

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL BAIL APPLICATION NO. 515 OF 2024

Shahid Mohd. Hussain Retiwala	...Applicant
Versus	
State Of Maharashtra	...Respondent

Dr.Abhinav Chandrachud with Mr.Vijay R. Garad for the Applicant.

Mr. H. J. Dedhia, APP for Respondent-State.

CORAM	:	N. J. JAMADAR, J.
DATE	:	26th SEPTEMBER 2024

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by D.A.ETHAPE
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PC.:

1. Heard the learned Counsel for the Applicant the learned APP for the State.
2. The Applicant, who is arraigned in N.D.PS. Special Case No. 997 of 2023 arising out of C.R. No. 196 of 2020 registered at Kurla Police Station, Mumbai, for the offences punishable under Sections 22 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “NDPS Act”), has preferred this Application to enlarge him on bail.
3. In fact, this is the second application for bail. The first application being Bail Application No.3746 of 2023 was withdrawn by the Applicant on 16th January 2024.

4. On 26th December 2022, while Kurla Police were on patrolling duty at 06:00 pm in front of Goa Wine Shop Kurla (W.), the Applicant was found standing beside an Activa Scooter. A yellow carry bag was hanged to the handle of the scooter. The movements of the Applicant appeared suspicious. The police party thus accosted the Applicant.

5. In the search of the carry bag, 10 bottles of COFSON CD cough syrup were found. Each of the bottles had a label “Codeine Phosphate & Chlorpheniramine Maleate Syrup 100 ml COFSON CD 100 ml. Each 5 ml syrup contained Codeine Phosphate I.P 10 mg. and Chlorpheniramine Maleate I.P 4 mg. As the bottles found in the possession of the Applicant contained Codeine, a narcotic drug, the Applicant was apprehended and the contraband substance i.e. 10 bottles of COFSON CD were sealed and seized in the presence of public witnesses, under a seizure panchnama.

6. On 27th December 2022, the Applicant made a discovery to point out the place from where his supplier Shriprakash Yadav (A1) used to supply the narcotic drug. The Applicant led the police party to CST bridge in front of HP Petrol Pump and

pointed out Shriprakash Yadav (A1), the co-accused. The latter was found with a motorcycle. A blue sack was kept on the said motorcycle. In the search of the sack, 100 bottles of COFSON CD were found. Those bottles containing the narcotic drug Codeine were sealed and seized.

7. Shriprakash Yadav (A1), in turn, made a discovery leading to recovery of 200 bottles of COFSON CD from Anil D. Mishra (A3). Upon completion of investigation, charge-sheet came to be lodged.

8. Dr. Chandrachud, the learned Counsel for the Applicant, submitted that only 10 bottles of COFSON CD cough syrup were allegedly found in possession of the Applicant. Even if the prosecution case is taken at par, in the backdrop of the quantity of the contraband drug found in each of the bottles, at best, the Applicant can be said to have been found in possession of 2.4 gm of the narcotic drug. The small quantity of Codeine under the notification dated 19th October 2001 is 10 gm and the commercial quantity 1 kg. For possession of the small quantity of the narcotic substance the maximum punishment under Section 22(a) of the N.D.P.S. Act, is rigorous imprisonment for a

term which may extend to one year only. The Applicant has already undergone more than one year and nine months of incarceration.

9. Mr.Chandrachud further submitted that there is no material to show that the Applicant was a party to the criminal conspiracy. Therefore, the charge under section 29 of the NDPS Act, 1985 *prima facie* appears unsustainable. The only nexus between the Applicant and the co-accused Shriprakash Yadav (A1) was the alleged discovery made by the Applicant. However, in the facts of the case, the recovery of 100 bottles cough syrup COFSON CD from co-accused Shriprakash Yadav (A1) cannot be attributed to the Applicant. Therefore, the Applicant deserves to be enlarged on bail.

10. Mr.Dedhia, the learned APP, strongly opposed the prayer for bail. It was submitted that, the fact that only 10 bottles of COFSON CD were found in possession of the Applicant, is not of decisive significance. On the basis of the discovery made by the Applicant, Shriprakash Yadav (A1) and Anand Mishra (A3), were apprehended with 100 and 200 bottles, respectively, and that itself establishes the nexus between the Applicant and the co-

accused. Mr.Dedhia further urged that for the purpose of determining the quantity of narcotic drug found in mixture, the entire mixture is required to be taken into account and not just the contraband substance. To lend support to this submission, Mr.Dedhia placed a strong reliance on a three Judge Bench Judgment of the Supreme Court in the case of ***Hira Singh and Anr. Vs. Union of India and Anr.***¹

