

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRR-69-2024 (O&M)

Reserved on: 01.02.2024

Date of Pronouncement : 22.02.2024

Ahmad Ali @ Makhan

...Petitioner

VERSUS

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE HARKESH MANUJA

Present : Mr. B.S. Bhalla, Advocate for the petitioner.

Mr. Gurlal Singh Dhillon,
Assistant Advocate General, Punjab

HARKESH MANUJA, J.

CRM-1718-2024

This is an application seeking condonation of delay of 72 days in filing the appeal.

While specifying the reasons for the delay, it has been stated in the application that the applicant/petitioner was suffering from high fever and could not travel to Chandigarh to engage the lawyer which caused delay in filing the appeal.

A perusal of the file shows that initially charges were framed under Section 22 of the NDPS Act vide order dated 15.05.2019, however, subsequently when amended charge-sheet was filed on 01.08.2023, fresh order for taking cognizance under section 22 of NDPS Act was passed. On 01.08.2023, no objection

was raised by the petitioner while charges were framed against him under Section 22 of NDPS Act. Rather proceedings remained continued against him since 15.05.2019 when charges were framed under Section 22 of NDPS Act and the opportunity of passing of fresh order for framing charge is being used as a belated attempt to unsettle the proceedings.

The Hon'ble Apex Court in a recent judgment titled as **"Sheo Raj Singh v. Union of India and another"**, reported as (2023) 10 SCC 531, observed that courts must distinguish between an 'explanation' and an 'excuse' in the facts and circumstances of a particular case, while deciding an application for the condonation of delay. Relevant para of this judgment is reproduced below:-

“29. Considering the aforementioned decisions, there cannot be any quarrel that this Court has stepped in to ensure that substantive rights of private parties and the State are not defeated at the threshold simply due to technical considerations of delay. However, these decisions notwithstanding, we reiterate that condonation of delay being a discretionary power available to courts, exercise of discretion must necessarily depend upon the sufficiency of the cause shown and the degree of acceptability of the explanation, the length of delay being immaterial. Sometimes, due to want of sufficient cause being shown or an acceptable explanation being proffered, delay of the shortest range may not be condoned whereas, in certain other cases, delay of long periods can be condoned if the explanation is satisfactory and acceptable. Of

course, the courts must distinguish between an 'explanation' and an 'excuse'. An 'explanation' is designed to give someone all of the facts and lay out the cause for something. It helps clarify the circumstances of a particular event and allows the person to point out that something that has happened is not his fault, if it is really not his fault. Care must however be taken to distinguish an 'explanation' from an 'excuse'. Although people tend to see 'explanation' and 'excuse' as the same thing and struggle to find out the difference between the two, there is a distinction which, though fine, is real. An 'excuse' is often offered by a person to deny responsibility and consequences when under attack. It is sort of a defensive action. Calling something as just an 'excuse' would imply that the explanation proffered is believed not to be true. Thus said, there is no formula that caters to all situations and, therefore, each case for condonation of delay based on existence or absence of sufficient cause has to be decided on its own facts. At this stage, we cannot but lament that it is only excuses, and not explanations, that are more often accepted for condonation of long delays to safeguard public interest from those hidden forces whose sole agenda is to ensure that a meritorious claim does not reach the higher courts for adjudication."

An examination of the present application reveals that the applicant/petitioner has tried to escape from providing exact details. Neither any specific date has been provided when he fell ill, nor any effort has been made to substantiate this fact by way of filing the

medical prescription of a registered practitioner along with the application so as to *prima facie* substantiate the cause.

In view of the above, no sufficient cause has been given by the applicant while seeking condonation of such delay and the application is accordingly dismissed. Still considering the fact that petition involves criminal prosecution, thus, touches the liberty of the petitioner and the matter has also been heard on merits, as such the same are dealt with as well.

MAIN CASE:

1. By way of present revision petition, challenge has been made to an order dated 01.08.2023 passed by learned Judge Special Court, Moga, framing charges against the petitioner under Section 22 of NDPS Act and further that he has been wrongly charged under commercial quantity; whereas charges should have been framed under Section 22(a) of the NDPS Act.

