

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

CRM-M-29128-2023

Date of decision : 24.08.2023

ARIF

....Petitioner

Versus

STATE OF PUNJAB

...Respondent

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present : Mr. Satnam S. Gill, Advocate
for the petitioner.

Mr. Amit Shukla, AAG, Punjab.

PANKAJ JAIN, J. (ORAL)

This petition has been filed under Section 439 Cr.P.C. for grant of regular bail to the petitioner in case F.I.R. No.121 dated 28.07.2022 registered for the offences punishable under Sections 18 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the NDPS Act') at Police Station Lalru, District SAS Nagar, Mohali.

2. As per the case of prosecution it has been contends as under :

“At about 02:15 P.M., one Haryana Roadways bus came from the side of Ambala, about 100 meters behind the naka, two young boys empty handed alighted from running bus and ran towards backside. I, SI on the basis of suspicion apprehended both the young boys with the help of companions and asked their names and addresses. First young boy disclosed his name as Arif son of Abrar, resident of village Majhgawan, Police Station Bisaratganj, Tehsil Ambla, District Bareilly (U.P.), aged about 23 years and second young boy disclosed his name as Ram Lakhan son of Devi Ram, resident of village Majhgawan, Police Station

Bisaratganj, Tehsil Ambala, District Bareilly (U.P.), aged about 20 years. They were asked the reason of alighting from running bus and run towards backside but they could not give satisfactory reply and became perplex. I being suspected that there is something intoxicant material with them. I, SI disclosed my identity to them and said that I, SI, Mandeep Singh No. 42/CP/ASR, am working in Punjab Police Department and posted as Incharge at Police Post Lehli and told them that I, SI suspect that there is something intoxicant substance with them and hence their search is to be conducted. They are legally entitled to get themselves searched in the presence of any Magistrate or Gazetted Officer, they can be called at the spot and they can be brought before them. Upon this, above mentioned Arif and Ram Lakhan though little while and said that they want to get themselves searched in the presence of any Gazetted Officer. Whereupon, I, SI recorded the dissent statements of above mentioned Arif and Ram Lakhan separately. Memo of dissent statement was signed by above mentioned Arif in Hindi whereas Ram Lakhan put his left thumb impression. Memo was also signed by the witnesses.”

3. Counsel for the petitioner submits that it is not a case of recovery of commercial quantity in view of the fact that individual recoveries have been made from the petitioner and co-accused namely Ram Lakhan and the petitioner cannot be held responsible for possession of 1 Kg.300 grams of opium recovered from Ram Lakhan. In support of his contention, he has relied upon law laid down by the Apex Court in **Amarsingh Ramjibhai Barot vs. State of Gujarat, (2005) 7 SCC 550** wherein it was observed as under :

“7. The learned counsel appearing for the appellant urged

only one contention in support of the present appeal. He contended that the High Court fell into an error in taking the total quantity of the offending substances recovered from the two accused jointly and holding that the said quantity was more than the commercial quantity, warranting punishment under Section 21(c) of the NDPS Act. He contended that as far as the appellant is concerned, the High Court erred by assuming that there was criminal conspiracy within the meaning of Section 29 of the NDPS Act, and erroneously proceeded under the said section. The High Court fell into a further error of assuming that because Section 29 was applicable, the total quantity of opium recovered was 920 grams plus 4.250 kgs. The counsel urged that because of this error the High Court took the wrong view that the total recovered opium was of "commercial quantity" and, therefore, attracted Section 21(c) of the NDPS Act.

8. Although, at first blush, the argument of the learned counsel appeared attractive, on careful appreciation of the facts on record we are satisfied that the High Court judgment is fully justified and needs to be upheld. It is true that the High Court proceeded on the footing that there was a criminal conspiracy between the appellant and the deceased, Danabhai Virabhai Rabari. In our view, however, there was no warrant for this conclusion at all as there is no evidence to suggest that there was any such abetment and/or criminal conspiracy within the meaning of Section 29 of the NDPS Act. The appellant and Danabhai Virabhai Rabari were found together, but individually carrying the recovered substances. Hence, it was not possible for the High Court to take the view that Section 29 was attracted.

9. The High Court was justified in its conclusion that the appellant could not have been punished under Sections 17 and 18 of the NDPS Act."

4. Further reliance has been placed upon order passed by

Co-ordinate Bench of this Court in CRM-M-53872-2021 titled as **Sukhdev**

Singh vs. State of Punjab, dated 27th of April, 2022 wherein by relying upon law laid down in Amarsingh Ramjibhai Barot's case (supra), the Bench held that :

“The Prayer in this petition is for the grant of regular bail under Section 439 Cr.PC in case FIR No.200 dated 12.09.2021 under Sections 18 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 registered at Police Station Goindwal Sahib, District Tarn Taran.

