

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Criminal Jurisdiction)

Wednesday, the Eighth day of May Two Thousand Nineteen

PRESENT

The Hon`ble Mr Justice N. ANAND VENKATESH

CRIMINAL ORIGINAL PETITION No.221 of 2019

A.M.MANIKANDAN

[PETITIONER / ACCUSED]

Vs

THE INTELLIGENCE OFFICER [RESPONDENT]

DIRECTORATE OF REVENUE INTELLIGENCE (D.R.I.),

NO.27, G.N.CHETTY ROAD,

T.NAGAR, CHENNAI-600 017.

For Petitioner : MR.B.KUMAR SENIOR COUNSEL FOR
M/S.J.NANDAGOPAL Advocate

For Respondent : MR.N.P.KUMAR SPECIAL PUBLIC PROSECUTOR FOR DRI
CASES
PETITION FOR BAIL 439 Cr.P.C.

ORDER : The Court Made the following order :-

The petitioner, who was arrested and remanded to judicial custody on 07.07.2018, for an offence u/s 8(c) r/w Section 21, 23, 28 & 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act 1985), on the file of the respondent Police seeks bail.

2. Based on the specific information, the Officers of the Directorate of Revenue Intelligence, Chennai stopped a consignment which is covered under Shipping Bill No.5963056 dated 02/07/2018 filed by M/s.AMM Exports and Imports and they seized ESKUF bottles [320 nos] weighing 32,000 ml and Codeine Sulfate tablets [24500 tablets] weighing 2817.50 grams which were attempted to be exported in the guise of ayurvedic medicines along with cover goods which was in contravention of the provisions of the NDPS Act r/w the Customs Act. The seizure was effected on 06.07.2018. The statement of the petitioner was recorded u/s 67 of the NDPS Act before the Intelligence Officer and he is alleged to have admitted that the seized quantity of contraband was meant for export to Malaysia to one Sudakar who is having a shop at Malaysia and that for the last five years, the petitioner had exported around 100 shipments of Ayurvedic and English medicines to Malaysia.

3. Codeine is said to be the derivative of Opium and Codeine Sulphate is a Narcotic drug covered under the provisions of the NDPS Act, and it appears at serial No.28 of the Schedule. It requires proper license/authorisation from the Narcotic Commissioner for export out of India. It is alleged that the petitioner did not possess any valid license for the export. Further, as per Form 20-B issued by Assistant Director of Drugs, no sale of any drug shall be made for the purposes of resale to a person not holding the requisite license to sell, stock or exhibit for sale or distribute the drug. In the instant case, it is alleged that the petitioner did not produce such a certificate from the consignee.

4. As per the notification in S.O.1055(E) dated 19.10.2001, the Narcotic Drug namely Codeine finds a place in Sl.No.28, in which the small quantity has been described as 10 grams and the commercial quantity has been described as 1 kg. In the instant case, the total weight of the Codeine Sulphate tablets was found to be 2817.50 grams and ESKUF Syrup bottles (containing Codeine Phosphate) was found to contain 32000 ml which is 32 kgs. Therefore, on both counts, the contraband was found to be in commercial quantity as per the NDPS Schedule. The manner in which the quantity was arrived has been described in detail at para 6 of the counter filed by the respondent.

5. Mr.B.Kumar, learned Senior counsel appearing on behalf of the petitioner submitted that the possession of the drugs by itself is not an offence under the NDPS Act. The learned Senior counsel submitted that the drugs which were sent through shipment is neither restricted nor prohibited under the NDPS Act. The learned Senior counsel submitted that the petitioner is doing the drugs business from 2011 onwards and he has got a valid license till 2022. The learned Senior counsel submitted that the petitioner never attempted to conceal or not to disclose the nature of medicines that were sought to be exported. The medicines themselves were described in the invoice and also in the bill of lading. The learned Senior counsel further submitted that the Customs authorities in the normal course perused the same and they did not come to any conclusion that there was anything wrong in the consignment that was sought to be exported.

