

IN THE HIGH COURT OF BOMBAY AT GOA**Criminal Application (Bail) NO.319/2017**

Mr. Ajmal Majeed Khan
Son of Majeed Khan

Applicant.

Versus

Police Incharge Saligaon Police Station
and another.

Respondents

Mr. Arjun F.Naik, Advocate for the applicant.
Mr. S.R.Rivankar, Public Prosecutor for the respondents.

CORAM : PRITHVIRAJ K.CHAVAN, J.
ORDER RESERVED ON : 16/1/2018.
ORDER PRONOUNCED ON :01/02/2018.

ORDER:

1. The applicant has been arrested on 8.1.2015 by the respondents in Crime No.2/2015 for the offences punishable under Section 22 (b) (C) read with Section 29 of the NDPS Act alleging that on 8.1.2015 between 1.00 hours to 4.50 hours at main gate of Catholic Cemetery at Saligao he was found in possession of 0.36 grams of LSD. One more accused was arrested with him who was found in possession of 8.70 grams of Methamphetamine and 1.40 grams of MDMA and 0.26 grams of LSD.

2. Earlier application for bail preferred by the applicant before the Special Judge, NDPS Court, Mapusa

came to be rejected on 3.5.2017. There are no new grounds in the present application nor change of the circumstance and, therefore, as a matter of fact successive bail application sans changed circumstance is not permissible, in view of law laid down in case of **Union of India and others Vs. Rajbir Singh Khanna and another reported in (2001) 7 SCC (Criminal) 113.**

3. However, the learned counsel for the applicant reiterated the same grounds, namely that the Investigating Officer found that the applicant was in possession of 0.36 grams of LSD, which was weighed on electronic scale whereas the Scientific Officer PW 3 S.N.Rasool, who deposed in the trial Court testified that it was 404.4 mg. when weighed by him in the laboratory. As such, it is submitted that there is difference in weight and, therefore, what has been found in possession of the applicant is a small quantity .002 mg as per the schedule and, therefore, he needs to be released on bail. Another ground put forth by the learned counsel for the applicant is that the prosecution has dropped panch witnesses and, therefore, rest of the witnesses being police personnel, there is hardly any scope of convicting the appellant. It is

pertinent to note that it was not the case of the prosecution, that it has dropped the panch witnesses, who were not found but it was as per the order of the Court due to which they were dropped. That itself, will not be a ground to release the applicant on bail, as the trial is still in progress and the panchanama can very well be proved even by the police personnel. It is for the trial Court to decide the evidentiary value of the police witnesses.

4. As regards the discrepancies in the weight of contraband articles seized as described in the charge-sheet and the evidence of the Expert, this aspect cannot be gone into at the stage of deciding the application for bail nor it can be said that it would be fatal to the prosecution at a premature stage. The learned Special Judge while rejecting the application for bail has already dealt with the said aspect by placing reliance on a case law reported in **2015 All MR (Cri) 4967 in case of Baldev Singh Vs. State of Harayana.**

5. The learned Public Prosecutor has strongly objected release of the applicant on bail mainly on the ground that as per Section 37 of the NDPS Act, bail is not

rule but an exception. The learned Public Prosecutor submits that 0.1 gram of LSD is a commercial quantity as per the schedule and that is the only dispute which would be adjudicated upon by the Special Court at the conclusion of the trial and, therefore, the applicant cannot take benefit of the said error in the weight of the LSD. He, however, admits that 0.002 grams is a small quantity. It is also submitted by the learned Public Prosecutor that the defence has not cross-examined the Scientific Officer of CFSL on the aspect of the weight of the LSD. It is also submitted by the learned Public Prosecutor that as per Section 35 of the NDPS Act, there is a presumption of culpable mental state of the accused which the Court shall presume its existence. This is also an important factor to be taken into account. The learned Public Prosecutor has relied upon a ruling of the Supreme Court reported in **(2001) 7 SCC 673 in case of State of M.P. Vs. Kajad**. The Hon'ble Supreme Court observed that in view of Section 37 (1)(b) (ii) of the NDPS Act, bail can be granted only under an exceptional circumstances. Liberal approach of the Court is unwarranted. It is also observed that the Court's satisfaction under clause (ii) about accused being not guilty must be arrived at on the basis

of the records produced before it. In view of the said ratio also, it would not be just and proper to enlarge the accused on bail when the trial has already commenced and the prosecution witnesses are being examined.

6. It is also not the case of the applicant that he has roots in the society. His abscondence in case of release on bail cannot be ruled out for the reason that he appears to have been involved in a serious offence of carrying psychotropic substance.

7. The learned counsel for the applicant has placed reliance upon a ruling of the Supreme Court in case of **E. Michal Raj Vs. Intelligence Officer, Narcotic Control Bureau** reported in **AIR 2008 SC 1720**. The Supreme Court has dealt with the sentencing aspect of the offences under NDPS Act and its quantum depending upon the quantity of offending material which was seized. It is not a case law touching the aspect of the bail and, therefore, it cannot be considered at the stage of entertaining the application for bail. The learned counsel has also placed reliance in the case law of **Sanjay Chandra Vs. CBI 2011 (13) SCALE 207** and drew my attention to para

21 to 23 which reads thus:

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention

being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson”.

8. No doubt, as per the observations of the Hon'ble Supreme Court, deprivation of liberty is considered unless it is required to ensure that an accused person will stand his trial when he is called upon. However, for the reasons discussed hereinabove, offence is serious in nature which affects the society at large. The trial has gone half-a-way and, therefore, releasing the accused, at this stage, would not be appropriate as it would be difficult to secure his presence at the time of judgment in view of the fact that he has no roots in the society and is likely to abscond. The trial Court may expedite the matter.

9. As such, I do not find any merit in the application and, therefore, its stand rejected.

PRITHVIRAJ K.CHAVAN, J.

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