2. The brief facts of the case are that while the police was on patrolling duty, two young persons alighted from a three wheeler scooter with bags on their shoulders and on seeing the police party got perplexed, turned backward and started moving hurriedly. On the basis of suspicion both of them were apprehended, who disclosed their names as Sukhdev Singh (present petitioner) son of Arjan Singh and the other one disclosed his name as Anurag Srivastav son of V.S. Srivastav. After completing the usual formalities their kit bags were searched and from the kit bag of Sukhdev Singh (petitioner) 1Kg 350 grams of Opium was recovered. From the kit bag of Anurag Srivastav 1Kg 250 grams of Opium was recovered.

3. The Counsel for the petitioner contends that the recovery effected from him was 1Kg 350 grams of Opium which was a non commercial quantity and recovery from his co-accused could not be clubbed to his recovery to make the total recovery that of commercial quantity. He relies on the judgment of this Court in **Amit Dhanak Vs. State of Haryana CRM-M-33684-2020 Decided on 11.01.2021** to contend that when there is separate recovery from each accused of non commercial quantity then the recovery from each accused cannot be clubbed together so as to disentitle all the accused to the grant of bail. Relevant para of the order is reproduced as under:-

“ Considering the facts; that in the FIR specific recovery has been attributed to all the three accused of 16Kgs of

Ganja Patti each; they are in custody since August, 2020; no recovery is to be made; the individual recovery is of non commercial quantity and conclusion of trial would take time, both the petitions are allowed. The petitioners are ordered to be released on bail subject to their furnishing surety/bail bonds to the satisfaction of the learned trial Court/Duty Magistrate concerned. ”

A similar view has been taken by this Court in the case of **Sukhwinder Singh Vs. State of Punjab CRM-M-13534-2022** Decided on 05.04.2022.

Similarly the Hon'ble Supreme Court in **Amarsingh Ramjibhai Barot Vs. State of Gujarat 2005 AIR (Supreme Court) 4248** held as under:-

“ A number of contentions were urged in the High Court by the appellant in support of his appeal. It was contended that the conviction was liable to be set aside as there was non compliance with the provisions of section 42(2), 50, 52 and 57 of the NDPS Act. There is no substance in this contention. The High Court, however, was of the view that the conviction of the appellant under section 17 and 18 read with section 29 of the NDPC Act was not correct. On the other hand, the High Court came to the conclusion that the appellant was liable to be convicted under Section 21(c) and also under Section 21 (c) read with Section 29 of the Act, for individually being in possession of 920 grams and for being jointly, in conspiracy with the deceased, in possession of 4.250 kgs. of the prohibited substance recovered. In the view of the High Court, the total amount of prohibited substance recovered (personally from the appellant and also from the joint possession of the two accused) being more than “commercial quantity” as defined under the applicable notification, the appellant was liable to be visited with the minimum punishment of 10 years rigorous imprisonment plus fine of Rs. 1 lakh. The High Court was

also of the view that, even if the quantity of 920 grams recovered from the appellant alone were to be considered, it would warrant conviction under Section 21 (c) and the minimum sentence of 10 years rigorous imprisonment plus fine of Rs. 1 lakh. Being aggrieved thereby, the appellant is before this Court compliance with the provisions of section 42(2), 50, 52 and 57 of the NDPS Act. There is no substance in this contention. The High Court, however, was of the view that the conviction of the appellant under section 17 and 18 read with section 29 of the NDPC Act was not correct. On the other hand, the High Court came to the conclusion that the appellant was liable to be convicted under Section 21(c) and also under Section 21(c) read with Section 29 of the Act, for individually being in possession of 920 grams and for being jointly, in conspiracy with the deceased, in possession of 4.250 kgs. of the prohibited substance recovered. In the view of the High Court, the total amount of prohibited substance recovered (personally from the appellant and also from the joint possession of the two accused) being more than “commercial quantity” as defined under the applicable notification, the appellant was liable to be visited with the minimum punishment of 10 years rigorous imprisonment plus fine of Rs. 1 lakh. The High Court was also of the view that, even if the quantity of 920 grams recovered from the appellant alone were to be considered, it would warrant conviction under Section 21(c) and the minimum sentence of 10 years rigorous imprisonment plus fine of Rs. 1 lakh. Being aggrieved thereby, the appellant is before this Court applicable, the total quantity of opium recovered was 920 grams plus 4.250 kgs. The counsel urged that because of this error the High Court took the wrong view that the total recovered opium was of “commercial quantity” and, therefore, attracted Section 21(c) of the NDPS Act Although, at first blush, the

argument of the learned counsel appeared attractive, on careful appreciation of the facts on record we are satisfied that the High Court judgment is fully justified and needs to be upheld. It is true that the High Court proceeded on the footing that there was a criminal conspiracy between the appellant and the deceased, Danabhai Virabhai Rabari. In our view, however, there was no warrant for this conclusion at all as there is no evidence to suggest that there was any such abetment and/or criminal conspiracy within the meaning of Section 29 of the NDPS Act. The appellant and Danabhai Virabhai Rabari were found together, but individually carrying the recovered substances. Hence, it was not possible for the High Court to take the view that Section 29 was attracted. ”