6. The learned Senior counsel brought to the notice of this Court, the definition of international convention which is defined under Section 2(ix). The learned Senior counsel specifically relied upon Clause A in the said definition which deals with the single convention on Narcotic Drugs, 1961. The learned Senior counsel submitted that according to the said convention recognising the medical use of Narcotic Drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of Narcotic Drugs for such purposes. The learned Senior counsel brought to the notice of this Court Schedule III to the said international convention which specifically deals with the list of preparations out of which Codeine is specifically dealt with and the permissible limits of the usage of Codeine in drugs is also dealt with in the said Schedule. The learned Senior

counsel also brought to the notice of this Court the definition of an essential Narcotic Drug defined under Section 2(VIIIa) which means a Narcotic Drug notified by the Central Government for medical and scientific use. In order to substantiate this definition, the learned Senior counsel also brought to the notice of this Court the notification of the Central Government dated 05.05.2015, wherein, the Central Government has notified for medical and scientific use Codeine within particular parameters to be an essential Narcotic Drug. By pointing out to the convention as well as the Notification issued by the Central Government, the learned Senior counsel submitted that the Codeine content found in the drugs seized by the respondent is well within the parameters prescribed by the convention as well as the Notification of the Central Government and therefore, the respondent cannot proceed to treat the drug as a restricted one just because, it contains Codeine as an ingredient.

7.The learned Senior Counsel further submitted that the drugs that were seized by the respondent totally contains 64 grams of Codeine content in the cough syrup and 367.5 grams of Codeine content in the tablets and totally only 431.5 grams of Codeine content is contained in the total drugs that have been seized by the respondent which is an in-between quantity and it is not a commercial quantity. For the purpose of substantiating the same, a seizure calculation memo has been filed before this Court. Therefore, the learned Senior counsel submitted that the rigour of Section 37 of the NDPS Act need not be applied in the present case, since the offence does not involve a commercial quantity.

8.The learned Senior Counsel in order to substantiate his submissions, relied upon the following decisions :

1. E.Micheal Raj .Vs. Intelligence Officer, Narcotic Control Bureau reported in 2008 Law Suit(SC) 243.

2.Mohamad Ali Jinna .Vs. Intelligence Officer, Directorate of Revenue Intelligence, Chennai-600 017 reported in 2017 Law Suit (Mad) 1166.

3.Mohamed Ali and Ors .Vs. State and Ors reported in 2017 Law Suit (Mad) 2836.

4. John Paul .Vs. Union of India & Another made in W.P.No.28715 of 2015.

5.Rajvir Singh @ Raju .Vs. State of Punjab reported in 2018 SCC Online P & H 1734.

6.Raj Kumar .Vs. State of H.P. reported in 2018 SCC Online HP 1743.

7. Hira Singh and Another .Vs. Union of India and Another reported in 2017 8 SCC 162.

8.E.Micheal Raj .Vs. Intelligence Officer, Narcotic Control Bureau reported in 2008 5 SCC 161.

9.Arvind Chandwani .Vs. The State of Madhya Pradesh made in M.Cr.C.Nos.12192, 12199 & 12208 of 2015.

9.Mr. N.P.Kumar, learned Special Public Prosecutor appearing on behalf of the respondent vehemently opposed the bail petition. A detailed counter has been filed by the respondent. Apart from reiterating the objections taken by the respondent in the counter, the learned Special public Prosecutor submitted that Rule 53 of the Narcotic Drugs and psychotropic Substance Rules 1985, specifically speaks about the Import into and Export out of India of the Narcotic Drugs and psychotropic substances. It specifically places prohibition except with an import certificate or export authorisation issued under the provisions of the said rule. The learned Special Public Prosecutor also relied upon Rules 58 and 59 which prescribes that the exporter has to file an application for export authorisation and the Narcotics Commissioner shall issue or deny the export authorisation. The learned Senior counsel also brought to the notice of this Court Rule 60 and 61 which mandates the transshipment and the procedure for transshipment with the permission of the Commissioner of Customs. The learned Special Public Prosecutor submitted that the exception in Section 8(c) of the NDPS Act covers the dealing in Narcotic Drugs or Psychotropic Substances and it is permitted only when such dealing is for medical purposes or scientific purposes. The learned Special Public Prosecutor submitted that the dealing in the Narcotic Drugs and Psychotropic Substances even if it is done for medicinal and scientific purposes does not completely lift the bar created under Section 8 (c) of the NDPS Act since it requires special permission.

