

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-9990-2024
Reserved on: 07.08.2024
Pronounced on: 30.08.2024

Sanjay Kumar Yadav @ Sanjay Yadav ...Petitioner

Versus

State of Haryana ...Respondent

CORAM: HON'BLE MR. JUSTICE ANOOP CHITKARA

Present: Mr. Manvinder Sidhu, Advocate
for the petitioner.

Mr. Aashish Bishnoi, D.A.G., Haryana.

ANOOP CHITKARA, J.

FIR No.	Dated	Police Station	Sections
0151	06.03.2023	Sirsa City, District Sirsa	17(C), 29 of NDPS Act

1. The petitioner incarcerated in the FIR captioned above had come up before this Court under Section 439 CrPC, 1973, seeking regular bail.
2. In paragraph 11 of the bail petition, the accused declares that he has no criminal antecedents.
3. Facts of the case are being extracted from status report dated 13.05.2024 filed by concerned DySP which reads as follows:-

“1. That brief facts are that in case are that on 06.03.2023, a police party headed by SI Dalip Singh while patrolling near Gate no.1 of Anaz mandi Sirsa noticed that one of the two young boys was carrying a bag on his back, while seeing the police party they became nervous and started walking towards mandi, On suspicion of any crime the boys were apprehended and on asking one of them disclosed his name as Sanjay son of Kaleshwar Yadav r/o Rakis PS Jori Disrict Chatra Jharkhand while the other told his name as karan Kumar son of Nageshar r/o Vill. Turi PS Pratappur District Chatra Jharkhand and when they were asked the reason to turn and brisk walking they failed to give satisfactory answer. On suspicion of having any intoxicant substance, a notice in writing, under section 50 NDPS Act was served upon Sanjay and a similar Notice was also served to Karan Kumar. After receiving the replies as per the desire of

accuseds, Gazetted Officer Sh. Rajender Kumar Jindal, Principal, Govt. Polytech. College Sirsa was requested telephonically to come to the spot. After arrival of Gazetted Officer, the search of accuseds was conducted as per rules. In the search of accused 2.750 Kg of Opium was recovered from the box in black polythene kept into bag. The parcels were packed as per rules on the spot. At the time of recovery both the accuseds Sanjay And Karan Kumar disclosed that this recovered Opium was given to them by Lal Dev @ Lalu r/o Vill. Rakis District Chatra Jharkhand. Accordingly, present case FIR No.151 dated 06.03.2023 under Section 17 NDPS Act, P.S. City Sirsa, District Sirsa, was registered in this regard.”

4. The petitioner's counsel prays for bail by imposing any stringent conditions and contends that further pre-trial incarceration would cause an irreversible injustice to the petitioner and their family.

5. Counsel for the petitioner submits that there is nothing to infer that the substance allegedly recovered from the petitioner was opium because the samples which were drawn in presence of Magistrate weighed 117 grams and 114 grams respectively, however the sample which was tested by the Laboratory weighed 35 grams with container. Counsel for the petitioner further submits that after the alleged seizure the case property was produced before the concerned Chief Judicial Magistrate where the case property was re-opened and weighed and at that the time the weight of the alleged substance was 2 kg 77 grams which is apparent from order dated 07.03.2023. Two samples of 100 grams each were drawn and they were put in separate containers and after that weight of the container was again taken which was found to be 117 grams and 114 grams respectively. The remaining contraband was again weighed and its weight along with cloth and seal was 2 kg 77 grams. Petitioner has also shown the photograph of the weighing machine to corroborate such argument. Counsel for the petitioner further submits that when the contraband was weighed in the laboratory, it weighed 35 grams.

6. State counsel does refer to the reply to explain this contradiction but could not find anything in the reply which would counter the petitioner's argument. An analysis of the above arguments would lead to the following outcome. Counsel for the petitioner has handed over the copy of order dated 07.03.2023 passed by concerned JMJC, Sirsa. Copy has also been supplied to State counsel. It would be appropriate to extract the following portion of the said order which reads as under:-

“At this stage, an application for preparing the inventory report filed by the police. The following inventory report is prepared:-

One parcel allegedly containing Opium (affem) weighing 2 kilo 776 gm (alongwith seal and cloth) has been produced before me. Same is bearing three seals of 'DR', one seal of 'R' and one seal of 'AB'. Sample seal of 'DR', 'R' and 'AB' were also produced

before the court. The case property was weighed and photographed in the court room. The seals are intact and tallying with the particulars of the case.

