

Deepak Gupta & Ors vs U.T. Of J&K & Anr on 26 April, 2022

Author: Mohan Lal

Bench: Mohan Lal

Sr. No. 142

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Bail App. No. 7/2022
Reserved on : 08.04.2022
Pronounced on : 26.04.2022

Deepak Gupta & Ors. Petitioner(s)
Through :- Mr. Satinder Gupta, Advocate
V/s

U.T. of J&K & Anr. Respondent(s)

Through :- Mr. Dewakar Sharma, Dy. AG

Coram: HON'BLE MR. JUSTICE MOHAN LAL, JUDGE

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26.04 .2022

1. Petitioners/accused namely, (i) Deepak Gupta (age 31 yrs) S/O Sh.

Ashwani Kumar R/O Ward No. 17 near Tangri Palace Kathua, (ii) Tarun Sharma (age 21 yrs) S/O Shiv Dutt Sharma R/O Ward No.6 Sher Singh Mandi Kathua & (iii) Hitesh Gupta (age 24 yrs) S/O Sh. Rakesh Gupta R/O Ward No. 2 Kathua, have sought regular bail in FIR bearing No. 56/2021 of police station Rajbagh Kathua for commission of offences contrary to sections 8/21/22/29 of Narcotic Drugs Psychotropic Substance Act 1985 (for short the NDPS Act). It is averred, that petitioners are permanent residents of U.T. of J&K and citizens of India having no criminal objectionable antecedents whatsoever are in their young age, but have been subjected to frivolous criminal case infringing their right of liberty and their entitlement to the presumption of innocence; that the petitioners came to be arrested on 15-09-2021 for the allegations that 24 bottles of CIREX 100ml each with mark WINCIREX were found from them while driving a car BREEZA bearing No. JK08H/5000 on a naka checking point opposite Rajbagh Police Station Kathua; that the court of Ld. Addl. Sessions Judge Kathua vide order dated 14-12-2021 framed charges against petitioners u/ss 8/21/22/29 of NDPS Act to which the petitioner/accused pleaded not guilty and trial is being conducted in the said court; that before framing charges petitioners had moved an application on 29-10-2021 for grant of bail, but Ld. Addl. Sessions Judge Kathua rejected the bail application vide order dated 14-12-2021; that the respondent/prosecution have not disclosed as how the alleged 24 bottles of CIREX 100ml each marked as WINCIREX are narcotic drugs/ psychotropic substance/manufacture drugs and even if those are so then also for how much quantity, commercial/intermediate or small the petitioners are being charge sheeted; that as per FSL report

only 2 bottles of specimen out of 24 bottles seized bottles accompany the charge sheet has only reference to the content of Codeine Phosphate as being a narcotic analgesic.

2. Respondent/U.T. of J&K has opposed the bail application on the grounds, that from the possession of accused persons while driving the vehicle car BREEZA bearing No. JK08H/5000, 24 bottles of WINCIREX were recovered whereby the accused have committed offences u/ss 8/21/22/29 of NDPS Act and the final report after usual investigation has been produced in the court of Ld. Addl. Sessions Judge Kathua where the trial is being conducted. It is contended, that the court cannot appreciate evidence at the stage of deciding the bail application, accused have committed heinous offences against society and their bail application deserves to be rejected and dismissed, as there is every likelihood that the accused may jump over the conditions of bail and influence the vital prosecution witnesses.