2. Briefly stated, facts of the case are that FIR No 24 dated 08.02.2019 was registered against the petitioner on the allegations that on 08.02.2019, a police party headed by ASI Malkit Singh was going towards New Grain Market, Moga via Joginder Singh Chowk, Moga in connection with patrolling and checking of suspected persons. When at about 2.15 PM police party reached near the gate of grain market which abuts to Katcha Zira Road, Moga then one person having hair cut was found holding a white colour plastic

polythene in his hand. On seeing the police party he became perplexed and tried to take a U-turn. On the basis of suspicion ASI Makit Singh with the help of police party apprehended said person and on enquiry he disclosed his name as Ahemed Ali Makhan @ Makhan (Petitioner) then ASI Malkit Singh introduced himself to the petitioner and told him that he has doubt that there is some intoxicant substance in his possession, so search of petitioner and his polythene is to be conducted, but he has a legal right to get the search conducted in presence of any Gazetted Officer or any Magistrate to which he reposed faith upon ASI Malkit Singh and replied that he can conduct his search, accordingly consent memo was prepared.

2.1 During search of said plastic polythene, 10 strips of Tramafit (Tramadol) each containing 10 tablets, total 100 tablets, 12 vials of Onerex, each containing 100 Milligrams syrup bearing batch No.ONCS-1087 and 13 vials of Onerex each contained 100 Milligram intoxicant syrup bearing Batch No. ONCS-1090 were recovered. Parcel of recovered intoxicants was prepared by keeping the same in same plastic polythene and sealed by ASI Malkit Singh with his seal 'MS' and sample seal was prepared separately.

2.2 On this account, proceedings were initiated against the petitioner under NDPS Act and after completion of investigation, challan against him was presented before the Ld. Trial Court on

01.05.2019 and charges were framed under Section 22 NDPS Act on 15.05.2019.

2.3 As per FSL report dated 28.02.2019, following salts were found in the recovered intoxicants:

Ingredients Present	Average quantity of ingredients present in the parcel		
	Exhibit 1	Exhibit 2	Exhibit 3
Chlorpheniramine Maleate	3.2mg/5ml	3.4mg/5ml	---
Codeine Phosphate	8.90mg/5ml	9.24mg/5ml	---
Tramadol Hydrochloride	---	--	8.90mg/tablet
Paracetamol			472mg/tablet

2.4 Subsequently on 01.8.2023, amended charge-sheet was filed and fresh order regarding taking cognizance u/s 22 of NDPS Act against the petitioner was passed by the Judge, Special Court, Moga. It is the aforesaid order dated 01.08.2023 which has been impugned by way of present revision petition.

3. Contrary to the facts of FIR, the version of the petitioner is that this is a completely concocted story. Petitioner is a licensed chemist and was picked up from his shop in the morning by the police officials, though subsequently in the FIR he was shown to be arrested from a different place and time. Learned counsel appearing for the petitioner contended that Inspector Navdeep Singh while appearing as DW2- has stated that the accused is a licensed chemist, however,

this fact was not found mentioned in the FIR which clearly shows the malafide of the police officials.

3.1 He further submitted that from the FSL report, it is clear that if quantity of narcotic/ psychotropic substance alone is taken into consideration then the same does not fall under commercial quantity. He also submitted that recovery from the petitioner is non-commercial and this fact also finds mention in the bail order and admitted by the respondents in their written statement as well.

3.2 Learned counsel for the petitioner also relied upon notification titled "Manufactured Narcotics Drug" (as contained in Government of India Notification No. S.O. 826 (E) dated 14.11.1985) issued in exercise of powers conferred by Sub-Clause (b) of Clause (xi) of Section 2 of the NDPS Act and drew attention towards Entry 35, which pertains to the substance Methyl Morphine (commonly known as 'Codeine') to contend that the drug recovered from the petitioner is not a manufactured drug in terms of NDPS Act and is governed by the Drugs and Cosmetic Act, 1940. The aforesaid entry reads as under:-

"S.O. 826(E). - In exercise of the powers conferred by sub-clause (b) of clause (xi) of section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government hereby declares the following narcotic substances and preparations to be manufactured drugs, namely:-

Xxx

35. *Methyl morphine (commonly known as 'Codeine') and Ethyle morphine and their salts (including Dionine), all dilutions and preparations except those which are compounded with one or more other ingredients and containing not more than 100 milligrams of the drug per dosage unit, and with a concentration of not more than 2.5% in undivided preparations and which have been established in Therapeutic practice."*

3.2 In support of his contentions, learned counsel placed reliance upon **"Sheelas v. State of Kerala"**, CrI.A. No 1909 of 2005, decided on 15.12.2020, wherein, Kerala High Court has taken into consideration only the quantity of the narcotic/ Psychotropic substance in an injection, without taking into consideration the neutral substance and granted bail to the accused.

