

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

CRIMINAL BAIL APPLICATION NO.4400 OF 2021

Bhavik Vijay Thakkar

.... Applicant

versus

State of Maharashtra

.... Respondent

.....

- Mr.Nitin Sejpai, Advocate for Applicant.
- Smt.A. A. Takalkar, APP for the State/Respondent.

CORAM : SARANG V. KOTWAL, J.
DATE : 27th JANUARY 2022
(through video conferencing)

P.C. :

1. Leave to amend. Amendment to be carried out forthwith.

2. This application was preferred by the Applicant with only one main prayer that the Applicant be released on bail invoking section 167(2) of Cr.PC. r/w 36A(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NPDS Act'), in connection with C.R.No.256/2021 registered with

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Bazarpeth Police Station, District Thane, under section 8(c), 22(c) and 29 of the NDPS Act. I have granted leave to amend as mentioned at the beginning of the order; pursuant to that amendment, further prayer was made for quashing and setting aside the order dated 10/12/2021 passed by the Special Court granting extension of 90 days for filing of the charge-sheet.

3. The basic facts necessary to decide this application are besides the merits of the matter because they depend on the dates of first remand, the last date for filing charge-sheet and the date on which extension of period to file charge-sheet was granted. However, just to complete the picture; the basic facts are mentioned as follows:

4. The FIR was lodged on 16/06/2021 by police constable Dilip Sonawane. He has stated that he was working with the Anti-Narcotic Squad, Crime Branch Thane City. On 15/06/2021 at about 09.00 a.m. he had joined his duty. The police officers received a secret information that the present Applicant was to

come on the road between Adharwadi Chowk to Birla College Ring Road, Kalyan, at about 06.00 p.m. on 15/06/2021 and that he was having 50-60 LSD papers for sale. The FIR mentions that the mandatory provisions were followed, the panchas were arranged and preparation was made to conduct the raid. As per the secret information the raiding party went to the spot at about 04.45 p.m. The FIR mentions that the Applicant came at the spot on his two wheeler bearing No.MH-05-EN-8297. The raiding party tried to nab him. He got alerted and tried to run away. The police party tried to stop him. There was some scuffle, but the Applicant managed to escape. However, in the scuffle his mobile phone and wallet fell at the spot. It was inspected. The wallet was found to contain 29 square papers. The prosecution case is that those papers were of LSD (Lysergic Acid). Some samples were cut from the papers and the papers were sealed. The further investigation shows that in the same connection, two more accused were arrested namely Manibhargav Nemmirai and Niwant Vilhekar. From them also many papers of LSD were seized. The prosecution case is that in all total 1496 LSD papers

weighing 25.540 gms were seized, which is the subject matter of this investigation. The chart to the NDPS Act shows that LSD which is known as Lysergic Acid is a psychotropic substance and the commercial quantity mentioned in the chart is 0.1 gms. The contraband seized in this particular case was 25.540 gms, which was way higher than commercial quantity. Thus, on merits the matter is quite serious.

5. However, the subject matter of the present Bail Application is not the merits of the matter, but the existence or otherwise of the Applicant's right to be released on bail for not filing of the charge-sheet within the stipulated period and also for not obtaining extension in accordance with law.

6. For this purpose certain dates are important. As submitted by learned APP, the Applicant was arrested on 18/06/2021. The first remand was obtained on 19/06/2021. The last date for filing of the charge-sheet, i.e. after 180 was to come to an end on 15/12/2021. The application for extension of

the period to file charge-sheet was made on 10/12/2021 and it was allowed on the same day. The extension for further 90 days was granted to file charge-sheet. Thereafter the Applicant did not make any application for bail before the Special Court; instead this application is preferred before this Court on 22/12/2021.

