

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL BAIL APPLICATION NO. 2321 OF 2015

Nazir Ahmad Sange
Aged about 47 years,
Occ: Business. Res. at
B/3, Paswan Co-op. Hsg. Soc. Ltd,
Friends Colony, New Hall Road,
Kurla (West), Mumbai 400 070.
presently in Judicial Custody at
Yerwada Central Prison

.. Applicant

v/s.

1. The State of Maharashtra
2. The Inspector of Customs,
Narcotics Cell, Pune

..Respondents

**WITH
CRIMINAL APPLICATION NO. 1161 OF 2015**

1. Ravindra Shankarrao Konduskar
Age 45 years, Occ: Education,
res. at Plot No.F-20, MIDC,
Islampur 415 414

2. Shri Ayub Akbarsha Makandar
R/s. Muzzemil Manzil,
310/25/1, Balkrishna Nagar,
Kupwad, Taluka Miraj,
District Sangli.
At present in Pune Jail
District Pune

..Applicants
(Org. accused nos.2 and 3)

Versus

1. State of Maharashtra

2. Narcotic Cell,
Through Inspector of Customs
(Prev.) Narcotics Cell,
41A ICE House,
Sasoon Road, Pune 411 001.

..Respondents

Mr. Mobin Solkar i/b. Tahera A. Rashid Qureshi for the applicant in B.A.No.2321 of 2015.

Mr.Ashok P. Mundergi, Senior Advocate with Mr. J.J.Bardeskar for the Applicants in APL/1161/2015.

Mrs.G.PMulekar, APP for the Respondent-State.

Ms.Rebecca Gonsalves, Addl.PP for the Respondent No.2

CORAM : SMT. ANUJA PRABHUDESSAI, J.
RESERVED ON : JANUARY 29, 2016.
DATED : JUNE 13, 2016.

JUDGMENT :

1. The applicants are arrayed as accused in Crime No.2 of 2015 registered at the office of Customs, Narcotic Cell for offences punishable under Section 21(b), 23(b) r/w. 8(c) of N.D.P.S. Act. The applicant in Bail Application No.2321 of 2015 was arrested on 9.3.2015 and he was produced before the Special Court, Pune on 10.3.2015, whereas the applicants in Criminal Application No.1161

of 2015 were arrested on 10.3.2015 and were produced before the Special Court, Pune on 11.3.2015. They were remanded in custody from time to time. The period of 180 days for completion of investigation in respect of the applicant Nazir in Bail Application No.2321 of 2015 was to expire on 6.9.2015, whereas the said period in respect of the applicants in Criminal Application No. 1161 of 2015 was to expire on 7.9.2015.

2. By report dated 1.9.2015 filed under Section 36A (4) of the N.D.P.S. Act, the Special Public Prosecutor sought extension of three months for completion of investigation. Upon hearing the prosecutor and the Advocate for the accused, the learned Special Judge by order dated 1.9.2015 granted extension for period of four days.

3. The applicant in Bail Application No.2321 of 2015 and the applicants in Criminal Application No. 1161 of 2015 filed separate applications for bail dated 15.9.2015 being Application Nos. 3036 of 2015 and 3037 of 2015 under Section 36-A(4) of N.D.P.S. Act r/w. 167(2) of Cr.P.C. Both these applications were dismissed by common

order dated 13.10.2015. Consequent thereto, the applicant Nazir Sange has filed Bail Application No. 2321 of 2015, whereas the applicants in Criminal Application No.1161 of 2015 have challenged the order of extension dated 1.9.2015 and have further sought release on bail.

4. Heard learned Sr. Counsel Mr. Mundargi for the applicants in Application 1161 of 2015 and learned Counsel Mr. Solkar for the applicant in Bail Application No.2321 of 2015. The learned counsels for the applicants have submitted that the application for extension was filed on 1.9.2015 whereas the period of 180 days was to get over on 6.9.2015. The learned Counsels therefore claim that the application for extension was premature. The learned Counsels for the applicants further submitted that the said application for extension which was filed by the original complainant cannot be treated as a report of the said Special Public Prosecutor.