3. Ld. Counsel for petitioners while making a strong case for their enlargement on bail has vehemently argued, that the charge sheet laid in the court of Ld. Addl. Sessions Judge Kathua does not depict that the quantity of alleged contraband recovered from the accused persons is commercial, one bottles of WINCIREX Syrup contain 10 mg of codeine phosphate out of 5ml which when calculated comes to total 48 grams of codeine phosphate in 24 bottles of WINCIREX Cough Syrup (100ml each) which is intermediate quantity. It is argued, that Delhi High Court in a case law, titled Iqbal Singh Vs. State decided on 13 July 2020 has granted the bail to the accused found in possession of Onerex cough syrup which also contained the codeine as the drug content, moreso, Coordinate Bench of J&K High Court on 28-01-2022 in a case titled Lovedeep Nath vs U.T. of J&K granted bail to the accused found in possession of 3000 capsules of Tramadol on the ground that the challan as well as the report of FSL did not mention percentage of narcotic content in the capsules and embargo contained u/s 37 was not applicable. It is moreso argued, that three Judge Bench of Hon'ble Supreme Court on December 13, 2021 also granted bail to the accused who were found in possession of 1,37,665 tablets of different types recovered by Directorate of Revenue Intelligence Chennai Zonal Unit-1 on the ground that there was no clarity on the quantitative analysis of the sample and the prosecution cannot be heard to state at this preliminary stage that accused/petitioners were found in possession of commercial quantity of psychotropic substance. It is argued, that out of the 24 bottles only one bottle sample has been sent to FSL which is violations of clause 2.4 of standing order No.1 of 1989 which demonstrates that in case of seizure of single package/container, one sample in duplicate shall be drawn from each package/container in case of seizure of more than one package/container, and as in the case in hand out of the 24 bottles only one sample bottle has been sent for chemical analysis, it is violation of standing order No.1 of 1989 entitling the accused to be granted bail. To support his arguments, Ld. Counsel for petitioners has relied upon the judgments viz;

(i) Iqbal Singh Versus State (decided by Delhi High Court on 31 July 2020), (ii) Lovedeep Nath Versus Union Territory of J&K & another (Bail Application No. 296/2021 decided by J&K High Court on 28-01-2022),

(iii) [Bharat Choudhary (Petitioner) versus Union of India (Respondent) [petition for special leave to appeal (CRL) No. 5703 of 2021 and Raja Chandrasekharan (Petitioner) Versus the Intelligence

officer directorate of Revenue Intelligence (Respondent) (Petition for special leave to appeal (CRL) No. 8919 of 2021] & (iv) Om Parkash Verma--Applicant Versus State of U.P.--Opposite Party (Crl. Misc. Bail App. No. 9660 of 2021 decided on 11-03-2022 by Allahabad High Court).

4. Ld. Counsel for U.T. has strongly opposed the bail on the grounds, that from the possession of accused persons while driving the vehicle car BREEZA bearing No. JK08H/5000, 24 bottles of WINCIREX were recovered whereby the accused have committed offences u/ss 8/21/22/29 of NDPS Act and the final report after usual investigation has been produced in the court of Ld. Addl. Sessions Judge Kathua where the trial is being conducted. It is argued, that the court cannot appreciate evidence at the stage of deciding the bail application, accused have committed heinous offences against society and their bail application deserves to be rejected and dismissed as there is every likelihood that the accused may jump over the conditions of bail and influence the vital prosecution witnesses.

5. I have heard Ld. Counsel for the petitioners/accused and Ld. GA for U.T/respondent. I have perused the record carefully and have bestowed my thoughtful consideration to the material aspects involved in the case and have scanned the judgments relied by Ld. Counsel for the petitioners/accused.

6. As emerges out from the copy of the charge sheet, it clearly transpires that on 15-09-2021 on a naka checking point opposite Rajbagh Poice Station Kathua the accused/petitioners while travelling/driving vehicle BREEZA bearing No. JK08H/5000 were intercepted and 24 bottles of CIREX 100ml each with mark WINCIREX were recovered from the vehicle. Copy of chargesheet and the charges framed against petitioners/accused on bare perusal do not disclose that accused/petitioners have been indicted for commission of offences contrary to commercial quantity where embargo for grant of bail u/s 37 of NDPS Act is attracted. The challan as well as the charges framed against accused are silent that 24 bottles of CIREX Syrup found from the possession of accused are of commercial quantity. Under Section 37 of the NDPS Act an accused person indicted for commission of offences u/ss 19/24/27-A for commercial quantity shall not be enlarged on bail unless the Public Prosecutor is given opportunity of being heard and the court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and he is not likely to commit any offence while on bail. Petitioners/accused are not indicted for offences u/ss 19 or 24 or 27-A, as well as the chargesheet is silent, and moreso, the copies of charges framed against accused also don't disclose that accused are involved in offence of commercial quantity. Literature of WINCIREX Syrup on bare look demonstrates that it's salt also contain codeine phosphate as 10mg/5ml meaning thereby that 10mg of codeine phosphate is contained in 5ml of the syrup and thus in 100ml (one bottle of WINCIREX syrup) the weight of codeine phosphate to my considered calculation would be $[10\text{mg} \div 5\text{ml} \times 100\text{ml (i.e.1 bottle)}] = 200\text{mg} = 2\text{grams}$, therefore 24 bottles of WINCIREX Syrup would contain $[=24\text{bottles} \times 2\text{grams}] = 48\text{ grams}$ of codeine phosphate. WINCIREX Syrup is not a narcotic drug and Psychotropic Substance Act in terms of SO 1055(E) dated 19-10-2021 as per the table appended to the NDPS Act. At S. No.28 of the Table in column 1, codeine is reflected as Narcotic Drug and Psychotropic Substance which specifies that 10 grams of codeine at column No.5 is small quantity whereas 1kg (1000grams) of codeine at column No.6 is commercial quantity. In the case in hand, as per the seizure of 24 bottles of WINCIREX Syrup from

