

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 16/05/2006

Coram

The Hon'ble Mr. Justice T.V. MASILAMANI

CRL.O.P. No.6964 of 2006

M.S.M.Uwize .. Petitioner

-Vs-

State by
The Intelligence Officer,
Narcotics Control Bureau,
South Zonal Unit,
Chennai-90. .. Respondent

Petition under Section 439 Cr.P.C. for bail pending trial in
C.C.No.191 of 2002 on the file of the Principal Special Judge for N.D.P.S.
and E.C. Cases, Chennai.

For Petitioner : Mr.T.K.Sampath,

For Respondent : Mr.P.N.Prakash,
Spl.P.P. for NDPS cases.

:O R D E R

The petitioner is the accused in C.C.No.191 of 2002 on the file of the Principal Special Judge, Special Court under N.D.P.S. Act, Chennai and he was charged for the offences under Section 8(c) r/w Sections 21, 23 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called "N.D.P.S. Act") in crime F.No.48/1/7/2001 on the file of the respondent for the alleged possession of 308 grams of Heroin. Since he was arrested on 15.12.2001 for the said offences, he came forward with the petition for bail earlier in Crl.O.P.No.13 503 of 2005 and the same was dismissed by this Court on 27.6.2005. This petition is filed by him for bail on the ground of change in the circumstances as narrated in the petition.

2. Per contra, the case of the prosecution is that on 15.12.2001 on a specific information, the Officers of Narcotics Control Bureau, South Zonal Unit, Chennai intercepted the petitioner at Anna International Airport, Chennai and that since he denied possession of any narcotic drug with him when

questioned, he was detained by the respondent and his officials as he was about to leave for Colombo at that time. They issued a summon under Section 67 of the N.D.P.S. Act on the same day and took him to NCB Office, Chennai for enquiry. During the course of interrogation, the petitioner admitted his possession of 300 grams of Heroin in 63 capsules swallowed and concealed in his stomach and expressed his willingness voluntarily to eject the contraband under medical supervision in a statement written on his own hand dated 16.12.2001. Hence, he was taken to the Judicial Magistrate, Alandur, Chennai on the same day and the learned Judicial Magistrate directed him for medical supervision at Kilpauk Medical College Hospital so as to eject the concealed contraband. Therefore the petitioner was taken to the said hospital where the medical officers recovered totally 63 capsules weighing 308.5 grams of brown colour powder believed to be Heroin and the same had been recovered by the respondent on four occasions (i.e.) 6 capsules weighing 29 grams, 12 capsules weighing 60.5 grams on 16.12.2001, 39 capsules weighing 189.5 grams on 17.12.2001 and 6 capsules weighing 29.5 grams on 18.12.2001.

3. Learned counsel for the petitioner would submit that in view of the subsequent events that the Chemical Analyst's report in relation to the contraband alleged to have been seized from the petitioner does not give qualitative analysis particulars and inasmuch as the petitioner is undergoing incarceration from 15.12.2001, he has come forward with this second bail application. Further he has submitted that even as per the Chemical Analyst's report relied on by the prosecution, the contraband seized from the petitioner falls short of the commercial quantity and that he is therefore entitled to be released on bail. He has relied on the judgments of the Supreme Court on this aspect of the matter reported in KALYAN CHANDRA SARKAR v. RAJESH RANJAN @ PAPPU YADAV (2005 (I) S.L.T. 496) wherein the following ratio was enunciated by Their Lordships of the Apex Court in paragraph 19 of the judgment:-

"Therefore, even though there is room for filing a subsequent bail application in cases where earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which an accused who has been denied bail earlier, can move a subsequent application."

4. As has been rightly argued by the learned Special Public Prosecutor, if the petitioner is able to convince this Court that there is change in the circumstances either in relation to the facts or on the question of law, the petitioner is entitled to maintain this second application for bail. In this context, the relevant portion in the report of the Chemical Examiner with reference to the contraband of Heroin alleged to have been seized from the petitioner in this case may be extracted hereunder to appreciate the rival submissions made by both sides:-

"REPORT: Each of the nine samples is in the form of brown coloured powder. Each answers the tests for the presence of Diacetyl morphine (Heroin) and is covered under the NDPS Act 1985. The percentage of Diacetyl Morphine (Heroin) by weight in samples is as under:

S.No.
Lab.No
Sample No.
Percentage of Heroin
Weight of sample received with polythene cover in gms.
Weight of remnant returned with polythene cover in gms.

