IN THE HIGH COURT OF BOMBAY AT GOA

LD-VC-BA-48/2020

Mr. Murat Tas …... Applicant.

Vs

State of Goa through P.I. & anr. …..... Respondents.

Shri R. Desai, Advocate for the applicant.
Shri P. Faldessai, Additional Public Prosecutor for the respondents.

Coram:- DAMA SESHADRI NAIDU, J.
Date: 8 October 2020.

PC.

The petitioner is the sole accused in Crime No. 3/2020 registered by the Anti Narcotic Cell (ANC), Goa. The allegations, in brief, are that on credible information, the ANC conducted a raid on the lodgings where the applicant was living. It was on 7.2.2020. They found in the applicant's possession 7.10 grams of MDMA which has a commercial value of Rs.71,00,000/-. Therefore, they registered the alleged crime under section 22 (c) of the NDPS Act and arrested the applicant. Ever since his arrest, the applicant is in judicial remand.

2. Initially, the applicant applied for bail before the Additional Sessions Judge, Panaji, but could not succeed. The trial Court dismissed the bail application, through its order, dated 25.8.2020. Later the police filed the charge-sheet as well.

3. Under these circumstances, the applicant, a Turkish national, has come up with this bail application.

Submissions:

The Applicant:

4. Indeed, Shri Desai, the learned counsel for the applicant, has strenuously contended that the prosecution case has been riddled with many unbridgeable gaps. According to him, the authorities concerned did not spell out what test they conducted to determine the substance as contraband, leave alone as MDMA. He also points out that they used stock Pancha, and that violates the safeguards under section 100 Cr.P.C. Besides, Shri Desai has also contended that even the safeguards under section 42 of the NDPS Act stand violated.

5. To elaborate, Shri Desai has submitted that when they could secure a Pancha from a place far removed from the alleged scene of the offence, they could have as well had enough time even to comply with section 42. Finally, Shri Desai has submitted that even the landlord's statement to the police does not conclusively show that the applicant has been actually living in the lodgings where the raid allegedly took place.

6. So Shri Desai argues that even prima facie the prosecution could not establish that the applicant is guilty of any offence under the NDPS Act. To support his contentions, he has relied on T*arlok v. State of Harayana*[1]*; Serguis Victor Manka v. State*[2]*; Ivon Minguel v. State*[3]*;* and *Lawarance D'Souza v. State of Maharashtra*[4].

The Respondents:

7. On the other hand, Shri P. Faldessai, the learned Additional Public Prosecutor has, with equal intensity, argued that the contraband is considerable and the applicant is a foreign national. According to him, the ANC has followed the procedure duly and even tested the substance. It has found it to be MDMA. As to the stock Pancha, Shri Phaldessai submits

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12019 (3) RCR (Criminal) 348

2(High Court of Bombay) 21 March 2018

3(High Court of Bombay) 30 October 2018

4*1992 Cri. LJ 399*

that merely because the same Pancha is found in another crime, it cannot be a discounting, much less a disbelievable, factor.

8. Heard Shri Rohan Desai, the learned counsel for the applicant, and Shri Pravin Faldessai, the learned Additional Public Prosecutor for the respondents.

Discussion:

9. Despite passionate arguments by Shri Desai, I find no substantial grounds to entertain this bail application. First, I will begin with the nature of the substance. Indeed, in a couple of decisions Shri Desai has relied on, no spot test was conducted. Besides, before the period prescribed under section 167(2)—the default bail period—the prosecution could not place on record the CFSL report to establish the nature of the substance. Here, on the contrary, ANC did spot test the substance. And it is said to be MDMA. About the correctness of the test, we cannot rule at this stage. On the converse, once the record bears out the fact that a test has been conducted, we ought to presume under section 114(g) of Indian Evidence Act that it has been conducted in accordance with the law.

10. As rightly contended by Shri Faldessai, merely because the same person has been a Pancha in two crimes, it cannot be conclusive, not even prima facie, that we must disbelieve the prosecution's version. As to the noncompliance with section 42 of the Act, I find sufficient explanation on record. And, again, it is premature to rule on the correctness of that explanation.

