

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-5077-2022
Reserved on: 28.04.2022
Pronounced on: 13-05-2022

Abida ...Petitioner

Versus

State of Haryana ...Respondent

CORAM: HON'BLE MR. JUSTICE ANOOP CHITKARA

Present: Mr.Lokesh Vohra, Advocate for the petitioner.

Mr. Rajat Gautam, DAG, Haryana, Advocate for the Respondent

Ms. Aashna Gill, Advocate (*Amicus Curiae*)

ANOOP CHITKARA, J.

FIR No.	Dated	Police Station	Sections
0171	15.03.2021	Sector 58, District Faridabad	21 of NDPS Act, 1985

A woman, aged 25 years, incarcerated since Mar 14, 2021 for violating section 21 of Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act), on account of the recovery of 41 kg. 200 grams of Ganja from the boot of the car, owned by her husband, and 10 kg 300 grams from the vehicle (MUV) of Fakrudin allegedly sold to him by petitioner’s husband and his accomplices after taking it from the car, has come up before this Court under Section 439 of Code of Criminal Procedure, 1973, (CrPC) seeking bail on the ground that she had married just two months earlier, was totally unaware of the activities of her husband, and had inadvertently become a partner in the alleged crime.

2. In paragraph 6 of the petition, it is declared that the accused has no criminal history.

3. The gist of the allegations is that on Mar 15, 2021, the police had received a secret information that Innus, Mubin, accompanied by a girl, were transporting ganja in a car, and would also be selling it to Fakruddin. The specific information was regarding the supply of ganja from Orissa for that day, i.e., 15.03.2021 at Transport Nagar Faridabad, where Fakruddin would take ganja from them. The police associated independent witnesses, reached the disclosed point,laid a trap where an exchange of ganja was supposed to take place, and concealed themselves. The police spotted the

disclosed vehicle and noticed that three males along with a female, the petitioner

herein, were sitting in the car. After a discreet wait, another vehicle, a MUV arrived and stopped, and one male descended from it. The three persons from the car handed over one packet to the person who had come in the MUV. Although the police immediately swung into action, yet all the three males managed to escape. However, the police party nabbed one female from the car, and she revealed her name as Abida, the petitioner herein. The police also apprehended the male from MUV, who revealed his name as Fakkrudin. The packet recovered from Fakkrudin was searched, and it contained 10 kg and 300 grams of ganja. On search by a Gazetted officer and a Magistrate, 41 kg 200 gms of ganja was recovered from the boot of the car in which the petitioner was sitting. After the search, the investigator arrested the petitioner Abida and Fakkrudin. The investigation and interrogation revealed that Innus, the petitioner's husband, owned and drove the car, and was one of the three males who had managed to run away.

4. Mr. Lokesh Vohra Ld. counsel for the petitioner referred to paragraph 5 of the bail application wherein it is averred that the petitioner had married Innus only two months before her arrest, and she was unaware of his illegal activities and criminal antecedents, let alone participate in it. He contends that Abida was unaware of the contents of the brown parcel allegedly handed over to Fakkrudin by three male persons, and one of such persons was her husband named Innus, who owned the car and her mere presence in her husband's car does not constitute knowledge and possession of the contraband.

5. Mr. Rajat Gautam, DAG, Haryana opposes the bail and submits that the quantity of contraband is commercial and the petitioner has failed to overcome the rigors of section 37 of NDPS Act. Ld. counsel for the State argues that whether the petitioner was in conscious possession of contraband would be a matter of trial on basis of evidence adduced. Ld. counsel further contended that the grant of bail encourages the drug peddlers and the drug menace is spreading day by day.

6. Ms. Aashna Gill, Ld. Amicus Curiae highlighted the judicial precedents on bail, with emphasis on section 37 of NDPS Act. On facts, Ld. Amicus submitted that while other persons were named explicitly in secret information, no role was attributed to Abida other than her mere presence in her husband's car, and probably, she was only mentioned due to her being caught. Ld. counsel further contends that the lady Constable Jyoti, who had apprehended Abida and conducted her search, was given up by the prosecution as unnecessary vide order dt. 04.01.2022 passed by the trial court. The said fact creates a big dent and a reasonable ground to doubt the prosecution's version. The next contention is that no notice under section 42 of the NDPS Act was

made on receipt of secret information despite having been received while present in the Crime Branch.

