

S.36A(4) NDPS Act | Apart From Reasons To Detain Accused Beyond Statutory Period, Prosecutor's Report Must Disclose Progress Of Investigation: Kerala HC

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

A. BADHARUDEEN; J.

CRL.MC NO. 6559 OF 2022; 10 November 2022

UBAID A.M. versus STATE OF KERALA

Petitioner / Accused by adv P. Rakesh Thamban

Respondents / State & Defacto Complainant SR. PP - T.R. Renjith

ORDER

This is a petition filed under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred as 'Cr.P.C.' for convenience) to quash Annexure-A4 common order in Crl.M.P.Nos.3101/2022 and 3126/2022, in crime No.128/2022 of Melparamba police station.

2. The petitioner herein is the sole accused in the above crime, where he alleged to have committed offences punishable under Section 22(b) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as 'the NDPS Act' for convenience). The respondent herein is the State of Kerala.

3. Heard the learned counsel for the petitioner/accused as well as the learned Public Prosecutor.

4. In this matter, when the police party intercepted the petitioner/accused at 22.30 hours on 29.01.2022, it was found that the petitioner/accused was possessing and transporting 241.38 gm of MDMA, for the purpose of sale, in a scooter bearing registration No.KL 14P 4348 at Chandragiri bridge in Chemmanur village. He was nabbed and the contraband was taken into custody. Thereafter, crime was registered, alleging commission of the above offences.

5. The petitioner/accused filed petition, vide Crl.M.P.No.3126/2022, before the Special court, seeking statutory bail on 29.07.2022, contending that, since he had been in custody from 29.01.2022, and the final report/charge sheet was not filed within 180 days of his custody, he was entitled to get statutory bail, on completion of 180 days, as stipulated under Section 167(2) of Cr.P.C.

6. Before filing the statutory bail plea at the instance of the accused, the learned Public Prosecutor filed Crl.M.P.No.3101/2022 (Annexure-A2), under Section 36-A(4) of the NDPS Act, along with report filed by the Inspector of Police, Melparamba, seeking extension of period of investigation, beyond the period of 180 days, upto a period of one year.

7. The learned Special Judge heard both petitions together and finally allowed Crl.M.P. No.3101/2022, ordering further detention of the petitioner/accused for a period of 180 days beyond the statutory period to complete the investigation. Crl.M.P.No.3126/2022, the application for default bail was dismissed.

8. The above common order is under challenge in this petition.

9. While assailing the common order, the learned counsel for the petitioner argued that in order to get extension of the period of investigation beyond 180 days, by resorting to Section 36-A(4), it is necessary, for the learned Public Prosecutor, to indicate the

progress of investigation and the specific reasons for the detention of the accused beyond the said period of 180 days. According to the learned counsel for the petitioner, the petition filed by the learned Public Prosecutor, copy of which produced as Annexure-A2 herein, does not contain the progress of investigation, though there are reasons for the detention of the accused beyond the said period of 180 days. Accordingly, it is argued that the Special court went wrong in allowing Annexure-A2 and dismissing the statutory bail plea of the petitioner, which is an indefeasible right of the petitioner, guaranteed by the Constitution. He has given emphasis to the decisions reported in **Hitendra Vishnu Thakur and others v. State of Maharashtra** [1994 SCC (4) 602], **Sanjay Kumar Kedia @ Sanjay Kedia Vs.Intelligence Officer, Narcotic Control Bureau & Another** [(2009) 17 SCC 631], Unreported CrI.M.C.No. 5412/2022, **Appukuttan vs. State of Kerala** (2013 KHC 3669), Unreported B.A.No.3850/2021 and **Nayantara Gupta V. State of Maharashtra** [2020 SCC Online Bom 873] in support of his contention.

10. Whereas, the learned Public Prosecutor, who supported the common order impugned, submitted that, going by the recitals in Annexure-A2 petition dated 26.07.2022 filed by the learned Public Prosecutor, compliance of the mandate of Section 36-A(4) could be gathered and therefore, the order impugned does not require any interference.

11. Having heard as argued, it is necessary to refer the statutory wordings, and then to the decisions highlighted by the learned counsel for the petitioner.

