

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-27654-2022
Reserved on: 19.12.2022
Pronounced on: 23.12.2022

Rattan Singh @ Manga ...Petitioner
Versus
State of Punjab ...Respondent

CORAM: HON'BLE MR. JUSTICE ANOOP CHITKARA

Present: Mr. B.S. Bhalla, Advocate for the petitioner.

Mr. Virat Rana, AAG, Punjab.

ANOOP CHITKARA, J.

FIR No.	Dated	Police Station	Sections
108	28.04.2020	Gate Hakima, District Amritsar	22/29/61/85 of NDPS Act

1. The petitioner incarcerated for violating the above-mentioned provisions of Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act) per the FIR captioned above, has come up before this Court under Section 439 CrPC seeking bail.
2. In paragraph 19 of the bail petition, the accused declares that he has no criminal antecedents.
3. The petitioner contends that the pre-trial incarceration would cause an irreversible injustice to the petitioner and family.
4. While opposing the bail, the contention on behalf of the State is that the quantity of contraband involved in the case falls in the commercial category.

REASONING:

5. It would be relevant to paragraph 24 of the status report, which reads as follows:

That it is humbly submitted that keeping in view the detailed facts and submissions as enumerated hereinabove it transpires that the present petitioner is involved in drug peddling for a long time. The petitioner used to purchase intoxicating tablets from the co-accused Amarjit Singh @ Kaka. The co-accused Lakhanpal Bhatia had delivered/sold four boxes containing 02 lacs intoxicating tablets to the Petitioner Rattan Singh @ Manga through the co-accused Amarjit Singh @ Kaka on 27.04.2020,

out of the consignment of seven boxes containing 3.50 lacs intoxicating tablets which he had received from the Goldendeep Enterprises. The petitioner remained absconding for a long time and could be arrested with a great hardship. Sufficient incriminating evidence is available on record in present case against the petitioner. The allegations levelled against the petitioner are very serious in nature. The present case is now pending for trial before the Court of learned Additional Sessions Judge, Amritsar wherein prosecution witnesses are being examined. The recovery of contraband effected in the present case is far greater than commercial quantity and the petitioner had purchased 02 lacs intoxicant tablets out of the total consignment of contraband. The rigors of Section 37 (i) (b) of the NDPS Act are applicable in this case. There is every likelihood that the petitioner may threaten or induce the prosecution witnesses or may tamper with evidence, or he may again abscond, if he is enlarged on bail, which would prejudice trial of the case. Hence, the petitioner is not entitled to the relief of bail. Therefore, the present petition is liable to be dismissed.

6. The petitioner claims bail on parity with Lakhanpal Bhatia @ Love, who was granted bail by a co-ordinate Bench of this Court in CRM -M-7891-2022 (Annexure P-1).

I have gone through the aforesaid order (Annexure P-1), vide which the co-ordinate Bench had granted bail on the grounds of the custody of Lakhanpal Bhatia @ Love being 01 year 09 months and 09 days. The petitioner did not file the bail at that stage and the Covid pandemic was still going on during such time and Court's approach was different. Although, it is not specifically mentioned in the order about the bail being granted on the grounds of Covid but the fact that the petitioner did not suppose to file a bail at that point of time would show that he was not claiming parity at that stage. The quantity involved is four times more than the commercial and the allegations are heinous. Considering the huge quantity involved and the fact that now the normal working of the Court have resumed for the considerable time, the purpose would suffice by directing the trial Court to expedite the trial.

7. Thus, the quantity allegedly involved in this case is commercial. Given this, the rigours of S. 37 of the NDPS Act apply in the present case. The burden is on the petitioner to satisfy the twin conditions put in place by the Legislature under Section 37 of the NDPS Act.

8. In State of Punjab v Baldev Singh, (1999) 6 SCC 172, the Constitutional bench of Hon'ble Supreme Court holds,

[14]. The provisions of Sections 100 and 165 Cr.P.C. are not inconsistent with the provisions of the NDPS Act and are applicable for effecting search, seizure or arrest under the NDPS Act also. However, when an empowered officer carrying on the investigation including search, seizure or arrest under the provisions of the Code of Criminal Procedure comes across a

person being in possession of the narcotic drugs or the psychotropic substance, then he must follow from that stage onwards the provisions of the NDPS Act and continue the investigation as provided thereunder. If the investigating officer is not an empowered officer then it is expected of him that he must inform the empowered officer under the NDPS Act, who should thereafter proceed from the stage in accordance with the provisions of the NDPS Act. In Balbir Singh's case after referring to a number of judgments, the Bench opined that failure to comply with the provisions of Cr.P.C. in respect of search and seizure and particularly those of Sections 100, 102, 103 and 165 *per se* does not vitiate the prosecution case. If there is such a violation, what the courts have to see is whether any prejudice was caused to the accused. While appreciating the evidence and other relevant factors, the courts should bear in mind that there was such a violation and evaluate the evidence on record keeping that in view.

9. The petition states that the quantity of substance allegedly recovered is marginally above the commercial quantity. This submission is more compassionate than legal. Once the quantity is greater than commercial, it is immaterial for the purpose of bail. Once it is in statute, Judges have no latitude. Given the legislative mandate under section 37 of the NDPS Act, an accused is not entitled to bail if the quantity is marginally above the commercial quantity.

10. Ld. counsel for the petitioner submits that the investigator conducted search and seizure violating sections 42 and 50 of the NDPS.

