

CRM-M-8267-2023

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-8267-2023
Reserved on: 24.04.2023
Pronounced on: 17.05.2023

Arshdeep Singh @ Arsh ...Petitioner

Versus

State of Punjab ...Respondent

CORAM: HON'BLE MR. JUSTICE ANOOP CHITKARA

Present: Mr. L.S. Sekhon, Advocate for the petitioner.

Mr. I.P.S. Sabharwal, DAG, Punjab.

ANOOP CHITKARA, J.

FIR No.	Dated	Police Station	Sections
13	08.02.2021	Sadar Sangrur, District Sangrur	22 & 29 of NDPS Act and 483 IPC

1. The petitioner incarcerated for violating the above-mentioned provisions of Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act) as per the FIR captioned above, on the allegations of transporting 11500 tablets of CLOVIDOL containing Tramadol Hydrochloride, which in all is multiple times more than the commercial quantity, has come up before this Court under Section 439 CrPC seeking bail.
2. In paragraph 17 of the bail petition, the accused declares that he has no criminal antecedents. Although as per the status report, there is one more FIR; however the said FIR is not found to be against the petitioner but against co-accused Munish Kumar.
3. The petitioner contends that the pre-trial incarceration would cause an irreversible injustice to the petitioner and family.
4. While opposing the bail, the contention on behalf of the State is that the quantity of contraband involved in the case falls in the commercial category.

REASONING:

5. On February 08, 2021, the petitioner along with his two accomplices was travelling on a bike and on seeing the police, the driver of the bike, Manish Kumar became perplexed and after that the person sitting in the middle Umesh threw a bag on the road, from which tablets spread on the road. The petitioner was sitting on the

CRM-M-8267-2023

back seat. The Investigator arrested all the three persons on jointly possessing Tramadol.

6. As per FSL report, total weight of one tablet is 521 mg. Thus, the total weight of 11,500 tablets would be 5991.5 grams. NDPS Act would make it a punishable offence in the following terms:

Substance Name	Tramadol
Quantity detained	5991.5 Gram
Quantity type	Commercial
Drug Quantity in % to upper limit of Intermediate	2396.60%

Specified as small & Commercial in S.2(viia) & 2(xxiii) NDPS Act, 1985	
Notification No	S.O.1762(E)
dated	4/26/2018
Sr. No.	238 ZH
Common Name (Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN)	Tramadol
Other non-proprietary name	*****
Chemical Name	*****
Small Quantity	5 Gram
Commercial Quantity	250 Gram

Declared as punishable under NDPS Act and as per schedule defined in S.2(xi) & 2(xxiii) NDPS Act, 1985	
Notification No	S.O.1761(E) & S.O. 3448(E)
dated	26-Apr-2018 & 26-Jul-2018
Sr. No.	110Y
Common Name (Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN)	Tramadol
Other non-proprietary name	*****
Chemical Name	*****

7. Thus, the quantity allegedly involved in this case is commercial. Given this, the rigours of S. 37 of the NDPS Act apply in the present case. The burden is on the petitioner to satisfy the twin conditions put in place by the Legislature under Section 37 of the NDPS Act.

8. The petition states that the accused is entitled to bail because of the non-examination of independent witnesses. However, this plea would gather force only when the accused establishes after cross-examination that the police deliberately did

CRM-M-8267-2023

not associate any independent witness even when they could have been made available, and in the facts and circumstances peculiar to this case, the argument does not satisfy the requirements of section 37 of NDPS Act.

9. In State of Punjab v Baldev Singh, (1999) 6 SCC 172, the Constitutional bench of Hon'ble Supreme Court holds,

[14]. The provisions of Sections 100 and 165 Cr.P.C. are not inconsistent with the provisions of the NDPS Act and are applicable for effecting search, seizure or arrest under the NDPS Act also. However, when an empowered officer carrying on the investigation including search, seizure or arrest under the provisions of the Code of Criminal Procedure comes across a person being in possession of the narcotic drugs or the psychotropic substance, then he must follow from that stage onwards the provisions of the NDPS Act and continue the investigation as provided thereunder. If the investigating officer is not an empowered officer then it is expected of him that he must inform the empowered officer under the NDPS Act, who should thereafter proceed from the stage in accordance with the provisions of the NDPS Act. In Balbir Singh's case after referring to a number of judgments, the Bench opined that failure to comply with the provisions of Cr.P.C. in respect of search and seizure and particularly those of Sections 100, 102, 103 and 165 *per se* does not vitiate the prosecution case. If there is such a violation, what the courts have to see is whether any prejudice was caused to the accused. While appreciating the evidence and other relevant factors, the courts should bear in mind that there was such a violation and evaluate the evidence on record keeping that in view.

