2012 AIOL 450 . 2012 SLT 8 362 . 2012 SCALE 10 77 . 2012 JT 11 310 . 2012 RCR CRIMINAL SC 4 733 . 2012 SCC 13 491 . 2012 SCC CRI 4 311 . 2012 SCC ONLINE SC 835 . 2012 AIC 119 45 . 2012 GLT SC 5 28 . 2012 SCR 8 1193 . 2013 ACR 2 1717 . 2012 UC 3 2372 . 2012 JT SC 11 310 .

Mohd. Sahabuddin And Another v. State Of Assam .

Supreme Court Of India (Oct 5, 2012)

CASE NO.

Criminal Appeal No. 1602 of 2012, decided on October 5, 2012

ADVOCATES

Manoj, Aparna Sinha, B.N Mazamder and Abhijat P. Medh, Advocates, for the Appellants;

Avijit Roy and M/s Corporate Law Group, Advocates, for the Respondent.

JUDGES

T.S Thakur

F.M Ibrahim Kalifulla, JJ.

IMPORTANT PARAS

1. 10. It is not in dispute that each 100 ml bottle of Phensedyl cough syrup contained 183.15 to 189.85 mg of codeine phosphate and the each 100 ml bottle of Recodex cough syrup contained 182.73 mg of codeine phosphate. When the appellants were not in a position to explain as to whom the supply was meant either for distribution or for any licensed dealer dealing with pharmaceutical products and in the absence of any other valid explanation for effecting the transportation of such a huge quantity of the cough syrup which contained the narcotic substance of codeine phosphate beyond the prescribed limit, the application for grant of bail cannot be considered based on the above submissions made on behalf of the appellants.

2. 11. The submission of the learned counsel for the appellants was that the content of the codeine phosphate in each 100 ml bottle if related to the permissible dosage, namely, 5 ml would only result in less than 10 mg of codeine phosphate thereby

would fall within the permissible limit as stipulated in the Notifications dated 14-11-1985 and 29-1-1993. As rightly held by the High Court, the said contention should have satisfied the twin conditions, namely, that the contents of the narcotic substance should not be more than 100 mg of codeine, per dose unit and with a concentration of not more than 2.5% in undivided preparation apart from the other condition, namely, that it should be only for therapeutic practice. Therapeutic practice as per dictionary meaning means “contributing to cure of disease”. In other words, the assessment of codeine content on dosage basis can only be made only when the cough syrup is definitely kept or transported which is exclusively meant for its usage for curing a disease and as an action of remedial agent.

3. 13. As far as the grievance raised on the ground that the appellants were illegally detained beyond 24 hours by the police is concerned, the conclusion of the High Court having been based on the satisfaction reached by it, we do not find any scope to interfere with the same.

4. 12. 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 NDPS 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 abovereferred 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.

SUMMARY

1. The allegations against the appellants concerned, in Bail Application No. 885 of 2012, were that on 16-2-2012 at about 8.30 p.m, based on a secret information, the police intercepted a truck bearing Registration No. HR 61 A6641 at Chgolia, Boxirhat, on the National Highway 31 and the vehicle along with the appellants was taken to Golakganj Police Station and that due to lack of proper light facility, the search could not be conducted and the vehicle and the appellants were kept in

the police station on that night.

2. According to the learned counsel for the State, the submission based on the number of days spent by the appellants in the prison was not raised before the High Court and the same cannot be a ground for consideration in this appeal.

3. The learned counsel contended that each of the 100 ml bottles, seized from the appellants, satisfy the requirement prescribed under the abovereferred to two Rules 65 and 97 and in the circumstances there was no question of proceeding against the appellants under the NDPS Act.

4. 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 fall within the penal provisions of the NDPS Act calling for appropriate punishment to be inflicted upon the appellants.

5. The appellants' failure to establish the specific conditions required to be satisfied under the abovereferred 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.

