

(2022) 09 GAU CK 0051

In the Gauhati High Court

Case No : Criminal Petition No. 99 Of 2022

Sofiquil Islam @ Safiquil Islam

APPELLANT

Vs

Narcotics Control Of Bureau And Anr

RESPONDENT

Date of Decision : 30-09-2022

Acts Referred:

Constitution Of India, 1950 — Article 227
Code Of Criminal Procedure, 1973 — Section 227, 228, 482
Narcotic Drugs and Psychotropic Substance Act, 1985 — Section 8(c), 21(c), 22, 22(c), 29, 43, 67

Citation : (2022) 09 GAU CK 0051

Hon'ble Judges : Robin Phukan, J

Bench : Single Bench

Advocate : H R A Choudhury

Final Decision : Dismissed

Judgement

1. Heard Mr. A. Ahmed, learned counsel for the petitioner. Also heard Mr. S.C. Keyal, learned standing counsel for the respondent- NCB.

2. In this petition under Section 482 of the Cr.P.C., read with Article 227 of the Constitution of India, the petitioner, Md. Sofiquil Islam @ Safiquil Islam has challenged the legality, propriety and correctness of the order dated 20.12.2021, passed by the learned Addl. District & Sessions Judge No.2, Kamrup (M) at Guwahati, in NDPS Case No.60/2019.

3. It is to be noted here that vide the impugned order dated 20.12.2021, the learned Court below has framed charge against the petitioner under Section 8(c)/21(c)/22(c)/29 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (here-in-after referred to as 'the NDPS Act').

4. The factual background leading to filing of the present petition, is briefly stated as under:

"On 28.02.2019, at about 1800 Hrs., Sri Phani Narjary, Intelligence Officer,

Narcotics Control Bureau, Guwahati Zone received one information that one Mograb Ali along with one Jiaur Rahman and Abdul Motleb Mir, using fake documents, are going to transport huge quantity of Relaxcof and Recofex Codeine based cough syrup consignment by his own vehicle, a Renault Kwid bearing Regn. No.AS-26-B-5506, from Barsajai, Lalmati at Guwahati to Dhubri via NH-37, to deliver the same to different persons at Dhubri and driver Jiaur Rahman would load the said consignment near Maruti Suzuki Showroom, opposite to Audi Showroom, Barsajai, Lalmati, Basistha at Guwahati and Mograb Ali also, has huge quantity of Methamphetamine tablets in his vehicle.

Then reducing the said information into writing, he had submitted a copy of the same to the Superintendent, NCB, Guwahati and further he had forwarded a copy to the Zonal Director, NCB, Guwahati, and thereafter a team comprising of himself and Sri Bam Shankar, Sri Kuldeep Tomar, Sri Karamvir Singh, Sri Manjesh Kumar, Sri Rajiv Choudhury, Sri Sadhan Roy, Sri Suraj Kumar Singh and Sri Nogram, proceeded and reached at NH-37, near Maruti Suzuki Showroom, and they kept vigil on arrival of the said car and after some time, the car reached the spot and then the team stopped the vehicle and checked the same and found seven (7) numbers of brown coloured cartoon boxes on the rear side luggage space (boot space) and another eight (8) numbers of brown coloured cartoon boxes in the back seat of the car and found three persons in the vehicle, namely- Mograb Ali, Jiaur Rahman and Abdul Motleb Mir. Then they have opened all the 15 cartoons and in five cartoons they have found containing 120 bottles each of Relaxcof cough syrup, each bottle contained codeine phosphate 10 mg, Chloropheni Ramine Malesta IP 4 mg and all the 12 cartoons contained 120 bottles each, totaling 1200 bottles of Recolex cough syrup, containing codeine phosphate 10 mg, Chlorpheceramine Mabete IP 4 mg and when asked, Mograb Ali stated that he had fake documents for the consignment and that his drug license is already invalid.

