

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPLICATION (BAIL) NO. 276 OF 2014

Mr. Elvis Anton Paul D'Souza,
son of Anton Alario D'Souza,
Aged 38 years, Indian National,
R/o. Flat No. S-6, Shambhuraj Bldg.,
Nova Portugal, Moira,
Bardez, Goa,
Presently lodged at Mapusa Judicial Lock up,
Mapusa, Goa.Applicant.

Versus

1. State of Goa
(As represented by
Officer-in-charge
Anti Narcotic Cell Police Station
Panaji, Goa.
2. The Public Prosecutor,
High Court Building,
Altinho, Panaji, Goa. ... Respondents.

Ms. Maria Caroline Collaso with Mr. Yadnyesh Kotkar, Advocates for
the applicant.

Mr. S. R. Rivankar, Public Prosecutor for the respondents.

Coram:-U. V. BAKRE, J.

Reserved on :- 22nd December, 2014

Pronounced on : 24th December, 2014.

ORDER:

The applicant, who is the accused in Special Criminal Case
No. 18 of 2014 pending before the Special Judge, N.D.P.S. Court
Mapusa, arising out of the culmination of chargesheet filed in
respect of F.I.R. No. 21 of 2013 registered by Anti Narcotic Cell

Police Station, Panaji for offence punishable under Sections 22(c) and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 ('N.D.P.S. Act', for short), and arrested on 17/12/2013, in the said Crime, has filed the present application for bail.

2. Case against the applicant is that between 17/12/2013 at 21.45 hours to 02.00 hours of 18/12/2013, acting upon information, the staff of Anti Narcotic Cell Police Station, Panaji, lead by PSI, Dinesh Gadekar along with two panchas and other staff members, conducted a narcotic raid at Century Ground, Near Maruti Temple, Housing Board, Porvorim, Bardez, Goa and caught the applicant red handed while being in illegal possession of 900 grams of Amphetamine, a psychotropic substance, worth ₹ 45,00,000/- in international market. The said drug was attached under a panchanama along with Hero Honda Passion motorcycle bearing No. GA-03/ J-3207 and cash of ₹ 2,000/- in denomination of ₹ 500/- x 4. The said contraband was allegedly supplied by one Shri Santosh Jha, cited as accused no. 2 in the chargesheet.

3. Ms. Collaso, learned Counsel for the applicant submitted that in terms of Section 36A(4) of the N.D.P.S. Act, chargesheet had to be filed within a period of 180 days from the date of registration of F.I.R. but in the present case an incomplete chargesheet was filed,

there being no conclusive report of Central Forensic Science Laboratory ('C.F.S.L.', for short) to establish that the alleged contraband attached from the possession of the applicant is 'Amphetamine'. She pointed out that as per the panchanama some 'Drug detection Kit' was carried by the Investigating Officer, who had picked up a pinch of whitish colour crystalline powder from the polythene bag which was with the applicant and had tested the same through said Kit and had told the staff and the raiding party that the same had tested positive for 'Amphetamine'. She submitted that since complete chargesheet was not filed within 180 days which was mandatory, the applicant is entitled to statutory bail. The learned Counsel further submitted that it was necessary for the Investigating Officer to mention in the panchanama about the details as to how, at what time and in what manner the tests were conducted, reasons, etc and mere statement that the substance was 'Amphetamine' was not sufficient. She submitted that once the applicant came within the purview of the provision of statutory bail, the fact that commercial quantity was found with him is not at all relevant. Learned Counsel submitted that the fact that the nature of the crime is heinous, howsoever it may be, cannot defeat the right of the applicant to get statutory bail. The learned counsel further contended that the mandatory provision of Section 42(2) of N.D.P.S. Act was not complied with though the raid

was after sunset but before sunrise that is at 11.00 p.m. Lastly, the learned Counsel submitted that a copy of seizure panchanama was not furnished to the applicant. She urged that on all the above grounds, the applicant, who is in judicial custody since last more than two years, is entitled to bail. The learned Counsel relied upon the following Judgments:

- (i) ***Nicklaus Peter Heel V/s. State of Goa***
[1995 (5) Bom.C.R. 438]
- (ii) ***Sanjay Kumar Kedia @ Sanjay Kedia V/s. Intelligence Officer, Narcotic Control Buereau and another,*** [2010 (1) Drugs Cases (Narcotics) 88]
- (iii) ***Uday Monhalal Acharya v/s. State of Maharashtra***
[2001 SCC (Cri) 760]
- (iv) ***Rafael Palafox Garcia V/s. The Union of India and Another,*** [CDJ 2008 BHC 1489]
- (v) ***Shankar Raju Bangalorkar v/s. State of Goa***
[CDJ 1992 BHC 438]
- (vi) ***State of Rajasthan V/s. Parmanand and Another***
[CDJ 2014 SC 161]
- (vii) Judgment dated 07/03/2013 of the Karnataka High Court in CRL. Petition No. 6110/2012 (***Shri Naseer Ahmed V/s. Superintendent of Customs***)
- (viii) Judgment dated 16/12/2011 of the Punjab-Haryana High Court, in Crl. Misc. No. M-35502 of 2011 (***Rajwinder Singh Vs. State of Punjab***).

