In the High Court for the States of Punjab and Haryana
At Chandigarh

CRM-M- 2080 -2019 (O&M)
Date of Decision : 15.12.2020

Rajpal @ Raju .....….Petitioner

Versus

State of Punjab ...….Respondent

CORAM : Hon'ble Mr. Justice Gurvinder Singh Gill

Present: Mr. Vipul Jindal, Advocate, counsel for the petitioner.

Mr. Ajay Pal Singh Gill, D.A.G., Punjab, for State.

(proceedings conducted through video conferencing)

*** * * * ***

Gurvinder Singh Gill, J.

1. The petitioner seeks grant of regular bail in case registered vide FIR No.204 dated 28.11.2018 under Sections 22, 25, 29 of NDPS Act, 1985 registered at Police Station, Majitha, District Amritsar.

2. The FIR was registered on the basis of a *'ruqa'* sent by ASI Hardev Singh to the effect that on 28.11.2018 when he along with other members of the police party was patrolling in the area of Memorial Gate, Amritsar Road, Majitha, then a secret informer furnished information to the effect that Rajpal @ Raju, Luv @ Sahil, Deepak Sharma and Narinder Pal have opened medical stores under the name and style of Devgan Medical Store and Luv Medical Store at Majitha and under the cover of the said medical stores they were selling intoxicating medicines. The information was further to the effect that on the said day Rajpal (petitioner) and Luv had gone to Amritsar on their white coloured Activa scooter bearing

registration No. PB-02-CU-5672 for purchasing intoxicating medicines and were now on their way back from Amritsar. Pursuant to receipt of aforesaid information barricading was raised and two persons riding a scooter bearing registration no. PB-02-CU-5672 were seen approaching. However, the driver of the said scooter, upon noticing the police party tried to turn back but in the process the scooter fell down. While the pillion rider managed to escape but the driver was nabbed by the police who disclosed his name as Rajpal @ Raju (petitioner). Upon search of the scooter, 1000 tablets of TRAMADOL were recovered, the possession of which could not be justified by the petitioner.

3. The learned counsel for the petitioner, while pressing for grant of bail has broadly made the following three submissions :

(i) that since the petitioner and his family are running a chemist shop i.e. M/s. Devgan Medical Store at Majitha, possession of medicines by him, even if the ingredient of which happens to be a psychotropic substance, cannot be said to be unauthorised possession;

(ii) that even if it is held that possession of the recovered medicines from the petitioner was unauthorized or was not in accordance with the prevalent rules, the same at best would constitute an offence under Drugs and Cosmetics Act, 1940 and that provisions of NDPS Act, 1985 would not come into play;

(iii) that in any case possession of Tramadol as in the month of November 2018 cannot be said to be constituting any offence under NDPS Act as the initial notification dated 26.4.2018 stood modified vide order dated 13.8.2019 passed by Government of Punjab;

4. Opposing the petition, the learned State counsel has submitted that even if it is presumed that the petitioner is a licensed chemist, still the possession of medicines containing Tramadol outside the licensed premises would be termed as unauthorized unless the petitioner could justify possession of the same on account of some legitimate reasons. It has further been submitted that in case the accused takes a stand that he was in the process of transporting the medicines having been supplied through a distributor/supplier, he would be required to produce bills issued by such distributor/supplier of the said date containing details of medicines including batch number etc. of such consignment apart from showing that the place from where the recovery has been effected falls enroute the godown/store of distributor and the medical shop of chemist. It has, thus, been submitted that since no such documents could be produced by the petitioner, the possession of such huge quantity of contraband would be an illegal possession

5. The learned State counsel has further submitted that Tramadol having been included in the list of psychotropic substances with effect from 26.4.2018 vide notification no. S.O. No. 1761(E) dated 26.4.2018, its unauthorized possession would attract NDPS Act.

