

VRJ

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

CRIMINAL APPLICATION NO.476 OF 2021

Rodrigo Dos Santosh Alves

Aged : 33 years. Occ : Nil

Add : Street Gaspar Becerra No.7,

Jardim Iguatemi, Vila Marilu,

Sao Paulo, Brazil 08371310

(Presently in Judicial custody

at Arthur Road Prison)

... Applicant

V/s.

1. The State of Maharashtra & Anr.

2. Air Intelligence Unit

Vide. F.No.SD/INT/AIU/239/2019

... Respondents

Mr. Dilip Mishra for the applicant.

Mr. A.R. Patil, APP for the respondent No.1/State.

Mr. Anil C. Singh, Additional Solicitor General with Mr. Shriram Shirsat, Mr. Aditya Thakkar, Ms. Anuradha Mane, SPP for Customs, Mr. Shekhar Mane, Mr. Pranav Thacker, Mr. Vandit Joshi, Mr. Nishi Singhani, Ms. Anna Oomer, Ms. Beena Sawant-Superintendent of Customs for the respondent No.2.

CORAM : AMIT BORKAR, J.

RESERVED ON : APRIL 27, 2023

PRONOUNCED ON : JUNE 5, 2023

JUDGMENT.:

1. By the present application under section 482 of the Code of Criminal Procedure, 1973, the applicant (accused) is challenging the order dated 16th January 2020, passed by the Narcotic Drugs and Psychotropic Substances Special Judge, City Civil and Sessions Court, Greater Mumbai extending time to file a complaint for further 90 days and also a rejection of bail application seeking benefit of section 167(2) of the Code of Criminal Procedure, 1973 (hereafter "the Cr.P.C.", for short).
2. The prosecution case relevant to the adjudication of the issues involved is as under.
3. On 22nd July 2019, specific intelligence that the applicant holding a Brazilian passport was carrying contraband covered under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter "the NDPS Act", for short) on his person was intercepted after clearing a green channel at Chhatrapati Shivaji Maharaj International Airport, Mumbai. Cocaine having a gross weight of polythene pouches containing white powder (H1-2037 and H2-2042) was recovered from the applicant's person. The total weight of the Cocaine was 4015 Grams which was seized by Seizure Memo No.219 of 2019 after following the due procedure of law.
4. On 23rd July 2019, the applicant was remanded to magisterial custody. The investigating agency carried out the investigation as disclosed in the application below Exhibit-7 filed

by the intelligence officer. According to the prosecution, one green sealed envelope containing white powder purported to be Cocaine was sent to Central Forensic Science Laboratory, Hyderabad. The said laboratory acknowledged its receipt on 8th August 2019. On 31st December 2019, an officer was designated to collect the test report, but it was intimated that the GC-MS Instrument was out of order for four months. It was rectified on 27th November 2019. Hence, the investigating officer filed an application on 14th January 2020 for permission to file a charge sheet for a period of six months.

5. The Special Public Prosecutor submitted a report under section 36(A)(4) of the NDPS Act stating that the investigation is in progress on crucial points, which will take time. The chemical analysis report is also abated as the instrument was out of order for four months. The total recovery was 4015 grams, much more than the commercial quantity. Therefore, the Public Prosecutor requested an additional six months to complete the investigation and file the complaint.

6. By the impugned order dated 16th January 2020, the learned Trial Court extended the period for completion of the investigation by 90 days. Additionally, the learned Trial Court extended the judicial custody of the applicant.

7. On 11th February 2020, the applicant filed an application for bail under section 167(2) of the Cr.PC. However, the Trial Court rejected the bail application on 20th February 2021, holding that time to file a complaint has already been extended by the learned

Sessions Judge and, therefore, the accused is not entitled to the benefit of section 167(2) of the Cr.P.C.

8. Learned advocate for the applicant submitted that the impugned orders are not sustainable on the following grounds:

- i. The appointment of the Public Prosecutor had expired before the filing of the report under section 36(A)(4).
- ii. Non-availability of a chemical analysis report or call data report is no grounds to seek an extension of filing of the complaint.
- iii. The Public Prosecutor had not applied her mind while giving a report under section 36(A)(4).

9. He submitted that the Central Government has, thereafter, issued a notification with retrospective effect appointing a Public Prosecutor in the present matter, which would not confer the benefit of conferring the status of Public Prosecutor or other.