4. On the other hand, learned State counsel while admitted that the quantity of Tramadol Hydrochloride is non-commercial, but contended that the quantity of Onerex found with the petitioner is commercial in nature as 25 vials, each containing 100 ml syrup were recovered from him which amounts to 2.5L. He further submitted that averment in the short reply regarding syrup being non-commercial is on account of an inadvertent mistake.

4.1 He also contended that the submissions made by learned

counsel for the petitioner that the quantity of neutral substance could not be taken into consideration, has already been dealt with by the Hon'ble Apex Court in "**Hira Singh & another vs. Union of India and another**", reported as (2020) 20 SCC 271, wherein it has been held that entire mixture has to be taken into consideration while calculating the quantity of narcotics substance.

4.2 With respect to Entry 35 in 1985 notification, learned State counsel contended that regarding possession of codeine, a Division Bench of Delhi High Court in "**Mohd Ahsan vs. Customs**", reported as 2023(1) DC (Narcotics) 317, has already discussed in detail and held that it is still in violation of Rule 52A of Chapter - VA to The Narcotic Drugs and Psychotropic Substances Rules 1985 (hereinafter "NDPS Rules") framed under NDPS Act and accordingly consequences would apply. In view of these submissions, he submitted that *prima facie*, quantity recovered from the petitioner was commercial quantity and in support of his contentions he also placed reliance upon the following judgments:-

- i. "**Iqbal Singh v. State of Punjab**", reported as 2014(14) R.C.R.(Criminal) 745
- ii. "**Prabhjot Singh v. State of Punjab**", reported as 2023(2) Law Herald 1215

5. I have heard learned counsel for the parties and gone through the paper book, however, I do not find much substance in the submissions made on behalf of the petitioner.

6. It is settled proposition of law that at the time of framing of charge only *prima facie* case has to be seen and material brought on record by the prosecution has to be believed and the defence evidence cannot be taken into consideration at that stage. Hon'ble Apex Court in a recent judgment titled as "**Captain Manjit Singh Virdi (Retd.) vs. Hussain Mohammed Shattaf** ", reported as (2023) 7 SCC 633, held as under:-

"11. The law on issue as to what is to be considered at the time of discharge of an accused is well settled. It is a case in which the Trial Court had not yet framed the charges. Immediately after filing of chargesheet, application for discharge was filed. The settled proposition of law is that at the stage of hearing on the charges entire evidence produced by the prosecution is to be believed. In case no offence is made out then only an accused can be discharged. Truthfulness, sufficiency and acceptability of the material produced can be done only at the stage of trial. At the stage of charge, the Court has to satisfy that a prima facie case is made out against the accused persons. Interference of the Court at that stage is required only if there is strong reasons to hold that in case the trial is allowed to proceed, the same would amount to abuse of process of the Court."

7. Similarly in "**State of Gujarat v. Dilipsinh Kishorsinh Rao**", 2023 (4) Law Herald (SC) 2731, the Hon'ble Apex Court held that defence evidence cannot be taken into consideration at the stage of framing of charges and mini trial is not permissible at this stage.

Relevant paras from this judgment are reproduced hereunder:-

"16. In the teeth of the above analysis of law when the impugned order of the High Court is perused, it would not detain us for too long to brush aside the contentions raised by the respondent-accused for reasons more than one. Firstly, the charge-sheet has been filed after taking into consideration the written submissions filed by the accused before the Investigating Authority which included the documentary evidences tendered by the respondent accused. Secondly, the statement of friends and acquaintances from whom loans of large amounts had been borrowed by the accused which had been relied upon by the accused to stave off the prosecution in his written submissions filed before the Investigating Authority and which material had persuaded the High Court to accept the same on its evaluation to be true, is nothing but short of accepting the same as defence evidence and examining the truthfulness of its contents even before trial could be commenced or held. Thirdly, the High Court has proceeded to examine the pros and cons of defense by weighing the defence-evidence and probabilities of the conclusion that may

ultimately be arrived at, as the basis for exercising the revisional jurisdiction which was impermissible. Fourthly, the purported loans said to have been obtained by the respondent accused from his mother, brother and father are all question of facts which requires adjudication and this could be done only during trial and the explanation relating to borrowing of large sums raises a reasonable suspicion, which has been termed by the Investigating Agency as strong material to file the charge sheet and based on such material the sanctioning authority also recorded its satisfaction under sanction order dated: 05.03.2015 to prosecute the respondent-accused. Hence, raising reasonable suspicion cannot be held or construed at the primary stage for discharging the accused.

