

225 IN THE HIGH COURT OF PUNJAB AND HARYANA
CHANDIGARH

CRM-M-28424-2022 (O&M)

Date of Decision: 01.08.2022

Lovepreet Kamboj alias Lovely ...Petitioner
Vs.
State of Punjab ...Respondent

CORAM: HON'BLE MR. JUSTICE VIKAS BAHL

Present:- Mr. Prateek Gupta, Advocate, for the petitioner.

Mr. Sukhbeer Singh, AAG Punjab.

VIKAS BAHL J. (Oral)

CRM-27250-2022

This is an application under Section 482 of the Code of Criminal Procedure for placing on record the copy of examination in chief and cross of PW-1/Gurdeep Singh as Annexure P-11.

Application is allowed, as prayed for. The copy of examination in chief and cross of PW-1/Gurdeep Singh (Annexure P-11), is taken on record, subject to all just exceptions.

CRM stands disposed of.

CRM-M-28424-2022

This is a second petition under Section 439 Cr.P.C. praying for grant of regular bail to the petitioner in case FIR No.155 dated 01.11.2020, under Sections 18(c), 29, 61 of the Narcotic Drugs and Psychotropic Substances Act, 1985, registered at Police Station Bahawala, Distt. Fazilka.

Learned counsel for the petitioner has submitted that in the present case, the petitioner has been in custody since 01.11.2020 and there are total 18 prosecution witnesses, out of which, only 4 have been examined, thus, the trial is likely to take time. It is further submitted that the documents,

which were prepared at the time of alleged recovery mentioned the FIR number as well as the date and the Sections under which the FIR has been registered and for the said purpose, has referred to the vernacular of the said documents also. Reference has also been made to the evidence of PW-1 Head Constable Gurdeep Singh, who, in his cross-examination has specifically stated that there was no arrangement of a laptop or a computer at the spot during the preparation of documents and has further submitted that at the time of preparation of the said documents, the police party was not aware about the FIR number. It is also submitted that even in the non-consent memo, there is a cutting in front of the word ASI Kala Singh and reliance has been placed upon a judgment of the Division Bench in "Didar Singh @ Dara Vs. The State of Punjab", reported as 2010(3) RCR (Criminal) 337 and of a Co-ordinate Bench of this Court in "Rajandeep Singh @ Ghughi Vs. State of Punjab", decided on 28.01.2021 passed in CRM-M-36504-2020, to contend that the existence of the particulars of FIR on the recovery memo when the FIR was not itself drawn up, would point to the case against the petitioner being a fabricated one. It is also submitted that in the present case, the alleged recovery from the petitioner was effected at 3:30 PM, whereas, the FIR has been registered at 7:15 PM. It is further submitted that an earlier bail application of the petitioner was withdrawn on 22.11.2021 and even thereafter, more than 8 months have elapsed and yet the trial has not made much progress as 14 witnesses are still to be examined.

Learned State Counsel, on the other hand, has opposed the present petition for regular bail and has submitted that in the present case, the recovery from the petitioner and the other co-accused is of 3.1 Kg. of Opium, which falls under the category of commercial quantity, inasmuch as,

the commercial quantity stipulated for Opium starts from 2.5 Kg. It is further submitted that the memos which have been referred to by the learned counsel for the petition are written by hand and the FIR number on the said memos have been entered subsequently and its only the date and the Sections of the FIR number that were mentioned at the time of recovery. It is further submitted that over-writing on the non-consent memo is on account of a mistake, which has been subsequently rectified. The period of custody, however, has not been disputed by learned State Counsel.

This Court has heard the learned counsel for the parties and has perused the paper-book.