Thereafter, the NCB team tested the bottles with drug detection kit, carried by them and the same tested positive for the presence of codeine and there were total 18 numbers of codeine based cough syrup bottles. On further search of the vehicle, they found two blue coloured plastic packets from the left side glove box and on asking, Mograb Ali told that the same are his tablets (Methane Phosphate Tablets) and having been tested, the same gave positive test for Methane Phetaranol. Then on reasonable belief of committing the offences under Section 8(c) read with Section 21(c)/22(c)/29 of the NDPS Act, all the 1800 bottles/15 boxes of Recolex and Relaxof codeine based cough syrup bottles and 758 W1 tablets (68 gms) Methane Phstamine Tablets were seized under Section 43 of the NDPS Act. On checking of left side of the glove box they also found ICICI bank deposit slip, ICICI bank saving account cheque books, Notary Agreement of drug license, GST invoice of TNB Pharma bills and also found from their possession PAN card, SBI debit card, UCO bank debit card, ICICI bank debit card, registration certificate of the vehicle and mobile phones from their possession. Accordingly, the same were seized in presence of independent witnesses and

drawn up sample as per provision of law and on being asked, accused Mograb Ali and his two accomplices, namely, Jiaur Rahman and Abdul Motleb Mir confessed that they have been illegally trafficking the consignment of above mentioned cough syrups and methane phetamine for its abuse. Thereafter notice under Section 67 of the NDPS Act was issued to all the three suspects for recording their voluntary statement. Thereafter the NCB Crime No.3/2019 has been registered and investigation is carried out and on completion of the investigation, the I.O. laid charge sheet against the afore mentioned three accused along with the present petitioner and seven others to stand trial in the Court, under Section 21(c)/22(c)/29 of the NDPS Act, for contravention of the provision under Section 8(c) of the NDPS Act, showing the petitioner as absconder in the charge sheet.

5. Thereafter, on the strength of warrant of Arrest issued by the learned court below the petitioner was arrested and remanded to jail hazoot. Then the petitioner has a petition No.899/21, under section 227 of the Cr.P.C. for discharging him. But, vide impugned order, dated 20.12.2021, the learned Court below has dismissed the same and framed charge against him and other co-accused under sections 21(c)/22(c)/29 of the NDPS Act, and on being read and explained over, the accused petitioner pleaded not guilty to the same and claimed to be tried.

6. Being highly aggrieved, the petitioner approached this Court by filing the present petition on the ground that the Court below has erred in law as well as in fact, while passing the impugned order and that the Court below has failed to appreciated the fact that the investigating agency could not place any incriminating materials against the petitioner to rope him with the offence alleged and that the learned Court below has mechanically framed charges against the petitioner without applying judicial mind and that except the statement of co-accused, there is no material to justify framing the charge against the petitioner and the learned court below has ignored the law laid down by the Hon'ble Supreme Court in the case of Toofan Singh vs. State of Tamil Nadu, reported in (2021) 4 SCC 1 and Sanjeev Chandra Agarwal & anr. vs. Union of India, reported in MANU/SC/1140/2021, and that the learned Court below has not discussed anything as to why the same were not applicable in the present case and that the petitioner was legally running the pharmacy and he purchased the medicines, but not banned medicines, from the pharmacy of other co-accused, who were also having valid drugs license and the bank transactions which the prosecution side has relied on is not sufficient to frame charge against the petitioner, in absence of any material to show that the said transaction were illegal and that the learned Court below has failed to appreciate the law relating to framing of charge, as laid down in the case of Asim Shariff vs. NIA, reported in (2019) 7 SCC 148, State of Orissa vs. Debendra Nath Padhi, reported in (2005) 1 SCC 568 and in the case of Amit Kapoor vs. Ramesh Chander, reported in (2012) 9 SCC 460 and therefore, it is contended to allow this petition, be setting aside the impugned order.

7. The respondent No.1/NCB, Guwahati has submitted its affidavit-in-opposition, denying the assertion made by the petitioner in his petition. It is stated that the petitioner has confessed in his statement that he was involved in illegal business of Codeine based cough syrup, which were used for intoxication purpose knowing that the same are harmful for people and society and he accepted that he has committed crime and he purchased the Codeine based cough syrup from Gopal Sarkar, who do not possess valid drug license and as per his bank account statement, he purchased Codeine based cough syrup and psychotropic medicines for approximately Rs.96 lacs between 03.10.2017, to 18.01.2020, but, he failed to produce sale record and that 1800 bottles of Codeine based cough syrup and 68 grams of methamphetamine tablets were recovered from Mograb Ali and two others and Mograb Ali is the big trafficker of Codeine based cough syrup in Dhubri District and so his drug license was cancelled by the Drug Controller, two times and he confessed having involved in illegal Codeine based cough syrup and he purchased the same from Gopal Sarkar, who do not have any valid drug license and as per the bank account statement of Unique Drugs and Surgical of petitioner Sofiquil Islam reveals total Rs.99,31,113.40 were debited and Rs.99,31,058/- were credited in the Bandhan Bank A/c. No.1017 0003 4370 67 and that there is sufficient evidence against the accused Sofiquil Islam. Therefore it is contended to dismiss the petition.

