

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPLICATION (BAIL) NO.107 OF 2019**

1 Mr. Florian Kern,
S/o. Klaus Kern, Aged 33 years,
German National, Presently housed
at Colvale Jail, represented through
Next friend Ms. Arundhati Pillay,
35 years, r/o. Marna Siolim,
Bardez, Goa. Applicant
V/s.

1 State of Goa
Through Officer Incharge
Crime Branch Police Station,
Ribander Goa.

2 The Public Prosecutor,
High Court, Panaji-Goa. Respondents

Shri Aman Preet Singh Rahi with Shri Pulkit Bandodkar,
Advocate for the Applicant.

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

Coram:- NUTAN D. SARDESSAI, J.

Reserved on :-29th April, 2019

Pronounced on :- 2nd May, 2019

ORDER :

The applicant seeks bail under Section 439 Cr.P.C.
read with Section 37 of the Narcotics Drugs and Psychotropic
Substances Act, 1985, 'the Act' for short hereinafter.

2. Heard Shri Aman Preet Singh Rahi, learned
Advocate on behalf of the applicant who contended that as
per the case of the prosecution 191 gms of LSD was

recovered from the house in occupation of the applicant. It was his contention that there was no compliance with the mandate of Section 50 of the Act and on that premise alone, the applicant was entitled to the benefit of bail. It was next his contention that as per the say of the State, the Field Testing Kit was procured on 04/09/2018 unlike their say in another matter wherein the Filed Detection Kit was not available till November, 2018 and for which he adverted to the order passed by this Court dated 28/11/2018. He next adverted to the complaint and submitted that there was a serious doubt on the conduct of the raid looking to the complaint which indicated that prior reliable information was received by the PSI at 10.00 hrs. and that within half an hour he had arranged the panchas, the raiding party members, communicated the information to his superior and then arranged the raiding party to proceed for the raid.

3. Shri Aman Preet Singh Rahi, learned Advocate on behalf of the applicant placed reliance in **Dharambir V/s. State [2018 254 DLT 354]**, **Babulal V/s. Union of India [1996 4 Crimes 143]**, **Noble V/s. State of Karnataka [2018 0 Supreme (Kar) 33]**, **Kelsi Katte Mahammed**

Shakir V/s. The Superintendent of Customs [2018 0 Supreme (Kar) 318] and otherwise submitted that he was entitled to be enlarged on bail since the sample too was referred only on 07/02/2019 for analysis unlike the case of the prosecution that the alleged LSD was found in the house during the course of the search on 05/12/2018 at Marna Siolim. Last but not the least, he relied in **Sri. S. Suresh V/s. State of Karnataka [Criminal Petition No.5449/2018]** and once again pressed for the grant of bail.

4. Shri S.R. Rivankar, learned Public Prosecutor on behalf of the State submitted that the raid was conducted on 05/12/2018 after 10.30 hrs. on the basis of the reliable information received on the same morning at 10.00 hrs. No incriminating articles were found during the personal search of the applicant and therefore no question arose to allege any violation of the predicates of Section 50 of the Act. It is only during the search of the house in his occupation that charas and LSD were found. He referred to Section 52(A) of the Act, placed reliance in the Criminal Application decided by this Court in **Mr. Sergius Victor Manka & Anr. V/s. State [Criminal Application (Main) No.196 of 2018]** and

submitted that in view of the bar under Section 37 of the Act and the quantity of the LSD being found to be commercial, he was not entitled to the benefit of bail. The said substance was tested with the Field Testing Kit which had tested positive for LSD and a representative sample thereafter was forwarded to the CFSL, Hyderabad for testing from which the report was still awaited. It was further his contention that besides, the applicant was a foreign national and there was no assurance that he would ensure his presence at the trial and on that count too he was not entitled to the benefit of bail. Last but not the least, he relied in **State of Madhya Pradesh V/s. Kajad [(2001) 7 SCC 673]** dealing with bail and the rigor attached to Section 37 of the Act and submitted that the applicant was not entitled to bail.

5. i would consider their submissions, the judgments relied upon and in view thereof decide the application appropriately.