11. Eventually, Shri Desai has drawn my attention to the charge-sheet. He pointed out that the landlord's statement could not be conclusive that the applicant has been residing in the lodgings. Indeed, the landlord unmistakably has gone on record that the applicant had been living in his lodgings. At this stage, our insisting on the lease deed or other relevant material as proof of the applicant's residence assumes no importance—in the face of the raid and the consequential arrest.

12. In *Tarlok*, the police submitted an incomplete challan to the trial Court. As the police did not submit the FSL report with challan, the petitioner applied under section 167(2) of Cr.P.C., for default bail. By then, the petitioner had been in custody for over 90 days. So treating an incomplete charge-sheet as falling foul of the statutory mandate under section 167(2), the High Court of Punjab and Haryana granted bail to the petitioner. In that process, *Tarlok* relied on a couple of Apex Court's decisions. First, in *Achpal @ Ramswaroop v. State of Rajasthan*[5], the police filed no charge-sheet. Whatever report the police had filed before the trial Court was returned with objections. That triggered section 167(2) of Cr PC.

13. In *Rakesh Kumar Paul v. State of Assam*[6], the petitioner faced allegations under the Prevention of Corruption Act, 1988 and the Indian Penal Code, 1860. He was arrested on 5 November 2016. As the statute mandates, the maximum period of detention during the investigation—that is, before the charge-sheet is filed—is 60 days under clause (ii) of proviso (a) to section 167(2) of Cr PC. In *Rakesh Kumar Paul*, 60 days would end by 3 January 2017. But the State contended that the petitioner had committed offences that might result in "imprisonment for a term not less than ten years". So the pre-chargesheet detention period must be 90 days under clause (i) of proviso (a) to Section 167(2) of Cr.P.C.

14. In answering the above question, the majority (2 to 1) of *Rakesh Kumar Paul* has held that the right to default bail is indefeasible. To elaborate, it has held that if charge sheet is not filed and right for 'default bail' has ripened into the status of indefeasibility, it cannot be frustrated by the prosecution on any pretext. Accused can avail himself of his liberty by applying for bail. The prosecution should adopt no subterfuge to defeat that indefeasible right of accused of 'default bail' "during

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interregnum when statutory period for filing charge-sheet or challan expires and submission of charge-sheet or challan in court."

15. In *Serguis Victor Manka*, the whole issue turns on section 42. The substance allegedly recovered from the petitioner "was not tested with the help of a field kit", nor was there a report of the chemical analyser to show that the substance seized is LSD. From the record, this Court gathered that the CSFL, Hyderbad, has refused to accept the sample because the standard LSD material for testing was unavailable. So the Court has felt that the very basis of the offence under section 22(c) of the NDPS Act was not made out, and the rigours of section 37 of the NDPS Act would remain inapplicable.

16. In *Ivan Minguel*, the applicant was prosecuted for the offences punishable under sections 20 (b) (ii) (B), 21 (b) and 22 (c) of the NDPS Act, 1985. The applicant was tried and convicted. In an application for suspension of sentence and bail, the applicant pointed out that the Chemical Analyser from CFSL, Hyderabad, did not depose about the tests he had conducted to determine the nature of the seized substance. Then, this Court has observed that "at this stage, it is neither necessary nor appropriate to go into the merits of the matter. Prima facie, it can be seen that the officer from the office of CFSL Hyderabad has not set out the details of the tests conducted in the evidence recorded before the learned Sessions Judge". It has also noted that the applicant has been in custody from 14.01.2014. and it is a matter of record that the passport of the applicant has already been seized. So it has suspended the sentence.