Before advertng to the facts of the present case, it would be relevant to note that in various cases where recovery of commercial quantity has been effected, the Supreme Court as well as this Court have, on the basis of arguable points in the bail application as well as by considering the custody undergone by the accused in the case, granted bail/suspension of sentence. Some of the said judgments are being discussed hereinafter. In Criminal Appeal No.965 of 2021 titled as **Dheeren Kumar Jaina v. Union of India**, wherein, the Hon'ble Supreme Court in a case where allegation in the charge-sheet was with respect to 120 kg of contraband i.e. “ganja”, thus, being of commercial quantity, was pleased to grant bail after setting aside the order of the High Court where the said application for grant of regular bail had been rejected.

A Co-ordinate Bench of this Court in a detailed judgment titled as **Ankush Kumar @ Sonu v. State of Punjab** reported as 2018 (4) RCR (Criminal) 84, had considered the provision of Section 37 of the NDPS Act in extenso and had granted bail in a case which involved commercial

quantity. The relevant portion of the said judgment is reproduced as under: -

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But, so far as second part of Section 37 (1) (b) (ii), i.e. regarding the satisfaction of the Court based on reasons to believe that the accused would not commit 'any offence' after coming out of the custody, is concerned, this Court finds that this is the requirement which is being insisted by the State, despite the same being irrational and being incomprehensible from any material on record. As held above, this Court cannot go into the future mental state of the mind of the petitioner as to what he would be, likely, doing after getting released on bail. Therefore, if this Court cannot record a reasonable satisfaction that the petitioner is not likely to commit 'any offence' or 'offence under NDPS Act' after being released on bail, then this court, also, does not have any reasonable ground to be satisfied that the petitioner is likely to commit any offence after he is released on bail. Hence, this satisfaction of the Court in this regard is neutral qua future possible conduct of the petitioner.”

The Special Leave Petition (Criminal) Diary No.42609 of 2018 filed against the aforesaid judgment of the Co-ordinate Bench of this Court, was dismissed by the Hon'ble Supreme Court.

Further, vide order dated 25.02.2021 in CRM-M-20177-2020, a Co-ordinate Bench of this Court granted regular bail to an accused who was involved in a case wherein recovery was of 3.8 kgs of “charas” (commercial quantity) after being in custody for 1 year and 7 months. The said order was upheld by the Hon'ble Supreme Court vide order dated 24.08.2021 in a Petition for Special Leave to Appeal (Crl.) No.5852/2021 titled as **“Narcotic Control Bureau v. Vipin Sood and another”**.

The Hon'ble Supreme Court of India vide order dated 12.10.2020 passed in Criminal Appeal No.668 of 2020 titled as **“Amit Singh @ Moni v. Himachal Pradesh”** was pleased to grant regular bail in a case

involving 3 kg and 800 grams of “charas” primarily on the ground of substantial custody and also, the fact that the trial would likely take time to conclude.

In Criminal Appeal No.827 of 2021 titled as **Mukarram Hussain v. State of Rajasthan and another**, the Hon'ble Apex Court vide judgment dated 16.8.2021 was also pleased to grant bail wherein the quantity of the contraband was commercial in nature.

A Co-ordinate Bench of this Court in CRM-M 10343 of 2021 titled as **Ajay Kumar @ Nannu v. State of Punjab** and other connected matters, vide Order dated 31.03.2021, after taking into consideration the stipulations of Section 37 of the NDPS Act, was pleased to grant regular bail in a case involving commercial quantity and a condition was imposed on the petitioner therein while granting the said bail and the said condition was incorporated in para 21 of the said judgment, which reads as under:

“21. However, the petitioners are granted regular bail subject to the condition that they shall not commit any offence under the NDPS Act after their release on bail and in case of commission of any such offence by them after their release on bail, their bail in the present case shall also be liable to be cancelled on application to be filed by the prosecution in this regard.”

