

Esha

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPLICATION (BAIL) NO. 8 OF 2022

LUCKY SHARMA, PRESENTLY
IN JUDICIAL CUSTODY,
MODERN CENTRAL JAIL
COLVALE ... APPLICANT

VS

STATE OF GOA (REP. BY
OFFICER IN CHARGE/ POLICE
INSPECTOR) AND 3 ORS ... RESPONDENTS

Mr. S. Kantak, Senior Advocate with Mr. Salil Saudagar,
Mr. Pravin Naik and Ms. Saicha Desai, Advocates for the
Applicant.

Mr. Nikhil Vaze, Additional Public Prosecutor for
Respondent Nos. 1 and 2.

Mr. Pravin Faldessai, Assistant Solicitor General of India
for Respondent No. 3.

CORAM: C.V. BHADANG, J.

DATED: 27 APRIL 2022

P.C.:

By this Application, the applicant (accused no. 4) seeks
release on bail in Crime No. 183/2021 of P.S. Pernem (now
being investigated by the NCB) under Section 20(b)(ii)(A),

22(c) and 29 of the NDPS Act. The aforesaid crime is registered on the basis of the complaint dated 25.11.2021 lodged by PSI, Vivek Halarnkar of P.S. Pernem. According to the informant in a raid conducted on 25.11.2021, on prior information, 49.2 grams of ganja, 15.7 grams of ecstasy tablets and 19.10 grams of MDMA was recovered from accused nos. 1, 2 and 3, namely, Shabab Khan, Imran Khan and Niyazuddin.

2. During the course of investigation, the statement of these accused persons were recorded under Section 67 of the NDPS Act, in which, it was disclosed that the contraband was procured from the applicant, who is the resident of Bengaluru. According to the prosecution, the statement of the present applicant also came to be recorded under Section 67 of the NDPS Act and during the course of investigation, it was disclosed that there were whatsapp chats between the applicant and accused no. 1 about sale and purchase of ganja. These whatsapp chats were during the period from November 2020 and January 2021.

3. The prosecution is also relying upon two Bank entries dated 28.10.2021 for ₹32,000/- and ₹4,999/- dated 29.10.2021 in order to claim that the applicant was associated with the accused in the matter of sale and purchase of the said contraband. The applicant was arrested on 22.02.2021 and is in custody since then. The investigation is stated to be in progress.

4. I have heard the learned Senior Counsel for the applicant, the learned Assistant Solicitor General of India for the respondent no. 3 and the learned Additional Public Prosecutor for the respondent nos. 1 and 2.

5. With the assistance of the learned Counsel for the parties, I have gone through the record.

6. It is submitted by the learned Senior Counsel for the applicant that the statement under Section 67 of the NDPS Act has been held inadmissible by the Supreme Court in **Tofan Singh Vs. State of Tamil Nadu, (2013) 16 SCC 31**, wherein the Officers of the NCB are held to be the Police Officers. Further reliance is placed on the decision of the Supreme Court in **Bharat Chaudhary Vs. Union of India, 2021 SCC Online SC 1235**, in order to submit that the Supreme Court has held that even for the purpose of bail, the prosecution cannot rely upon the statement under Section 67 of the NDPS Act. It is submitted that the whatsapp chats are about one year prior to the recovery of the contraband from the co-accused and the Bank entries are not shown to be related to any such transaction of sale and purchase of ganja. Reliance is also placed on the decision of this Court in **Shashikant Prabhu Vs. Rahul Saini & Another, 2020 SCC Online Bom 11226**.

7. The learned Assistant Solicitor General of India submitted that notwithstanding that the statement under Section 67 having been held to be inadmissible, the same can be used

as an investigating aid tools. On the basis of the statement under Section 67 of the NDPS, the prosecution could lead to the applicant. It is submitted that during further investigation, the whatsapp chats surfaced, which are sufficient to show the complicity of the applicant in the offence. It is submitted that the reliance placed in the case of **Shashikant Prabhu** (supra) is misplaced in as much as in that case one of the co-accused was serving with the other co-accused. In that case, it was held that the Bank transactions may not lead to the inference of commission of a crime.

8. I have carefully considered the rival circumstances and the submissions made.

9. Admittedly, there is no recovery of any contraband from the present applicant. The recovery was from accused nos. 1, 2 and 3. The prosecution has relied on three circumstances, (i) statement under Section 67 of the NDPS Act of the co-accused; (ii) the whatsapp chats and (iii) the Bank entries as referred to above to show the complicity of the applicant in the said offence.

10. The Supreme Court in the case of **Bharat Chaudhary** (supra) in the context of statement under Section 67 of the NDPS Act at the stage of consideration of bail, has held thus in para 11 of the judgment:

“In the absence of any psychotropic substance found in the conscious possession of A-4, we are of the opinion that mere reliance on the

statement made by A-1 to A-3 under Section 67 of the NDPS Act is too tenuous a ground to sustain the impugned order dated 15th July, 2021. This is all the more so when such a reliance runs contrary to the ruling in Tofan Singh (supra) ”

It is necessary to note that an order cancelling bail was subject matter of challenge before the Supreme Court.

11. Insofar as the whatsapp chats are concerned, they are said to be a year before the recovery. In my considered view, *prima facie*, it is not shown as to how the whatsapp chats relate to the recovery of the contraband from the accused nos. 1, 2 and 3 a year later.

12. The last circumstance is of the Bank entries, which are also not relatable to the sale and purchase of the contraband pertaining to the recovery in this case.

13. No criminal antecedents are alleged or shown against the applicant, of any nature, much less an offence of a similar kind.

14. In such circumstances, the following order is passed:

O R D E R

- (a) The applicant, Lucky Sharma, be released on bail on furnishing a P.R. Bond in the sum of ₹50,000/- with one or two solvent sureties in the like amount.

- (b)** The applicant shall undertake to remain present before the Special Court during the course of the trial unless exempted.
- (c)** The applicant shall furnish his local address and mobile number alongwith proof to the satisfaction of the Investigating Officer.
- (d)** The applicant shall surrender his passport, if any, to the Investigating Officer.
- (e)** The applicant shall attend the Investigating Officer as and when required and shall co-operate with the investigation.
- (f)** In the event of breach of any of the conditions, the bail is liable to be cancelled.
- (g)** Bail Bonds shall be furnished before the learned Special Court.
- (h)** It is made clear that the observations herein are made for the limited purpose of granting bail and the learned Special Judge shall not be influenced by the same at the trial.

15. The Criminal Bail Application is disposed of in the above terms.

C.V. BHADANG, J.