Although, at first blush, the argument of the learned counsel appeared attractive, on careful appreciation of the facts on record we are satisfied that the High Court judgment is fully justified and needs to be upheld. It is true that the High Court proceeded on the footing that there was a criminal conspiracy between the appellant and the deceased, Danabhai Virabhai Rabari. In our view, however, there was no warrant for this conclusion at all as there is no evidence to suggest that there was any such abetment and/or criminal conspiracy within the meaning of Section 29 of the NDPS Act. The appellant and Danabhai Virabhai Rabari were found together, but individually carrying the recovered substances. Hence, it was not possible for the High Court to take the view that Section 29 was attracted. ”

4. The Counsel for the State on the other hand contends that the total quantity of the contraband recovered from both the accused is to be considered in order to adjudicate upon the bail application in which case the recovery was of a commercial quantity thereby attracting the bar of Section 37 of the NDPS

Act.

5. I have heard counsel for both the parties at length.

6. A perusal of the orders/judgments reproduced herein above would show that the total quantity recovered from both the accused are not to be seen collectively when individual recovery from each accused is of non commercial quantity.

In view of the above, since the recovery from the petitioner is of a non commercial quantity of Opium the rigors of Section 37 of the NDPS Act are not applicable to the case of the petitioner.

The petitioner is in custody since 12.09.2021 and the investigation stands completed. Therefore, the further incarceration of the petitioner is not required, moreso when the trial is not likely to be concluded in the near future.

In view of the above, the present petition is allowed and the petitioner-Sukhdev Singh son of Sh. Arjan Singh is ordered to be released on bail subject to his furnishing bail bonds and surety bonds to the satisfaction of learned CJM/Duty Magistrate, concerned.

The petitioner shall appear before the police station concerned on the first Monday of every month till the conclusion of the trial and shall furnish an affidavit each time that he is not involved in any other crime other than the present case during the time he was on bail.

Petition stands disposed of.”

to submit that the total quantity recovered from both the accused are not to be seen collectively when individual recoveries from each of accused is of commercial quantity.

5. Per contra, State Counsel submits that both the petitioners were travelling together in a bus and alighted together and thereafter ran together.

Therefore, at this stage this Court cannot hold that the recovery effected

from both the accused has to be seen individually.

6. I have heard counsel for the parties and have gone through records of the case.

7. A careful perusal of the observation made by Apex Court in Amarsingh Ramjibhai Barot's case (supra) would reveal that the Apex Court observed that in the absence of evidence to suggest that there was any abetment and/or criminal conspiracy within the meaning of Section 29 of the NDSPS Act individual recoveries cannot be clubbed together.

8. In **Union of India v. Md. Nawaz Khan (2021) 10 SCC 100**, Supreme Court held as under :

“22. We shall deal with each of these circumstances in turn. The respondent has been accused of an offence under Section 8 of the NDPS Act, which is punishable under Sections 21, 27A, 29, 60(3) of the said Act. Section 8 of the Act prohibits a person from possessing any narcotic drug or psychotropic substance. The concept of possession recurs in Sections 20 to 22, which provide for punishment for offences under the Act. In **Madan Lal and Another v. State of Himachal Pradesh, (2003) 7 SCC 465** this Court held that

"19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record are that all the accused persons were travelling in a vehicle and as noted by the trial court they were known to each other and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

21. It is highlighted that unless the possession was coupled with the requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

22. The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in **Supdt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja [(1979) 4 SCC 274 : 1979 SCC (Cri) 1038: AIR 1980 SC 52]** to work out a completely logical and precise definition of "possession" uniform [ly] applicable to all situations in the context of all statutes.

23. The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended.[...]

26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law.xxxx”

9. In the present case and that too in terms of provisions as contained under Sections 35 and 54 of the NDPS Act it will be too early in the day for this Court to hold that there is nothing on record to draw such inference.

10. In view of above, this Court does not find any reason to grant bail to the petitioner. Consequently, the same is dismissed.

August 24, 2023		(Pankaj Jain)
Dpr		Judge
Whether speaking/reasoned	:	Yes/No
Whether reportable	:	Yes/No