

Uday S. Jagtap

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL BAIL APPLICATION NO. 3234 OF 2022

Chetan Hariraji Purohit .. Applicant

Vs.

The State of Maharashtra .. Respondent

.....
Mr. Mithilesh Mishra a/w Mr. Hansraj Solanki i/b Ganesh Gupta,
for the applicant

Ms. Anamika Malhotra, APP for the respondent – State

.....

CORAM : PRITHVIRAJ K. CHAVAN, J.

CLOSED ON : 22nd FEBRUARY, 2024.

PRONOUNCED ON : 28th FEBRUARY, 2024.

P.C.

1. By this application, the applicant who is one of the three accused has prayed for his release on bail in connection with an FIR registered with Chakan Police Station, Pune vide C.R. No. 49 of 2022 for the offences punishable under Sections 8(c), 20(b)(ii)(C), 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “NDPS Act”) for allegedly found in possession of commercial quantity of Ganja during a chance raid on 10.01.2022 at about 15.30 hours.

2. Briefly stated, it is the case of the prosecution that under the leadership of Police Inspector Satish Pawar, the police personnel were on usual patrolling duty in a Government Vehicle No. MH-14JM-6261 along with other few private vehicles. While patrolling within the territorial jurisdiction of Alandi Police Station, when the team headed by P.I. Satish Pawar entered into the jurisdiction of Chakan Police Station on Chakan – Shikrapur Road, a White Coloured Hundai i-20 car bearing Registration No. RJ14-ZC-3310 overtook the police vehicle in a high speed. The team suspected some foul play and, therefore, followed the said Hundai i-20 car. Ultimately, the said car was intercepted wherein three passengers were found, comprising two males and one female. Admittedly, the co-accused namely Kantilal Mangilal Ghanchi and Monika Hakim Sinh have already been granted bail.

3. The Police Officer from the raiding team introduced themselves by displaying their identity cards. Upon inquiry with the passengers in the Hundai i-20 car, it revealed that the applicant though is a temporary resident of Pune basically hails from Village Karlu, Tahasil Binmal, Dist. Jalor, Rajasthan. Second accused - Kantilal Ghanchi is also a permanent resident of Tahasil Marwad

Junction, Dist. Pali, Rajasthan and third accused – Monika Sinh is a resident of Hardev Nagar, Barrah Kanpur, Uttar Pradesh. The raiding team apprised them about their right to be searched in the presence of Gazetted Officer, both in Hindi and Marathi language. They were also apprised of the search and seizure of Hundai i-20 Car, which was being driven by accused Kantilal Ghanchi. All of them declined to get themselves searched in the presence of any Gazetted Officer or Magistrate in view of Section 50(1) of the NDPS Act.

4. Accordingly, the raiding team in the presence of two pancha witnesses searched Hundai i-20 car and found following contraband, which was of commercial quantity.

1. 20 kg 727 gram ganja found concealed beneath the rear seat of Hundai i-20 car in 10 packets
2. 29 kg 674 gram ganja found concealed in 39 packets stored in the dickey of the said car.
3. 17 kg 899 gram ganja found concealed in 9 packets stored in the dickey of the said car.
4. 18 kg 199 gram ganja concealed in 9 packets
5. 12 kg 344 gram ganja concealed in dickey

5. Thus, 98 kg 843 grams of ganja worth Rs. 31,73,075/- was found in the dickey of the said car. Seizure panchanama depicts that the contraband which came to be seized from the said Hyundai i-20 car comprised flowering and fruiting tops of the cannabis plant along with seeds accompanied with greenish brownish coloured substance, meaning thereby, the said substance indeed falls within the definition of “Ganja” as provided in Section 2(iii)(b) of the NDPS Act. The seized commercial quantity indeed is in the form of flowering of fruiting tops of the cannabis plant. As per the definition of “Ganja”, if the flowering of fruiting tops are without seeds and leaves when not accompanied by the tops, then it would be termed as “Ganja”. If seeds and leaves are found which are not accompanied by the tops, it would exclude from the definition of “Ganja”. The Investigating Agency has, thereafter, drawn different samples of 25 grams each from the bags. The Hyundai i-20 car No. RJ14-ZC-3310 was seized. The seized samples were duly sealed in different packets in the presence of panch witnesses by obtaining their signatures. During interrogation, it revealed that the said contraband was obtained by the applicant at the behest of one Ganesh alias Deepak Pawar with whom he was acquainted while in jail in connection with some other case of *Gutkha*. He along with

