

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPLICATION (BAIL) NO. 24 OF 2020.

Mr. Florian Kern,
s/o. Mr. Klaus Kern,
Aged 33 years,
German National,
presently lodged at
Central Mordern Jail,
Colvale, Brdez, Goa.

...Applicant

V/s.

1. State
(As represented by Officer In-charge)
Crime Branch, Ribander)
Ribander, Goa

2. The Public Prosecutor,
High Court Building,
Althinho Panaji, Goa.

... Respondents

Shri Maria Carolline Collasso, Advocate for the applicant.

Shri Pravin N. Faldessai, Additional Public Prosecutor for the respondents

Coram:- NUTAN D. SARDESSAI, J.

Reserved on :- 3rd February, 2020

Pronounced on: 06th February, 2020

ORDER:

The applicant is again before this Court seeking his release on bail by his application under Section 439 CrPC coming up for disposal today.

2. Heard Ms. C. Collasso, learned Advocate for the applicant who submitted that the applicant was allegedly found in possession of 100.91gms of LSD which was a commercial quantity and 50 grams Charas which was admittedly a small quantity. However, in her submission, the applicant was entitled to bail relying in **Mohan Lal v/s The State of Punjab** (CDJ 2018 SC 842) since the complainant and the Investigating Officer were one and the same and the substantial part of the investigation was completed by the Investigating Officer who had also filed the complaint on behalf of the State. She further placed reliance in **State v/s. Svetlana Federova** (CRMAM No. 97 of 2019) and **Akshat Anant v/s. State** (CRMAB No.306 of 2018) to buttress her plea for the release of the applicant on bail and lastly placed reliance in the Judgment in **Sunil Vasantrao Phulbande v/s. State of Maharashtra** (2002(3) MhLj 689). The arrest of the applicant was on 05/12/2018 much after the judgment in Mohan Lal's case and therefore the judgment squarely applied to his case.

3. Shri P. Faldessai, learned Additional Public Prosecutor submitted that the judgment in **Mohan Lal**(supra) did not apply.

He adverted to his reply to oppose the bail application on the premise that the LSD found with the applicant was primarily a commercial quantity and the rigours of Section 37 of the Act applied and the applicant was not entitled to the benefit of bail.

4. Ms. Collasso, learned Advocate in reply submitted that the learned Additional Sessions Judge had rejected the bail application primarily on the ground that the LSD found with the applicant was a commercial quantity and moreover at that stage the report from CFSL Calcutta was not received in respect of the same. In any event, the applicant was entitled to the benefit of bail and therefore favourable orders were to be passed in the applicant's favour.

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

6. It is not singularly in dispute that PSI Marlon D'Souza who had received the information had done the needful of forwarding the information to the DySP for his information, arranged panchas, secured the house search warrant, arranged the raiding

party members and then conducted the raid in which the offers would made to the accused in compliance with Section 50 of the NDPS Act and thereafter the personal search was taken of the applicant and also the house leading to the recovery of the stated quantity of the drugs. The same were thereafter packed and sealed and attached under the Panchanama prepared at the spot followed by the forwarding of the seal back to the DySP for safe custody. Therefore it is apparent that a major part of the investigation except recording the statements of the witnesses and forwarding of the sealed exhibits remained to be done by PSI D'Souza who was both the complainant and also the Investigating Officer in the case.

7. **Mohan Lal**(Supra), challenged his conviction under Section 18 of the NDPS Act sentencing him to rigorous imprisonment and fine with a default stipulation. In the brief facts of that case an FIR was lodged on 03/02/1997 by Sub-Inspector Chand Singh and as he harboured doubt about the appellant upon seeking him, he has called the Gazetted Officer and taken search of the appellant leading to the recovery of 4Kg of Opium in a bag carried by him. The seized Opium was then separated into a

sample of 20gm and 3kg 980gms, the specimen seal was prepared by him and after use, the seal was handed over to ASI, Balwinder Singh. The Panchanama was prepared by PSI Chand Singh and forwarded to Balianwali Police Station where ASI Darshan Singh registered the formal F.I.R. and handed over the investigation back to PSI Chand Singh Pw1.

8. In **Mohan Lal**(supra), in the brief facts of the case, the question for consideration before their Lordships was whether in a criminal prosecution, it would be in consonance with the principles of justice, fair play and a fair investigation, if the informant and the investigating office were to be the same person. In such a case, is it necessary for the accused to demonstrate prejudice, especially under laws such as NDPS Act, carrying a reverse burden of proof. The apex Court took a view 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 and this requirement was carrying a reverse burden of proof and in that

view of the matter the prosecution was vitiated because of the infraction of the constitutional guarantee of a fair investigation directing the release of the appellant forthwith unless wanted in any other Crime.