7. Heard Mr.Nitin Sejpal, learned counsel for the Applicant and Smt. A.A. Takalkar, learned APP for the State.
8. Learned counsel for the Applicant submitted that before granting the extension, no notice was issued to the Applicant. The Applicant's advocate was not served. The application was not made by the public prosecutor by way of his own report, but the application was made under the signature of the Investigating Officer. The application did not show any application of mind from the public prosecutor and therefore this is all against the law laid down by the Hon'ble Supreme Court in the various judgments and therefore the extension is

bad in law. Therefore according to Mr.Sejpal the infeasible right of being released on bail accrued in favour of the Applicant on 13/12/2021. (According to Shri Sejpal, last date for filing the charge-sheet was on 12/12/2021). In support of his contention Mr.Sejpal relied on the judgment of Hon'ble Supreme Court in the case of Sanjay Kumar Kedia @ Sanjay Kedia Vs. Intelligence Officer, Narcotics Control Bureau & Anr. as reported in 2010 ALL MR (Cri) 1310 (SC).

9. He also relied on the judgment of Hon'ble Supreme Court in the case of Sanjay Dutt Vs. State of Maharashtra, through CBI, Bombay (II) as reported in 1994 Supreme Court Cases (Cri) 1433 and finally he relied on the judgment of Hon'ble Supreme Court in the case of Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others, as reported in AIR 1994 Supreme Court 2623.

10. Learned APP opposed this application by filing the say of investigating agency. She submitted that till the period of 180 days was over, the C.A. report was not available and therefore

extension of period to file the charge-sheet was sought. The C.A. report was subsequently made available only on 15/01/2022. The C.A. report does support the prosecution case that the sample show presence of Lysergic acid diethylamide (LSD). She submitted that the offence is very serious. She disputed the fact that the public prosecutor had not filed his own report seeking extension. She submitted that the report in fact was filed by the public prosecutor. However, she admitted on instructions that the accused was not served the application for extension and even the Applicant's advocate was not served. Therefore when the extension was granted, at that time, the Applicant was not served is an admitted position. She also stated on instructions that, till today the charge-sheet is not filed.

11. However, she strongly urged that unless the Applicant had made an application for his release on bail before the Special Court no order granting bail in his favour can be passed. She also relied on the case of Hitendra Thakur (Supra) to support her contention.

12. I have considered these submissions. The facts necessary for the decision of this application are in narrow compass. Before coming to the legal aspects, it is necessary to refer to the averments in the Petition and the reply of the prosecution. The Applicant has specifically pleaded in paragraph No.6 of the memo of the application that the application for extension of time was filed by the Investigating Officer on 10/12/2021. Learned Public Prosecutor had only submitted the application to the Court by making an endorsement in the application filed by the Investigating Officer. There is no report of the special reasons given by the public prosecutor and/or separate application or report that was submitted by the Public Prosecutor in the present case.

13. Learned Special Judge was pleased to pass an order granting further period of 90 days without giving notice to the accused. This is gross violation of the fundamental rights in view of the judgment of Hitendra Thakur's case.

14. To these specific averments there is reference in paragraph No.10 in the affidavit-in-reply. It is mentioned that record shows that on 10/12/2021 the Investigating Officer had filed an application through the learned APP for extension of time. The said application was filed before the expiry of prescribed period of 180 days. On the said application, say of the Applicant was called by the learned Court. At that time, no say has been filed and nobody appeared on behalf of the accused on that day. Thus, there is no direct answer to the averments, that the application was not filed by the Public Prosecutor as his own report.

15. In this factual background, it is necessary to consider the provisions of law canvased by both the parties. For the sake of convenience it is necessary to refer to certain provisions which are discussed by the Hon'ble Supreme Court in the above judgments.

