

HIGH COURT OF CHHATTISGARH, BILASPURMisc. Criminal Case No.2927 of 2020Order reserved on: 13-7-2020Order delivered on: 5-8-2020

Rajesh Agrawal, S/o Shri Anand Kumar Agrawal, Aged about 42 years, R/o Devendra Nagar, Sector-4, District Raipur (C.G.)

(In Jail)
---- Applicant

Versus

State of Chhattisgarh, Through Police Station Maudhapara, Raipur, District Raipur (C.G.)

---- Non-applicant

For Applicant: Mr. B.P. Sharma, Advocate.
For Non-applicant: Mr. Rahul Jha, Govt. Advocate.

Hon'ble Shri Justice Sanjay K. AgrawalC.A.V. Order

1. Proceedings of this matter have been taken-up for final hearing through video conferencing.
2. The accused/applicant has moved this bail application under Section 439 of the Code of Criminal Procedure, 1973 for releasing him on regular bail during trial in connection with Crime No.226/2019, registered at Police Station Maudhapara, Raipur, Distt. Raipur for the offence punishable under Sections 21(b), 29 and 32 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the NDPS Act').
3. Case of the prosecution, in brief, is that 50 cartons containing 7,200 bottles (one carton containing 144 bottles and one bottle containing 100 ml. of liquid) of Codeine Phosphate RC-Kuff Syrup having

Codeine was recovered from the possession of the applicant without authority of law.

4. Mr. B.P. Sharma, learned counsel for the applicant, would submit that this is the first bail application filed on behalf of the applicant for grant of regular bail, the applicant has not committed any offence and he has been falsely implicated. He would further submit that the applicant has been granted license in Form 20 – B under Rule 61(2) of the Drugs and Cosmetics Rules, 1945 to sell, stock or exhibit (or offer) for sale, or distribute drugs by wholesale Drugs specified in Schedules C, C(1) (excluding those specified in Schedule X) and the license was renewed for the period from 20-6-2017 to 19-6-2022 under Rule 63-A in Form 21C and therefore he is entitled to be released on bail.
5. Mr. Rahul Jha, learned State counsel, would oppose the bail application of the applicant and would submit that the applicant was found in possession of commercial quantity of the narcotic drug and he was having license to sell Schedules C & C(1) drugs whereas, Codeine is Schedule H drug, therefore, the applicant was not entitled to sell Schedule H drug i.e. Codeine and as such, he is not entitled to be released on bail and the application deserves to be rejected.
6. I have heard learned counsel for the parties and considered the rival submissions made herein-above and also went through the written submissions filed by learned counsel for the parties with utmost circumspection.
7. The main dispute is with regard to the quantity of Codeine Phosphate in RC-Kuff Syrup which is 50 cartons i.e. 7,200 bottles each bottle containing 100 ml. i.e. total 7,200 ml. x 100 = 7,20,000

ml. recovered from the possession of the applicant, as applicability of Section 37(1)(b) of the NDPS Act is dependent upon the quantity of narcotic drug.

8. The Supreme Court (two-Judges Bench) in the matter of **E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau**¹ held that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance(s), for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration. This view was doubted and the matter was ultimately referred to a larger Bench. Ultimately, their Lordships of the Supreme Court (three-Judges Bench) in the matter of **Hira Singh and another v. Union of India and another**² have finally set at rest the controversy by holding that in case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the “small or commercial quantity” of the Narcotic Drugs or Psychotropic Substances. Paragraph 10 of the report states as under: -

“10. In view of the above and for the reasons stated above, Reference is answered as under:

(I) The decision of this Court in the case of *E. Micheal Raj* (supra) taking the view that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight of the offending narcotic drug which is relevant for the purpose of

1 (2008) 5 SCC 161

2 2020 SCC OnLine SC 382

determining whether it would constitute small quantity or commercial quantity, is not a good law;

(II) In case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the “small or commercial quantity” of the Narcotic Drugs or Psychotropic Substances;

(III) Section 21 of the NDPS Act is not stand-alone provision and must be construed along with other provisions in the statute including provisions in the NDPS Act including Notification No.S.O.2942(E) dated 18-11-2009 and Notification S.O 1055(E) dated 19-10-2001;

(IV) Challenge to Notification dated 18-11-2009 adding “Note 4” to the Notification dated 19-10-2001, fails and it is observed and held that the same is not *ultra vires* to the Scheme and the relevant provisions of the NDPS Act. Consequently, writ petitions and Civil Appeal No. 5218/2017 challenging the aforesaid notification stand dismissed.”