6. I have heard both the learned counsel. The submissions raised on behalf of the petitioner are being discussed individually hereinunder:

7. ***Submission no. (i)*** :

The scheme of the Act, while prohibiting possession, sale, transportation etc. of narcotic drugs and psychotropic substances also provides for certain exceptions wherein under special circumstances such drugs or substances

could be possessed or sold. The basics of the scheme may be extracted as follows:

Section 8 of NDPS Act : **(PROHIBITION)**	<u>Gist of Section 8:</u> **Prohibition** as regards possession, sale and other operations pertaining to narcotic drugs and psychotropic substances **except** for medical or scientific purposes;
Rule 65-A, 66 and 67 of NDPS Rules 1985 : **(EXCEPTIONS)**	<u>Gist of Rule 65-A,66 & 67:</u> While reiterating the prohibition contained in Section 8 of NDPS Act, the said rules spell out the nature of authorization required for possession, sale, transportation etc. of *'psychotropic substances'* in exceptional circumstances as Section 8 itself provides for some exceptions. A licence issued under Drugs and Cosmetics Rules 1945 is a duly recognized exception as per Rule 65-A of NDPS Rules 1985.
Rule 61, 62, 62-A, 62-C and 62-D, of Drugs & Cosmetics Rules 1945. **(LICENCES)**	<u>Gist of Rules 61,62,62-A,62-C,62-D:</u> <u>(D & C Rules)</u> (i) Different types of licences are prescribed under the said Rules of 1945 to sell different types of drugs. (ii) A provision is also there for issuance of Licences to itinerant vendors. (iii) A separate provision has been made for issuance licences to sell drugs by wholesale or distribute drugs from a motor vehicle

8. Section 8 of NDPS Act (hereinafter referred to as the 'Act') which prohibits possession, sale, transportation etc of narcotic drugs and psychotropic substances reads as under:

> **"8. Prohibition of certain operations**.--
>
> No person shall -
>
> (a) cultivate any coca plant or gather any portion of coca plant; or
>
> (b) cultivate the opium poppy or any cannabis plant; or
>
> (c) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship 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:
>
> *Provided* that …. xxx
>
> *Provided* further that ….. xxx"

9. A perusal of Section 8 of the Act would show that while possession, sale etc. of narcotic drugs and psychotropic substances is prohibited but certain exceptions have been provided therein. It is Rule 65-A, 66 and 67 of NDPS Rules 1985, wherein circumstances under which sale, possession, transportation etc. of a psychotropic substances may be justified, have been spelt forth. Rule 65-A, 66 and 67 of NDPS Rules, 1985 read as follows:

> **65A. Sale, purchase, consumption or use of psychotropic substances.-**
>
> No person shall sell, purchase, consume or use any psychotropic substance except in accordance with the Drugs and Cosmetics Rules, 1945.

Provided that sale, purchase, consumption or use of a psychotropic substance specified in Schedule I shall be only for the purposes mentioned in Chapter VIIA.

66. Possession, etc., of psychotropic substances.-

(1) No person shall possess any psychotropic substance for any of the purposes covered under 1945 rules, unless he is lawfully authorized to possess such substance for any of the said purposes under these rules:

Provided that possession of a psychotropic substance specified in Schedule I shall be only for the purposes mentioned in Chapter VIIA.

(2) Notwithstanding anything contained in sub-rule (1), any research institution, or a hospital or dispensary maintained or supported by Govemment or local body or by charity or voluntary subscription, which is not authorised to possess any psychotropic substance under the 1945 Rules, or any Person who is not so authorised under the 1945 Rules, may possess a reasonable quantity of such substance as may be necessary for their genuine scientific requirements or genuine medical requirements, or both for such period as is deemed necessary by the said institution or, as the case may be, the said hospital or dispensary or person;

Provided that where such psychotropic substance is in possession of an individual for his personal medical use the quantity thereof shall not exceed one hundred dosage units at a time.

Provided further that an individual may possess the quantity of exceeding one hundred dosage units at a time but not exceeding three hundred dosage units at a time for his personal long term medical use if specifically prescribed by a Registered Medical Practitioner.

(3) The research institution, hospital and dispensary referred to in sub-rule (2) shall maintain proper accounts and records in relation to the purchase and consumption of the psychotropic substance in their possession.