7. Section 2 (vii-a) of the NDPS Act defines commercial quantity as the quantity greater than the quantity specified in its schedule, and S. 2 (xxiii-a) defines a small quantity as the quantity lesser than the quantity specified in the schedule. The remaining quantity falls in an undefined category, which is now generally called intermediate quantity. All Sections in the NDPS Act, which specify an offence, also mention the minimum and maximum sentence, varying from the quantity of the substance. When the substance falls under commercial quantity, the statute mandates a minimum sentence of ten years of imprisonment and a minimum fine of INR One Lac, and bail is subject to the riders mandated in S. 37 of the NDPS Act.

8. The quantity allegedly involved is 51 kg and 500 grams of ganja. The substance finds mentioned at entry no. 55 of the table specifying small and commercial quantities, as per which the quantity greater than 20 kg falls in commercial quantity and lesser than 1 kg as small. Given this, the rigours of S. 37 of the NDPS Act apply in the present case and burden is on the petitioner to satisfy the twin stringent conditions put in place by the Legislature under Section 37 of the NDPS Act.

ANALYSIS OF THE RIGORS OF S. 37 OF NDPS ACT:

9. In the present case, the quantity of substance allegedly seized is commercial. Given the legislative mandate of S. 37 of the NDPS Act, the Court can release a person accused of an offence punishable under the NDPS Act for possessing a commercial quantity of contraband only after recording reasonable satisfaction of its rigors. Section 37 of the NDPS Act mandates that the offences under the NDPS Act are to be cognizable and non-bailable. Further, under sub-section (1) (b) of section 37, no person accused of an offence punishable for offences involving commercial quantity shall be released on bail unless- (i) the Public Prosecutor has been given an opportunity to oppose the application of release, and (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that accused is not guilty of such offence and is not likely to commit any offence while on bail.

10. Thus, both the twin conditions need to be satisfied before a person accused of possessing a commercial quantity of drugs or psychotropic substance is to be released on bail. The first condition is to provide an opportunity to the Public Prosecutor, enabling to take a stand on the bail application. The second stipulation is that the Court must be satisfied that reasonable grounds exist for believing that the accused is not

guilty of such offence, and is not likely to commit any offence while on bail. If either of these two conditions is not met, the ban on granting bail operates. The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. Even on fulfilling one of the conditions, the reasonable grounds for believing that the accused is not guilty of such an offence, the Court still cannot give a finding on assurance that the accused is not likely to commit any such crime again. Thus, the grant of bail or denial of bail for possessing commercial quantity would vary from case to case, depending upon its facts.

JUDICIAL PRECEDENTS ON S. 37 OF NDPS ACT:

11. In Narcotics Control Bureau v Kishan Lal, 1991 (1) SCC 705, Supreme Court holds,

[6]. Section 37 as amended starts with a non-obstante clause stating that notwithstanding anything contained in the Code of Criminal Procedure, 1973 no person accused of an offence prescribed therein shall be released on bail unless the conditions contained therein were satisfied. The Narcotic Drugs And Psychotropic Substances Act is a special enactment as already noted it was enacted with a view to make stringent provision for the control and regulation of operations relating to narcotic drugs and psychotropic substances. That being the underlying object and particularly when the provisions of Section 37 of Narcotic Drugs And Psychotropic Substances Act are in negative terms limiting the scope of the applicability of the provisions of Criminal Procedure Code regarding bail, in our view, it cannot be held that the High Court's powers to grant bail under Section 439 Criminal Procedure Code are not subject to the limitation mentioned under Section 37 of Narcotic Drugs And Psychotropic Substances Act. The non-obstante clause with which the Section starts should be given its due meaning and clearly it is intended to restrict the powers to grant bail. In case of inconsistency between Section 439 Criminal Procedure Code and Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 Section 37 prevails.

12. In Union of India v. Merajuddin, (1999) 6 SCC 43, a three Judges Bench of Supreme Court while cancelling the bail, observed in Para 3, as follows,

The High Court appears to have completely ignored the mandate of Sec. 37 of the Narcotic Drugs and Psychotropic Substances Act while granting him bail. The High Court overlooked the prescribed procedure.

13. In Babua v. State of Orissa, (2001) 2 SCC 566, Supreme Court holds,

[3] In view of Section 37(1)(b) of the Act unless there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail alone will entitle him to a bail. In the present case, the petitioner attempted to secure bail on various grounds but failed. But those reasons would be insignificant if we bear in mind the scope of Section 37(1)(b) of the Act. At this stage of the case all that could be seen is

whether the statements made on behalf of the prosecution witnesses, if believable, would result in conviction of the petitioner or not. At this juncture, we cannot say that the accused is not guilty of the offence if the allegations made in the charge are established. Nor can we say that the evidence having not been completely adduced before the Court that there are no grounds to hold that he is not guilty of such offence. The other aspect to be borne in mind is that the liberty of a citizen has got to be balanced with the interest of the society. In cases where narcotic drugs and psychotropic substances are involved, the accused would indulge in activities which are lethal to the society. Therefore, it would certainly be in the interest of the society to keep such persons behind bars during the pendency of the proceedings before the Court, and the validity of Section 37(1)(b) having been upheld, we cannot take any other view.