17. In *Lawarance D'Souza*, this Court, per M. G. Chaudhari J, has surveyed the precedential position and held that although Ss. 41 to 58 may be read as mandatory, their violation does not ipso facto vitiate the conviction of the accused. He must establish prejudice. As to the reliability of the Panchas' evidence, *Lawarance D'Souza* has held that it is also to be decided on the touchstone of prejudice to the accused, besides

its inherent trustworthiness. Pertinently, *Lawarance D'Souza* observes that "the question whether the violation of the provisions of Ss. 41 to 58 of the Act and/or of S.100(4) of the Criminal Procedure Code has not been decided in the context of bail applications." In the Court's opinion,

> "[D]ifferent test will have to be applied at the stage of bail for two important reasons. Firstly, at that stage, the accused has no opportunity to cross-examine the witnesses or to establish prejudice which he can hope only to do at the stage of the trial. Secondly, the provisions would be applicable right from the inception of the investigation. It would be fallacious and pernicious to leave the question of their compliance to be looked into only at the stage of the trial. Such a situation is fraught with the danger of the prosecution agency ignoring altogether the compliance of the provisions which contain in-built safeguards to the accused, with impunity and with ulterior purpose in a given case. That would bring into peril the liberty of the citizen guaranteed under Art.21 of the Constitution.

18. Then, *Lawarance D'Souza* has held that the accused should be entitled to rely upon the infirmities with all its rigour even at the stage of bail. On facts, *Lawarance D'Souza* has held that both the Panchas are regular and professional Panchas of Narcotic Cell, M.I.D.C. Bombay. The petitioner has provided to the Court the C.R. Numbers in which they were used. Here, before us, one Pancha is found to have participated in another raid earlier. I am afraid one previous instance cannot turn a Pancha into a professional.

19. Chapter V of the NDPS Act deals with the procedure. Section 41 of the Act enlists the authorities that can be empowered and authorised by the State and Central Governments to issue warrants and authorisations for arresting suspects and for searching any place. The persons authorised under section 41 will have all the powers under section 42: the powers of entry, search, seizure, and arrest without warrant or authorisation. Section 43 of the Act delineates the powers of seizure and arrest in public places. At this stage, I see no patent infraction of the safeguards under Chapter V, especially section 43, of the Act.

20. In *Rhea Chakraborty v. The Union of India*[7], this Court, per Sarang V. Kotwal, J, has elaborately with various facets of the NDPS Act and also the jurisprudential issues of bail in the face of a stringent statute. It has, among other things, considered the "interplay between sections 27A & 37" of the Act. *Rhea Chakraborty* has first noted the scope of certain amended provisions. According to it, the scheme of the NDPS Act, amended in 2001, shows that the concept of small, intermediate, and commercial quantity got introduced into some penal sections. So the sentencing structure, too, was changed. For a smaller quantity, the sentence is much lesser. For an intermediate quantity, a minimum sentence has not been provided. Yet for the offences involving commercial quantity, the minimum sentence is ten years.

21. Then, *Rhea Chakraborty* posed unto itself a question whether "the rigours of Section 37 will apply to the offences under Sections 19, 24, and 27A of the NDPS Act if only the offences involve commercial quantity". Of course, it has held in the negative. It has reasoned that if the Legislature wanted to restrictively apply the rigours "only to the offence involving commercial quantity including sections 19, 24 & 27, there was no necessity to mention these sections specifically in section 37". Instead, a simple expression that the rigours will apply to all offences involving commercial quantity would have served the purpose.

22. In the end, on the question of interplay between sections 27A and 37 of the Act, *Rhea Chakraborty* has lucidly held:

> When the Act was amended in the year 2001, the other relevant penal Sections, viz., Sections 20, 21 & 22 were amended to include the concept of commercial quantity and lesser quantity. However, these three Sections were deliberately left untouched. Therefore, the concept of commercial quantity or lesser quantity does not apply to these Sections even for consideration of bail applications.

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23. That is, if the prosecuting agency has material to show that any offence is allegedly committed under section 19, 24 or 27, then despite the quantity of the contraband, the rigours of Section 37 will apply.

24. So I hold that there are no substantial grounds that outweighed Section 37 of the NDPS Act.

Result:

As a result, I dismiss the bail application. At any rate, I leave it open for the applicant to revive his efforts for enlargement on bail once the CFSL report is available.

DAMA SESHADRI NAIDU, J.

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