

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

(1)

CRM-M-12951-2020

Date of decision: 09.04.2021

Ashok Kumar

.....Petitioner

Versus

State of Haryana

.....Respondent

(2)

CRM-M-7998-2020

Date of decision: 09.04.2021

Danvir Singh

.....Petitioner

Versus

State of Haryana

.....Respondent

(3)

CRM-M-9957-2020

Date of decision: 09.04.2021

Bhim Singh

.....Petitioner

Versus

State of Haryana

.....Respondent

CORAM: HON'BLE MR. JUSTICE ARUN KUMAR TYAGI

Argued by : Mr. Sandeep Siwach, Advocate for
Mr. D.D. Sharma, Advocate
for the petitioner in CRM-M-12951-2020.

Mr. Deepan Sharma, Advocate
for the petitioner in CRM-7998-2020 and
CRM-9957-2020.

Mr. Ranvir Singh Arya, Addl. A.G., Haryana
for the respondent-State.

(Order pronounced through video Conferencing).

ARUN KUMAR TYAGI, J.

1. Petitioner-Ashok Kumar has filed CRM-M-12951-2020, petitioner-Danvir Singh has filed CRM-M-7998-2020 and petitioner-Bhim Singh has filed CRM-M-9957-2020 under Section 439 of the Code of Criminal Procedure, 1973 (for short, "the Cr.P.C.") for grant of regular bail in case FIR No.194 dated 27.07.2019 registered under Section 20 of the Narcotic Drugs and Psychotropic Substances Act,

1985 (for short, "the NDPS Act") at Police Station IMT Rohtak.

2. As per the prosecution version on 27.07.2019, the police party headed by ASI Pankaj was present in official vehicle for patrolling duty in the area of IMT Chowk, Rohtak. Secret information was received that accused Ashok Kumar (petitioner in CRM-M-12951-2020), Danvir Singh (petitioner in CRM-M-7998-2020) and Bhim Singh (petitioner in CRM-M-9957-2020), who were supplying intoxicants would come from Delhi to Rohtak in car No.HR-26-AD-5275 with huge quantity of intoxicants and if the vehicle was searched the same could be recovered. Intimation under Section 42 of the NDPS Act was sent and written information was also sent through EHC Rakesh to Police Station IMT, Rohtak. ASI Pankaj also informed police officers about the said facts and started checking the vehicles coming from Delhi. Car No.HR-26-AD-5275 was stopped. Accused Bhim Singh was driving the car while accused Danvir was sitting on the co-driver seat and accused Ashok Kumar was sitting on the rear seat. Notice under Section 50 of the NDPS Act was served on them informing them about their right to search of car in the presence of Gazetted Officer or Magistrate but the above said accused persons consented to search by ASI Pankaj. ASI Pankaj searched the car and recovered two plastic bags from dicky of the car. On weighing, both the bags were found to contain ganja patti weighing 16 kilograms 100 grams and 17 kilograms 400 grams respectively totaling 33 kilograms 500 grams. The car and the ganja patti were taken into possession by the police. Written information was sent to the police station for

registration of the FIR with the request to send another investigating officer. The police arrested the petitioners and subsequently also arrested co-accused Dharmender in view of the disclosure statement of petitioner-Ashok Kumar and on completion of investigation charge-sheeted them to face trial.

3. The petitioners being in custody have filed the present petitions for grant of regular bail.

4. The petitions have been contested by the respondent-State in terms of replies filed by way of affidavit of Narender Kumar, HPS, Deputy Superintendent of Police, Sampla, District Rohtak in CRM-M-12951-2020 and CRM-M-7998-2020. However, no reply has been filed by respondent-State in CRM-M-9957-2020.

5. I have heard arguments addressed by learned Counsel for the petitioners and learned State Counsel and gone through the relevant record.

6. Learned Counsel for the petitioners have argued that the petitioners have been falsely implicated in the present case and have nothing to do with the alleged offence. In the present case mandatory provisions of Section 50 of the NDPS Act have not been complied with. ASI Pankaj gave joint notice to the petitioners informing them about their right to search of the car in the presence of Gazetted Officer or Magistrate but alleging giving of consent by the petitioners to search of the car by him, himself conducted the search of the car. Giving of joint notice to the petitioners regarding their right to search of the car in the presence of Gazetted Officer or Magistrate and also subsequent search

of the car by ASI Pankaj on the basis of alleged consent of the petitioners was violative of mandatory provisions of Section 50 of the NDPS Act which vitiates the recovery and investigation and the petitioners are entitled to grant of concession of regular bail on this ground. In support of their arguments, learned Counsel for the petitioners have placed reliance on the observations in ***State of Rajasthan Vs. Parmanand and another : 2014(2) R.C.R. (Criminal) 40; State of Punjab Vs. Balbir Singh : 1994(1) R.C.R. (Criminal) 736*** and ***Arif Khan @ Agha Khan Vs. State of Uttarakhand : 2018(2) R.C.R. (Criminal) 931.***