F.M Ibrahim Kalifulla, J. — Leave granted. This appeal is directed against the common order passed by the Gauhati High Court in Bail Applications Nos. 885 of 2012 and 886 of 2012. The allegations against the appellants concerned, in Bail Application No. 885 of 2012, were that on 16-2-2012 at about 8.30 p.m, based on a secret information, the police intercepted a truck bearing Registration No. **HR 61 A6641** at Chgolia, Boxirhat, on the National Highway 31 and the vehicle along with the appellants was taken to Golakganj Police Station and that due to lack of proper light facility, the search could not be conducted and, therefore, the vehicle and the appellants were kept in the police station on that night. On the next day i.e on 17-2-2012 when a search was effected in the presence of the Deputy Superintendent of Police (HQ), Dhubri, Circle Inspector of Golakganj and local witnesses, it revealed that 347 cartons, each carton containing 100 bottles of 100 ml Phensedyl cough syrup and 102 cartons, each carton containing 100 bottles of 100 ml Recodex cough syrup were found concealed along with household articles. For transporting such a huge quantity of pharmaceutical products, the driver of the vehicle could not produce any valid documents. Further the chemical analysis of the contents of the cough syrup disclosed that it contained codeine phosphate beyond the prescribed quantity and,

therefore, the articles were seized. The appellants were produced before the CJM, Dhubri on 18-2-2012 who remanded them to judicial custody.

2. As we are concerned with Bail Application No. 885 of 2012, we do not deal with the details of seizure and arrest effected on the accused concerned in Bail Application No. 886 of 2012.

3. The appellants moved the Court of Sessions Judge, Dhubri for grant of bail and the learned Sessions Judge, by order dated 30-3-2012 rejected the bail application. Thereafter, the appellants moved the High Court, which by the order impugned in this appeal having declined to grant bail; the present appeal has been filed.

4. The learned counsel for the appellants, apart from making his submissions also filed written submissions on behalf of the appellants. The learned counsel submitted that the appellants were only transporting cough syrup, that the content of codeine phosphate was less than 10 mg (per dosage), namely, 5 ml and, therefore, by virtue of the Central Government Notifications bearing S.O 826(E) dated 14-11-1985 and GSR 40(E) published on 29-1-1993, no offence was made out under the provisions of the NDPS Act and, therefore, the rejection of the bail application by the learned Sessions Judge as well as by the High Court was not justified. The learned counsel placed reliance upon certain decisions of the High Court of Punjab and Haryana in support of his submissions. Reliance was also placed upon **Rules 65, 97, 61(1) and 61(2) of the Drugs and Cosmetics Rules along with Section 27 of the Drugs and Cosmetics Act, 1940** in support of his submissions. It was also contended that the appellants have spent more than 180 days in custody since 17-2-2012/18-2-2012 and were entitled to bail under Section 36-A(4) of the NDPS Act read with proviso (a) to Section 167(2) CrPC.

5. The bail application was opposed on behalf of the *State* contending that the seized materials, which admittedly contained codeine phosphate of prohibited quantity, were found concealed with household articles in the vehicle, that it was not the case of the appellants that the seized pharmaceutical products were meant for supply to any dealer or shop to be sold by way of medicine under the prescription of approved medical practitioner and having regard to total quantity content of the prohibited substance, the plea of the appellants that the provisions of the NDPS Act are not attracted, cannot be accepted. According to the learned counsel for the *State* , the submission based on the number of days spent by the appellants in the prison was not raised before the High Court and, therefore, the same cannot be a ground for consideration in this appeal.

6. Having heard the respective counsel and having perused the order of the Sessions

Court as well as the High Court, at the very outset, we feel that to appreciate the gravity of the offence alleged against the appellants, it is worthwhile to refer to the nature of materials seized, the total quantity and the extent of codeine phosphate contained therein which has been noted by the High Court in para 34 of its order which can be usefully extracted hereunder:

"BA No. **885 of 2012**

Recodex 10200 □ 182.73 milligrams = 1863 gm = 1.863 kg

Phensedyl 34700 □ 183.15 milligrams = 6355 gm = 6.355 kg

Total = 8.218 kg

i.e total 8 kg 219 gm"

7. The contentions of the appellants were fourfold. In the first place, it was contended that the cough syrups Phensedyl and Recodex are pharmaceutical products covered under the provisions of the Drugs and Cosmetics Act, that the Rules prescribe the measure of dosage as 5 ml and that under **Rules 65 and 97 of the Drugs and Cosmetics Rules,** it is lawfully permissible to sell such cough syrups in the open market, which can also be transported, kept in stock and sold in the pharmaceutical shops as a prescribed drug under Schedule H at Serial No. 132. According to the appellants, such prescribed drugs under the Rules can contain codeine to the extent permissible. While referring to Rule 97, it was contended that Schedule H drugs containing permissible extent of narcotic substance could be sold in retail on the prescription of registered medical practitioner. The learned counsel, therefore, contended that each of the 100 ml bottles, seized from the appellants, satisfy the requirement prescribed under the abovereferred to two Rules 65 and 97 and in the circumstances there was no question of proceeding against the appellants under the NDPS Act.