14. In Bijando Singh v. Md. Ibocha, 2001 LawSuit(SC) 1470, decided on Supreme Court holds,

[3]. Being aggrieved by the order of the Special Court (NDPS), releasing the accused on bail, the appellant moved the Guwahati High Court against the said order on the ground that the order granting bail is contrary to the provisions of law and the appropriate authority never noticed the provisions of Section 37 of the Narcotic Drugs And Psychotropic Substances Act. The High Court, however, being of the opinion that if the attendance of the accused is secured by means of bail bonds, then he is entitled to be released on bail. The High Court, thus, in our opinion, did not consider the provisions of Section 37 of the Narcotic Drugs And Psychotropic Substances Act.

15. In Customs, New Delhi v. AhmadalievNodira, (2004) 3 SCC 549, (Decided on 11-03-2004) a three Judges Bench of Supreme Court holds,

[7]. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the public prosecutor, the other twin conditions which really have relevance so far the present accused-respondent is concerned, are (1) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based for reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.

16. In N.C.B.Trivandrarum v. Jalaluddin, 2004 LawSuit(SC) 1598, (Decided on 22-04-2004) Supreme Court observed,

[3]. ...Be that as it may another mandatory requirement of Section 37 of the Act is that where Public Prosecutor opposes the bail application, the court should be 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. In the impugned order we do not find any such satisfaction recorded by the High Court while granting bail nor there is any material available to show that the High Court applied its mind to these mandatory requirements of the Act.

17. In Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798, the Hon'ble Supreme Court holds,

[6]. As the provision itself provides no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and. that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

[7]. The expression used in Section 37(1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

[8]. The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word 'reasonable'. Stroud's Judicial Dictionary, Fourth Edition, page 2258 states that it would be unreasonable to expect an exact definition of the word "reasonable". Reason varies it, its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy. (See : Municipal Corporation of Delhi v. M/s Jagan Nath Ashok Kumar and another, (1987)4 SCC 497 and Gujarat Water Supplies and Sewerage Board v. Unique Erectors (Gujarat) Pvt Ltd and another [(1989)1 SCC 532].

[9]. It is often said "an attempt to give a specific meaning to the word 'reasonable' is trying to count what is not number and measure what is not space". The author of 'Words and Phrases' (Permanent Edition) has quoted from in re Nice &, Schreiber 123 F. 987, 988 to give a plausible meaning for the said word. He says, "the expression 'reasonable' is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes reasonable can be determined". It is not meant to be expedient or convenient but certainly something more than that.

[10]. The word 'reasonable' signifies "in accordance with reason". In the ultimate analysis it is a question of fact, whether a particular act is reasonable or not depends on the circumstances in a given situation. (See : Municipal Corporation of Greater Mumbai and another v. Kamla Mills Ltd., 2003(4) RCR(Civil) 265 : (2003)6 SCC 315)."

[11]. The Court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the

existence of such grounds. But the Court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.

[12]. Additionally, the Court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion.

18. In N.R. Mon v. Md. Nasimuddin, (2008) 6 SCC 721, Supreme Court holds,

[9]. ...The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are: the satisfaction of the court that there are reasonable grounds for believing, that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. 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" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case hand the High Court seems to have completely overlooked underlying object of Section 37.

19. In Union of India v. Rattan Mallik @ Habul, (2009) 2 SCC 624, Supreme Court holds,

[14]. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the Narcotic Drugs and Psychotropic Substances Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the Narcotic Drugs And Psychotropic Substances Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.

20. In Union of India v. Sanjeev v. Deshpande, (2014) 13 SCC 1, a three-judges bench of Supreme Court holds,

[5]. ...In other words, Section 37 departs from the long-established principle of presumption of innocence in favour of an accused person until proved otherwise.

21. In Union of India v. Niyazuddin, (2018) 13 SCC 738, (Decided on 28-07-2017) Supreme Court holds,

[7]. ...Section 37 of the NDPS Act contains special provisions with regard to grant of bail in respect of certain offences enumerated under the said Section. They are :- (1) In the case of a person accused of an offence punishable under Section 19, (2) Under Section 24, (3) Under Section 27A and (4) Of offences involving commercial quantity. The accusation in the present case is with regard to the fourth factor namely, commercial quantity. Be that as it may, once the Public Prosecutor opposes the application for bail to a person accused of the enumerated offences under Section 37 of the NDPS Act, in case, the court proposes to grant bail to such a person, two conditions are to be mandatorily satisfied in addition to the normal requirements under the provisions of the Cr.P.C. or any other enactment. (1) The court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence; (2) that person is not likely to commit any offence while on bail.