Ganesh alias Deepak Pawar from whom he received an offer that contraband is to be brought from a place called Bhawanipatna from Odisha from a person namely Kumkum and after the sell of the said contraband, the applicant and Ganesh alias Deepak Pawar would share 50% profit each. Accordingly, after his release from the jail, the applicant along with the said Ganesh alias Deepak Pawar and the other two accused had been to Bhawanipatna in the State of Odisha. They were introduced with Kumkum by Ganesh alias Deepak Pawar. Accordingly, they purchased two packets of 40 kg each of Ganja and brought the same to Pune. After selling the contraband at Pune, they shared 50% profit as promised earlier.

6. Again on 07.01.2022 the applicant, after having a discussion with Ganesh alias Deepak Pawar bought the contraband from Bhawanipatna, Odisha, who was accompanied by the other two accused. After returning to Pune, out of 50 packets of contraband purchased from Kumkum, one sample packet was given to Ganesh alias Deepak Pawar at Shikrapur.

7. After investigation, a charge-sheet came to be filed in the Special Court at Khed-Rajgurunagar, Pune against all the accused.

8. Accused – Monika was released on bail by the Sessions Court, Pune on 15.07.2022. Accused – Kantilal was released on bail by this Court on 25.04.2023 on the ground of parity.

9. I heard Mr. Mishra, learned Counsel for the applicant at a considerable length. He has placed multiple authorities on record in order to buttress his contention as regards non-compliance of certain mandatory provisions, namely, Section 42 and 52A of the NDPS Act. Apart from long incarceration, the Counsel would argue that in the absence of antecedents and considering the uncertainty of the conclusion of the trial, the applicant needs to be enlarged on bail. The Counsel would also emphasize on the fact that what has been seized and sent for chemical analysis does not attract provisions of Section 2(iii)(b) of the NDPS Act, meaning thereby, it does not fall within the definition of “Ganja”. He also raised a doubt as regards quantity of the contraband alleged to have been seized by the Officers including flowers of fruiting top along with leaves and seeds etc.

10. The third limb of his argument is that in view of various pronouncements of the Supreme Court and this Court in the

following decisions, the applicant is entitled to be released on bail.

1. Noor Aga Vs. State of Punjab, (2008) 16 SCC 417.
2. Hari Mahadu Valse Vs. The State of Maharashtra, AIR Online 2021 (AnujaPrabhudessai, J.).
3. Kunal Dattu Kadu Vs. Union of India, 2022 SCC Online Bom 1770.
4. Ibrahim Khwaja Miya Sayyed @ Raju Vs. The State of Maharashtra, Criminal Bail Application No.1296 of 2022 decided on 17th March, 2023.

11. While vehemently opposing the application seeking release of the applicant on bail, learned APP has pressed into service, following decisions of the Supreme Court.

1. Union of India through Narcotics Control Bureau, Lucknow Vs. Md. Nawaz Khan, (2021) 10 Supreme Court Cases, 100,
2. State of Himachal Pradesh Vs. Sunil Kumar, 2014 AIR (SC), 2564,
3. Union of India Vs. Shiv Shankar Kesari, (2007) 7 Supreme Court Cases, 798,
4. Hira Singh and another Vs. Union of India and another, AIR 2020 Supreme Court, 3255,
5. State NCT of Delhi Vs. Malvinder Singh, (2007) 11 Supreme Court Cases 314.

12. Learned A.P.P strenuously urged to reject the application in view of the huge commercial quantity of contraband recovered from the possession of the applicant, which according to her, is evident from the seizure panchanama and charge-sheet; not only

that he has been indulging in transporting the contraband from the State of Odisha in the past. It is not the contention of the applicant that he is being prosecuted for the first time for the offences under the NDPS Act, since, admittedly he had been arrested previously in connection with *Gutkha*. Learned APP would further contend that this case does not attract Section 42 but Section 43 of the NDPS Act since it was a chance raid. There was no question of any prior information being received and written down, since Hyundai i-20 car was seized in *transit*.

