

Sr.No.204

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

**CRM-11612 of 2020 and
CRM-24686 of 2020 in/and
CRM-M-13312 of 2020
Date of decision:10.11.2020**

Sukhwinder Singh @ Vicky

... Petitioner(s)

versus

State of Punjab

... Respondent (s)

Coram: Hon'ble Mr. Justice Jasgurpreet Singh Puri

**Present: Ms. Simsi Dhir Malhotra, Advocate
for the petitioner.**

Ms. Bhavna Gupta, DAG, Punjab.

Through Video Conference

Jasgurpreet Singh Puri, J.

CRM-11612 of 2020

Present application has been filed under Section 482 Cr.P.C seeking exemption from filing the process fee and permission to file the same within a period of one week on resumption of normal functioning of the Court.

Since the respondent State had already appeared on 11.06.2020, the present application has been rendered infructuous.

Disposed of.

CRM-24686 of 2020

Allowed as prayed for.

Annexure P-4 is taken on record.

CRM-M-13312 of 2020

Present petition has been filed under Section 439 Cr.P.C seeking regular bail in FIR No.148, dated 17.08.2018 for the offences punishable under Sections 22/61/85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the Act'), registered at Police Station Division No.1, District Police Commissionerate Jalandhar.

The allegations contained in the FIR are that when the police party on private vehicles was on patrolling for checking of bad elements then two gentlemen were seen coming on motor cycle and after looking at the Naka of the police, the driver of the motor cycle tried to turn back the motor cycle but the motor cycle slipped and they fell down. There was black colour glazed envelope which was in the hands of person sitting on the backside of the motor cycle who fell down on the ground. Injections which were wrapped with tape in the glazed envelope were also scattered on the ground. Thereafter, their names were asked and the driver told his name to be Rakesh Kumar @ Sunny and person sitting on the rear side told his name Sukhwinder Singh @ Vicky (petitioner). 70 injections of Pheniramine Maleate 10 ml Avil and 70 injections of Buprenorphine Rexogesic 2 ml each were allegedly recovered from them.

On 11.06.2020 when the matter came up for hearing, learned State counsel sought time to file reply and the matter was adjourned for 26.06.2020. However, no reply/affidavit has been filed in the present case.

Learned counsel for the petitioner has submitted that in the present case, the petitioner is in custody since 17.08.2018 and charges were framed by the learned Judge Special Court, Jalandhar on 02.02.2019 and

thereafter, even after expiry of 1½ years out of 9 prosecution witnesses only 4 have been examined. She has further submitted that due to the Covid-19 epidemic, the trial is being delayed. Learned counsel for the petitioner has further submitted that false case was implanted upon the petitioner and there is no other case against the petitioner. However, in one earlier case, the petitioner has already been discharged. She has further submitted that vide order dated 25.02.2020 in CRM-M-42122 of 2019 the other co-accused has already been granted bail.

Learned counsel for the petitioner has submitted that it is a case where allegation pertains to recovery of 70 injections of Pheniramine Maleate 10 ml Avil which is not covered under the NDPS Act and so far as the alleged recovery of 70 injections of Buprenorphine Rexogesic 2 ml is concerned, the same would not constitute an offence as the same was required to be used for personal medical use and therefore, the proceedings against the petitioner are otherwise, bad in law. In this regard, she has further submitted that as per medical science, Buprenorphine is used to treat dependence/addiction to opioids and it belongs to class of drugs called Mixed opioid agonist - antagonists and it helps for prevention of withdrawal symptoms caused by stopping other opioids and is used as a part of complete treatment programme for drug abuse. She has further submitted that by virtue of proviso contained in Section 66 of the Narcotic Drugs and Psychotropic Substances Rules, 1985 (for short, 'the NDPS Rules') the petitioner could have possessed less than 100 dosage for his personal medical use (although denying that any recovery was made from the petitioner). The provisions of Rule 66 of the aforesaid Rules as substituted

vide Notification No. G.S.R.224(E) dated 25.3.2015 (w.e.f. 25.3.2015) are reproduced as under:-

“66. Possession, etc., of psychotropic substances.-3[(1) No person shall possess :!ny 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.I

(2) Notwithstanding anything contained in sub-rule (1), any research institution, or a hospital or dispensary maintained or supported by Government 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 substane 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.”

