

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPLICATION (BAIL) NO. 29 OF 2021

FABIAN HELMCHEN, PRESENTLY
LODGED IN JUDICIAL CUSTODY,
LODGED AT MODERN CENTRAL
JAIL, COLVALE

.... APPLICANT

Versus

STATE OF GOA, AS REP. BY
OFFICER INCHARGE/ POLICE
INSPECTOR, ANJUNA POLICE
STATION, ANJUNA AND ANR

.... RESPONDENTS

Mr. Tushar Jarwal with Mr. Salil S. Saudagar and Mr. Rahul Sateeja, Advocates for the Applicant.

Mr. S.G. Bhohe, Public Prosecutor for the Respondents.

Coram:- M.S. JAWALKAR, J.

Reserved on:- 2nd March 2021.

Pronounced on:- 6th March 2021.

ORDER:

Heard Mr. Tushar Jarwal, the learned Counsel for the applicant and Mr. S.G. Bhohe, the learned Public Prosecutor for the respondents.

2. This is an application under Section 439 of the Code of Criminal Procedure, 1973 (Cr.P.C.) filed by the applicant seeking regular bail.

3. It is the case of the applicant that he has been arraigned as accused in Special Criminal Case (NDPS) No. 61/2020, arising from FIR No. 46/2020 dated 13.03.2020 for the offences punishable under Sections 22(c), 20(b)(ii)(A) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act, for short). However, during the course of investigation, Section 29 of the NDPS Act has been added to allege the involvement of the applicant.

4. It is submitted by the learned Counsel for the applicant that the applicant is a German citizen and is a qualified Audio Engineer and Roofing Specialist for assembly of solar panel and that the applicant comes from a reputed family settled in Germany. It is further submitted that the applicant is a law abiding citizen and has never been involved in any criminal activity in his entire life. It is submitted that the applicant is innocent and has not committed any offence alleged against him and that he has been falsely implicated in the present case and that the entire story of the prosecution is concocted. In view of this, the learned Counsel for the applicant prays for grant of bail.

5. The learned Public Prosecutor filed say on behalf of the State. It is stated that the offence committed by the applicant is of serious nature. It is stated that the inventory of the attached drugs was sent to Goa State Forensic Science Laboratory, Verna for examination, which are tested positive for narcotic drug, "Charas". It is submitted that it is not known since when the applicant is residing in the State of Goa and for how long the applicant is involved in drug trade. It is submitted that if the applicant is released on bail, the applicant will jump bail and flee from justice as the applicant is a foreign national. Moreover, the applicant if released on bail will threaten the witnesses and tamper with evidence. It is submitted that the application for bail filed by the applicant before the Additional Sessions Judge, Mapusa was dismissed on the ground that the offence is heinous in nature against the society at large and if the applicant is released on bail, there are possibilities that the applicant may tamper with the evidence and the witnesses and the applicant may commit similar type of offence and also flee from bail. It is also observed that there is nothing on record to show as to why the applicant was present in the flat of accused no. 1. In view of the above, it is prayed that the present bail application by the applicant for release on bail may be rejected.

6. In reply, the learned Counsel for the applicant submitted that on the face of the copy of the charge sheet, there is nothing against the applicant. The case of the applicant is that he was picked up by the respondent no. 1 on 12.03.2020, while he was going to meet his friend in Goa and he was taken at the Anjuna Police Station. The applicant was at Anjuna Police Station at the time of the raid i.e. between 2.45 till 5:40 p.m. It is stated that the applicant came to India for the first time for tourism purpose and he had booked round trip flight tickets. The applicant arrived on 31.01.2020 and was scheduled to return to Germany on 18.03.2020. He visited on a valid visa. From 31.01.2020 to 05.03.2020, he stayed in Goa in a rented premises at Anjuna, Bardez and further, on 05.03.2020 had rented an apartment for one night at Siolim as he was scheduled to leave on the next date. Around this period only, he met accused no. 1. It was nothing but mere acquaintance. On 12.03.2020, he checked out from Siolim with all his belongings as he was scheduled to meet his friend when he was picked up by the Police for the raid.

The learned Counsel for the applicant also placed on record a copy of order dated 05.02.2021 passed by this Court (Dama Seshadri Naidu, J.) in Criminal Miscellaneous Application

(Bail) (F) No. 38 of 2021 in **Arshiya Anjum Vs. State and Another** in order to submit that accused no. 1 is already released on bail and considering the facts on record, there is nothing against this applicant and as such, he is entitled for grant of bail.

7. Section 29 of the NDPS Act stood added subsequently, however, if FIR is perused, the psychotropic substances were found in the bedroom of accused no. 1 that too in a polythene zip lock bag inside the ladies clothes in the locker of a steel almirah. All these articles are admitted by accused no. 1 as belonging to her. At no stretch of imagination one may have knowledge of this narcotic substance kept in a polythene zip lock bag inside the ladies clothes in the locker of a steel almirah. As per the schedule of the applicant he was to leave India on 18.03.2020, but his flight was cancelled. There are documents to that effect along with the charge sheet. Moreover, the said lady i.e. accused no. 1 was residing in the said flat since October 2019. There is tenant verification form on record. Even as per the information received by the Police it is stated that "one female person at her flat" is likely to dispose of narcotic substance, which "will be delivered to her

prospective customers in her flat". As such there is nothing against this applicant to array him as accused. It is also a fact that seized articles were kept at Police Station till the filing of the charge sheet. The seized psychotropic substances were not of commercial quantity. As nothing was found in possession of the applicant, charge under Section 29 of NDPS Act was made applicable. Moreover, there is nothing on record to show that there is any conspiracy between the applicant and accused no. 1.