13. Before adverting to the rigours of Section 37 of the NDPS Act as well as the question raised by the learned Counsel for the accused as regards non-compliance of Section 42 and 52 of the said Act, it would be apposite to go through certain salient aspects of the prosecutions case.

14. The Investigating Officer of this case has recorded statement of a few witnesses which would be significant while considering the application for bail. There is a statement of one Naresh Hiralalji Mehta – a friend of the applicant. It was recorded on 15.01.2022. The sum and substance of his statement is that on 17.12.2021, he

had hired a Innova Car bearing Registration No. MH-14CX-7694 from his acquaintance, namely Suraj Yuvraj Mulik, who is a tour operator. The said Innova car was hired for the purpose of carrying his wife to Nagpur. Accordingly, his wife was taken to Nagpur in the said Innova Car and it returned to Pune on 18.12.2021. At that point of time, the applicant along with his friends (co-accused) decided to go for a pleasure trip in the State of Odisha and, therefore, they were in need of a vehicle. At the request of the applicant and by taking consent of Suraj Mulik, said Innova car was given to the applicant by Naresh Mehta for 4 – 5 days.

15. When the applicant and co-accused returned to Pune from Odisha on 25.12.2021, Naresh Mehta noticed some brown coloured packets duly sealed with cello-tape in the said Innova Car. The applicant and the co-accused were searching for a place to keep the said packets in safe custody, however, they could not get any place and, therefore, the said packets were kept in the Innova car itself. Upon being asked, the applicant informed Naresh Mehta that the packets contain Ganja. When Naresh Mehta expressed his anger as to how the vehicle was misused by the applicant, he replied that those packets belong to a friend of the applicant and,

thereafter, the said packets were concealed somewhere.

16. Needless to state that the applicant, *prima facie*, appears to have been indulged in transporting Ganja even before interception of the Hundai i-20 car by the Investigating Agency on 10.01.2022.

17. The applicant and the co-accused indeed are not first timers and innocent as tried to be demonstrated by the learned Counsel for the applicant. The Investigating Agency has recorded the statement of one Aman A. Nial, the Hotel Manager at Hotel Center Park, Ghorghat Chowk, Bhawanipatna, Odisha. The witness states that on 20.12.2021 at 20.30 hours persons namely; Chetan Purohit (applicant), Kantilal M. Ghanchi and Monika Sinh (co-accused) had been to his aforesaid hotel where they had booked Room No.212 and Room No.222 by paying Rs.3,000/- and Rs. 2,500/- respectively. Again on 21.12.2021, Room No.212 was booked by Chetan Purohit. Monika and Kantilal booked Room No. 222. On 22.12.2021, one more Room i.e Room No.110 was booked at Rs.1,400/- by Kantilal. They checked out on 22.12.2021 at 13.27 hours. Again on 07.01.2022, i.e. 3 days prior to the incident in question, the applicant - Chetan, accused Kantilal and Monika had

been to the said hotel around 10.05 hours. Applicant – Chetan and Monika booked Room No.222 by paying Rs.2,500/- while Kantilal booked Room No.217 by paying Rs.999/-. They checked out on 08.01.2021 at about 21.15 hours.

18. Copies of Hotel bills substantiating the said fact have been annexed along with the statement of Aman A. Nial indicating the bills in the name of applicant – Chetan, Monika as well as Kantilal. It is not informed to this Court by the learned APP as to whether orders granting bail to the co-accused have been challenged or otherwise? Be that as it may. If the statement of Naresh Mehta *vis-a-vis* the statement of Aman A. Nial and the hotel bills are juxtaposed, it would reveal the *modus operandi* of the applicant and the co-accused in illicit trafficking of huge quantity of Ganja all the way from the State of Odisha to Pune.

19. There is one more statement of Vikas Sharma, which indicates that all the three accused were staying in the same hotel where he stayed and that all three accused hail from Rajasthan. He states that on 07.01.2022, applicant – Chetan Purohit requested him to lend his car for a pleasure drive and, as such, Hundai i-20 car in which

the contraband was found was given to the applicant by this witness. It is surprising as to why the aforesaid material evidence has not been brought before the other Courts while entertaining applications for bail.

