
(2011) 02 BOM CK 0146

In the Bombay High Court

Case No : Criminal Application No. 1405, 5718, 5719, 5722, 5725 and 5726 of 2010

Union of India (UOI)

APPELLANT

Vs

Jagdish Singh and Another and Others

RESPONDENT

Date of Decision : 17-02-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 437, 439

Evidence Act, 1872 — Section 105, 67, 76(1), 8, 9

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 19, 2, 22, 24, 27(A)

Citation : (2011) 113 BOMLR 881 : (2011) CriLJ 2601

Hon'ble Judges : J.H. Bhatia, J

Bench : Single Bench

Advocate : F.E. Saldanha and Revati Mohite Dere, alongwith Smita Deokar and Mandar Goswami, Spl. P.P, for the Appellant; Anil G. Lalla, alongwith Sunil Ghadge, in Cri. Appln. No. 1405 and 5725 of 2010, Ayaz Khan, in Cri. Appln. No. 5718 and 5722 of 2010, Sartaj Shaikh, in Cri. Appln. No. 5719 of 2010, Dilip Mishra, in Cri. Appln. No. 5726 of 2010 and A.T. Javeri, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

J.H. Bhatia, J.—All these applications are filed by the Union of India seeking cancellation of bail granted to accused Nos. 1 to 6 by the learned Special Judge by different orders.

2. According to the prosecution on the basis of specific information received, the officers of the Narcotics Central Bureau, Mumbai Zonal Unit, Mumbai intercepted accused No. 1 - Jagdish Singh, accused No. 2 - Harvinder Singh and accused No. 3 - Harjinder Ram near the Oberoi Mall, Goregaon (East), Mumbai when they arrived there in Toyota Innova car bearing registration No. PB-10-CJ-2414. They delivered the contraband to taxi driver - Veer Bahadur Singh, who is accused No. 4 The taxi driver had come by taxi No. MH-01-X-5483 for taking delivery of the

contraband. On interception 25 kgs. of Methamphetamine was recovered. After completing the formalities it was seized, samples were taken. The statements of accused Nos. 1 to 4 were recorded u/s 67 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (for short hereinafter referred as "NDPS Act") on 9th June, 2009. It was revealed that accused Nos. 1 to 3 had brought the said contraband from Punjab by car and it was to be delivered to accused No. 5 - Anil Kumar Menon. Accused No. 4, taxi driver - Veer Bahadur Singh had come near the Oberoi Mall to receive that consignment for and on behalf of accused No. 5 - Anil Kumar Menon. During interrogation, in the statements of accused No. 4 - Veer Bahadur Singh it was revealed that accused No. 5 - Anil Menon and accused No. 6 - G. Samuel @ Anna use to provide strategic and logistic support for export of the drugs to Cambodia. The statements of accused No. 6 - G. Samuel @ Anna was also recorded u/s 67 and he also confirmed this fact. Initially, the crime was registered bearing No. NCB/BZU/CR/09/2009. The samples were sent to forensic laboratory and after getting the report it was confirmed that the samples were Methamphetamine. The complaint was filed in the court of Special Judge, Mumbai on 4th December, 2009 and it came to be registered as NDPS Special Case No. 152 of 2009.

3. First of all, accused No. 1 - Jagdish Singh filed bail application No. 237 of 2009 which was rejected by learned Special Judge as per the order dated 16th November, 2009. Thereafter, he filed another application for bail relying on certain authorities of this Court as well as from different High courts and Supreme Court. His main contention was that even though Methamphetamine is shown as psychotropic substance in schedule to the NDPS Act, it was not shown in schedule I to the NDPS Rules and, therefore, possession or transportation of Methamphetamine could not be an offence. After hearing the parties the learned Special Judge granted bail to him by the order dated 3.3.2010. That order is sought to be set aside and cancelled by the Union of India. It may be noted that initially this Court had granted stay to implementation of the bail order. That order was challenged before the Supreme Court and the Supreme Court allowed the appeal and set aside the order of stay passed by this Court while the application for cancellation of bail continues to be pending before this Court. After accused No. 1 - Jagdish Singh was granted bail, accused Nos. 2 to 6 also filed different applications for bail before the learned Special Judge who by orders dated 12.10.2010 granted bail to each of them. The Union of India has challenged those orders and seeks cancellation of bail.