8. Mr. A. Ahmed, learned counsel for the petitioner submits that nothing was recovered from the possession of petitioner Sofiquil Islam @ Safiquil Islam and the pharmacy was in the name of his wife and nothing was found in the pharmacy and the drug license of the said pharmacy was valid from 31.07.2017 till 30.07.2022 and there is no contravention of the provision under Section 8(c) of the NDPS Act and that the learned Court below has failed to assign any reason as to why the ratio laid down in the case of Toofan Singh (supra) and Sanjeev Chandra Agarwal & anr. (Supra) was ignored and that the statement of co-accused and bank transactions are not sufficient to establish a prima facie case to frame charge against the petitioner. Mr. Ahmed further submits that instead of the NDPS Act, a case under the Drugs and Cosmetics Act, 1940 is made out and the investigating agency should have submitted the charge sheet against the petitioner under the said Act and therefore, Mr. Ahmed contended to allow this petition.

9. On the other hand, Mr. S.C. Keyal, learned standing counsel appearing for the respondent No.1/NCB, Guwahati submits that the petitioner is shown absconder in the charge sheet and non-bailable warrant of arrest (NBWA) was issued against him by the learned Court below and that, on the basis of said NBWA, he was arrested and the learned Court below, after hearing both the parties and considering the materials on record, framed charge against the petitioner under Section 21(c)/22(c)/29 of the NDPS Act and that the ratio laid down in the case of Toofan Singh (supra) and Sanjeev Chandra Agarwal & anr. (Supra) are not applicable here in this case and that the State has right to proceed against the petitioner under the NDPS Act, though the Drugs and Cosmetics Act, 1940 also

attracted here in this case, in view of the judgment of the Hon'ble Supreme Court in the case of State of Punjab vs. Rakesh Kumar reported in (2019) 2 SCC 466 and therefore, Mr. Keyal submits that the impugned order suffers from no illegality or impropriety, requiring any interference of this Court.

10. Having heard the submissions of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record and also perused the case laws referred by learned Advocates for both sides and perused the impugned order dated 28.12.2021, passed by the learned Addl. District & Sessions Judge No.2, Kamrup (M) at Guwahati.

11. It appears from the final complaint lodged by the I.O. that the statement given by Mograb Ali and Gopal Sarkar reveals that they used to supply codeine based cough syrup to Sofiqul Islam of Unique Drugs and Surgical, Dhubri and he is one of the main supplier of codeine based cough syrup illegally in Dhubri District. Further it appears that three numbers of notices were issued under Section 67 of the NDPS Act to Sofiqul Islam for recording his statement, but, he did not appear to give his statement by the NCB, which shows the culpable mental state of Sofiqul Islam. Further, it appears Rs.1,00,000/- was transferred on 16.01.2019 and Rs.1,03,000/- was transferred on 04.01.2019 to the account No.07280210001356 of Salma Drug Distributor from the account of Unique Drugs and Surgical, Dhubri and Rs.60,000/- was transferred on 22.02.2019 from the account of Unique Drugs and Surgical, Dhubri, Rs.50,000/- was transferred from the account of Sofiqul Islam on 26.02.2019 and Rs.1,00,000/- was transferred in the Central Bank of India current account No.3715928196 of T.N.B. Pharma from the account of Unique Drugs and Surgical, Dhubri. It is to be noted here that accused Mograb Ali, Jiaur Rahman and Abdul Motleb Mir were arrested on 28.02.2019, while they were carrying 1800 bottles of codeine based cough syrup bottles and 758 W1 tablets (68 gms) Methane Phstamine Tablets, for distribution in Dhubri District.

12. The statement of Mograb Ali and Gopal Sarkar reveals that they used to supply codeine based cough syrup to the petitioner, who has one firm in the name and style of Unique Drugs and Surgical, Dhubri and it also appears that there is Bank transactions between Unique Drugs and Surgical, Dhubri, Salma Drug Distributor and T.N.B. Pharma. It is to be mentioned here that Salma Drug Distributor is owned by Mograb Ali and the owner of the T.N.B. Pharma belongs to accused Gopal Sarkar and both Gopal Sarkar and Mograb Ali, both are supplier of codeine based cough syrup.

