

GAHC010027122022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Rev.P./60/2022

MAHESH RAY @ ROY
S/O LT. RAM DAYAL RAI
PRESENT ADDRESS-
PALTAN BAZAR, K.C. SEN ROAD,
PIN-781008, DIST. KAMRUP (M), GUWAHATI, ASSAM,
PERMANENT ADDRESS-
VILL- GAUSPUR BARIARPUR
P.O. CHAKSIKANPUR
P.S. RAJAPAKAR
DIST. BAISHALI
PIN-844115, BIHAR

VERSUS

THE UNION OF INDIA AND ANR
REP. BY NARCOTICS CONTROL BUREAU.

2:SRI PHANI NARJINARY
INTELLIGENCE OFFICER NARCOTICS CONTROL BUREAU
GUWAHATI ZONAL UNIT
GUWAHATI

Advocate for the Petitioner : MR J I BARBHUIYA

Advocate for the Respondent : SC, NCB

BEFORE

HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

19.02.2024

1. Heard Mr. J.I. Barbhuiya, learned counsel for the petitioner. Also heard Mr. S.C. Keyal, learned Standing Counsel, Narcotic Control Bureau (NCB).

2. This Criminal Revision Petition has been registered on filing of an application under Section 397/401 the Code of Criminal Procedure, 1973 by the petitioner, namely, Mahesh Ray @ Roy, impugning the order dated 28.07.2020 passed by the learned Additional Sessions Judge No. 1, Kamrup(M), Guwahati in NDPS Case No. 81/2019, whereby, charges under Section 21(c)/29 of the NDPS Act, 1985 were framed against the petitioner, Mahesh Ray @Roy.

3. The facts relevant for consideration of the instant criminal revision petition, in brief, are as follows:-

(i) That on 07.05.2019 at around 12:30 PM, Sri Anil Khushwa, Intelligence Officer, Narcotics Control Bureau, Guwahati Zonal Unit received an information regarding carrying of 5 packets of phensedyl cough syrup without proper documentation by some persons, which were kept at Madhur courier Service at Lachit Nagar, Guwahati. Accordingly, a team of officials were constituted and they reached the spot at the given time, i.e., 2:30 PM and intercepted two persons, who came there to pick up the said carton boxes containing cough syrup. On search, it was found that each carton boxes contained 1,000 bottles of codeine based cough syrup. Each carton box contained following numbers of bottles of cough syrup as shown herein below: -

a) P1: 200 Bottles (Batch No. PHB 8353)

b) P2: 200 Bottles (Batch No. PHB8353)

c) P3:180 Bottles (Batch No. PHB8353)

d) P4:220 Bottles (Batch No. PHB 8357)

e) P5: 200 Bottles (Batch No. PHB 8357)

(ii) The statement of two co-accused, namely, Nirmal Kumar Shah and Jay Shankar Ray were recorded by the Investigating Officer and thereafter, notices were issued to the present petitioner, who appeared before the Investigating Officer and his statement was recorded and thereafter, he was also arrested in connection with the said case.

(iii) Thereafter, on 01.11.2019, one Phani Narjinary filed a complaint before the learned Special Judge, Kamrup(M), Guwahati and NDPS Case No. 81/2019 was registered.

(iv) On 28.07.2020, learned Additional Sessions Judge No. 1, Kamrup(M), Guwahati framed charges against the present petitioner and two other co-accused under Section 21(c)/29 of the NDPS Act, 1985.

4. Mr. J.I. Barbhuiya, learned counsel for the petitioner has submitted that though the charges under Section 21(c)/29 of the NDPS Act, 1985 have been framed against the present petitioner, however, there is nothing on record to show the total weight of contraband seized in this case. It is further submitted that though the seizure list shows that 1000 (one thousand) bottles of codeine cough syrup were seized in this case, however, what was the content

of each bottle of the seized contraband has not been mentioned anywhere and hence, it is submitted that trial court was wrong in framing charges against the present petitioner under section 21(c)/29 of the NDPS Act, 1985 as there was no basis for the court to ascertain the total quantity of the seized contraband as only the total number of bottles seized has been mentioned in the seizure list without mentioning anything regarding the total weight of the content of each bottle.

5. Learned counsel for the petitioner has also submitted that though there was considerable delay in filing the present revision petition, as the impugned order was passed on 28.07.2020, whereas, the instant revision has been filed on 10.02.2022, however, as the said period was affected by Covid-19 and as the Apex Court in Miscellaneous Application No. 21/2022 has observed that in cases where the limitation would have expired during the period between 15.03.2020 and 28.02.2022, notwithstanding the actual balance period of limitation remaining all persons shall have a limitation period of 90 days from 01.03.2022, in the event the actual balance period of limitation remaining with effect from 01.03.2022 is greater than 90 days the longer period shall apply. Learned counsel for the petitioner has submitted that in view of the aforesaid observation, as the period of limitation for filing of the instant revision petition by the petitioner would have expired within the aforesaid period as mentioned by the Apex Court, the instant case is not barred by limitation.

6. Learned counsel for the petitioner has also submitted that as per the forensic laboratory report, each bottle of cough syrup contains 163 to 169 mg of codeine and by that calculation the codeine content of all the 1000 bottles would be 169000 mg or 169 gm only, which is less than commercial quantity and hence, it is submitted that trial court erred in framing charges

under 21(c)/29 of the NDPS Act, 1985.

7. On the other hand, Mr. S.C. Keyal, learned Standing Counsel, Narcotics Control Bureau, has submitted that in the instant case, 1000 bottles of codeine cough syrup were recovered and seized and each bottle contains 100 ml of cough syrup which clearly appears from the forensic laboratory report dated 14.05.2019 which is annexed as Annexure-5 to Criminal Revision Petition by the present petitioner. It is further submitted by the learned Standing Counsel, Narcotics Control Bureau that two sealed bottles sent as samples to the forensic laboratory contain 100 ml of liquid substance in each and hence, the total weight of seized contraband would be much more than 1000 gms of codeine which is the quantity beyond which any contraband containing codeine would be considered as of commercial quantity.