20. Section 35 and 54 of the NDPS Act raise presumptions with regard to the culpable mental state and possession of illicit articles on the part of the accused as also places burden of proof in this behalf on him; but the provision would operate during trial of the accused. I am conscious of these legal presumptions, nevertheless, it cannot be heard to say that what had been seized by the Investigating Officer from the Hyundai i-20 car in the form of huge commercial quantity of Ganja is being a mixture, cannot be treated as a commercial quantity in light of the fact that the Chemical Analyzer report dated 28.04.2022 forwarded by Regional Forensic Science Laboratory, Pune indicates that the parcel contained flowering-fruited tops mixed with pieces of stalks, stems, leaves and seeds put in **separate polythene bags** which was again wrapped in paper marked S-1, S-2, S-3, S-4 and S-5 respectively. No doubt, after testing the samples, it proved to be positive for Ganja, which falls within the definition of Section 2(iii)(b) of the NDPS Act.

21. In an order of this Court in **Kunal Dattu Kadu Vs. Union of India**, passed in Anticipatory Bail Application No. 2173 of 2022, dated 29.08.2022 (Coram : Bharati Dangre, J.), it is observed that the chemical analyzers report indicates that the samples under reference tested positive for Ganja. However, for the first time, in contrast to the green leafy substance which was found and seized, from each samples were drawn, report of analysis refers to the sample which is in the form of soft greenish heterogeneous mixture flowering and fruiting tops, bits of leaves, stem and stalk along with seeds of plant and the same was tested positive for Ganja. The quantity of contraband as was found in that case was 43 kg. The Court held that there was a discrepancy in what has been recovered and analyzed and, therefore, there were reasonable grounds for believing the applicant not guilty of the offence dealing in commercial quantity and in the absence of any antecedents, it is observed that he is not likely to commit offence while on bail. In that context, it can be seen from the facts and the material placed in this case is that the total quantity of contraband was around 99 kg. Flowering and fruiting tops of contraband was segregated and sealed in separate polythene bags which weighed more than 20 kg. As such, no discrepancy is noted in the panchanama.

22. The order of this Court in case of Kunal Dattu Kadu (supra), therefore, can be distinguished on facts. This Court cannot overlook the fact that the Chemical Analyzer's report indicates that the substance tested is positive for Ganja. It is pertinent to note that the Investigating Officer is duty bound under the Code of Criminal Procedure and the NDPS Act to seize the material or contraband in the form as it is found in possession of the accused. If an accused carries Ganja with flowering of fruiting tops, bits of leaves, stems and stalks along with seeds of plant, there is no option to the Investigating Officer than to seize the entire material as it stands, else, it would tantamount to tampering with the evidence of the seized muddemal. This aspect appears to have not been addressed so far. Be that as it may.

23. Insofar as non-compliance of Section 52A of the NDPS Act is concerned, the argument of the Counsel for the applicant is devoid of any substance for the simple reason that there seems to be due compliance of Section 52A(4) of the NDPS Act as an Inventory Certificate appears to have been duly issued by JMFC, Rajgurunagar-Khed on 13.01.2022 itself.

24. A bare look at the said Inventory Certificate indicates that the learned JMFC has meticulously seen the muddemal brought before him by the Investigating Officer. He verified the seal of the police, manner of sealing the packets, its quantity as well as the condition and nature of the contraband.

25. Learned Counsel for the applicant vehemently argued that there is non-compliance of Section 42 of the NDPS Act. There is no specific ground raised as regards alleged non-compliance of the said provision in the application for bail, yet, in view of the arguments raised in that regard, it would be expedient to consider the said aspect in light of the fact that learned APP strenuously argued that this is not a case falling within the ambit of Section 42 but within the ambit of Section 43 of the NDPS Act for the simple reason that it was a chance raid.

26. Learned APP has, therefore, rightly placed a useful reliance upon a judgment of the Punjab and Haryana High Court in the case of **Mandeep Kaur Vs. State of Punjab**, passed in CRM-M-27760-2021(O&M) dated 25.07.2022. Learned single Judge of the said High Court framed two material questions in the said case, which

reads thus:-

“(a) the present case is a case where Section 42 of the Act can be said to have any application and that there is violation of the same;

or

(b) as to whether the present case is a case where the vehicle has been intercepted while in ‘**transit**’ and thus, the provisions of Section 43 of the Act will get attracted?”

