

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M- 31336 of 2018

Date of Decision:-13.8.2018

Salamodeen

..... Petitioner

Versus

State of Punjab

..... Respondent

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present:- Mr. D.S. Pheruman, Advocate for the petitioner.

Ms. Ruchika Sabherwal, Assistant A.G, Punjab.

GURVINDER SINGH GILL, J.

1. The petitioner Salamodeen seeks grant of regular bail in respect of a case registered against him vide FIR No.0144 registered under Sections 20, 21 and 22 of Narcotic Drugs and Psychotropic Substances Act 1985 at Police Station Division No.2, Pathankot for having been found in possession of 310 grams of '*heroin*'.
2. It is the case of prosecution that a secret information was received by Inspector (STF) Bharat Bhushan to the effect that seven persons namely Manjur Ahmad Lon, Mohammad Rafiq Chak, Mohammad Ajan Khan, Sabro Deen, Salamodeen (referred to as Salamu Din in FIR), Saf Ali and Farook Ahmad were coming in a Jeep to supply '*heroin*' and '*charas*'. Upon receipt of said information barricading was raised and a Jeep was apprehended and 6 out of the above named 7 persons were apprehended, while one managed to

escape. The present applicant Salamu Din was found to be in possession of 310 grams of 'heroin'. The remaining apprehended persons were also found in possession of some other quantities of contraband.

3. The learned counsel has mainly raised the following submissions:

- (i) *that since as per the report of the Chemical Examiner, the recovered contraband was found to contain Dicetylmorphine to the extent of 41.62% only and since only one sample of 5 grams had been sent for analysis, therefore the actual drug content in the sample weighing 5 grams works out to 2.08 grams only which would fall within the category of 'small quantity' for which the maximum sentence provided under the NDPS Act is one year. It has thus been contended that the petitioner cannot be prosecuted in respect of the quantity of contraband other than the quantity of sample as the remaining contraband was never sent for chemical examination to determine its ingredients. The learned counsel in order to hammer forth his aforesaid submission places reliance upon a judgement of Hon'ble Supreme Court rendered in AIR 1993 Supreme Court 1456 Gaunter Edwin Kircher vs. State of Goa.*
- (ii) *that even if the entire recovered contraband, though the entire has not been analysed, is held to be containing Dicetylmorphine to the extent of 41.62%, still the total active ingredient out of the recovered 310 grams of contraband would work out to 129 grams which is less than "commercial" quantity. That, further, since the validity and vires of the notification dated 18.11.2009 providing for taking into account the entire recovered contraband and not just the active ingredient, is already under challenge before Hon'ble Supreme Court, the petitioner in any case deserves the relief of bail till the same is decided. The learned counsel in order to hammer forth his*

aforesaid submission places reliance upon a judgement of Hon'ble Supreme Court rendered in Jagdish Singh vs. Union of India (Criminal Appeal 1845 of 2010, Decided on 23.9.2010.

(iii) *that in any case since the said notification dated 18.11.2009 would apply only where the contraband is a “mixture” of narcotic drugs or psychotropic substances and since in the present case the recovered contraband is not a mixture but was found to contain Diacetylmorphine 'only', therefore the said notification of 2009 would have no application and it is only the active drug content which has to be taken into account and by taking the said drug content only into account, the recovered quantity, in any case, would be less than commercial quantity.*

Submission no. (i)

4. The learned counsel, while stressing upon his first submission that entire contraband should have been sent for chemical examination, is relying upon a judgement of Hon'ble Supreme Court rendered in Gaunter Edwin Kircher's case(supra). However upon perusal of the said judgement, it is noticed that the facts of the said case were distinct and would not be applicable to the present case inasmuch as in the cited case two cylindrical pieces of charas, one weighing 5 grams and the other 7 grams were recovered and only the piece weighing 5 grams was sent for chemical examination and the other was neither sent nor any sample from the said 2nd piece was sent. It was in the said circumstances that it was held that the accused could be held liable only in respect of 5 grams of charas. Obviously, in the backdrop of recovery of two different sized articles in the cited case, a presumption could not be drawn that one was representative of the other one.

5. However the present case is a case of recovery of 'heroin' which is in form of powder and which was contained in one packet. Bearing in mind the form of contraband recovered i.e. powdered form from one packet, the sample drawn from the same would represent the entire recovered contraband unlike cases where contraband is either in shape of different lumps and pieces or is recovered from different packets/bags. It is nowhere mandated that the entire recovered contraband has to be sent for chemical examination. It is only one of the representative samples drawn which has to be sent for chemical examination. It will not be out of place to mention that on various occasions the recovered contraband is in truck-loads and it is neither possible nor feasible to either store the entire contraband for a long time or to send the entire contraband for chemical examination. That is why it is provided that representative samples be drawn out of which one sample is sent for chemical examination. Thus, the aforesaid submission being devoid of merits, is repelled.