4. Prosecution has challenged the grant of bail by the Special Judge on the ground that the Methamphetamine is a psychotropic substance as defined in Section 2(xxiii) as it is shown at Serial No. 19 in the Schedule of the NDPS Act. It is contended that Section 8(c) provides that no person shall produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance, except for medical or scientific purposes and in the manner and to the extent provided by the

provisions of this Act or the rules or orders made thereunder. Section 22 provides punishment for contravention in relation to psychotropic substances. It is also pointed out that as per the table notified by the Government of India as per Sub-clause (viiia) and (xxiiia) of Section 2 of the NDPS Act, small quantity of Methamphetamine, also known as Methamphetamine, is 2 grams while commercial quantify is 50 grams. In this case, 25 kg. Of Methamphetamine in powder form was recovered. It is contended that in view of the large quantity of psychotropic substance u/s 22(c), the offence is punishable with imprisonment for not less than 10 years and which may also extend to 20 years with fine. It is contended on behalf of the prosecution that the learned trial court committed error in holding that the provisions of NDPS Act are not applicable and that no offence under the said Act is made out.

5. On the other hand, the learned Counsel for the accused persons vehemently contended that even though Methamphetamine is shown as psychotropic substance in the Schedule annexed with the NDPS Act, it is not shown in the Schedule I as per Rules 53 and 64 of the NDPS Rules, 1985 and therefore, under the Rules, the general prohibition imposed by Rules 53 and 64 are not applicable. He also contended that it a drug in Schedule X under the Drugs and Cosmetics Act, 1940 and therefore, the provisions of NDPS Act will not be applicable. He contended that assuming, but not admitting, that the said substance was in possession of the accused persons, still it does not amount to an offence and in support of this, he placed reliance upon several authorities, particularly, the judgment of Delhi High Court in *Rajinder Gupta v. The State*, judgment of this High Court in *M.V. Henry, Intelligence Officer v. Ravi Prakash Goel and Anr.* (Criminal Application No. 3295/2005) and *Pradeep Dhond v. Intelligence Officer, Narcotics Control Bureau* (Criminal Application No. 6787/2005), *Riyaz s/o. Razak Menon and Anr. v. The State of Maharashtra* (Criminal Application No. 3196/2010) and Supreme Court judgment in *State of Uttaranchal v. Rajesh Kumar Gupta*, 2007 (1) Crimes 6 (SC). According to him, when the said Methamphetamine is a scheduled drug under the Drugs and Cosmetics Act and when it is not included in Schedule I under the Rules, the provisions of Section 8 and 22 of the NDPS Act will not be applicable and no offence is made out. He contended that the trial court was justified in granting bail to the accused persons relying on the judgment of this Court in *M.V. Henry, Intelligence Officer v. Ravi Prakash Goel and Anr.* (supra). Learned Counsel for accused No. 5 also contended that accused No. 5 was having a certificate of import and export from the Ministry of Commerce and he has also license to sell, stock, exhibit or offer for sale or distribution of certain medicines from the licensing authority, Food and Drug Administration, Maharashtra State and, therefore, the provisions of NDPS Act would not be applicable to him. Learned Counsel also contended that statement of accused No. 5 u/s 67 of the NDPS Act was recorded after his arrest and, therefore, it cannot be given much importance and further this statement was retracted by him later on before the Metropolitan Magistrate.

6. At the outset it may be stated that I had occasion to deal with similar matter

in Criminal Application No. 3618 of 2010 Union of India (UOI) v. Ravindran Krarapaya @ Ravi and Ors. Criminal Application No. 3618 of 2010 and Criminal Application No. 5640 of 2009 Union of India (UOI) v. Xie Jing Feng @ Richard and Anr. Criminal Application No. 5640 of 2009 in which 7 Kgs. of Methamphetamine was alleged to be recovered from the accused persons. Same arguments were also advanced by both the parties in those applications which were filed by the Union of India for cancellation of bail. I have dealt with the related provisions of NDPS Act and Rules in depth in the judgment dated 19th November, 2010. Later on the reasons given in the said judgment were adopted in toto by another learned Judge of this Court in Criminal Application No. 4824 of 2010 Union of India (UOI) v. Riyaz Razak Menon and Ors. Criminal Application No. 4824 of 2010 which was decided on 10th January, 2011 (Coram: R.C. Chavan, J.). In fact to a great extent these applications are covered by the earlier judgment dated 19th November, 2010 but it would be useful to deal with the legal position again as some more points are raised in these matters.

7. Section 2(xxiii) defines psychotropic substance. It reads thus:

psychotropic substance" means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule.

Methamphetamine is shown at entry No. 19 in the Schedule of the psychotropic substances and therefore, there can be no dispute that Methamphetamine is the psychotropic substance as defined in Section 2(xxiii). Section 2(viia) provides that commercial quantity, in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette and similarly, Clause (xxiia) provides that small quantity, in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette. The Central Government has issued a Notification under Sub-clause (viiia) and (xxiia) of Section 2 and Methamphetamine, also known Methamphetamine, is at Entry No. 159 of the said table and as per column 6, the commercial quantity means the quantity more than 50 grams. In the present case, 7 kg. of Methamphetamine was allegedly seized from flat No. 601 and thus, undoubtedly, it is huge commercial quantity.