10. The learned Special Public Prosecutor submitted that even though the petitioner produced a valid license issued by the Assistant Director of Drugs Controller, Tamil Nadu, the petitioner was not able to produce the export authorisation which is mandatory from the Narcotic Commissioner and the drugs were sought to be exported to a non-license holder. Therefore, the learned Special Public Prosecutor submitted that *prima facie* the petitioner has committed an offence under the NDPS Act. The learned Special Public Prosecutor placed reliance upon the judgment of the Hon'ble Supreme Court in **Mohabet Shahabudeen and Another .vs. State of Assam** made in Crl.A.No.1602 of 2012 dated 05.10.2012. The learned Special Public Prosecutor also placed reliance upon the judgment of the Hon'ble Supreme Court in **Union of India and Another .Vs. Sanjeen V. Deshpande**, reported in [2014 (14) SCC page 1].

11.The learned Special Public Prosecutor while dealing with the contention of the quantity of the contraband found in the drugs, placed specific reliance upon the notification dated 18/11/2009 made in S.O.2941(E) through which the following note was 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."

The learned Special Public Prosecutor by pointing out to the said note contended that the percentage of Narcotic Drug and Psychotropic Substance has been calculated purely in accordance with the said notification and the total quantity has been specifically arrived at in accordance with law and it is found that both in the tablet as well as in the syrup, the same contained a commercial quantity of Codeine Phosphate. The tablet contained 2817.50 grams of Codeine Sulphate and the syrup contained 32,000 ml which is again a commercial quantity as per the NDPS Schedule. The learned Special Public Prosecutor therefore submitted that the contention raised on behalf of the petitioner in this regard is also liable to be rejected by this Court. The learned Special Public Prosecutor further submitted that the Hon'ble Supreme Court has already referred to a larger Bench to sort out the controversy regarding the determination of the quantity of the contraband in a seized material in **Hirasing and Another .Vs. Unin of India** reported in [2017 8 SCC 162] and the case is at the stage of final hearing and the judgment is expected to be delivered at any time. The learned Special Public Prosecutor therefore submitted that for the present, the quantity that has been determined by the respondent is well within the notification dated 18.11.2009 and the case clearly falls within a commercial quantity and the petitioner has not satisfied the twin requirements of Section 37 of the NDPS Act.

12. This Court has carefully considered the submissions made on either side. It is an admitted case that the petitioner did not get the mandatory authorisation from the Narcotic Commissioner as required under Rule 58 and 59 of the Narcotic Drugs and Psychotropic Substances Rules 1985. Admittedly, the contraband involved falls well within the notification of the Government of India which specifically provides the export status regarding Codeine as "restricted". Therefore, the petitioner has attempted to export a huge quantity of tablets and syrup which admittedly contained the Narcotic Drug Codeine Phosphate. These tablets and syrup were attempted to be exported in the guise of Ayurvedic medicines along with cover goods which are *prima facie* in contravention of the provisions of the NDPS Act. The petitioner was not able to produce any material to show that he has obtained any authorisation from the Narcotic Commissioner for making the said export. The petitioner has also attempted to export to a non-license holder. The Drugs and Cosmetics Act deals with drugs which are intended to be used for therapeutic or medicinal usage. On the other hand, the NDPS Act is intended to curb and penalise the usage of drugs which are used for intoxication or for getting a stimulant effect. The mere fact that

the dealing in Narcotic Drugs and Psychotropic Substances is for a medical or a scientific purposes, does not by itself lift the embargo created under Section 8(c) of the NDPS Act and such dealing must be in the manner and the extent provided by the provisions of the Act and Rules made thereunder. Therefore, the contention of the learned Senior counsel appearing on behalf of the petitioner bringing to the notice of this Court the convention and the notification of the Central Government is of no avail since the petitioner has not satisfied the minimum requirement of getting the export authorisation from the Narcotic Commissioner as mandated under the NDPS Act.

13. Insofar as the issue regarding the quantity of the contraband contained in the drugs, this Court is of the *prima facie* view that the respondent has arrived at the quantity in accordance with the notification dated 18.11.2009, extracted *supra*.

