

NCB Vs. Ganesh Pun
Case No. SC/29/19

16.11.2019

Present: Sh. B.S. Arora, SPP for NCB.

Accused not produced from JC.

Sh. Rajnish Kalawatia, Ld. Counsel for accused

Accused not produced from JC due to administrative reasons

Separate order on charge passed. Prima facie offence punishable u/s 8(c) and 21(b) NDPS Act is made out. Further, the application seeking bail moved on behalf of accused is dismissed.

Put up for formal framing of charge on 23.11.2019. At request of Ld. Counsel, date is changed to 04.12.2019. Production warrants be issued for accused Ganesh Pun for next date.

(Ajay Kumar Jain)
Special Judge/NDPS
New Delhi/16.11.2019

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Vide this order, I shall pass the order on charge as well as decide the bail application of accused Ganesh Pun.

Facts in brief as per complaint filed are that on 12.02.2018 at 1100 hours a secret and reliable information received at NCB office that a parcel destined to USA suspected to contain narcotic drugs and if the search of said parcel is conducted it may result in recovery of narcotic drug thereafter, the raiding party was constituted and reached the Blue Dart Office where the suspected parcel was produced by Ashish Gupta, Incharge showing the consignor name Sushma Chetri and the consignee is of USA. On opening the said parcel six polythene packets were recovered containing in total 200 tablets of nitrazepam and the same were transferred in the polythene and weighed around 108 gm. It was revealed during investigation that the suspect Sushma Chetri had sold the property of the address shown in the consignment and presently residing in a flat at Greenfield City, and again it is revealed that she had left the said flat. On 24.09.2018 NCB team of Delhi alongwith NCB team of Kolkata Zonal Unit reached flat no. 2D, Block No. 72, Greenfield city, Kolkata and found suspect Sushma Chetri alongwith her husband Ganesh Pun and from the search of said flat huge quantity of psychotropic substance/tablets were found and a separate case was registered by NCB. On 25.09.2018 the statement of Sushma Chetri and accused Ganesh Pun u/s 67 was recorded. Statement of one Arun Adhikari, booking clerk of Blue Dart was also recorded on 25.09.2018 who disclosed that accused Ganesh Pun and his wife came to his office for booking the parcel and identified accused Ganesh Pun. Thereafter, on returning to Delhi NCB team moved an application for production warrants of accused. In pursuant to production warrants accused was produced on 15.11.2018 and one day PC remand was taken. Statement of accused was recorded on

15.11.2018 and he was also arrested however inadvertently in the arrest memo the date is mentioned as 14.11.2018. The accused was arrested at around 02.30 on 15.11.2018, jamatalashi was also taken into possession and accused was got medically examined. During investigation an application on 13.02.2018 moved before this court for drawal of samples however same was dismissed vide order dated 08.05.2018 with observation that the said application to be moved before Executive Magistrate and the certified copy of said order was received on 11.06.2018. Thereafter on 18.09.2018 an application was moved before SDM, Rajouri Garden and samples were drawn on 02.01.2019 in the malkhana of NCB in presence of Executive Magistrate and test memo in triplicate were prepared at the spot. The samples were sent to CRCL and as per CRCL report, nitrazepam content per tablet is 7.4 mg.

Ld. Counsel for the accused submitted that the entire investigation is perfunctory which is vitiated for non compliance of mandatory guidelines. The search and seizure was made on 12.02.2018 however no sample was drawn at that time in violation of the standing order. Ld. Counsel further submits that in terms of section 3(4) Cr.PC, Executive Magistrate have no power to certify the inventory u/s 52A NDPS Act and it is only through the court that the said proceedings could be conducted. Ld. Counsel submits that there is inordinate delay in drawing of sample and thus only on this ground entire proceedings stand vitiated. Ld. Counsel submits that in the complaint, it is mentioned that on 26.02.2018 a secret information was received, however the seizure was already conducted on 13.02.2018, this creates doubt over the factum of search and seizure on 12.02.2018. Ld. Counsel submits that there is a discrepancy of date of order of arrest, this all suggests that the entire investigation is sham. Ld. Counsel submits that seizure of 200 tablets of nitrazepam weighing 108 gm whereas the test memo 10 number of tablets weighed around 6.1 gm therefore total weight is 122 gm and not 108 gm. Furthermore, as per CRCL report, the