8. Section 8(c) of the NDPS Act reads as under:

8. Prohibition of certain operations - No person shall

(a) xxxxxxxxxxxxxx

(b) xxxxxxxxxxxxxx

(c) Produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance, except for medical

or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation:

9. From this it is clear that no person shall produce, manufacture, possess, sell, purchase, transport, import inter-State, export inter-State, import into or export from India or tranship any narcotic drug or psychotropic substance except for medical or scientific purposes and when it is produced, manufactured, possessed, sold, purchased, transported, warehoused, used, consumed, imported or exported inter-State or in India or outside India, all that has to be done in the manner and to the extent provided by the said Act, Rules or Orders that may be issued and also subject to the requirements of the licence, permit or authorisation which may be issued.

10. Section 22 is a penal provision and is in relation to psychotropic substance. It reads thus:

Section 22. Punishment for contravention in relation to psychotropic substance.- Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any psychotropic substance shall be punishable,-

(a) Where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

11. From the language of Section 22, it becomes clear that whoever manufactures, possesses as well as purchases, transports, imports inter-State, export inter-State or uses any psychotropic substance shall be punished if any such act is done in contravention of any provisions of the NDPS Act OR any rule OR order made under the Act OR in contravention of any conditions of the licence granted to him. Further if the provisions of Section 8(c) and Section 22 are read together, it would be clear that there is a complete ban on the production, manufacture, possession, sale, purchase, transport, warehouse, use,

consumption, import inter-State, export inter-State, import into India, export into India or transshipment of any narcotic drug or psychotropic substance, except for the medical or scientific purposes and where any person is found to be in possession, etc. of any such psychotropic substance and if he does not claim that he came in possession etc. for the medical or scientific purposes by virtue of the provisions of the Act, Rules, Orders, etc., he will be treated to have contravened the provisions of Section 8(c) and that contravention is punishable u/s 22. To bring the case under exception, the initial burden will naturally lie on the accused to show that he had come in possession etc. for the medical or scientific purposes. If he claims that he has done any such act for medical or scientific purposes, it will be for him to show that he had done it in the manner and to the extent provided by the provisions of the Act, Rules or orders thereunder. If he fails to show that he had done any such act for medical or scientific purposes and as per the provisions of the Act, he will be liable to be convicted and sentenced u/s 22. Further if a person having done any such act under the provisions of the Act and but if contravenes any Rule or Order or if contravenes the terms and conditions of licence, permit or authorisation, still he is liable to be convicted u/s 22. In view of the provisions of Section 105 of the Evidence Act, when a person is accused of an offence, the burden of proving the existence and the circumstances bringing the case within any special exception or proviso contained in any law defining the offence is upon him and Court shall presume the absence of such circumstances. As noted above, Section 8(c) prohibits a person from producing, manufacturing, possessing, selling, purchasing, transporting, warehousing, using, consuming, importing and exporting inter-State, import into India and export from India or transshipment of drug and psychotropic substance. Having prohibited such operations, Section 8 provides for exception where the person claims that he had done any such operation for medical or scientific purposes. In view of the provisions of Section 105 of the Evidence Act, the burden will lie on that person to prove circumstances and the facts which would bring his case within the exception.

12. In the present case prima facie it appears that accused Nos. 1, 2 and 3 had brought 25 Kgs. of Methamphetamine from Punjab to Bombay and they were intercepted when they gave delivery of the same to accused No. 4, Veer Bahadur Singh - Taxi Driver, who had come to receive the consignment for and on behalf of accused No. 5 - Anil Kumar Menon. Accused Nos. 1 to 3 did not claim that they had any license or authorisation for possession or inter-state transport from Punjab to Maharashtra. Accused No. 4 also does not claim that he had any license or authorisation to take delivery of Methamphetamine. According to him he was innocent taxi driver and was not knowing what were contents of the consignment. From his statement u/s 67 and from the arguments advanced on his behalf by learned Counsel it appears that he was regular taxi driver for accused Nos. 5 and 6 and accused No. 5 had asked him to collect the said consignment and, therefore, he had accepted the said consignment without any knowledge of the same. Accused No. 5 claims that he has a certificate for export