27. The learned single Judge while elaborating the scope and distinction between these two sections has also considered the pronouncements and the well known judgment of the Supreme Court in the case of **Boota Singh & Ors. Vs. State of Haryana, 2021 (2) RCR (Criminal) 892** and in the case of **State of Punjab Vs. Baldev Singh 1999(3) RCR (Cri.) 533**. It would be apposite to extract relevant paragraphs of the judgment of the Punjab & Haryana High Court.

“14. Section 43 of the Act reads as under :-

43. Power of seizure and arrest in public place. Any officer of any of the departments mentioned in section 42 may

(a) seize in any public place **or in transit**, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or

conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act;

(b) **detain and search** any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation. For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

15. The learned counsel for the petitioners have vehemently argued that since recovery was effected from a private vehicle, therefore, in terms of ratio of Boota Singh's case (supra), it is the procedure as per Section 42 of the Act, which was required to be adhered to and since neither secret information was taken down in writing nor any search warrant was obtained, the provisions of Section 42 of the Act stand violated. The learned counsel have drawn the attention of this Court to Para 12 of the said judgment, which reads as follows :-

“12. The evidence in the present case clearly shows that the vehicle was not a public conveyance but was a vehicle belonging to accused Gurdeep Singh. The Registration Certificate of the vehicle, which has been placed on record also does not indicate it to be a Public Transport Vehicle. The explanation to Section 43 shows that a private vehicle would not come within the expression “public place” as explained in Section 43 of the NDPS Act. On the

strength of the decision of this Court in Jagraj Singh alias Hansa , the relevant provision would not be Section 43 of the NDPS Act but the case would come under Section 42 of the NDPS Act.”

16. Upon perusal of the above cited Boota Singh's case (supra), this Court finds that the factual position was distinct on some material aspects which determine as to whether Section 42 of the Act would apply or as to Section 43 of the Act would get attracted. The said distinctions are stated herein-under :-

Boota Singh's Case	Present case
In Boota Singh's case, secret information had been received to the effect that the accused are selling “poppy straw” <u>from a vehicle on a katcha path</u> and they could be apprehended in case raid is conducted. Accordingly, raid was conducted and while two persons were found sitting on the bags kept in a Jeep, another managed to escape. It, however, needs to be noticed that in the cited case, the vehicle in question was found <u>'parked'</u> on an un-metalled path. Search of two bags led to recovery of poppy straw.	In the present case, secret information was received to the effect that Ranjit Singh Harjit Singh and Mandeep Singh Kaur are <u>proceeding in a car</u> for the purpose of <u>supplying heroin</u> and could be caught redhanded. Pursuant to said information, the police was able to intercept the car and three persons sitting in car were detained by Inspector Vikrant Sharma. Later when DSP reached at spot, their search was effected leading to recovery of heroin from each of them from personal search. In other words, the contraband was in process of <u>'transit'</u> unlike in Boota Singh's case where the accused were selling from a <u>'parked'</u> jeep.
Search was conducted by officer of the rank of Inspector .	While Inspector Vikrant had detained the accused, the search was conducted

	only after Gazetted Officer of the rank of DSP came at the spot.
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17. Though, the distinctions are rather fine distinctions but the same would have entirely different ramifications. In Boota Singh's case, the accused were selling poppy straw from a jeep 'parked' on an unmettled path whereas in the present case the vehicle was on the move i.e. the contraband was in 'transit'. Another distinction, as noticed above is that while in Boota Singh's case, the search was conducted by an officer of the rank of Inspector, who while drawing powers under Section 42 of the Act, would have some limitations as regards timing of search and would be required to observe some checks in the shape of taking down secret information in writing and conveying to superiors, but in the present case the Inspector had merely 'detained' the car in transit in which accused were travelling and search was conducted when DSP, i.e. a Gazetted Officer came at the spot and in which case the search would be in exercise of powers conferred by Section 43 of the Act wherein the limitations as are there in Section 42 of the Act do not apply. Section 41(2) of the Act would also come into play as search being in presence of gazetted officer, the restrictions as regards timing of search or intimation to superiors as imposed by Section 42 of the Act would not be there. The relevant provisions of Sections 42 and 43 of the Act are juxtaposed below:-