8. Learned Standing Counsel, Narcotics Control Bureau has also submitted that the submissions made by learned counsel for the petitioner that only the actual content by weight of the offending narcotic drug, (i.e. the codeine in this case) should be considered relevant for the purpose of determining the question whether as to the contraband would be of commercial quantity or not is no longer a good law in view of the ruling of the Supreme Court of India in "**Hira Singh Vs. Union of India** reported in **(2020) 20 SCC 272**". Referring to the above ruling of the Apex Court, it is submitted by the learned Standing Counsel, Narcotics Control Bureau that while determining as to whether the offending drugs are of commercial quantity or of small quantity, the total weight of the mixture including the narcotic drugs and the neutral substance should be taken into consideration and it is submitted that in the instant case, as each bottle contains 100 ml of cough syrup the total weight of the seized contraband would be $100 \times 1000 = 100$ litres, which clearly falls

within the category of commercial quantity. Hence, the learned Standing Counsel, Narcotics Control Bureau has submitted that the trial court has rightly framed the charges and the impugned order needs no interference and this criminal petition is liable to be dismissed.

9. I have considered the rival submissions made by learned counsel for both the parties and have perused the materials available on record, including the scanned copy of the record of the NDPS Case No. 81/2019.

10. On perusal of the seizure memo dated 07.05.2019 prepared by the Seizing Officer in this case, it appears that total 1000 bottles of phensedyl cough syrup packed in 5(five) packets marked as P1 to P5 in (Batch No. PHB 8353 and Batch No. PHB 8357) were seized from the possession of the co-accused, Nirmal Kumar Shah and Jay Shankar Ray. Though, in the seizure list, the total numbers of bottles of phensedyl cough syrup seized have been mentioned is 1000 bottles; however, there is no mention regarding the liquid content of each of the bottle. Similarly, on perusal of the inventory of seized narcotics drugs prepared on 08.05.2019 also, it appears that the total quantity of codeine phosphate cough syrup seized has been shown as 100 bottles; however, there is no mention in the inventory regarding the total weight of the liquid content of each bottle. Further, it appears from the record that in the memorandum of charges framed against the present petitioner and the other two co-accused, there is only mention about 1000 bottles of phensedyl and there is no mention of the weight of the content of individual bottles. However, if we consider the forensic laboratory report dated 14.06.2019, it appears that there is a mention that the two sealed plastic bottles sent to the forensic laboratory as sample of the seized contraband for forensic examination consisted of 100 ml liquid substance in each and branded as phensedyl.

11. It is also pertinent to mention herein that in the complaint petition filed by the Narcotics Control Bureau, no where there is any mention about the weight of the content of each bottles seized by the Narcotics Control Bureau. There is only mentioned about seizure of 1000 bottles without mentioning the contents of each bottle.

12. Undoubtedly, there appears to be laxity on the part of the prosecution side in not mentioning about the weight of the seized contraband and only mentioning about the number of bottles seized in the seizure list, inventory, as well as in the complaint petition.

13. It is pertinent to mention herein that Section 2(vii a) of the NDPS Act, 1985 defines 'commercial quantity', in relation to narcotics drugs and psychotropic substance meaning any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette.

14. It is also pertinent to mention herein that the concerned notification issued by the Central Government has described the content of the small quantity and commercial quantity of narcotics drugs and psychotropic substances in the said notification by weight, i.e. in grams or kilograms and not by numbers. The small quantity of narcotics drugs and psychotropic substances containing codeine is mentioned at row No. 28 of the table given in the notification of the Central Government, wherein the small quantity of codeine is mentioned as less than 10 grams and the commercial quantity of codeine is mentioned as more than 1 kg. Thus, it appears that to ascertain as to whether the seized contraband containing codeine is of commercial quantity or of small quantity, the weight of seized contraband has to be mentioned in grams or kilograms and not by merely mentioning the total numbers of bottles seized without there being any mention about the total weight of the content of each

bottle.

15. Be that as it may, at the stage of framing charges by the trial court, if the Judge is of the opinion that there is ground for presuming that the accused has committed an offence, he may frame charges against the accused. What is required is only *prima facie* satisfaction on the basis of consideration of the police report and other documents and after hearing both the sides that there is ground for presuming that the accused has committed the offence. In the instant case, though neither in the complaint petition nor in the seizure list or in the inventory prepared, there is any mention about the total weight of the seized contraband, however, the forensic report dated 14.06.2019, clearly mentions that the two samples consisting of sealed plastic bottles branded as phensedyl contained 100 ml of liquid substance in each bottle. Therefore, at least at the stage of framing of charges, there was some material before the trial court for *prima facie* coming to the conclusion that each bottle of phensedyl cough syrup seized in this case contained 100 ml (equivalent to 100g) of liquid content each and therefore, though only total numbers of bottles (that is 1000 bottles) has been mentioned in the memorandum of charges, it could be presumed, for the limited purpose of framing of charges that the accused has committed the offence relating to the commercial quantity of contraband. Though, it is pertinent to mention herein that failure to prove the total weight of the contraband during trial would certainly have an impact on the outcome of the trial.

16. For the reasons stated in foregoing paragraphs, this revision petition is dismissed.

17. The stay granted by this court, by order dated 13/02/2024, on further proceeding of the trial is hereby vacated. The trial court may proceed

with the trial.

18. Registry shall send a copy of this order to the trial court immediately.

JUDGE

Comparing Assistant