The seals of parcel were broken and out of which one black colour polythene in which one plastic container alleging opium which was weighed and found 2 kilo 746. Two representative samples have been drawn weighing 100 grams (with plastic container) each in the presence of court. Thereafter, the each representative sample was sealed with three seals of 'AA' (seal of this court) and the residue case property i.e. 2 kilo 568 grams opium was sealed with one seal of 'AA' (seal of this court). The two small plastic boxes containing samples were again weighed and were found to be 117 grams and 114 grams each respectively (including the weight of small plastic box, cloth and seal). The residue case property (alongwith cloth and seal) was again weighed and was found to be 2 kilo 596 gm. Photographs of representative samples and residue case property were again taken in the presence of court.

The inventory report, case property, samples and sample seal chits have been attested by the undersigned and returned to the police. IO is directed to send one sample of contraband along with sample seal to RFSL (Hisar) for the purpose of investigation. Case property be dealt with as per under Section 52-A of the NDPS Act.

Another parcel loading bag silver sky black colour Marka Adidas also produced before me. Same is bearing three seals of 'DR', one seal of 'R' and one seal of 'A.B'. Sample seal of 'DR', 'R' and 'A.B' were also produced before the court. The case property was weighed and photographed in the court room. The seals are intact and tallying with the particulars of the case."

7. Perusal of the said order clearly reveals that the samples which were taken were 100 grams each and the weight of the bulk was 117 grams and 114 grams respectively and they were sealed with two seals of 'A'. After that, one sample was forwarded to RFSL, Hisar through road certificate which mentions the weight as 100 grams and two seals of 'A' and the specimen signatures were affixed and the same was attested by JMIC dated 07.03.2023, however report of the RFSL, Hisar reads as follows:-

"To

Dy. Supdt. Of Police,

(HQ) Sirsa.

Your forwarding memo no.376-5A dated 09.03.2023 regarding one sealed parcel in connection with FIR no.151 dated 06.03.2023 under Section 17/61/85 NDPS Act Police Station City Sirsa stated to have been dispatched by you vide R.C No.225 dated 10.03.2023 through Ct. Pawan Kumar, B.No.494/SRS and received in this division 10.03.2023.

Description of Parcel and condition of seals.

One sealed cloth parcel with barcode. The seals were intact and tallied with the specimen seal as per Forwarding Authority’s letter.

Description of article contained in parcel.

<i>Parcel No.</i>	<i>No. & seal Impression</i>	<i>Description of article/sample</i>
<i>1.</i>	<i>03-AA</i>	<i>Bearing barcode 56468-230310-2218564</i> <i>Sample marked here as HSR/N-191/2023</i> <i>Physical appearance Brownish black colour substance</i> <i>Weight of sample received 35 gm with container</i>

Analytical Techniques Applied:-

. Color tests, TLC & UV spectroscopy

Observations:-

. The tests were positive for the presence of Morphine, Codeine, Thebaine, Narcotine, Papaverine and Meconic acid in the sample.

. 10.9% (w/w) Morphine was detected in the sample.

Opinion:

. The sample was identified as OPIUM containing 11.0% (w/w) Morphine.

Notes:-

- 1. Weight of sample returned- 30 gm with container.*
- 2. The opinion relates to the analyzed sample only.*
- 3. After examination the remnants of the sample along with its original wrapper were sealed with the seal(s) having inscription of ARB SSO NDPS FSL RFSL s(HR).”*

8. Perusal of the reply reveals that Senior Scientific Officer who had tested the samples found its weight to be 35 grams each with container. 5 grams of opium was utilized for testing and remaining 30 grams was returned. A perusal of the reply does not refer that how the weight of the samples which was 114 grams and 117 grams along with container reduced to 35 grams when it reached laboratory. Thus, on this ground alone, petitioner is entitled to bail.

9. The State opposes bail.

10. The quantity allegedly involved in this case is commercial. Given this, the rigors of S. 37 of the NDPS Act apply in the present case. The petitioner must satisfy the twin conditions put in place by the Legislature under Section 37 of the NDPS Act.

11. Given the broken link, prima facie, it would be difficult to presume that the sample tested in the laboratory reached it without tampering or interference. Thus, the petitioner has prima facie satisfied the first condition of section 37 of the NDPS Act to make a case for bail. Regarding the second rider of S. 37, this court will put very stringent conditions in this order to ensure that the petitioner does not repeat the offense.

12. In *Abida v. State of Haryana*, 2022:PHHC:058722, [Para 10], CRM-M-5077-2022, decided on 13-05-2022, this court observed as follows:

[10]. Thus, both the twin conditions need to be satisfied before a person accused of possessing a commercial quantity of drugs or psychotropic substance is to be released on bail. The first condition is to provide an opportunity to the Public Prosecutor, enabling to take a stand on the bail application. The second stipulation is that the Court must be satisfied that reasonable grounds exist for believing that the accused is not guilty of such offence, and is not likely to commit any offence while on bail. If either of these two conditions is not met, the ban on granting bail operates. The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. Even on fulfilling one of the conditions, the reasonable grounds for believing that the accused is not guilty of such an offence, the Court still cannot give a finding on assurance that the accused is not likely to commit any such crime again. Thus, the grant of bail or denial of bail for possessing commercial quantity would vary from case to case, depending upon its facts.