Learned counsel for the petitioner has relied upon various judgments of this Court to contend that vide Rule 66 of the NDPS Rules possession of less than 100 units of Buprenorphine Rexogescic would not be considered as an offence in case the same is required for medicinal use. Reliance has been made on a Division Bench judgment of this Court

rendered in ***Saleem Mohd. vs. State of Punjab; 2015(25) R.C.R.(Criminal)***

816. Relevant portion of the judgment is reproduced as under:-

“5.The petitioner is in custody from last more than two years. There is no other case registered against him under the NDPS Act. The alleged contraband was not recovered from the petitioner's physical possession as he is said to have got it recovered while in custody.

6.The petitioner relies upon Rule 66 of the Narcotic Drugs and Psychotropic Substances Rules, 1985 to contend that even without any medical prescription, 100 doses of such like Psychotropic substance could be retained by him.

7.Having heard learned counsel for the parties and taking into consideration the total custody period of the ptitioner; his past antecedents and the legal submission based upon Rule 66 ibid but without expressing any final opinion in relation thereto, we are satisfied that no useful purpose shall be served by keeping the petitioner behind the bars and as such he deserves to be granted the concession of regular bail.”

Further, reliance has been made on judgment of this Court rendered in **CRM-M-37530 of 2015** titled as **Dr. Rajinder Singla vs. State of Punjab**. The relevant portion of the same is reproduced as under:-

“Buprenorphine Hydrochloride I.P. is also a medication and is used as a pain reliever. Recently, it is also being used to treat opiate addiction (such as addiction to heroin). It has legitimate uses as an analgesic and for de-addiction. However, it is also capable of misuser being a psychotropic substance. Perhaps because of this reason, it was left out of Schedule I to the Narcotic Drugs And Psychotropic Substances Act but is very much regulated under the D and C Act and Rules.

As indicated above, Buprenorphine Hydrochloride is a Schedule H drug under the D and C Act and Rules and, though it is a psychotropic substance under the Narcotic Drugs And Psychotropic Substances Act, it is not included in Schedule I to the NDPS Rules. That being the case, its manufacture, possession or sale is not prohibited. As such, there is no contravention of the provisions of the NDPS Rules. Consequently, the offence under Section 8 of the Narcotic Drugs And

Psychotropic Substances Act is not made out. Obviously, punishment under Section 22 of the Narcotic Drugs And Psychotropic Substances Act is also not attracted.

Accordingly in these circumstances no offence under the Narcotic Drugs And Psychotropic Substances Act is made out, the petitioner would be entitled to bail. Accordingly, he is directed to be released on bail on furnishing a personal bond in the sum of Rs.50,000/- with one surety of the like amount to the satisfaction of the concerned trial Court.”

Further reliance has been made on the judgment of this Court rendered in **CRM-M-38986 of 2018** titled as **Nitin Rajput @ Raman vs. State of Punjab** decided on 19.11.2018. The relevant portion of the same is reproduced as under:-

5. In the present case, the alleged recovery is 12 injections of Buprenorphine. As per proviso to Rule 66 of the NDPS Act, an individual can possess 100 doses of Buprenorphine Hydrochloride. The controversy with regard to Buprenorphine at Serial No.169 of the notification/Schedule of the NDPS Act, would be debatable as to whether it is a psychotropic substance or not.

6. *In view of the conflicting opinion given in Kismat Singh Vs. State of Punjab, 2012 (2) RCR (Criminal) 329 and Ajaib Singh Vs. State of Punjab, 2012 (2) RCR (Criminal) 330, wherein it was held that Buprenorphine falls under Drugs and Cosmetics Act and the salt has not been included in the Schedule I of the NDPS Rules, whereas as per judgment in case Dilip Kumar Virvani and others Vs. State of Chattishgarh, 2014 (35) RCR (Criminal) 329, Buprenorphine Hydrochloride is a psychotropic substance within the meaning of Section 2 (xxiii) of the Act. Same issue was there in judgments of this Court in cases Amandeep Vs. State of Punjab CRM-M No.250 of 2018 decided on 12.01.2018, Sonu Vs. State of Punjab CRM-M No.30008 of 2017 decided on 06.10.2017 as well as Sulakhan Singh @ Billa Vs. State of Punjab CRM-M No.1010 of 2018 decided on 24.01.2018.*