[8]. There is no such consideration with regard to the mandatory requirements, while releasing the respondents on bail.

[9]. Hence, we are satisfied that the matter needs to be considered afresh by the High Court. The impugned order is set aside and the matter is remitted to the High Court for fresh consideration. It will be open to the parties to take all available contentions before the High Court.

22. In Satpal Singh v. State of Punjab, (2018) 13 SCC 813, (Decided on 27-03-2018) a bench of three judges of Supreme Court directed that since the quantity involved was commercial, as such High Court could not have and should not have passed the order under sections 438 or 439 CrPC, without reference to Section 37 of the NDPS Act.

23. In State of Kerala v. Rajesh, (2020) 12 SCC 122 (Decided on 24-01-2020), the While canceling the post-arrest bail granted to the accused, Hon'ble Supreme Court has held that any concession of release granted sans noticing the mandate of sec. 37(1)(b)(ii) is bad in law. While discussing the broad parameters laid down for grant of bail in the NDPS case, the Court has held that the expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable cause for believing that the accused is not guilty of the alleged offence. Hon'ble Supreme Court holds,

[21]. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

24. In Sujit Tiwari v. State of Gujarat, 2020 SCC Online SC 84, (Decided on 28-01-2020)

in the given facts, Supreme Court granted bail, by observing,

[10]. The prosecution story is that the appellant was aware of what his brother was doing and was actively helping his brother. At this stage we would not like to comment on the merits of the allegations levelled against the present appellant. But other than the few WhatsApp messages and his own statement which he has resiled from, there is very little other evidence. At this stage it appears that the appellant may not have even been aware of the entire conspiracy because even the prosecution story is that the brother himself did not know what was loaded on the ship till he was informed by the owner of the vessel. Even when the heroin was loaded in the ship it was supposed to go towards Egypt and that would not have been a crime under the NDPS Act. It seems that Suprit Tiwari and other 7 crew members then decided to make much more money by bringing the ship to India with the intention of disposing of the drugs in India. During this period the Master Suprit Tiwari took the help of Vishal Kumar Yadav and Irfan Sheikh who had to deliver the consignment to Suleman who had to arrange the money after delivery. The main allegation made against the appellant is that he sent the list of the crew members after deleting the names of 4 Iranians and Esthekhar Alam to Vishal Kumar Yadav and Irfan Sheikh through WhatsApp with a view to make their disembarkation process easier. Even if we take the prosecution case at the highest, the appellant was aware that his brother was indulging in some illegal activity because obviously such huge amount of money could not be made otherwise. However, at this stage it cannot be said with certainty whether he was aware that drugs were being smuggled on the ship or not, though the allegation is that he made such a statement to the NCB under Section 67 of the NDPS Act.

[11]. At this stage, without going into the merits, we feel that the case of the appellant herein is totally different from the other accused. Reasonable possibility is there that he may be acquitted. He has been behind bars since his arrest on 04.08.2017 i.e. for more than 2 years and he is a young man aged about 25 years. He is a B.Tech Graduate. Therefore, under facts and circumstances of this case we feel that this is a fit case where the appellant is entitled to bail because there is a possibility that he was unaware of the illegal activities of his brother and the other crew members. The case of the appellant is different from that of all the other accused, whether it be the Master of the ship, the crew members or the persons who introduced the Master to the prospective buyers and the prospective buyers.

[12]. We, however, feel that some stringent conditions will have to be imposed upon the appellant.

25. In UOI v. Prateek Shukla, (2021) 5 SCC 430, (decided on 8-3-2021), Hon'ble

Supreme Court holds,

[12]. ...Merely recording the submissions of the parties does not amount to an indication of a judicial or, for that matter, a judicious application of mind by the Single Judge of the High Court to the basic question as to whether bail should be granted. The provisions of Section 37 of the NDPS Act provide the legal norms which have to be applied in determining whether a case for grant of bail has been made out...

