

H I G H C O U R T O F O R I S S A

BLAPL No.2464 of 2020

Bikash Duria ... Petitioner

Versus

State of Odisha ... Opp. Party

7. 20.08.2020

In view of extraordinary situation arose out of COVID-19 lockdown, the matter is taken up through video conferencing.

1. Drug addiction is like a curse and until it is broken, its victim will perpetually remain in the shackles of bondage” aptly put by Oche Otorkpa while articulating the danger of the issue at hand and its ripple effect. The furtive smuggling and trafficking of drugs linked it to a host of social ills, including involvement in crime, destabilization and decline in family relationship, kinship, neighbourhoods etc. More importantly, it has resulted in rampant substance abuse by the youth. The Parliament has passed the NDPS Act with an objective to arrest the menace by making the deterrent effect more

stringent so that the guilty is appropriately punished. The said Act seeks to control both the demand and supply of drugs by criminalizing production, trafficking and use. It prohibits the manufacture, production, possession, consumption, sale, purchase, trade, use, import and export of narcotic drugs and psychotropic substances, except for medical or scientific purposes. The Judiciary also saddled with the responsibility of strictly adhering to the law so that the traffickers of drugs do not go unpunished and the growth boom of trafficking is checked. The trafficking and smuggling have flared sporadically in the recent years transcending the geographical boundaries. The case in hand typifies this alarming trend. The petitioner herein has filed the instant application under Section 439 of Cr.P.C seeking bail in connection with Bolangir Sadar P.S. Case No. 24 of 2020 corresponding to Special G.R. Case No. 10 of 2020 pending in the court of the learned Sessions Judge-cum-Special Judge, Bolangir. The petitioner herein is the accused in connection with alleged commission of

offences punishable under

Sections 21(c) and 29 of the N.D.P.S. Act.

2.The case of the prosecution presents a distinct case of transportation of drugs under the guise of medicinal products. In fact, the renewed focus on narcotics by the enforcement authorities has resulted in shifting of the focus by the traffickers towards Pharmaceutical drugs like the present one. On 17.01.2020, Jhasketan Bhoi, S.I. of Police, Sadar P.S., Bolangir detained two vehicles bearing Registration Nos.OD-03-P-2651 and OD-26-C9693 occupied by five persons loaded with huge quantity of cough syrup. Ashok Leyland Pick Up and Mahindra TUV 300 plus were carrying 3840 and 1120 bottles of sealed Eskuf Cough Syrup. A total of 5920 bottles containing 1kg 184gms of Codeine Phosphate which is more than the commercial quantity were recovered. The occupants of the vehicles failed to produce any invoice, license or authority in support of possession of Cough Syrup bottles. The police further submitted that the accused confessed of not carrying any drug license and the cough syrups were sold to different customers for the purpose of intoxication rather than for therapeutic use which leads to apparent fillip in the drug trade.

3. Heard Sri Milan Kanungo, Ld. Senior Counsel appearing for the petitioner, Sri P.C.Das, learned Additional Standing Counsel for the opposite party and perused the up-to-date case diary.

4. Drug addiction is a complex illness with far-reaching consequences for those who know, work with, and support the drug-addicted individual. Families suffer due to cultural and social factors of drug behavior, including their own understanding of the disease process and the addict's behavior due to drug abuse; draining of family resources, shrinking from responsibilities, sickness, and dysfunctional relationships, distortion of interpersonal family relationships, violence and death faced as a consequence of drug abuse. The cost of drug abuse is enormous and multifaceted which poses severe threat to the social fabric of the country. Ergo, instances of drug abuse is required to be dealt with a strict 'hard on Crime' attitude. Realising the danger of the present menace, the Apex Court has iterated that taking a liberal approach is uncalled for while exercising the power to grant bail in cases under the Narcotic Substances and Psychotropic Substances Act (NDPS Act). The plea for bail under

section 439 of CrPC should be read with Section 37 of the NDPS Act. Section 37(1)(b)(ii) provides that where the Public Prosecutor opposes the application, the court should grant bail only when it is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. As iterated in the recent case of

***State of Kerala and Ors. vs Rajesh and Ors.*¹:**

“20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained Under Section 439 of the

Code of Criminal Procedure, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said Section is in the negative form prescribing the enlargement of bail to any person Accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

¹ AIR 2020 SC 721.

21. The expression "reasonable grounds" means something more than *prima facie* grounds. It contemplates substantial probable causes for believing that the Accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the Accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the Code of Criminal Procedure, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for."

5. The Supreme Court in the case of **Union of India v. Ram Samujh and Ors.**² outlines some grave reasons while rejecting a bail application in connection to an offence committed under the NDPS Act:

"7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young

² 1999(9) SCC 429.

victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved.”