14. It will also be relevant to rely upon the judgment of the Hon'ble Supreme Court in **Mohammed Sahabuddin and Another**, referred *supra* and the relevant paragraphs are extracted hereunder:

"8. The contentions of the appellants were fourfold. In the first place, it was contended that the cough syrups Phensedyl and Recodex are pharmaceutical products covered under the provisions of the Drugs and Cosmetics Act, that the Rules prescribe the measure of dosage as 5 ml and that under Rules 65 and 97 of the Drugs and Cosmetics Rules, it is lawfully permissible to sell such cough syrups in the open market, which can also be transported, kept in stock and sold in the pharmaceutical shops as a prescribed drug under Schedule H at Serial No. 132. According to the appellants, such prescribed drugs under the Rules can contain codeine to the extent permissible. While referring to Rule 97, it was contended that Schedule H drugs containing permissible extent of narcotic substance could be sold in retail on the prescription of registered medical practitioner. The learned counsel, therefore, contended that each of the 100 ml bottles, seized from the appellants, satisfy the requirement prescribed under the abovereferred to two Rules 65 and 97 and in the circumstances there was no question of proceeding against the appellants under the NDPS Act.

11. It is not in dispute that each 100 ml bottle of Phensedyl cough syrup contained 183.15 to 189.85 mg of codeine phosphate and the each 100 ml bottle of Recodex cough syrup contained 182.73 mg of codeine phosphate. When the appellants were not in a position to explain as to whom the supply was meant either for distribution or for any licensed

dealer dealing with pharmaceutical products and in the absence of any other valid explanation for effecting the transportation of such a huge quantity of the cough syrup which contained the narcotic substance of codeine phosphate beyond the prescribed limit, the application for grant of bail cannot be considered based on the above submissions made on behalf of the appellants.

12. The submission of the learned counsel for the appellants was that the content of the codeine phosphate in each 100 ml bottle if related to the permissible dosage, namely, 5 ml would only result in less than 10 mg of codeine phosphate thereby would fall within the permissible limit as stipulated in the Notifications dated 14-11-1985 and 29-1-1993. As rightly held by the High Court, the said contention should have satisfied the twin conditions, namely, that the contents of the narcotic substance should not be more than 100 mg of codeine, per dose unit and with a concentration of not more than 2.5% in undivided preparation apart from the other condition, namely, that it should be only for therapeutic practice. Therapeutic practice as per dictionary meaning means "contributing to cure of disease". In other words, the assessment of codeine content on dosage basis can only be made only when the cough syrup is definitely kept or transported which is exclusively meant for its usage for curing a disease and as an action of remedial agent.

13. As pointed out by us earlier, since the appellants had no documents in their possession to disclose as to for what purpose such a huge quantity of Schedule H drug containing narcotic substance was being transported and that too stealthily, it cannot be simply presumed that such transportation was for therapeutic practice as mentioned in the Notifications dated 14-11-1985 and 29-1-1993. Therefore, if the said requirement meant for therapeutic practice is not satisfied then in the event of the entire 100 ml content of the cough syrup containing the prohibited quantity of codeine phosphate is meant for human consumption, the same would certainly fall within the penal provisions of the NDPS Act calling for appropriate punishment to be inflicted upon the appellants. Therefore, the appellants' failure to establish the specific conditions required to be satisfied under the above referred to notifications, the application of the exemption provided under the said notifications in

order to consider the appellants' application for bail by the courts below does not arise.

15. It will also be relevant to rely upon the judgment of this Court in **Mohammed Ali and Others .Vs. State** reported in [2017 (1) Law (Cr1) 842], the relevant portions are extracted hereunder:

