

IN THE HIGH COURT OF BOMBAY AT GOA.**CRIMINAL APPLICATION (BAIL) NO.7 OF 2021.**

Mr. Antonio Manuel Faria Ramos
s/o Mr. Alvim da Costa Ramos,
Aged 42 years, Portuguese National,
Presently Lodged at Central Jail
Colvale, Bardez Goa.

.... Applicant.

Vs

The State of Goa(through)

1. The Police Inspector
Officer in-charge
Anti Narcotic Cell Police Station,
Panjim Goa.
2. The Public Prosecutor,
High Court of Bombay at Goa,
Altinho, Panjim Goa.

.... Respondents.

Shri Sangram Desai and Shri Rohan Desai, Advocates for the
applicant.

Shri P. Faldessai, Addl. Public Prosecutor for the respondents.

Coram:- SMT. M. S. JAWALKAR, J.

Reserved on:- 23rd June, 2021.

Pronounced on:29th June, 2021.

ORDER:-

The present application is filed under Section 439
of the Code of Criminal Procedure, 1973 for bail against the
order of the Additional Sessions Judge, Margao.

2. It is the case of the applicant that the case of the prosecution is that on 29.12.2019 the staff of ANTI Narcotic Cell (ANC), Panaji left for patrolling at Margao and around 15.30 hours when they reached near the electricity department near Aquem PSI Arun Desai received reliable information that one men foreign national about 40 to 45 years old tall in height and average built wearing black colour T-shirt and grey colour jeans pant will be delivering narcotic drugs to her prospective customers at the bus stop shed.

3. Since there was no time to obtain search warrant and possibility that the suspect would dispose of the narcotic drugs the PSI Desai reduced the information into writing and the grounds of belief for not obtaining such warrant and sent the same to Dy.SP at his residence. They parked the vehicle in the parking at some distance from the spot of the raid. At around 17.05 hours it is alleged that seeing the applicant and features tallying with the information, they rushed

towards him and surrounded him. It is further alleged that on the search of his shoulder bag, Officer found applicant in possession of 110.820 gms of white crystalline powder suspected to be cocaine, 101.108 gms of white colour mixture of crystals and powder substance suspected to be MDMA and 240 gms of charas. FIR bearing no. 27/2019 was registered for an offence punishable under section 21(C), 22(C) and 20(b) (ii) (B) of the NDPS Act. It is submitted by the applicant that the contents in the FIR are false and fabricated. He was not in possession of any drugs.

4. It is submitted that the applicant is entitled for the bail since there is violation of Section 50 of the NDPS Act which is mandatory provision. The non-compliance of the same vitiates the entire search and seizure. The seizure was not in presence of Gazetted Officer or a Magistrate. There is clear violation of Section 42 of the NDPS Act. Not handing over a spot panchanama and seizure report to the applicant is in violation of Section 100 of CR.P.C. There were no details of the test carried out to support the contention that

substance tested was contraband nor any chemical analysis report is on record.

5. The alleged substances are weighed alongwith polythene bag and hence there is no conformity weight of the cocaine and MDMA and, therefore, constraints of Section 37 of the NDPS Act are not applicable. The Chemical Analysis report is still awaited. Considering the COVID-19 pandemic there is great fear to the applicant that he may be contacted with the deadly disease.

6. The learned counsel for the Applicant Shri Sangram Desai, pointed out that if information received is perused there is no where mention that contraband is in luggage or handbag nor it is reflecting in search and seizure panchanama that such information was received. The panch witnesses are of Tiswadi which is around 30 kms away from the spot of a raid and they are not from the locality of Margao. The panch witness, alongwith PI and the raiding party appears to be the same who has earlier also acted as a

panch witness alongwith them. It is also alleged that there is no reference of handing over contraband for depositing the same in the police station. There is delay in carrying out inventory and also request for issuance of authority to hand over the samples to the Director CFSL.

7. The learned counsel relied on following citations in support of his contention that if suspect is not informed by the Investigating Officer of their right to be searched before Gazetted Officer or Magistrate the conviction of the accused vitiates thereby :

- (i) **(2016) 4 MH.L.J (Cri) 389, Bhanudas Dnyanoba Girigosawi and others Vs. State of Maharashtra;**
- (ii) **2014 Cri. L. J. 1756, State of Rajasthan Vs. Parmanand;**
- (iii) **2019(2) ABR(CRI) 894, Krishna S.o Kavi Raj Malla Vs. State;**
- (iv) **2014 ALL MR(Cri) 1953, Thulile Goodness Dhalmini Vs. Union of India and anr.;**
- (v) **2018 Law Suit (SC) 855 SK. Raju Vs. State of West Bengal;**

- (vi) **1999 (SC) 685, State of Punjab Vs. Baldev Singh;**
- (vii) **2009 Law Suit (SC) 1066, Union of India Vs. Shah Alam;**
- (viii) **2010 Law Suit(SC) 768 Vijaysinh Chandubha Jadeja Vs. State of Gujarat; and**
- (ix) **2007 ALL MR(Cri.) 823 Dilip & Anr. Vs. State of West Bengal.**

8. It is the contention of the applicant that when bag and luggage were searched and thereafter personal search was also carried out, it was incumbent on the part of the Police Inspector to appraise the accused about his rights to be searched in presence of the Gazetted Officer or a Executive Magistrate even before searching his bag and luggage. It is also the contention of the applicant that the accused was not knowing English being a Portuguese national and, therefore, he has not even sign the panchanama.