11. Whether the Investigator complied with the mandatory provisions of sections 42 and 50 of the NDPS Act is a question of fact to be adjudicated in the trial. However, before this court treats the compliances as illegal, the prosecution needs an opportunity to prove that they had complied with the mandatory provisions per law. Such stage would come only during the trial and certainly not at the bail stage, where it would be hit by the maxim *Audi alteram partem*. The exception to this would be applicable only when the non-compliance of the mandatory provisions of sections 42 and 50 of the NDPS Act is apparent on the face of the special report under section 57 of the NDPS Act and other documents of search and seizure, and in the opinion of the court, the lapse is non-rectifiable, after recording a finding that it is an incurable defect, the court might consider granting bail on such violations.

12. In State of H.P. v. Prithi Chand, (1996) 2 SCC 37, Hon'ble Supreme Court holds,

[3]. The question is whether the learned Sessions Judge was justified, at the stage of taking cognizance of the offence, in discharging the accused, even before the trial was conducted on merits, on the ground that the provisions of Section 50 of the Act had not been complied with. This Court in State of Punjab v. Balbir Singh [(1994) 3 SCC 299] : (AIR 1994 SCW 1802) has considered the provisions of the Act. Section 50 has been held to be mandatory. In paragraph 16, this Court has held that it is obligatory on the part of the empowered or the authorised officer to inform the suspect that, if so required, he

would be produced before a Gazetted Officer or a Magistrate and search would be conducted in his presence. It was imperative on the part of the Officer to inform the person of the above right and if he failed to do the same, it amounted to violation of the requirement of Section 50 of the Act. It was held that when the person was searched he must have been aware of his right and that it could be done only if the authorised or empowered Officer informed him of the same. Accordingly, this Court by implication read the obligation on the part of authorised Officer to inform the person to be searched of his right to information that he could be searched in the presence of the Gazetted Officer or the Magistrate. In SaiyadMohd. Saiyaad Umar Saiyed v. State of Gujarat [1995(3) JT SC 489] a three-Judge Bench of this Court had reiterated the above view and held that having regard to the grave consequences that might entail the possession of illicit articles under the Act, viz., the shifting of the onus to the accused and the severe punishment to which he became liable, the Legislature had enacted safeguards contained in Section 50. Compliance of the safeguards in Section 50 is mandatory obliging the Officer concerned to inform the person to be searched of his right to demand that search could be conducted in the presence of a Gazetted Officer or a Magistrate. The possession of illicit article has to be satisfactorily established before the Court. The Officer who conducts search must state in his evidence that he had informed the accused of his right to demand, while he is searched, in the presence of a Gazetted Officer or a Magistrate and that the accused had not chosen to so demand. If no evidence to that effect is given, the Court must presume that the person searched was not informed of the protection the law gives him and must find that possession of illicit articles was not established. The presumption under Article 114, illustration (e) of the Evidence Act, that the official duty was properly performed, therefore, does not apply. It is the duty of the Court to carefully scrutinise the evidence and satisfy that the accused had been informed by the concerned Officer that he had a right to be searched before a Gazetted Officer or a Magistrate and that the person had not chosen to so demand.

[4]. It is to be seen whether the accused has been afforded such a right and whether the authorised Officer has violated the mandatory requirement, as a question of fact, has to be proved at the trial. In Pooran Mal v. Director of Inspection [(1974) 1 SCC 345] : (AIR 1974 SC 348) a Constitution Bench of this Court had held that power of search and seizure, is, in any system of jurisprudence, an overriding power of the State for the protection of social security and that power is necessarily regulated by law. A search by itself is not a restriction on the right to hold and enjoy property, though seizure is a temporary restriction to the right of possession and enjoyment of the property seized. However, the seizure will be only temporary and limited for the purpose of the investigation. The power of search and seizure is an accepted norm in our criminal law envisaged in Sections 96 to 103 and 165 of the Criminal Procedure Code, 1973 [for short, "the Code"]. The Evidence Act permits relevancy as the only test of admissibility of evidence. The evidence obtained under an illegal search and seizure does not exclude relevant evidence on that ground. It is wrong to invoke the spirit of Constitution to exclude such evidence. The decisions of the American Supreme Court spelling out certain Constitutional protections in regard to search and seizure are not applicable to exclude the evidence obtained on an illegal search. Courts in India refuse to exclude relevant evidence merely on the

ground that it is obtained by illegal search and seizure. When the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search and seizure, is not liable to be shut out. Search and seizure are not a new weapon in the armoury of those whose duty it is to maintain social security in its broadest sense. If the safeguards are generally on the lines adopted by the Code, they would be regarded as adequate and render the restrictions imposed as reasonable measures.

[7]. It would thus be settled law that every deviation from the details of the procedure prescribed for search, does not necessarily lead to the conclusion that search by the police renders the recovery of the articles pursuant to the illegal search, irrelevant evidence nor the discovery of the fact inadmissible at the trial. Weight to be attached to such evidence depends on facts and circumstances in each case. The Court is required to scan the evidence with care and to act upon it when it is proved and the Court would hold that the evidence would be relied upon.

13. The stand that the accused is in custody for sufficient time is also not a legal ground to overcome the rigors of S. 37 of the NDPS Act at this stage.

14. The grounds taken in the bail petition do not shift the burden placed by the legislature on the accused under S. 37 of the NDPS Act. The petitioner has not stated anything to discharge the burden put by the stringent conditions placed in the statute by the legislature under section 37 of the NDPS Act. Thus, the petitioner has failed to make a case for bail at this stage.

15. A perusal of the bail petition and the documents attached, prima facie points towards the petitioner's involvement and does not make out a case for bail. Any further discussions are likely to prejudice the petitioner; this court refrains from doing so.

16. 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.

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

Trial be expedited and the concerned court to try to complete the same by the end of March 2023. Parties and Registry to communicate this order to the concerned trial judge.

(ANOOP CHITKARA)
JUDGE

23.12.2022
Jyoti-II

Whether speaking/reasoned:	Yes
Whether reportable:	No.