6. Indisputably, the Officer incharge of the Crime Branch had received reliable information on the morning of 05/12/2018 at 10.00 hrs. giving the name, particulars and

details of the applicant, that he was involved in narcotic activities and had concealed narcotic drugs in his residential flat. He had reduced the information to writing, forwarded a copy thereof to the Dy.S.P. for his information, arranged the panchas and the raiding party members and then proceeded for the raid after procuring the seal of the concerned Police Station. It is otherwise the case of the prosecution that the applicant was informed of the reliable information upon being detained and he was appraised of his right under Section 50 of the Act and made an offer to search the members of the raiding party including the panchas and also to be searched in the presence of a Gazetted Officer or a Magistrate. His personal search had not led to any incriminating article being found on his person. However, during the course of the search of the flat, black colour substance was found on the table and on opening, it was noticed that it contained 6 autopress, transparent polythene bags containing blackish colour substance suspected to be charas and which on weighing were found to be 50 gms. He had tested the sample from the same and found it positive for charas. The same was duly packed and sealed and attached under the panchanama.

7. He had during the course of the further search found a bottle in the refrigerator containing some liquid substance in it and which he had tested with the Field Testing Kit and the same had tested positive for LSD. It had been duly packed, sealed and attached under the panchanama and then the necessary procedure was followed. At the outset the contention of Shri Aman Preet Singh, learned Advocate for the applicant that there was no compliance with Section 50 assuming it was so would not enable him to seek the benefit of bail when apparently nothing was recovered during the course of his personal search. On that count alone, it cannot be heard on behalf of the applicant that the entire search of the premises and the seizure of the suspected charas and LSD was without any basis and was fatal to the case of the prosecution.

8. **Dharambir** (supra), was convicted by a judgment dated 21/03/2017 passed by the learned Special Judge, Dwarka for the commission of the offence punishable under Section 18(b) of the Act and for being found in possession of 30 kilos of opium and sentenced to undergo rigorous imprisonment of 15 years with fine of ₹1,50,000/- with

default sentence of two years simple imprisonment which was challenged in appeal before the Delhi High Court. In the brief facts, secret information was received at about 8.15 p.m. on 06/02/2012 that a person named Dharambir, resident of Mansa Ram Park, Uttam Nagar, would be coming alongwith his son in a Maruti Zen Car bearing no.DL 8 CF 2191 below the metro station, Dwarka, between 10.00 p.m. and 11.00 p.m. and carrying opium with him. This secret information was recorded by SI Satyawar and forwarded to Inspector Kuldeep Singh who further forwarded the information to ACP Beer Singh and directed SI Satyawar to conduct the raid. Accordingly, a raiding team comprising of Ct. Surender Kumar, Ct. Jai Prakash, Ct. Satya Pal and himself was organised by SI Satyawar which reached the metro station, Dwarka at about 10.00 p.m. Public persons were asked to join the proceedings but they refused to do so.

9. In **Dharambir** (supra), when the person came to the spot at about 10.20 p.m., he was identified by the secret informer as Dharambir who alighted and waited for about 10 minutes. He was apprehended by the raiding team. He was apprised by the raiding team of his right to be searched

before a Gazetted Officer or a Magistrate and a notice under Section 50 of the Act was also served on him. However it was contended that Dharambir had declined the said right whereupon SI Satyawan had conducted the search of his person as well as of his vehicle. Though nothing incriminating was recovered from Dharambir, two containers closed with lids were recovered from the rear seat of the Maruti car. On opening these containers, they were found to have a sticky black coloured substance kept in a polythene bag. Testing of the said substance using the Field Testing Kit was carried out by the raiding team which disclosed the substance to be opium and on weighing was found to be 14 kgs and 16 kgs respectively. Two samples of 50 gms each were taken from the polythene bags and kept in separate parcels, marked as A1, A2 and B1, B2 respectively. The remaining opium was retained in the respective containers which were marked with marks A and B respectively. FSL form was filled and the parcels were sealed by SI Satyawan.

10. In **Dharambir** (supra), the learned Special Judge on considering the evidence had held the appellant guilty and convicted him accordingly. The said judgment reproduced

Section 50 of the Act and reiterated that Section 50 of the Act will have no application if a bag carried by a person is searched without there being any search of his person. But if the bag carried by him is searched and his person is also searched, Section 50 of the Act will have application. There can be no dispute with the proposition as laid down by the Hon'ble Apex Court in **State of Punjab V/s. Baldev Singh [(1999) 6 SCC 172]** that Section 50 of the Act is mandatory in nature insofar as it relates to the personal search of an accused person. It does not however extend to the search of a vehicle or a receptacle or a premises or the like. This judgment therefore does not advance the case of the applicant any which way.