Submission no. (ii)

6. The learned counsel, in order to contend that the petitioner is entitled to bail on account of vires of 2009 notification having been challenged in Hon'ble Supreme Court presses into service a judgement of Supreme Court rendered in Jagdish Singh's case (supra).
7. I have considered the aforesaid submission and have also perused the cited judgement. It is indeed correct that vires of the Notification dated 18.11.2009 has been challenged in Hon'ble Supreme Court and the matter has been referred to a larger bench. In the said order of referral reported as 2017(3)

RCR(Criminal) 633 Hira Singh v. Union of India, the matter has been referred to a larger bench to consider the following questions:

- (a) Whether the decision of Supreme Court in E. Micheal Raj 2008(2) RCR (Crl.) 597 requires reconsideration having omitted to take note of entry no.239 and Note 2 (two) of the notification dated 19.10.2001 as also the interplay of the other provisions of the Act with Section 21?
- (b) Does the impugned notification issued by the Central Government entail in redefining the parameters for constituting an offence and more particularly for awarding punishment?
- (c) Does the Act permit the Central Government to resort to such dispensation?
- (d) Does the Act envisage that the mixture of narcotic drug and seized material/substance should be considered as a preparation in totality or on the basis of the actual drug content of the specified narcotic drug?
- (e) Whether Section 21 of the Act is a stand alone provision or intrinsically linked to the other provisions dealing with "manufactured drug" and "preparation" containing any manufactured drug?

8. Although the aforesaid matter is still pending in Hon'ble Supreme Court but the operation of the said notification dated 18.11.2009 has not been stayed so far so as to make the said notification inoperative. As regards the judgement relied upon by the petitioner i.e. Jagdish Singh's case, in the said case the accused who was facing trial for having been found in possession of 25 kg of Methamphetamine had been granted bail by the Special Judge while relying upon a decision of Bombay High Court, delivered in case of one *Pradeep Dhond*. However, the High Court stayed the operation of said bail order on the ground that the decision in

Pardeep Dhond's case had been referred to a larger bench in Supreme Court. Upon the said stay order having been challenged in Hon'ble Supreme Court it was submitted that mere reference of a case to a larger bench was no ground to cancel bail especially since even in *Pradeep Dhond's case*, the order granting bail had not been set aside by the Supreme Court and the matter had merely been referred to a larger bench.

9. The aforestated facts would show that in *Jagdish Singh's case* (supra), Hon'ble the Supreme Court vacated the stay order passed by Bombay High Court. The Bombay High Court, by passing the stay order, had virtually cancelled the bail mainly on the ground that the decision on which the Special Court had relied upon was pending adjudication before a larger bench in Hon'ble Supreme Court. Such a consideration certainly cannot be held to be valid so as to make the bail order inoperative. It is well settled that while it is easier to grant bail, it is difficult to cancel bail. However the facts of the present case are not such so as to attract application of *Jagdish Singh's case* (supra). In any case *Jagdish Singh's* case rather reiterates that pendency of some matter in higher Court *ipso-facto* is not to be treated as any kind of "stay". Thus, the submission raised in this regard can not be accepted.

Submission no. (iii)

10. In order to consider submission no (iii) raised above, it is apposite to refer to note (4) inserted vide notification dated 18.11.2009 to earlier notification

dated 19.10.2001 defining “commercial quantities” of various contrabands. The said note (4) reads as follows:

“(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 salt of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.”

11. Bearing the language of the aforesaid note (4), the contention of learned counsel for petitioner that 2009 notification is not attracted to the present case since the recovered contraband is not found to be a “mixture” of more than one contraband cannot be accepted as the above reproduced note (4) makes it amply clear that it is not just the pure drug content but the entire quantity which has to be taken into account. The words “any one or more narcotic drugs or psychotropic substances” necessarily indicate that the ingredients of the recovered mixture need not necessarily contain two contrabands and that even if one of the ingredient is a contraband and the other is not and is some other substance, still it is the entire mixture which will have to be taken into account. In other words even the neutral content would have to be included in the weight of the contraband.
12. In view of the discussion made above and in light of the fact that the present case is a case of recovery of contraband of commercial quantity and there being nothing on record to suggest that the petitioner has been falsely implicated or that if released on bail he is not likely to indulge in similar

offences, this Court does not find any ground to grant bail to the petitioner.
The petition is without merits and is hereby dismissed.

August 13, 2018
kamal

(Gurvinder Singh Gill)
Judge

Whether speaking /reasoned	Yes / No
Whether Reportable	Yes / No