nitrazepam content per tablet is 7.4 mg therefore in total 7.4×200 is 1480 mg which is 1.48 gm, less than small quantity i.e. 20 gm. Ld. Counsel submits that even otherwise, the total quantity of 108 gm is well below the commercial quantity i.e. 500 gm. Ld. Counsel submits that there is doubt over the identity of accused as the accused was being identified after 7 months through the dealing clerk of DHL office. Ld. Counsel submits that such an identification cannot be taken into consideration which is in the violation of provisions of Cr.PC. Ld. Counsel submits that in terms of E. Michael Raj the rate of purity of drug is to be taken into consideration for determining quantum of sentence for small, intermediate or commercial quantity. The judgment of E. Michael Raj is still binding as observed by Hon'ble Apex Court in *Hira Singh & anr. Vs. UOI 2017(8) SCC 162*. Ld. Counsel submits that Hon'ble High Court of HP in case titled as *Naseer Mohd. Vs. State of HP AIR Online 2019 HP 336* has granted the bail after considering the purity of the content found to be under small quantity. Ld. Counsel submits that Punjab and Haryana High Court in case titled *Rajbir Singh @ Raju Vs. State of Punjab 2019 SCC Online P&H 1734* clarifies that any neutral substance which has nothing to do with psychotropic substance cannot be counted towards the total weight of seized contraband and it is only the actual quantity of contraband which is to be taken into consideration and any other interpretation would lead to absurd results. Ld. Counsel submits that it is held that neutral solution of non psychotropic substance is not to be counted towards commercial quantity of the said narcotic/psychotropic substance present in a mixture/solution. Ld. Counsel submits that in case titled as *Mohd. Ali Jinna Vs. Intelligence Officer DRI 2017 SCC Online Madras 1502* only the actual content of drug to be taken into consideration. Ld. Counsel submits that it will fall under small quantity. Ld. Counsel submits that the accused has already been released on bail in case of commercial quantities at Kolkata High Court and the present case even as per the case of the prosecution falls under intermediate quantity

and accused is in custody for around one year therefore, he be released on bail. Ld. Counsel submits that the material on record do not suggest any prima facie case against the present accused therefore, accused is entitled to be discharged. Ld. Counsel submits that in case the accused not stands discharged, he be released on bail.

Ld. SPP for NCB stated that though from the parcel recovered at Delhi intermediate quantity of drug is recovered however, when the raid is conducted at the flat of the accused in Kolkata, huge commercial quantity of drug is recovered and the accused was granted bail in case of commercial quantity only because the NCB unable to file the chargesheet and bail there is a default bail. Ld. SPP submits that error in the dates of arrest or in the report u/s 57 are clerical errors which were duly clarified in the complaint and are subject matter of trial cannot be considered at this stage. Ld. SPP further submits that the said parcels were booked through the wife of the accused and both were found present at the time of raid in Kolkata thus there is no dispute about the identity of accused therefore the contention that the accused was identified through the booking clerk of the courier office after delay of seven months is hardly of any consequence at this stage. Ld. SPP submits that the judgment of E. Michael Raj for taking the purity content only is prior to the notification dated 18.11.2009 and the said notification was duly upheld by the Delhi High Court in case titled as *Abdul Mateen Vs. Union of India & Anr. In WP crl. 1552/2010*. Ld. SPP submits that in this judgment high court has also considered the judgment of E. Michael Raj and categorically held that the preparation includes reference to a mixture of one narcotic drug with neutral material. Ld. Counsel submits that therefore the entire mixture is to be taken into consideration and not the drug content in the entire mixture. Ld. SPP submits that judgment of *Abdul Mateen* is Division Bench of Delhi High Court which is binding on this court and till date is not overruled by Supreme Court and the Hon'ble Supreme Court has referred Hira Singh judgment to the larger Bench and till date this

judgment will hold the law on this point. Ld. SPP submits that prima facie offence u/s 8(c) and 22(b) is clearly made out against the accused. Ld. SPP submits that as far as bail of the accused is concerned though the contraband recovered is of intermediate quantity but the accused is found to be dealing with commercial quantities as huge recovery was made at Kolkata. The bail at Kolkata is the default bail. The conduct of the accused suggests that he deals in illegally in the drugs and there is most likely if he is released on bail he will indulge in same activities. Ld. SPP submits that therefore the accused is not entitled to be released on bail.

Heard. Record perused.