and import and also licence from the Food and Drug Administration, Maharashtra Government for sale, storage and manufacture of certain medicines. He has also produced the copies of relevant certificate and licence. The certificate of Importer-Exporter Code (IEC) appears to have been issued by the Ministry of Commerce, Government of India on 1.11.2004 in favour of Anjali Enterprises situated at Rose Villa, Christain Street, Madh Island, Mumbai, Maharashtra with branch office at Andheri (East). This certificate nowhere indicates that the certificate of import or export was issued to him for the purpose of possession, transportation, inter-state import or export or export to foreign countries of any psychotropic substance and particularly Methamphetamine. It appears to be general Importer Exporter Code, which authorises business of export and import. Naturally, this certificate is of no use when he wants to deal in psychotropic substance like Methamphetamine. Next is licence in form 20-D issued by the Licensing Authority, Food and Drug Administration, Maharashtra State. This licence is issued on 31st August, 2004 in favour of Anjali Enterprises. It shows that by this licence Anjali Enterprises has licence to sell, stock or exhibit or offer to sell or distribute by wholesale drugs other than those specified in Schedule C, C(1) or X, subject to the conditions specified in the licence and subject to provisions of Drugs and Cosmetics Act, 1940 and Rules thereunder. Methamphetamine is also a drug in Schedule "X" under Drug and Cosmetics Act. The main argument advanced by learned Counsel for the accused against application of NDPS Act to Methamphetamine is that it is shown in schedule "X" of the Drug and Cosmetics Act but is not shown in schedule-I of the NDPS Rules and, therefore, NDPS Act is not applicable. The above referred licence issued by the Food and Drug Administration gives licence to Anjali Enterprises for certain operations in respect of drugs other than those specified in Schedule C, C(1) and X and, therefore, this licence does not authorise Anjali Enterprises or accused No. 5 to sell, stock, distribute, transport etc. any drug and particularly Methamphetamine which is shown in schedule "X". In view of the above the Importer-Exporter Code and the licence issued by the Food and Drug Administration, Maharashtra State do not provide any authority to accused No. 5 to deal with or possess psychotropic substance i.e. Methamphetamine. These certificate and licence are of no use in this case.

13. After the claim of accused No. 5 to possess Methamphetamine on the basis of above referred certificate of Importer Exporter Code or license issued by Food and Drug Administration, Maharashtra State is rejected, there is no document on record produced by any of the accused persons to bring their case within the scope and ambit of the exception to Section 8(c). Therefore, consideration of rules framed under NDPS Act would in fact be unnecessary. However, because the learned Counsel for the Respondent/accused have relied on certain authorities, contending that as Methamphetamine is not shown in the Schedule I to the Rules, the provisions of NDPS Act are not applicable, it will be necessary to deal with the relevant rules and the authorities relied on by the learned Counsel.

14. Section 76(1) of the Act provides that subject to other provisions of the act,

the Central Government may, by notification in the Official Gazette, make rules for carrying out purposes of this Act. Section 9 provides that subject to provisions of Section 8, the Central Government may, by rules permit and regulate cultivation, production, manufacture, etc. of coca plant, opium, other narcotic drugs as well as psychotropic substances. The Central Government by virtue of powers under Sections 9 and 76 framed and notified Narcotic Drugs and Psychotropic Substances Rules, 1985. Chapter III and IV provides for opium. In view of the language of Section 9, it is clear that the Rules, that the Central Government has framed to permit or regulate such operations, are subject to provisions of Section 8 and Section 8, as pointed out above, prohibits any such operation in respect of narcotic drugs or psychotropic substances except for medical or scientific purposes. It means u/s 9, the Government may frame rules to permit and regulate such operations as per the said exception to Section 8 and not in contravention of the same. Similarly, Section 76 clearly shows that the Central Government may frame and make rules for carrying out purposes of the Act and not for anything in contravention to that. The schedule of the psychotropic substances under the Act is part of the Act and no rule can be framed or can be interpreted in the manner which would be in contravention of the said schedule or the contravention of Section 8 or Section 22.

15. Chapter 5 of the Rules deals with the rules and grant of licence for the manufacture of drugs. Chapter 6 of the Rules deals with import, export, transshipment of narcotic drugs and psychotropic substances. Rule 53 puts a general prohibition on the import into and export out of India on the narcotic drugs and psychotropic substances specified in Schedule I subject to other provisions of that chapter. Chapter 7 deals with psychotropic substances and Rule 64 provides that no person shall manufacture, possess, transport, import inter-State, export inter-State, sell, purchase, consume or use any of the psychotropic substances specified in Schedule I. Thus, it will be clear that while Rule 53 prohibits import in and export out of India of the narcotic drugs and psychotropic substances specified in Schedule I. Rule 64 prohibits inter-State import or export, sell, possession, etc. of psychotropic substances specified in schedule I of the Rules. It may be noted that prior to amendment with effect from 13th October, 2006 in the Schedule I of the Rules, 33 narcotic drugs and some psychotropic substances were included in that Schedule I. After the amendment, only there are three entries under the Narcotic Drugs and there are three entries under the Psychotropic Substances, fourth in each category is salts, preparations, admixtures, extracts and other substances containing any of these drugs or psychotropic substances. Thereafter, there is a Schedule II framed under Rule 53-A which provides that narcotic drugs or psychotropic substances or preparations specified in Schedule II shall not be exported to the countries or to the regions mentioned therein. Again in Schedule II, there are in all 45 entries and against each substance, in column No. 5, names of the countries are mentioned to which, that particular narcotic drug and psychotropic substance cannot be exported. Methamphetamine is at Serial No. 30 in the said Schedule