Section 42	Section 43
<u>Power of entry, search, seizure and arrest without warrant or authorisation -</u>	<u>Power of seizure and arrest in public place,</u>
Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, or any other department..... if	<u>Any officer of any of the departments mentioned in section 42 may.</u>
	(a) seize in any public place <i>or in transit</i> any narcotic drug or psychotropic substance

he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, is <u>kept or concealed</u> in any building, conveyance or enclosed place, may between <u>sunrise and sunset</u>, (a) <u>enter into</u> and search any such building, conveyance or place; (b)..... <i>Provided</i> that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief	 along with such drug or substance, any animal or conveyance (b) <u>detain and search</u> any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company. <u>Explanation.</u> For the purposes of this section, the expression “public place” includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.
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18. A Constitution Bench of Hon'ble Supreme Court in State of Punjab vs. Baldev Singh 1999(3) RCR(Cr) 533, while comparing provisions of Section 42 with those of Section 43 of the Act held as under:-

“9. The proviso to sub-section (1) lays down that if the empowered officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment

of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief. Vide sub-section (2) of Section 42, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to sub-section (1) shall forthwith send a copy of the same to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a public place. The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any Narcotic Drug or Psychotropic Substances in a public place where such possession appears to him to be unlawful.”

19. Another material distinction between search of a building, conveyance or enclosed place conducted under provisions of Section 42 of the Act and a search of a vehicle in 'transit' in terms of Section 43 of the Act is that in case of a search of vehicle in transit there is no requirement of obtaining any search warrant even if search is conducted after sunset by a non-gazetted officer unlike a case of search of a building, conveyance or an enclosed place. Boota Singh's case (Supra) has only interpreted the word 'public place' as existing in Section 43 of the Act and not the word 'transit' which is used alternatively with word public place as 'public place or transit'. As already stated above in Boota Singh's case, vehicle was 'parked' and contraband was being sold and vehicle was not on the move i.e. not in transit. The distinction between the word 'conveyance' as existing in Section 42 of the Act and conveyance in 'transit' as

existing in Section 43 of the Act has been well highlighted in Dharminder Kumar's case.
(emphasis supplied)

28. As can be seen, the material difference between the provisions of Section 43 and Section 42 is that Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, whereas Section 43 does not contain any such provision and as such while taking an action under Section 43 of the NDPS Act, the empowered officer has the power of seizure of the articles or the contraband and arrest a person who is found to be in possession of any Narcotic Drug and Psychotropic Substances in his possession and such possession appears to him to be unlawful.

29. It is quite explicit from the decision in the case of Boota Singh (supra) *vis-a-vis* case in hand that search of a building, conveyance or enclosed place conducted under the provisions of Section 42 of the Act and a search of a vehicle in '*transit*' in terms of Section 43 of the Act, is essentially a search of a vehicle in '*transit*'. There is no requirement of obtaining any search warrant even if search is conducted after sunset by a non-gazetted officer unlike a case of

searching of a building, conveyance or an enclosed place. Boota Singh's case (supra) has only interpreted the word '*public place*' as existed in Section 43 of the Act and not the word '*transit*' which is used alternatively with word 'public place' as '*public place or transit*'. In case of Boota Singh (supra) vehicle was '*parked*' and contraband was being sold, meaning thereby the vehicle was not on the move i.e. not in '*transit*'. In case at hand, the vehicle was in '*transit*' and, therefore, squarely falls within the scope and ambit of Section 43 of the Act. This ratio would be squarely applicable to the given set of facts.

30. The learned APP has pressed into service a decision of the Supreme Court in case of **Union of India, through Narcotics Control Bureau, Lucknow Vs. Mohd. Nawaz Khan, (2021) 10 SCC 100**. The Union of India has challenged a judgment of a Single Judge of the Lucknow Bench of High Court of Judicature at Allahabad in NCB case by which the Lucknow bench has granted bail to the respondent accused wherein commercial quantity of Heroin was found in the possession of the respondent-accused. The facts of the case are more or less similar to the facts of the case in hand. One of the grounds raised by the respondent-accused before

the Court was that he was simply a companion with the co-accused who was driving the vehicle and, therefore, he was not in conscious possession of the contraband. While arguing the matter before the Supreme Court, the Additional Solicitor General highlighted certain crucial circumstances which the High Court lost sight of namely; (i) huge contraband of morphine weighing 3.300 kg has been recovered from the vehicle, (ii) the respondent was admittedly travelling in a vehicle all the way from Dimapur in Nagaland to Rampur in Uttar Pradesh; and (iii) the complaint tabulates the call data records of the cell phones used by the accused. The accused persons were found to have been in touch with each other and a flow chart has been set out in the complaint. The Hon'ble Supreme Court noted certain glaring aspects in para 30 to 34, which are extracted below :-