8. By referring to **Rules 61(1) and 61(2) of the Drugs and Cosmetics Rules,** it was contended that the prescribed licence which is required for sale, stock, exhibit, offer for sale or distribution as a mandatory requirement under Section 27 of the Drugs and Cosmetics Act providing for imposition of penalty would be applicable only to manufacturers or those who sell, stock, exhibit or offer for sale or distribution of drugs and that a transporter, in particular, the driver and a khalasi was under no obligation to hold a licence under the Drugs and Cosmetics Act.

9. At the very outset, the abovesaid submission of the learned counsel is liable to be rejected, inasmuch as, the conduct of the appellants in having transported huge

quantity of 347 cartons containing 100 bottles in each carton of 100 ml Phensedyl cough syrup and 102 cartons, each carton containing 100 bottles of 100 ml Recodex cough syrup without valid documents for such transportation cannot be heard to *state* that he was not expected to fulfil any of the statutory requirements either under the provisions of the Drugs and Cosmetics Act or under the provisions of the NDPS Act.

10. It is not in dispute that each 100 ml bottle of Phensedyl cough syrup contained 183.15 to 189.85 mg of codeine phosphate and the each 100 ml bottle of Recodex cough syrup contained 182.73 mg of codeine phosphate. When the appellants were not in a position to explain as to whom the supply was meant either for distribution or for any licensed dealer dealing with pharmaceutical products and in the absence of any other valid explanation for effecting the transportation of such a huge quantity of the cough syrup which contained the narcotic substance of codeine phosphate beyond the prescribed limit, the application for grant of bail cannot be considered based on the above submissions made on behalf of the appellants.

11. The submission of the learned counsel for the appellants was that the content of the codeine phosphate in each 100 ml bottle if related to the permissible dosage, namely, 5 ml would only result in less than 10 mg of codeine phosphate thereby would fall within the permissible limit as stipulated in the Notifications dated 14-11-1985 and 29-1-1993. As rightly held by the High Court, the said contention should have satisfied the twin conditions, namely, that the contents of the narcotic substance should not be more than 100 mg of codeine, per dose unit and with a concentration of not more than 2.5% in undivided preparation apart from the other condition, namely, that it should be only for therapeutic practice. Therapeutic practice as per dictionary meaning means “contributing to cure of disease”. In other words, the assessment of codeine content on dosage basis can only be made only when the cough syrup is definitely kept or transported which is exclusively meant for its usage for curing a disease and as an action of remedial agent.

12. 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 NDPS 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 abovereferred 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.

13. As far as the grievance raised on the ground that the appellants were illegally detained beyond 24 hours by the police is concerned, the conclusion of the High Court having been based on the satisfaction reached by it, we do not find any scope to interfere with the same.

14. As far as the submission now made for the first time that the appellants had been in jail for more than the minimum required period is concerned, since neither the Sessions Judge nor the High Court had the opportunity to examine the said claim made by the appellants, we do not propose to deal with the same in this appeal.

15. When we refer to the decisions relied upon by the learned counsel for the appellants, we find that none of the facts relating to those decisions are parallel to the facts of the present case. Those are all cases which were related to the persons who had valid licences and in the course of their regular business transaction when they were dealing with the pharmaceutical products which contained the prescribed permitted content of narcotic substance and when they were proceeded against for violations, the relief came to be granted in their case. We do not, therefore, find any scope to apply any of the ratios of those decisions to the facts of this case.

16. We do not find any merit in this appeal. The appeal fails and the same is dismissed. We, however, make it clear that whatever stated in this order is only for the purpose of dealing with the appellants' application for grant of bail and we have not stated anything on the merits of the allegations levelled against the appellants.