9. In the light of the decision of the Supreme Court in **Hira Singh** (supra) following table would demonstrate whether the drug seized from the possession of the applicant is of small quantity or commercial quantity: -

Sr. No.	Name of Article seized	Quantity	In Lt.	Drug content	
1.	Codeine Phosphate RC-Kuff Syrup	50 cartons (one carton contains 144 bottles) 7,200 bottles	Each bottle contains 100 ml. 7,200 x 100 = 7,20,000 ml.	“Codeine”	10 gm. small quantity and commercial quantity 1 kg Sl. No. 28 of Notification S.O. 527 (E) dated 16th July, 1996

10. A careful perusal of the aforesaid table would show that small quantity of Codeine Phosphate RC-Kuff Syrup is 10 gms. and

commercial quantity is 1 Kg., whereas the applicant is found in possession of 7,20,000 ml. = 720 Kgs. of Codeine Phosphate RC-Kuff Syrup which is more than commercial quantity and therefore he was in possession of commercial quantity of the said article.

11. Now, the first question would be, whether the applicant has license to sell in wholesale the RC-Kuff Syrup (Codeine Phosphate) which contains Codeine and which is a narcotic drug under notification dated 16th July, 1996 in which the narcotic drug Codeine finds place at serial No.28 and small quantity is 10 gms., whereas commercial quantity is 1 Kg.?
12. Schedule H enacted under Rules 65 and 97 of the Drugs and Cosmetics Rules, 1945 prescribes "Prescription Drugs". Serial No.346 of Schedule H prescribes that Narcotic Drugs listed in Narcotic Drugs and Psychotropic Substances Act, 1985 will also be a Scheduled H drug.
13. The applicant has filed copy of license originally issued in Form 20 – B under Rule 61(2) of the Drugs and Cosmetics Rules, 1945 – license to sell, stock or exhibit (or offer) for sale, or distribute drugs by wholesale Drugs specified in Schedules C, C(1) (excluding those specified in Schedule X). Initially it was issued for the period from 20-6-2012 to 19-6-2017 and now, it has been renewed from 20-6-2017 to 19-6-2022 under Form 21C under Rule 63-A of the Drugs and Cosmetics Rules, 1945 and the applicant has been shown as Proprietor of M/s. Tirupati Pharma.
14. Rule 61(2) of the Drugs and Cosmetics Rules, 1945 specifies that a licence to sell, stock, exhibit or offer for sale or distribute drugs specified in Schedules C and C(1) excluding those specified in Schedule X, by retail on restricted licence or by wholesale shall be

issued in Form 21, Form 21A or Form 21B, as the case may be. It appears from the record that under Rule 61(2), the applicant has been issued license to sell, stock or exhibit (or offer) for sale, or distribute drugs by wholesale Drugs specified in Schedules C & C(1).

15. A careful perusal of Schedules C & C(1) drugs appended with the Drugs and Cosmetics Rules, 1945 would show that Codeine Phosphate RC-Kuff Syrup is not the drug scheduled in Schedules C & C(1) of the Drugs and Cosmetics Rules, 1945, rather it is, as mentioned above, covered under serial No.346 (Narcotic Drugs listed in the NDPS Act, 1985) of Schedule H drugs and mentioned in serial No.28 of notification No.S.O.527(E) dated 16th July, 1996 issued by the Central Government under clauses (viia) & (xxiia) of Section 2 of the NDPS Act. As such, the applicant does not have any license to sell, stock or exhibit (or offer) for sale, or distribute drugs by wholesale the Schedule H drug, admittedly and therefore his possession of the said drug is totally unauthorised. Therefore, the applicant's contention that he has license for selling the aforesaid narcotic drug being authorised from Novitas Health-care is totally not available to him.
16. The Supreme Court in the matter of **Union of India and another v. Sanjeev V. Deshpande**³ has clearly held that the Drugs and Cosmetics Act, 1940 deals with various operations of manufacture, sale, purchase, etc., of the drugs generally, whereas the NDPS Act deals with a mere specific class of drugs and therefore, a special law on the subject. It was further held that the provisions of the NDPS Act operate in addition to the provisions of the 1940 Act.

17. According to Section 8(c) of the NDPS Act, no person shall produce, manufacture, possess, sell, purchase, transport any narcotic drug or psychotropic substance except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation.

18. Thus, in the case in hand, rigour of Section 37(1)(b) of the NDPS Act would fully attract which states as under:-

“37. Offences to be cognizable and non-bailable.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail.”