67. **Transport of psychotropic subetances-**

(1) No consignment of psychotropic substance shall be transported, imported inter-State or exported inter-State unless such consignment is accompanied by a consignment note in Form 6 appended to these rules and in the manner as provided hereinafter:

Provided that a psychotropic substance specified in Schedule I shall be transported, imported inter-State or exported inter-State only for the purposes mentioned in Chapter VIIA:

Provided further that a psychotropic substance specified in Schedule I shall be transported for export out of India only after an export authorization is issued by the Narcotics Commissioner under rule 59.

(2) The consignment note referred in sub-rule (1) shall be prepared in triplicate and the original and duplicate copies of the said note shall be sent alongwith the consignment of psychotropic substances to the consignee who shall return the dupiicate copy of the note to the consignor for his use after endorsing on the original and duplicate copies the particulars of the receipt of the quantity consigned.

(3) -------

(4) The consignor and consignee shall keep such consignment note for a period of two years and the said note may be inspected at any time by an officer authorised in this behalf by the Central Govemment.

Provided that consignment note in Form 6 shall not apply in cases where the sale of the psychotropic substances is accompanied by a sale bill or invoice or cash memo or any other document duly signed by the consignor or his authorised signatory, which shall include the following information about the consignment:-

(a) name, address and licence number of the consignor and the consignee;

(b) description, batch number and quantity;

(c) mode and particulars of transport:

Provided further that such document shall be preserved by consignor and consignee for a period of two years for inspection by the officers referred to in sub-rule (4) above.

Explanation.-Where the consignee is a research institution, registered medical practitioner, hospital or dispensary, the requirement of incorporating licence number of consignee shall not be applicable.

10. At this juncture, it will be beneficial to peruse Rules 61, 62, 62-A, 62-C and 62-D, of Drugs & Cosmetic Rules 1945, which are hereinafter reproduced:

61. Forms of licences to sell drugs. –

(1) A licence to sell, stock, exhibit or offer for sale or distribute drugs other than those specified in Schedules C, C(1) and X and by retail or restricted licence or by wholesale, shall be issued in Form 20, Form 20-A or Form 20-B, as the case may be:

Provided that a licence in Form 20-A shall be valid for only such drugs as are specified in the licence.

(2) A licence to sell, stock, exhibit for sale or offer for sale or distribute drugs specified in Schedules C and C(1) excluding those specified in Schedule X, by retail or restricted licence or by wholesale shall be issued in Form 21, Form 21-A or Form 21-B, as the case may be:

Provided that a licence in Form 21A shall not be granted for drugs specified in Schedule C and shall be valid for only such Schedule C (1) drugs as are specified in the licence.

(3) A licence to sell, stock or exhibit for sale or offer for sale or distribute drugs specified in Schedule X by retail or by wholesale shall be issued in Form 20-F or Form 20-G, as the case may be.

62. **Sale at more than one place**. –
If drugs are sold or stocked for sale at more than one place, separate application shall be made, and a separate licence shall be issued, in respect of each such place:

Provided that this shall not apply to itinerant vendors who have no specified place of business and who will be licensed to conduct business in a particular area within the jurisdiction of the licensing authority.

62-A. Restricted licences in Forms 20-A and 21-A. –

(a) x x x

(b) Licences to itinerant vendors shall be issued only in exceptional circumstances for *bona fide* travelling agents of firms dealing in drugs or for a vendor who purchases drugs from a licensed dealer for distribution in sparsely populated rural areas where other channels or distribution of drugs are not available.

(c) The licensing authority may issue a licence in Form 21-A to a travelling agent of a firm but to no other class of itinerant vendors for the specific purpose of distribution to medical practitioners or dealers, samples of biological and other special products specified in Schedule C :

Provided that travelling agents of licensed manufacturers, agents of such manufacturers and of importers of drugs shall be exempted from taking out licence for the free distribution of samples of medicines among members of the medical profession, hospitals, dispensaries and the medical institutions or research institutions.

62-B. Conditions to be satisfied before a licence in Form 20-A or Form 21-A is granted.

(1) x xx

(2) x x x

62-C. Application for licence to sell drugs by **wholesale or to distribute** the same from a motor vehicle. –

(1) Application for the grant or renewal of a licence to sell by wholesale or to distribute from a motor vehicle shall be made to the licensing authority in **Form 19-AA** and shall be accompanied by a fee of rupees five hunded.