7. Learned Counsel for the petitioners have further argued that as per the definition of ganja given in Section 2(iii)(b) of the NDPS Act the same comprises of flowering or fruiting tops of the cannabis plant excluding the seeds and leaves. In the FSL report, the contraband received in the sample parcel is mentioned to be greenish brown vegetative material having flowering/fruiting tops and seeds etc. The contents of the bags allegedly recovered from possession of the petitioners also included seeds and leaves of the cannabis. In the FSL report the percentage of seeds and leaves was not mentioned. In view of the same actual quantity of ganja could not be ascertained and the actual weight of ganja contained in the bags allegedly recovered from the petitioners cannot be said to be the same as determined by the investigating officer and to fall in the category of commercial quantity as the possibility of the same being much lower and falling in the category of non-commercial quantity could not be ruled out.

Consequently, the petitioners cannot be said to be in conscious possession of commercial quantity of ganja and the petitioners are entitled to grant of bail on this ground. In support of their arguments, learned Counsel for the petitioners have placed reliance on the observations in ***Roshan Kumar Vs. State of Haryana : 2019(3) R.C.R. (Criminal) 692; Sudhir Vs. State of Haryana : 2008(4) R.C.R. (Criminal) 385*** and ***Manu Kumar (Manukumar M) and others Vs. State of Karnataka : 2018(1) DC (Narcotic) 434.***

8. Learned Counsel for the petitioners have further argued that ganja total weighing 33 kilograms 500 grams was allegedly recovered from all the three petitioners and on apportionment none of the petitioners can be said to be in conscious possession of ganja weighing more than 20 kilograms falling in the category of commercial quantity. All the three petitioners being in conscious possession of non-commercial quantity of less than 20 kilograms of ganja are entitled to grant of bail on this ground also. In support of this argument learned Counsel for the petitioners have placed reliance on the observations in ***Sudhir Vs. State of Haryana : 2008(4) R.C.R. (Criminal) 385.***

9. Learned Counsel for the petitioners have further argued that the petitioners are in custody since 27.07.2019. The Co-ordinate Benches in similar cases have granted regular bail to the accused on the basis of period of custody. Similarly placed co-accused Dharmender has been granted regular bail by this Court vide order dated 21.08.2020. The trial is likely to take long time due to restrictions imposed to prevent the spread of Covid-19 and no useful purpose will be served by

further detention of the petitioners in custody during trial. Therefore, the petitioners may be granted regular bail.

10. On the other hand, learned State Counsel has argued that recovery of ganja was made from dicky of the car in which the petitioners were travelling together. The petitioners were in joint conscious possession of commercial quantity of the contraband. The petitioners cannot be said to be in possession of non-commercial quantity of the contraband by applying the method of apportionment. Section 50 of the NDPS applies to personal search and the same was not applicable to search of the car and the recovery and investigation are not vitiated on the ground of non-compliance with the same. As per the FSL report the contraband recovered from the possession of the petitioners was ganja and the total weight has to be taken into consideration for determination of the quantity of the contraband. Rigors of Section 37(1)(b) of the NDPS Act are applicable and regular bail cannot be granted to the petitioners unless both the conditions thereof are satisfied. In view of nature of accusation and gravity of the offence, the petitioners do not deserve grant of regular bail. Therefore, the petitions may be dismissed.

11. Section 37 of the NDPS Act, which legislates the offences under the NDPS Act to be cognizable and non bailable and embodies the limitations on grant of bail for the specified offences, reads as under:-

“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 3 [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.”

12. In ***Union of India Vs. Rattan Malik @ Habul : (SC) :***

2009(1) R.C.R.(Criminal) 938 Hon'ble Supreme Court observed as under:-

“13. It is plain from a bare reading of the non-obstante clause in the Section and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the Narcotic Drugs And Psychotropic Substances Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub-section (1) of Section 37 of the Narcotic Drugs and Psychotropic Substances Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds". The expression 'reasonable grounds' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not

guilty of the alleged offence. [Vide Union of India v. Shiv Shanker Kesari, 2007(4) RCR (Criminal) 186 : 2007(5) RAJ 134 : (2007)7 SCC 798]. Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the Narcotic Drugs And Psychotropic Substances Act.”