the possession of petitioners/accused, 48 grams of codeine phosphate as Narcotic Drug and Psychotropic Substance is contained in them which in my considered view falls in between small and commercial quantity and is therefore, 'intermediate quantity', as such, a rigor of Section 37 of NDPS Act is not attracted. Hon'ble Delhi High Court in a case law titled Iqbal Singh Vs. State (decided on July 31 2020) granted bail to the accused found in possession of 57 bottles of Onerex Cough Syrup containing codeine content on the ground that the charge sheet was not of definite conclusion that whether the quantity is commercial or small. In the case of Lovedeep Nath v/s U.T. of J&K Coordinate Bench of J&K High Court on 28-01- 2022 granted bail u/ss 8/21/22/27-A/29 NDPS Act in case FIR No. 28/2019 to the accused found in possession of 3000 capsules of tramadol on the grounds, that the FSL did not mention the percentage of the narcotic content and rigor contained u/s 37 of NDPS Act was not applicable. In Bharat Choudhar vs Union of India (decided by Hon'ble Supreme Court on 13 December 2021) Hon'ble Supreme Court granted bail to the accused found in possession of 1,37,665 tablets of different types on the ground that there was no clarity on the quantitative analysis of sample and the prosecution could not be heard to state that petitioners has been found in possession of commercial quantity of Psychotropic Substance Act. In Om Parkash Verma vs State of U.P. (Criminal Misc. bail Application No. 9660 of 2021 decided on 11-03-2022) Hon'ble Allahabad High Court also granted bail to accused from whose possession 19 packets of contraband were recovered and one polythene amounting to total of 1 quintal 3 kg and 290 grams on the grounds that only one sample was taken from the said contraband which was clear violation of clause 2.4 of the standing order No.1 of 1989 specifying the taking of one sample from each container. Applying the ratios of judgments (Supra) to the facts of the case in hand, the charge sheet, the report of FSL and even the charges framed against the petitioners/accused are silent whether 24 bottles of WINCIREX Syrup recovered from the possession of petitioners/accused is commercial quantity or not. Once the prosecution is uncertain regarding the quantity whether it is small, intermediate or commercial, the accused cannot be kept for indefinite period of incarceration and have good case for bail.

In a case law titled Vishal Joshi -(Appellant) Vs. State of J&K -(Respondent), a bail application decided on 28.09.2018, wherein Hon'ble Mr. Justice M.K Hanjura (His Lordships the then was) while granting bail to an accused indicted for carrying 9 Kg Poppy Straw (Intermediate quantity) for infraction of offence U/S 8/15 NDPS Act in case FIR No. 50/2018 while discussing the scope of section 37 NDPS Act vis-à-vis personal liberty of the accused, in Paras 8, 9, 11 & 12 held as under:-

8. What gets revealed from the order of the trial court is that the quantity of the contraband recovered from the possession of the accused does not fall within the parameters of commercial quantity but it is an intermediary one and, therefore, the application of the applicants had to be considered under the provisions of 497 Cr. PC.

