

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.50012 of 2022

Arising Out of PS. Case No.-238 Year-2022 Thana- PATNA GRP CASE District- Patna

MUKESH KUMAR, Son of Late Binda Chaudhary, Resident of Village -
Azad Nagar Ganj, Block Road, Ward no.5, Simri, Bakhtiyarpur, District-
Saharsa.

... .. Petitioner/s

Versus

The State of Bihar

... .. Opposite Party/s

Appearance :

For the Petitioner/s : Mr. Chandra Mohan Jha, Advocate

For the Opposite Party/s : Mr. Akhileshwar Dayal, Advocate

CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
CAV JUDGMENT

Date : 14-03-2023

Heard learned counsel for the petitioner and learned
APP for the State.

2. The petitioner seeks regular bail in connection with
Special (NDPS) Case No. 47 of 2022, arising out of GRP Patna
P.S. Case No. 238 of 2022 registered for the offence punishable
under Sections 21 C/29 of the NDPS Act and under Sections
274, 275, 276/ 34 of the IPC.

3. As per prosecution case, on 25.04.2022 during the
course of checking at railway platform, petitioner with co-
accused were found in suspicious condition and on search, from
the possession of the petitioner 98 pieces of WISCOF Cough
Syrup – 100 ml containing Codeine Phosphate and Triprolidine
Hydrochloride and a touch screen mobile were recovered from



his pitthu bag and the same quantity of the said cough syrup and touch screen mobile also recovered from the co-accused from his pitthu bag. The total quantity of cough syrup recovered is 19.6 litres. They could not produce any valid document to carry the said quantity of contraband.

4. Learned counsel for the petitioner has submitted that petitioner is a student having no criminal antecedent and has been falsely implicated in the present case. He has further submitted that even if the alleged recovered 98 bottles of cough syrup from possession of the petitioner containing only 9.8 gram of Codein Phosphate if taken into account it would tantamount to small quantity and is not commercial quantity.

5. Learned counsel for the petitioner further contended that only psychotropic substance contained in the contraband is required to be taken into consideration while determining quantity of prohibited drug i.e. Codein Phosphate and not the whole of the mixture contained in the cough syrup.

6. He has further submitted that there is no independent witness to support the prosecution case. The investigation in the present case is completed and charge-sheet has already been submitted and as such there is no chance of his absconding and tampering with the evidence. The conclusion of



trial will take time, hence prayed for release of the applicant on bail.

7. Learned APP vehemently opposed the instant bail petition. He has submitted that the petitioner is indulged in illegal business of drug trafficking and thus is not entitled to bail on the contours of Section 37 of the NDPS Act. There is recovery of contraband bottles from the present accused thus there is statutory presumption under Section 35 and 54 of the NDPS Act against the accused person.

8. Learned APP has submitted that there is direct recovery of 98 pieces of WISCOF cough syrup carrying 100 ml each i.e. total 9.8 litres which was carrying in his hand in a black colour bag and there is similar recovery from the co-accused namely Ayush Kumar (a juvenile) i.e. 9.8 litres and thus the total recovery in the case is 19.600 litres and they were not having documents to keep the same in their possession. It is further submitted that total recovery in commercial quantity under the NDPS Act and the petitioner does not deserve bail.

9. To determine as to whether the petitioner was in actual possession of commercial quantity of Codein, it is relevant to refer to the notification specifying small and commercial quantity for the purpose of the Act S.O. 1055 (E)



dated 19th October, 2001 published in Gazette of India, Extra Part-II, Section 3 (ii) dated 19th October, 2001, as amended on 18.11.2009. As per entry 28 of the list, small quantity of Codein is defined as 10 gram and a commercial quantity of Codein is defined as 1kg.

10. The question for consideration in this case is as to whether for the purpose of the NDPS Act, 1985, a commercial quantity of Codein has been recovered from the petitioner and whether the rigour of Section 37 of the NDPS Act which regulate the grant of bail for offence involving commercial quantity of drugs is attracted or not.