5. The learned Counsels for the applicants have further submitted that the investigation was already completed and that the Special

Public Prosecutor had not spelt out the reasons for further extension.

6. The learned counsels for the applicants have further submitted that the order of extension was passed without issuing notice to the accused/in the absence of the accused. The learned Counsels for the applicants have further submitted that Advocate Raju Mate who was present in the Court on that day had no instructions either to oppose the application or to argue on behalf of the applicants. The learned counsels for the applicants therefore claim that mere presence of the advocate in the court does constitute notice to the applicant accused and does not meet the requirement of Section 36-A(4) of the N.D.P.S. Act. The learned counsels for the applicants have stated that there was no progress in the investigation and that the learned Special Judge has granted extension mechanically, without application of mind.

7. The learned Counsel for the applicants have relied upon the decision of the Apex Court in *Hitendra Thakur v. State of*

Maharashtra 1994 (4) SCC 602, Sanjay Dutt v. State 1994 SCC (Cri.) 1433, Ateef Mulla v. State of Maharashtra (2005) 7 SCC 29.

8. The Learned Addl.PP Ms. Rebecca Gonsalves submitted that the period of 180 days for completion of investigation in respect of the applicant in Bail Application No. 2321 of 2015 was to expire on 6.9.2015, whereas the period in respect of applicants in Criminal Application No. 1161 of 2015 was to expire on 7.9.2015. She submitted that since the investigation could not be completed within 180 days, the Special Public Prosecutor had filed the report indicating the progress of the investigation and also specified the detail reasons which necessitated further extension beyond the period of 180 days. She has submitted that Advocate Raju Mate had filed Vakalatnama on behalf of the applicants and that he was appearing on behalf of the applicants since the date of their first production before the Court. She has submitted that Advocate Raju Mate had represented all the applicants on 1.9.2015. He neither made any submission, nor opposed the prayer for extension of time.

He also did not ask for further time to seek instructions from the applicants and instead submitted that the court should pass appropriate order. Learned Counsel Ms. Gonsalves has therefore submitted that the advocate who was representing the applicants was present in the court and he was given an opportunity to make submissions on behalf of the applicants, which meets the requirements of Section 36-A(4) of the Act.

9. Learned Counsel Ms. Rebecca Gonsalves has further submitted that the applicant in Bail Application No.2321 of 2015 has not challenged the order of extension dated 1.9.2015 and had filed the bail application after time for investigation was already extended. She submits that the said application was therefore not maintainable. Learned Counsel Ms. Gonsalves has further submitted that the learned Special Judge had extended the time after perusing the records and considering the grounds raised by the Special Public Prosecutor. She has stated that there is no infirmity either in the order of extension or order of rejection of bail application. She has relied upon the decision rendered by this Court in **Baba @**

Kamalakar Kisan Bodke & Anr. v. State of Maharashtra (Cri. Application No.3522 of 2004), as well as the decision of Delhi High Court in *Mohd. Maroof @ Ibrahim & Ors. v. State (Cri. Misc. Application No.3644 of 2014)*.

10. I have perused the records and considered the arguments advanced by the learned Counsels for the applicants and the learned Addl.PP. for the respondent no.2.

11. The records reveal that on 8.3.2015 at about 21.45 hours Deputy Commissioner, Customs (prev.) Pune had received information that one Ayub Makandar would be taking delivery of 50 kgs of Mephedrone, a psychotropic substance under the N.D.P.S. Act, 1985 from Ravindra Konduskar (applicant in Application No.1161 of 2015) and that thereafter he would be handing over the same to the applicant Nazir Sange (Applicant in Bail Application No. 2321 of 2015). The information disclosed that the said psychotropic substance was being transported in white colour Toyoto Etios vehicle

bearing No. MH 06 J 9490. Accordingly, on 9.3.2015 the officers laid a trap. They intercepted the vehicle bearing No. MH 06 J 9490 near Talegaon Tol Plaza in presence of two panchas. Said vehicle was driven by the applicant Nazir Sange.