and against that entry, names of 14 countries are mentioned to which this substance cannot be exported. Rule 65 provides that manufacture of psychotropic substances other than those specified in Schedule I shall be in accordance with conditions of licence granted under the Drugs and Cosmetics Rules, 1945, framed under the Drugs and Cosmetics Act, 1940, by an authority in charge of drugs control in a State appointed by the State Government in this behalf. Proviso of Rule 65 provides that said authority in charge of the drug control may issue a licence to manufacture a psychotropic substance specified in Schedule III for the purpose of export only. In the Schedule III, there are 34 items.

16. If the schedule of the Act is perused carefully along with Schedules I, II and III under the Rules, it will be clear that while the Schedule under the Act describes the psychotropic substances, the Schedule I, II and III are framed under the Rules for different purposes and none of those three schedules contains all the psychotropic substances which are shown in the schedule to the Act. Some of them are in Schedule I, some of them are in Schedule II and some are in Schedule III of the Rules and the purpose of each schedule is different. If these schedules I, II and II are read along with Rules, it will become clear that under Rule 53, drugs and psychotropic substances specified in schedule I cannot be imported into and exported out of India, except under an import certificate or export authorisation issued under different provisions of that chapter. Under Rule 64, no person shall manufacture, transport, possess, import inter-State, export inter-State, sell, purchase, consume, use any of the psychotropic substances specified in Schedule I. As per Rule 65, the manufacture of psychotropic substances other than those mentioned in Schedule I shall be in accordance with the conditions of the licence granted under the Drugs and Cosmetics Rules, 1945. The psychotropic substances in Schedule III should be manufactured under licence issued by the authority in charge of the drug control in the State. Rules 66(1) specifically provides that no person shall possess any psychotropic substance for any of the purposes covered by the Drugs and Cosmetics Rules, 1945 unless he is lawfully authorised to possess such substance for any of the purposes under the Rules. Thereafter, Rules 66(2) provides for possession and use of psychotropic substances by research institutions, hospitals, dispensaries, etc. It also provides for possession by an individual for his personal medical use subject to prescription by the registered Medical Practitioner. In normal circumstances for medical purposes, one may be permitted to possess not exceeding 100 dosage units at a time and for his personal long term medical use, he may be permitted to possess more than 100 dosage but not exceeding 300 dosage at a time. The quantity which may be possessed by the research institutions, hospitals, dispensaries, etc. are also prescribed by the Rules and the licence or permit which may be issued to them. From this, it is clear that nobody can be in possession of any such psychotropic substance unless he has got appropriate licence, permit or authorisation either under these Rules or under the Drugs and Cosmetics Rules, 1945. At the cost of repetition, it may be again

stated that in the present case, none of the accused persons claim to have any such licence, permit or authorisation to possess or store or use any quantity of Methamphetamine.