It is only on the application of the rigor of or of NDPS Act to a given case that bail can be withheld. In any case which does not fall within the purview, scope and definition of Section 37 of the NDPS Act, grant of bail has to be considered on the agility and celerity of Section 497 Cr. PC. Therefore, a realistic view and a pragmatic approach has to be taken in such a case.

9. The settled position of law as evolved by the Supreme Court in a catena of judicial dictums on the subject governing the grant of bail is that there is no strait jacket formula or settled rules for the use of discretion but at the time of deciding the question of "bail or jail" in non-bailable offences. Court has to utilize its judicial discretion, not only that as per the settled law, the discretion to grant bail in cases of non-bailable offences has to be exercised according to rules and principle as laid down by the Code and various judicial decisions. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses, if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

11. Testing at the instant application from the above perspective, it requires to be recapitulated that the rigor of Section 37 of the NDPS Act does not apply to the instant case. It also needs to be said that the case of the applicant does not fall within the parameters of the offences that are punishable with death or imprisonment of life. Therefore, there appears to be no reasonable ground for declining bail to the applicant. The maxim of the law of bails which has its application to the case on hand where the quantity of narcotics recovered from the applicant falls within the scales of an intermediary quantity, for which the punishment provided is upto 10 years and a fine of rupees one lac is "bail and not jail".

12. Deprivation of liberty is tantamount to punishment. The principal that punishment begins after conviction and that every man is deemed to be innocent unless duly tried and duly found guilty has its application to the facts of the instant case in all the fours. The object of the bail is to seek attendance and appearance of the accused at the trial by a reasonable amount of bail. Bail cannot be withheld as a means of punishment. Prison hell destroys the tender sentiments of a person. The applicant has been languishing in the jail for the last more than three months by now. The accused has to prepare for his defence which is of an essence in a criminal trial. The discretion has to be exercised on well based foundations of law and one cannot gets swayed by sentiments. Temper and passion have no role to play in exercising the discretion for the grant of bail. An individual cannot be denied the concession of bail on the pretext that he is the resident of a particular area. Grant of bail

is the general rule and the accused cannot be discriminated against on the basis of the place of residence wherever he resides as long as he is a citizen of India. Mere apprehension that the accused will evade trial is not sufficient to deny bail".

Ratios of the Judgments (Supra) make the legal proposition manifestly clear, that in case of intermediate quantity of contraband, the rigor of Section 37 of NDPS Act does not apply to the bail application of the accused and the bail application has to be considered in terms of provisions of Section 497 of Cr.PC. In the case in hand as discussed above, 24 bottles of WINCIREX Syrup found in possession of petitioners/accused contain only 48 grams of codeine phosphate as contraband narcotic drug which is intermediate quantity. Moreso, the chargesheet is silent about the quantity of contraband drug seized from the possession of petitioners/accused. From the date of arrest of the petitioners/accused on 15-09-2021 for the last more than 7 months they are languishing in judicial custody in District Jail Kathua. Deprivation of personal liberty is tantamount of punishment, the principle is that punishment begins after conviction and every accused is innocent unless duly tried and found guilty. The object of bail is to secure attendance of the accused at the time of trial. Bail cannot be with- held as matter of punishment. Grant of bail is general rule and it's refusal is an exception. Mere apprehension that accused will evade trial and remain absent is not sufficient to deny the bail. In view of law laid down in the case law (supra) petitioners/accused have carved out a strong case for bail in their favour, therefore, they are admitted to bails subject to furnishing of bail bonds in the sums of Rs. 50,000/- each before the Registrar Judicial of this Court with direction to furnish personal recognizance's of like amounts before Incharge District Jail Kathua, subject to the following terms and conditions:-

- (i) that the petitioners/accused shall remain present before the trial Court on each and every date of hearing except for special circumstances beyond his control;
- (ii) that the petitioners/accused shall not tamper the prosecution evidence or threaten the prosecution witnesses or dissuade them from deposing before the court.
- (iii) that if the prosecution during the course of trial collect sufficient evidence that the petitioners/accused are violating any terms and conditions, the prosecution is within it's rights to appear before this court for cancellation of their bails.

7. Disposed of accordingly.

(MOHAN LAL) JUDGE Jammu:

26.04.2022 Vijay Whether the order is speaking: Yes/No Whether the order is reportable: Yes/No