
(2021) 11 P&H CK 0098

In the Punjab And Haryana At Chandigarh

Case No : Criminal Miscellaneous Petition (M) No. 3289, 5195 Of 2021 (O&M)

Rahul And Others

APPELLANT

Vs

Union Of India, Narcotics Control Bureau, Chandigarh

RESPONDENT

Date of Decision : 22-11-2021

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 8, 18, 27A, 29, 37, 53, 60, 67
Evidence Act, 1872 — Section 25, 27

Citation : (2021) 11 P&H CK 0098

Hon'ble Judges : Gurvinder Singh Gill, J

Bench : Single Bench

Advocate : Inderjeet Singh, Ashish Pal Kaushal, Rajiv Sharma

Final Decision : Dismissed

Judgement

Gurvinder Singh Gill, J

1. This order shall dispose of the aforesaid two petitions i.e. CRM-M-3289-2021 and CRM-M-5195-2021 filed on behalf of the petitioners, namely, Rahul and Harishankar respectively, seeking grant of regular bail in respect of a complaint case registered against them vide Crime No.19/2019 dated 24.04.2019 at Narcotic Control Bureau, Chandigarh, under Section 8/18/29/60 of the NDPS Act, 1985 (Section 27A of the NDPS Act added later on).

2. The aforesaid complaint was lodged at the instance of Narcotics Control Bureau, Chandigarh (for short 'NCB'), wherein it is alleged that on 23.04.2019, a secret information was received by Gurpreet Singh, SA, to the effect that 3 persons, namely, Rajesh, Rahul and Harishankar indulged in smuggling drugs and that they are going to deliver huge quantity of opium at Rajpura and are on their way from Jharkhand in a vehicle i.e. Hyundai Eon bearing registration No.UP-25-CD-0818 and would be crossing Shambhu Toll Plaza, Ambala (Haryana) between 8:30 to 9:30 AM on 24.04.2019. Pursuant to receipt of said information, Avdesh Kumar, Intelligence Officer, NCB, Chandigarh, accompanied

by other officials of the NCB reached Shambhu Toll Plaza, Panipat-Jalandhar Highway and mounted surveillance. Two independent witnesses were also associated. At about 9:00 AM, a vehicle bearing registration No.UP-25-CD-0818 was noticed approaching the Toll Plaza. Avdesh Kumar, Intelligence Officer, disclosed his identity to the occupants of the car. Upon enquiry, the driver of the car disclosed his name as Rahul and the person sitting beside him on the front passenger seat disclosed his name as Harishankar and the person sitting on the rear seat disclosed his name as Rajesh Kumar. They disclosed that they hail from Kargania, Barelley, Uttar Pradesh. Upon being asked, all the 3 persons denied being in possession of any contraband. However, when they were directed to open the bonnet of the car, then Harishankar and Rajesh Kumar hesitatingly informed that they had hidden opium in AC vent of the car. Upon checking the AC vent, 4 packets wrapped in black tape were recovered. The accused disclosed that they had procured opium from Barelley and were to deliver the same at Rajpura, Punjab. The said black tape on the packets was removed and the contents were found to be black sticky material in the nature of opium. Upon weighment, the recovered contraband was found to be 4.65 Kgs. of opium. Necessary formalities for sealing and taking into possession of contraband were completed. Statements of the accused were recorded in terms of Section 67 of the NDPS Act admitting their guilt.

3. It is further the case of the prosecution that the accused Harishankar in his statement recorded under Section 67 of the NDPS Act disclosed that the opium was to be delivered to Gurmail Singh @ Kala, Lakhwinder Singh and Nirmal Singh. Consequently, the aforesaid persons were also associated with investigation and their statements were also recorded under the provisions of Section 67 of the Act. All the aforesaid 3 persons admitted that they had been receiving opium from Harishankar.

4. Samples drawn from the recovered contraband were sent for chemical analysis and as per the report of the Analyst, the recovered contraband was 'opium'.

5. Learned counsel for the petitioners have submitted that they have falsely been implicated in the present case and that the entire complaint is based mainly on statements of the accused recorded in terms of Section 67 of the NDPS Act, whereas such statements have been held to be inadmissible as per the reference answered by Hon'ble Supreme Court in Tofan Singh Vs. State of Tamil Nadu, (2021) 4 SCC 1 [Criminal Appeal No.152 of 2013 decided on 29.10.2020].

6. Learned counsel have further submitted that a perusal of the report of the FSL would indicate that the sample analyzed is not the same sample, which had been drawn inasmuch as there is difference in weights of the sample sent and the sample received. Learned counsel have further submitted that while the sample sent is recorded to be weighing 22.9 grams, the sample received in FSL was found to be weighing 25 grams. It has further been submitted that the very fact that the recovery-cum-seizure memo prepared at the spot mentions complaint number, casts a serious doubt on the case of the prosecution inasmuch as when

the recovery memo would have been prepared, complaint would not have been lodged.

7. Learned counsel appearing on behalf of the petitioner - Rahul has additionally submitted that he is merely employed as a driver with Harishankar getting a monthly salary and that although the investigating agency has collected call details of all the accused, but there is no record to suggest that the petitioner - Rahul was frequently in touch with other accused, whereas the remaining accused were exchanging various calls INTER SE amongst themselves. It has been submitted that as per the investigation, Gurmail Singh (non-applicant) had deposited Rs.1 lakh in the account of Harishankar, but there is no evidence to show that any amount had ever been deposited in the account of the petitioner - Rahul.