1		
225		
S1(Seizure of 29 gms)		
46.9		
4.94		
4.58		
2		
226		
S1(Seizure of 33.5 gms)		
51.7		
5.15		
4.05		
3		
227		
S1(Seizure of 27 gms)		
50		
5.13		
4.8		
4		
228		
S1(Seizure of 30.5 gms)		
49.8		
4.99		
4.52		
5		
229		
S1(Seizure of 66.5 gms)		
50.5		
5.12		
4.63		
6		
230		
S1(Seizure of 47 gms)		
49.1		
5.1		
4.84		
7		
231		
S1(Seizure of 35.5 gms)		
48.8		
4.98		
4.68		
8		
232		
S1(Seizure of 29.5 gms)		

51.2
4.95
4.66
9
233
S1(Seizure of 10 gms)
51.1
9.97
9.55

The test report is given under the hand of Government Scientific expert mentioned in Sec.293 Cr.P.C. 73 read with notification dated 17.7 .76 and 2.2.1977 issued by the Government of India, Ministry of Finance (Department of Revenue and Banking) published in the Government of India, Gazette Part I, Section 2 on 21.8.76 and 12.3.77 respectively."

5. Relying on the said report, learned counsel for the petitioner has submitted that on a calculation out of 308.5 grams of the total quantity of the contraband only about 50% of the contraband was found by the chemical examiner to contain diacetyl morphine (Heroin). Hence he has submitted with reference to the notification dated 19.10.2001, wherein the Central Government specified under entry No.56 small quantity as 5 grams and commercial quantity as upto 250 grams of Heroin and that in view of the said Chemical Examiner's report, the contraband weighing only about 154 grams alone could be classified as Heroin. Therefore he has contended that the quantity of contraband seized was only less than commercial quantity as per the said notification and that it follows that the vigour of Section 37 of the N.D.P.S. Act, 1 985 is mellowed down so as to enable the petitioner to seek bail in this application.

6. In support of such contention, the learned counsel for the petitioner has cited the following decision reported in ANSAR AHMED v. STATE (GOVT. OF N.C.T. OF DELHI) 2005 (4) CRIMES 598 (DELHI), RAJDEEP SINGH v. STATE OF PUNJAB (1999 (3) CRIMES 308), PITABAS PRADHAN v. STATE OF ORISSA (2002 (2) CRIMES 250), MOHD. SAYED v. CUSTOMS (2002 (4) CRIMES 497), and RAJESH KUMAR @ RAMJAN KHAN v. STATE OF CHHATTISGARH (2004 (2) CRIMES 240).

7. In answer to such contention, learned Special Public Prosecutor has pointed out that the said decisions rendered by the other High Courts may have only a persuasive force with reference to the question in this case and therefore he has drawn the attention to the decision rendered by this Court in STANLEY v. STATE (1998 M.L.J.(CRL) 706) wherein (vide) paragraph 45, V.BAKTHAVATSALU, J. laid the ratio as under:-

"It is no doubt true that in Ex.P-20, the percentage of Di-acetyl morphine is not noted. But it is stated in Ex.P-20 that the sample is in the form of brownsugar and that it answers test for the presence of Di-acetyl morphine. The heroin comes under opium derivative Section 2(xvi)(d) of the Act will show that percentage of Di-acetyl morphine is not essential to ascertain whether a

particular drug is heroin or not. Therefore, the absence of percentage of Di-acetyl morphine in Ex.P-20 will not affect the case of the prosecution."

8. Further he has also relied on the judgment of the Apex Court AMARSINGH RAMJIBHAI BAROT v. STATE OF GUJARAT (2006 (1) M.L.J. (CRL.) 7), wherein it was held in paragraph 15 as follows:-

"The evidence also does not indicate that the substance recovered from the appellant would fall within the meaning of Sub-clauses (a), (b), (c) or (d), of Section 2(xvi). The residuary Clause (e) would take into its sweep all preparations containing more than 0.2% of morphine. The FSL report proves that the substance recovered from the appellant had 2.8% anhydride morphine. Consequently, it would amount to "opium derivative" within the meaning of Section 2(xvi)(e). Clause (a) of Section 2(xi) defines the expression "manufactured drug" as:

"2(xi) 'manufactured drug' means: (a) all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;
(b)"

All "opium derivatives" fall within the expression "manufactured drug" as defined in Section 2(xi), N.D.P.S. Act. Thus, we arrive at the conclusion that what was recovered from the appellant was " manufactured drug" within the meaning of Section 2(xi), N.D.P.S. Act. The material on record therefore, indicates that the offence proved against the appellant fell clearly within Section 21, N.D.P.S. Act for illicit possession of "manufactured drug".