7. *Accordingly, keeping in view the ratio of law laid down in above said judgments and the orders passed under the similar circumstances, the present petition is allowed and the petitioner (Nitin Rajput @ Raman) is*

*directed to be released on regular bail on
furnishing bail/surety bonds to the
satisfaction of the trial Court.”*

Further reliance has been made on the judgment of this Court rendered in **CRM-M-52372 of 2019** titled as ***Shiv Kumar @ Shis vs. State of Punjab*** decided on 07.08.2020. The relevant portion of the same is reproduced as under:-

“3. Learned counsel for the petitioner relies upon a decision of a Co-ordinate Bench of this Court dated 19.06.2020 in CRM-M-14155 of 2020 in case titled as ‘Sukhwinder Kumar versus State of Punjab’, in which there was recovery of 85 injections of Avil and 85 injections of Buprenorphine each, containing 02 ml. In said case, the co-ordinate Bench took into account the decision in the case of ‘Dalwinder Singh versus State of Punjab’ decided on 03.05.2019 in CRM-M-10753 of 2019 in which the petitioner therein, who was in possession of 15 injections of Buprenorphine, containing 02 ml. each, was granted regular bail on account of his having put in about a year in custody, while in the case of ‘Kamaljeet Singh @ Kamal versus State of Punjab’ i.e. CRM-M-4538 of

2019, decided on 13.03.2019, the petitioner therein who was in possession of 12 injections of Buprenorphine, containing 02 ml. each was granted regular bail after having put in about 09 months in custody and in the case of 'Kuldeep Singh versus Union Territory, Chandigarh' i.e. CRM-M-1400 of 2018, decided on 19.01.2018, the petitioner therein who was in possession of 12 injections of Buprenorphine, containing 02 ml. each, was granted regular bail, after having put in about 03 months in custody. The coordinate Bench after relying on the aforementioned decisions granted bail to Sukhwinder Kumar, after taking into account that he was in custody for 01 year 04 months and 17 days and was not involved in any other case under the NDPS Act, as also the prevailing Corona Virus Pandemic and the conclusion of the trial would likely take some time.

4. Per contra, learned State Counsel, on instructions from SI Rakesh Kumar, admits the custody undergone. Learned Sr. DAG also admits that the recovery of 11 injections of Buprenorphine 2/2 ml. works

out to 22 ml. i.e. 22 grams only, that commercial quantity of Buprenorphine is 20 ml i.e. 20 gms only while the 145 injections of Pheniramine Maleate Avil 10x10 ml. recovered from the possession of petitioner do not constitute an offence under the NDPS Act. He however, contends that there were 03 other cases under the NDPS Act against the petitioner, although in one case he had been acquitted while in the second case cancellation report had been submitted and in the third case, the petitioner had undergone 03 months of imprisonment.

5. Taking into account the recovery as well as the decision of the coordinate Bench relied upon, besides the fact that the petitioner has been behind bars since 10 months and 10 days, challan has been filed but none of the 09 prosecution witnesses have been examined and the trial is like to take time on account of prevailing Corona Virus Pandemic, I am of the view that no useful purpose would be served by keeping the petitioner behind bars.”

Further reliance has been made on the judgment of this Court rendered in **CRM-M-14155 of 2020** titled as **Sukhwinder Kumar vs. State**

of Punjab decided on 19.06.2020. The relevant portion of the same is reproduced as under:-

“2. Learned counsel for the petitioner contends that the allegations in the FIR are that 85 injections of Avil and 85 injections of Buprenorphine each containing 2 ml. are stated to have been recovered from the petitioner. He further contends that Avil does not constitute an offence under the NDPS Act. The petitioner is in custody for over one year and six months and is not involved in any other case under the NDPS Act. He has relied upon the judgements of the Coordinate Benches of this Court in the case of Dalwinder Singh versus State of Punjab, passed in CRM-M-10753-2019 on 03.05.2019 whereby the petitioner therein, who was in possession of 15 injections of Buprenorphine containing 2 ml each, was granted regular bail after having put in about a year in custody; in the case of Kamaljeet Singh @ Kamal versus State of Punjab, passed in CRM-M4538 of 2019 on 13.03.2019, whereby the petitioner therein, who was in possession of 12 injections of Buprenorphine containing 2 ml each, was granted regular bail after