10. The petition states that the the police party was travelling in a private vehicle which is illegal. However, whether they were travelling in a private vehicle to remain discreet or was an illegality, is a matter of trial and petitioner is not entitled to bail on this ground.

11. Ld. counsel for the petitioner submits that the investigator conducted search and seizure violating sections 42 and 50 of the NDPS.

12. Whether the Investigator complied with the mandatory provisions of sections 42 and 50 of the NDPS Act is a question of fact to be adjudicated in the trial. However, before this court treats the compliances as illegal, the prosecution needs an opportunity to prove that they had complied with the mandatory provisions per law. Such stage would come only during the trial and certainly not at the bail stage, where it would be hit by the maxim *Audi alteram partem*. The exception to this would be applicable only when the non-compliance of the mandatory provisions of sections 42 and 50 of the NDPS Act is apparent on the face of the special report under section 57 of the NDPS Act and other documents of search and seizure, and in the opinion of the court, the lapse is non-rectifiable, after recording a finding that it is an incurable defect, the court might consider granting bail on such violations.

13. In State of H.P. v. Prithi Chand, (1996) 2 SCC 37, Hon'ble Supreme Court holds,

[3]. The question is whether the learned Sessions Judge was justified, at the stage of taking cognizance of the offence, in discharging the accused, even before the trial was conducted on merits, on the ground that the provisions of Section 50 of the Act had not been complied with. This Court in State of Punjab v. Balbir Singh [(1994) 3 SCC 299] : (AIR 1994 SCW 1802) has considered the provisions of the Act. Section 50 has been held to be mandatory. In paragraph 16, this Court has held that it is obligatory on the part of the empowered or the authorised officer to inform the suspect that, if so required, he would be produced before a Gazetted Officer or a Magistrate and search would be conducted in his presence. It was imperative on the part of the Officer to inform the person of the above right and if he failed to do the same, it amounted to violation of the requirement of Section 50 of the Act. It was held that when the person was searched he must have been aware of his right and that it could be done only if the authorised or empowered Officer informed him of the same. Accordingly, this Court by implication read the obligation on the part of authorised Officer to inform the person to be searched of his right to information that he could be searched in the presence of the Gazetted Officer or the Magistrate. In Saiyad Mohd. Saiyaad Umar Saiyed v. State of Gujarat [1995(3) JT SC 489] a three-Judge Bench of this Court had reiterated the above view and held that having regard to the grave consequences that might entail the possession of illicit articles under the Act, viz., the shifting of the onus to the accused and the severe punishment to which he became liable, the Legislature had enacted safeguards contained in Section 50. Compliance of the safeguards in Section 50 is mandatory obliging the Officer concerned to inform the person to be searched of his right to demand that search could be conducted in the presence of a Gazetted Officer or a Magistrate. The possession of illicit article has to be satisfactorily established before the Court. The Officer who conducts search must state in his evidence that he had informed the accused of his right to demand, while he is searched, in the presence of a Gazetted Officer or a Magistrate and that the accused had not chosen to so demand. If no evidence to that effect is given, the Court must presume that the person searched was not informed of the protection the law gives him and must find that possession of illicit articles was not established. The presumption under Article 114, illustration (e) of the Evidence Act, that the official duty was properly performed, therefore, does not apply. It is the duty of the Court to carefully scrutinise the evidence and satisfy that the accused had been informed by the concerned Officer that he had a right to be searched before a Gazetted Officer or a Magistrate and that the person had not chosen to so demand.

