

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPLICATION (MAIN) NO. 3 OF 2019

STATE, THR. ITS POLICE

INSPECTOR/INVESTIGATION OFFICER,

ANC POLICE STATION, PANAJI.

... Applicant

Versus

PAUL WILLIAM D'SOUZA AND ANR.

... Respondents

Shri S. R. Rivankar, Public Prosecutor for the applicant.

Shri K. Poulekar, Advocate for the respondents No.1 and 2.

Coram:- NUTAN D. SARDESSAI, J.

Date:- 9th April 2019

ORAL ORDER:

1. Heard Shri S.R. Rivankar, learned Public Prosecutor who submitted that the raid was conducted on 03/01/2018 where the respondents No.1 and 2 were found in possession of 25 grams and 15 grams of MDMA respectively. Both of them had filed applications for bail on 6/1/2018 and interim bail was granted on 19/03/2018 pending the report from the Central Forensic Science Laboratory, Hyderabad. The CFSL report was received only on 11/04/2018 indicating that the substance detected was N-Methyl-3, 4-Methylenedioxyamphetamine. The State had moved for the cancellation of the bail before the learned Additional Sessions Judge on receipt of the report and by an order dated 05/07/2018 the learned Additional Sessions Judge rejected the application on the

premise that the name disclosed in the CFSL report did not tally with the name of the suspected MDMA as indicated in the table to the Act which showed the chemical name of MDMA as per the table to the Act as (+)-N, alphadimethyl-3, 4-(methylenedioxy) phenethylamine and indicating that the 0.5 gms was a small quantity and 10gms was a commercial quantity in respect thereof.

2. The learned Additional Sessions Judge had dismissed the application for cancellation of bail on the premise that the name given in the report of the Chemical Analyzer did not correspond to the name in the Schedule to the Act which precipitated the State to move for a clarification from the CFSL, Hyderabad. They have received the clarification on 09/07/2018 indicating that the chemical name of MDMA is (+)-N, alphadimethyl-3, 4-(methylenedioxy) phenethylamine being the same as the substance earlier detected in the sample forwarded for examination. It was further the contention of Shri S.R. Rivankar, learned Public Prosecutor that in view of the bar under Section 37 of NDPS Act in the matter of commercial quantity, bail could not have been granted to the respondents and therefore he pressed for the grant of the application and the dismissal of the grant of bail. It was his contention further that the quantity of MDMA found with both the respondents was a commercial quantity and therefore this Court in exercise of its inherent power and that under Section 439(2) CrPC

was empowered to cancel the bail earlier granted in favour of the respondents No.1 and 2.

3. Shri K. Poulekar, learned Advocate contended at the outset that the application under Sections 482 and 439(2) CrPC was not maintainable as the challenge was offered to the order dated 05/07/2018 and there was no challenge to the order granting interim bail dated 19/03/2018. It was next his contention that the cancellation of bail was permissible under only two circumstances namely if there was a violation of the conditions of bail and secondly if the bail was wrongly granted in the respondents' favour. None of these conditions were fulfilled and therefore the applicant-State was not entitled for the cancellation of bail granted in the respondents' favour. His next contention was that an alternate remedy was available to the State to challenge the order of the learned Sessions Judge rejecting the application for cancellation of bail and that in the absence thereof the present application was not tenable. His next plank of argument was that the report was furnished by one scientific officer while the clarification was issued by another scientific officer and that there was no authenticity to such report whereby the substance found with the respondents could be confirmed to be the prohibited psychotropic substance MDMA. Besides, it was his contention that only 5gms of the substance was analyzed and not the commercial quantity and

therefore the bar under Section 37 of the Act was not attracted. He also placed reliance in the order of this Court in **State V/s. Menino Fernandes** [Cr. Application (Main) No.158/18] where this Court by its order dated 26/7/2018 had declined to interfere with the bail granted in favour of the respondents and dismissed the application for the cancellation of bail.

