

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

Reserved on: 25.03.2022
Pronounced on:29.03.2022

CRM(M) No.251/2020

c/w

Bail App No.16/2021

KHURSHID AHMAD DAR

... PETITIONER(S)

Through: - Mr. M. Ashraf Wani, Advocate
with Mr. Shabir Ahmad Bhat, Advocate.

Vs.

UNION TERRITORY OF J&K

...RESPONDENT(S)

Through: - Mr. M. A. Chashoo, AAG.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) By this common order, the petition under Section 482 of Cr. P. C filed by the petitioner against the order dated 03.11.2020 passed by learned Principal Sessions Judge, Anantnag, whereby charges for offences under Section 21/22 of the NDPS Act have been framed against the petitioner, and the application for grant of bail to the petitioner are proposed to be disposed of.

2) Before coming to the grounds urged in the two petitions, it would be apt to refer to the facts which emerge from the charge sheet that has been filed against the petitioner before the trial court.

3) On 09.02.2020, the police intercepted a vehicle bearing No.JK03F-2341 that was proceeding from Qazigund to Bijbehara. The petitioner was in charge of the vehicle at the relevant time and upon search of the vehicle, 35 strips of Sposmo Proxyvan capsules were recovered and in all, 840 capsules were found in these 35 strips. The petitioner could not produce any authorization or document as regards the possession of the aforesaid drug. FIR No.08/2020 for offences under Section 21/22 of the NDPS Act came to be registered with Police Station, Bijbehara and the accused was taken into custody. The recovered capsules were seized and sample thereof was sent to the FSL, Srinagar, for its examination. After completion of the investigation, offences under Section 21/22 of the NDPS Act were found established against the petitioner and the challan was laid before the trial court.

4) The learned trial court vide impugned order dated 03.11.2020, framed charges for offences under Section 21/22 of the NDPS Act against the petitioner. It also appears that vide order dated 09.11.2020 followed by order dated 02.02.2021, the learned trial court dismissed the successive bail applications of the petitioner.

5) The main ground that has been urged by the learned counsel for the petitioner in both these petitions is that as per the FSL report, "Tapentadol" was detected in the sample of the capsules that were sent by the investigating agency to the FSL for examination. According to the learned counsel for the petitioner, the aforesaid drug does not find its mention in the Schedule to the NDPS Act, 1985, as such, the petitioner

could not have been charged for offences under Section 21/22 of the NDPS Act and consequently the rigor of Section 37 of the NDPS Act in the matter of grant of bail to the petitioner could not have been invoked by the learned trial court while rejecting his bail applications.

6) I have heard learned counsel for the parties and perused the material on record.

7) What comes to the fore from the material on record is that in the charge sheet as well as in the seizure memo, it is recorded that 35 strips of Spasmo Proxyvan were recovered from the possession of the petitioner. However, in the letter addressed by the Executive Magistrate, 1st Class, to the Director, FSL, Srinagar, at the time of sealing of the samples of the capsules, the name of the drug is shown as 'Spasmo Proxyvan-T Plus'. The report of the FSL dated 29.04.2020 also records the name of the drug as 'Spasmo Proxyvan-T Plus'. As per the report of the FSL, "Tapentadol" was detected in the sample that was examined by it.

8) The respondent-State in its reply has clarified that the name of the seized material has been wrongly mentioned as 'Spasmo Proxyvan' in the charge sheet as well as in the seizure memo when, in fact, the drug 'Spasmo Proxyvan-T Plus' had been actually recovered from the possession of the petitioner, sample whereof was sent to the Director, FSL, Srinagar, for its examination. So we have to proceed on the basis that 'Spasmo Proxyvan-T Plus' capsules were recovered from the

possession of the petitioner, which, as per the report of the FSL, contains the substance ‘Tapentadol’.

9) Before coming to the merits of the submissions of learned counsel for the petitioner, we need to understand the definition of ‘manufactured drug’ and the definition of ‘psychotropic substance’ so as to come to a conclusion whether the substance ‘Tapentadol’ qualifies to be either a ‘manufactured drug’ or a ‘psychotropic substance’.

10) ‘Manufactured drug’ is defined in Section 2(xi) of the NDPS Act.

It reads as under:

“manufactured drug” means—

- (a) all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;*
- (b) any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug,*

but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug”

11) From a perusal of the aforesaid provision, it is clear that a ‘manufactured drug’ means all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate besides any other narcotic substance or preparation declared to be as such by notification in the official gazette.

12) Section 2(xxii) of the NDPS Act defines the ‘Psychotropic substance’. It reads as under:

(xxiii) “Psychotropic substance” means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule;

13) From a perusal of the aforesaid provision, it is clear that a substance or the material included in the list of psychotropic substances specified in the Schedule to the NDPS Act would come within the definition of ‘Psychotropic substance’.

14) What is punishable under Section 21 of the NDPS Act is possession of ‘manufactured drugs’ and preparations thereof and under Section 22 of the NDPS Act, the possession of ‘psychotropic substances’ has been made punishable. Thus, unless a drug qualifies to be a ‘manufactured drug’ or a ‘psychotropic substance’ the possession thereof would not be an offence under the provisions of Section 21 or Section 22 of the NDPS Act.