“30. The following circumstances are crucial to assessing whether the High Court has correctly evaluated the application for bail, having regard to the provisions of Section 37:-

(i) The respondent was travelling in the vehicle all the way from Dimapur in Nagaland to Rampur in Uttar Pradesh with the co-accused;

(ii) The complaint notes that the CDR analysis of the mobile number used by the respondent indicates that the respondent was in regular touch with the other accused

persons who were known to him;

(iii) The quantity of contraband found in the vehicle is of a commercial quantity; and

(iv) The contraband was concealed in the vehicle in which the respondent was travelling with the co-accused.

31. The impugned order of the High Court, apart from observing that no contraband was found from the personal search of the respondent has ignored the above circumstances. The High Court has merely observed that

“[...]

In view of the above, the twin conditions contained under Section 37(1)(b) of the NDPS Act stand satisfied. This Court is of the view that if there is reasonable ground, the applicant is entitled to be released on bail.”

32. The High Court has clearly overlooked crucial requirements and glossed over the circumstances which were material to the issue as to whether a case for the grant of bail was established. In failing to do so, the order of the High Court becomes unsustainable. Moreover, it has emerged, during the course of the hearing that after the respondent was enlarged on bail he has consistently remained away from the criminal trial resulting in the issuance of a non-bailable warrant against him. The High Court ought to have given due weight to the seriousness and gravity of the crime which it has failed to do.

33. For the above reasons, we allow the appeal and set aside the impugned judgment and order of the High Court dated 1 October 2020 in Bail No. 7379 of 2019.

34. The application for bail filed by the respondent shall stand dismissed. The respondent shall accordingly surrender forthwith.”

(emphasis supplied)

31. The Hon'ble Supreme Court, while cancelling bail of the respondent, has also found that the High Court, apart from observing that no contraband was found from the personal search of the respondent has also ignored the rigours of Section 37(1)(b) of the NDPS Act.

32. The ratio laid down by the Supreme Court in the case of **Mohd. Nawaz Khan** (supra) would be squarely applicable to the facts of the case at hand, inasmuch as not only the material placed on record, as observed hereinabove, indicates conscious possession of the contraband *qua* the applicant in the Hyundai i-20 car with whom the co-accused were also travelling but the previous conduct of the applicant along with co-accused in transporting commercial quantity of Ganja from the State of Odisha to Pune which also cannot be lost sight of. It is not the case of the applicant that the co-accused who also appear to be co-conspirators are strangers. No sane man will believe that looking to the past conduct. In the case at hand, even there are CDRs and the extract of bank accounts of the applicant which would be duly considered during the trial.

33. Learned APP has placed reliance on a very recent order of the Supreme Court in the case of **State by the Inspector of Police Vs. B. Ramu (Arising out of SLP (Cri.) No(s). 8137 of 2022) dated 12.02.2024.** The learned Single Judge of the Madras High Court has granted Anticipatory Bail to the respondent accused under Section 438 of the Cr.P.C. against whom offence punishable under Sections 8(C), 20(b)(ii)(c) and 29(1) of the NDPS Act has been registered. It was a commercial quantity of Ganja weighing 20 kg. The Hon'ble Supreme Court, while expounding the scope of Section 37 of the NDPS Act observed thus:-

“9. A plain reading of statutory provision makes it abundantly clear that in the event, the Public Prosecutor opposes the prayer for bail either regular or anticipatory, as the case may be, the Court would have to record a satisfaction that there are grounds for believing that the accused is not guilty of the offence alleged and that he is not likely to commit any offence while on bail.