10. Per contra, Mr Singh learned ASG submitted that the data recovered from the applicant's cell phone was in Portuguese; therefore, completion of the investigation required further extension. He submitted that the applicant did not raise an objection about the expiry of tenure of the Public Prosecutor immediately on her expiry. Therefore, the applicant is precluded from raising such an objection. According to him, section 36(A)(4) confers the status of the Public Prosecutor on the advocate appointed by the prosecution. In support of his submission, he relied on the Division Bench judgment of this Court in **Union of**

India, through the Air Intelligence Unit through M.K. Shrivastava vs Okorake Emmanuel Chukwunonyere and Another reported in (2011) 5 AIR Bom R 198, to urge that the person appointed on behalf of the prosecution before the learned Special Court is deemed to be a Public Prosecutor.

11. Rival contentions fall for consideration.

12. Based on documents of record, the following factual situation emerges.

- i. On 23rd July 2019, the applicant was remanded to judicial custody.
- ii. On 19th January 2019, the period of 180 days expired.
- iii. On 14th January 2019, the investigating officer sought an extension from the learned Special Court.
- iv. On 14th January 2019, the learned Special Public Prosecutor submitted her report seeking an extension of time to file a complaint.
- v. On 16th January 2020, the learned Special Judge extended the period for completion of the investigation to 90 days.
- vi. On 11th February 2020, the applicant moved an application for bail.
- vii. On 13th February 2020, the prosecution filed the complaint before the learned Trial Court.
- viii. On 20th February 2021, the learned Trial Court rejected

the applicant's bail application.

13. The question that arises for consideration is whether the appointment of an Advocate by the prosecution under the signature of the principal commissioner before filing of a report under section 36(A)(4) would confer such Advocate status of Public Prosecutor under deeming fiction of section 36(C) of the NDPS Act. And whether the report of the Public Prosecutor submitted on 14th January 2020 satisfied the requirements of the proviso of Section 36(A)(4).

14. For the adjudication of the first question of law on the point of conferment status of the Public Prosecutor on an advocate appointed by the Principal Commissioner of Customs, it is necessary to note the relevant provisions of the NDPS Act. Section 36(C) of the NDPS Act reads as under:

“36-C. Application of Code to proceedings before a Special Court.— Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.”

15. In the facts of the case, it is not in dispute that before the submission of the report, the advocate appearing for the prosecution was authorized by the Principal Commissioner of Customs, CSMI Air Port, Mumbai, by a note of appearance dated 1st October 2019. On perusal of the note of appearance, it appears that the Special Public Prosecutor accepted the Vakalatnama and

appeared in the matter. Though her appointment under the notification issued by the central government notifying her as public prosecutor came to an end on 5th October 2018, it appears that she was appointed to represent the complainant much prior to the submission of the report under section 36(A)(4). The effect of deeming fiction under section 36(C) of the NDPS Act came up for consideration before the Division Bench of this Court in the case of **Okorake Emmanuel** (supra). After considering the judgment of the Constitution Bench of the Apex court in the case of **A.R. Antulay vs Ramdas Srinivas Nayak And Another** reported in 1984 (2) SCC 500 and subsequent decision in the case of **R.S. Nayak vs A.R. Antulay** reported in (1984) 3 SCC 86, the Division Bench of this Court in paragraph Nos. 32 to 33, held as under:

“**32.** In paragraph 8 of the same decision, with reference to the purport of Section 8 of the Act of 1952, the Court has further opined that it is for the complainant to decide who should be his advocate in charge of the prosecution; and there is no question of entrusting the trial of the two cases to a State-appointed public prosecutor.

33. Applying the principle underlying the dictum of the Apex Court in the above-said decision, we have no hesitation in taking the view that Section 36-C of the NDPS Act is a provision which, by legal fiction, declares that the person conducting a prosecution before a Special Court to be deemed to be a public prosecutor. In the present cases, the Central Government has not only asserted that the said Advocate was authorized to conduct the two cases on hand; and had thus entered his appearance in those cases as Special Public Prosecutor, pursuant to the Notification dated 27th April 2005, when the same was in force, but has also asserted that the said Advocate should be allowed to appear and conduct those two cases in which he has already entered appearance until the same is decided, and no fresh notification was necessary. It would necessarily follow that

the appointment, as well as the continuation of the said Advocate, to be in charge of the prosecution and conduct of the two cases on hand is on instructions and under the proper authority of the Central Government. By virtue of legal fiction contained in Section 36-C of the NDPS Act, he is deemed to be a Public Prosecutor within the meaning of Section 24, read with Section 2 (u) of the Code.”

