

(2022) 07 J&K CK 0031
In the Jammu And Kashmir High Court
Case No : Bail Application No. 51 Of 2022

Nissar Ahmad Yattoo

APPELLANT

Vs

UT Of J&K Through P/S Batamaloo

RESPONDENT

Date of Decision : 18-07-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 439
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 2, 2(xi), 8, 21, 37, 50

Citation : (2022) 07 J&K CK 0031

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Tasaduq H. Khawaja, Sajad Ashraf

Final Decision : Dismissed

Judgement

Sanjay Dhar, J

1) The petitioner has invoked jurisdiction of this Court under Section 439 of the Cr. P. C seeking bail in FIR No.139/2020 for offences under Section 8/21 of NDPS Act registered with Police Station, Batamaloo.

2) As per case of the prosecution, on 30.09.2020, while the police personnel of Police Station, Batamaloo, were on Naka duty at Nundreshi Colony, Bemina, they found a person carrying a blue coloured bag with him, proceeding from Bemina towards Tengpora. The said person, on spotting the police party, tried to run away but he was nabbed by the police whereafter he was subjected to search. Upon search of the bag that was being carried by the said person, 11 bottles of Omrex (100 ml each) and 05 bottles of X-Cuf (100 ml each) were recovered from his possession. The said person was identified as the petitioner herein. FIR No.139/2020 came to be registered and investigation of the case was set into motion. During investigation of the case, samples of the recovered drugs were found to contain Codeine Phosphate and Chlorpheniramine Maleate. Since the Codeine Phosphate is included in the definition of "manufactured drug", as such,

offences under Section 8/21 of NDPS Act were found established against the petitioner and the challan was laid before the trial court.

3) It appears that vide order dated 15.02.2021 passed by the trial court, charges for offences under Section 8/21 of NDPS Act stand framed against the petitioner and presently the prosecution evidence is going on. The trial court record shows that statements of as many as four, out of seven listed prosecution witnesses, have been recorded. It also appears that the petitioner had approached the trial court for grant of bail but his application has been dismissed by the learned trial court vide order dated 23.04.2022.

4) It has been contended in the petition that the petitioner has been falsely implicated in the case and that mandatory provisions of Section 50 of the NDPS Act have not been complied with, while conducting search of the petitioner. It is further contended that there are contradictions in the statements of prosecution witnesses and, as such, it cannot be stated that there are reasonable grounds for believing that the petitioner is involved in the alleged crime. Lastly, it has been contended that the petitioner is ready to abide by all the conditions that may be imposed by this Court in case he is enlarged on bail.

5) The respondent has resisted the bail application of the petitioner by filing a reply thereto. In the reply, it has been contended that commercial quantity of manufactured drug has been recovered from the possession of the petitioner, as such, rigour of Section 37 of the NDPS Act is attracted to his case. It is further contended that the petitioner is involved in a heinous crime and, as such, he does not deserve any leniency from this Court.

6) I have heard learned counsel for the parties and perused the record of the case including the trial court record.

7) Learned counsel for the petitioner has vehemently contended that the substance alleged to have been recovered from the petitioner does not come within the definition of "manufactured drug" because the notification bearing No.S.O826(E), issued by the Central Government in exercise of the powers conferred by sub-clause (b) of clause (xi) of Section 2 of the NDPS Act, clearly shows that if concentration of Methyl morphine (Codeine) is not more than 2.5% in undivided preparations, the same is excluded from the purview of the definition of "manufactured drug". In this behalf the learned counsel has relied upon the judgment of the High Court of Delhi in the case of Iqbal Singh vs. State (Bail Appln. No.645/2020 decided on 31 July, 2020) and the judgment of the High Court of Himachal Pradesh in the case of Harish Kumar vs. State of Himachal Pradesh (CrMP(M) No.1977 of 2019 decided on November 18, 2019).

8) In order to determine the merits of the contention raised by learned counsel for the petitioner, it would be apt to notice the definition of "manufactured drug" as contained in Section 2(xi) of the NDPS Act. It reads as under:

"manufactured drug" means—

(a) all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;

(b) any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug, but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug.

9) From a perusal of the aforesaid definition of the "manufactured drug", it appears that any narcotic substance other than all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate, which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug. It further provides that it would, however, not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a "manufactured drug".

10) It appears that, in exercise of the powers conferred under the aforesaid provision, the Central Government has issued notification bearing No.S.O.826(E), declaring certain narcotic substances and preparations to be "manufactured drug". Entry (35) of the said notification is relevant to the context and the same is reproduced as under:

"(35) Methyl morphine (commonly known as 'Codeine') and Ethyl morphine and their salts (including Dionine), all dilutions and preparations, except those which are compounded with one or more other ingredients and containing not more than 100 milligrammes of the drug per dosage unit and with a concentration of not more than 2.5 per cent in undivided preparations and which have been established in therapeutic practice."

