

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH
(215)

1. CRM-M-39328-2021 (O&M)
Baljinder Singh @ LambarPetitioner

Versus

State of PunjabRespondent

2. CRM-M-1899-2022
Gurmeet Singh alias GarryPetitioner

Versus

State of PunjabRespondent

Date of decision: - 04.08.2022

CORAM : HON'BLE MR. JUSTICE VIKAS BAHL

Present:- Mr. Vipul Jindal, Advocate
for the petitioners in CRM-M-39328-2021.

Mr. Vivek K. Thakur, Advocate
in the petitioner in CRM-M-1899-2022.

Mr. Sukhbeer Singh, AAG, Punjab.

VIKAS BAHL, J. (ORAL)

This order will dispose of two petitions. The first petition has been filed by Baljinder Singh @ Lambar i.e., CRM-M-39328-2021 and the second petition has been filed by Gurmeet Singh @ Garry i.e., CRM-M-1899-2022.

Both the said petitions have been filed under Section 439

Cr.P.C. for the grant of regular bail to the petitioners in FIR No.120 dated 08.07.2021, under Sections 21 and 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'NDPS Act'), registered at Police Station City Nakodar, District Jalandhar Rural.

Learned counsel for the petitioners have jointly submitted that in the present case, both the petitioners are in custody since 08.07.2021 and there are total 13 prosecution witnesses, none of whom have been examined, thus, the trial is likely to take time. It is further submitted that the petitioners are not involved in any other case. It is argued that in the present case, there is violation of the mandatory provisions of Section 50 of the NDPS Act, inasmuch as, no non-consent memo had been prepared in the present case and even in the notice under Section 50 of the NDPS Act, it had been stated that the petitioners had the right to get themselves searched and their vehicle searched by "me or from the Magistrate". It is submitted that the said offer cannot be stated to be in consonance with mandate under Section 50 of the NDPS Act and for the said purpose, reliance has been placed upon a judgment of Co-ordinate Bench of this Court in case titled "**Rakesh Kumar Vs. State of Punjab**", *passed in CRM-M-9848-2018, decided on 18.04.2018.*

Learned counsel for the petitioner Baljinder Singh @ Lambar has further highlighted that in the present case, the charges framed against petitioner Baljinder Singh @ Lambar are with respect to possession of 150 grams of Heroin, which is a non-commercial quantity. Even reference has been made to paragraph 5 of the report filed by the respondent-State

on the said aspect.

Learned State counsel, on the other hand, has opposed the present petitions for regular bail and has submitted that in the present case, the recovery effected from petitioner Baljinder Singh @ Lambar is of 150 grams of Heroin and that from petitioner Gurmeet Singh @ Garry is of 350 grams, but since both the said petitioners were travelling in one car, thus, the same would be taken as a joint recovery. The other factual aspects however, have not been disputed by learned State counsel.

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

Learned counsel for the petitioners has also highlighted the fact 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**, the Hon'ble Supreme Court in a case where allegation in the chargesheet 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: -

“ xxx--xxx--xxx

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 abovementioned 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 petitioners are in custody since 08.07.2021 and there are total 13 prosecution witnesses, none of whom have been examined, thus, the trial is likely to take time. The petitioners are stated to be not involved in any other case. No non-consent memo was prepared in the present case and even in the notice under Section 50 of the NDPS Act, it has been stated that the petitioners have a right to be searched from "me or from the Magistrate". The relevant portion of the said notice under Section 50 of the NDPS Act, issued to petitioner Baljinder Singh @ Lambar (page 22 of CRM-M-39328-2021), is reproduced herein below: -

"NOTICE UNDER SECTION 50 NDPS ACT"

In front of the witnesses mentioned below I, DSP Sub Division reached at the spot where I, while introducing myself to the person apprehended namely Baljinder Singh @ Lambar S/o Jasvir Singh R/o Awaan Khalsa PS Mehtpur, District Jalandhar told that my name is Navneet Singh (PPS). That I am posted as DSP in Nakodar. That I am Gazetted Officer. That I am having suspicion that you are having heroin. Your search and search of your vehicle is to be conducted. That you have right that you can get your search and search of vehicle from me or from any Magistrate Sahib. Arrangement for the same can be made at the spot. He stated that I have faith on you. You can conduct my search and search of my vehicle. That 50 NDPS was complied with. That the signature of accused Baljinder Singh @ Lambar above is being taken.

