

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPLICATION (BAIL) NO.178 OF 2018

Mr. Omer Mizrahi
S/o. Mr. Moshe, Age 23 years,
Israeli National,
Presently lodged in central Jail Colvale. ... Applicant
Versus

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

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

Coram : NUTAN D. SARDESSAI, J.

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

ORDER :

Heard Shri J.P. D'Souza, learned Advocate for the applicant and Shri S.R. Rivankar, learned Public Prosecutor for the Respondents.

2. The applicant seeks his enlargement on bail who had been detained for the alleged illegal possession of 2.06 kilograms of charas and 10.421 grams of LSD liquid on 02/12/2017 by the Officers of the Anti-Narcotic Cell Police

Station acting on the basis of reliable information and the raid conducted thereon at Sarina Guest House, Khalchawada Arambol Goa.

3. The respondents were required to complete the investigation and file the chargesheet within 180 days from the date of the first remand in terms of Section 36A Sub-section 4 of the NDPS Act, Act for short hereinafter and which period was to expire on 30/05/2018. The applicant was produced before the learned Sessions Judge at Panaji on 29/05/2018 and was handed over certain documents in English being the application for extension of time to file the chargesheet beyond 180 days. The application was disposed off on the very same day granting extension of time for a period of 60 days to file a chargesheet. He had moved an application for bail on the completion of 180 days alleging that the extension of time was against the principles of natural justice and by the non-application of mind. The bail application however came to be rejected by the order of the learned Additional Sessions Judge at Mapusa dated 14/06/2018. The applicant was therefore entitled to the benefit of bail.

4. A reply came to be filed at the behest of the respondents spelling out that though the period of 180 days to file a chargesheet was expiring on 30/05/2018, nonetheless, the application for enlargement of time to file the chargesheet was moved before the learned Sessions Judge on 25/05/2018 on the ground that the CFSL Report was not received from the laboratory. The Special Court had issued a notice to the applicant on 28/05/2018 and which was served on him in the custody. Although he was notified of the application and the request contained therein and produced before the Sessions Court on 29/05/2018, no reply came to be filed at his instance and the learned Sessions Judge granted 60 days time to file the chargesheet. This order was challenged by the applicant in Criminal Writ Petition No.117/2018 and a learned Judge of this Court (C.V. Bhadang, J.) by the order dated 27/06/2018 dismissed the petition confirming the order dated 29/05/2018 granting extension of time to file the chargesheet.

5. The applicant was therefore not entitled to re-agitate the issue afresh. There were ample powers in the Court to extend the time beyond 180 days in appropriate cases and which was granted in the present case. The applicant was not entitled to

the benefit of bail as he was found in possession of the commercial quantity of contraband charas apart from 10.421 grams of LSD liquid. A representative sample of LSD was drawn and sent for chemical analysis to CFSL, Hyderabad on 06/01/2018 which by its letter dated 08/01/2018 returned the sample expressing its inability to conduct the test. A representative sample of charas was referred to DFDA, Goa on 18/01/2018 and a report was received that it was charas. The question of granting bail to the applicant found in possession of the commercial quantity of charas did not arise and therefore his application had to be dismissed. This is besides the fact that he was an Israeli National and the possibility of him jumping bail and absconding, intimidating the witnesses and hampering the investigation could not be ruled out. A reply was accompanied by the annexures including the order passed by the learned Judge dated 27/06/2018 amongst others and the report of the DFDA, Panaji.

6. Heard Shri J.P. D'Souza, learned Advocate for the applicant who submitted at the outset that the applicant was placed under arrest and was found allegedly to be in illegal possession of 2.06 kilograms of charas and 10.421 grams of

LSD. The field test kit used at the time of the raid had tested positive for charas and LSD and on that basis itself, the respondent no.1 could file the chargesheet against the applicant. He placed reliance in **Rafael Palafox Garcia V/s. The Union of India & anr. [CDJ 2008 BHC 1489]**. He next adverted to the predicates of Section 36A(4) of the Act and placed further reliance in **Rajwinder Singh @ Baljinder Singh V/s. State of Punjab**, an unreported judgment of the Punjab and Haryana High Court and that in **Sanjay Kumar Kedia V/s. Intelligence Officer, Narcotic Control Bureau & Ors. [2010 Cr.L.J. 2054]** to buttress his contention that the applicant was entitled to the benefit of bail.