having put in about nine months in custody and in the case of Kuldeep Singh versus Union Territory, Chandigarh, passed in CRM-M-1400- 2018 on 19.01.2018 whereby the petitioner therein, who was in possession of 12 injections of Buprenorphine containing 2 ml each, was granted regular bail after having put in about three months in custody. Learned State counsel, upon instructions from SI Pargat Singh, Police Station Phillaur, contends that the petitioner is in custody for 01 year, 04 months and 17 days. He also contends that 01 out of 10 prosecution witnesses has been examined. Heard through video conferencing. In view of the submissions of the learned counsel for the petitioner, especially when the petitioner is in custody for over one year and four months; he is not involved in any other case under the NDPS Act; the orders of the Coordinate Benches of this Court, the COVID-19 pandemic and the conclusion of the trial is likely to take some time, I deem it a fit case to grant the concession of regular bail to the petitioner.”

On the other hand, learned State counsel while opposing the grant of bail to the petitioner submitted that it is correct that the petitioner is in custody since 17.08.2018 which is more than two years and the charges have been framed on 02.02.2019 and that out of 9 prosecution witnesses 4 have already been examined. Learned State counsel also did not dispute that there is no other case against the petitioner and there was only one earlier case in which he has already been discharged. However, learned State counsel has opposed the bail on the ground that the alleged recovery from the petitioner was 70 injections of Buprenorphine Rexogesic 2 ml which falls in the commercial quantity and therefore, it is hit by provision of Section 37 of the NDPS Act. She has further submitted that the proviso contained in Rule 66 of the NDPS Rules cannot become a ground for the grant of bail to the petitioner in view of the bar contained under Section 37 of the NDPS Act.

Learned State counsel has placed reliance on judgments of the Hon'ble Supreme Court rendered in ***Union of India vs. Niyazuddin SK & another***; AIR (2017) SC 3932 and ***State of Kerala etc. vs. Rajesh etc***; 2020(1) R.C.R.(Criminal) 818 and argued that the provisions of Section 37 of the NDPS Act are mandatory in nature and therefore, once there is alleged recovery of commercial quantity of psychotropic substance, then the petitioner will not be entitled for the grant of bail. The relevant portion of the aforesaid judgment in ***Rajesh etc(supra)*** is reproduced as under:-

“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 nonobstante 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.

22. We may further like to observe that the learned Single Judge has failed to record a finding mandated under [Section 37](#) of the [NDPS Act](#) which is a sine qua non for granting bail to the accused under the [NDPS Act](#).”

Learned State counsel has further relied upon the judgment of this Court rendered in **CRM-M-14010 of 2020** titled as **Manjit Kaur vs. State of Punjab** decided on 21.08.2020 and also on **CRM-M-40371 of 2017** titled as **Sarbjit Singh @ Sabbi vs. State of Punjab** decided on 25.07.2018 to contend that notwithstanding the fact that the alleged recovery was less than 100 injections but the same would not entitle the petitioner for the grant of bail.

I have heard the learned counsel for the parties.

In the present case it is not in dispute that the petitioner is in custody for more than two years i.e. from 17.08.2018, charges have been framed on 02.02.2019 and that out of 9 prosecution witnesses 4 have been examined. It is also not in dispute that there is no other case against the petitioner except for one earlier case in which he stands discharged. In a

Division Bench judgment of this Court in *Saleem Mohd.'s case (supra)* the petitioner was in custody for more than two years and there was no case registered against him under the NDPS Act and the petitioner had relied upon Rule 66 of the NDPS Rules, 1985 to contend that even without any medical prescription, 100 doses of such like psychotropic substance could be retained by him. This Court while taking into consideration the total custody period of the petitioner, past antecedents and the legal submissions based upon Rule 66 of the NDPS Rules, 1985 but without expressing any final opinion in relation thereto, granted concession of bail to the petitioner. In *Dr. Rajinder Singla's case (supra)* this Court held that Buprenorphine Hydrochloride is also medication and is used as a pain reliever and that the same although is a psychotropic substance under the NDPS Act but it is not included in the Schedule I of the NDPS Rules and as such there is no contravention of the provisions of NDPS Rules and consequently, the offence under Section 8 of the NDPS Act is not made out and obviously, the punishment under Section 22 of the NDPS Act is also not attracted. Therefore, the petitioner was granted bail.