(2) A fee of rupees one hundred and fifty shall be paid for a duplicate copy of a licence issued under this rule, if the original is defaced, damaged or lost.

62-D. Form of licences to sell drugs by wholesale or distribute drugs from a motor vehicle. –

A licence shall be issued for sale by wholesale or for distribution from a motor vehicle of drugs other than those specified in Schedule C and Schedule C(1) in Form 20-BB and of drugs specified in Schedule C and Schedule C(1) in Form 21-BB :

> Provided that such a licence shall not be required in a case where a public carrier or a hired vehicle is used for transportation or distribution of drugs.

11. The learned counsel for the petitioner, in order to hammer forth his contention that he is a licensed chemist, has drawn attention of this Court to copies of the licenses (Annexure P-3), issued in favour M/s Devgan Medicos, of which the petitioner is a partner. The said two licenses i.e. license no. 130694 and license no. 130695 were issued on 21.2.2018 and are stated to be valid for 5 years i.e. up to 20.2.2023. While one of the Licence (FORM 20) authorizes M/s Devgan Medicos to sell stock or exhibit drugs other than those specified in Schedule C, C(1) and X, the other licence(FORM 21) authorizes M/s Devgan Medicos to sell, stock or exhibit for sale or distribute drugs by retail specified in Schedule C and C(1) but excluding those mentioned in Schedule X.

12. A perusal of both the aforesaid licenses would further show that the same have been issued for carrying out the business at a specified premises only which have been described as follows in both the licenses:

> I/S Shupla Sharma Clinic, Sohian Road,
> Near Bus Stand, Majitha, Amritsar,
> Tal : Amritsar Zone-5 (Amritsar[5] 5)

13. A perusal of the Drugs and Cosmetics Rules 1945, particularly Rule 62 as reproduced above, would make it amply clear that when a person is authorised to store medicines, the said authorisation is for specified premises only and in case business is sought to be carried out from some other premises, a separate licence would be required. In other words, the scheme does not provide that a chemist, once authorized, can carry on his

business from any premises which he chooses. Further, Rules 62-A, 62-C and 62-D of Drugs & Cosmetic Rules, 1945 would also show that certain provisions have been made for sale by itinerant vendors under some restrictive circumstances but the petitioner, in any case, does not possess any such licence as an itinerant vendor so as to justify his possession of medicines beyond the licensed premises. It is a case of a recovery of a huge quantity of 1000 'Tramadol' tablets. The petitioner could not produce any document to show that the recovered medicines were in fact in transit having been duly purchased from a distributor against a bill. In such circumstances, possession of such tablets which otherwise are meant for some therapeutic use, would be termed as unauthorised even though such possession is by a licensed chemist since such possession is neither from the licenced premises as authorized in the licence nor it can be said that the medicines were in transit in a legitimate manner. Thus, the fact that the petitioner happens to be a licenced chemist will not confer any immunity upon him in case his possession is found to be under dubious circumstances suggesting it to be a case of misuse of drugs for a purpose other than therapeutic purpose. Possession under such like circumstances, even by a licenced chemist, has to be termed as illegal. Thus, submission no. (i) can not be accepted.

14. ***Submission no. (ii)*** :

The the learned counsel has vehemently argued that since Rule 65-A of NDPS Rules, 1985 recognises an authorisation in terms of Drugs and Cosmetics Rules, 1945 and the petitioner does have licenses issued under the said rules, therefore, any irregularity in respect of possession or stocking of such medicines which he otherwise is authorized to possess,

stock or sell as per the licenses issued to him, could at best be said to be a violation of the conditions of licence entailing prosecution under Drugs and Cosmetics Act and that NDPS Act would not have any application.

15. I have considered aforesaid submission. The instant case is a case of recovery of 1000 tablets of *'Tramadol'* from possession of the petitioner from a place other than the licensed premises and in respect of which the petitioner could not produce any document to justify his possession. Such like possession, even if by a licensed chemist, would assume the character of a violation of prohibition encompassed in provisions of Section 8 of NDPS Act and the factum of mere issuance of a license in favour of such a person would not confer him with any immunity from prosecution under NDPS Act.