12. The case of the prosecution is that two cartons were found in the dicky of the said vehicle, which were opened in the presence of panchas. One of the said cartons contained laminated plastic packets. The substance from the said plastic packet appeared to be Mephedrone. The contents were emptied in one polythene bag. The total weight of the said substance was 25 kgs. Two samples of 25 gms each were drawn and sealed. The second carton was also opened and it contained similar substance, which weighed about 25 kgs. Two samples of 25 gms each were drawn and sealed. The second carton was also opened and it contained similar substance, which weighed about 25 kgs. Two samples of the said substance were drawn from the second carton. The statement of the applicant Nazir was recorded under Section 67 of the N.D.PS.Act. He was placed under arrest and was produced before the Special Judge

(N.D.P.S.) Pune, on 10.3.2015, on which date he was remanded to judicial custody.

13. On the same day the factory premises of M/s. Onkar Industries, Islampur was searched. The applicant-Ravindra was present in the factory and he had stated that the product Benzitrol was manufactured in the said factory and upon being questioned he admitted that Mephedrone HCL was also manufactured in the said factory premises. At the instance of applicant Ravindra 18 bags weighing 337.865 gms. allegedly containing Mephedrone HCL were recovered, samples were drawn from the said bag and the said psychotropic substance was seized. The residence of Ravindra was also searched and Rs.7,10,000/- were recovered from the bathroom, which was also seized under the belief that the same were sale proceeds of Mephedrone psychotropic substance. The statements of Ravindra and co-accused Ayub were recorded under Section 67 of the N.D.P.S. Act and they were placed under arrest on 10.3.2015. They were produced before the Special Judge (N.D.P.S.), Pune on 10.3.2015 and were remanded to judicial custody.

14. The records reveal that the said samples were sent to the Central Forensic Science Laboratory, Ramanthapur, Hyderabad-13. Report dated 12th August, 2015 of CFSL, Ramnathpur confirmed that samples tested positive of mephedrone.

15. Since the investigation could not be completed within 180 days, the Special Public Prosecutor filed a report dated 1.9.2015 under proviso to Section 36-A(4) of the N.D.P.S. Act and sought extension of three months for completion of investigation. By order dated 1.9.2015 the learned Special Judge granted extension of two months time for completion of the investigation. The applicant in C.C.No. 2321 of 2015 has not challenged the said order, but has merely challenged the order of rejection of bail. Having failed to assail the correctness of the order of extension of time, the application for bail would not be maintainable.

16. Be that as it may, Sub Section (4) of Section 36-A of the N.D.P.S. Act provides that:

“(4) In respect of persons accused of an offence punishable under Section 19 or Section 24 or Section 27-A or for offences involving commercial quantity the references 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.”

17. The Apex Court in *Sanjay Kumar Kedia v. Narcotics Control Bureau* (supra) while considering the scope of the proviso to sub section 4 of Section 36A of N.D.P.S. Act has observed as under :

“12. The maximum period of 90 days fixed under Section 167(2) of the Code has been increased to 180 days for several categories of offence under the Act but the proviso authorises a yet further period of detention which may in total go up to one year, provided the stringent conditions provided therein are satisfied and are complied with. The conditions provided are:

- 1) a report of the Public Prosecutor;*
- 2) which indicates the progress of the investigation, and*
- 3) specifies the compelling reasons for seeking the detention of the accused beyond the period of 180 days, and*
- 4) after notice to the accused.”*

18. In *Hitendra Thakur* (supra) the Apex Court while dealing with the proviso inserted in clause (bb) of sub section 4 of Section 20 of the TADA Act, which is para materia with the proviso to sub section (4) of Section 36-A of the Act has observed as under :

“21... It is true that neither clause (b) nor clause (bb) of sub-section 20 TADA specifically provide for the issuance of such a notice but in our opinion the issuance of such a notice must be read into these provisions both in the interest of the accused and the prosecution as well as for doing complete justice between the parties. This is a requirement for the principles of natural justice and the issuance of notice to the accused or the Public Prosecutor, as the case may be, would accord with fair play in action, which the courts have always encouraged and even insisted upon. It would also strike a just balance between the interest of the liberty of an accused on the one hand and the society at large through the prosecuting agency on the other hand. There is no prohibition to issuance of such a notice to the accused or the public prosecutor in the scheme of the Act and no prejudice whatsoever can be caused by issuance of such a notice to any party.”

