

CRM-M-51016-2022

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-51016-2022
Reserved on: 15.11.2022
Pronounced on: 23.11.2022

Sakir ...Petitioner

Versus

State of Haryana ...Respondent

CORAM: HON'BLE MR. JUSTICE ANOOP CHITKARA

Present: Mr. Rahul Jaswal, Advocate for the petitioner.

Mr. Rajat Gautam, DAG, Haryana.

ANOOP CHITKARA, J.

FIR No.	Dated	Police Station	Sections
326	31.08.2020	Punhana, Distt. Nuh	20/61/85 of NDPS Act

1. The petitioner incarcerated for violating the above-mentioned provisions of Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act) as per the FIR captioned above, has come up before this Court under Section 439 CrPC seeking bail.

2. In paragraph 12 of the bail petition, the accused declares the following criminal antecedents:

Sr. No.	FIR No.	Date	Offences	Police Station
1	226	2021	3/25 of Arms Act	Jurhara, Distt. Bharatpur (Rajasthan)
2	227	2021	457, 380, 459 & 307 IPC	Jurhara, Distt. Bharatpur (Rajasthan)

3. The petitioner seeks bail on the grounds of parity with three co-accused namely Umar Daraj, Mahender and Illyas. 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, and given the criminal past, the accused is likely to indulge in crime once released on bail. He further contends that the petitioner is not entitled to bail on the grounds of parity.

REASONING:

5. In Paramjeet Singh v. State of Punjab, CRM-M 50243 of 2021, this court observed, While considering each bail petition of the accused with a criminal history, it throws an onerous responsibility upon the Courts to act judiciously with reasonableness because arbitrariness is the antithesis of law. The criminal history must be of cases where the

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accused was convicted, including the suspended sentences and all pending First Information Reports, wherein the bail petitioner stands arraigned as an accused. In reckoning the number of cases as criminal history, the prosecutions resulting in acquittal or discharge, or when Courts quashed the FIR; the prosecution stands withdrawn, or prosecution filed a closure report; cannot be included. Although crime is to be despised and not the criminal, yet for a recidivist, the contours of a playing field are marshy, and graver the criminal history, slushier the puddles.

6. A perusal of the petition does not refer to any averment based on which this court is assured that if this recidivist is released on bail, then he shall not indulge in criminal behavior. Apart from this, the allegations against the petitioner are of violating Section 20 of NDPS Act and for possessing 90 kg of Ganja which is five times over the commercial quantity. The co-accused/Umar Daraj was granted bail by the Sessions Court on 15.12.2020 on the ground that he was a juvenile, whereas the petitioner is not juvenile. Thus his case is not covered under the case of Umar Daraj. The other co-accused/Mahender was granted bail by the trial Court on 17.06.2021 on the grounds of Section 167(2) CrPC for non-filing of police report. The petitioner did not choose to file the petition under the provisions of Section 167(2) CrPC, as such the petitioner is not entitled to bail on parity with Mahender. Third accused/Ilyas was granted bail by the Coordinate Bench of this Court on 08.03.2022 on the grounds that he was not named in the secret information and was implicated based on disclosure statement of the co-accused. A perusal of the order dated 08.03.2022 passed in CRM-M-52970-2021, reveals that there is no mention of the co-accused-Ilyas having criminal history and contrary, the petitioner had criminal antecedents of two cases one under Arms Act and other under IPC Act. Furthermore on seeing the police, it was when the police had inquired the vehicle then three persons alighted from the car and started running away, however the police was able to nab two persons in all including the petitioner. Thus the petitioner's case is not covered on the grounds of parity with the co-accused-Ilyas. Furthermore the quantity involved in the case is commercial.

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. The petition states that the accused is entitled to bail because of the non-examination of independent witnesses. However, this plea would gather force only when the accused establishes after cross-examination that the police deliberately did not associate any independent witness even when they could have been made available, and in the facts and circumstances peculiar to this case, the argument does not satisfy the requirements of section 37 of NDPS Act.

9. In State of Punjab v Baldev Singh, (1999) 6 SCC 172, 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

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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.

10. 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.

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

12. 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.

13. 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

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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.

14. 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.

15. 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.

16. 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.

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17. 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.

(ANOOP CHITKARA)
JUDGE

23.11.2022
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Whether speaking/reasoned: Yes
Whether reportable: No.