ORDER:

(i) The applicants shall be released on bail on execution of a P.R. Bond in the sum of Rs.50,000/- (Rupees Fifty thousand only) each with one or two

sureties each in the like amount.

(ii) The applicants shall furnish their local address along with proof before the learned Special Court.

(iii) The applicants shall attend the Investigating agency on every Saturday between 10a.m. to 1p.m. and as and when required by the investigating officer.

(iv) The applicants shall cooperate with the investigating agency and shall not interfere or tamper with the prosecution witnesses or evidence in any manner.

(v) The applicants shall not commit any offence, while on bail.

(vi) In the event of breach of any of the conditions, the bail is liable to be canceled.

(vii) Liberty to the prosecution to move for cancellation/modification on receipt of the report of the chemical analyzer.

(viii) The Bail bonds to be furnished before the learned Special Judge.

C. V. BHADANG, J.

Ap/