[30]. From the summary of the law relating to rigors of S.37 of NDPS Act, while granting bail involving commercial quantities, the following fundamental principles emerge:

(a). In case of inconsistency, S. 37 of the NDPS Act prevails over S. 439 CrPC. [*Narcotics Control Bureau v Kishan Lal*, 1991 (1) SCC 705, Para 6].

(b). The limitations on granting of bail come in only when the question of granting bail arises on merits. [*Customs, New Delhi v. Ahmadaliev Nodira*, (2004) 3 SCC 549, Para 7].

(c). The provisions of Section 37 of the NDPS Act provide the legal norms which have to be applied in determining whether a case for grant of bail has been made out. [*UOI v. Prateek Shukla*, **2021:INSC:165 [Para 11]**, (2021) 5 SCC 430, Para 12].

(d). In case the Court proposes to grant bail, two conditions are to be mandatorily satisfied in addition to the standard requirements under the provisions of the CrPC or any other enactment. [*Union of India v. Niyazuddin SK & Anr*, **2017:INSC:686 [Para 7]**, (2018) 13 SCC 738, Para 7].

(e). Apart from granting opportunity to the Public Prosecutor, the other twin conditions which really have relevance are the

Court's satisfaction that there are reasonable grounds for believing that the accused is not guilty of the alleged offence. [N.R. Mon v. Md. Nasimuddin, (2008) 6 SCC 721, Para 9].

(f). The satisfaction contemplated regarding the accused being not guilty has to be more than prima facie grounds, considering substantial probable causes for believing and justifying that the accused is not guilty of the alleged offence. [Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549, Para 7].

(g). The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. [State of Kerala v. Rajesh, **2020:INSC:88 [Para 21]**, AIR 2020 SC 721, Para 21].

(h). Twin conditions of S. 37 are cumulative and not alternative. [Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549, Para 7].

(i). At the bail stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed an offence under the NDPS Act and further that he is not likely to commit an offence under the said Act while on bail. [Union of India v. Rattan Mallik @ Habul, (2009) 2 SCC 624, Para 14].

(j). If the statements of the prosecution witnesses are believed, then they would not result in a conviction. [Babua v. State of Orissa, (2001) 2 SCC 566, Para 3].

(k). Merely recording the submissions of the parties does not amount to an indication of a judicial mind or a judicious application of mind. [UOI v. Prateek Shukla, **2021:INSC:165 [Para 11]**, (2021) 5 SCC 430, Para 12].

(l). Section 37 departs from the long-established principle of presumption of innocence in favour of an accused person until proved otherwise. [Union of India v. Sanjeev v. Deshpande, (2014) 13 SCC 1, Para 5].

(m). While considering the application for bail concerning Section 37, the Court is not called upon to record a finding of not guilty. [Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798, Para 11].

(n). The confessional statement recorded under Section 67 of the NDPS Act is inadmissible in the trial of an offence under the NDPS Act. [Tofan Singh v. State of Tamil Nadu, **2020:INSC:620**, (2021) 4 SCC 1]

(o). In the absence of clarity on the quantitative analysis of the samples from the laboratory, the prosecution cannot be heard to state at this preliminary stage that the accused possessed a commercial quantity of psychotropic substances as contemplated under the NDPS Act. [Bharat Chaudhary v. Union of India **2021:INSC:877 [Para 11]**, 2021 SCC OnLine SC 1235, Para 10].

(p). When there is evidence of conscious possession of commercial quantity of psychotropic substances, such accused is

not entitled to bail given Section 37 of the Act as contemplated under the NDPS Act. [State by (NCB) Bengaluru v. Pallulabid Ahmad Arimutta, **2022:INSC:26 [Para 11]**, 2022 SCC OnLine SC 47, Para 12].

(p). Bail must be subject to stringent conditions. [Sujit Tiwari v. State of Gujarat, **2020:INSC:101 [Para 12]**, 2020 SCC Online SC 84, Para 12].

[31]. Satisfying the fetters of S. 37 of the NDPS Act is candling the infertile eggs. The stringent conditions of section 37 placed in the statute by the legislature do not create a bar for bail for specified categories, including the commercial quantity; however, it creates hurdles by placing a reverse burden on the accused, and once crossed, the rigors no more subsist, and the factors for bail become similar to the bail petitions under general penal statutes like IPC.