19. It is thus evident that in terms of proviso to sub section 4 of Section 36A the Special Court is authorised to extend the period for completion of investigation upto one year subject to filing of the report of the public prosecutor indicating the progress of the

investigation and specifying the specific reasons for seeking further extension beyond the period of 180 days. Though the Section does not provide for issuance of notice to the accused, in terms of the observation of the Apex Court in *Hitendra Thakur (supra)*, it is necessary to issue a notice to the accused before extending the term for completing the investigation. The Apex Court in *Sanjay Dutt (supra)* has further clarified that notice referred in the case of *Hitendra Thakur* does not contemplate a written notice to the accused but production of the accused in the court and informing him that the question of extension of the period for completing the investigation is being considered, is alone sufficient for the purpose.

20. The question which therefore falls for our consideration is whether the application for extension filed by the Public Prosecutor meets the necessary conditions stipulated in proviso to sub-section 4 of Section 36A of the N.D.P.S.Act. It is not in dispute that the applicant in Bail Application No.2321 of 2015 was arrested on 9.3.2015 and was produced before the court on 10.3.2015, whereas the applicants in Criminal Application No. 1161 of 2015 were

arrested on 10.3.2015 and were produced before the court on 11.3.2015. In the course of the investigation they were produced before the court and remanded from time to time.

21. In the instant case, the period of 180 days for completion of investigation was to expire on 6.9.2015 in respect of Bail Application No.2321 of 2015 and on 7.9.2015 in respect of Criminal Application No. 1161 of 2015. By application dated 1.9.2015 the learned Prosecutor had submitted the report for extension of time for the period of three months. It is true that the said application was filed prior to expiry of 180 days. It is however, to be noted that the proviso to sub-section 4 of Section 36A of N.D.P.S. Act does not stipulate that the application has to be filed on the last date of the expiry of time for investigation. Nor does it preclude the prosecution from filing the application for extension before the expiry of 180 days. As held by this Court in *Baba @ Kamalakar Kisan Godke* (supra), it is open to the prosecution to take out such application before the accused exercises his right to avail remedy to bail on the ground of default. Needless to state that the extension

would operate from the date of expiry of 180 days. Hence, the argument of the learned counsels for the applicants that the application for extension was not maintainable being premature is devoid of any merit.

22. It is to be noted that the prosecution has sought extension of time beyond 180 days. In the case of Hitendra Thakur the Apex Court has held that the public prosecutor is not just a post office or a forwarding agency, but he is required to apply his mind to the request of the investigating agency before submitting the report to the court for extension of time. The Apex Court has further held that:

“23..... for seeking extension of time under clause (bb), the Public Prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court indicating therein the progress of the investigation and disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation. The Public Prosecutor may attach the request of the investigating officer along with his request or application and report, but his report, as envisaged under clause (bb), must disclose on the face of it that he has applied his mind and was satisfied with the progress of the investigation and considered grant

of further time to complete the investigation necessary. The use of the expression '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' as occurring in clause (bb) in sub-section (2) of Section 167 as amended by Section 20(4) are important and indicative of the legislative intent not to keep an accused in custody unreasonably and to grant extension only on the report of the Public Prosecutor. The report of the Public Prosecutor, therefore, is not merely a formality but a very vital report, because the consequence of its acceptance affects the liberty of an accused in clause (bb). The request of an investigating officer for extension of time is no substitute for the report of the Public Prosecutor.”