4. On the other hand, Mr. Rivankar, learned Public Prosecutor submitted that as required under Section 36A(4) of the N.D.P.S. Act,

chargesheet was filed within the statutory period of 180 days, awaiting the report of C.F.S.L. He submitted that the present position is that charge has been already framed by the N.D.P.S. Court on 10/11/2014 and even the report of C.F.S.L. has been received and a supplementary report has been filed before the N.D.P.S. Court on 20/12/2014 along with the report of the C.F.S.L. He submitted that the said final report shows that the substance in possession of the applicant is 'Methamphetamine' which is psychotropic substance as per Schedule I. He further submitted that the question of granting statutory bail in the circumstances above to the applicant does not arise. He further pointed out from the panchanama that the said contraband was not found in the building or conveyance but was found on the person of the accused and therefore Section 42(2) of the N.D.P.S Act is not applicable. He read out the provision of Section 37(1) (b) of the N.D.P.S. Act. He urged that a clear cut case has been made out against the applicant regarding the offence which is of a very serious nature, the drug being of commercial quantity. The learned Public Prosecutor relied upon the case of "***State of Madhya Pradesh V/s. Kajad***" [(2001) 7 SCC 673]. He therefore submitted that the application be dismissed.

5. In rejoinder, the learned Counsel for the applicant submitted

that the applicant had filed the bail application prior to the receipt of the report of C.F.S.L. and the chargesheet as well as the material annexed to the chargesheet did not make out any prima facie case against the applicant and therefore, the applicant is entitled to bail.

6. I have gone through the chargesheet and annexures to the same. I have considered the arguments advanced by the learned Counsel for the parties as also judgments relied upon by them.

7. Section 36A(4) of the N.D.P.S. Act provides that in respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the reference in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) thereof to “ninety days” where they occur, shall be construed as reference to “one hundred and eighty days”: Provided that if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days. The above provision does not make any difference between complete and incomplete chargesheet. In the case of “*Uday*

Mohanlal Acharya" (supra), it has been held by the Apex Court that the accused has indefeasible right to be released on bail when investigation is not completed within a period specified under provision under Section 167(2) of the Code of Criminal Procedure. It has been observed that in order to avail of said right, the accused is only required to file an application before the Magistrate seeking release on bail alleging that no challan has been filed within the period prescribed and he is prepared to offer bail on being directed by the Magistrate. Same thing has been held by the Karnataka High Court in the case of ***"Shri Naseer Ahmed"*** (supra). The above cases are not applicable to the facts and circumstances of the present case because in the present case challan was already filed against the applicant and other accused within the statutory period of 180 days. It is true that at the time of filing of the chargesheet, the report of C.F.S.L. was awaited. However, the seized contraband was already forwarded to the Director, C.F.S.L., Hyderabad and the investigation was completed. Merely because the C.F.S.L. report was not received, that does not mean that chargesheet was not filed within the prescribed time. In the case of ***"Rafael Palafox Garcia"***(supra), at the time of filing of the chargesheet, the Chemical Analysis report was not filed and therefore, it was contended that an incomplete chargesheet was filed. It was further contended that at the time of the filing of the

chargesheet since the C. A. Report was not filed, there was no material before the learned Judge to come to the conclusion that the substance seized was pseudo-ephedrine and hence the Court could not have taken cognizance of the said case. In the present case, it is true that C. A. Report from C.F.S.L. was not received at the time of filing of the chargesheet. However, the panchanama of seizure clearly stated that the applicant was carrying black colour polythene bag in which there was transparent auto press polythene bag which contained whitish colour powder substance which was suspected to be "Amphetamine" – a psychotropic substance. The panchanama clearly mentioned that PSI Dinesh Gadekar took a pinch of said whitish crystalline powder and tested through Drug Detection Kit and told the raiding party that the said whitish crystalline powder tested positive for 'Amphetamine'. The total substance was found weighing 900 grams and therefore, prima facie there was evidence that a commercial quantity of psychotropic substance was found on the person of the applicant. In the present case, though the report of C.F.S.L. was not received, by order dated 09/10/2014, passed in the said Special case No. 18/2014, the learned Special Judge held that there was sufficient material on record to frame charge against the applicant for the offence punishable under Sections 8(c) and 22(c) of the N.D.P.S. Act. Charge has been framed by the learned N.D.P.S. Court against