9. In **Svetlana Federova**(supra), the State had sought for the cancellation of bail granted to the respondent in view of the law laid down by the Hon'ble Apex Court in **Mohan Lal**(supra). In the facts of that case too the learned Single Judge of this Court found that a substantial part of the investigation was conducted by the PSI Manjunath Naik unlike the contention of the learned Public Prosecutor that the substantial part of the investigation was conducted by another PSI who had registered and FIR which did not find favour with the learned Single Judge and ultimately dismissed the application for cancellation of bail for want of merit. In **Akshat Anant**(supra), too reliance was placed in **Mohan Lal**(supra) and a plea taken that the complainant and the Investigating Officer were the same and as such the prosecution would stand vitiated in view of the Judgment in **Mohan Lal**(supra). Another learned Single Judge of this Court considering the judgment in **Mohan Lal**(supra) held the applicant

entitled to bail and ordered his release on certain terms and conditions.

10. **Sunil Phulbande**(supra), sought for the grant of bail for the offences punishable under Sections 20, 22 and 25 of the NDPS Act, 1985. In the brief facts, the Pandharkawada Police Station official received information that ganja was being transported in the Maruti car bearing distinct registration number belonging to the applicant. The Police Officials made arrangements for search of the vehicle and during the course of the search of the vehicle Ganja weighing 100kgs which was kept in gunny bags, was seized from the vehicle and an offence was registered against the applicant who was placed under arrest. The Police filed a charge sheet after taking out the samples and forwarding the same to the Chemical Analyser for necessary analysis. It was contended on their behalf that the Police had filed the chargesheet in the absence of the necessary relevant documents including the Chemical Analyser report. Moreover that although the applicants were present in the Court, necessary documents under Sections 42, 500 and 57 of the NDPS Act and the copy off the Chemical Analyzer's report were not supplied to

the applicants as required under Section 207 of the CrPC and the matter was twice adjourned at the request of the prosecution.

11. In **Sunil Phulbande**(supra), the first application for bail moved at their instance was rejected by the Special Judge and thereafter another application was filed seeking their release on bail in view of the provisions of Section 167(2) of the Code since the prosecution failed to file the chargesheet contemplated under Section 173(2) and (5) of the Code within a period of ninety days from the date of the first remand and they were entitled to be released on bail. In the facts of that case though the charge sheet was filed within 90 days from the date of the first remand of the applicants, the same being incomplete and not being accompanied with the documents contemplated under subsection 5 of section 173 the Code, it could not be treated as a charge sheet which would empower the Magistrate to take cognizance of the offences and the hence the applicants were entitled to be released on bail in view of Section 167(2) of the Code.

12. In **Sunil Phulbande**(supra), a learned Single Judge of this Court at the principal seat found that the chargesheet was filed

on 04/08/2001 in court without enclosing documents contemplated under Section 47 of the Act as well as the report of the Chemical Analyser which was filed for the first time in the Court on 09/11/2001 and the information required to be given to the superior Office in writing as contemplated under Section 42(1) of the Act was filed in the Court on 07/02/2002 i.e. both beyond the period of 90 days when they were first remanded to Police Custody by the Judicial Magistrate First Class. The learned Single Judge found that it was not in dispute that the report of the Chemical Analyser was the foundation on the basis of which the Magistrate could proceed to take cognizance of the offences. The contraband which was seized was Ganja and unless and until the sample, which was drawn by the prosecution, conforms with the article, which was seized during investigation i.e. Ganja, the Magistrate was not in a position to proceed to take cognizance of the offence. The learned Single Judge further found that in the absence of the material documents being a part of the charge sheet without which the charge sheet submitted by the Police under Section 173(5) of the Code would be incomplete and the Magistrate may not be in a position to proceed to take cognizance

on the basis of the said report and in that view of the matter ordered the release of the applicant on bail.

13. The quantity of charas found with the applicant is admittedly a small quantity and the applicant would therefore be entitled to bail as a matter of course though the same cannot be said in respect of the quantity of LSD found with the applicant being 100.91 grams being a commercial quantity. Nonetheless looking to the fact that a substantial part of the investigation was carried by one and the same Officer who was both the complainant and the Investigating Officer and by applying the principles in **Mohan Lal**(supra) and also the judgments of this Court in **Akshat Anant**(supra), in the peculiar facts the applicant would be entitled to bail irrespective of the rigours of Section 37 of the Act.

14. In the result, i pass the following:

1. The applicant shall be enlarged on bail on executing bail bonds in the amount of ₹1,00,000/- (Rupees One Lakh only) and furnishing one local surety in co-extensive

amount to the satisfaction of the learned Special Judge, Panaji.

2. The applicant shall co-operate with the course of investigation and shall not tamper with the witnesses.

3. The applicant to deposit his original passport in the Court forthwith.

4. The applicant shall also not leave the State of Goa and the territorial waters of India without the prior written permission of the learned Court.

5. The applicant shall ensure his presence in the Court on all the dates of hearing on commencement of trial.

15. In these terms the application stands disposed off.

NUTAN D. SARDESSAI,J.

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