11. The scheme of NDPS Act provides graded sentences for possession of small, intermediate and commercial quantities of narcotic drugs or psychotropic substances. Therefore, the penalties or the sentencing has a direct nexus with the amount of contraband psychotropic substance.

12. Section 21 (c) of the NDPS Act provides for punishment for contravention in relation to manufactured drugs and preparations where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than 10 years but which may extend to 20 years, and shall be liable to fine which shall not be less than one lakh



rupees but which may extend to two lakh rupees. Section 29 of the NDPS Act provides punishment for abatement and criminal conspiracy.

13. Besides, Section 37 of the NDPS Act imposes certain limitations when granting bail for offences involving a commercial quantity of narcotic drugs or psychotropic substances. These limitations are in addition to those under the Cr.P.C. or any other law for the time being in force.

14. The judgment of **Hira Singh vs. Union of India (AIR 2020 SC 3255)** squarely covers the issue and the Hon'ble Supreme Court held that total weight of the manufactured drug or preparation including the neutral material is required to be considered while determining small quantity or commercial quantity.

15. In **Hira Singh (supra)**, the three Judge Bench of the Hon'ble Supreme Court had held thus:-

“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 Narcotic Drugs or Psychotropic Substances.”



16. The **Hon'ble S.C.** in the order dated 17.11.2022 in **Intelligence Officer, Thiruvananthapuram vs. Naushad K.K. & Ors. (2022 Livelaw (SC)978) Cr. App. No. 1726 of 2019** reiterated that neutral substance quantity cannot be ignored while labeling the quantity of contraband recovered on 'small quantity' or commercial quantity.

*“There is no cavil to the issue that the judicial pronouncement now settles the issue in **“Hira Singh & Anr. vs. Union of India & Anr.”** reported as 2020 SCC online SC 382 opining that the decision of this Court relied upon in impugned order **“E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau (2008) 5 SCC 161”** is no more good law and in determining as to what is the quantity, the neutral substance quantity is not be ignored”.*

17. In view of the gravity of the consequences of drug trafficking, the offences under the NDPS Act have been made cognizable and non-bailable. To prevent the devastating impact on the people of nation, parliament in its wisdom deemed it fit to introduce stringent conditions for grant of bail under the Act. Section 37 (b) (i) gives effect to the doctrine of *audi alteram partem*. Since the crime is an act against the society, the legislature has contemplated that public prosecutor must be



given an opportunity to oppose the bail application under the Act. Additionally, under Section 37 (b) (ii) of the NDPS Act, the Court is not required to be satisfied about the dual conditions i.e. *prima facie* opinion of the innocence of the accused and that the accused will not commit a similar offence while on bail, but the court must have “reasonable grounds” for such satisfaction. The standard of satisfaction in such cases is more than satisfaction on a *prima facie* opinion.

18. The accused at this stage cannot be presumed to be ‘not guilty’ of the offence that he is charged with. Additionally, the presumption under Section 35 and 54 of the NDPS Act are against the petitioner's innocence. Since this court is not satisfied on this ground, there is no question to consider that the accused will not commit the offence while on bail.

19. The quantity of Codein seized from the petitioner comes under the commercial quantity being 9.8 litres (98x100ml) cough syrup which is much more than commercial quantity for Codein (mention in Sr. No. 28 of the Table) as the quantity seized shall apply to the entire mixture or solution. Hence, the rigors of Section 37 of the NDPS Act, 1985 is attracted in this case. The conditions stipulated under Section 37 of the Act are not satisfied and there are no reasonable grounds



to presume that petitioner is not guilty of offence, accordingly, this is not a fit case where the petitioner be admitted to bail.

20. Accordingly, the prayer for bail of the abovenamed petitioner is rejected. Considering the facts and circumstances of this case, the petitioner is directed to surrender within two weeks from today and in case of non-compliance of this direction by the petitioner, the learned court below is directed to take the necessary steps for arrest of the accused/petitioner after the said period granted for his surrender.

(Sunil Dutta Mishra, J)

khushbu/-

AFR/NAFR	AFR
CAV DATE	22.02.2023
Uploading Date	14.03.2023
Transmission Date	