17. In *Rajinder Gupta v. State* (supra), the accused-applicant was a partner in the firm known as M/s.A.D.S. Associates. It was alleged that as a partner of the said firm, he had sold 2,61,000 ampoules of Buprenorphine Hydrochloride Injections under the brand name Bunogesic which he had allegedly received from M/s. Pharma Deal Agencies, New Delhi. No recovery of the said Buprenorphine Hydrochloride Injections was made from the Petitioner. On the basis of the record, it was revealed that he had sold those ampoules. Each injection was of 2 ml each bearing the branded name "Bunogesic" and each ml contained Buprenorphine Hydrochloride IP equivalent to Buprenorphine Hydrochloride 0.3 mg and water for injection. It means each ampoules contained 0.6 mg Buprenorphine Hydrochloride. Two questions were posed before the Delhi High Court, first, whether Buprenorphine Hydrochloride was a psychotropic substance and if yes, whether Chapter VII of the NDPS Rules could be applicable. It was held that Buprenorphine Hydrochloride is a psychotropic substance as shown in the Schedule to the Act. However, it was also schedule H Drug and it could be manufactured under the licence under the Drugs and Cosmetics Rules, 1945 and the said drug was manufactured by and was received from M/s. Pharma Deal Agencies by the Petitioner. It was held that the Petitioner was carrying on business in partnership and that he had received the injections which were manufactured by another company under the licence and therefore, the provisions of NDPS Act would not be applicable. In the result, the accused were granted bail. It may further be noted that the Delhi High Court also calculated the total quantity of the Buprenorphine Hydrochloride on the basis of the ampoules which were seized on the basis of certain disclosures and it was found that it was much less than the commercial quantity of 20 grams. In fact, in view of this, the case would not fall within the limits of commercial quantity to which the rigours of Section 37 NDPS Act are applicable and the bail application could be considered as per the provisions of Section 437 or 439 of the Code of Criminal Procedure. The view taken by the Delhi High Court in *Rajinder Gupta* (supra) was followed by learned Single Judge of this Court in *M.V. Henry, Intelligence Officer v. Raviprakash Goyal* (supra). In that case also, according to the prosecution, one Aslam Mohammed Shaikh was to receive a consignment of Norphazine Injections containing Buprenorphine, which is a psychotropic substance. On information, in presence of the panch witnesses and Aslam Mohammed Shaikh, search of the premises of transporter M/s. Chavla Carriers was carried out and the NCB recovered and seized 11950 ampoules of the said psychotropic substance. Said samples were manufactured by M/s. Gopish Pharma, a firm carrying on business in New Delhi. Accused Ravi Prakash Goel was a proprietor of the said firm. The said ampoules were transported from M/s. Gopish Pharma i.e. from the accused Ravi Prakash Goel to M/s. G and G Medicine Company which was the sole distribution agent for M/s. Gopish Pharma. In that case, Aslam

Mohammed Shaikh was granted bail on the ground that the quantity of the psychotropic substance was less than commercial quantity. On the same ground, Ravi Prakash Goel was also granted bail. That order was challenged by the Intelligence Officer before this Court. This Court (Coram: S.C. Dharmadhikari, J.) concurred with the view taken by Delhi High Court in respect of the Rules and held that the said drug, though a psychotropic substance, was also a schedule H drug for which the licences are given under the Drugs and Cosmetics Rules, 1945. In the result, the application for cancellation of bail was rejected. It is material to note that in paras 2 and 4 of that judgment, the learned Judge repeatedly stated that the observations and findings in the said order were only for the disposal of the bail application and those observations are only prima facie and shall not prevent the court below from recording its finding on merits at the time of the conclusion of the trial. The learned Judge further observed that the prohibition contained in the statute must be seen in the context of individual operations and the psychotropic substance, in question. This judgment was again followed by the learned Judge in Pradeep Dhond v. Intelligence Officer (supra). In Riyaz s/o. Razak Menon v. State of Maharashtra (Criminal Application No. 3196/2010) (supra), it appears that alprazolam and diazepam powders were seized from the accused. The order shows that it was argued that the said substances do not come within the ambit of Section 8(c) of the NDPS Act and that the said substance seized from the manufacturer therein may fall within the ambit of Drugs and Cosmetics Act and therefore, NDPS Act could not be applicable. The learned Judge referred to the judgments of Supreme Court in Ouseph v. State of Kerala, (2004) 4 SCC 446, Hussain Vs. State of Kerala, and State of Uttaranchal Vs. Rajesh Kumar Gupta, and held that the provisions of Section 8(c) are not applicable. Details of the facts of that case are not revealed in the judgment.

18. In State of Uttaranchal v. Rajesh Kumar Gupta, 2007(1) Crimes 6 (SC), the accused was Ayurvedacharya and he was operating from two clinics viz. Neeraj Clinic Pvt. Ltd and Dr. B.S. Gupta Medical Charitable Society. He was assisted by eight other Medical Practitioners. During the raid, 70 kg. Pure Phenobarbitone was recovered. It was also revealed that from his two clinics, huge quantity of the said drug was sold and sent to the customers by post during the years 2001 to 2005. In that case also, the Supreme Court dealt with different rules and as he was a Medical Practitioner and he claimed that he was in possession of the said drugs for the medical purposes, the case would be covered by the Drugs and Cosmetics Act and Rules thereunder and therefore, even though the said drug was also psychotropic substance within the meaning of Schedule to the NDPS Act, still the provisions of Section 8 would not be applicable. The Supreme Court upheld the grant of bail and rejected the appeal preferred by the State. The Supreme Court also noted that the Delhi High Court and Bombay High Court in the above referred two cases had taken the same view. It may be noted here that in Customs New Delhi v. Ahmadalieva Nodira, 2004 Criminal Law Journal 1810 wherein Diazepam of 5 mg. tablets were seized. Three Judge Bench of the