16. Clause (bb) of sub-section 4 of section 20 of Terrorist

And Disruptive Activities (Prevention) Act, 1987 (for short ‘TADA’), reads thus :

“Section 20 - Modified application of certain provision of the Code :

(4) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act or any rule made thereunder subject to the modifications that-

(a) xxxxx

(b) xxxxx

(bb) in sub-section (2), after the proviso, the following proviso shall be inserted, namely:

‘Provided further that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Designated Court shall 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. Proviso to sub section 4 of section 36A of NDPS Act is worded in the similar manner, which reads thus

Section 36A - Offences triable by Special Courts

(1) xxxxx

(2) xxxxx

(3) xxxxx

(4) 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 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.

XXXXX”

18. Apart from that section 24(8) of TADA is relatable to section 37 of the NDPS Act. Having noted these sections, now it is advantageous to refer to the judgments cited by the parties. Sanjay Kedia’s case (supra) refers to Hitendra Thakur’s case (supra) and discusses about the necessity for filing of the report of the Public Prosecutor and other requirements mentioned in the Hitendra Thakur’s case. Thus Sanjay Kedia’s case basically reiterates what Hitendra Thakur’s case states. Similar is the case with Sanjay Dutt’s case, wherein again Hitendra Thakur’s case was relied on, as is clear from paragraph No.53(2)(a) and paragraph No.53(2)(b) of that judgment. Therefore it is

important that the observations by Hon'ble Supreme Court in Hitendra Thakur's case are considered and applied to the facts of the present case.

19. In this context, the discussion from paragraph No.19 upto paragraph 28 of Hitendra Thakur's case (supra) are important. Certain important observations can be highlighted as follows:

In paragraph No.20 necessity to complete investigation at the earliest is discussed. In case of failure of the investigating agency to comply with the provision of section 167(2) of Code it is observed that indefeasible right of being released accrued in favour of the Applicant. This was all in context of the provisions of section 20(4) of TADA. Various other judgments were referred and it was observed that an obligation, in such a case, is cast upon the Court, when after the expiry of the maximum period during which an accused could be kept in custody, to decline the police request for further remand except in cases governed by

Section 20(4)(bb). There is yet another obligation also which is cast on the Court and that is to inform the accused of his right of being released on bail and enable him to make an application in that behalf. It was also mentioned that at that stage merits of the case were not to be examined. In the same paragraph it was further observed that once the period for filing the charge-sheet had expired and either no extension under Cl. (bb) had been granted by the Designated Court or the period of extension had also expired, the accused person would be entitled to move an application for being admitted to bail under Sub-section (4) of Section 20 TADA read with Section 167 of the Code and the Designated Court shall release him on bail, if the accused sought to be so released and furnished the requisite bail. Hon'ble Supreme Court has importantly further observed thus "We are not impressed with the argument of the learned Counsel for the appellant that on the expiry of the period during which investigation is required to be completed under Section 20(4) TADA read with Section 167 of the Code, the Court must release the accused on bail on its own motion even without any

application from an accused person, on his offering to furnish bail. In our opinion an accused is required to make an application if he wishes to be released on bail on account of the 'default' of the investigating/prosecuting agency and once such an application is made, the Court should issue a notice to the public prosecutor, who may either show that the prosecution has obtained the order for extension for completion of investigation from the court under Cl. (bb) or that the challan has been filed in the Designated Court before the expiry of the prescribed period or even that the prescribed period has actually not expired and, thus resist the grant of bail on the alleged ground of 'default'. The issuance of notice would avoid the possibility of an accused obtaining an order of bail under the 'default' clause by either deliberately or inadvertently concealing certain facts and would avoid multiplicity of proceedings. It would, therefore, serve the ends of justice if both sides are heard on a petition for grant of bail on account of the prosecution's 'default'. Similarly, when a report is submitted by the public prosecutor to the Designated Court for grant of extension under Cl. (bb), its notice

should be issued to the accused before granting such an extension so that an accused may have an opportunity to oppose the extension on all legitimate and legal grounds available to him.

20. Hon'ble Supreme Court further observed that this was a requirement of 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.