Further, a Division Bench of this Court vide judgment dated 31.08.2021 passed in CRM-8262-2021 in CRA-S-3721-SB of 2015 titled as, **Harpal Singh v. National Investigating Agency and another**, granted suspension of sentence in a case where the recovery was of commercial quantity. In the above-mentioned order, the Division Bench had taken into consideration the right vested with an accused person/convict under Article 21 of the Constitution of India with regard to speedy trial. Further, the

judgment of Hon'ble the Supreme Court in **State (NCT of Delhi) v. Lokesh Chadha**; (2021) 5 SCC 724 was also taken into account and the provisions of Section 37 of NDPS Act were considered and the sentence of the applicant-appellant therein was suspended after primarily considering the period of custody of the applicant-appellant therein and also the fact that the appeal was not likely to be heard in near future. Reference in the order was also made to the Division Bench judgment of this Court in **Daler Singh v. State of Punjab**; 2007 (1) R.C.R. (Criminal) 316 and the view taken in Daler Singh's case (supra) was reiterated and followed. In the above said judgment, it was also noticed that the grounds for regular bail stand on a better footing than that of suspension of sentence, which is after conviction. It is apparent that to meet the requirement of Section 37 of the NDPS Act, various Courts have taken into consideration the merits of the case and the period of custody and where, in a case there are arguable points on merits and the custody is also adequate, the Hon'ble Supreme as well as various High Courts have granted bail even in cases involving commercial quantity.

The Division Bench in "**Didar Singh @ Dara's case** (supra) had observed as under:-

*“29. There is another infirmity on the record which further creates a doubt about the entire prosecution case. As per the prosecution, at the time of the recovery, various documents were prepared. Those documents are Ex.PA, Ex.PB, Ex.PC, Ex.PD, Ex.PE and Ex.PF. All these memos bear the FIR number of the case. It is admitted case of the prosecution that when these documents were prepared, the FIR was not registered and FIR No. was not available as the same was registered later on, on the ruqa sent by the police. It has not been explained how all these memos contained the FIR number, which was not existing at the time when these memos were prepared. In **Ajay Malik & Ors. v.***

State of U.T. Chandigarh, 2009(3) RCR (Crl.) 649, this Court while dealing with similar situation has observed that two inferences could be drawn from such situation, i.e. either the FIR was registered prior to the alleged recovery of the contraband or number of FIR was inserted in the document after its registration. But in both situations, it seriously reflects upon the integrity of the prosecution version. While relying upon several other decisions, it was held that such serious lapses in the prosecution case create a doubt to the prosecution theory.

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32. *In view of the aforesaid discussion, the appeal is allowed and the impugned judgment of conviction and order of sentence passed by the Judge, Special Court, Amritsar are set aside. The appellant, who is in custody, be set at liberty forthwith if not required in any other case."*

A coordinate Bench of this Court in **Ajay Kumar @ Nannu's** case

(supra) had held as under:-

*"(iii) that mentioning of number of FIR and additional offences in the recovery memo shows manipulation and fabrication of recovery memo subsequently in the police station which denudes recovery memo of any sanctity and strikes out integrity and shatters credibility of the prosecution version and entitles the petitioners to grant of bail. In support of his arguments Mr. Vipul Jindal, learned Counsel for the petitioners has placed reliance on the observations in judgments passed in **Ajay Malik Vs. State of U.T. Chandigarh : 2009(3) RCR (Criminal)***

649 (P&H); Didar Singh @ Dara Vs. State of Punjab : 2010(3) RCR (Criminal) 337 (P&H);** where mentioning of subsequent details in recovery memo was held to affect sanctity/credibility of recovery memo and **Criminal Appeal No.1809 of 2009 titled as 'Ram Chander Sharma @ Pandit Vs. State (NCT of Delhi)' decided on 01.12.2020 (SC); CRM-M-38153-2019 (O&M) titled as 'Satish Kumar Vs. State of Punjab' decided on 11.02.2020; CRM-M-42370-2019 (O&M) titled as 'Tarsem Lal Vs. State of Punjab' decided on 17.09.2020; CRM-M- 44921-2019 titled as 'Gurdeep Singh Vs. State of Punjab' decided on 18.02.2020; CRM-M-32615-2018 titled as 'Rinku Singh Vs. State of Punjab' decided on 07.08.2018; CRM-M-61999-2018 titled as