17. *The plea or the defence when requiring to be proved during course of trial is itself sufficient for framing the charge. In the instant case, the learned Trial Judge has noticed that explanation provided by the respondent accused pertaining to purchase of shop No.7 of Suman City Complex of plot No.19, Sector-11 from the loan borrowed and paid by the respondent was outside the check period and hence the explanation provided by respondent is a mere eye wash. This is an issue which has to be thrashed out during the course of the trial and at the stage of framing the charge mini trial cannot be held. That apart the explanation offered by the respondent*

accused with regard to buying of Maruti Wagon-R car, Activa scooter, purchase of house etc., according to the prosecution are all the subject matter of trial or it is in the nature of defence which will have to be evaluated after trial.”

8. Argument made by learned counsel that if quantity of only narcotic/psychotropic substance is taken into consideration, then the quantity recovered from the petitioner would not fall within the scope of commercial quantity, is without any basis. This issue has been comprehensively settled by the Hon'ble Apex Court in **Hira Singh's case** (supra), wherein, it was held that the quantity of neutral substance(s) is not to be excluded and is required 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. Concluding para of this judgment is it reproduced here under:

“10. In view of the above and for the reasons stated above, Reference is answered as under:

(I). The decision of this Court in the case of E. Micheal Raj (Supra) taking the view that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight of the offending narcotic drug which is

relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, is not a good law;

(II). 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;

(III). Section 21 of the NDPS Act is not stand-alone provision and must be construed along with other provisions in the statute including provisions in the NDPS Act including Notification No.S.O.2942(E) dated 18.11.2009 and Notification S.O 1055(E) dated 19.10.2001;

(IV). Challenge to Notification dated 18.11.2009 adding "Note 4" to the Notification dated 19.10.2001, fails and it is observed and held that the same is not ultra vires to the Scheme and the relevant provisions of the NDPS Act. Consequently, writ petitions and Civil Appeal No. 5218/2017 challenging the aforesaid notification stand dismissed."

9. Other arguments raised by both the parties, if taken into consideration, would be touching on the merits of the case and it would not be appropriate for this court to discuss those in detail when the trial is still going on. Reliance by the learned Counsel for the petitioner on 1985 notification and counter reliance by the learned State counsel on division bench judgment by Delhi High Court in

Mohd Ahsan's case has to be argued and considered by the trial court and at this stage this court is purposefully staying away from any discussion as it would amount to a mini trial. Similarly, another defence of the petitioner that he is a licensed chemist and his reliance on the statement of Drug Inspector Navdeep Singh - DW 2 cannot be looked into at this stage as it would amount to taking into consideration the defence evidence at this stage, which is not permissible.

10. Similarly, Observation by this Court in order dated 27.08.2019 while granting bail that the quantity is less than the small quantity, cannot be made basis as it was passed before judgment in **Hira Singh's case** (supra). Similarly, while it cannot be denied that State should have been alert while making an averment in the reply, and in case of any error, it should have been rectified by way of filing an affidavit; but at the same time, incorrect statement in the reply can also not be made the basis of framing of charges.

11. Further, Initially charges u/s 22 of NDPS Act were framed vide order dated 15.05.2019 passed by learned Judge, Special Court, Moga. A perusal of the impugned order dated 01.08.2023 shows that after taking into consideration the amended chargesheet, there is no change and charges have remained u/s 22 of NDPS Act. A further perusal also reveals that no objection was taken by the petitioner while the impugned order was passed, rather a statement was

suffered by petitioner Counsel that cross examination of prosecution witnesses already recorded before amendment in the chargesheet may please be read as the same, after amendment in chargesheet except PW5 - Inspector Ranjinder Singh and PW6 - Jagtar Singh. There is nothing on record that any application under section 216 Cr.P.C. was filed by the petitioner before the Special Court to seek amendment of charges. A cumulative analysis of these incidences suggests that this revision petition is merely an afterthought to claim trial under lesser charges.

12. In view of the discussion made above, no interference is warranted in the impugned order dated 01.08.2023 and thus, the present criminal revision is hereby dismissed.

13. Pending miscellaneous application(s), if any, shall also stand disposed of.

22.02.2024
sanjay

(HARKESH MANUJA)
JUDGE

Whether speaking/reasoned ?	Yes/No
Whether Reportable ?	Yes/No