IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPLICATION (MAIN) NO.158 OF 2018

State
Through its Police Inspector/
Investigation Officer,
CID, Crime Branch,
Ribander Goa. ... Appellants

Versus

Mr. Minino Fernandes
S/o. late Falicio Fernandes,
Age 55 years,
R/o. H.No.725/2,
St. Anthonys Trais Vaddo,
Anjuna, Bardez-Goa. ... Respondent

Shri S.R. Rivankar, Public Prosecutor for the Appellants.
Shri J.P. D'Souza, Advocate for the Respondent.

Coram : NUTAN D. SARDESSAI, J.

Reserved on : 23rd July, 2018
Pronounced on : 26th July, 2018

ORDER :

The State is seeking the cancellation of bail under Section 439(2) and 482 Cr.P.C. against the order passed by this Court dated 23/04/2018 granting conditional bail to the respondent.

2. Shri S.R. Rivankar, learned Public Prosecutor came to be heard on behalf of the appellants whose case was that the respondent was placed under arrest for being found in

possession of 9.38 grams of cocaine and 67 grams of MDMA totally worth ₹7,50,000/- in the course of the raid conducted on 16/02/2018. An application for bail was moved by the respondent and this Court vide the order dated 23/04/2018 passed a conditional order of bail ordering his release on bail and granting liberty to the State to move for the cancellation/modification on receipt of the Chemical Analyzer's Report. It was pursuant to the conditions imposed by this Court and on receipt of the Report that the State was constrained to move for the cancellation of bail. In the facts at large it was noticed by the learned Judge of this Court (C.V. Bhadang, J.) that the contraband MDMA and cocaine were neither tested with the aid of the field testing kit nor was there a Report from the CFSL to show that the substance recovered from the respondent was MDMA and on that premise proceeded to grant conditional bail to the respondent.

3. The State was now in receipt of the CFSL Examination Report on 02/05/2018 clearly indicating that cocaine had been detected in Exhibit A1 and MDMA had been detected in Exhibit B1 which was a commercial quantity. Since the contraband MDMA recovered from the respondent was a commercial

quantity, Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985, Act for short hereinafter, was applicable and therefore the bail which was earlier granted in favour of the respondent had to be cancelled. Shri S.R. Rivankar, learned Public Prosecutor referred to the Report of the CFSL, Hyderabad and pressed for the cancellation of bail earlier granted in the respondent's favour. Shri J.P. D'Souza, learned Advocate for the respondent did not file any separate reply and submitted at the outset that there was no breach or violation of the order granting bail and therefore the applicants were not entitled to the cancellation of bail granted in his favour. He placed reliance in **Abdul Basit V/s. Abdul Kadir Choudhary [(2014) 10 SCC 754]** and once again reiterated that it was only in case there was violation of the terms of bail, was the State entitled to seek cancellation of bail and/or otherwise it would be a whimsical cancellation.

4. Shri D'Souza, learned Advocate for the respondent adverted to the Report of the Chemical Analyzer and submitted that the MDMA found with the respondent was a small quantity and not a commercial quantity and submitted that the Note 4 of the Schedule to the Act did not apply to the

case of the respondent and therefore the application had to be dismissed. Shri S.R. Rivankar, learned Public Prosecutor for the appellants in reply submitted that the Note 4 would still apply as the substance MDMA though did not have an international non-proprietary name, it still had other non-proprietary name as prescribed in column 3 and hence the argument of Shri D'Souza, learned Advocate for the respondent that Note 4 could not apply was not tenable. It was also his further contention that the State had clearly indicated even in its application at paragraph 8 that the contraband MDMA recovered from the respondent was a commercial quantity and therefore the bar under Section 37 of the Act was applicable and he was not entitled to the benefit of bail. Last but not the least, it was his contention that what was forwarded to the CFSL, Hyderabad was only a representative sample for examination and not the entire quantity to meet the contention of Shri D'Souza, learned Advocate for the respondent and that it was a commercial quantity.