10. It is apposite to note that the High Court not only omitted to record any such satisfaction, but has rather completely ignored the factum of recovery of narcotic substance (ganja), multiple times the commercial quantity. The High Court also failed to consider the fact that the accused has criminal antecedents and was already arraigned in two previous cases under the NDPS Act.

11. In case of recovery of such a huge quantity of

narcotic substance, the Courts should be slow in granting even regular bail to the accused what to talk of anticipatory bail more so when the accused is alleged to be having criminal antecedents.

12. For entertaining a prayer for bail in a case involving recovery of commercial quantity of narcotic drug or psychotropic substance, the Court would have to mandatorily record the satisfaction in terms of the rider contained in Section 37 of the NDPS Act.

13. Manifestly, a very strange approach has been adopted by the learned Single Judge in the impugned order whereby the anticipatory bail was granted to the respondent on the condition that the appellant would deposit a sum of Rs. 30,000/ to the credit of the registered Tamil Nadu Advocate Clerk Association, Chennai along with various other conditions. The condition no. [a] (supra) so imposed by the High Court is totally alien to the principles governing bail jurisprudence and is nothing short of perversity.

14. The fact that after investigation, the charge-sheet has been filed against the respondent accused along with other accused persons, fortifies the plea of the State counsel that the Court could not have recorded a satisfaction that the accused was *prima facie* not guilty of the offences alleged.

15. As a consequence, the impugned order is cryptic and perverse on the face of the record and cannot be sustained. Thus, the same is quashed and set aside.

16. The appeal is allowed in these terms.

17. The respondent accused shall surrender before the learned trial court within a period of 10 days from today.

18. Pending application(s), if any, shall stand disposed of”.

34. It can thus be seen that in case of recovery of huge quantity of Narcotic substance, the Court should be slow in granting even regular bail to the accused what to talk of anticipatory bail, more so when the accused is alleged to be having criminal antecedents. It is noticed that no satisfaction was recorded by the High Court which is mandatory under Section 37 of the NDPS Act.

35. Insofar as the twin conditions and rigours in Section 37 of the NDPS Act are concerned, the same will have to be strictly adhered to in case the Court is persuaded to grant bail to the accused. It is needless to reiterate and interpret the word ‘*reasonable grounds*’ in II of Section 37 of (1) of the Act. Having given an opportunity to the Public Prosecutor to oppose the application for bail, the defence has miserably failed in bringing out reasonable grounds for believing that the applicant is not guilty of the offence with which he has been charged as is evident from the discussions made hereinbefore. Secondly, there is every likelihood of committing similar offence in case of his release as has already been stated that

even before the incident in question, the applicant along with co-accused were found transporting commercial quantity of Ganja from the State of Odisha in a private car of his friend Naresh Mehta.

36. No doubt, recording of finding mandated under Section 37 of the NDPS Act is a *sine qua non* for granting bail to an accused under this Act. Since I am not inclined to grant bail to the accused in light of the discussion hereinabove, there is no question of recording any satisfaction as contemplated in sub-clause 2 of Section 37(1) of the NDPS Act.

37. At this stage, it is apposite to draw support from a decision of the Supreme Court in case of **Union of India Vs. Ram Sumujh and another, (1999) 9 Supreme Court Cases 429** wherein the Supreme Court elucidated the devastating and deleterious effects of Narcotic Drugs upon the society at large as well as the nexus of the organized criminals, underworld and traffickers in spreading the menace in our country. The relevant paragraph can be quoted for advantage, which read thus :-

“7. It is to be borne in mind that the aforesaid legislative

mandate is required to be adhered and followed. It should be borne in mind that in murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to number of innocent young victims, who are vulnerable; it causes deleterious effects and deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under NDPS Act, has succinctly observed about the adverse effect of such activities in *Durand Didier v. Chief Secretary, Union Territory of Goa*. (1990) 1 SCC 95 as under: (SCC p. 104, para 24)

"24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportion in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine,"

38. Indeed, after having considered the record, it is obvious that in all probability, in case of his release, the applicant would continue in his evil activities of trafficking in the drugs in a clandestine manner. Of course, these are *prima facie* observations

and shall not be construed as expression on the merits and demerits of the case.

39. Upshot of the discussion made hereinabove is that the application is devoid of merits and hence needs to be rejected and as such stands, rejected.

(PRITHVIRAJ K. CHAVAN, J.)