

Uttarakhand High Court

Tekendra Prasad Joshi vs State Of Uttarakhand on 9 June, 2020

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

First Bail Application No. 1164 of 2018

Tekendra Prasad Joshi

....Applicant

Vs.

State of Uttarakhand

.....Respondent

Hon'ble Alok Kumar Verma, J.

This bail application has been filed under Section 439 of the Code of Criminal Procedure, 1973 for grant of regular bail in connection with FIR No.10 of 2018, registered with Police Station Banbasa, District Champawat, for the offence punishable under Section 8/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act, 1985').

2. Facts, to the limited extent necessary, are that on 19.02.2018, when the informant M.P. Singh, Inspector of Special Task Force along with other police personnels were on routine checking in the area of Police Station Banbasa, India-Nepal border to prevent the illegal trafficking of the narcotic drugs, received an information in respect of a person carrying Charas, who was coming from Nepal after crossing Sharda River, and trying to sell it at the west corner of the bridge of Fagpur. In spite of an endeavour, no independent witness could be secured. The police team reached the spot. The applicant was apprehended. At that time, a plastic bag was in his hand. On interrogation, he revealed his name as Tekendra Prasad Joshi alias Tekraj, son of late Madhav Joshi, resident of Ward No.9, village Brahamdev, District Kanchanpur, Nepal. He disclosed that he was carrying Charas from Nepal to sell it and he was waiting for customers. Mr. Rajendra Singh, Circle Officer of the Police, Tanakpur, was informed by the informant on mobile phone and in presence of him search was conducted. During the search, he was found to be in possession of 2 kg. 504 gram. of Charas, which was put in his hand bag. The applicant was arrested at 21.15 hrs. After recovery, recovered contraband was sealed. Furd was prepared. Sample from the recovered contraband was taken before the court and sent to F.S.L., Rudrapur. According to the report dated 05.05.2018 of the Regional Forensic Science Laboratory, Rudrapur, District Udham Singh Nagar, the tested material was Charas. The charge sheet was submitted after investigation. According to both the parties, four prosecution witnesses have been examined.

3. Heard Mr. Harshit Sanwal, the learned counsel for the applicant and Mr. S.S. Adhikari, learned A.G.A. assisted by Mr. P.S. Uniyal, the learned Brief Holder for the State through video conferencing.

4. The learned counsel appearing for the applicant submits that the applicant has been falsely implicated; provisions of Section 42, Section 50, Section 52 and Section 57 of the Act, 1985 have not been complied with; no public witness was taken by the police in the alleged recovery proceedings despite the alleged recovery was made on National Highway; the alleged recovery was made in the

presence of Circle Officer, who was highly interested person; the applicant has no criminal history; he is in custody since 19.02.2018. The case of the prosecution is not proved in the light of the evidence of witnesses, examined by the prosecution in the trial.

5. The learned Assistant Government Advocate appearing for the State opposed the bail application and submits that provisions of Section 42 and Section 50 of the Act, 1985 are not attracted in this case; the recovered Charas was in commercial quantity; looking to the involvement in commission of the crime, the chances of misuse of bail and abscondence of the applicant cannot be positively ruled out as the applicant is a permanent resident of Nepal.

6. As per the Table prepared in terms of Section 2 (xxiii a) and Section 2 (vii a) of the Act, 1985, 100 gram of Charas is small quantity and greater than one kg is commercial quantity (Entry No.23).

7. The preamble of the Act, 1985 shows that the object of this Act is to consolidate and amend the law relating to narcotic drugs and to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances etc.

8. At this stage, it seems appropriate to notice the provisions of Section 50 and Section 37 of the Act, 1985. The provisions of Section 50 and Section 37 of the Act, 1985 are to the following effects:-

"Section 50:- Conditions under which search of persons shall be conducted-- (1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1). (3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973. (6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

"Section 37:- Offences to be cognizable and non-bailable--(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless--

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause

(b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail".

9. In the case of State vs. Syed Amir Hasnain, (2002) 10 SCC 88, the Hon'ble Apex Court has held, "In view of the two judgments of this Court in Union of India vs. Ram Samujh, (1999) 9 SCC 382 and Union of India vs. Aharwa Deen, (2000) 9 SCC 382, even the High Court would be bound by the provisions of Section 37 of the NDPS Act and would not be entitled to release the accused under the provisions of the NDPS Act unless the provisions of Section 37 are satisfied."

10. In the case of Megh Singh vs. State of Punjab, 2004 (1) CCSC 337, the Hon'ble Supreme Court held that a bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises.

11. In the case of Makhan Singh vs. State of Haryana, (2015) 4 CCSC 1790, the Hon'ble Apex Court has held that compliance which Section 50 of the Act, 1985 will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container etc., which the accused may be carrying ought to be searched.

12. Considering the alleged Charas was recovered from the bag, held by the applicant and not in his personal search, it can be said that the compliance of Section 50 of the Act, 1985 was squarely not applicable in the instant case.

13. The submission of the learned counsel for the applicant is that the provisions of Sections 42, 52 and 57 of the Act, 1985 were not complied with. The learned counsel for the applicant relied upon a judgment in the Appeal (Crl.) No.311 of 2002, Directorate of Revenue and another vs. Mohammed Nisar Holia, passed by the Hon'ble Supreme Court on 05.12.2007, Crl. L.P.310 of 2013 Directorate of Revenue Intelligence vs. Manjinder Singh, passed by the High Court of Delhi on 23.01.2014, Criminal Appeal No.1233 of 2006 State of Rajasthan vs. Jag Raj Singh, passed by the Hon'ble

Supreme Court on 29.06.2016 and Criminal Appeal Nos.36 of 2003 and 606 of 2004 Karnail Singh vs. State of Haryana, passed by the Hon'ble Supreme Court on 29.07.2009.