16. The Apex court, in the case of **A.R. Antulay** (supra), was considering the purport of sub-section (3) of section 8 of the Criminal Law (Amendment) Act 1952, section 8(3) is similar to section 36(C) of the NDPS act which reads thus:

“8. Procedure and powers of Special Judges.—

(1).....

(2).....

(3) Save as provided in sub-section (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1898 (5 of 1898), shall, so far as they are not inconsistent with this Act, apply to the proceedings before a Special Judge; and for the purposes of the said provisions, the Court of the Special Judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors and the person conducting a prosecution before a Special Judge shall be deemed to be a public prosecutor.”

17. The Apex Court, in paragraph 30 of its judgment, repelled contentions specifically raised on behalf of the accused that the Public Prosecutor needs to be appointed by the Central or State Government as he is under a solemn duty under section 24 of the Cr.P.C. and to perform a solemn duty, such appointment must be made after consultation with the High Court. The Apex Court also repelled the contention that only such Public Prosecutor alone shall be entitled to conduct a trial before the Session Court. The

Apex Court held in paragraph 30 that the deeming fiction enacted under section 8(3) is confined to the limits of its requirement in that the person conducting a prosecution before a Special Judge is deemed to be a Public Prosecutor.

18. The exposition rendered in the case of **A.R. Antulay** (supra) has been thereafter reiterated by the Constitution Bench of the Apex Court in the case of **R.S. Nayak** (supra) whether the Apex Court in paragraph 4 observed as under:

“**4.** The clarification in respect of the first point read with the judgment rendered in Criminal Appeal No.247 of 1983 in which Section 8(3) of the Criminal Law (Amendment) Act, 1952 had come in for interpretation, it follows as a corollary that if the cognizance of an offence is taken under Section 8(1) of the Criminal Law (Amendment) Act, 1952 and the trial has to be held according to the procedure prescribed therein, under Section 8(3) the learned advocate engaged by the complainant to conduct the prosecution will be deemed to be a public prosecutor. In such a situation, there is no question of the State-appointed public prosecutor to conduct the prosecution. It is, therefore, clarified which to some extent may appear tautologous in view of the aforementioned judgment, that it would be for the complainant to decide who would be the learned advocate in charge of the prosecution and the advocate so appointed would be deemed to be a public prosecutor.”

19. On reading section 36(C) of the NDPS Act, I am satisfied that the language of said section creating deeming fiction of Public Prosecutor is similar to that of section 8(3) of the Criminal Law (Amendment) Act 1952. Therefore, in view of the preposition of law laid down in the case of **A.R. Antulay** (supra), **R.S. Nayak** (supra) and **Okorake Emmanuel** (supra), I have no visitation to hold that an advocate appointed by the prosecution conducting a

prosecution before the Special Court shall be deemed to be a Public Prosecutor irrespective of the fact as to whether such advocate has not been appointed by following procedure under section 24 of the Cr.P.C.

20. The second contention is whether the report submitted by the Public Prosecutor complies with the proviso to section 36(A) (4) of the NDPS Act. Section 36(A)(4) of the NDPS Act reads as under:

“36-A. Offences triable by Special Courts.—

(1).....

(2).....

(3).....

(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 a 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.”

21. It is not in dispute that the offences alleged against the applicant involved commercial quantity and, therefore, the period

of 90 days referred to in subsection (2) of section 167 of the Cr.P.C. needs to be construed as 180 days.

22. The period of 180 days was to expire on 20th January 2019. However, on 14th January 2019, the investigating officer filed an application before the learned Trial Court mentioning four reasons for the extension of time to file the complaint. The reasons are mentioned in paragraph 18 of the application. Paragraph 18 reads as under:

“18. Apart from this, an investigation into this matter is also pending because of the following reasons:

(i) Scrutiny of the data retrieved (data could be retrieved only in the third week of November 2019) from the seized mobile phones of the accused, Mr. Rodrigo Dos Santos Alves, is still in progress because all the retrieved data are in Portuguese Language. Translation and scrutiny of the entire data are yet to be completed.

