

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M No.37131 of 2024
Reserved on: 18.10.2024
Pronounced on: 29.10.2024

Akashdeep Singh @ Nikku ...Petitioner

Versus

State of Punjab ...Respondent

CORAM: HON'BLE MR. JUSTICE ANOOP CHITKARA

Present: Mr. Balbir Kumar Saini, Advocate
for the petitioner.

Mr. Aksay Kumar, DAG, Punjab.

ANOOP CHITKARA, J.

FIR No.	Dated	Police Station	Sections
02	03.01.2024	Sadar Moga, District Moga	22 of NDPS Act, 1985

1. The petitioner incarcerated in the FIR captioned above had come up before this Court under Section 439 CrPC, 1973, seeking regular bail.
2. Per paragraph 27 of the bail application and the reply/custody certificate, the accused has the following criminal antecedents:

Sr. No.	FIR No.	Date	Offenses	Police Station
1.	61	10.06.2021	Under section 21, 22, 61, 85 of NDPS Act	Sadar Moga
2.	23	20.03.2021	Under sections 323, 325, 324, 34 IPC	Sadar Moga
3.	76	19.06.2023	Under sections 21, 61, 85 of NDPS Act	Zira
4.	135	14.12.2023	Under sections 21, 29, 61, 85 NDPS Act	Sadar Moga
5.	76	06.08.2022	Under sections 323, 325, 336, 341, 427, 452, 148, 149 IPC and 25 of Arms Act	Sadar Moga
6.	122	11.09.2021	Under sections 21, 29, 61, 85 NDPS Act	Sadar Moga
7.	142	27.12.2021	Sections 25, 54, 59 of Arms Act	Sadar Moga
8.	119	20.09.2020	Under sections 25, 54, 59 of Arms Act	Zira

9.	167	14.09.2023	Under section 21 of NDPS Act	Sadar Khanna
10.	18	28.02.2023	Under sections 22, 29, 61, 85 of NDPS Act	Sadar Moga

3. The facts and allegations are taken from the reply filed by the State. On Jan 03, 2024, based on a chance recovery, the Police seized 60 tablets containing Etizolam, weighing 11.160 grams, from the petitioner's possession. The Investigator claims to have complied with all the statutory requirements of the NDPS Act, 1985, and CrPC, 1973.

4. The petitioner's counsel refers to the bail petition and specifically to paras 8 & 9, which read as follows:

“8. That it is pertinent to make a mention here that as per the prosecution story the alleged contraband has been recovered from white transparent polythene bag. The Hon'ble Apex Court as well as Hon'ble High Court repeatedly held that it is highly unlikely for a person who has to carry contraband, to carry the same in a transparent polythene bag.

9. That it is pertinent of make a mention here that as per the alleged prosecution story, while patrolling they were on a private vehicle, however, as per the guidelines, the police party cannot use the private vehicle without permission. It is pertinent to make a mention here that a bare perusal of FIR as well as report under Section 173 of Cr.P.C clearly reveals that no private vehicle number has been mentioned therein. The Petitioner humbly submits that the police cannot use private vehicle without prior permission of the Higher Authorities and they would required to obtain necessary permission. In this regard the Director General of Police, Punjab Chandigarh has issued policy for hiring or private vehicles for purpose of investigation of criminal cases by Police Department, duly approved by State Government. As per the said policy, "if a private vehicle is used for investigation of any case, the details of the vehicle e.g. number, type, driver's name and payment details shall be duly recorded in the case Diary of the case", which is missing in the present case, which creates the doubt about the story of the prosecution.”

5. 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.

6. The State’s counsel opposes bail and refers to para4of the reply, which reads as follows:

“4. That as per FSL report, Etizolam salt was found in the recovered tablets. Average weight of each tablet was 186 mg/tablet, in this way total recovery reached 11.160 grams. Copy of FSL report is attached herewith as Annexure R-1. As per provisions of NDPS Act, the recovery of 2.5 grams Etizolams falls within provisions of Commercial quantity. So, in this way recovery effected from

possession of petitioner falls within ambit of commercial quantity and provisions of Section 37 of NDPS Act are applicable in the present case.”

7. Dealing in 11.160 grams of Etizolamis a punishable offense under the NDPS Act in the following terms:

Substance Name	Etizolam
Quantity detained	11.16 Gram
Quantity type	Commercial
Drug Quantity in % to upper limit of Intermediate	446.40%

Specified as small & Commercial in S.2(viia) & 2(xxiii) NDPS Act, 1985	
Notification No	S.O.1276(E)
dated	3/23/2021
Sr. No.	238ZZC
Common Name (Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN)	Etizolam
Other non-proprietary name	*****
Chemical Name	4-(2-Chlorophenyl)-2-ethyl-9-methyl-6H-thieno[3,2-f][1,2,4]triazolo[4,3a][1,4]diazepine
Small Quantity	0.05 Gram
Commercial Quantity	2.5 Gram

Declared as punishable under NDPS Act and as per schedule defined in S.2(xi) & 2(xxiii) NDPS Act, 1985	
Notification No	S.O.1275(E)
dated	3/23/2021
Sr. No.	110ZN
Common Name (Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN)	Etizolam
Other non-proprietary name	*****
Chemical Name	4-(2-Chlorophenyl)-2-ethyl-9-methyl-6H-thieno[3,2-f][1,2,4]triazolo[4,3a][1,4]diazepine

8. 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.