The rigour of section 37(1)(b)(ii) of the NDPS Act in regards to the rejection of bail in the matters where the

transportation of drugs was of commercial quantity has been provided in plethora of cases by the Supreme Court, especially, in ***Union of India Vs. Ram Samujh and others***³ and ***Union of India Vs. Shri Shiv Shanker Kesari***.⁴

6. Adverting to the facts involved in the present case, Codeine as previously categorised under Schedule H of Drugs and Cosmetics Act which is considered to be extremely harmful and addictive to the human body. It is a derivative of opium and is considered less potent in term of analgesic and sedative effects than opium. However, over-the-counter (OTC) opioid abuse, including codeine, has been a growing problem across India.

³ (1999) 9 SCC 429

⁴ (2007) 7 SCC 798

Although the majority of the abusers use it for recreational purposes, many become dependent on it after having used it as medication for pain or cough. Unfortunately, some people choose to misuse codeine to get feelings of elation and euphoria. Possible long-term consequences of codeine abuse include frequent over sedation, a risk of overdose, chronic constipation, sexual dysfunction, low sex drive, and disrupted menstrual cycles. When someone becomes addicted to the drug, it can have serious consequences on his health, finances and relationships. Codeine abuse has markedly on rise in the state and significantly large number of commercial quantity cases entering the criminal justice system.

7. The law laid down by the Hon'ble Apex Court in ***Mohd. Sahabuddin & Anr. Vs. State of Assam***⁵ (supra) has been very categorical about the stricter approach by the Court while granting bail in the cases of substance abuse, whereby recovery of cough syrup containing Codeine Phosphate in bail matter was found to be sufficient ground to reject the bail application:

⁵ 2012 (10) SCALE 77.

“13. As pointed out by us earlier, since the Appellants had no documents in their possession to disclose as to for what purpose such a huge quantity of Schedule 'H' drug containing narcotic substance was being transported and that too stealthily, it cannot be simply presumed that such transportation was for therapeutic practice as mentioned in the Notifications dated 14.11.1985 and

29.1.1993. Therefore, if the said requirement meant for therapeutic practice is not satisfied then in the event of the entire 100 ml. content of the cough syrup containing the prohibited quantity of codeine phosphate is meant for human consumption, the same would certainly fall within the penal provisions of the N.D.P.S. Act calling for appropriate punishment to be inflicted upon the Appellants. Therefore, the Appellants' failure to establish the specific conditions required to be satisfied under the above referred to notifications, the application of the exemption provided under the said notifications in order to consider the Appellants' application for bail by the Courts below does not arise.”

The said precedence has been followed by several High Courts including Rajasthan High Court in the case of **Gavranjeet Singh alias Gavrana vs State**⁶ wherein it

⁶ Criminal Misc. Bail No. 3790 / 2017.

was iterated that merely because the recovery is of small quantity, as defined in the Schedule, the benefit of bail cannot be granted to the present petitioners.

8. While strict liability provisions of the NDPS Act are considered deterrent, application of these provisions has not resulted in high punishment. Despite

strict provisions, the recorded crime rate under the NDPS Act has increased in the country more during the last ten years. It is also equally disturbing to note that there is a disparate sentence in such kind of cases which is quite contrary to the notion of graded punishment prescribed under the law, as similar drug quantities witness varying degree of sentences. The lack of uniform sampling procedures adds to the overall inconsistency in sentencing for drug cases, more especially in pharmaceutical drugs like of cough syrup containing Codeine Phosphate. This kind of ambiguity in the application of the law with regards to most drug abuse cases in the country still persists. As a negatively-defined category, intermediate quantity cases receive disparate sentences, due to the wide range of punishments

available to a judge together with a lack of sentencing guidelines. This sort of inconsistencies problematises and affects the conviction rate in such crimes. But this case present a clear picture of recovery of commercial quantity.

9. However, on the basis of doctrine of parity, wherein a co-accused, who was charged under similar offences, has been granted bail by the Court, the other coaccused shall also be entitled to bail. The Allahabad Court in **Yunis And Anr. vs State Of U.P.** (1999 CriLJ 4094) while relying on **Nanha v. State of U.P.** (1993 Cri LJ 938) held that:

“5. where the case of co-accused is identically similar and another co-accused has been granted bail by the Court, the said co-accused is entitled to be released on bail on account of desirability of consistency and equity. As regards the principle of parity in matter of rejection of bail application, it may be observed that law of parity is a desirable rule.”

In the said case the bail was granted merely for the sake of judicial consistency and propriety. Nonetheless, this court wishes to clarify that the NDPS cases should always be dealt with stricter approach of ‘No Tolerance’. In the

instant case, this Court is painstakingly deviating from its “No-tolerance approach” because of the fact that the co-accused who was placed quite worse than the present Petitioner has been enlarged on bail. Thus, the present bail application is allowed solely on the basis of parity.

The Bail Application is accordingly disposed of.

As Lock-down period is continuing for COVID-19, learned counsel for the petitioner may utilize the soft copy of this order available in the High Court’s website or print out thereof at par with certified copies in the manner prescribed, vide Court’s Notice No.4587 dated 25.3.2020.

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S. K. Panigrahi, J.