the applicant for offence punishable under Sections 8(c) and 22(c) of the N.D.P.S. Act on 10/11/2014. Neither the order dated 09/10/2014 for framing charge nor the charge as framed has been challenged. Therefore, in the present case there was material before the learned N.D.P.S. Court for framing charge against the applicant, even without the report of C.F.S.L.. Now, the report of the C.F.S.L. has also been received which shows that the said substance is "Methamphetamine", which is a psychotropic substance as per Schedule I.

8. In the case of "*Sanjay Kumar Kedia @ Sanjay Kedia*" (supra), it has been held that the application for extension of period for completion of investigation has to satisfy conditions mentioned in proviso to Section 36A(4) of the N.D.P.S. Act and when the same was filed without indicating the progress of investigation and without compelling reasons which required extension of custody beyond 180 days and where no notices were issued to the accused before granting application for extension of the custody, the extension was illegal and the accused was entitled to be released on bail. In the present case, the question of filing any report indicating progress of investigation or indicating the compelling reasons required for extension of custody did not arise since the challan was already filed within the prescribed period of 180 days.

For the same reason, the judgement dated 16/12/2011 of the Panjab- Haryana High Court in Criminal Misc. No. M-35502 of 2011 (*Rajwinder Singh V/s. State of Panjab*) is not applicable to the facts of the present case.

9. In the case of “ *Shankar Raju Bangalorkar*” (supra), this Court observed that with regard to the panchanama of recovery it was found that no copy of the same was supplied to the appellant after the purported search and recovery of drugs was done and this was clear violation of the imperative mandate of sub-sections (6) and (7) of section 100 of Cr.P.C. due to which the entire search panachama and consequent recovery was held as vitiated, illegal and void. In the present case, the seizure report mentions that the copy thereof was received by the applicant but the applicant refused to sign the said report. There is nothing on record to establish at this stage that copy of the panchanama was not furnished to the applicant and truth will come during the course of trial.

10. In the case of “ *Nicklaus Peter Heel*” (supra), it has been held that the report of Chemical Examiner must show the tests or experiments performed by him, the factual data and if the same is not there, the report would not have any value as a piece of

evidence. It has been held that the Court has to scan through the evidence of Analyst, with reference to certificate issued by him, and find out whether his evidence inspires confidence to solely rely upon the opinion expressed by the expert. It has been observed that under the N.D.P.S. Act, the recovery and chemical analysis are imported stages in the investigation of the offence and both are the beginning and the end of the investigation. If any laxity is exhibited in these important stages of recovery and analysis, the real culprit will escape. In the present case, charge has been already framed against the applicant and there is report of C.F.S.L. stating that the substance is "Methamphetamine", which as per Schedule – I to the N.D.P.S. Act, is a psychotropic substance. There is no dispute at this stage that what has been found in possession of the applicant is commercial quantity. Trial is yet to begin. In the circumstances above, the judgment in the case of "*Nicklaus Peter Heel*" (supra) is also not applicable.

11. Section 42(2) of the N.D.P.S. Act comes into play when the entry and search is made into any building, conveyance or place. In the present case, the panchanama reveals that the substance was found on the person of the accused, since the applicant was carrying the said black colour polythene bag containing the said substance. In such circumstances, prima facie it cannot be said

that there is violation of section 42(2) of the N.D.P.S. Act.

12. In the case of "*Kajad*" (Supra) , it has been held thus:

"5. Section 37 of the Act provides that the offences under the Act shall be cognizable and non-bailable. It reads:

"Offences to be cognizable and non-bailable- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 -

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless— i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force, or granting of bail."

The purpose for which the Act was enacted and the menace of drug trafficking which intends to curtail is evident from its scheme. A perusal of

Section 37 of the Act leaves no doubt in the mind of the court that a person accused of an offence, punishable for a term of imprisonment of five years or more, shall generally be not released on bail. Negation of bail is the rule and its grant an exception under sub-clause (ii) of clause (b) of Section 37(1). For granting the bail the court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail. It has further to be noticed that the conditions for granting the bail, specified in clause (b) of sub-section (1) of Section 37 are in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail. Liberal approach in the matter of bail under the Act is uncalled for."

13. In view of the above, the accused is not entitled to be released on bail.

14. Hence, the application is rejected.

U. V. BAKRE, J.

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