8. Learned counsel representing the NCB has vehemently opposed the petitions on the ground that the statements of the accused recorded under the provisions of Section 67 of the NDPS Act cannot be absolutely discarded particularly when the same found corroboration from other evidence collected during the course of investigation. It has been submitted that in the instant case, the call details record collected by the investigating agency in respect of the phone numbers being used by the petitioners as well as other accused clearly shows that there had been exchange of various calls amongst them, which would clearly reflect that they were hand in glove with each other. Learned counsel has further submitted that in any case the petitioners are amongst those 3 accused, who had been caught red-handed while travelling in a car in which 4.65 Kgs. of opium had been kept concealed in AC vent regarding which they could not furnish any explanation and as such, they do not deserve concession of regular bail particularly keeping in view the restrictions imposed by Section 37 of the NDPS Act.

9. I have considered rival submissions addressed before this Court.

10. As far as the proposition of law in respect of statements recorded in terms of Section 67 of the NDPS Act is concerned, the Hon'ble Supreme Court in Tofan Singh's case has set at rest the controversy addressed while holding as under:

"155. We answer the reference by stating:

(i) That the officers who are invested with powers under section 53 of the NDPS Act are "police officers" within the meaning of section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

(ii) That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."

11. The ratio of the aforesaid judgment is very clear to the effect that any confessional statement in terms of Section 67 of the NDPS Act would be hit by

provisions of Section 25 of the Evidence Act. However, the position may be slightly different if pursuant to any such statement some recovery is also effected and in which case it would be governed by provisions of Section 27 of the Evidence Act. It will not be out of place to mention here that recently this Court in *Abhijeet Singh Vs. Narcotics Control Bureau, Chandigarh*, 2021 (3) RCR (Criminal) 285 pertaining to a matter regarding grant of bail in a case registered under the NDPS Act, wherein also *Tofan Singh's case (supra)* had been cited, observed that while judgment in *Tofan Singh's case (supra)* was rendered on 29.10.2020, earlier the legal position regarding admissibility was considered in light ratio of two earlier decisions of Supreme Court i.e. *Raj Kumar Karwal Vs. Union of India*, (1990) 2 SCC 409 and *Kanhaiyalal Vs. Union of India*, (2008) 4 SCC 668, as per which such statements were admissible. In the said case, as in the present case, the occurrence had taken place prior to 29.10.2020. The said bail application was ultimately dismissed, mainly on the ground that case was not solely based on statements under Section 67 of the NDPS Act, but there was other evidence to establish factum of recovery of contraband. In any case, the accused/petitioners herein were caught red-handed while travelling in a car in which 4.65 Kgs. of opium had been kept concealed in AC vent for which the accused could not furnish any justifiable explanation. Thus, even if the said confessional statements recorded under Section 67 of the NDPS Act are ignored, the accused would be required to explain the circumstances under which huge quantity of opium came to be recovered from the car in which they were travelling.

12. As far as the contention of learned counsel for the petitioners as regards the disparity in the weight of the sample as recorded by the investigating agency and as recorded by the Analyst is concerned, this Court finds that there is very minor disparity of 2.1 grams, which can safely be attributed to difference in calibration of different scales with which the samples had been weighed at different points of time. The accused cannot derive any benefit from such negligible difference in weighment and as such, the aforesaid contention cannot be accepted.

13. As far as contention of the petitioners pertaining to the mention of the complaint number in the recovery-cum-seizure memo is concerned, a perusal of the recovery memo would show that while a substantial part of the recovery-cum-seizure memo is printed, the material portions have been filled-in hand. As such, the complaint number could have been filled-in after the same had been conveyed to the Investigating Officer at the spot. The arrest memo would be prepared only after recovery had been effected and formal enquiries had been made from the accused as regards any explanation. By the time formal arrest memo would have been prepared, the complaint number would have been conveyed and as such, the existence of complaint number on the arrest memo cannot be said to be a suspicious circumstance.

14. Coming to the additional contention raised on behalf of the petitioner - Rahul on whose behalf it has been submitted that he is merely a driver employed by

Harishankar and was getting a monthly salary from Harishankar and that as such, he cannot be attributed conscious possession of the contraband recovered from the car and that he cannot even be connected with the remaining accused on the basis of call details record, it does appear that he is a driver of the vehicle in question from which the contraband was recovered. However, it needs to be borne in mind that the recovery was effected in the last week of April, 2019, when it is fairly hot in this part of the country and while driving a car one would prefer to use AC. A driver of the car would be expected to be aware in case there is any malfunction or break down of any function of the car particularly as regards head-light, indicator, AC etc. Even if the statement of accused Rahul recorded under Section 67 of the NDPS Act, wherein he has confessed that he used to get some additional incentives when opium etc. were being transported in the car is ignored, still a driver would be expected to be aware if something is specifically concealed in the engine compartment instead of the body of the vehicle. As such, complicity of the petitioner - Rahul to some extent cannot be ruled out though he cannot be said to be an active partner or a conspirator of the racket of drug trafficking.

15. In view of the discussion made above, the involvement of both the petitioners is clearly evident. There is nothing on record to show that in case released on bail, they would not indulge in similar offence again. Even otherwise, the recovered quantity of contraband, which falls in the category of 'commercial quantity', would attract fetters imposed by Section 37 of the NDPS Act in the matter of grant of bail. Hon'ble Apex Court in a recent judgment i.e. State of Kerala Vs. Rajesh Kumar, 2020(1) RCR(Criminal) 818, has reiterated the legal position as regards the limitations imposed by Section 37 of the NDPS Act and has further held that a liberal approach in matters of bail in offences under NDPS Act is uncalled for. There is nothing on record at this stage from which it could be inferred that the petitioners are not guilty of the offence in question. Both the petitions are found to be sans merit and are hereby dismissed.