11) From a perusal of the aforesaid Entry, it appears that Codeine and its salts, all dilutions and preparations have been declared as "manufactured drugs". An exception has been carved out in respect of those which are compounded with one or more other ingredients and containing not more than 100 mg of the drug per dosage unit and with a concentration of not more than 2.5% in undivided preparations and which have been established in therapeutic practice, meaning thereby that if concentration of Codeine in undivided preparation is not more than 2.5% and further it has been established in therapeutic practice, then it would not qualify to be a "manufactured drug".

12) Coming to the instant case, as per the seizure memo, 11 bottles of Omrex (100 ml each) were recovered from the possession of the petitioner and as per

the literature, each bottle contained 10 mg of Codeine Phosphate. Similarly, the seizure memo depicts that 05 bottles of X-Cuf (100 ml each) were recovered from the petitioner and as per the literature, each bottle contained 10 mg of Codeine Phosphate. Thus, the material on record prima facie suggests that out of 100 ml of the preparation contained in each bottle, the quantity of Codeine Phosphate was found to be 10 mg, which roughly comes to about 10% of the contents of the whole bottle. Thus, the notification bearing No.S.O.826(E) of the Central Government, particularly the exclusion clause contained in Entry (35), would not come to the rescue of the petitioner.

13) As already noted, the material on record prima facie suggests that the quantity of Codeine Phosphate in the mixture of recovered drug was more than 2.5%, as such, the substance recovered from the petitioner falls within the definition of "manufactured drug" in terms of Entry (35) of notification bearing No.S.O.826(E) issued by the Central Government.

14) So far as the judgment of the High Court of Delhi in Iqbal Singh's case (supra) is concerned, in that case the report of the FSL clearly showed that the quantity of Codeine in the samples was 0.17% and 0.18%. In the instant case, the report of the FSL is silent in this regard. Thus, the question as to what is the percentage of Codeine Phosphate in the drugs recovered from the petitioner becomes a matter of trial. At this stage the Court would go by the literature of the recovered drug as mentioned in the recovery memo, according to which the quantity of Codeine Phosphate in each 100 ml is 10 mg, which definitely exceeds 2.5.

15) Once it is found that one of the substances contained in the mixture of drug recovered from the petitioner falls within the definition of "manufactured drug", the whole quantity of the mixture has to be taken into consideration while deciding the bail application or while deciding the quantum of punishment in case the offence is proved against the petitioner. I am fortified in this regard by the judgment of the Supreme Court in the case of Hira Singh and Ors. Vs. Union of India and Ors., AIR 2020 SC 3255. In the said judgment the Supreme Court has laid the ratio that in case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and is to be taken into consideration along with actual content by weight of the offending drug, while determining the "small or commercial quantity" of the Narcotic Drugs or Psychotropic Substances

16) When we take the quantity of the entire mixture of drugs recovered from possession of the petitioner, the same falls within the parameters of commercial quantity attracting the rigour contained in Section 37 of the NDPS Act. The said provision clearly provides that a person accused of an offence involving the commercial quantity cannot be released on bail unless:

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

17) In the instant case, as already noted, the material collected by the investigating agency during investigation of the case clearly suggests that there are reasonable grounds for believing that the petitioner has committed the alleged offence and it is for this reason only that he has been charged for offences under Section 8/21 of NDPS Act and the same has not been challenged by the petitioner before this Court.

18) Now coming to the statements of the prosecution witnesses recorded during the trial of the case. It has been contended by the petitioner that there are contradictions in these statements, which, when taken into consideration, would persuade this Court to take a view that there are reasonable grounds for believing that the petitioner is not involved in the alleged offence. It has to be borne in mind that at the time of considering a bail application, it is not open to this Court to meticulously analyze the prosecution evidence so as to return a finding of innocence of the accused. The same can be done only at the conclusion of the trial. A perusal of the statements of the prosecution witnesses recorded so far does not suggest that they have either resiled from the prosecution story or that they have falsified the prosecution story. Ultimately the petitioner may succeed in bringing to the fore the circumstances from a critical analysis of the statements of the prosecution witnesses that would entitle him to acquittal but at this stage such an exercise cannot be undertaken by this Court. The prosecution evidence led so far and the evidence which is yet to be led by the prosecution does not persuade this Court to form an opinion that the petitioner is not involved in the alleged offence. For this reason, the petitioner is not entitled to grant of bail on merits at this stage.

19) So far as the contention of the petitioner that the provisions of Section 50 of the NDPS Act were not followed by the police at the time of his search, is concerned, the same is without any merit for the reason that it was a case of chance recovery as the recovery of the contraband substance was not effected from the petitioner on the basis of any prior information. Therefore, provisions contained in Section 50 of the NDPS Act have no applicability to the present case.

20) For the foregoing reasons, I do not find any merit in this petition. The same is, accordingly, dismissed.