11. In the facts of the case, it may not be warranted to delve deep into the aspect of the quantity of narcotic drug in the bottles found in the possession of the applicant. Evidently, only 10 bottles of COFSON CD were found in possession of the Applicant. The substance found in possession of the Applicant satisfies the description of manufactured drug. The narcotic drug includes all manufactured drug. The question as to whether, while determining the small or commercial quantity in relation to narcotic drugs or psychotropic substances in a mixture with one or more neutral substance(s), the quantity of neutral substance(s) is not to be taken into consideration or it is only the actual content by weight of the offending drug which is relevant for the purpose of determining whether it would constitute small

1 AIR 2020 SC 3255

quantity or commercial quantity, is no longer *res integra*.

12. In the case of ***Hira Singh and Anr. Vs. Union of India and Anr.*** (supra), a three Judge Bench of the Supreme Court after an elaborate analysis of the provisions of the NDPS Act, 1985, the notification issued thereunder and the precedents ruled 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.

13. The legal position, that the total quantity of the mixture which includes the neutral substance(s) ought to be reckoned for the purpose of NDPS Act, 1985 thus stands crystalised. The Judgment in the case of ***Hira Singh*** (supra) was followed by another three Judge Bench of the Supreme Court in the case of ***Raveen Kumar Vs. State of Himachal Pradesh.***²

14. Nonetheless, the Applicant was allegedly found in possession of only 10 bottles each containing 100 ml of Codeine.

The commercial quantity of Codeine is 1 kg. The prosecution,

² (2021) 12 SCC 557

however, alleges that the Applicant was a part of the drug cartel and pursuant to the discovery made by the Applicant, first 100 bottles of COFSON CD 100 ml, were recovered and, therefore, on the basis of the disclosure made by Shriprakash Yadav (A1), 200 bottles of COFSON CD 100 ml, were recovered.

15. I have perused the memorandum of disclosure statement allegedly made by the Applicant and the seizure memo. Whether the disclosure statement made by the Applicant distinctly relates to the recovery of the contraband substance *prima facie* appears to be debatable. To add to this, there is no material in the form of financial transactions or electronic evidence which would show that the Applicant was a confederate in the conspiracy with the co-accused. Whether the recovery of the contraband substance from Shriprakash Yadav (A1) and Anand Mishra(A3) can be fastened to the Applicant, would thus be a matter for adjudication at the trial. In any event, having regard to the period of incarceration in the context of the recovery of only 10 bottles of COFSON CD from the possession of the Applicant a *prima facie* case for exercise of discretion is made out.

16. Thus, having regard to the quantity of the contraband substance, allegedly recovered from the Applicant an inference may be drawn that the interdict contained in Section 37 of the NDPS Act, 1985 may not operate.

17. Mr.Dedhia, learned APP, submitted that the Applicant has an antecedent. Dr. Chandrachud, joined the issue by submitting that in C.R. No.95 of 2015 for the offence punishable under Section 328 read with 34 of the Penal Code, 1860 and Sections 18(a), 18(c), 26(a), 27(b) and 28(b) of the Drugs and Cosmetics Act and Section 8(c) and 22 of NDPS Act, the Applicant has been enlarged on bail as the Applicant was found in possession of a small quantity of dextropropoxiphen tablets. It was submitted that the Applicant is a chemist. A copy of the order passed by the learned Special Judge dated 18th May 2015 in Bail Application No. 96 of 2015 in C.R. No.95 of 2015 was tendered for the perusal of the Court. The submissions of Dr.Chandrachud are born out by the aforesaid order. Thus, the Court may also draw an inference that the Applicant may not indulge in identical offences for which he has been arraigned in this case, if he is release on bail.

18. Hence, the following order.

ORDER

- A] The Application stands allowed;
- B] The Applicant be released on bail in Special Case No. 997 of 2023 arising out of C.R. No.196 of 2020 registered with Kurla Police Station, Mumbai, on furnishing a P.R. bond in the sum of Rs.1,00,000/- with one or more sureties in the like amount.
- C] The Applicant shall mark his presence at Kurla Police Station on the first Monday of every month between 11 am to 1 pm till conclusion of the trial.
- D] The Applicant shall not indulge in the activity for which he has been arraigned in this case.
- E] The Applicant shall not tamper with the prosecution evidence and give threat or inducement to first informant, any of the prosecution witnesses or any person acquainted with the facts of the case.
- F] The Applicant shall furnish his contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.
- G] The Applicant shall regularly attend the proceedings before

the jurisdictional Court.

H] By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the Applicant and the trial Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

(N. J. JAMADAR, J.)