26. In UOI through NBC, Lucknow v. Md. Nawaz Khan (2021) 10 SCC 100, (Decided on 22-09-2021), Hon'ble Supreme Court holds,

[28]. As regards the finding of the High Court regarding absence of recovery of the contraband from the possession of the respondent, we note that in Union of India v. Rattan Mallik, (2009) 2 SCC 624, a two-judge Bench of this Court cancelled the bail of an accused and reversed the finding of the High Court, which had held that as the contraband (heroin) was recovered from a specially made cavity above the cabin of a truck, no contraband was found in the 'possession' of the accused. The Court observed that merely making a finding on the possession of the contraband did not fulfil the parameters of Section 37(1)(b) and there was non-application of mind by the High Court.

[29]. In line with the decision of this Court in Rattan Mallik (supra), we are of the view that a finding of the absence of possession of the contraband on the person of the respondent by the High Court in the impugned order does not absolve it of the level of scrutiny required under Section 37(1)(b)(ii) of the NDPS Act.

27. In Bharat Chaudhary v. Union of India, 2021 SCC OnLine SC 1235, a three-judges bench of Hon'ble Supreme Court holds,

[10]. After carefully examining the arguments advanced by learned counsel for the parties and having cursorily glanced at the records, we are of the opinion that the impugned order cancelling the bail granted in favour of Bharat Chaudhary [A-4], is not sustainable in view of the fact that the records sought to be relied upon by the prosecution show that one test report dated 6th December, 2019, two test reports dated 17th December, 2019 and one test report dated 21st December, 2019 in respect of the sample pills/tablets drawn and sent for testing by the prosecuting agency conclude with a note appended by the Assistant Commercial Examiner at the foot of the reports stating that "quantitative analysis of the samples could not be carried out for want of facilities". In the absence of any clarity so far on the quantitative analysis of the samples, the prosecution cannot be heard to state at this preliminary stage that the petitioners have been found to be in possession of commercial quantity of psychotropic substances as contemplated under the NDPS Act. Further, a large number of the tablets that have been seized by the DRI admittedly contain herbs/medicines meant to enhance male potency and they do not attract the provisions of the NDPS Act. Most importantly, none of the tablets were seized by the prosecution during the course of the search conducted, either at the office or at the residence of A-4 at Jaipur, on 16th March, 2020. Reliance on printouts of Whatsapp messages downloaded from the mobile phone and devices seized from the office premises of A-4 cannot be treated at this stage as sufficient material to establish a live link between him and A-1 to A-3, when even as per the prosecution, scientific reports in respect of the said devices is still awaited.

28. In State by (NCB) Bengaluru v. Pallulabid Ahmad Arimutta, 2022 SCC OnLine SC 47, (Decided on 10-01-2022), a three-judge bench of Hon'ble Supreme Court holds,

[11]. It has been held in clear terms in Tofan Singh v. State of Tamil Nadu, (2021) 4 SCC 1, that a confessional statement recorded under Section 67 of the NDPS Act will remain inadmissible in the trial of an offence under the NDPS Act. In the teeth of the aforesaid decision, the arrests made by the petitioner-NCB, on the basis of the confession/voluntary statements of the respondents or the co-accused under Section 67 of the NDPS Act, cannot form the basis for overturning the impugned orders releasing them on bail. The CDR details of some of the accused or the allegations of tampering of evidence on the part of one of the respondents is an aspect that will be examined at the stage of trial. For the aforesaid reason, this Court is not inclined to interfere in the orders dated 16th September, 2019, 14th January, 2020, 16th January, 2020, 19th December, 2019 and 20th January, 2020 passed in SLP (Crl.) No@ Diary No. 22702/2020, SLP (Crl.) No. 1454/2021, SLP (Crl.) No. 1465/2021, SLP (Crl.) No. 1773-74/2021 and SLP (Crl.) No. 2080/2021 respectively. The impugned orders are, accordingly, upheld and the Special Leave Petitions filed by the petitioner-NCB seeking cancellation of bail granted to the respective respondents, are dismissed as meritless.

[12]. However, the evidence brought before us against Mohammed Afzal [A-2], respondent in SLP (Crl.) No. 1569/2021, subject matter of the second case i.e., NCB Case FN No. 48/01/07/2019/BZU, who was granted bail vide order dated 08th January, 2020, will have to be treated on an entirely different footing. There are specific allegations levelled against the said respondent regarding recovery of substantial commercial quantities of drugs from a rented accommodation occupied by him pursuant to which he was arrested on 16th June, 2019. This aspect has been completely overlooked while passing the order dated 08th January, 2020 wherein, the only reason that appears to have weighed with the High Court for releasing him on bail is that his case stands on the same footing as A-1, A-3 and A-4 who had been enlarged on bail vide orders dated 11th October, 2019, 16th September, 2019 and 09th September, 2019, in connection with the second case registered by the Department. We are of the firm view that A-2 cannot seek parity with the aforesaid co-accused and no such benefit could have been extended to him in view of Section 37 of the Act when he was found to be in conscious possession of commercial quantity of psychotropic substances, as contemplated under the NDPS Act. That being the position, the petitioner-NCB succeeds in SLP (Crl.) No. 1569/2021. The bail granted to the respondent-Mohammed Afzal [A-2] is cancelled forthwith at this stage and he is directed to surrender before the Sessions Court/Special Judge (NDPS) within a period of two weeks, for being taken into custody.