13. Exercise of power to grant bail is not only subject to limitations contained under section 439 of Cr.P.C., 1973 but is also subject to limitations placed by Section 37 of the NDPS Act. No person can be enlarged on bail for offences enumerated under Section 37 of the NDPS Act unless twin conditions embodied therein are satisfied. The finding mandated under Section 37 of the NDPS Act in this regard is a sine qua non for granting bail to the accused under the NDPS Act. (See *Union of India Vs. Niyazuddin Sk., (SC) : 2017(4) R.C.R.(Criminal) 644; Satpal Singh Vs. State of Punjab (SC) : 2018(5) R.C.R.(Criminal) 152 and State of Kerala Vs. Rajesh (SC) : 2020 (1) R.C.R.(Criminal) 818*. Hon'ble Supreme Court has also held in *State of Kerala Vs. Rajesh (SC) : 2020 (1) R.C.R.(Criminal) 818* that in the matter of grant of bail in cases under the NDPS Act liberal approach is uncalled for.

14. The facts and circumstances of the present case and material on record have to be prima facie gone through for considering as to whether the conditions laid down in Section 37 of the NDPS Act are satisfied in the present case to entitle the petitioners to grant of regular bail.

15. As per the prosecution version two bags containing ganja patti weighing 16 kilograms 100 grams and 17 kilograms 400 grams total weight 33 kilograms 500 grams were allegedly recovered from the

dicky of the car in which the petitioners were travelling. Admittedly, joint notice informing the petitioners about their right to search of the car in the presence of Gazetted Officer or Magistrate was served on the petitioners and on the basis of their alleged consent search of the car was conducted by ASI Pankaj. There is no dispute with the proposition of law that the provisions of Section 50 of the NDPS Act are mandatory as held in *State of Rajasthan Vs. Parmanand and another : 2014(2) R.C.R. (Criminal) 40*; *State of Punjab Vs. Balbir Singh : 1994(1) R.C.R. (Criminal) 736* and *Arif Khan @ Agha Khan Vs. State of Uttarakhand : 2018(2) R.C.R. (Criminal) 931*. However, it is now well settled that Section 50 of the NDPS Act applies to case of personal search and does not apply to search of bag/briefcase/vehicle or premises as held in *State of Punjab Vs. Baljinder Singh : AIR 2019 (SC) 5298*. Therefore, search of the car by ASI Pankaj cannot be prima facie said to be violative of mandatory provisions of Section 50 of the NDPS Act and the petitioners are not entitled to grant of regular bail on the ground that recovery and investigation are thereby vitiated and the observations in *State of Rajasthan Vs. Parmanand and another : 2014(2) R.C.R. (Criminal) 40*; *State of Punjab Vs. Balbir Singh : 1994(1) R.C.R. (Criminal) 736* and *Arif Khan @ Agha Khan Vs. State of Uttarakhand : 2018(2) R.C.R. (Criminal) 931* relied upon by learned Counsel for the petitioners are not applicable and are not of any help to the petitioners so far as the question of grant of regular to them is concerned.

16. In the FSL report the contraband recovered was mentioned

to be greenish brown vegetative material having flowering, fruiting tops/seeds etc. and it was also mentioned therein that on analytical techniques applied the tests were positive for the presence of tetrahydrocannabinidiol and cannabidiol; characteristics trichomes of ganja were present; and tests were positive for presence of ganja in the samples. Section 2(iii)(b) of the NDPS Act defines ganja as “*the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever, name they may be known or designated*”. As per the definition of ganja contained in Section 2(iii)(b) of the NDPS Act, the seeds and leaves are excluded from definition of ganja only when the same are not accompanied by the tops. No doubt in the present case the contraband recovered from the petitioners included the seeds and leaves but the same were accompanied by the flowering/fruiting tops of the cannabis plant. Therefore, in the present case prima facie seeds and leaves accompanied by the flowering/fruiting tops of the cannabis plant would fall in the definition of ganja and weight of the same would not be liable to be excluded from the total weight of the contraband recovered on the basis of definition of ganja. Therefore, the quantity of the contraband allegedly recovered from the petitioners cannot be said to fall in the category of non-commercial quantity on the ground of the same being less than 20 kilograms by excluding assumed weight of seeds and leaves and the petitioners are not entitled to grant of bail on this ground. In these facts and circumstances of the case the observations in ***Roshan Kumar Vs. State of Haryana : 2019(3) R.C.R.***

(Criminal) 692; Sudhir Vs. State of Haryana : 2008(4) R.C.R. (Criminal) 385 and Manu Kumar (Manukumar M) and others Vs. State of Karnataka : 2018(1) DC (Narcotic) 434 relied upon by learned Counsel for the petitioners are not of any help to the petitioners so far as the question of grant of regular bail to the petitioners is concerned.

