

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL MISC. APPLICATION NOS. 324 & 325 OF 2018
IN
CRIMINAL APPEAL NO. 79 OF 2018

Anton Marline, Presently at
Central Jail, Colvale ... Applicant
Versus
State Thr. Anti Narcotic Cell
Police Station, Panaji & Anr. ... Respondents

Shri T. George John, Advocate for the Applicant.

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

CORAM : C.V. BHADANG, J.

DATE : 27th NOVEMBER 2018

ORAL ORDER:

By these applications, the applicant-accused is seeking suspension of sentence and release on bail. The applicant has been convicted for the offence punishable under Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act, for short), for having found in illegal possession of 54 grams of methamphetamine.

2. I have heard Shri John, the learned Counsel for the applicant and Shri Rivankar, the learned Public Prosecutor for the respondents. Perused record.

3. Shri John, the learned Counsel for the applicant has contended that the investigating officer and the complainant, in the present case, is the same and as such, the prosecution would stand vitiated as held by the Hon'ble Supreme Court in the case of **Mohan Lal Vs. State of Punjab, 2018 AIR SC 3853**. Secondly, reliance is placed on the decision of the Supreme Court in the case of **Arif Khan @ Agha Khan Vs. State of Uttarakhand, 2018 (5) SCJ 450**, in order to submit that even where the applicant-accused declines to be searched in the presence of the Executive Magistrate or a Gazetted Officer, the raiding officer is under an obligation to take the accused to the nearest Magistrate or a Gazetted Officer. It is submitted that in the absence of the same, there is breach of provisions of Section 50 of the NDPS Act.

4. Shri Rivankar, the learned Public Prosecutor has submitted that the applicant was apprised of his right, to be taken or searched in the presence of the Gazetted Officer or the Magistrate, to which, the applicant had declined, which is sufficient compliance with Section 50 of the NDPS Act. Insofar as the other ground is concerned, it is not disputed that the complainant and the investigating officer, in the present case, is the same. It is however submitted that as per para 25 of the

judgment in the case of **Mohan Lal** (supra), the informant and the investigating officer must not be the same person and in the present case, they are not.

5. I have considered the circumstances and the submissions made. The Supreme Court in para 25 of the judgment in the case of **Mohan Lal** (supra) has held thus:

“In view of the conflicting opinions expressed by different two Judge Benches of this Court, the importance of a fair investigation from the point of view of an accused as a guaranteed constitutional right under Article 21 of the Constitution of India, it is considered necessary that the law in this regard be laid down with certainty. To leave the matter for being determined on the individual facts of a case, may not only lead to a possible abuse of powers, but more importantly will leave the police, the accused, the lawyer and the courts in a state of uncertainty and confusion which has to be avoided. It is therefore held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof.”

(Emphasis supplied)

That was a case arising out of the provisions of the NDPS Act, where the applicant was allegedly found in possession of 4 kgs. of opium and was convicted for the offence punishable under Section 18 of the NDPS Act. The Hon'ble Supreme Court has *inter alia* held that the complainant and the investigating officer cannot be the same person, more so, in cases involving a reverse burden of proof.

6. *Prima facie*, it cannot be accepted that the “informant” as appearing in para 25 of the judgment would be a person giving the information, on the basis of which the raid is conducted. This is because such an informant, who is a private person can never be the investigator. Thus, there would be no occasion for such “source informant”, who is a private individual, being an investigator. *Prima facie*, it appears that the ratio as laid down in the case of **Mohan Lal** (supra) would be attracted in this case.

7. In that view of the matter, the following order is passed:

ORDER

(a) The substantive sentence awarded to the applicant is hereby suspended, subject to the applicant furnishing a P.R. bond in the sum of

Rs.50,000/- alongwith one or two solvent sureties in the like amount and on deposit of the fine amount, within a period of one week from today.

(b) The bail bonds to be furnished and the fine amount to be deposited before the learned Sessions Judge.

(c) The criminal applications are disposed of.

C.V. BHADANG, J.

EV