29. In Satinder Kumar v. State of H.P., 2020 SCC OnLine HP 3276, the High Court of Himachal Pradesh analyzed the twin conditions as mandated under section 37(1)(b)(ii), before granting bail in relation to commercial quantity of drugs or psychotropic substance.

SUM UP:

30. From the summary of the law relating to rigors of S.37 of NDPS Act, while granting bail involving commercial quantities, the following fundamental principles emerge:

- (a). In case of inconsistency, S. 37 of the NDPS Act prevails over S. 439 CrPC. [Narcotics Control Bureau v Kishan Lal, 1991 (1) SCC 705, Para 6].
- (b). The limitations on granting of bail come in only when the question of granting bail arises on merits. [Customs, New Delhi v. AhmadalievaNodira, (2004) 3 SCC 549, Para 7].
- (c). The provisions of Section 37 of the NDPS Act provide the legal norms which have to be applied in determining whether a case for grant of bail has been made out. [UOI v. Prateek Shukla, (2021) 5 SCC 430, Para 12].
- (d). In case the Court proposes to grant bail, two conditions are to be mandatorily satisfied in addition to the standard requirements under the provisions of the CrPC or any other enactment. [Union of India v. Niyazuddin&Anr, (2018) 13 SCC 738, Para 7].
- (e). Apart from granting opportunity to the Public Prosecutor, the other twin conditions which really have relevance are the Court's satisfaction that there are reasonable grounds for believing that the accused is not guilty of the alleged offence. [N.R. Mon v. Md. Nasimuddin, (2008) 6 SCC 721, Para 9].
- (f). The satisfaction contemplated regarding the accused being not guilty has to be more than prima facie grounds, considering substantial probable causes for believing and justifying that the accused is not guilty of the alleged offence. [Customs, New Delhi v. AhmadalievaNodira, (2004) 3 SCC 549, Para 7].
- (g). The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. [State of Kerala v. Rajesh, AIR 2020 SC 721, Para 21].
- (h). Twin conditions of S. 37 are cumulative and not alternative. [Customs, New Delhi v. AhmadalievaNodira, (2004) 3 SCC 549, Para 7].
- (i). At the bail stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed an offence under the NDPS Act and further that he is not likely to

commit an offence under the said Act while on bail. [Union of India v. Rattan Mallik @ Habul, (2009) 2 SCC 624, Para 14].

(j). If the statements of the prosecution witnesses are believed, then they would not result in a conviction. [Babua v. State of Orissa, (2001) 2 SCC 566, Para 3].

(k). Merely recording the submissions of the parties does not amount to an indication of a judicial mind or a judicious application of mind. [UOI v. Prateek Shukla, (2021) 5 SCC 430, Para 12].

(l). Section 37 departs from the long-established principle of presumption of innocence in favour of an accused person until proved otherwise. [Union of India v. Sanjeev v. Deshpande, (2014) 13 SCC 1, Para 5].

(m). While considering the application for bail concerning Section 37, the Court is not called upon to record a finding of not guilty. [Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798, Para 11].

(n). The confessional statement recorded under Section 67 of the NDPS Act is inadmissible in the trial of an offence under the NDPS Act. [Tofan Singh v. State of Tamil Nadu, (2021) 4 SCC 1]

(o). In the absence of clarity on the quantitative analysis of the samples from the laboratory, the prosecution cannot be heard to state at this preliminary stage that the accused possessed a commercial quantity of psychotropic substances as contemplated under the NDPS Act. [Bharat Chaudhary v. Union of India, 2021 SCC OnLine SC 1235, Para 10].

(p). When there is evidence of conscious possession of commercial quantity of psychotropic substances, such accused is not entitled to bail given Section 37 of the Act as contemplated under the NDPS Act. [State by (NCB) Bengaluru v. Pallulabid Ahmad Arimutta, 2022 SCC OnLine SC 47, Para 12].

(p). Bail must be subject to stringent conditions. [Sujit Tiwari v. State of Gujarat, 2020 SCC Online SC 84, Para 12].