17. Recovery of 33 kilograms 500 grams of ganja patti was made from dicky of the car in which all the three petitioners were travelling and prima facie the petitioners have to be considered to in joint conscious possession of commercial quantity of the contraband and in the absence of any statutory provision enabling apportionment in such a case, the petitioners cannot be said to be in possession of non-commercial quantity of the contraband by applying the method of such apportionment. Consequently, general observations made by Co-ordinate Bench of this Court in *Sudhir Vs. State of Haryana : 2008(4) R.C.R. (Criminal) 385* at the time of considering the question of grant of bail to accused not being of any precedential value are not of any help to the petitioners.

18. Even though the petitioners are in custody since 27.07.2019 but mere length of period of custody is by itself no ground for grant of bail in a case involving alleged commission of cognizable and non-bailable offence under the NDPS Act as apart from limitations embodied in the provisions of Cr.P.C., limitations enacted in Section 37 of the NDPS Act apply and anticipatory or regular bail cannot be granted to accused without recording findings as to satisfaction of the conditions laid down in Section 37 of the NDPS Act.

19. So far as argument of learned Counsel for the petitioners regarding grant of bail by the Co-ordinate Benches in similar cases on the basis of period of custody is concerned, it may be observed that in ***Gajanand Aggarwal Vs. State of Orissa and others : 2006(4) R.C.R. (Criminal) 311*** it was held by Hon'ble Supreme Court that orders of bail are not necessarily orders of any precedent value. Orders passed by Co-ordinate Benches where provisions of Section 37 of the NDPS Act were not referred to and findings as to satisfaction of the conditions thereof were not given will not have any binding or even persuasive value so far as the question of grant of regular bail to the petitioners is concerned and will not be of any help to the petitioners. For judicial precedents in this regard reference, at the cost of repetition, may be made to ***Union of India Vs. Niyazuddin Sk., (SC) : 2017(4) R.C.R.(Criminal) 644; Satpal Singh Vs. State of Punjab (SC) : 2018(5) R.C.R.(Criminal) 152 and State of Kerala Vs. Rajesh (SC) : 2020 (1) R.C.R.(Criminal) 818***).

20. In the present case prima facie there is no reasonable ground for believing that the petitioners have not committed the alleged offence. Admittedly, the petitioners are not involved in any other case under the NDPS Act and in view of their antecedents there is reasonable ground for believing that they would not commit any offence under the NDPS Act in future. However, in the present case first condition laid down in Section 37(1)(b) of the NDPS Act as to there being reasonable ground for believing that the petitioners have not committed the alleged offence is not satisfied. Therefore, the

petitioners are not entitled to grant of regular bail in view of the limitations contained in Section 37(1)(b) of the NDPS Act.

21. So far as the question of parity with co-accused Dharmender, who has been granted regular bail by this Court vide order dated 21.08.2020 is concerned, it is pertinent to observe that he was not present on the spot, no recovery was made from him and he was arrested on the basis of disclosure statement of petitioner-Ashok Kumar naming him as the supplier of the contraband.

22. In view of the above discussion, I am of the considered view that the petitioners do not deserve grant of regular bail and the petitions are liable to be dismissed.

23. Accordingly, the petitions for grant of regular bail to the petitioners are hereby dismissed.

24. However, in view of the facts and circumstances of the case and observations made by Hon'ble Supreme Court in ***Doongar Singh Vs. State of Rajasthan 2018 (1) RCR Criminal 256, State of U.P. Vs. Shambhu Nath Singh and others, 2001 (2) R.C.R. (Criminal) 390, Hussain and another Vs. Union of India 2017(2) RCR Criminal 312 and Thana Singh Vs. Central Bureau of Narcotics 2013(1) R.C.R(Criminal) 861***, the trial Court is directed to expedite trial and conclude prosecution evidence expeditiously preferably within a period of four months from the date of receipt of copy of this order by conducting trial on day to day basis as far as possible and by allocating block of dates for the trial as directed by Hon'ble Supreme Court and by issuing coercive process for securing presence of the witnesses, if so

required.

25. In case of non-appearance of any of the prosecution witnesses, the trial Court shall take appropriate action against the concerned prosecution witness absents without any lawful excuse by filing complaint under Section 174 of the Indian Penal Code, 1860 or taking proceedings under Section 350 of the Cr.P.C. against him.

26. A copy of this order be sent to the trial Court concerned for requisite compliance.

09.04.2021

(ARUN KUMAR TYAGI)
JUDGE

Vinay

Whether speaking/reasoned	:	Yes
Whether reportable	:	Yes