11. In **Babulal** (supra), it was contended on his behalf that taking a Gazetted Officer with the raiding party and thereafter saying that the accused was searched before a Gazetted Officer will not be in any way in compliance with Section 50 of the Act. Rather, it is the mandate of Section 50 that an offer has to be made to the suspect that he has a right to be searched in the presence of a Gazetted Officer or a Magistrate and not a Gazetted Officer forming a part of the

raiding team. The judgment laid emphasis on the expression "take such person" as also the words "Gazetted Officer or Magistrate before whom any such person is brought" and the words "take and brought" used invariably to indicate that the person apprehended by raiding party has to be taken before a Magistrate or a Gazetted Officer and if such person is "brought" before a Magistrate or a Gazetted Officer and if there is no ground for search, such person be discharged forthwith.

12. **Noble** (supra), filed the petition under Section 439 Cr.P.C. seeking his release on bail for the offence punishable under Section 22(b) of the Act. In the brief facts of that case information was received by the Inspector of Police about the selling of drugs by one black complexion African person, who used to come in white colour two wheeler bearing distinct registration number near BBMP office, Honi main road, Horamavu Agara Post, Bangalore. Upon this information, the Police Inspector arranged a team and collected panchas, took permission from official superior and went to the place at 12.20 p.m. and when he noticed one person standing with two wheeler and on observation and after confirmation

surrounded and apprehended him on the spot. On inquiry, he admitted that he was dealing with the drugs. After confirming this the Officer had secured the presence of ACP and upon his arrival said to have given option of search. Then he opted for search before the Gazetted Officer and since ACP was the Gazetted Officer search was conducted. When he was found to be in possession of 18 gms of MDMA, mobile phones, laptops, ₹4,000/- cash, back pack bag and one two wheeler and all the items were seized under mahazar and a report was submitted. On the basis of the complaint, the case was registered by the respondent Police.

13. **Noble** (supra), it was found that there was no specific mention on receipt of the credible information by the complainant that it was reduced into a diary which was maintained for registration of such information, which itself went to show that there was no compliance of the mandatory requirements of Section 42(1) of the Act. There was also no compliance of Section 42(2) of the Act inasmuch as no copies were furnished to the immediate superior within 72 hours even if there were no specific averments with regard to Section 42(2) of the Act. It was found that though 18 gms of

MDMA was seized from his person, Section 50 of the Act would come into play and there was a duty cast on the Police to explain to the petitioner that he was having a legal right of exercising option for conducting search before the Gazetted Officer or a Magistrate. In **Noble** (supra), it was found that there was no averment that the Police had explained that the petitioner was having such a legal right of exercising option. In those set of circumstances was it held that the applicant was entitled to the benefit of bail and moreover as there was no qualitative as well as quantitative test for MDMA and in those circumstances was he ordered to be released on bail. This judgment too is otherwise distinguishable and at the most has a persuasive value and not binding on this Court.

14. **Kelsi Katte Mahammed Shakir** (supra), had filed an application under Section 439 Cr.P.C. for his release on bail for the offence punishable under Section 9 and 23 of the Act and under Section 114 and 135 of the Customs Act, 1962. In the brief facts, the Superintendent of Customs, Air Intelligence Unit, Kempegowda International Airport, Bengaluru was informed that one CISF Unit had suspected a passenger by name Kelsikatte Mahammad Shakir during Pre

Embarkation security check and found three bags of suspected narcotic items weighing 3 kgs in the hand baggage who was supposed to travel from Bengaluru to Doha and the said passenger was handed over to the Customs for further necessary action and thereafter necessary Mahazars were drawn and the case was registered.

15. In **Kelsi Katte Mahammed Shakir** (supra), it was contended on his behalf that he was not aware of the contents of the bag as it was handed over to him by one Sri. Shafeer of Gandhinagar who arranged the tickets and VISA for him to go to Doha for the purpose of ascertaining the job and requested him to do a favour to carry his bag and which bag he was to hand over to a person in Doha. It was contended on his behalf that as per the instruction issued by the Narcotic Control Bureau the analysis of the drug was to be completed within 15 days from the date of receipt of the sample and that the result of the quantitative test should be sent to the Officer from whom the samples were received within next 15 days. Noncompliance of the standing instructions was considered to be a serious lacuna and it could not be held that the seized articles were contraband under the Act.