21. In paragraph No.22 the Hon'ble Supreme Court had observed that the application for seeking extension has to be a report of the public and not of the investigating agency. In conclusion the Hon'ble Supreme Court in paragraph No.28 has observed thus;

“28. *In conclusion, we may (even at the cost of repetition) say that, an accused person seeking bail under Section 20(4) has to make an application to the court for grant of bail on grounds of the 'default' of the prosecution and the court shall release the accused on bail after notice to the public prosecutor uninfluenced by the gravity of the offence or the merits of the prosecution case since Section 20(8) does not control the grant of bail under Section 20(4) of TADA and both the provisions operate in separate and independent fields. It is, however, permissible for the public prosecutor to resist the grant of bail by seeking an extension under clause (bb) by filing a report for the purpose before the court. However, no extension shall be granted by the court without notice to an accused to have his say regarding the prayer for grant of extension under clause (bb). In this view of the matter, it is immaterial whether the application for bail on ground of 'default' under Section 20(4) is filed first or the report as envisaged by Clause (bb) is filed by the public prosecutor first so long as both are considered while granting or refusing bail. If the period*

prescribed by clause (b) of Section 20(4) has expired and the court does not grant an extension on the report of the public prosecutor made under Clause (bb), the court shall release the accused on bail as it would be an indefeasible right of the accused to be so released. Even where the court grants an extension under Clause (bb) but the charge-sheet is not filed within the extended period, the court shall have no option but to release the accused on bail, if he seeks it and is prepared to furnish the bail as directed by the Court. Moreover, no extension under Clause (bb) can be granted by the Designated Court except on a report of the public prosecutor nor can extension be granted for reasons other than those specifically contained in Clause (bb), which must be strictly construed.”

22. Thus, all these observations indicate following consequences:

If the accused is not served with the application for extension, the extension cannot be sustained. Secondly, the application has to be made by the Public Prosecutor after

applying is own mind. The second fact is disputed as to whether the Public Prosecutor himself had filed an application for extension by showing his application of mind. However, there is no dispute that the Applicant or his counsel was not served with an application for extension of period to file the charge-sheet. In this view of the matter, the extension granted on 10/12/2021 for filing of the charge-sheet for further period of 90 days is clearly unsustainable and that order is required to be set aside.

23. However, the consequence of setting aside of that order means that after 15/12/2021 (or 12/12/2021 as submitted by Shri Sejpal) when the charge-sheet was to be filed and it was not filed and extension is held to be bad in law, then the Applicant gets right to make an application for default bail. Such application was not made in the present case. Looking at the facts of this case, liberty can be granted to the Applicant to make an application for his release on default bail. If such application is made, then all the procedural requirements provided in the paragraph No.28 of the Hitendra Thakur's case will have to be

complied with. Thus, if such application for bail is made, then the Court will have to issue notice to the Public Prosecutor and the Public Prosecutor can resist grant of bail by seeking extension of period to file the charge-sheet by filing a report for that purpose before the Court. These are the observations made in paragraph No.28 of the Hitendra Thakur's case (supra).

24. In view of this discussion following order is passed:

ORDER

- (i) The order dated 10/12/2021 passed by the Special Court for NDPS , Kalyan extending time to file charge-sheet is set aside.
- (ii) The Applicant is at liberty to make an application for default bail under provisions of section 167 of Cr.PC. r/w 36-A(4) of NDPS Act.
- (iii) If such an application is made notice shall be issued to the Public Prosecutor and in accordance with observations in the Hitendra Thakur's case (supra) the Public Prosecutor can resist such application through Public

Prosecutor's report for extension of period for filing of the charge-sheet.

- (iv) The Special Court shall decide the question of grant or refusal of default bail and of granting extension of period to file charge-sheet in accordance with the judgment of the Hon'ble Supreme Court in the case of Hitendra Thakur (supra).
- (v) With these observations the application is disposed of.

(SARANG V. KOTWAL, J.)