*Witness: SI/SHO Jatinder Kumar
SHO PS City Nakodar Sd/-*

2. *ASI Balwinder Singh No.191
PS City Nakodar Sd/-*

*Sd/-
Deputy Suptd. of Police
Sub Division Nakodar
Dated 8/7/2021"*

To the similar effect is the notice under Section 50 of the

NDPS Act given to the petitioner Gurmeet Singh @ Garry (page 10 of CRM-M-1899-2022).

A perusal of the above would show that in the said notice under Section 50 of the NDPS Act, it had not been stated that the search of the petitioner could be made before any Gazetted Officer and thus, the same amounts to non-compliance of Section 50 of the NDPS Act. A Coordinate Bench of this Court in **Rakesh Kumar's case (supra)** has held as under: -

"xxx xxx xxx xxx

In the case in hand, a limited consent was given vide Annexure P-2 which is reproduced hereunder: -

"I ASI, in front of below mentioned witnesses, told accused RakeshKumar while disclosing my identity to him that I am ASI Hardip Singh and I am posted at police station Lahori Gate, Patiala. I have a suspiciion that some narcotic substance is present with you or in the car in your possession and I want to search you and your car but you have a legal right that you can get yourself and your car searched from the Gazetted Officer of Police or Magistrate, who can be called on the spot, who after thinking for a while said, I have full faith upon you and you can search my person and the car in my possession, on which consent memo has been prepared and the signature of Rakesh Kumar above and witnesses are being taken on memo."

In view of the judgment of Hon'ble Supreme Court in Parmanand's case (supra), the accused must be apprised of his right of search before the Gazetted Officer but in the case in hand, he was apprised of his limited right such as before Police Gazetted Officer. To the mind of this Court, there is a violation of Section 50 of NDPS Act."

A perusal of the above-said judgment would show that in the said case, the option which was given to the accused therein was that his

search could be conducted in the presence of the "**Gazetted Officer of Police or Magistrate**" and even the said offer was held to be *prima facie* violation of Section 50 of the NDPS Act, inasmuch as, the accused had a right to be searched from any Gazetted Officer. In the present case, the DSP, Sub-Division, Nakodar had restricted the offer to be searched to himself or to any Magistrate and thus, had given a limited right to the petitioners, who were entitled to be given an option to be searched before any Gazetted Officer or Magistrate. The above-said facts raise a debatable issue, which would be finally adjudicated during the course of trial.

Keeping in view the above-said facts and circumstances and the fact that there are arguable points in the present case as well as in view of the aforesaid judgments, the present petitions are allowed and the petitioners are ordered to be released on bail on their furnishing bail / surety bonds to the satisfaction of the concerned trial Court/ Duty Magistrate and subject to them not being required in any other case. In order to meet the rigors of Section 37 of the NDPS Act, the petitioners shall also abide by the following conditions:-

1. The petitioners will not tamper with the evidence during the trial.
2. The petitioners will not pressurize / intimidate the prosecution witness(s).
3. The petitioners will appear before the trial Court on the date fixed, unless personal presence is exempted.
4. The petitioners shall not commit an offence similar to the offence of which they are accused of, or for commission of which they are suspected.
5. The petitioners 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 petitions.

Pending miscellaneous applications, if any, stand disposed of in view of the abovesaid order.

August 04, 2022
naresh.k

(VIKAS BAHL)
JUDGE

Whether reasoned/speaking?	Yes
Whether reportable?	Yes