13. As per paragraph 9 of the bail petition, the petitioner has been in custody since 06.03.2023. Per the custody certificate dated 06.08.2024, the petitioner’s total custody in this FIR is 01 year, 04 months and 29 days. Given the penal provisions invoked viz-a-viz pre-trial custody, coupled with the prima facie analysis of the nature of allegations, and the other factors peculiar to this case, there would be no justifiability for further pre-trial incarceration at this stage, subject to the compliance of terms and conditions mentioned in this order.

14. Without commenting on the case's merits, in the facts and circumstances peculiar to this case, and for the reasons mentioned above, the petitioner makes a case for bail. This order shall come into force from the time it is uploaded on this Court's official webpage.

15. Given above, provided the petitioner is not required in any other case, the petitioner shall be released on bail in the FIR captioned above subject to furnishing bonds to the satisfaction of the concerned Court and due to unavailability before any nearest Ilaqa Magistrate/duty Magistrate. Before accepting the surety, the concerned Court must be satisfied that if the accused fails to appear, such surety can produce the accused.

16. While furnishing a personal bond, the petitioner shall mention the following personal identification details:

1.	AADHAR number	
2.	Passport number (If available) and when the attesting officer/court considers it appropriate or considers the accused a flight risk.	
3.	Mobile number (If available)	
4.	E-Mail id (If available)	

17. This order is subject to the petitioner’s complying with the following terms. The petitioner shall abide by all statutory bond conditions and appear before the concerned Court(s) on all dates. The petitioner shall not tamper with the evidence, influence, browbeat, pressurize, induce, threaten, or promise, directly or indirectly, any witnesses,

Police officials, or any other person acquainted with the facts and circumstances of the case or dissuade them from disclosing such facts to the Police or the Court.

18. Given the background of allegations against the petitioner, it becomes paramount to protect the drug detection squad, their family members, as well as the members of society, and incapacitating the accused would be one of the primary options until the filing of the closure report or discharge, or acquittal. Consequently, it would be appropriate to restrict the possession of firearm(s). [This restriction is being imposed based on the preponderance of evidence of probability and not of evidence of certainty, i.e., beyond reasonable doubt; and as such, it is not to be construed as an intermediate sanction]. Given the nature of the allegations and the other circumstances peculiar to this case, the petitioner shall surrender all weapons, firearms, and ammunition, if any, along with the arms license to the concerned authority within fifteen days from release from prison and inform the Investigator about the compliance. However, subject to the Indian Arms Act, 1959, the petitioner shall be entitled to renew and take it back in case of acquittal in this case, provided otherwise permissible in the concerned rules. Restricting firearms would instill confidence in the victim(s), their families, and society; it would also restrain the accused from influencing the witnesses and repeating the offense.

19. The conditions mentioned above imposed by this court are to endeavor to reform and ensure the accused does not repeat the offense and also to block the menace of drug abuse. In *Mohammed Zubair v. State of NCT of Delhi*, 2022:INSC:735 [Para 28], Writ Petition (Criminal) No 279 of 2022, Para 29, decided on July 20, 2022, A Three-Judge bench of Hon'ble Supreme Court holds that "The bail conditions imposed by the Court must not only have a nexus to the purpose that they seek to serve but must also be proportional to the purpose of imposing them. The courts, while imposing bail conditions must balance the liberty of the accused and the necessity of a fair trial. While doing so, conditions that would result in the deprivation of rights and liberties must be eschewed."

20. Given the serious contradiction in the weight of the sample which was 100 grams of the substance and 114 grams and 117 grams along with container but tested by the Senior Scientific Officer, it was 35 grams with container which means that there is deficiency of around 70%. Considering the fact that initially the total weight of the substance was foot falling the commercial quantity where the prescribed minimum sentence is 10 years and also to ensure that in future the lapses do not occur, this Court directs the further investigation into this matter. The Superintendent of Police shall either conduct further investigation himself/herself or by authorizing any officer of the rank of DySP. The investigation be completed on priority and supplementary report under Section 173(8) CrPC/193 of BNSS be forwarded to the concerned Court. It is clarified that the trial may continue upto the stage of 313 CrPC/351 BNSS but at this stage

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onwards, further proceedings before the trial Court shall remain stayed till the completion of further investigation and filing of supplementary report.

21. Any observation made hereinabove is neither an expression of opinion on the case's merits nor shall the trial Court advert to these comments.

22. A certified copy of this order would not be needed for furnishing bonds, and any Advocate for the Petitioner can download this order along with case status from the official web page of this Court and attest it to be a true copy. If the attesting officer wants to verify its authenticity, such an officer can also verify its authenticity and may download and use the downloaded copy for attesting bonds.

23. **Petition allowed** in terms mentioned above. All pending applications, if any, stand disposed of.

(ANOOP CHITKARA)
JUDGE

30.08.2024
Jyoti Sharma

Whether speaking/reasoned: Yes
Whether reportable: YES.