9. The learned Additional Public Prosecutor Shri P.

Faldessai, vehemently opposed the application. It is submitted that, so far his knowledge about English is concerned, nowhere in the panchanama it reflects that he does not know English. On the contrary he has surrendered his luggage and bag as per instruction. He declined to personal search in presence of Executive Magistrate or Gazetted Officer. Search of luggage and hand bag cannot be said to be a personal search and mandate of Section 50 will not apply in the same. In spite of that before personal search an offer was given to him as per section 50 however, he declined the same. The most important is that no personal search was taken by the Investigating Officer. There is no substance in the ground raised by the applicant for grant of bail that seized contraband were not deposited in the police station or not seized as per the procedure. It is pointed out that the inventory was prepared in the presence of Magistrate, accordingly, certificate is also issued. Therefore there is no substance in the contention that there is no proper compliance of the procedure.

10. Learned Additional Public Prosecutor, Shri Pravin Faldesssai, relied on **2021 ALL MR (Cri) 888 Ivan Minguel vs State of Goa and anr.** It is pointed out that almost all the judgments relied on by the applicant are already considered by the Division Bench of this Court in **Ivan Minguel**(supra). So far as **Sk. Raju** (Supra) and **Dilip & Anr.** (Supra) are already discussed in recent judgment reported in **2020 ALL SCR(Cri) 684, State of Punjab Vs Baljinder Singh and anr.**

11. The Hon'ble Apex Court referred to the decision of the Constitution Bench in **Baldev Singh and Vijaysinh Jadeja**(supra) matters and held that mandate of Section 50 of the NDPS Act is confined to "Personal search" and not to search of a vehicle or a container or premises. **Baldev Singh** (supra) clearly states that the conviction may not be based "only" on the basis of possession of an illicit article recovered from personal search in violation of Section 50 of NPDS Act, but if there is other evidence on record, such material can certainly be looked into. The Hon'ble Apex Court

in **Baljinder Singh**(supra) finally held that since the two Judges Bench of the Hon'ble Apex Court in **Dilip**(supra) has not adverted to the distinction pointed out in the decision of the two Constitutional Benches and proceeded to confer an advantage upon the accused even in respect of recovery from the vehicle on the ground that the requirements of Section 50 relating to personal search were not complied with, the law laid down in **Dilip's**(supra) case cannot be said to be correct and is in fact opposed to the law laid down in **Baldev Singh**(Supra) and other Judgments.

12. In **Baljinder Singh** (supra), where the accused had contended that the provisions of Section 50 of the NDPS Act would also apply while searching the bag, briefcase, etc. carried by the person and its non-compliance would be fatal to the proceedings initiated under the NDPS Act. The Hon'ble Apex Court, however, found no merit in the contention and held that the question of compliance or non-compliance with Section 50 of the NDPS Act is relevant only where the search of a person is involved, as such said Section

is not applicable nor attracted where no search of a person is involved. Search, recovery from a bag, briefcase, container does not come within the ambit of Section 50 of the NDPS Act because, Firstly, Section 50 expressly speaks of search of a person only. Secondly the Section speaks of taking of the person to be searched by a Gazetted Officer or a Magistrate for the purpose of the search.

13. In ***Vijaysinh Jadeja***(supra) the Constitution Bench has made it clear the mandate of Section 50 of the NDPS Act is to appraise the person intended to be searched of his right to be searched before a Gazetted Officer or a Magistrate. Thereafter, the suspect may or may not exercise the right provided to him under the said provision. In the present case, considering the documents placed on record it appears that there is no question of compliance of Section 50 as the luggage and handbag were searched first. Thereafter before commencing any personal search the accused was asked whether he wanted to be examined before the Executive Magistrate or the Gazetted Officer, as such, prima facie it is

sufficient compliance. Moreover, there was no personal search in fact carried out by the PI in the case even after such offer and denial by the accused.

14. So far as contention of the applicant that non indication of, the details of the test employed by the IO to ascertain that the substance allegedly found in the shoulder bag were narcotic substance or psychotropic substance entitle's the applicant to bail. I do not see any substance in the said contention as the panchanama and FIR clearly indicate that raiding party had carried with them a drug detection kit and investigation kit box and the substances seized were tested with the said kit. Even the IO by testing the pinch of powder concluded that it tested positive for cocaine.

15. So far as the contention about weighing substance alongwith polythene bag, it can be seen charas weighed 240 gms, Cocaine weighted alongwith polythene bag 110.820 gms and MDMA weighed alongwith polythene bag 101.108 gms.

As per table provided in the NDPS Act 1 kg of charas as per entry 23 is a commercial quantity, as per entry 27, 100 gms of cocaine is a commercial quantity and as per entry 134, 10 gms of MDMA is a commercial quantity. Thus though charag appears to be is in variable/intermediate quantity the cocaine (110.820 gms) MDMA (101.108 gms) is more than the commercial quantity. While deciding the bail application we are not deciding the matter on merits but we have to see whether there are reasonable grounds that is substantial probable causes for believing that the accused is not guilty of the offence charged. It can be seen that the weight of MDMA seized is ten times more than the commercial quantity. Cocaine is also there more than commercial quantity. Therefore, ground of weighing substance alongwith polythene hardly have any substance. It is also prima facie appears that there is compliance of Section 50 as well as other provisions in relation to search and seizure.

16. So far as the applicant's submission in respect of outbreak of Covid 19 is concerned, the learned Addl. Public

Prosecutor informed that the jail authorities have already taken vaccination drive in the jail and also monitoring that there should not be any overcrowding. Offence is serious one and no reasonable grounds made out to release the accused on bail specifically when commercial quantity of two contraband substances were found in possession of the accused.

17. Hence, the application stands rejected.

M.S.JAWALKAR, J.

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