5. i would consider their submissions and decide the application appropriately also in the light of the Schedule to

the Act and the judgment in **A. Basit** (supra). This is besides referring to the judgment in **Union of India v/s. Mohanlal & Anr. [(2016) 3 SCC 379]** referred to by Shri S.R. Rivankar, learned Public Prosecutor on behalf of the appellants State.

6. In **A. Basit** (supra), the Hon'ble Apex Court held in the factual matrix that the circumstances brought on record did not reflect any situation where the bail was misused by the petitioner accused and therefore the High Court could not have entertained the said petition and cancelled the bail on the grounds of it being perverse in law. There can be no dispute with this proposition that the bail cannot be cancelled unless there is violation of any of its conditions on which it is granted in favour of a party. It is also not the case of the appellants State that the respondent had violated any of the terms of the conditional order on which he was set at liberty by a learned Judge of this Court pending the Report of the CFSL, Hyderabad. The only question which therefore remains at large is whether the appellants State is entitled to seek the cancellation of bail on the premise that the receipt of the report indicates that the contraband found with him was

positive for MDMA and the said MDMA was of a commercial quantity. There was no dispute by Shri D'Souza, learned Advocate for the respondent that in view of the judgment in **Union of India** (supra), a representative sample had to be drawn no sooner a seizure of the contraband was made apart from preparing an inventory, certifying its correctness and certifying the photographs of such drugs from the substances taken before the Magistrate as true.

7. The Notification issued under the Act specifies the quantity mentioned in columns 5 & 6 of the table in relation to the narcotic drugs or psychotropic substances mentioned in the corresponding entry in columns 2 to 4 of the said table, as the small quantity and commercial quantity respectively for the purposes of the said clauses of that section. The first item is the serial number as per the table, the second serial number gives the name of the narcotic drug and psychotropic substance (International non-proprietary name), the column three specifies the other non-proprietary name, the column four indicates the chemical name and the columns 5 & 6 prescribes the small quantity and commercial quantity in respect of each categories of the narcotic drugs and

psychotropic substances. MDMA, Ecstasy apparently does not have an international non-proprietary name indicated in column 2 but it has another non-proprietary name MDMA, Ecstasy apart from the chemical name and defining the quantity as small and commercial in columns 5 & 6. The note 4 at the foot of this Notification reads as below:

> 4. The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.

The contention therefore of Shri D'Souza, learned Advocate for the respondent that MDMA is not contained in column 2 with its non-proprietary international name as to apply the rigors of the column of commercial quantity cannot stand the test of scrutiny by any stretch of imagination.

8. Shri D'Souza, learned Advocate for the respondent also tried to take the benefit of the Exhibit B1 containing 4.829 grams of brown coloured powder as contained in the Examination Report to canvass his contention that the MDMA if at all was not of a commercial quantity as allegedly

recovered from the respondent and therefore there was no basis to contend that the quantity was commercial and/or that the rigors of Section 37 would apply and the respondent would not be entitled to bail. However, Shri S.R. Rivankar, learned Public Prosecutor on behalf of the State further invited attention to the reply filed to the bail application dated 19/04/2018 wherein it was clearly revealed that the seized contraband was kept at the Police Station and the samples procured in the presence of an Executive Magistrate alone were forwarded to the CFSL, Hyderabad for examination and Report.

9. In any event, though the argument of Shri D'Souza may appeal that what was forwarded to the CFSL, Hyderabad was the only quantity of MDMA weighing 4.829 grams and not 67 grams as per the case of the prosecution, there could be no dispute about the fact that what is forwarded for analysis in terms of the directions issued by the Apex Court is the representative sample and not the entire quantity for analysis and Report. Since however, the Report of CFSL, Hyderabad indicates that what was forwarded for examination and Report as Exhibit B1 was 4.829 grams of brown coloured powder

certified as MDMA on examination, the respondent accused would be entitled to reap the benefit in the facts peculiar to this case.

10. The applicant therefore not having made out any ground for cancellation of bail, i do not find any merit in the application which is hereby dismissed.

NUTAN D. SARDESSAI, J.

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