16. The said matter has been authoritatively set at rest by Hon'ble Supreme Court in its judgement *State of Punjab Vs. Rakesh Kumar (2019)2 SCC 466*. In the said case, the accused who was found in unauthorised possession of manufactured drugs was held guilty for having committed offences under Sections 21 and 22 of NDPS Act. Upon an appeal challenging conviction having been admitted in this Court, the sentence of imprisonment was ordered to be suspended while observing that any violation in respect of manufactured drugs, whether it contains a Narcotic Drug or Psychotropic substance, if manufactured by a manufacturer, must be tried under the Drugs and Cosmetics Act and not under the NDPS Act, except in cases where recovered substance is in loose form by way of powder, liquid etc. The State appealed against the said order and the Hon'ble Apex Court, while setting aside the said order held as follows:

"13. However, we are unable to agree on the conclusion reached by the High Court for reasons stated further. First, we note that Section 80 of the N.D.P.S Act, clearly lays down that application of the Drugs and Cosmetics Act is not barred, and provisions of N.D.P.S. Act can be applicable in addition to that of the provisions of the Drugs and Cosmetics Act. The statute further clarifies that the provisions of the N.D.P.S Act are not in derogation of the Drugs and Cosmetics Act, 1940. This Court in the case of ***Union of India v. Sanjeev V. Deshpande*** (supra), has held that,

"35. ...essentially the Drugs & Cosmetics Act, 1940 deals with various operations of manufacture, sale, purchase etc. of drugs generally *whereas Narcotic Drugs and Psychotropic Substances Act, 1985 deals with a more specific class of drugs and, therefore, a special law on the subject.* Further the provisions of the Act operate in addition to the provisions of 1940 Act."
(emphasis supplied)

15. The aforesaid decision further clarifies that, the N.D.P.S Act, should not be read in exclusion to Drugs and Cosmetics Act, 1940. Additionally, it is the prerogative of the State to prosecute the offender in accordance with law. In the present case, since the action of the accused-Respondents amounted to a *prima-facie* violation of Section 8 of the N.D.P.S Act, they were charged under Section 22 of the N.D.P.S Act."

17. In view of aforesaid discussion, especially in light of law laid down by Apex Court, the submission no.(ii) is found to be without merit and can not be accepted.

18. ***Submission no. (iii)*** :

The case in hand is a case of recovery of 1000 tablets of *'Tramadol'*. The Drugs and Cosmetics Rules, 1945 (D&C rules) were amended vide Drugs and Cosmetics (Fourth Amendment) Rules, 2013 published under Gazette notification G.S.R. 588(E) dated 30.08.2013 so as to include Schedule H-1 in the Drugs and Cosmetics Rules 1945, wherein certain antibiotics, anti-TB drugs and habit forming drugs were listed. The notification states that these rules will come into force after six months of their publication in the official Gazette and thus were effective w.e.f. March, 2014. *"Tramadol"* was one of those 46 habit-forming drug listed under Schedule H-1.

19. Further, on April 26, 2018, Department of Revenue, Ministry of Finance, vide its notification S. O. 1761(E), declared *Tramadol* as a Psychotropic substance to control its abuse/misuse, in exercise of the powers conferred by Section 3 of the Narcotic Drugs and Psychotropic Substances Act, 1985. As a result, the sale & distribution of 'Tramadol' would be under supervision and control of Narcotics Control Bureau (NCB). Simultaneously, vide another notification no. S.O. No. 1762(E) dated 26.4.2018, the 'small quantity' and 'commercial quantity' of the aforesaid psychotropic substance was specified as 5 gms and 250 gms respectively, and inserted at serial No. 238 ZH of the table which had initially been notified vide notification dated 19.10.2001. While bearing in mind the aforesaid basic position, this Court proceeds to consider the submissions raised on behalf of the petitioner.