14. Per contra, the learned counsel for the State submits that the provisions of Section 42 of the Act, 1985 is not applicable in this case. According to him, the information was received when the informant was busy in the routine checking and there was not enough time for reducing the information in writing and informing the same to his superior officer and obtain his permission.

15. Section 42 comprises of two components. One relates to the basis of information i.e. (i) from personal knowledge, and (ii) information given by person and taken down in writing. The second is that the information must relate to commission of offence punishable under Chapter IV of the Act and/or keeping or concealment of document or article in any building, conveyance or enclosed place which may furnish evidence of commission of such offence. Unless both the components exist Section 42 has no application. Where a search is required to be made at a public place which is open to the general public, Section 42 would have no application. Therefore, if a search was made in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 of the Act, 1985. Apart from this, compliance of Section 42 is a question of fact. Thus, it is to be looked into by the court during trial and may not be looked into for consideration of a bail application. Section 52 and Section 57 are not mandatory but only directory as held in Babubhai Odhavji Patel vs. State of Gujrat, (2005) 8 SCC 725.

16. The rulings cited by the learned counsel for the applicant are on merits. It has not been explained by the learned counsel for the applicant that how the applicant can get the benefit of the decisions passed on the basis of merit at the stage of hearing of the bail application in the present case.

17. Each criminal case presents its own peculiar factual scenario and, therefore, certain grounds peculiar to a particular case may have to be taken into account by the court.

18. In Gian Chand and others vs. State of Haryana, (2013) 14 SCC 420, the Hon'ble Supreme Court has held that one additional or different fact may make a world of difference between cases or between two accused in same case. Each case depends on its own facts and a close similarity between one case and another is not enough because a single significant detail may alter entire aspect.

19. In the instant case, the search and seizure was made at a public place, therefore, the provisions of Section 42 of the Act were not attracted because Section 43 of the Act, 1985, pertaining to search at a public place, will apply in such a situation. The clear case of the respondent is that at the time of receiving the information, there was not enough time for reducing the said information in writing and informing the same to the superior officer.

20. The learned counsel appearing for the applicant submits that no public witness was taken by the police in the alleged recovery proceedings despite the alleged recovery was made on the National Highway, therefore, this recovery cannot be presumed to be an impartial recovery and the applicant is in custody since 19.02.2018.

21. According to the FIR, the recovery was made at night and due to night and seclusion no public witness could be secured. Apart this, the law is well settled that the evidence of a public officer cannot be thrown only on the ground that he is a police officer.

22. The accusation in the present case is with regard to the commercial quantity. Once the public prosecutor opposes the application for bail to a person accused of the enumerated offences, in case, the Court proposes to grant bail to such a person, two conditions are to be mandatorily satisfied in addition to the normal requirements under the provisions of the Code of Criminal Procedure, 1973 or any other enactment, (i) the Court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence. In Criminal Appeal No(s) 154-157 of 2020 State of Kerala Vs. Rajesh and others, the Hon'ble Supreme Court has held on 24.01.2020 that the expression "reasonable grounds" means something more than prima facie grounds, and (ii) that person is not likely to commit any offence while on bail. It is the mandate of the legislature which is required to be followed. The non-obstante clause with which this Section starts should be given its due meaning and clearly it is intended to restrict the powers to grant bail. To check the menace of dangers drugs and psychotropic substances flooding the market, the Parliament has provided that the person accused of the offences under the Act should not be released on bail during the trial unless the mandatory conditions provided under Section 37 of the Act, 1985 are satisfied.

23. In State of M.P. Vs. Kajad, (2001) 7 SCC 673, the Hon'ble Supreme Court has held that negation of bail is the rule and its grants an exception under (ii) of clause (b) of Section 37(1) of the Act, 1985.

24. In Criminal Appeal No(s) 154-157 of 2020 (Supra) the Hon'ble Supreme Court has held that liberal approach in the matter of bail under the N.D.P.S. Act is uncalled for.

25. Therefore, it is quite clear that an order of bail cannot be granted in an arbitrary or fanciful manner. A ratio decidendi of the judgment of Hon'ble Apex Court in Anil Kumar Yadav Vs. State (N.C.T.) of Delhi and another, 2018(1) CCSC 117 is that in serious crimes, the mere fact that the accused is in custody for more than one year, may not be a relevant consideration to release the accused on bail.

26. In the light of the facts and circumstances of the present case, it cannot be said that mandatory conditions, as mentioned above, have been satisfied. It would be inappropriate to discuss the evidence in depth at this stage because it is likely to influence the trial court. But, from the perusal of the evidences, collected during investigation so far, it prima facie appears that the applicant was involved in this offence. No reason is found to falsely implicate the applicant/accused person. Therefore, there is no good ground to release the applicant-accused person on bail at this stage. The bail application is liable to be rejected. The bail application is rejected accordingly.

27. It is clarified that the observations made regarding the bail application is limited to the decision, in the light of the facts, provided by the parties at this stage, as to whether the bail application should be allowed or not and the said observations shall not effect the trial of the case.

28. The applicant is in custody since 19.02.2018, therefore, the trial court is hereby directed to expedite trial and dispose of the case, at the earliest.

(Alok Kumar Verma, J.) 09.06.2020 JKJ/Neha