15) In the light of the aforesaid legal position, let us now advert to the facts of the instant case. As already noted, the drug allegedly recovered from the petitioner is ‘Spasmo Proxyvan-T Plus’ and as per the report of the FSL, the said drug contains the substance ‘Tapentadol’. The notification issued by the Ministry of Finance, Government of India, mentioning the name of the manufactured drugs does not include the name of the substance ‘Tapentadol’. Even in the Schedule to the NDPS Act, 1985, ‘Tapentadol’ does not figure. Thus, it is clear that the drug

recovered from the possession of the petitioner neither qualifies to be a manufactured drug/narcotic drug nor does it qualify to be a psychotropic substance.

16) The learned trial court has, while framing charges against the petitioner and while rejecting his bail application on the ground that commercial quantity of psychotropic substance has been recovered from him, held that the drug recovered from the petitioner is not listed in the Schedule to the NDPS Act, but has gone on to observe that as per the FSL report, the drug in question causes addiction and that the search undertaken through Google, shows that it is more aggressive than 'Tremadol'. On this basis, the learned trial court has concluded that there are grounds for presuming that the petitioner has committed offences under Section 21/22 of the NDPS Act and that commercial quantity of the psychotropic substance has been recovered from him, thus, he does not deserve the concession of bail.

17) As has been already noted, it is only possession of those drugs which qualify to be either the manufactured drug/narcotic drug or psychotropic substance that has been made punishable by the provisions of the NDPS Act. The possession of any other drug or substance, unless it is notified to be a 'manufactured drug' or a 'psychotropic substance' even if it has adverse effects on its consumers or it causes addiction to its consumers, is not punishable under the provisions of the NDPS Act. The possession of any such drug which is neither a manufactured drug/narcotic drug nor a 'psychotropic substance' without a license or

authority may be an offence under the Drugs and Cosmetics Act or J&K Excise Act but it does not qualify to be an offence under the provisions of the NDPS Act.

18) For the foregoing discussion, it is clear that the learned trial court has, while framing charges against the petitioner, landed itself into an error and it has again committed a grave illegality by invoking the provisions of Section 37 of the NDPS Act while rejecting the bail applications of the petitioner even on the basis of the material on record it could not have been, even prima facie, stated that the petitioner is involved in commission of an offence under the provisions of the NDPS Act.

19) The Supreme Court in the case of **State Of Uttaranchal vs. Rajesh Kumar Gupta ,(2001) 1 SCC 355**, has clearly laid down that a person cannot be denied the right of being released on bail unless a clear case of application of the provisions of the NDPS Act is made out.

20) It is a settled law that a trial court while framing charge against an accused has not to act as a post office but it has to apply its mind to the material produced on record by the investigating agency and frame its independent opinion upon consideration of the same. The trial court is not bound by the opinion of the investigating agency. In the instant case, the material on record, more particularly the report of the FSL, in clear cut terms shows that the drug recovered from the petitioner contain the substance 'Tapentadol' which has neither been notified as 'manufactured

drug' nor the same has been included in the Schedule to the NDPS Act. In the presence of such clinching material on record, it was not open to the trial court to just go by the opinion framed by the investigating agency, while framing charge against the petitioner and invoke the provisions of the NDPS Act while deciding his bail applications. The kind of drug that has been recovered from the possession of the petitioner may have an adverse impact on its consumers or even it may cause addiction but then it is for the Government to consider these aspects and having regard to the available information as to its nature, include it in the list of 'manufactured drugs' or 'psychotropic substances'. The Courts cannot enter into this arena and make a declaration that a particular drug is a 'manufactured drug' or a 'psychotropic substance'. This is exactly what the learned trial court has done, thereby exceeding its jurisdiction.

21) For the forgoing reasons, both the petitions are allowed. The impugned order passed by the learned trial court framing charge against the petitioner under Section 21/22 of the NDPS Act is set aside. The matter is remanded back to the trial court to consider the question of framing of charges afresh and to determine as to whether the petitioner is prima facie involved in commission of any offence under any other statute, whereafter the trial court shall proceed in that matter in accordance with the law.

22) Having regard to the fact that provisions of the NDPS Act are not applicable to the instant case, the rigor of Section 37 of the NDPS Act

would not come into play. The investigation of the case is complete and the charge sheet has already been laid before the Court. The petitioner is in custody for the last more than two years. Thus, a case for grant of bail in his favour is made out. Accordingly, it is directed that the petitioner shall be enlarged on bail subject to the following conditions:

- (I) *That he shall furnish personal bond in the amount of Rs.50,000/ with one surety of the like amount to the satisfaction of the learned trial court;*
- (II) *That he shall appear before the trial court on each and every date of hearing;*
- (III) *That he shall not leave the territorial limits of Union Territory of J&K without prior permission of the learned trial court;*

23) Both the petitions shall stand disposed of.

24) A copy of this order be sent to the learned trial court for information and compliance.

(SANJAY DHAR)
JUDGE

Srinagar,
29.03.2022
"Bhat Altaf, PS"

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