

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

CRM-M-43430-2017

Date of Decision: February 8th, 2018

Abhishek Kumar

..... Petitioner

Versus

Union Territory, Chandigarh

..... Respondent

CORAM: HON'BLE MR. JUSTICE SUDIP AHLUWALIA

Present: Mr. B.S.Jatana, Advocate for the Petitioner.

Ms. Ashima Mor, Assistant Public Prosecutor
for UT, Chandigarh.

SUDIP AHLUWALIA, J.

This is an Application under Section 439 Cr.PC in which, Petitioner is seeking his release on bail in FIR No.134 dated 21.07.2017, registered at Police Station Mauli Jagran, Chandigarh under Section 22 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (in short “NDPS Act”).

2. According to the State, the contraband in the form of 15 Injections of Buprenorphine Omgesic 2 ML each and 15 Injections of Pheniramine Maleate 10 ML each were recovered from the Petitioner. Pheniramine is stated to be outside the ambit of NDPS Act, and the total weight of Buprenorphine seized, according to the Petitioner comes to 28.33 grams, which is marginally above the commercial quantity.

3. Ld. counsel for State-UT has nevertheless opposed the Application by contending that the trial is now at an advanced stage inasmuch as only two witnesses of the prosecution now remain to be examined.

4. Be that as it may, since Ld. counsel for Petitioner has also contended that the case against him is untenable, so the grounds raised and citations placed from his side are taken up for consideration.

5. It was initially contended on behalf of Petitioner that the FIR against him was not tenable in view of the fact that there was no compliance of the provisions of Section 42 read with Section 50 of the NDPS Act. From the record however, it was verified that the present case happens to be one in which, the contraband was allegedly seized from the Petitioner as a 'chance recovery' and not on the basis of any prior knowledge or reason to believe that he was carrying the same. Hence according to State counsel, the ground raised on behalf of Petitioner is itself untenable.

6. Ld. counsel for Petitioner thereafter cited the decision of the Supreme Court in '**Mohinder Kumar v. The State, Panaji, Goa**' 1995 (2) R.C.R. (Criminal) 599 in which, the Appeal against conviction of the Appellant was allowed after observing inter-alia -

“Under Section 42(1) proviso, if the search is carried out between sun set and sun rise, he must record the grounds of his belief. Admittedly, he did not record the grounds of his belief at any stage of the investigation subsequent to his realising that the accused persons were in possession of charas. He also did not forward a copy of the ground to his superior officer, as required by Section 42(2) of the Act because he had not made any record under the proviso to Section 42(1). He also did not adhere to there provisions of Section 50 of the Act in that he did not inform the person to be searched that if he would like to be taken to a Gazetted Officer or a Magistrate, a requirement which has been held to be mandatory.”

7. From other side, Ld. counsel for UT has cited the Apex Court's decision in '**State of H.P. v. Sunil Kumar**' **2014(2) R.C.R. (Criminal) 139**. In this case, the Supreme Court set aside the judgment of this Court and upheld the Trial Court's decision convicting the Respondent for the offence under Section 20 of the NDPS Act by holding inter-alia -

“14. The expression 'chance recovery' has not been defined anywhere and its plain and simple meaning seems to be a recovery made by chance or by accident or unexpectedly. In Mohinder Kumar v. State, Panaji, Goa, 1995(2) R.C.R (Criminal) 599 : (1998)8 SCC 655 this Court considered a chance recovery as one when a police officer "stumbles on" narcotic drugs when he makes a search. In Sorabkhan Gandhkhan Pathan v. State of Gujarat, 2006(2) Apex Criminal 214 : (2004) 13 SCC 608 the police officer, while searching for illicit liquor, accidentally found some charas. This was treated as a 'chance recovery'.

15. Applying this to the facts of the present appeal, it is clear that the police officers were looking for passengers who were travelling ticketless and nothing more. They accidentally or unexpectedly came across drugs carried by a passenger. This can only be described as a recovery by chance since they were neither looking for drugs nor expecting to find drugs carried by anybody.

16. It is not possible to accept the view of the High Court that since the police officers conducted a random search and had a "positive suspicion" that Sunil Kumar was carrying contraband, the recovery of charas from his person was not a chance recovery. The recovery of contraband may not have been unexpected, but the recovery of charas certainly was unexpected notwithstanding the submission that drugs are easily available in the Chamba area. The police officers had no reason to believe that Sunil Kumar was carrying any drugs and indeed that is also not the case set up in this appeal. It was plainly a chance or accidental or unexpected recovery of charas - Sunil Kumar could well have been carrying any other contraband such as, smuggled gold, stolen property or an illegal firearm or even some other drug.”

8. The decision relied upon by UT appears to be much more applicable to the facts of the present case. This is so because according to FIR the Petitioner was chased and arrested after he tried to run away on seeing the Police who were on a Patrol duty, which caused suspicion in the mind of the Police Party. Such apprehension of the Petitioner by the Police was near Shiv Mandir 'Mauli Jagran', and not inside any closed premises and the time of the occurrence was also at 5.25 PM on 21.7.2017, which undoubtedly was when sun set could not have occurred. So, in view of the interpretation of Apex Court cited above, there was no scope for compliance of the provisions of Section 50 read with Section 42 of the NDPS Act, since the arrest of Petitioner was made by chance inasmuch as the contraband was recovered after he tried to flee away on seeing the Police, and not on the basis of any prior information.

9. Ld. counsel for Petitioner has also cited a Single Bench decision of the Kerala High Court in '**Salam v. Union of India**' 2008(1) KLT 498 in which, the Court had determined -

“Under the above circumstances, the writ petition will stand disposed of declaring that 1 gram of buprenorphine is equivalent to 3333.33 milli liters when it is a liquid form for the purpose of small quantity and declaring further that for the purpose of commercial quantity of 20 grams of buprenorphine is equivalent to 66666.60 ks.”

10. The aforesaid observations of the Single Bench of Kerala High Court are in the first place not binding upon this Court, nor need to be applied in the case of present Petitioner at this stage, since the fag end of the trial is stated to be approaching. He would be well advised to raise all such contentions in this regard at the stage of arguments after closure of the prosecution evidence, which is reported to be not very far away from now.

11. With the above observations, the present application is dismissed. However, with a direction upon the Trial Court to complete the trial as expeditiously as possible and preferably within a period of three months from the date of communication of this Order.

February 8th, 2018
AS

(SUDIP AHLUWALIA)
JUDGE

1. Whether speaking/ reasoned : Yes/ No
2. Whether reportable : Yes/ No