31. Satisfying the fetters of S. 37 of the NDPS Act is candling the infertile eggs. The stringent conditions of section 37 placed in the statute by the legislature do not create a bar for bail for specified categories, including the commercial quantity; however, it creates hurdles by placing a reverse burden on the accused, and once crossed, the

rigors no more subsist, and the factors for bail become similar to the bail petitions under general penal statutes like IPC.

32. In the present case, the petitioner explicitly declares in paragraphs 3 & 5 of her bail application that she had married Innus two months before the seizure of the contraband. The State did not dispute the fact of recent marriage. As per the prosecution's case, as revealed in the reply filed in the bail petition of the co-accused Fakruddin, [CRM-M-26389-2021], and his disclosure statement, he used to purchase ganja from Innus. The investigator had recorded the disclosure statement of Abida, and she had apprised the investigator of her marrying Innus after divorce from her first marriage. At the time of marriage, she was not aware of Innus involvement in drugs, but when she came to know about it, she joined him in his activities. This statement before the police is *prima facie* hit by the bar of section 25 of the Indian Evidence Act. The investigation does not reveal that Abida had married Innus even after knowing about his involvement in drugs. She had married Innus just two months before the seizure of bhang from the boot of the car owned and driven by him. Two months is too brief a time to establish her knowledge and participation with certainty and presuming her involvement/knowledge about her husband's nefarious activities due to a brief period of stay at her matrimonial house. The prosecution has also been unable to refer to any investigation conducted to ascertain the fact of her *prima facie* knowledge or participation.

33. S. 37 of the NDPS Act implies that the accused should satisfy its twin conditions and come out clean. In the entirety and facts and circumstances peculiar to this case, Abida has satisfied the first rigor of section 37 of the NDPS Act. To take care of the second rigor, this court shall impose stringent conditions to assure that she does not indulge in the drug trade while on bail. Any detailed discussions about the evidence may prejudice the case of the prosecution, petitioner, or the other accused. Suffice it to say that due to the reasons mentioned above, and keeping in view the nature of the allegations, the petitioner has satisfied the twin conditions of section 37 and has crossed the hurdles justifying the disruption of any further pretrial incarceration.

34. The possibility of the accused influencing the investigation, tampering with evidence, intimidating witnesses, and the likelihood of fleeing justice, can be taken care of by imposing elaborative and stringent conditions. In *Sushila Aggarwal*, (2020) 5 SCC 1, Para 92, the Constitutional Bench held that unusually, subject to the evidence produced, the Courts can impose restrictive conditions.

35. Without commenting on the case's merits, in the facts and circumstances peculiar to this case, and for the reasons mentioned above, the petitioner makes a case for bail,

subject to the following terms and conditions, which shall be over and above and irrespective of the contents of the form of bail bonds in chapter XXXIII of CrPC, 1973.

36. In Mahidul Sheikh v. State of Haryana, Law Finder Doc Id # 1933969, CRM-33030-2021 in CRA-S-363-2020, decided on 14-01-2022, Para 53, this Court observed,

[53]. The pragmatic approach is that while granting bail with sureties, the “Court” and the “Arresting Officer” should give a choice to the accused to either furnish surety bonds or to handover a fixed deposit, or direct electronic money transfer where such facility is available, or creating a lien over his bank account. The accused should also have a further option to switch between the modes. The option lies with the accused to choose between the sureties and deposits and not with the Court or the arresting officer.

37. Given above, provided the petitioner is not required in any other case, she shall be released on bail in the FIR mentioned above, subject to furnishing a personal bond of Rs. Ten thousand (INR 10,000/-) and shall furnish one surety of Rs. Twenty-five thousand (INR 25,000/-), to the satisfaction of the concerned Court/ Judicial Magistrate having the jurisdiction over the Police Station conducting the investigation, and in case of non-availability, any nearest Ilqa Magistrate/duty Magistrate. Before accepting the sureties, the concerned Court must satisfy that if the accused fails to appear in Court, then such surety is capable of producing the petitioner before the Court.

38. In the alternative, the petitioner may furnish a personal bond of Rs. Ten Thousand only (INR 10,000/-), and hand over to the concerned court a fixed deposit(s) for Rs. Ten Thousand only (INR 10,000/-), made in favour of Chief Judicial Magistrate of the concerned district. Said fixed deposit may be made from any of the banks where the stake of the State is more than 50%, or any of the well-established and stable private banks, with the clause of automatic renewal of the principal and the interest reverting to the linked account.