8. I have considered the arguments advanced by the learned Counsel for the applicant as well as the learned Public Prosecutor for the respondents. The applicant is a German National working as qualified Audio Engineer and a Roofing Specialist. He came to India for the first time for tourism purpose. The travel tickets show that he had booked a round trip. There are no criminal antecedents. The most important thing is that neither in the information received by the Police Authorities suggest that there was any male person present nor involvement of any male person in the said offence. More so, the psychotropic substances were not found in the possession of the applicant. The place where it was found was the bedroom

of accused no. 1 that too in a polythene zip lock bag inside the ladies clothes in the locker of a steel almirah. The panchanama also reveals that accused no. 1 has made a statement that it belongs to her. Accused no. 1 was in occupation of the rented flat since October 2019. The police verification also confirms this fact. The said flat consists of one hall with attached balcony, one bedroom and one kitchen. As per panchanama, the applicant was found in the hall (though the applicant denied his presence) with all his belongings, however, nothing incriminating is found. The possession under NDPS Act has to be conscious and exclusive. The person possessing the same must have knowledge and control over title and custody of the same.

9. The learned Counsel for the applicant has relied on **Ram Singh Vs. Central Bureau of Narcotics, (2011) 11 SCC 347**, wherein the Hon'ble Apex Court held that:

“It is trite that to hold a person guilty, possession has to be conscious. Control over the goods is one of the tests to ascertain conscious possession so also the title. Once an article is found in possession of an accused it could be presumed that he was in conscious possession. Possession is a polymorphous

term which carries different meaning in different context and circumstances and, therefore, it is difficult to lay down a completely logical and precise definition uniformly applicable to all situations with reference to all the statutes. A servant of a hotel, in our opinion, cannot be said to be in possession of contraband belonging to his master unless it is proved that it was left in his custody over which he had absolute control."

10. The learned Counsel for the applicant also relied on **Smt. Jintabi Vs. State, 1996 SCC Online MP 369** (paras 17 to 22) for similar proposition of law.

11. In my considered opinion, to attract Section 29 of NDPS Act, *prima facie* evidence of conspiracy or connivance should be recorded. The learned Counsel for the applicant relied on the decision of the Principal Bench of this Court in the case of **Sangeeta Y. Gaikwad Vs. State of Maharashtra** (Criminal Application No. 2597 of 2006 dated 03.08.2006) and the decision of the Hon'ble Apex Court in the case of **Amarsingh Ramjibhai Barot Vs. State of Gujrat, (2005) 7 SCC 550** in support of his contention that even if the applicant had knowledge of the offence that does not per se attract

Section 29 of the NDPS Act. The record also does not reveal, even *prima facie*, the role that the applicant has played and one cannot be *ipso facto* made an accused because of his/her presence in the house. There ought to be conspiracy. It is also a fact that the report of CFSL is yet to be received.

12. Considering the facts, *prima facie*, there is no evidence on record to suggest that the applicant was in occupation of the room from where the psychotropic substance was recovered. Further, the evidence *prima facie* clearly points out that the said seized psychotropic substances were in custody and control of accused no. 1. There is nothing on record, *prima facie*, to make out the case of conspiracy to attract Section 29 of NDPS Act. When the main accused is already released on bail, there is no propriety in keeping the present applicant behind bars, specifically when there is no *prima facie* evidence against him. Insofar as whether there is any delay in sending the seized articles to the laboratory or whether it is commercial or small quantity, I need not go into these questions as it is not necessary in view of the foregoing paras. I am satisfied that *prima facie* the facts revealing from the charge sheet that the applicant is not guilty of such offences

and he is entitled to be released on bail. The observations made in this order are *prima facie* in nature and cannot be taken into consideration while proceeding with the trial. The apprehension of prosecution that the applicant is a foreign national and may jump bail can be taken care of by imposing stringent conditions.

13. Accordingly, I proceed to pass the following order:

ORDER

- (a) The application is allowed.
- (b) The applicant, Fabian Helmchen is directed to be released on bail on his executing P.R. Bond in the sum of Rs.50,000/- with one or two solvent sureties each in the like amount to the satisfaction of the learned Additional Sessions Judge, Mapusa.
- (c) The applicant shall furnish his detailed address along with his mobile number/contact number to the Police Authorities as well as to the Trial Court. He shall also inform to the Police Authorities as well as to the Trial Court if there are any changes in the address and mobile number/contact number in future.

- (d) The applicant shall not leave the State of Goa without prior permission of the learned Trial Court.
- (e) The applicant shall attend the hearing of the case on the dates fixed by the Trial Court.
- (f) The applicant shall not influence, induce, threaten or coerce the witness; nor should he abuse the process.
- (g) The applicant shall not commit similar or other offences.
- (h) The applicant's failure to abide by these conditions, will entail the prosecution to apply for cancellation of bail now granted to the applicant.
- (i) The application is disposed of in the aforesaid terms.

14. Parties to act on the authenticated copy of this order.

M.S. JAWALKAR, J.

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