Supreme Court had set aside the bail granted to the accused. It may be noted that in *Pradeep Dhond (supra)*, the Union had preferred appeal before the Supreme Court and in the order dated 20th April, 2007, the Supreme Court noted the judgment in *Customs, New Delhi Vs. Ahmadalieva Nodira*, rendered by three Judge Bench and subsequent judgment of two Judge Bench in the *State of Uttaranchal v. Rajesh Kumar Gupta (supra)* and in view of the provisions of Section 80 of the NDPS Act, Their Lordships observed that the matter needs to be placed before three Judge Bench. The learned Counsel for the parties informed that the matter is still not decided by the larger Bench of the Supreme Court. The reference of the matter to the larger Bench indicates the difference of opinion by the three Judge Bench in the earlier case and the two Judge Bench in the later case and therefore, Their Lordships of the Supreme Court felt that the matter needs to be considered by the three Judge Bench again, apparently to sort out the difference of opinion. It is not necessary for this Court to make any comment about the same. In my opinion, on facts none of the above authorities including *State of Uttaranchal v. Rajesh Kumar Gupta (supra)* is applicable to the facts of the present case. In each of these cases, certain ampoules of injections were manufactured by some pharmaceutical company having certain licence under the Drugs and Cosmetics Act and Rules. In *Rajesh Kumar Gupta (supra)*, he was a Medical Practitioner running two clinics and was also helped by other Medical Practitioners. According to him, he was in possession of the said drugs for medical purposes. Thus, in each of the cases, the accused had tried to bring the case within the ambit and scope of exception to Section 8 and the Courts had come to the conclusion, for the purpose of deciding the bail applications *prima facie*, that the case was not covered by the provisions of Section 8 read with Section 22 of the NDPS Act. Therefore, either bail was granted or confirmed.

19. The whole thrust of the argument advanced by learned Counsel for the accused was based on *Rajesh Kumar Gupta (supra)* which was delivered by His Lordship Mr. Justice S.B. Sinha for the bench of Supreme Court. It is useful to note that in *D. Ramkrishnan v. Intelligence Officer, Narcotics Control Bureau* 2009 AIR SCW 4772 Mr Justice Sinha, heading the bench of Supreme Court, himself distinguished the facts of that case from the facts of *Rajesh Kumar Gupta (supra)*. In *D. Ramkrishnan (supra)* accused No. 1, who was absconding, was indulging in illegal internet pharmacy business with a branch at Coimbatore. Accused No. 2 - D. Ramkrishnan was managing the activities of the said branch. During the search it was revealed that accused No. 1 used to procure different drugs indicated by the Appellant -D. Ramkrishnan by the local pharmacy and pack them separately as per packing slips and dispatch the same to the customers through airmail and RMS post office at Coimbatore. The drugs procured and exported were Alprazolam, Lorazepam and Nitrazepam. These drugs find place at serial Nos. 30, 56 and 64 respectively of the schedule appended to the NDPS Act. However, none of these drugs were shown in schedule I to NDPS Rules. It was revealed that Appellant -D. Ramkrishnan and co-accused were said to have got license under the Drug and Cosmetics Act,

1940 which gave them general permission for import and export. After referring to the observations in paragraph 19 and 20 in *Rajesh Kumar Gupta*, His Lordship observed thus:

11. Section 80 of the Act provides that the provisions of the Act or the rules made thereunder are in addition to, and not in derogation of the Drugs and Cosmetics Act, 1940 or the rules made thereunder.

Drugs and Cosmetics Act, 1940 does not deal with exports. The provisions of Customs Act do. The licensees, therefore, were, thus, required to comply with the specific requirements of the Act and the Rules. It is not denied or disputed that the Appellant neither applied for nor granted any authority to export by the Narcotic Commissioner or any other Officer who is authorized in this behalf.

12. We, therefore, are of the opinion that the High Court is right in opining that the decision of this Court in *Rajesh Kumar Gupta* (supra) is not applicable to the facts of this case.

20. Thus, the Supreme Court itself held that unless there was necessary licence under the provisions of NDPS Act and Rules, merely because of some licence under the Drug and Cosmetics Act, the accused do not get licence or authorisation for dealing in psychotropic substances shown in NDPS Act. Thus I am supported by the judgment of the Supreme Court itself while distinguishing the facts of the present case from *Rajesh Kumar Gupta* (supra), *Pradeep Dhond* (supra) and *M.V. Henry* (supra).

