

THE HIGH COURT OF TRIPURA
AGARTALA

BAIL APPLICATION NO.28 OF 2015

Sri Narayan Das,
S/O. Sri Ramen Das,
R/O. Ramthakur Sangha, Madhya Pratapgarh,
P.O:- Pratapgarh, P.S.-East Agartala,
District:-West Tripura.

..... **Petitioner.**

On behalf of:-

Sri Hrishikesh Das @ Sonai,
S/O. Sri Ramen Das,
R/O. Town Pratapgarh,
Near Ramthakur Sangha,
P.O: Agartala, P.S: West Agartala,
District: Tripura (West).

..... **Accused Person.**

- V e r s u s -

The State of Tripura,
Represented by its Secretary-cum-
Commissioner to the Department of Home,
Government of Tripura,
P.O: Kunjaban, P.S: New Capital Complex,
Dist: West Tripura.

..... **Respondent.**

BEFORE
HON'BLE THE CHIEF JUSTICE MR. DEEPAK GUPTA

For the petitioner	: Mr. A. Bhowmik, Advocate.
For the respondent	: Mr. A. Ghosh, Public Prosecutor.
Date of hearing	: 30.03.2015.
Date of judgment	: 20.04.2015.
Whether fit for reporting	: YES.

JUDGMENT & ORDER

This bail application has been filed by the petitioner Sri Narayan Das on behalf of accused Sri Hrishikesh Das who is charged with having committed an offence punishable under Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act').

2. Briefly stated, the facts of the case are that the brother of the petitioner was travelling as a passenger along with 9 other passengers in a Mahindra Cruiser on 19-02-2015. The police staff were on checking duty and stopped the vehicle and during search two numbers of hard paper cartons and two big size travelling bags were alleged to be found and these allegedly belonged to the accused. These cartons and bags contained 550 plastic bottles containing codeine based cough syrup of 100 ml. each of two different brand names. The accused was arrested and is behind bars since then and has virtually spent almost two months behind bars.

3. It is urged by Sri Arijit Bhowmik, learned counsel for the petitioner, that the accused has wrongly been charged with having committed an offence punishable under Section 22(c) of the NDPS Act and in fact the offence, if any, would be one under section 21 because this is a case of manufactured drugs. At this stage, that would be not of much consequence and the trial Court at the time of framing of Charge can see under which section the Charge is to be framed.

4. The main issue raised by Sri Bhowmik is that each 100 ml. bottle of cough syrup contained only 10 mgs. of codeine phosphate in each bottle and, therefore, the total amount of codeine present in the bottles is 5500 mg. which would be equal to 5.5 grams much below the quantity of 10 gms. specified in the schedule. He submits that the offence is at best a small quantity. Reliance has been placed by Sri A. Bhowmik on the judgment of the Apex Court in ***E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau, [(2008) 5 SCC 161]*** wherein the Apex Court held that it is only the quantity of contraband which is relevant to decide the nature of the offence.

5. However, Sri A. Ghosh, learned P.P., has brought to my notice the notification dated 18th November, 2009 issued by the Government of India and in the said notification after the schedule to the table, the following Note has been inserted:-

“(4) The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.”

6. A bare perusal of this note indicates that the Government has taken a decision that the quantity shown in

column 5 and 6 relating to the respective drugs shall apply to the entire mixture when such drugs are mixed with other substances and not just of the pure drug content. This notification virtually sets at naught the judgment of the Apex Court.

7. This is a bail application and it would not be appropriate for me to go into the merits of the case but it would be pertinent to mention that as the law now stands *prima facie* it appears to me that weight of the entire mixture shall be relevant and not only the pure drug content. In this behalf, I may make reference to the judgment of the Delhi High Court in ***Abdul Mateen vs. Union of India and another*** decided on 06-11-2012 wherein the petitioner had sought quashing of the notification dated 18-11-2009 and had urged that only the weight of the contraband drug should be taken into consideration and not of the preparation or mixture. In para-11, the Delhi High Court held as follows:-

“11. The word ‘preparation’ itself has been defined in section 2(xx) to, inter alia, mean any solution or mixture, in whatever physical state containing one or more such narcotic drug or psychotropic substance. It is obvious that if there is only one narcotic drug and we are referring to a mixture, then the other material must be a neutral material. Therefore, the word “preparation” includes reference to a mixture of one narcotic drug with a neutral material. Once we understand this, it becomes clear that the Central Government has been given the power to specify the quantity of this ‘preparation’ or mixture of a narcotic drug and a

neutral substance. Once this is accepted then there is no escape from the conclusion that the Central Government had the power to specify the quantities shown in column 5 and 6 of the Table appended to the notification dated 19.10.2001 with reference to the entire mixture and not just its pure drug content. This is so because all preparations which contain diacetylmorphine would be opium derivatives which, in turn, would be manufactured drugs and that would lead us to the expression narcotic drugs. And, ultimately to the said expression as used in section 21 of the NDPS Act. We would tend to agree with the learned counsel for the respondent that the decision of the Supreme Court in the case of E. Micheal Raj (supra) was rendered at a point of time when this so-called “loop-hole” had not been plugged and therefore it is not as if we are taking a view contrary to the Supreme Court. The Central Government, at that point of time had catered to a situation which involved a mixture of one or more narcotic drugs and psychotropic substances with or without neutral material. It had not dealt with a situation which involved one narcotic drug or one psychotropic substance with some neutral material. Unless and until there was a specific provision for it, the courts could not supply the gap particularly because these were penal provisions. Now, that the gap has been filled by the amendment to the notification dated 19.10.2001 by introducing note 4 therein, the earlier decisions would really not be applicable. We make it clear that apart from the challenge to the notification as being ultra vires the provisions of the NDPS Act, there is no challenge whatsoever to the provisions of the NDPS Act.”

8. In view of the above discussion, I am clearly of the view that the contents of the entire preparation, i.e. the cough syrup is relevant for deciding the nature of the offence.

9. It was also urged by Sri Arijit Bhowmik that it is not possible to find out the weight in view of the fact that in the bottles only the volume is given. I am not at all impressed with this argument. It is very easy to find out the weight if the exact volume is known. Therefore, I am of the view that the offence would be in relation to a commercial quantity and, therefore, the provisions of section 37 would apply.

10. Section 37 of the NDPS Act provides that where the Public Prosecutor opposes the application for grant of bail, the bail can be granted by the Court only where the Court has reasonable grounds for believing that the petitioner is not guilty of such offence and is not likely to commit any such offence while on bail. It is difficult for me to come to the conclusion that there are reasonable grounds for believing that the petitioner is not guilty of such offence. His only defence is that the bottles did not belong to him and belong to some other passengers. That will have to be decided during trial.

11. Therefore, I find no merit in the petition which is accordingly dismissed.

CHIEF JUSTICE