

207

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRM-M-7638-2023 (O&M)
Date of decision : 27.02.2023

Gurvail Singh @ Gelu

...Petitioner

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE VIKAS BAHL

Present: Mr. P.S. Sekhon, Advocate for the petitioner.

Mr. Ferry Sofat, Addl. A.G. Punjab.

VIKAS BAHL, J. (ORAL)

This is the second petition filed under Section 439 of Cr.P.C. for grant of regular bail to the petitioner in FIR No.43 dated 22.06.2021 registered under Sections 21 and 25 of the NDPS Act, 1985 at Police Station Harike, District Tarn Taran.

Learned counsel for the petitioner has submitted that the petitioner was arrested on 22.06.2021 and investigation is complete and challan has been presented and his earlier bail application was withdrawn on 29.11.2022 at that stage. It is further submitted that there 12 prosecution witnesses, out of which, none have been examined as yet and thus, the conclusion of trial is likely to take time. It is contended that there are several arguable points involved in the present case including the point regarding

non-compliance of Section 50 of the NDPS Act. It is further contended that a perusal of the FIR would show that the recovery, in the present case, is effected from the polythene bag which was recovered from the right pocket of capri worn by the petitioner and thus, the same was recovered after the personal search of the petitioner. It is argued that the non-consent memo of personal search dated 22.06.2021 (Annexure P-8) was recorded, in which, offer which was given by the SI/SHO was to the effect that he wished to conduct the search of the petitioner and the petitioner had a legal right to get the search conducted by any Magistrate or any ***Gazetted Officer of Police***. It is further argued that even a perusal of the consent memo of personal search dated 22.06.2021 (Annexure P-9) would show that even the DSP, Sub Division, Patti had reiterated the same offer and had submitted that the petitioner had a legal right to be searched by any Magistrate *or any other Gazetted Officer of Police Department*. It is stated that the said offer is in complete violation of the provisions of Section 50 of the NDPS Act and for the said purpose, reliance has been placed upon a judgment of Coordinate Bench of this Court in case titled "***Rakesh Kumar Vs. State of Punjab***", passed in ***CRM-M-9848-2018, decided on 18.04.2018***.

On the other hand, learned State Counsel has opposed the present petition for grant of regular bail to the petitioner and has submitted that the recovery, in the present case, effected from the pocket of capri amounts to 250 grams of heroin and the said quantity would fall within the ambit of commercial quantity and thus, the bar under Section 37 of the NDPS Act would apply to the present case. It is further submitted that the petitioner is also involved in three other cases.

Learned counsel for the petitioner, in rebuttal to the said argument, has relied upon the judgment of Hon'ble Supreme Court in ***“Maulana Mohd. Amir Rashadi vs. State of U.P. and another”***, reported as ***2012 (2) SCC 382*** to contend that the facts and circumstances of the present case are to be seen and the bail application of the petitioner cannot be rejected solely on the ground that the petitioner is involved in another case. The relevant portion of the said judgment is reproduced hereinbelow:-

“As observed by the High Court, merely on the basis of criminal antecedents, the claim of the second respondent cannot be rejected. In other words, it is the duty of the Court to find out the role of the accused in the case in which he has been charged and other circumstances such as possibility of fleeing away from the jurisdiction of the Court etc.”

This Court has heard 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 the various cases where recovery of commercial quantity has been effected and 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.

In the present case, the petitioner was arrested on 22.06.2021 and investigation is complete and challan has been presented and out of 12 prosecution witnesses, none have been examined as yet and thus, the

conclusion of trial is likely to take time. The petitioner was also granted interim bail and he had never misused the said concession. A perusal of non-consent memo of personal search dated 22.06.2021 would show that the offer made to the petitioner was to the extent that he could get himself searched by any Magistrate or any **Gazetted Officer of Police** and the said offer was a restricted offer and is, prima facie, in violation 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 suspicion 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 violative of the provision of Section 50 of the NDPS Act, inasmuch as, the accused had a right to be searched from any Gazetted Officer and not just a Police Gazetted Officer. The law laid down in the above-said judgment would also apply in the present case. In view of what has been stated hereinabove, there are reasonable grounds to believe that the petitioner is not guilty of the offences he has been charged with.

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 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.

In order to meet the rigors of Section 37 of the NDPS Act, 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, keeping in view the observations made in paragraph 15 of the judgment of the Hon'ble Supreme Court in **Narcotics Control Bureau Vs. Mohit Aggarwal, passed in Criminal Appeal Nos.1001-1002 of 2022 (arising out of petitions for Special Leave to Appeal (Criminal) No.6128-29 of 2021)**, decided on 19.07.2022, 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.

All the pending miscellaneous applications, if any, shall stand disposed of in view of the abovesaid judgment.

27.02.2023

Pawan

**(VIKAS BAHL)
JUDGE**

Whether speaking/reasoned:-

Yes/No

Whether reportable:-

Yes/No