19. A careful perusal of the aforesaid provision would show that power and jurisdiction of the court considering the application for grant of bail under the provisions of the NDPS Act is circumscribed by the

provision of Section 37 of the NDPS Act, in the case of a person accused of an offence punishable under Section 19(2), under Section 24(3), under Section 27-A(4) and also of offences involving commercial quantity. These limitations are in addition to those prescribed under the CrPC or any other law in force on the grant of bail. It can be considered and granted only in a case where there are reasonable grounds for believing by the court concerned that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. The above-stated statutory requirements are mandatory to be complied with while releasing the accused on bail.

20. The Supreme Court in the matter of **Union of India v. Ram Samujh and another**⁴, considering the issue held that several conditions imposed under Section 37(1)(b) of the NDPS Act are mandatory and observed as under: -

“8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

(i) there are reasonable grounds for believing that the accused is not guilty of such offence; and

(ii) that he is not likely to commit any offence while on bail

are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent-accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended.”

21. The Supreme Court in the matter of **State of M.P. v. Kajad**⁵ held that negation of bail is the rule and its grant an exception under sub-clause (ii) of clause (b) of Section 37(1) of the NDPS Act and for granting the bail the court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail.

22. The aforesaid legal position stands reiterated in the matter of **Sami Ullaha v. Superintendent, Narcotic Central Bureau**⁶ and **Union of India v. Rattan Mallik alias Habul**⁷ in which it has been clearly held by their Lordships of the Supreme Court that when a prosecution / conviction is for offence(s) under a special statute and that statute contains specific provisions for dealing with matters arising thereunder, including an application for grant of bail, such provisions cannot be ignored while dealing with such an application. It has been observed in paragraph 9 of **Rattan Mallik's** case (supra) as under: -

“9. The broad principles which should weigh with the court in granting bail in a non-bailable offence have been enumerated in a catena of decisions of this Court and, therefore, for the sake of brevity, we do not propose to reiterate the same. However, when a prosecution/ conviction is for offence(s) under a special statute and that statute contains specific provisions for dealing with matters arising thereunder, including an application for grant of bail, these provisions cannot be ignored while dealing with such an application.”

23. The Supreme Court in **Rattan Mallik's** case (supra) and further, in **Sanjeev V. Deshpande's** case (supra), explained the true import of

5 (2001) 7 SCC 673

6 (2008) 16 SCC 471

7 (2009) 2 SCC 624

Section 37 of the NDPS Act. Paragraph 12 of the report of **Rattan Malik's** case (supra) is as follows: -

“12. It is plain from a bare reading of the non obstante clause in Section 37 of the NDPS Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz. (i) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".”

24. In the matter of **Union of India v. Niyazuddin SK. and another**⁸, their Lordships of the Supreme Court reiterating the requirement of Section 37(1)(b) of the NDPS Act to be mandatory, held as under: -

“6. Section 37 of the NDPS Act contains special provisions with regard to grant of bail in respect of certain offences enumerated under the said section. They are :

- (1) In the case of a person accused of an offence punishable under Section 19,
- (2) Under Section 24,
- (3) Under Section 27-A and
- (4) Of offences involving commercial quantity.

7. The accusation in the present case is with regard to the fourth factor, namely, commercial quantity. Be that as it may, once the Public Prosecutor opposes the application for bail to a person accused of the enumerated offences under Section 37 of the NDPS Act, in case, the court proposes to grant bail to such a person, two conditions are to be mandatorily satisfied in addition to the normal requirements under the provisions

of CrPC or any other enactment. (1) The court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence; (2) That person is not likely to commit any offence while on bail.

8. There is no such consideration with regard to the mandatory requirements, while releasing the respondents on bail.”

25. Similarly, in the matter of **Satpal Singh v. State of Punjab**⁹, it was held that in case the quantity of narcotic drug is commercial, the court granting bail under Section 438 or 439 of the CrPC must meet-out the statutory requirement contained in Section 37(1)(b) of the NDPS Act and observed as under: -