4. i have heard Shri S.R. Rivankar, learned Public Prosecutor on behalf of the State and Shri Poulekar, learned Advocate on behalf of the respondents. There was no singular dispute of the fact that the raid was conducted on 03/01/2018 when the two respondents were purportedly found in possession of 25 grams and 15 grams of MDMA being commercial quantity thereof. The bail applications were filed at their instance and they were secured by the order of interim bail on 19/03/2018 pending the report of the CFSL. It is the another matter that the report was received on 11/04/2018 indicating that the substance in question forwarded for examination was N-Methyl-3, 4-Methylenedioxyamphetamine being detected in the sample forwarded for analysis. The learned Additional Sessions Judge who dismissed the application for the cancellation of bail was swayed by the fact that the substance detected as MDMA did not tally with the chemical name of the substance as indicated in the table to the Act as (+)-N, alphadimethyl-3, 4-(methylene-dioxy) phenethylamine. The CFSL from whom the clarification was sought

had certified that the chemical name of MDMA was (+)-N, alphadimethyl-3, 4-(methylene-dioxy) phenethylamine in the exhibit forwarded for examination.

5. The contention of Shri Poulekar, learned Advocate for the respondents that these were two different persons who had carried out the examination on the substance cannot be countenanced where both were the scientific officers attached to the CFSL and who had on examination of the sample certified the same to be MDMA with the stated name. No doubt the 2nd scientific officer had not carried out the test but nonetheless on the basis of the study material available with her, she had confirmed that the sample forwarded for analysis tallied with the chemical name indicated in the table to the Act at Sr. No.134 for MDMA.

6. Shri Rivankar, learned Public Prosecutor had also placed reliance in **State of MP v/s. Kajad** [(2001) 7 SCC 673] where the Hon'ble Apex Court had held that the rejection of bail was the rule and the grant of the bail was the exception in the offences involved under the NDPS Act to substantiate his contention that the respondents were not entitled to the benefit of bail and that granted in their favour prior to the receipt of the report had to be cancelled.

7. Although a point was canvassed by Shri Poulekar, learned Advocate that the present application was not maintainable in the absence of challenge to the grant of bail, nonetheless the State has invoked the inherent jurisdiction of this Court under Section 482 Cr.P.C. and sought for the cancellation of bail granted to the respondents which would take within its sweep also a challenge to the order dated 19/3/2019 granted interregnum and prior to the receipt of the report in question.

8. The next contention of Shri Poulekar, learned Advocate that there was no violation of the conditions of bail also cannot stand the test of scrutiny inasmuch as though apparently there had been no violation of the conditions of bail, it would appear from the records that the learned Additional Sessions Judge was in undue haste to secure the respondents with the order of interim bail pending the receipt of the report from the CFSL, Hyderabad which was received on 11/4/2018 clearly indicating that the substance forwarded for examination was the prohibited substance MDMA in terms of the table to the Act. In that context it was contended that the learned Sessions judge had wrongly granted the bail to the respondents being oblivious to the fact that the quantity of the prohibited substance found with them namely MDMA was commercial quantity as described in the table to the Act and that the bar under Section 37 of the Act was clearly attracted to the

case at hand. The other contention of Shri Poulekar, learned Advocate that only 5 grams was forwarded for examination as not to attract the bar of Section 37 cannot be entertained inasmuch as what the Investigating Officer was required to do was to forward a representative sample of the seized drugs for the examination and not the entire bulk quantity as the case may be and on that premise too his argument does not inspire confidence. i have examined the judgment in **M. Fernandes**(supra) which is clearly distinguishable and does not apply to the case at hand.

9. Last but not the least it is borne out from the report of the scientific officers on examination of the samples forwarded for examination and that issuing the clarification that the substance with both the respondents was MDMA as per item No.134 of the table to the Act and qualifying as commercial quantity. In such circumstances, therefore the respondents would not be entitled to the benefit of bail when the substance purportedly found with them was commercial quantity of the prohibited psychotropic substance MDMA. In these circumstances, there is merit in the application of the State for the cancellation of bail which is accordingly allowed and the bail earlier granted to the respondents stands withdrawn. The respondents shall surrender to the custody of the Additional Sessions Judge, Mapusa within four weeks from today.

10. Shri Poulekar, learned Advocate seeks the stay of the order to pursue his remedies before the higher appellate forum. Stay is granted of four weeks in the interest of justice.

11. The Criminal application stands disposed off accordingly.

NUTAN D. SARDESSAI, J.

mv