7. Shri S.R. Rivankar, learned Public Prosecutor on behalf of the State submitted that the 180 days period for filing the chargesheet expired on 30/05/2018 taking into account the date of the raid as 01/12/2017. However, the respondent no.1 had sought extension of time to file the chargesheet by its application on 25/05/2018 on the ground that the LSD was sent to CFSL, Hyderabad and charas to DFDA, Panaji for testing vide the letter dated 06/01/2018 and 18/01/2018 respectively. The Report from the DFDA was received on

06/07/2018 certifying that the contraband substance was charas. The mandate of Section 36A(4) of the Act therefore applied. There was no basis in the case on behalf of the applicant that the extension of time was illegal when it was sought on 25/05/2018 and granted vide the order dated 29/05/2018 i.e. before the expiry of the 180 days period. Besides, the extension was challenged in Criminal Writ Petition No.117/2018 and by the order dated 27/06/2018, a learned Single Judge of this Court dismissed the petition thereby bringing a finality to the order. It was therefore not open to the applicant to challenge enlargement of time. He was not entitled to the benefit of bail and hence the application had to be dismissed.

8. I have heard Shri J.P. D'Souza, learned Advocate for the applicant and Shri S.R. Rivankar, learned Public Prosecutor on behalf of the State, perused the relevant provision of the Act and the judgments relied upon apart from the factual matrix of the case.

9. There was no singular dispute that a raid was conducted on 01/12/2017 on the stated date, place and time and that

the applicant was placed under arrest upon being found allegedly in possession of 2.06 kilograms of charas and 10.421 grams of LSD. The period for filing the chargesheet expired on 30/05/2018, however, the respondent no.1 sought for the extension of time vide the application dated 25/05/2018 and which came to be granted before the expiry of the said period. Moreover, it is relevant to note that this order granting extension of time was challenged by the applicant in the Criminal Writ Petition No.117/2018 and a learned Single Judge of this Court took note of the fact that he was found in possession of 2.06 kilograms of charas and 10.421 grams of LSD, both of which were commercial quantities attracting the offences punishable under Section 20(b)(ii)(C) and 22(c) of the Act and for which the period for filing the chargesheet under Section 36A(4) of the Act expired on 30/05/2018.

10. The learned Judge had further observed that an application for the extension of time was filed on 25/05/2018 for the reasons stated therein and that there was no basis in the plea raised on behalf of the applicant that he did not understand the English language and did not find fault with

the order of the learned Sessions Judge granting the enlargement of time vide the order dated 29/05/2018. The learned Judge accordingly proceeded to dismiss the petition drawing the curtain over the issue on the enlargement of time being granted in filing the chargesheet. Therefore, as rightly submitted by Shri S.R. Rivankar, learned Public Prosecutor on behalf of the respondents, it is not available to the applicant to canvass that there was no basis to enlarge the time to file the chargesheet and/or that the applicant was entitled to the benefit of bail irrespective of the quantity found with him of the alleged contraband being commercial within the prerequisites of the said offences. The question which therefore would remain at large is whether the applicant would still be entitled to the benefit of bail irrespective of the quantities of contraband found with him being commercial quantities.

11. **Rafael** (supra), was seeking bail in a case under Section 29 read with 9A and 25A of the Act. The case against him briefly was that on the basis of specific reliable information one Khan with the help of two persons including the applicant was manufacturing pseudo-ephedrine which is a controlled

substance. Raid was conducted when the applicant was found with others in possession of 290 kilograms of pseudo-ephedrine. Field test kit was used to conduct the test which was positive for the presence of pseudo-ephedrine and accordingly the applicant came to be arrested on 19/12/2007. His bail application before the Special Court came to be rejected giving rise to the application before the High Court. It was contended on his behalf that the C.A. report was not filed at the time of filing the chargesheet and therefore there was no material before the learned Judge to conclude that the substance seized was pseudo-ephedrine and the Court could not have taken cognizance of the case. It was further contended that the chargesheet being filed without the Report of the C.A., it amounted to filing an incomplete chargesheet which cannot be said to be a chargesheet within the meaning of Section 173(5) of Cr.P.C. and as the chargesheet, as contemplated under Section 173 of Cr.P.C. was not filed within the stipulated period of 60 days, a right accrued to the applicant to seek his release on bail.

12. In **Rafael** (supra), the learned Single Judge considered a number of judgments and observed at paragraph 15 that

even if there was any lacuna in the C.A. report, the report of the field testing kit conducted by the Officers could be relied upon to convict the accused. If the report of the field testing kit could be relied upon to convict the accused then in the present case where similar test was conducted, it cannot be said that an incomplete chargesheet was filed on 13/02/2008. The chargesheet forwarded to the Court on that day contained material which would be sufficient for the Court to take cognizance of the offence as it showed that 290 kilograms of pseudo-ephedrene came to be seized and the involvement of the accused materially was also seen in the chargesheet filed on 13/02/2008. This was an observation made by the learned Judge of this Court in the facts of that case and which do not buttress the contention of Shri D'Souza, learned Advocate for the applicant that the respondent no.1 could very well have filed the chargesheet within the period of 180 days when the alleged contraband was tested with the field testing kit at the scene of offence and had tested positive for charas and LSD.