[4]. It is to be seen whether the accused has been afforded such a right and whether the authorised Officer has violated the mandatory requirement, as a question of fact, has to be proved at the trial. In Pooran Mal v. Director of Inspection [(1974) 1 SCC 345] : (AIR 1974 SC 348) a Constitution Bench of this Court had held that power of search and seizure, is, in any system of jurisprudence, an overriding power of the State for the protection of social security and that power is necessarily regulated by law. A search by itself is not a restriction on the right to hold and enjoy property, though seizure is a temporary restriction to the right of possession and enjoyment of the property seized. However, the seizure will be only temporary and limited for the purpose of the investigation. The power of search and seizure is

an accepted norm is our criminal law envisaged in Sections 96 to 103 and 165 of the Criminal Procedure Code, 1973 [for short, "the Code"]. The Evidence Act permits relevancy as the only test of admissibility of evidence. The evidence obtained under an illegal search and seizure does not exclude relevant evidence on that ground. It is wrong to invoke the spirit of Constitution to exclude such evidence. The decisions of the American Supreme Court spelling out certain Constitutional protections in regard to search and seizure are not applicable to exclude the evidence obtained on an illegal search. Courts in India refuse to exclude relevant evidence merely on the ground that it is obtained by illegal search and seizure. When the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search and seizure, is not liable to be shut out. Search and seizure are not a new weapon in the armoury of those whose duty it is to maintain social security in its broadest sense. If the safeguards are generally on the lines adopted by the Code, they would be regarded as adequate and render the restrictions imposed as reasonable measures.

[7]. It would thus be settled law that every deviation from the details of the procedure prescribed for search, does not necessarily lead to the conclusion that search by the police renders the recovery of the articles pursuant to the illegal search, irrelevant evidence nor the discovery of the fact inadmissible at the trial. Weight to be attached to such evidence depends on facts and circumstances in each case. The Court is required to scan the evidence with care and to act upon it when it is proved and the Court would hold that the evidence would be relied upon.

14. The petitioner's main contention is that he was allegedly sitting in the last and it was driver of bike who had become perplexed and it was the person sitting in the middle seat who had thrown the packet, as such the petitioner had no possession over the substance and also no knowledge can be attributed to him. This argument looks impressive on face values; however, the case of the prosecution is that the tablets were kept loose in an open packet, and when the person sitting in the middle seat threw the packet, it spilled over. Thus, the burden was on the petitioner that he did not know the contents of the packet which his companion was carrying, and he did not even utter a word about it in the petition. Thus, the stringent conditions of section 37 of NDPS Act are not explained and satisfied.

15. The stand that the accused is in custody for sufficient time is also not legal grounds to overcome the rigors of S. 37 of the NDPS Act at this stage.

16. The grounds taken in the bail petition do not shift the burden placed by the legislature on the accused under S. 37 of the NDPS Act. The petitioner has not stated anything to discharge the burden put by the stringent conditions placed in the statute by the legislature under section 37 of the NDPS Act. Thus, the petitioner has failed to make a case for bail at this stage.

CRM-M-8267-2023

17. A perusal of the bail petition and the documents attached, prima facie points towards the petitioner's involvement and does not make out a case for bail. Any further discussions are likely to prejudice the petitioner; this court refrains from doing so.

18. Any observation made hereinabove is neither an expression of opinion on the merits of the case nor shall the trial Court advert to these comments.

The petition is dismissed. However, considering the petitioner's custody, this court requests the concerned trial court to make all endeavours to conclude the trial by July 31, 2023, of which the prosecution evidence be completed by July 10, 2023 and the remaining time to provide an opportunity to the accused to lead defence evidence, if so desired. It is clarified that this order speeding-up the trial is subject to the condition that neither the petitioner shall seek any adjournment nor try to use any tactics to delay the trial. If they do so, this order of expediting the trial shall stand automatically recalled by resorting to Section 362, read with Section 482 Code of Criminal Procedure, 1973, without any further reference to this court. All pending applications, if any, stand closed. **Since the petitioner is in custody since Feb 08, 2021 and is a first offender, it is further clarified that if the trial court fails to conclude the trial by July 31, 2023, which would mean that petitioner would have spent a week less than 2 years and 6 months in pre-trial custody, then it shall be permissible to the petitioner to file an application for bail before trial court itself and the trial court shall release him on bail.**

(ANOOP CHITKARA)
JUDGE

17.05.2023
anju rani

Whether speaking/reasoned: Yes
Whether reportable: No.