12. Section 36-A provides as under:

“36-A.Offences triable by Special Courts.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974).

2. xxxx

3. xxxx

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 subsection (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.”

13. In **Hitendra Vishnu Thakur’s** case (supra), paragraph No.23 dealt with Section 20(4)(bb) of the Terrorist and Disruptive Activities (Prevention) Act, 1987, (hereinafter referred as ‘TADA’ for convenience) and it was held as follows:

“23. on a plain reading of clause (bb) of sub-section (4) of Section 20, point out that the Legislature has provided for seeking extension of time for completion of investigation on a report of the public prosecutor. The Legislature did not purposely leave it to an investigating officer to make an application for seeking extension of time from the court. This provision is in tune with the legislative intent to have the investigations completed expeditiously and not to allow an accused to be kept in continued detention during unnecessary prolonged investigation at the whims of the police. The Legislature expects that the investigation must be completed with utmost promptitude but where it becomes necessary to seek some more time for completion of the investigation, the investigating agency must submit itself to the scrutiny of the public prosecutor in the first instance and satisfy him about the progress of the investigation and furnish reasons for seeking further custody of an accused. A public prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure. He is not a part

of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation. In that event, he may not submit any report to the court under clause (bb) to seek extension of time. Thus, for seeking extension of time under clause (bb), the public prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court indicating therein the progress of the investigation and disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation. The public prosecutor may attach the request of the investigating officer along with his request or application and report, but his report, as envisaged under clause (bb), must disclose on the face of it that he has applied his mind and was satisfied with the progress of the investigation and considered grant of further time to complete the investigation necessary. The use of the expression "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" as occurring in clause (bb) in Subsection (2) of Section 167 as amended by Section 20(4) are important and indicative of the legislative intent not to keep an accused in custody unreasonably and to grant extension only on the report of the public prosecutor. The report of the public prosecutor, therefore, is not merely a formality but a very vital report, because the consequence of its acceptance affects the liberty of an accused and it must, therefore, strictly comply with the requirements as contained in clause (bb). The request of an investigating officer for extension of time is no substitute for the report of the public prosecutor. Where either no report as is envisaged by clause (bb) is filed or the report filed by the public prosecutor is not accepted by the Designated Court, since the grant of extension of time under clause (bb) is neither a formality nor automatic, the necessary corollary would be that an accused would be entitled to seek bail and the court 'shall' release him on bail if he furnishes bail as required by the Designated Court."

14. Again, it was held that,

"The courts are expected to zealously safeguard his liberty. Clause (bb) has to be read and interpreted on its plain language without addition or substitution of any expression in it. We have already dealt with the importance of the report of the public prosecutor and emphasised that he is neither a 'post office' of the investigating agency nor its 'forwarding agency' but is charged with a statutory duty. He must apply his mind to the facts and circumstances of the case and his report must disclose on the face of it that he had applied his mind to the twin conditions contained in clause (bb) of sub-section (4) of Section 20."

15. Again, it was held that,

"even the mere reproduction of the application or request of the investigating officer by the public prosecutor in his report, without demonstration of the application of his mind and recording his own satisfaction, would not render his report as the one envisaged by clause (bb) and it would not be a proper report to seek extension of time. In the absence of an appropriate report the Designated Court would have no jurisdiction to deny to an accused his Indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail bonds as directed by the court."

16. In **Sanjay Kumar Kedia's** case (supra), the Apex court considered the scope and ambit of Section 36-A(4) of the NDPS Act read with Section 167(2) of Cr.P.C. In this decision, the Apex Court considered the decision in **Hitendra Vishnu Thakur's** case

(supra), and held that Section 36-A(4) of the NDPS Act is parimateria with Section 20(4) of the TADA. In paragraph 10, it has been observed as under:

“10 The question to be noticed at this stage is as to whether the two applications for extension that had been filed by the public prosecutor seeking an extension beyond 180 days met the necessary conditions. We find that the matter need not detain us as it is no longer res integra and is completely covered by the judgment of this Court in Hitendra Vishnu’s case (supra). In this case, the Bench was dealing with the proviso inserted as clause (bb) in Subsection (4) of Section 20 of TADA, which is parimateria with the proviso to Sub-section (4) of Section 36-A of the Act. This Court accepted the argument of the accused that an extension beyond 180 days could be granted but laid a rider that it could be so after certain conditions were satisfied.”