'Jatinder Vashisht Vs. State of Punjab' decided on 26.03.2019; CRM-M- 34433-2019 titled as 'Harvinder Singh @ Shammi Vs. State of Punjab' decided on 25.11.2019; CRM-20778-2018 in CRA-S-2212- SB-2016 titled as 'Kashmir Singh @ Koki Vs. State of Punjab' decided on 24.01.2019; CRM-19587-2019 in CRA-S-2884-SB-2016 titled as 'Charno Vs. State of Punjab' decided on 16.08.2019; CRM-M- 36504-2020 (O&M) titled as 'Rajandeep Singh @ Ghughi Vs. State of Punjab' decided on 28.01.2021 and Mustkeem @ Sirajudeen Vs. State of Rajasthan (SC): 2011(3) RCR (Criminal) 766 where bail was granted/ suspension of sentence was allowed on this ground.

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16. *In Mustakeem @ Sirajudeen Vs. State of Rajasthan : AIR 2011 SC 2769 it was held by Hon'ble Supreme Court that if the recovery memos were prepared at the Police Station itself then the same would lose its sanctity. In Ajay Malik Vs. State of U.T. Chandigarh : 2009(3) RCR (Criminal) 649 (P&H) it was held by this Court that presence of FIR details on recovery memos etc. leads to two inferences: either the FIR was registered prior to the alleged recovery of contraband or the number of FIR was inserted in these documents after its registration in both the situations it seriously reflects upon the integrity of the prosecution version. This view was upheld and reiterated by the Division Bench of this Court in Didar Singh @ Dara Vs. State of Punjab : 2010(3) RCR (Criminal) 337 (P&H) and mentioning of such details in recovery memo was held to affect sanctity/credibility of recovery memo. In Criminal Appeal No.1809 of 2009 titled as 'Ram Chander Sharma @ Pandit Vs. State (NCT of Delhi)' decided on 01.12.2020 (SC); CRM-M-38153-2019 (O&M) titled as 'Satish Kumar Vs. State of Punjab' decided on 11.02.2020; CRM-M-42370-2019 (O&M) titled as 'Tarsem Lal Vs. State of Punjab' decided on 17.09.2020; CRM-M-44921-2019 titled as Gurdeep Singh Vs. State of Punjab' decided on 18.02.2020; CRM-M-32615-2018 titled as 'Rinku Singh Vs. State of Punjab' decided on 07.08.2018; CRM-M-61999-2018 titled as 'Jatinder Vashisht Vs. State of Punjab' decided on 26.03.2019; CRM-M-34433-2019 titled as 'Harvinder Singh @ Shammi Vs. State of Punjab' decided on 25.11.2019; CRM-20778-2018 in CRA-S-2212-SB-*

2016 titled as 'Kashmir Singh @ Koki Vs. State of Punjab' decided on 24.01.2019; CRM-19587-2019 in CRA-S-2884-SB-2016 titled as 'Charno Vs. State of Punjab' decided on 16.08.2019; CRM-M-6504-2020 (O&M) titled as 'Rajandeep Singh @ Ghughi Vs. State of Punjab' decided on 28.01.2021 and Mustkeem @ Sirajudeen Vs. State of Rajasthan (SC): 2011(3) RCR (Criminal) 766 bail was granted/suspension of sentence was allowed on this ground.