23. In the instant case, a bare perusal of the application dated 1.9.2015 shows that it was a “ report of the Special Public Prosecutor with prayer for extension for filing the complaint.” The said report was signed by the Public Prosecutor and it does not cease to be a report merely because it is also signed by the Inspector of Customs, (Narcotic Cell), Pune. The report gives details of the progress of the investigation conducted so far. The report submitted by the prosecutor reveals that the CSFL report along with reminent samples were received from CSFL, Hyderabad on 21.8.2015. The said report reveals that the substance tested positive for mephedrone. The

prosecutor had further stated that, in the meantime a FAX letter dated 3.8.2015 was received from Inspector, ATS, Charkop Unit, Mumbai, stating that five persons had been arrested under Section 8(c), 22 and 29 of N.D.P.S. Act and 26.500 kg of processed mephedrone and 100 litres of raw mephedrone of liquid and solid form were seized. Two of these persons were found involved in the present case. Hence application was filed before the Special N.D.P.S. Court, Mumbai to hand over the custody of the said two persons. The said application was rejected on 26.8.2015, since the Investigating Officer had not placed on record the requisition of the concerned court before whom the Crime No. 2 of 2015 was pending. The prosecutor had therefore sought further extension of time to draw statements of chemists and packing staff of M/s. Onkar Industries, statement of Rajkumar Konduskar, Shankar Konduskar, Prakash Shinde to explain the cash transaction as well as record the statement of supplier of raw material to manufacture mephedrone. The prosecutor had further stated that an application was also moved before the Superintendent of Arthur Road Prison, to hand over the custody of Sachin Bagul and Ayub Tasir Khan, arrested by

ATS, Charkop Unit, and who was wanted in the present crime, who used to take delivery from Nazir Sange, the applicant in Bail Application No.2321 of 2015 and dispose of mephedrone in the market and collect the sale proceeds in cash. The prosecutor had stated that the further investigation was necessary to ascertain the role of Ayub Khan and Sachin Bagul in the conspiracy to process, transport and sell mephedrone. A perusal of the application/report clearly indicates that the prosecutor has not only given the detail progress of the investigation but has also spelt out the compelling reasons for seeking detention beyond the period of 180 days. The report submitted by the prosecutor shows application of mind and meets the requirements specified in the proviso to sub section 4 of Section 36A of the Act.

24. As regards notice to the applicant /accused it is not in dispute that the applicant-accused were not produced before the court on 1.9.2015. It is also not in dispute that Advocate Mate had filed his vakalatnama on behalf of the accused and that he was representing the applicants from the first day they were produced before the

court. He was present before the court on the day the prosecutor had filed the report for extension of time and he was informed about the report filed by the prosecutor. The records also reveal that after the court had granted extension, learned Advocate Mate had filed an application for bail and one of the grounds raised in the said application was that the applicants were not given the notice of the application for extension. While dismissing the said application, by order dated 13.10.2015 the learned Judge has observed that the learned Counsel Shri Mate who has been representing the applicants since the beginning was present in the court on 1.9.2015. The learned Judge has recorded that learned Counsel Shri Mate has admitted that before passing any order on the said application for extension, he was asked as to whether he wanted to make any submission on behalf of the applicant/accused and that he had declined to make any submissions. The learned Judge has further recorded that before passing the said order of extension, the attention of learned Advocate Shri Mate was invited towards the contents of the application and despite which he had chosen not to make any submissions.

25. The applicants have not controverted the said statements recorded by the learned Special Judge in order dated 13.10.2015. It is thus evident that the Counsel representing the applicant was present before the court when the application for extension was filed. The contents of the application were brought to his notice and he was given a fair opportunity to give his say in the matter. The learned advocate for the applicants did not raise any objection for extension of time nor did he insist on production of the accused for the purpose of extension. Thus, there was total compliance of the principles of natural justice. It is pertinent to note that the object of notice/ production of the accused before the court is mainly to appraise the accused of request for extension of time. In the instant case though the accused were not produced before the court, the contents of the report was brought to the notice of the advocate representing the accused and he was given sufficient opportunity to give his say on the question of extension. The order of extension is therefore in total conformity with the requirements of the proviso to sub section (4) of Section 36-A of the N.D.PS.Act. There is no

infirmity in the impugned order of extension. Consequently, the applicants are not entitled for bail under Section 167 (2) of Cr.P.C.

26. Under the circumstances and in view of the discussion supra the applications have no merits and are hereby dismissed.

(ANUJA PRABHUDESSAI, J.)