

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL WRIT PETITION NO.8 OF 2021.

Mr. Fabian Helmchen,
S/o Mr. Gerd Helmchen,
Deutsch National,
Age 40 years,
Presently lodged in Judicial
Custody, Lodged at Modern Central Jail,
Colvale, Colvale, Bardez, Goa.

.... Petitioner.

Vs.

1. State of Goa,
(As rep. By Officer incharge/Police
Inspector Anjuna Police Station
Anjuna, Bardez, Goa.

2. The Public Prosecutor,
Office of the Public Prosecutor,
High Court Building, Altinho,
Panaji, Goa.

.... Respondents.

Shri Tushar Jarwal, Shri Salil Saudagar, Shri Rahu Sateeja, Advocates for
the petitioner.

Shri S. G. Bhobe, Public Prosecutor for the respondents.

Coram:- M. S. JAWALKAR, J.

Date:-2nd March, 2021.

JUDGMENT

Heard Shri Tushar Jarwal, learned counsel for the petitioner and
Shri S. G. Bhobe, learned Public Prosecutor for Respondent.

2. Rule. Rule is made returnable forthwith at the request and with the
consent of the learned counsel for the parties.

3. The petition is filed by the petitioner under Section 482 of Cr.P.C. for setting aside the impugned order dated 29.11.2020 passed by the learned Additional Sessions Judge, Mapusa whereby rejected the application filed by the petitioner under Section 91 of Cr.P.C. for issuance of direction to the mobile phone operator to place on record call data record alongwith location or to preserve the data recorded or the location of the petitioner and police officers of the raiding team. Similarly for further directions to the respondent no.1 to produce or preserve CCTV records of Anjuna Police Station Goa from 22.00 hrs on 12.3.2020 till 14.00 hrs on 13.3.2020.

4. Heard Shri Tushar Jarwal, the learned counsel for the applicant and Shri S. G. Bhobe, the learned Public Prosecutor for the respondents.

5. It is the case of the petitioner that he is German citizen and he is qualified audio engineer. He arrived in India for tourism purpose on 31.1.2020 and the return flight of the petitioner scheduled for 18.3.2020. Petitioner was picked up on 12.3.2020 by respondent no.1 and taken to Anjuna Police Station where he was detained illegally. The alleged raid is between 2.45 hours till 5.40 hours as per FIR and at the relevant time he was at Anjuna Police Station. It is his contention that he was not present at the spot of the raid between 2.45 till 5.40 but was at Anjuna Police Station. The same can be verified from Camera Record alongwith call data record and location of the petitioner and police officer. Accordingly, he

moved application under Section 91 of Cr.P.C. The said application was dismissed on the ground that the chargesheet has not been filed. After filing of chargesheet the petitioner again moved application under Section 91 alongwith paper books and case laws. It is submitted that without considering the fact that call data record will not be available at the later stage as the same information is retained only upto one year by the telephone service providers, similarly, the CCTV footage are also not retained permanently, therefore, it is necessary to save the said documents. However, the learned Addl. Sessions Judge, Mapusa rejected the application and has failed to recognize the most imperative principle of criminal jurisprudence of fair trial to an accused person. The learned counsel for the applicant relied on (i) ***Kamal Ahmed Mohammed Vakil Ansari and others Vs. State of Maharashtra in Criminal Appeal No.973 of 2012*** an(ii) ***Suresh Kumar Vs. UOI , SLP (CRI) NO.1477/2014.***

6. The learned Public Prosecutor Shri S. G. Bhole, on instructions from the I.O (who is present in Court) informed that call details and location of the applicant is available and we have no objection if those details were directed to be produced before the Additional Sessions Judge at the time of arguments or before framing of charge.

7. Learned Public Prosecutor fairly conceded that procedure as laid down by the Hon'ble High Court in the case of ***Kamal Ahmed***

Mohammed Vakil Ansari (supra) has not been followed while passing the impugned order.

8. In ***Kamal Ahmed Mohammed Vakil Ansari***(supra), the Hon'ble High Court held that it is the duty of the Court to discover the truth and if the Court is of the opinion that there is no ulterior motive (like delaying the trial etc) in filing the application, then the Court must exercise its jurisdiction and direct the production of documents. It appears that the learned Additional Sessions Judge, Mapusa has not taken into account the guiding principles laid down in ***Kamal Ahmed Mohammed Vakil Ansari***(supra). Undoubtedly the principles of natural justice are integral part of the fair trial. Learned Public Prosecutor fairly made a statement on instructions that whatever available with the Investigating Officer will be provided to the accused in respect of call details of accused Airtel mobile no.+918421766836.

9. The applicant is at liberty to make a fresh application before the learned Additional Sessions Judge for remaining grievances and the learned Additional Sessions Judge to consider it in the light of principle of law laid down by this Court in ***Kamal Ahmed Mohammed Vakil Ansari***(supra) case. It would not be proper at this stage to go into the merits of the matter. Following order will suffice the purpose.

ORDER

- i. Petition is allowed.

- ii. The impugned order dated 21.11.2020 below Exh. D-9 passed by the learned Additional Sessions Judge in Special Criminal Case(NDPS) No.61/2020 is hereby quashed and set aside.
- iii. Investigating Officer is directed to produce on record whatever call details available with them in respect of Airtel Mobile Phone number +918421766836. Apart from that if the petitioner requires anything more, he may apply to Additional Sessions Judge.
- iv. The learned Additional Sessions Judge, Mapusa is hereby directed to consider the same on its own merits keeping in view, the citations referred above. It may pass the orders directing to preserve data if required to the concerned authorities.

Rule is made absolute. There shall be no order as to costs.

Petition stands disposed of.

Parties to act on the duly authenticated copy of this Order.

M. S. JAWALKAR, J.

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VINITA VIKAS
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