20. The Central Government, vide notification no. S.O. 3448(E) dated 13th July, 2018, amended the aforesaid notification dated 26.4.2018 and granted

a four months' exemption to manufacturers and exporters of 'Tramadol' in order to enable them to liquidate the stock which they may be holding when 'Tramodol' came to be declared as a *'psychotropic substance* on 26.4.2018. The said amendment, by way of an insertion of a note in notification dated 26.4.2018 reads as follows:

> *"Note: The licensed manufacturers, importers and exporters of Tramadol shall be covered under the provisions of this notification after the expiry of a period of 120 days from the date of its publication in the Official Gazette.".*

21. However, as noticed above, the said exemption was available only to manufacturers and exporters and not to chemists or others. The learned counsel for the petitioner has, however, submitted that subsequently even the chemists were afforded 15 days time to clear their stocks and in this context has referred to a letter dated 13.8.2019 of Joint Commissioner (Drugs), Food and Drug Administration, Punjab, which is addressed to all the Zonal Licensing Authorities and also to all Drug Control Officers in the State of Punjab pertaining to some modification in an earlier order dated 29.7.2019 regarding imposition of certain restrictions on stocking for sale and distribution of 'Tramadol' by wholesalers, retailers, RMPs etc. A copy of the same has been passed onto this Court and the same is taken on record. The learned counsel relies upon condition (a) of said letter which reads as follows:

> (a) that all the retail-sale and wholesale chemists including C & FA, distributors, stockists etc. are not permitted to stock for sale and distribution the drug formulations containing Tramadol and Tarpentadol oral solid dosage forms in addition to already is 6 restricted drugs in the State of

> Punjab through these orders and directed to return the stocks of such drugs to the manufacturers or C & FA or distributors in writing within 15 days from the date of issue of these orders and submit stock statements before the concerned Drugs Inspector. The eligible chemists shall apply before the licensing authority for obtaining the permission for legal possession of these drugs."

22. Having perused the aforesaid letter, this Court finds that the aforesaid submission is rather misconceived. Infact, the State of Punjab, while noticing that pharmaceutical medicines which contained 'Tramadol' were being grossly misused, had issued this letter/order dated 13.8.2019 so as to take strict measures for restricting the availability of such drugs even at chemist shops. The sum and substance of said letter/order may be briefly stated as follows:

    (i) that even the licenced chemists would not be able to stock or sell Tramadol unless a special permission has been obtained from Licensing authority;

    (ii) only leading chemists with credible track-record situated within or just outside hospitals could apply for seeking permission to stock 500 tablets at a time;

    (iii) the wholesalers could get permission to stock upto 5000 tablets and the distributors upto 50,000 tablets;

    (iv) the chemists were afforded 15 days' time to return the available stocks to manufacturers or distributors and to submit stock statement to Drug Inspector.

23. Thus, as per said order dated 13.8.2019, the stocking of medicines containing 'Tramadol' was further restricted to selected chemist shops and in order to enable the remaining chemists to liquidate their available stocks,

a period of 15 days was afforded to them. The learned counsel has not shown as to whether the petitioner had obtained special permission to stock or sell Tramadol, as required pursuant to order dated 29.7.2019 as modified vide order dated 13.8.2019 passed by Food and Drug Administration, Punjab. In any case, the instant case, is not a case where the drugs in question were recovered from within the authorised premises of the chemist shop but were recovered from a place other than the authorised premises and for which the petitioner could not justify his possession. Consequently, the aforesaid submission no. (iii) is also found to be devoid of merits and cannot be accepted.

24. The recovered quantity of contraband which falls in the category of 'commercial quantity' would attract fetters imposed by Section 37 of NDPS Act in the matter of grant bail. Hon'ble Apex Court in its latest judgement *2020 (1) RCR (Criminal) 818 - State of Kerala etc. vs. Rajesh Kumar etc.* has reiterated the legal position as regards the limitations imposed by Section 37 NDPS Act and has further held that a liberal approach in matters of bail in offences under NDPS Act is uncalled for. There is nothing on record at this stage from which it could be inferred that the petitioner is not guilty of the offence in question. The petition is sans merit and is hereby dismissed.

(GURVINDER SINGH GILL)
JUDGE

15.12.2020
(kamal)

Whether reasoned / speaking? **Yes / No**
Whether reportable? **Yes / No**