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20. *In view of the above, the petitions are allowed and the petitioners are ordered to be released on regular bail on furnishing of personal bond and bond of one surety in heavy amount to the satisfaction of the trial Court/Chief Judicial Magistrate/Duty Magistrate concerned.”*

Similarly, a coordinate Bench of this Court in ***Rajandeep Singh @***

Ghughi's case (supra) had held as under:-

*“In this backdrop, the submission made by Ld. Counsel for the petitioner is that in view of the decision of the Supreme Court in **Ram Chander Sharma @ Pandit v. State (NCT Delhi) Criminal Appeal No. 1809 of 2009**, the existence of the FIR on the recovery memo when the FIR was not itself drawn up would point to the case against the petitioner being a fabricated one. Reliance has thereafter been placed upon an earlier decision of this Court in **Ajay Malik v. State of U.T. Chandigarh, 2009(3) RCR (CrI.)649 (P&H)** which was thereafter followed by the Division Bench in the decision of **Didar Singh @ Dara v. State of Punjab, 2010(3) RCR (Criminal) 337 (P&H) (DB)**. Various Benches of this Court have subsequently granted bail to such accused persons in view of these decisions wherever number of the FIR was seen to have been noted down in the documents purported prepared before registration of the FIR itself.*

*[i) CRM-M-38153-2019 titled **Satish Kumar v. State of Punjab;***

*(ii) CRM-M-42370-2019 titled **Tarsem Lal v. State of Punjab;***

*(iii) CRM-M-44921-2019 titled **Gurdeep Singh v. State of Punjab;***

*(iv) CRM-M-32615-2018 titled **Rinku Singh v. State of Punjab;***

(v) CRM-M-61999-2018 titled *Jatinder Vashisht v. State of Punjab*;

(vi) CRM-M-34433-2019 titled *Harvinder Singh @ Shammi v. State of Punjab*.]

Similarly in :-

(vii) CRM-20778-2018 in CRA-S-2212-SB-2016 titled *Kashmir Singh @*

***Kokki v. State of Punjab*; and**

(viii) CRM-19587-2019 in CRA-S-2884-SB-2016 titled *Charno v. State of Punjab*, the benefit of suspension of sentence even in favour of the convicts was granted by this Court for the same reason, i.e. existence of the F.I.R.

number on the Recovery Memo/ Documents prepared before registration of the F.I.R.”

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[8] In addition, Ld. Counsel for the petitioner has separately relied upon an appropriate format of the Recovery Memo pertaining to Heroin in FIR No. 232 dated 24.09.2016, Police Station Chheharta Amritsar to demonstrate in what manner the relevant FIR number is to be shown. Perusal of the same goes to show that the recovery from the concerned accused Karan Singh @ Karan s/o Watan Singh was purportedly effected on 23.09.2016, but the relevant FIR No. 232 dated 24.09.2016 was separately entered on the margin which was totally distinct from the original contents with a separate/categorical noting that the memo in question pertains to the said FIR drawn up on the following day. The said document is now tagged as Annexure 'X' with the record. It would, therefore, be clear that such format was being followed by the Narcotic Cell Authorities of the area for more than three years prior to the apprehension of the petitioner in the present case, and so mentioning of the FIR number in the very beginning of the Recovery Memo as done in the present case, and not by way of a subsequent explanatory endorsement to indicate that it relates to the relevant FIR drawn up subsequently, would only go to support the contention raised on behalf of the petitioner.

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[11] The petition is, therefore, allowed and the petitioner is directed to be released on bail to the satisfaction of the Ld. Trial Court/ Duty Magistrate, concerned."

Perusal of the above said judgments would show that the Division Bench as well as coordinate Benches of this Court had considered the contention raised by learned counsel for the present petitioner to be one of the weighty points while granting the concession of regular bail to the petitioner therein. Even in a case involving commercial quantity, it was observed that in such a situation only two inferences can be drawn, i.e., either the FIR was registered prior to the alleged recovery of contraband or the number of the FIR has been inserted in the document after its registration and both situations seriously reflect upon the integrity of the prosecution version and the same is a serious lapse in the prosecution case and creates a doubt in the prosecution theory. The coordinate Bench of this Court in ***Rajandeep Singh @ Ghughi's*** case (supra) had even explained as to how an entry was to be made with respect to the FIR which was entered into subsequently and it was observed that separate/categorical noting to the effect that FIR and its number having been mentioned, should be made. The same has not been done in the present case.

