

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPLICATION (BAIL) NO. 318 OF 2019

Mr. Mir Fazal Ali Farhan,

Age 26 years,

R/o. Noor Khan Bazar,
Charminar, Hyderabad, Andhra Pradesh, Presently lodged at
Judicial Custody, Colvale
Modern Jail, Colvale, Bardez- ... Applicant
Goa.

Versus

- 1 Union of India
Through Intelligence Officer,
Narcotics Control Bureau, Sub
Zone, Home in the woods,
Porvorim, Goa.
- 2 Spl Public Prosecutor,
High Court Bldg., ... Respondents
Althinho, Panaji- Goa.

Shri K. Poulekar, Advocate for the applicant.

Shri Mahesh Amonkar, Special Public Prosecutor for the respondents.

Coram:- NUTAN D. SARDESSAI, J.

Reserved on : 11th March, 2020.

Pronounced on : 18th March, 2020.

ORDER:

The applicant is invoking the jurisdiction of this Court under Section 439 CrPC seeking his release on bail.

2. Heard Shri K. Poulekar, learned Advocate on behalf of the applicant who submitted that he was placed under arrest on 04/10/2018 for the alleged possession of 2Kgs of Charas and a chargesheet was filed against him under Section 20(b)(ii)(C) NDPS Act ("the Act", for short) on 01/04/2019. He was detained at the securityhold area of the International Airport and the raid was conducted by one Officer named Harkesh and thereafter the entire investigation was taken over by Haresh Gangan who was also the complainant and besides the Investigating Officer in this case. He sought for his release on bail on the grounds firstly that there was violation of the judgment in **Mohan Lal v/s. The State of Punjab**[(CDJ 218 SC 842)] since the complainant and the Investigating Officer was one and the same and on that count alone the applicant was entitled to bail. The second ground on which he sought for his release

on bail was that there was no compliance with the mandate of Section 50 of the NDPS Act and in that context placed reliance in **Ebanezar Adebaya v/s. B.S. Rawat and Ors.** [1996 CrLJ 3210] and **Vennela Tilak v/s. Shahasane, Assistant Collector of Customs and another**[1997 2 MLJ 337].

3. Shri K. Poulekar, learned Advocate referred to the complaint to buttress his contention and otherwise placed reliance in **Florian Kern v/s. State**[Crmab No.24/2020] where a learned Single Judge of this Court had enlarged the applicant on bail despite being in possession of commercial quantity of the stated drug since there was non-compliance with the mandate of Section 50 of the Act and being in violation of the mandate in Mohanlal's case. There was no material to show that the raid was conducted in the security area and on the contrary the documents relied upon on behalf of the prosecution indicated that the applicant was offloaded from the flight and therefore it was unbelievable

that the raid was conducted in the securityhold area. His next point for his release on bail was that the Chemical Analysor's Report did not give any conclusive proof of the presence of Charas but showed the presence of hairs resembling Charas which was not conclusive and in that context placed reliance in **Ivan Minguel v/s. State and another** [Crwab No.294 of 2018] and pressed for his release on bail.

4. Shri Mahesh Amonkar, learned Special Public Prosecutor on behalf of the State contended that the applicant with another named Mohmad Kadar were charged for the possession of Charas in commercial quantity. Offloading was not necessary after boarding and not being allowed to board was equivalent to offloading. There was no dispute that the bag in question belonged to the applicant which was put in the screening area and where it was detected to contain suspicious substance which was later on shown to be Charas. There was no violation of the mandate

of Section 50 of the Act as the bag was not in his possession. To that extent he clearly distinguished the judgments in **Ebanezer Adebaya** and **Veneela Tilak**(supra) and submitted that both these judgments were not applicable as the bag was not found on the person of the applicant but on the x-ray machine. Both these judgments were clearly distinguishable insofar as the applicability of the judgment in **Mohan Lal**(supra) was concerned.

5. Shri Amonkar, learned Special Public Prosecutor for the respondents submitted that information was received by Harkesh and thereupon he conducted the search while the investigation was carried out by Haresh Gangan. The judgment in **Mohan Lal**(supra) was therefore not applicable to the case. He had also adverted to the Chemical Analysor's Report and submitted that all tests done were positive for Charas. There was a statement recorded of the security personnel who alone was available in the securityhold area and there was no outsider whose statement could be

recorded by the respondents. The applicant was not entitled to any bail and his application had to be dismissed. On his part he placed reliance in the **State of Kerala etc. v/s Rajesh etc.** (Cri.Appeal Nos.154-157 of 2020) and pressed for the dismissal of the application.