9. Section 2(xvi)(d) and (e) of the N.D.P.S. Act, 1985 reads as follows:-

"2(xvi) "opium derivative" means--

.. ..

(d) diacetylmorphine, that is the alkaloid also known as diamorphine or heroin and its salts; and

(e) all preparations containing more than 0.2 per cent, of morphine or containing any diacetylmorphine;"

10. Thus, in view of Section 2(xvi)(d), he has contended that " Heroin" falls within the definition of "opium derivatives" and that therefore the presence of diacetyl morphine itself is sufficient without the percentage being mentioned in the Chemical Examiner's report to show that the petitioner was in possession of total quantity of 308.5 grams of Heroin. Further he has distinguished the decisions relied on by the learned counsel for the petitioner and contended that the contrabands involved in the cases as noted hereunder was not "heroin" as in this case so as to attract the said provision of law in favour of the petitioner. Since in both the cases, RAJDEEP SINGH v. STATE OF PUNJAB (1999 (3) CRIMES 308), and PITABAS PRADHAN v. STATE OF ORISSA (2002 (2) CRIMES 250), the contraband seized did not exceed 0.2% morphine, it was held that the prosecution failed to prove any circumstance against granting of bail to the accused therein.

11. Similarly, he has drawn the attention of this Court to the facts of the case in MOHD. SAYED v. CUSTOMS (2002 (4) CRIMES 497) and contended

that the total quantity of buprenorphine found in the contraband was quantified only at 0.578 ml. and therefore it was brought within the definition of "small quantity" in that case. Similarly, in the judgment rendered by the Apex Court in SAJAN ABRAHAM v. STATE OF KERALA (2004 (2) SUPREME 339), it was held (vide) paragraph 10 that the contraband seized from the accused therein was found to be in his possession for personal consumption and not for trading purposes and therefore it has been submitted by the learned Special Public Prosecutor that the said decision is also not helpful to the petitioner.

12. Much reliance is placed on VICTORIA MARCEL ENO v. OFFICERS, NCELL, CUSTOMS (PREVENTIVE) BOMBAY & ANOTHER (2005(1) CRIMES 287), a judgment rendered by the Bombay High Court, by the learned counsel for the petitioner to show that absence of quantitative analysis of sample of heroin as per the Amendment Act 9 of 2001 to classify the same as either small quantity or commercial quantity, is a circumstance in favour of the petitioner/accused herein. Per contra, learned Special Public Prosecutor has referred me to paragraph 6 of the same decision wherein, the Supreme Court in P.P.FATHIMA v. STATE OF KERALA (2003 (4) CRIMES 390) held as follows:-

"In our opinion there is no substance in the legal argument of learned Counsel that Section 21 is not attracted to the facts of the case or that the seized goods are not contraband drugs as contended by learned Counsel. A perusal of the definition section clearly shows that brown sugar contains heroin which is a prohibited drug, possession of which is punishable under Section 21 of the Act."

13. Hence, the ratio in that decision rendered by the Bombay High Court can only have persuasive value as against the decision rendered by this Court as well as by the Supreme Court cited by the prosecution referred supra. Thus, the learned Special Public Prosecutor has again drawn the attention of this Court to the ratio of the decision STANLEY v. STATE (1998 M.L.J.(CRL) 706) (vide) paragraph 45 to support his contention that as per the definition under Section 2(xvi)(d) of the N.D.P.S. Act, the contraband seized from the petitioner was found to have contained diacetyl morphine which is sufficient enough to come to the conclusion that the total quantity 308.5 grams should be considered as a whole and that therefore absence of the percentage of quantity of heroin contained in the seized drug is not necessary so as to render a finding in this application for bail.

14. Considering the totality of the facts and circumstances as narrated above and considering the ratio laid down in the decision of this Court referred supra, I am of the opinion that mere absence of the quantity analysis in the said Chemical Examiner's report and conversely the presence of diacetyl morphine (Heroin) is sufficient to serve the purpose in so far as this application is concerned, the petitioner cannot be enlarged on bail as prayed for.

15. For the foregoing reasons, this petition is dismissed. In view of the fact that the petitioner is in custody from 15.12.2001, the trial court is directed to post the case on day-to-day basis and dispose of the same on or

before 31st August, 2006 on merits and in accordance with law without being influenced by any observation made in this order.

dpp

To

1. The Principal Special Judge, Special Court under NDPS Act Cases, Chennai.
2. The Superintendent, Central Prison, Chennai.
3. The Special Public Prosecutor for N.D.PS Cases, High Court, Madras.
4. The Intelligence Officer, N.C.B., South Zone, Chennai.

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