16. In **Kelsi Katta Mahammed Shakir** (supra), it was contended on behalf of the State that the provision of Section 37 of the Act was in addition to the provision of Section 439 Cr.P.C. The limitation of granting bail comes only when the question of granting bail arises on the merits apart from granting opportunity to the Public Prosecutor. In case there was prima facie reasonable ground to believe that the petitioner was involved in the alleged offence which was punishable under the Act then under such circumstances the Court can reject the bail application. Furthermore, the quantity of Hashish which was said to have been seized from the petitioner was more than the commercial quantity and it could be said on the basis of the sample test kit instruction given positive result that it was Hashish seized from the petitioner and further if the article was more than 1 kg, it is commercial quantity. Karnataka High Court considered Section 37 of the Act, the interpretation of the standing instructions and in the absence of the Chemical Analysis Report observed that the petitioner was having a right to be enlarged on bail by imposing stringent conditions. This judgment only has persuasive value and is not binding on this

Court apart from the fact that it is distinguishable on facts.

17. **Sri S. Suresh** (supra), sought for his release on bail under Section 439 Cr.P.C. for the offence punishable under Section 20(b), 21 and 22 of the Act in Crime No.28/2018 of Koramangala Police Station, Bangalore. The case against him briefly was that on 16/01/2018, a credible information was received pursuant to which the complainant searched a person at Koramangala in the presence of Superior Officers and pancha witnesses and upon apprehending him and on his personal search they found 2 kgs. of ganja and 0.41 gms. of LSD paper and a cash of ₹1,100/-. It was contended on his behalf that the procedure as prescribed by the Drug Law Enforcement Authority for recovery of the seized articles and being tested with the help of the Field Test Kit should be established and also corroborated by questioning the owner/occupier/possessor to ensure that the substance recovered is NDPS or CS and a small quantity thereof must be tested with the Field Testing Kit. In case this procedure was not followed, the benefit should be given to the accused. It was submitted on behalf of the State that the seizure had taken place in the presence of the Officer and

there was compliance with the provisions of Section 52 of the Act. It was further submitted while opposing the application for bail that the petitioner accused was found in possession of more than commercial quantity of LSD papers which was going to be supplied in the society and as such there would be a serious effect on the society. The learned Single Judge of the Karnataka High Court found on examining the material that mandate of the standing instructions issued by the Narcotic Control Bureau had not been followed and as such there was nothing to show that the said seized articles were contraband articles and in view thereof ordered his release on bail. This judgment too is distinguishable on facts apart from the fact that at the highest it has persuasive value.

18. At the cost of repetition nothing incriminating was recovered from the search of the applicant but during the course of the search of the flat in his occupation charas and LSD in commercial quantity were found from him and which tested positive with the aid of the Field Testing Kit.

19. **Mr. Sergius Victor Manka & Anr.** (supra), invoked the jurisdiction of a Division Bench of this Court for

quashing the FIR and the charge sheet filed against them under Section 22(C) of the Act. In brief facts, reliable information was received at the Pernem Police Station and thereupon raiding party was arranged with two panchas and the petitioners were found. During the search of the house 64 gms. of LSD liquid drops were found worth ₹64,00,000/- apart from a mobile phone, other articles and a cash of ₹27,500/- and which were duly attached under a panchanama. In the said facts, the suspected LSD liquid was sent to the Director CFSL, Hyderabad for examination which was returned due to absence of standard reference material of LSD in the laboratory and the same was under process of procurement. Even after the expiry of more than 84 days the Investigating Agency was not in a position to prima facie bring on record that the seized article was a psychotropic substance.