There is a recovery of 108 gm of nitrazepam tablets which is shown through the CRCL report. The errors in recording the date of secret information or the arrest cannot be appreciated at this stage. The delay in procuring the samples is duly explained however also the subject matter of trial. The delay in identification is also not a ground to discharge at this stage in present facts and circumstances. As far as the drug content is concerned, as per the CRCL report, it is found to be under small quantity however in terms of notification dated 18.11.2009 passed by Central Government inserting note 4, entire substance/mixture is to be taken into consideration and the said notification is upheld by Delhi High Court in case titled as *Abdul Mateen*. The para 11 of the judgment is reproduced as under:

11. The word 'preparation' itself has been defined in section 2 (xx) to, inter alia, mean any solution or mixture, in whatever physical state containing one or more such narcotic drug or psychotropic substance. It is obvious that if there is only one narcotic drug and we are referring to a mixture, then the other material must be a neutral material. Therefore, the word "preparation" includes reference to a mixture of one narcotic drug with a neutral material. Once we understand this, it becomes clear that the Central Government has been given the power to specify the quantity of this 'preparation' or mixture of a narcotic drug and a neutral substance. Once

this is accepted then there is no escape from the conclusion that the Central Government had the power to specify the quantities shown in column 5 and 6 of the Table appended to the notification dated 19.10.2001 with reference to the entire mixture and not just its pure drug content. This is so because all preparations which contain diacetylmorphine would be opium derivatives which, in turn, would be manufactured drugs and that would lead us to the expression narcotic drugs. And, ultimately to the said expression as used in section 21 of the NDPS Act. We would tend to agree with the learned counsel for the respondent that the decision of the Supreme Court in the case of E. Micheal Raj (supra) was rendered at a point of time when this so- called "loop-hole" had not been plugged and therefore it is not as if we are taking a view contrary to the Supreme Court. The Central Government, at that point of time had catered to a situation which involved a mixture of one or more narcotic drugs and psychotropic substances with or without neutral material. It had not dealt with a situation which involved one narcotic drug or one psychotropic substance with some neutral material. Unless and until there was a specific provision for it, the courts could not supply the gap particularly because these were penal provisions. Now, that the gap has been filled by the amendment to the notification dated 19.10.2001 by introducing note 4 therein, the earlier decisions would really not be applicable. We make it clear that apart from the challenge to the notification as being ultra vires the provisions of the NDPS Act, there is no challenge whatsoever to the provisions of the NDPS Act.

Hon'ble Madhya Pradesh High Court in case titled *Jitender Hirvey Vs State of Madhya Pradesh M.Cr.C no. 25164/2018* dated 03.08.2018, in paragraph 14 and 15 held as under:

12. The Hon'ble Supreme Court in the case of *Union of India and Anr. Vs. Sanjeev V Deshpande*, reported in 2014 Cr.L.R. SC 896 (2014) 13 SCC 1 : (AIR 2014 SC 3625), considered the controversy as to whether the contents of psychotropic salt in the tablets could be separately counted for calculating the weight or volume of psychotropic substance in medicinal preparation. The Supreme Court turned down the contention and held that the gross weight of the drug is to be counted and

not merely the net percentage/contents of the salt in the medicinal preparation for finding out the actual weight of the drugs in reference to the schedule under the NDPS Act.

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14. Co-ordinate Bench of this Court in MCRC No.20360/2018 order dated 28/05/2018 and in MCRC No.11448/2016 order dated 13.12.2016 has taken the same view. Following the judgments of Hon'ble the Supreme Court passed in Sanjeev V Deshmukh & Mohd. Shahbuddin cases (supra) the Rajasthan High Court has also taken the same view in the case of Ravi alias Ravikant Vs. State of Rajasthan reported in 2016 CRI. L. J. 3309 that gross weight is to be considered for calculation of commercial quantity.

15. Thus, it is evident that the whole quantity of material recovered in the form of mixture is to be considered for the purpose of determining the quantity of psychotropic substance and when the psychotropic drug is kept in possession without any document showing that it was meant for therapeutic use and the gross weight of psychotropic substance is well above the commercial quantity, the restriction contained in Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) is directly applicable to the case of the petitioners. Nothing is on record to satisfy the conditions enunciated in this Section. Therefore, the petitioners are not entitled to be released on bail.

As per the observation in this judgment the entire drug content is to be seen not only the purity. On consideration of entire material on record, prima facie offence u/s 8(c) and 21(b) NDPS Act is made out. Charge be framed accordingly.

As far as bail application of accused is concerned, the main plea of Ld. Counsel for accused is that present case is of intermediate quantity and the accused is in JC since 15.11.2018 for about one year in this case therefore, he be released on bail. The present offence is relating to the manufactured drugs and the accused is found to be dealing in these drugs illegally. There are commercial quantities of these substances recovered at

the instance of this accused at Kolkata in which he is already on bail but the bail was not a regular bail but a default bail. This accused is found to be changing the addresses and with great difficulty got apprehended. The conduct of the accused suggests that he will likely to indulge in these activities if released on bail. The total sentence even for intermediate quantity is 10 years. Considering the gravity of offence, conduct of accused, I am not inclined to release the accused Ganesh Pun on bail hence his bail application stands dismissed. Copy of this order be given dasti as well as be sent to accused in jail.

(Ajay Kumar Jain)
Special Judge/NDPS
New Delhi/16.11.2019