"[20]. In *E. Michael Raj v. Intelligence Officer, Narcotic Control Bureau*, 2008 2 SCC (Cri) 558, the isolation theory was adopted in respect of heroin and only to get over that, the notification dated 19.10.2001 was amended on 18.11.2009 with the inclusion of footnote No.4 to the notification. The constitutional validity of this amendment has been upheld by a Division Bench of this Court in *Sadiq Basha v. Union of India* in W.P.No.28702 of 2015 dated 01.10.2015 and *John Paul v. Union of India* in W.P.No.28715 of 2015 dated 01.10.2015. The said amendment also came up for consideration before a Division Bench of this Court in *M. Veludurain v. State, rep. by the Superintendent of Customs, Special Narcoic Cell, Nagercoil*, 2012 1 LAW (Cri) 70, wherein, the Division Bench held that post 18.11.2009, purity test need not be performed. In para 23 of *M.A. Jinna*, 2017 1 LW (Cri) 543, the learned Judge has stated that he finds support from the reasoning in the decision of the Apex Court in *Mohd. Sahabuddin and another vs. State of Assam*, 2012 13 SCC 491, whereas, on a closer scrutiny of the said judgment, it is seen that it is opposed to the isolation theory propounded in *M.A. Jinna*, 2017 1 LW (Cri) 543, as could be seen from para Nos.10, 11 and 12 of *Mohd. Sahabuddin's* case which are as under:

"10. It is not in dispute that each 100 ml bottle of Phensedyl cough syrup contained 183.15 to 189.85 mg of codeine phosphate and the each 100 ml bottle of Recodex cough syrup contained 182.73 mg of codeine phosphate. When the appellants were not in a position to explain as to whom the supply was meant either for distribution or for any licensed dealer dealing with pharmaceutical products and in the absence of any other valid explanation for effecting the transportation of such a huge quantity of the cough syrup which contained the narcotic substance of codeine phosphate beyond the prescribed limit, the application for grant of bail cannot be considered based on the above submissions made on behalf of the appellants.

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12. As pointed out by us earlier, since the appellants had no documents in their possession to disclose as to for what purpose such a huge quantity of Schedule H drug containing narcotic substance was being transported and that too stealthily, it cannot be simply presumed that such transportation was for therapeutic practice as mentioned in the Notifications dated 14-11-1985 and 29-1-1993. Therefore, if the said requirement meant for therapeutic practice is not satisfied then in the event of the entire 100 ml content of the cough syrup containing the prohibited quantity of codeine phosphate is meant for human consumption, the same would certainly fall within the penal provisions of the NDPS Act calling for appropriate punishment to be inflicted upon the appellants. Therefore, the appellants' failure to establish the specific conditions required to be satisfied under the above referred to notifications, the application of the exemption provided under the said notifications in order to consider the appellants' application for bail by the courts below does not arise."

[21] From a reading of the above judgment, it is beyond cavil that the Supreme Court has rejected this isolation theory and has proceeded to take into consideration the entire quantity of the seized drug.

16. The above referred judgments will clearly apply to the facts of the present case and it strengthens the above findings of this Court.

17. The petitioner has to necessarily satisfy the twin test stipulated under Section 37 of the NDPS Act, namely that he is not guilty of the offence and he would not commit an offence if he is enlarged on bail. This Court has to be satisfied on a reasonable ground that the accused person is not guilty and only then this Court can enlarge the accused person on bail otherwise, there is a bar to enlarge the accused person on bail, if he is in possession of a contraband, more than the commercial quantity. In the considered view of this Court, the petitioner has not satisfied the twin test imposed by Section 37 of the NDPS Act. In view of the same, this Court is not inclined to grant bail to the petitioner, and accordingly, this criminal original petition is dismissed.

-sd/-

08/05/2019

This order, on being produced, be punctually observed and carried into execution by all concerned

TRUE COPY

Sub-Assistant Registrar (Statistics/C.S.)
High Court, Madras - 600 104.

TO

1 THE I ADDITIONAL SPECIAL COURT
FOR NDPS ,CHENNAI

2 THE SUPERINTENDENT,
CENTRAL PRISON, PUZHAI, CHENNAI

3 THE INTELLIGENCE OFFICER
DIRECTORATE OF REVENUE INTELLIGENCE (D.R.I.),
NO.27, G.N.CHETTY ROAD,
T.NAGAR, CHENNAI-600 017.

4 THE PUBLIC PROSECUTOR
HIGH COURT, MADRAS.

+2 CC to M/S.J.NANDAGOPAL Advocate on payment of necessary charges SR.NO. 9226

CRL OP.221/2019

Date :08/05/2019

RD 10/05/2019