20. In **Mr. Sergius Victor Manka & Anr.** (supra), it was contended that on 09/01/2018 an inventory proceeding of drawing samples was conducted before the Executive Magistrate and the contents of Exhibit A being liquid LSD weighing 64 gms. was again transferred to the other bottle

with the help of another plastic pump and marked as Exhibit I. It was further contended on their behalf that the empty bottle with traces of LSD allegedly sealed during the inventory was marked as Exhibit II and the prosecution had not sent the plastic pump for examination marked as Exhibit III. Furthermore, it was contended that Exhibit I sent to the CFSL, Hyderabad was returned on the ground of non availability of standard reference material of LSD and therefore the same remained in the custody of HC-3782 Ladu Shetye of Pernem Police Station and therefore it was unknown why the representative samples were not drawn immediately and sent to CFSL, Hyderabad. Moreover, it was further contended that on 18/09/2018 CFSL, Kolkata communicated to the Inspector General of Police, Panaji that LSD/MDMA standards were not available in the laboratory. Nonetheless, utilising the mass spectrum laboratory available with GC-MS system of CFSL, Kolkata, the detection of LSD and MDMA from the said crime exhibits would be possible. It was contended that the CFSL, Kolkata on analysing the three sealed packets which were not all original seized material detected only the presence of LSD content in each of the three exhibits without determining the exact weight and even the seal of the Police Station

mentioned was different. It was therefore contended on behalf of the petitioners that as the Investigating Agency had violated various provisions of the Act including Section 52A, there was hardly any chance of conviction of the petitioners as neither the 'LUPIN' or 'SIEGMA PET' bottles were sent to CFSL Kolkata for chemical analysis. The charge sheet even did not form a part of 'SIEGMA PET' and 'LUPIN' bottle but instead four other bottles were shown and there was a change of seal by the Investigating Agency. It was also argued that No standard reference material of LSD was available in India while pressing for the quashing of the FIR and the charge sheet.

21. In **Mr. Sergius Victor Manka & Anr.** (supra), the Division Bench found on a consideration of the arguments canvassed on behalf of the petitioners and State that there was no discrepancy in so far as the application of Section 52 or Section 52A of the Act are concerned. Besides, it was also found that the procedure prescribed under Section 52A of the Act has been followed and granted liberty to the petitioners to point out any material discrepancy before the Special Court, if any, while ultimately dismissing the petition for quashing the

proceedings and charge sheet.

22. **Kajad** (supra), was intercepted by the Police and after compliance with Section 50 of the Act opium weighing 7 kgs. was seized from him. A charge sheet was submitted against him in the competent Court where he moved an application for bail which was rejected by the Trial Court. His further application before the High Court was also rejected. Without mentioning any change in the circumstance, he moved another application in the High Court which was allowed. Allowing the appeal the Supreme Court held that Section 37 of the Act enjoins that a person accused of an offence punishable for a term of imprisonment of 5 years or more shall generally not be released on bail. Negation of bail is the rule and its grant an exception under sub-clause (ii) of clause (b) of Section 37(1). For granting bail the Court must on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail. It has further to be noticed that the conditions for granting the bail specified in clause (b) of sub-section (1) of Section 37 are

in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail. Liberal approach in the matter of bail under the Act is uncalled for.

23. In the facts of the present case, the drug on recovery was tested with the Field Testing Kit and found positive particularly for LSD in commercial quantity. No doubt the drug has been tested in the CFSL Laboratory but the report is yet to be received. The rigors of Section 37 of the Act would squarely apply which provide that the offences are to be cognizable and non-bailable and that no person accused of an offence punishable for the offences under Section 19 or 24 or 27(a) and also for the offences involving in commercial quantity shall be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity to oppose such release and where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he will not commit any offence while on bail. The limitations contained in Section 37(1)(b) are in addition to the reliefs under the Code of Criminal Procedure in the matter of

grant of bail. Since the LSD found in the house occupied by the applicant is a commercial quantity the rigors attached to Section 37 would apply and the applicant would not be entitled to the benefit of bail. Moreover, he is admittedly a foreign national and there is no justification to account for his presence during the course of the trial.

24. The applicant who was apparently found in possession of the flat of which the search was taken led to the recovery of commercial quantity of LSD. The contention of Shri Aman Preet Singh, learned Advocate for the applicant that there were two women in the house and that their statements were not recorded does not in any manner affect the prosecution case. At the highest the applicant would be at liberty to examine them as his witnesses if so advised and during the course of the trial. No grounds whatsoever have been made out for the grant of bail and therefore i do not find any merit in the application which is hereby dismissed.

NUTAN D. SARDESSAI, J.

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