21. The contention of learned Counsel for the accused that the provisions of NDPS Act would not be applicable to possession etc of Methamphetamine because it is not shown in schedule I of the NDPS Rules though it is shown in schedule appended to NDPS Act has to be rejected for one more reason. Methamphetamine is psychotropic substance shown in the schedule to NDPS Act. Section 22 of NDPS Act provides that whoever, in contravention of any provisions of the Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any psychotropic substance shall be punished according to the quantity. The commercial quantity for Methamphetamine is 50 gm. In the present case 25 Kgs. of Methamphetamine was seized from accused Nos. 1 to 4. For the offence involving commercial quantity punishment is imprisonment for a term, which shall not be less than 10 years but which may extend to 20 years with fine. Section 31 provides for enhanced punishment for offences after previous conviction. Section 31-A provides only death sentence for certain offences after previous conviction. As per Section 31-A if any person, who has been convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence punishable u/s 19, 24 and 27-A or an offence involving commercial quantity of any narcotic drug or psychotropic substance, is subsequently convicted for offence relating to engaging in the production, manufacture, possession, transportation, import into India or

transshipment, of the NDPS specified in column (1) of the Table given in Section 31-A and involving the quantity which is equal or more than quantity indicated against each such drug or substance shall be liable to punishment of death. In the table Methamphetamine is shown against entry No. (xi) and quantity prescribed is 1500 gms. It means if a person has been convicted for an offence involving commercial quantity of narcotic, drug or psychotropic substance and after that conviction he is again convicted with similar offence involving 1500 gms. of Methamphetamine the only sentence which can be awarded is death penalty. If argument of the learned Counsel for accused is accepted that merely because Methamphetamine is not shown in schedule I of the Rules, provisions of NDPS Act are not applicable, the provisions of Section 8, 22 and 31-A will become nugatory and redundant. It is impossible to hold that the provisions of NDPS Act will be governed or overshadowed by the Rules framed thereunder. u/s 76, the Central Government is empowered to make rules for carrying out purposes of the said Act and not in contravention of the said Act. Therefore, this argument advanced by learned Counsel for the accused has no basis and is liable to be rejected.

22. Learned Counsel for accused No. 5 also contends that against entry No. 30 pertaining to Methamphetamine in schedule to the NDPS Rules, name of Cambodia is not shown as country to which the said drug can not be exported. The heading of column 5 reads thus: "Country or region to which export is prohibited". In column 2 and 3, the names of narcotic drugs or psychotropic substance is shown. In column 4, its chemical name is given and in column 5 names of the countries to which export is prohibited is shown. In entry No. 30 though the name of Cambodia is not there, name of Thailand is specifically mentioned. If the heading of column 5, as noted above, is read carefully, it indicates that prohibition against export is not only to that country but also to that region in which that country is situated. Cambodia has common border with Thailand and, therefore, Cambodia is a country in the region in which Thailand is situated and, therefore, it can be held that export of Methamphetamine to Cambodia is also prohibited. Prima facie accused Nos. 5 and 6 used to provide logistic support for transshipment and export of Methamphetamine to Cambodia. Therefore, prima facie case is made out against them under NDPS Act.

23. In the present case huge quantity of 25 Kgs. of Methamphetamine was recovered from possession of accused Nos. 1 to 4 and prima facie it is shown that accused Nos. 5 and 6 were involved in transshipment and export of the said psychotropic substance. It is not the case of the accused that they had any licence, permit or authorisation either to manufacture or possess or store the said psychotropic substance. Therefore, none of the above authorities or the Rules comes to support of the accused. In fact, Rule 66 also prohibits any person from possession of any psychotropic substance for any of the purposes covered by the Drugs and Cosmetics Rules, 1945 unless he is lawfully authorised to possess a substance for any of the said purposes under the Rules. In the present case, accused do not claim to have any such authorisation. Therefore, in view of

the provisions of Section 8 read with 22 of the NDPS Act, prima facie, the accused had committed the offence of possession of commercial quantity of psychotropic substance i.e. Methamphetamine and are prima facie, liable to be convicted and sentenced u/s 22(c). Taking into consideration huge quantity which is much beyond the limits of commercial quantity also and the revelation made during the investigation that accused No. 3 was regularly dealing with export of psychotropic substances from India and that accused Nos. 1 and 2 were assisting him, no case is made out to grant bail to them. The learned Special Judge did not consider the facts of the present case and without considering the facts and the legal position, granted bail following the judgment in Ravi Prakash Goel and Pradeep Dhond (supra), without looking to the difference in the facts of the cases. In view of the above facts and circumstances, I hold that the trial court committed serious error in granting bail to the accused persons and therefore, in the larger interest of justice, it is necessary to set aside the said orders of bail.

24. Therefore, these applications are allowed and the impugned orders granting bail to accused Nos. 1 to 6 are hereby set aside. The accused persons shall immediately surrender before the Special Judge, NDPS Act and they shall be taken in custody.

25. Learned Counsel for the accused persons make request to stay operation of this order for six weeks. The request is rejected.