

CRM-M-33061 of 2022 (O&M)

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

CRM-M-33061 of 2022 (O&M)

Reserved on: 20.01.2023

Pronounced on: 24.01.2023

Nisha

.....Petitioner

versus

State of Haryana

.....Respondent

CORAM: HON'BLE MR. JUSTICE NAMIT KUMAR

Present: Mr. Gaurav Arora, Advocate,
for the petitioner.

Mr. Vikrant Pamboo, DAG, Haryana.

NAMIT KUMAR, J.

CRM-26724 of 2022

This application has been filed under Rule 3-A(i) of Chapter 6, Part B Volume-V of the High Court Rules and Orders to appear, act and plead in this Court on behalf of the petitioner in the present case.

Allowed as prayed for.

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This petition has been filed by the petitioner under Section 439 Cr.P.C. seeking regular bail in case FIR No.412 dated 09.12.2021 under Sections 22, 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, registered at Police Station IMT Rohtak, District Rohtak.

According to the prosecution, on 09.12.2021 ASI Ashwani

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Kumar received a secret information that petitioner along with co-accused Saroj are carrying Heroine. On this information, a report under Section 42 of NDPS Act was sent to the police station. The police party reached at the given place, where two ladies were apprehended on the basis of suspicion. On asking they disclosed their names as petitioner-Nisha wife of Karamjit and Saroj wife of Surender. Notice under Section 50 of NDPS Act was issued to them. DSP Mahesh Kumar was called at the spot and in presence of DSP 225 grams of Heroine was recovered from petitioner-Nisha and 225 grams of Heroine was recovered from accused Saroj without any permit or licence. In this manner total 450 grams of Heroine was recovered. They were arrested on 09.12.2021.

Learned counsel for the petitioner contends that the recovery effected from petitioner was 225 grams of heroin which was a non-commercial quantity and recovery from her co-accused could not be clubbed to her 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 dated 11.01.2021 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

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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.

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.

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.”

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He further submits that petitioner is involved in one more case under the NDPS Act but she is on bail therein.

Learned State counsel 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.

I have heard counsel for both the parties at length.

A perusal of the orders/judgments reproduced herein above would show that the total quantity recovered from both the accused is 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 Heroin the rigors of Section 37 of the NDPS Act are not applicable to the case of the petitioner.

The petitioner is in custody since 09.12.2021 and the investigation stands completed. Challan has been presented before the trial Court; charges have been framed and out of total 11 prosecution witnesses, 04 have been examined and 07 are yet to be examined. 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 is ordered to be released on bail subject to her furnishing bail bonds and surety bonds to the satisfaction of learned CJM/Duty Magistrate, concerned.

The petitioner shall appear before the police station concerned

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on the first Monday of every month till the conclusion of the trial and shall furnish an affidavit each time that she is not involved in any other crime other than the present case during the time she was on bail.

Petition stands disposed of.

24.01.2023

R.S.

(NAMIT KUMAR)

JUDGE

Whether speaking/reasoned

:

Yes/No

Whether reportable

:

Yes/No