17. In the said decision also, the duty of the Public Prosecutor has been extensively discussed while **holding** that proviso to sub-section (4) of Section 36-A has to be construed in relation to the subject matter covered by the said section. In an unreported decision of this Court in CrI.M.C.No.5412/2022, this Court granted default bail, on the finding that the learned Public Prosecutor did not seem to have applied his mind to the report of the Investigating Officer. In **Appukuttan’s** case (supra), this Court while dealing with impact of Section 36-A(4) of the NDPS Act, followed the ratio in **Hitendra Vishnu Thakur’s** case (supra) and **Sanjay Kumar Kedia’s** case (supra) by reiterating the principles. In the other decisions pointed out by the learned counsel for the petitioner also, the same legal position has been reiterated.

18. Thus, the law emerges is that, as per Section 36A(4) of the NDPS Act, in respect of persons accused of an offence punishable under Sections 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 reference to “one hundred and eighty days”. 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 acting on the report of the Public Prosecutor. The proviso to Section 36-A(4) categorically states that the Public Prosecutor, while making an application for extension of time, shall indicate two aspects on applying his mind, viz., (a) the progress of the investigation and (b) the specific reason for the detention of the accused beyond the said period of 180 days and failure to narrate either of the twin aspects, that is, both aspects together would make the said application outside the ambit of the proviso to Section 36-A(4) of the NDPS Act and in such an application, extension of time cannot be granted.

19. Going by the said ratio, it has to be held that a mere re-production of the application or request of the Investigating Officer by the Public Prosecutor in his report, without demonstration of the application of his mind and record of his own satisfaction would not render his report as the one envisaged under Section 36-A(4) of the Act. Similarly, in the report, the Public Prosecutor shall narrate the progress of investigation and the specific reason for the detention of the accused beyond 180 days.

20. In this case, the learned Public Prosecutor filed Annexure-A2 application, runs into seven paragraphs. Even on meticulous reading of AnnexureA2 petition, compliance of the first condition, i.e., indication of progress of the investigation could not be gathered, though it has been stated therein that the accused had been furnishing incorrect details of the contraband, so as to divert the investigation and therefore, further investigation had to be done to find out, whether any other persons were also involved in the above crime. Thus, it has to be held that the application as Annexure-A2 put by the prosecutor is not in terms of the mandate of proviso to Section 36-A(4) of the NDPS Act and therefore, the same

cannot be allowed. Thus, it is held that the learned Special Judge went wrong in allowing Annexure-A2 application and denying the statutory bail plea of the petitioner herein/the accused.

21. To the contrary, it is held that the statutory bail, an indefeasible right of the petitioner, is liable to be granted since the petition for extension is not in accordance with the statutory mandate.

22. Accordingly, the impugned common order stands set aside. Crl.M.P.No.3101/2022 stands dismissed and consequently, Crl.M.P.No.3126/2022 stands allowed. The accused shall be released on statutory bail, on the following conditions:

1) The petitioner/accused shall be released on bail, on executing bond for Rs.1,00,000/- (Rupees one lakh only) each by himself and by two solvent sureties to the satisfaction of the Special Judge.

2) The petitioner/accused shall surrender his passport, if any, before the Special Court on the date of execution of bond, or within a period of three days thereafter, after getting exemption in this regard from the Special Court. If he has no passport, he shall file an affidavit stating so, on the date of execution of bond or within three days' thereafter.

3) The petitioner/accused shall co-operate with the investigation and he shall be made available for interrogation by the Investigating Officer, as and when directed, till the investigation is complete.

4) The petitioner/accused shall not leave India without prior permission of the Special Court.

5) The petitioner/accused shall not commit any offence during the currency of this bail and any such involvement is a reason to cancel the bail hereby granted.

Registry is directed to forward a copy of this order to the Advocate General, Additional Advocate General, Director General of Prosecution with request to forward copy of this order to all Public Prosecutors in the State for future guidance.

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