6. i would consider their submissions, the judgments relied upon and decide the matter accordingly.

7. First and foremost the bag found to contain Charas of 2kgs was in the x-ray screening and not in the possession of the applicant and therefore the requirement under Section 50 of the Act would not be applicable to the case of the applicant.

8. In **Ebanezer Adebaya**(supra), a Full Bench of the Bombay High Court considered the concept of "search of the person" and ultimately held that search of a person would include within its sweep search of article on the person or

body of the person or bag or luggage in **physical possession** of the person at the time of the search. The same principle has been retreated in **Veneela Tilak**(supra) by following the judgment in **Ebanezer Adebaya**(supra). Both these judgments are clearly distinguishable considering that the bag was not in position of the applicant but was detected for Charas in commercial quantity in the screening compartment and which cannot qualify as the possession of the applicant. Hence, the respectable departure from the applicability of the ratio in **Ebanezer Adebaya** and **Veneela Tilak**(supra).

9. Shri Poulekar, learned Advocate may however have a point in his favour inasmuch as the raid was conducted by Harkesh and then the entire investigation was done by Haresh Gangan who was also the complainant in the case apart from carrying out the substantial part of the investigation. To that extent the judgment in **Mohan Lal** (supra) would apply which vitiates the trial where the

complainant and the investigating officer is one and the same person. However, i do not find force in his contention that the raid was not conducted in the security area on the premise that the applicant was offloaded from the flight inasmuch as there appears substance in the contention of Shri Amonkar, learned Special Public Prosecutor on behalf of the Union of India that offloading need not necessarily be after boarding the flight but as in the instant case no sooner he was detected with Charas in the security hold area and before he could board the flight.

10. The last contention on behalf of Shri Poulekar, learned Advocate also does not stand to reason qua the Chemical Analysor's Report inasmuch as the report clearly reveals the various tests carried out on the suspected Charas and there was a finding not only that the microscopic examination showed the presence of hair resembling Charas but that two other tests were conducted for the presence of Charas being Beam's and Nigm's tests which were both positive for

Charas and that the Scientific Officer had opined that the sample analysed contained Charas. To that extent the judgment in **Ivan Minguel**(supra) would not support the contention of the applicant which even otherwise was a case decided on the merits and at the time of considering the application for suspension of sentence and release of the applicant after a full dress trial.

11. **Florian Kern**(supra) had considered the judgment in **Mohan Lal**(supra) at length and ultimately held in favour of the applicant despite being found in possession of 100.91grams of LSD being a commercial quantity applying the principles in **Mohan Lal**(supra). In view thereof and applying the same principle to this case, i do not find myself in agreement with the contention of Shri Amonkar, learned Special Public Prosecutor that the judgment in **Mohan Lal**(supra) is clearly distinguishable.

12. Shri Amonkar, learned Special Public Prosecutor otherwise placed reliance in **Rajesh**(supra) in which the State had challenged the discretion exercised by the learned Single Judge of the High Court of Kerala in granting post-arrest bail to the accused/respondents without noticing the mandate of Section 37(1)(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and rejecting the application filed by the applicant under Section 482 CrPC for recalling the order of post-arrest bail. In the facts of this case, the respondent was found in possession of more than 1.800kgs of hashish oil which was commercial quantity and in that context it was observed that the rigours of Section 37 of the Act was not being adhered to by the learned Single Judge. In those circumstances, the Honorable Apex Court was inclined to set aside the order passed by the High Court releasing the respondents on bail and directing that he being taken into custody. This judgment is clearly distinguishable inasmuch as though the quantity of the Charas found with the applicant is commercial quantity, no

doubt the principle culled out in **Mohan Lal**(supra) would apply and it would be a case where the applicant would be entitled to the benefit of bail only for the infraction of the principles laid down in **Mohan Lal**(supra).

13. In the result, therefore, i allow the application for bail on the following terms and conditions:

- 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 Additional Sessions Judge, South Goa, Margao.
- 2.The applicant shall co-operate with the course of investigation and shall not directly or indirectly influence the witnesses or otherwise hamper the course of the trial.
- 3.The applicant shall also not leave the State of Goa and the territorial waters of India without the prior

written permission of the learned Additional Sessions Judge.

4.He shall deposit his passport in the Court of the Additional Sessions Judge, Margao forthwith if not deposited so far.

5.He shall appear at every hearing of the trial when the same commences before the Additional Sessions Judge, South Goa, Margao.

14. In these terms the application stands disposed off.

NUTAN D. SARDESSAI, J.

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