“Leave granted. The appellant Satpal Singh (in Crl. Appeal. No. 462 of 2018) is before this Court, challenging the order dated 4-10-2017 passed by the High Court of Punjab and Haryana at Chandigarh in *Sat Pal Singh v. State of Punjab*¹⁰ rejecting his application for anticipatory bail. The High Court took note of the fact that the appellant was an accused in FIR No. 0053 dated 11-6-2017 under Sections 22 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short “the NDPS Act”), registered at Police Station Bhadson, District Patiala. Though it was argued that a coordinate Bench of the High Court had granted anticipatory bail to the co-accused, namely, Beant Singh and Gurwinder Singh, who are brothers of the appellant, as per order dated 21-9-2017¹¹, the learned Judge was not inclined to accept the contention since there was no question of parity as far as the bail is concerned and in view of the fact that the coordinate Bench had not taken note of the limitations under Section 37 of the NDPS Act. In our view, the learned Judge is perfectly right in his approach and in declining the protection under Section 438 of the Code of Criminal Procedure, 1973 (in short “CrPC”).

3. Under Section 37 of the NDPS Act, when a person is accused of an offence punishable under Section 19 or 24 or 27-A and also for offences involving commercial quantity, he shall not be released on bail unless the Public Prosecutor has been given an opportunity to oppose the application for such release, and in case a

9 (2018) 13 SCC 813

10 2017 SCC OnLine P&H 3802

11 Beant Singh v. State of Punjab, 2017 SCC OnLine P&H 3801

Public Prosecutor opposes the application, the court must be satisfied that there are reasonable grounds for believing that the person is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. Materials on record are to be seen and the antecedents of the accused is to be examined to enter such a satisfaction. These limitations are in addition to those prescribed under CrPC or any other law in force on the grant of bail. In view of the seriousness of the offence, the lawmakers have consciously put such stringent restrictions on the discretion available to the court while considering application for release of a person on bail. It is unfortunate that the provision has not been noticed by the High Court. And it is more unfortunate that the same has not been brought to the notice of the Court.

14. Be that as it may, the order dated 21-9-2017 passed by the High Court does not show that there is any reference to Section 37 of the NDPS Act. The quantity is reportedly commercial. In the facts and circumstances of the case, the High Court could not have and should not have passed the order under Section 438 or 439 CrPC without reference to Section 37 of the NDPS Act and without entering a finding on the required level of satisfaction in case the Court was otherwise inclined to grant the bail. Such a satisfaction having not being entered, the order dated 21-9-2017 is only to be set aside and we do so.”

26. Very recently, in the matter of **State of Kerala Etc. v. Rajesh Etc.**¹², their Lordships of the Supreme Court followed the principles of law laid down in **Ram Samujh's** case (supra) and clearly held that Section 37 of the NDPS Act commences with non-obstante clause and the conditions enumerated in Section 37(1)(b) have to be complied before admitting the accused on bail of the aforesaid offence under the Act in case of commercial quantity. Their Lordships explained the meaning of “reasonable grounds” in paragraph 21 of the report by holding as under in paragraphs 20 and 21 of the said report: -

“20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

21. The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.”

27. Reverting to the facts of the case in the light of the aforesaid legal position, it is quite vivid that the applicant was found in possession of 50 cartons containing 7,200 bottles (one carton containing 144 bottles and one bottle containing 100 ml. of liquid) of Codeine Phosphate RC-Kuff Syrup having Codeine. Reportedly, as per the notification issued by the Central Government dated 16-7-1996, accusation to the applicant is of commercial quantity (7,20,000 ml.) = 72 Kgs. and the rigour of Section 37 of the NDPS Act is attracted. Taking into consideration the material available on record and submissions of learned counsel for the parties, it cannot be held

that there is reasonable ground for believing that the applicant has not committed the offence.

28. Now, the ground of parity comes in. A careful perusal of the order passed in M.Cr.C.(A)No.2157/2019 (Ajay Kumar Chauhan v. State of Chhattisgarh), would show that no such commercial quantity of narcotic drug was seized from the possession of Ajay Kumar Chauhan, so the claim of parity with that of Ajay Kumar Chauhan – co-accused is not available to the applicant. Similarly, in the order dated 4-6-2020 passed in M.Cr.C.No.1211/2020 (Mohammad Sajid Tigala v. State of Chhattisgarh), it has been mentioned that only 10.4 gms. of Tramadol Hydrochloride was seized from the possession of said co-accused Mohammad Sajid Tigala and he has been granted bail on the ground that the quantity seized is more than small quantity, but less than commercial quantity, therefore, the plea of parity with that of Mohammad Sajid Tigala – another co-accused is also not available to the applicant.

29. In view of the above, the applicant is not entitled to be released on bail either on merit or on the ground of parity. Accordingly, the application is rejected.

Sd/-
(Sanjay K. Agrawal)
Judge