39. The fixed deposit need not necessarily be made from the applicant's account. If such a fixed deposit is made in physical form, i.e., on paper, then the original receipt shall be handed over to the concerned court. If made online, its printout, countersigned by the accused, shall be given; and the depositor shall get the online liquidation disabled. The applicant shall inform the concerned branch of the bank at the earliest that it has been tendered as surety. Such information be sent either by e-mail or by post/courier about the fixed deposit, whether made on paper or in any other mode, along with its number and FIR number. After that, the applicant shall hand over such proof and endorsement to the concerned police station. Such court shall have a lien over the deposit until the case's closure, or discharged by substitution, or up to the expiry of the period mentioned under S. 437-A CrPC, 1973, as the case may be. Subject

to the proceedings under S. 446 CrPC, the entire amount of fixed deposit, less taxes, if any, shall be endorsed/returned to the depositor.

40. It shall be the total discretion of the applicant to choose between surety bonds and fixed deposits. It shall also be open for the applicant to apply to the investigator or the concerned court to substitute fixed deposit with surety bonds and vice-versa.

41. On the reverse page of personal bonds, the attesting officer shall mention the permanent address of the petitioner along with the phone number linked with the AADHAR card, the other phone numbers (if any), and e-mail (if any). In case of any change in the above particulars, the petitioner shall immediately and not later than 30 days from such modification, intimate about the change to the concerned Police Station and the concerned Court.

42. The petitioner to also execute a bond for attendance in the concerned Court(s), as and when asked to do so. The presentation of the personal bond shall be deemed acceptance of the following and all other stipulations, terms, and conditions of this bail order.

43. The petitioner shall not influence, browbeat, pressurize, make any inducement, threat, or promise, directly or indirectly, to the witnesses, the police officials, or any other person acquainted with the facts and the circumstances of the case, to dissuade them from disclosing such facts to the police, or the court, or to tamper with the evidence.

44. Within ten days of release from prison, the petitioner shall procure a smartphone and inform its IMEI number and other details to the SHO/I.O. of the Police station mentioned above. The petitioner shall always keep the phone location/GPS on the "ON" mode. Whenever the Investigating officer asks to share the location, the petitioner shall immediately do so. The petitioner shall neither clear the location history, WhatsApp chats, call logs nor format the phone without permission of the concerned SHO/I.O. This condition shall continue till the completion of the trial or closure of case, whichever is earlier.

45. Given the nature of allegations and the other circumstances peculiar to this case, the petitioner shall surrender all weapons, firearms, ammunition, if any, along with the arms license to the concerned authority within ten days of release from prison and inform the Investigator about the compliance. However, subject to the Indian Arms Act, 1959, the petitioner shall be entitled to renew and take it back in case of acquittal in this case.

46. During the trial's pendency, if the petitioner repeats or commits any offence where the sentence prescribed is more than seven years or violates any condition as stipulated in this order, it shall always be permissible to the respondent to apply for cancellation of this bail. It shall further be open for any investigating agency to bring it to the notice of the court seized of the subsequent application that the accused was earlier cautioned not to indulge in criminal activities. Otherwise, the bail bonds shall continue to remain in force throughout the trial and after that in terms of Section 437-A of the CrPC.

47. Any Advocate for the petitioner and the Officer in whose presence the petitioner puts signatures on personal bonds shall explain all conditions of this bail order in any language that the petitioner understands.

48. If the petitioner finds bond amount beyond social and financial reach, it may be brought to the notice of this Court for appropriate reduction. Further, if the petitioner finds bail condition(s) as violating fundamental, human, or other rights, or causing difficulty due to any situation, then for modification of such term(s), the petitioner may file a reasoned application before this Court, and after taking cognizance, even to the Court taking cognizance or the trial Court, as the case may be, and such Court shall also be competent to modify or delete any condition.

49. This order does not, in any manner, limit or restrict the rights of the Police or the investigating agency from further investigation as per law.

50. Any observation made hereinabove is neither an expression of opinion on the merits of the case nor shall the trial Court advert to these comments. This decision is restrictive to the facts and circumstances peculiar to the case.

51. In return for the protection from incarceration, the Court believes that the accused shall also reciprocate through desirable behavior.

52. *There would be no need for a certified copy of this order for furnishing bonds, and any Advocate for the Petitioner can download this order along with case status from the official web page of this Court and attest it to be a true copy. In case the attesting officer wants to verify the authenticity, such an officer can also verify its authenticity and may download and use the downloaded copy for attesting bonds.*

Petition allowed in aforesaid terms. All pending applications, if any, stand disposed.

(ANOOP CHITKARA)
JUDGE

May 13, 2022
sonia arora

Whether speaking/reasoned:	Yes
Whether reportable:	Yes.