In *Nitin Rajput @ Raman's case (supra)* it was held that there was recovery of 12 injections of Buprenorphine and as per proviso of Rule 66 of the NDPS Act, an individual can possess 100 doses of Buprenorphine Hydrochloride and that the controversy with regard to Buprenorphine at Sr. No.169 of the Notification of the Schedule of NDPS Act would be debatable as to whether it is a psychotropic substance or not..

In *Shiv Kumar @ Shiv's case (supra)* this Court relied upon another judgment of this Court rendered in *Sukhwinder Kumar's case (supra)* in which further reliance was also placed upon the co-ordinate

benches of this Court and there was a recovery of 85 injections of Buprenorphine in Sukhwinder Kumar's case and concession of regular bail was granted to the petitioner.

So far as the proposition of law as held in *Niyazuddin's case (supra)* and *State of Kerala etc case (supra)*, the same is no longer *res integra*. Provisions of Section 37 of the NDPS Act are mandatory in nature. However, departure can certainly be made in case the conditions contained in the aforesaid section itself are satisfied. The first condition being that the prosecution must be given an opportunity to oppose the application and the second condition being that the Court must be satisfied that there are reasonable doubts for believing that he is not guilty of such an offence and both these conditions are co-existent.

In *Manjit Kaur's case (Supra)* which has been relied upon by the learned State counsel, there was an allegation of recovery of 14 injections of Buprenorphine and the issue as to whether the possession of Buprenorphine injections would constitute an offence under the NDPS Act and Rules or not, this Court observed that the matter has been referred to the larger bench in **CRM-M-28002 of 2018** titled as **Anil Kumar @ Nehla vs. State of Punjab** on 01.10.2018. However, learned State counsel has pointed out that in the aforesaid order the question which was referred to the larger bench was '*whether the pure content of the narcotic drug/psychotropic substance alone is to be taken into consideration for determining small or commercial quantity.*' According to learned State counsel the matter which was referred to the larger bench was not with regard to the proposition as to whether the possession of Buprenorphine injection would be an offence under NDPS Act and Rules or not. She has further submitted that even

otherwise, also now the Hon'ble Supreme Court in the case of ***Hira Singh and another vs. Union of India*** in ***Crl.Appeal No.722 of 2017*** has decided the proposition of law with regard to as to whether pure content alone is to be taken or not. However, in *Manjit Kaur's case (supra)* the petitioner had history of cases under NDPS Act against him and was a habitual offender and was convicted in a number of cases and therefore, the bail was declined to him.

In *Sarabjit Singh @ Sabbi's case (supra)* this Court however, observed that Rule 66(2) of NDPS Rules were absurd and were contrary to the provisions of Section 37 of the Act. However, neither the validity of Rule 66 of NDPS Rules was challenged nor the vires of the same was decided. It is settled law that a statutory provision is presumed to be valid unless the same is struck down by a competent court of law.

In the present case, the State has been granted opportunity and time was also granted for filing of reply but the same was not filed.

It is not the case of the State that in case the bail is granted to the petitioner then there is likelihood of his tampering with the evidence or influencing of the witnessess nor the same has been pleaded by the learned State counsel. So far as the condition of existence of any reasonable ground for believing that he is not guilty of such an offence is concerned, considering the provisions of Rule 66 of NDPS Rules and aforementioned judgments the petitioner having committed an offence under Section 22 of the NDPS Act would be a debatable issue as it is also subject to fulfillment of ingredients of first proviso to Rule 66(2) of NDPS Rules. In case Rule 66(2) of NDPS Rules is applied in the present case then the same would be a

reasonable ground and something more than *prima facie* ground to believe at this stage that the petitioner is not guilty of the alleged offence. Apart from this, the fact that the petitioner is in custody for more than two years and is not involved in any other case at present is also a relevant factor. The aforesaid observations are only for the purpose of deciding the present bail application and would not in any way reflect any observation on the merits of the case.

Keeping in view the above facts and totality of circumstances of case and without expressing any opinion on the merits of the case, the present petition is allowed. Petitioner is granted the concession of regular bail. He be released on regular bail subject to furnishing bail bonds/surety to the satisfaction of the concerned Trial Court/Duty Magistrate.

10th Novemner, 2020

Shivani Kaushik

**[JASGURPREET SINGH PURI]
JUDGE**

Whether speaking/reasoned

Yes/No

Whether Reportable

Yes/No