13. Thus, not only the statement of the co-accused, but also the bank transactions between the firm of the petitioner with that of accused Mograb Ali and Gopal Sarkar reveals the complicity of the petitioner with that of the racket of supplying codeine based cough syrup, illegally in the Dhubri District. Thus a clear case of abatement and criminal conspiracy to commit the offence under Section 8(c) of the NDPS Act, which is punishable under Section 21(c)/22(c) of the NDPS Act, appears to be made out against the petitioner.

14. In view of above factual position, the submission so advanced by Mr. A. Ahmed, learned counsel for the petitioner fails to persuade this Court that no materials are there to frame charge against the petitioner, punishable under Section 21(c)/22(c) of the NDPS Act. It is a fact that, as submitted by the learned counsel for the petitioner that nothing was recovered from the possession of the petitioner but the bank transactions between the petitioner and other two accused, namely, Mograb Ali and Gopal Sarkar and their statement and failing to comply with the notice of the investigating agency under Section 67 of the NDPS Act, clearly reveals his mental state and complicity with the offence.

15. Though Mr. Ahmed submits that instead of Section 21(c)/22(c) of the NDPS Act, an offence under the Drugs and Cosmetics Act, 1940 is made out against the petitioner, yet in view of the law laid down by the Hon'ble Supreme Court in the Case of Rakesh Kumar (supra), the submission so advanced by Mr. Ahmed left this Court unimpressed. It is to be mentioned that in the case of Rakesh Kumar (supra), the Hon'ble Supreme Court has held that NDPS Act should not be read in exclusion of Drugs and Cosmetics Act, 1940. Additionally it is the prerogative of the State to prosecute the offender in accordance with law. Further, Hon'ble Supreme Court has held that the action of the accused/respondent amounted to a prima facie violation of Section 8 of the NDPS Act, they are charged under Section 22 of the NDPS Act. Mr. S.C. Keyal, learned standing counsel for the respondent No.1/NCB, Guwahati has rightly pointed this out, in his argument and I record concurrence to the same.

16. It is a fact that in the case of Toofan Singh (supra), the Hon'ble Supreme Court has held that the 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. But, here in this case, apart from the statement of the co-accused namely, Mograb Ali and Gopal Sarkar, some more materials are there to show complicity of the accused with the offence alleged and in view of above, this Court is of the considered opinion that the ratio laid down in the Toofan Singh (supra) would not come into the aid of the petitioner. On the same ground the ratio laid down in the case of Sanjeev Chandra Agarwal & anr. (Supra) also would not come into the aid of the petitioner.

17. Thus, having carefully examined the materials on the record and the principle of law, discussed here in above, this Court is of the view that the learned Court below has not committed any illegality or impropriety, while framing charge against the petitioner under Section 21(c)/22(c)/29 of the NDPS Act, for contravention of the provision of Section 8(c) of the NDPS Act.

18. The law regarding discharge of the accused under Section 227 of the Cr.P.C. has been well settled by the Hon'ble Supreme Court in umpteen cases and one of the lead case in this regard is Union of India vs. Prafulla Kumar Samal, reported in (1979) 3 SCC 4, wherein the Hon'ble Supreme Court held that:-

"7. Section 227 of the Code runs thus:-

"227. Discharge.- If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

The words "not sufficient ground for proceeding against the accused" clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities, which is really his function after the trial starts. At the stage of section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. The sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him."

19. Further in the case of Sajjan Kumar vs. CBI, reported in (2020) 9 SCC 368, the Hon'ble Supreme Court, inter alia, observed that:-

"21. On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following principles emerge:

* * *

(ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial".

20. It is to be mentioned here that while exercising revisional jurisdiction the High Court cannot substitute its view for that of the trial court in two views are possible. Reference in this context can be made to a decision of Hon'ble Supreme Court in the case of Helper Girdharbhai vs. Saiyed Mohmad Mirsaheb Kadri and Ors. reported in AIR 1987 SC 1782.

21. In view of above, I find no merit in this petition and accordingly the same stands dismissed. Stay, if any, granted earlier, stands vacated. The parties are directed to appear before the learned Court below within a period of 15 (fifteen) days from today. There is no order as to the cost.