9. Section 37¹ of the NDPS Act mandates under sub-section (1) (b) of section 37

¹**37. Offences to be cognizable and non-bailable.**—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—
(a) every offence punishable under this Act shall be cognizable;

that no person accused of an offense punishable for offenses involving commercial quantity shall be released on bail unless- (i) the Public Prosecutor has been given an opportunity to oppose the application of release, and (ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that accused is not guilty of such offense and is not likely to commit any offense while on bail. Thus, the rigors of S. 37 of the NDPS Act apply in the present case, and the burden is on the petitioner to satisfy the twin conditions put in place by the Legislature under Section 37 of the NDPS Act. Given the legislative mandate of S. 37 of the NDPS Act, the Court can release a person accused of an offense punishable under the NDPS Act for possessing a commercial quantity of contraband only after recording reasonable satisfaction of its rigors.

10. The State's Counsel argues that a plain reading of Section 37 reveals that the legislature intends to make the law stringent to curb the drug menace. It is further to be noticed that the provisions are couched in negative language, meaning that to grant bail, the Court needs to record a finding that there are reasonable grounds for believing that the petitioner is not guilty of the offense. The burden of proof is also on the petitioner to satisfy the Court about his non-involvement in the case. While interpreting the provisions of Section 37 of the NDPS Act, the Court must be guided by the objective sought to be achieved by putting these stringent conditions.

11. 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 exist, and the factors for bail become similar to the bail petitions under general penal statutes like IPC. 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 them 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 an offense and is not likely to commit any offense while on bail. If either of these conditions is not met, the ban on granting bail operates. The

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—
(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing the accused is not guilty of the alleged offense. Even on fulfilling one of the conditions, the reasonable grounds for believing that the accused is not guilty of such an offense, the Court still cannot give a finding on the assurance that the accused is not likely to commit any such crime again.

12. The petitioner’s arguments did not point toward any material contradictions. It was a case of chance recovery. As such, S. 42 would not apply initially, and recovery was not from the person. As such, S. 50 would also not attract. Non-examination of independent witnesses is not illegal, and its outcome depends upon the nature of evidence tendered in the examination in chief and its cross-examination.

13. The submissions made above and the grounds in the bail petition do not shift the burden the legislature places on the accused under S. 37 of the NDPS Act. The petitioner has not stated anything in the bail petition to discharge the burden put by the stringent conditions placed in the statute by the legislature under section 37 of the NDPS Act. The investigation reveals sufficient prima facie evidence to connect the petitioner with the crime; thus, the petitioner fails to make out a case for bail. Any detailed discussions about the evidence may prejudice the case of the petitioner, the State, or the other accused.

14. Per the custody certificate, the petitioner's custody is 09 months and 12 days, which cannot be considered prolonged, and the ratio of Dheeraj Shukla does not apply.

15. The petitioner is not entitled to bail based on Dheeraj Kumar Shukla v. The State of Uttar Pradesh [SLP (Crl) 6690-2022], decided on 25 Jan 2023. Dheeraj Shukla would be attracted when the three conditions are fulfilled,

- (a). The custody of more than two years and six months and the delay was not attributable to the accused.
- (b). The trial is at an initial stage.
- (c). The petitioner is the first offender.

16. The petitioner has similar criminal antecedents, and if released on bail, there is no assurance that he will not repeat them. Considering the bail petition of an accused with a criminal history throws an onerous responsibility upon the courts to act judiciously and reasonably because arbitrariness is the antithesis of law. The criminal history must be of cases where the accused was convicted, including the suspended sentences and all pending First Information Reports, wherein the bail petitioner stands arraigned as an accused. In reckoning the number of cases as criminal history, the prosecution resulting in acquittal or discharge, or when Courts quashed the FIR, the prosecution stands withdrawn, or the prosecution filed a closure report, cannot be

included. Although crime is to be despised and not criminal, for a recidivist, the contours of a playing field are marshy, and the graver the criminal history, the slushier the puddles.

17. A perusal of the bail petition and the documents attached prima facie points towards the petitioner’s involvement and does not make out a case for bail. The impact of crime would also not justify bail. Any further discussions will likely prejudice the petitioner; this court refrains from doing so.

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

19. Petition dismissed. Interim orders, if any, are recalled with immediate effect. All pending applications, if any, stand disposed of.

(ANOOP CHITKARA)
JUDGE

29.10.2024
Sonia Puri

Whether speaking/reasoned:	Yes
Whether reportable:	No.