(ii) On initial scrutiny of the data, some Indian numbers have been found. SDR and CDR details in respect of these numbers have been called upon. However, addresses provided by the service provider in respect of these numbers are incomplete. Efforts are being made to find out the correct address with the help of other details available in SDR forms (such as Aadhar card number or another reference number) and further summon them and record their statement in this case.

(iii) Further statement of the accused will be required to be recorded in case any new finding relevant to this case surfaces after the completion of scrutiny of data retrieved from the seized mobile phones of the accused and after gathering some evidence by means of recording of statement of other related persons, if any, is traced out.

(iv) Many of the Indian numbers found during the initial scrutiny of the retrieved data from the seized mobile phone of the accused appear to have changed their service provider. Tracing the actual service provider in respect of these Indian numbers and calling for CDR and SDR details from them may take quite a time.”

23. The Public Prosecutor, on the same day, submitted a report under section 36(4) stating that the report and submission of the investigating officer show that the investigation is in progress on crucial points, which will take time. She also mentioned about chemical analysis report, which was awaited due to the non-availability of the instrument for a period of four months. She, therefore, prayed for an extension of six months.

24. The Apex Court had an occasion in the case of **The State of Maharashtra vs. Surendra Pundlik Gadling And Ors.** reported in (2019) 5 SCC 178, to consider provisions of default bail under section 43(D) of The Unlawful Activities (Prevention) Act, 1967. The Apex Court considered the requirements necessary to claim an extension of the period for filing the charge sheet on a report of the Public Prosecutor. The Apex Court was considering a situation where the report of the Public Prosecutor was a repetition of averments of applications filed by the investigation officer seeking an extension of time. In the report, the Public Prosecutor endorsed that he had perused the grounds in the application submitted by the investigating officer and was thus satisfied that the case for the extension of time to complete the investigation was missing. However, the Apex Court accepted the contention on behalf of the appellant that the Public prosecutor's report shows the necessary

application of mind. Distinguishing judgment in the case of **Hitendra Vishnu Thakur vs. The State of Maharashtra** reported in (1994) 4 SCC 602, the Apex Court accepted the contention of the prosecution that in the facts of **Hitendra Thakur's** case, the application filed by the investigating officer for extension of time was supported by his affidavit. The endorsement of the Public Prosecutor identified the signature on the said affidavit; therefore, the Apex Court in **Hitendra Thakur's** case held that mere identification by Public Prosecutor could not be treated as an application of mind of the Public Prosecutor. However, in the facts of **Gadling's** case, endorsement by the Public Prosecutor reiterating the averments in terms of grounds for extension pleaded by the investigating officer was held to be a proper application of mind by the Public Prosecutor.

25. In the facts of the present case, the report of the Public Prosecutor indicates satisfaction of the Public Prosecutor where she has stated that the report and submissions of the investigating officer show that the investigation is in progress on crucial points and it will take time. In my opinion, therefore, the report of the Public Prosecutor satisfies both requirements of (i) the progress of the investigation; (ii) specific reasons for the detention of the accused. As noted earlier, the investigating officer has specifically stated in his reasons that all the retrieved data was in Portuguese language and translation and scrutiny of the entire data was not complete. Further statements of the accused will be necessary to be recorded in case new finding relevant to the case surface after the completion of scrutiny of data retrieved from the accused's

mobile phone is traced out. The report of the Public Prosecutor endorses the reasons mentioned by the investigating officer. The report of the Public Prosecutor shows that she agreed with the reasons given by the investigating officer seeking an extension of time. The report shows the application of mind by the Public Prosecutor. I am also satisfied that the grounds endorsed by the Public Prosecutor would fall in the category of "compelling reasons" as enunciated in the case of **Sanjay Kumar Kedia @ Sanjay Kedia vs Intelligence Officer, Narcotic Control Bureau And Anr.**, reported in 2009 (17) SCC 631.

26. Therefore, in my opinion, the Trial Court has rightly rejected the application for the grant of benefit of default bail to the accused and rightly extended the time to file a complaint based on the report of the Public Prosecutor.

27. There is no merit in the application. The criminal application is, therefore, dismissed. No costs.

(AMIT BORKAR, J.)