The issue raised in the above-said cases would also arise in the present case, inasmuch as, a perusal of the memo dated 01.11.2020 (Annexure P-3) and its vernacular (at page 50 of the paper book) would show that the FIR number as well as the date and Sections have been mentioned in the same. PW-1 Head Constable Gurdeep Singh in his cross-examination has stated as under:-

"We reached at the alleged place of recovery at about 3:50PM. Ruqa was prepared in my present and sent to the police station

through PHG Radhey Sham at about 3:30pm. ASI Davinder Singh knew earlier the driver of first vehicle. The first vehicle was without RC number. Three persons were travelling in that first car. I knew Karanvir Singh earlier from the first vehicle. The second police party was having three members heading by ASI Davinder Singh. ASI Davinder Singh reached at the spot after sending the ruqa to the police station. I can not say if by that time ruqa was received at PS Bahawwala or not. ASI Davinder Singh reached at about 3:50PM on private Swift Car, but I do not remember its RC number or colour. It is correct that ASI Davinder Singh came from PP Sito Gunro as he was posted at that police post at that time. PP Sito Gunro is at the distance of about 23km from PS Bahawwala. All the writing work was done in my presence and was done by me, ASI Davinder Singh, LSC Mamta Rani and SC Gurpal Singh. There was no arrangement of laptop or computer at the spot. the time of preparing documents at the spot, we were not aware about the FIR number/All the documents were prepared without filling the FIR number only."

A perusal of the above-said evidence would show that it has been specifically stated by PW-1 H.C. Gurdeep Singh that there was no arrangement of a laptop or a computer at the spot and at the time of preparing of these documents at the spot, they were not aware about the FIR number and all the documents were prepared without filling in the FIR number. However, the document at page 50 of the paper-book would show that the FIR number has been filled up, although, it the case of the State that the same has been filled up subsequently.

In the present case, the petitioner has been in custody since 01.11.2020 (1 year and 9 months) and out of total 18 prosecution witnesses, only 4 have been examined, thus, the trial is likely to take time. The earlier bail application of the petitioner was withdrawn on 22.11.2021 and thereafter, a period of more than 8 months has elapsed and 14 witnesses are still to be examined.

The above-said facts would show that the law laid down in the above-said judgments would also apply to the present case and the said aspect would be finally adjudicated during the course of trial. This Court is of the opinion that in the present case, there are arguable points which have been raised by the learned counsel for the petitioner and all the abovesaid factors are sufficient to entitle the petitioner for the concession of regular bail. Moreover, this Court proposes to impose such conditions that would meet the object of Section 37 of the NDPS Act.

Keeping in view the above-said facts and circumstances, the present petition is allowed and the petitioner is ordered to be released on bail on his furnishing bail / surety bonds to the satisfaction of the concerned trial Court/ Duty Magistrate and subject to him not being required in any other case. The petitioner shall also abide by the following conditions:-

1. The petitioner will not tamper with the evidence during the trial.
2. The petitioner will not pressurize / intimidate the prosecution witness(s).
3. The petitioner will appear before the trial Court on the date fixed, unless personal presence is exempted.
4. The petitioner shall not commit an offence similar to the offence of which he is accused of, or for commission of which he is suspected.
5. The petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

In case of breach of any of the above conditions, the prosecution shall be at liberty to move an application for cancellation of bail before this Court.

However, nothing stated above shall be construed as a final expression of opinion on the merits of the case and the trial Court would proceed independently of the observations made in the present case which are only for the purpose of adjudicating the present bail petition.

August 01, 2022
naresh.k/Ajay Goswami

(VIKAS BAHL)
JUDGE

Whether speaking/reasoned	Yes
Whether reportable	No