13. In any event, the period for filing the chargesheet in the facts of this case was 180 days and pending the decision from the CFSL, Hyderabad and DFDA, Goa, the respondent no.1

had sought for the enlargement of time to file the chargesheet and which was granted by the learned Sessions Judge vide the order dated 29/05/2018 i.e. within time and before the expiry of the 180 days period. This aspect had attained finality once the petition at the applicant's instance also came to be dismissed. Therefore it is not at all available to the applicant to canvass that by virtue of the proviso to Section 36A(4) of the Act, the applicant was entitled to the benefit of bail. Last but not the least, the report of the Chemical Analyzer has confirmed that the contraband sent to the laboratory for testing had tested positive for charas and being a commercial quantity, the applicant would not be entitled to the benefit of being enlarged on bail looking to the seriousness and gravity of the offence with which he stands charged.

14. **Rajwinder Singh** (supra), sought for his release on bail who was placed under arrest on 08/05/2015 for the alleged recovery of 120 kilograms of poppy husk. In the brief facts of that case, since the statutory period of 180 days for filing the chargesheet was on the verge of expiry, an application was moved under Section 36A of the Act seeking extension of time

and by an order dated 03/11/2015, 60 days period was granted for filing the report under Section 173 Cr.P.C. A second application seeking extension was filed which was allowed by the Trial Court granting an extension for a further period of 60 days and followed by a third extension of 60 days. Two applications for bail filed by the applicant came to be dismissed on the ground that the extension in time for filing the final report stood granted. This judgment is clearly distinguishable inasmuch as there were extensions of time, time and again and the reasons cited therefor was the report of the Chemical Analyzer having not been furnished. This judgment at the highest has persuasive value and cannot advance the case of the applicant which stands on a different footing.

15. **Sanjay Kumar Kedia** (supra), was arrested on 12/02/2007 for the offences punishable under Sections 24, 29, 30 and 38 of the Act and was produced before the Special Judge who remanded him to judicial custody for fifteen days, the period being extended from time to time and the application moved for bail before the Special Judge too being rejected whereafter he moved the Calcutta High Court and his

application came to be rejected on 07/06/2007. He preferred a Special Leave Petition which too was dismissed on 03/12/2007. In the meantime, the period of 180 days fixed under Section 36A(4) of the Act was to expire on 10/08/2007 and the respondent no.1 filed an application thereunder seeking six months time for completion of the investigation and filing of the complaint which was allowed by the Special Judge vide his order dated 02/08/2007. The extended period was to expire on 02/02/2008 when another application was moved under Section 36A(4) of the Act which was allowed and the time for completion of the investigation was extended to 13/02/2008.

16. In **Sanjay Kumar Kedia** (supra), an application for bail was moved under Section 36A(4) of the Act on the plea that the investigation had not been completed within the stipulated period of time fixed by the Special Judge which came to be rejected on 13/02/2008. He moved an application in the Calcutta High Court on 07/02/2008 against the order dated 30/01/2008 whereby an extension of six months had been granted. He also filed an application before the Calcutta High Court challenging the order dated 13/02/2008 rejecting the

bail application. The learned Single Judge of the Calcutta High Court rejected both the applications for want of jurisdiction as they were required to be heard by a Division Bench. The matters came before the Division Bench and were dismissed by the order dated 05/09/2008 giving rise to the appeal assailing the said order.

17. In the facts of that case the Hon'ble Apex Court found that a perusal of the application did not show even remotely any application of mind on the part of the Public Prosecutor. It did not indicate the progress of the investigation nor the compelling reasons which required an extension of custody beyond 180 days. Moreover, no notice was also issued to the accused unlike the facts of our case. The second application was also found to be more incomprehensible. It was in the factual matrix that the Apex Court found that the extension granted to the Investigating Agency under the proviso to Section 36A(4) did not satisfy the conditions laid down therein and found both the extensions contrary to law. It was in those facts that the Apex Court ordered the enlargement of the appellant on bail. This judgment is clearly distinguishable and hence the respectful departure.

18. At the cost of repetition, an application for enlargement of time was made before the learned Special Judge setting out the grounds that the extension of time was required including the non-receipt of the report from the testing laboratory and the learned Judge was satisfied on the basis of the material placed on record to extend the period beyond 60 days as against 90 days prayed for on behalf of the State with no further enlargement at their instance. Considering thus the factual matrix therefore and that the Report of the Chemical Analyst reveals that the quantity forwarded for examination was charas and which was a commercial quantity, the applicant is not entitled to the benefit of bail. In view thereof, i do not find any merit in the contention on behalf of the applicant that the extension of time was unjustified and or that the applicant would be entitled to the benefit of bail. As a result therefore the application does not survive and is hereby dismissed.

NUTAN D. SARDESSAI, J.

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