

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M No.37788 of 2024
Reserved on: 16.10.2024
Pronounced on: 22.10.2024

Dalwinder Kumar@ Binder ...Petitioner

Versus

State of Punjab ...Respondent

CORAM: HON'BLE MR. JUSTICE ANOOP CHITKARA

Present: Mr. Inderpal Singh Deol, Advocate
for the petitioner.

Mr. Jasjit Singh, DAG, Punjab.

ANOOP CHITKARA, J.

FIR No.	Dated	Police Station	Sections
93	30.09.2023	Mehtiana, District Hoshiarpur	22 of NDPS Act

1. The petitioner incarcerated in the FIR captioned above had come up before this Court under Section 483 of Bharatiya Nagarik Suraksha Sanhita, 2023, [BNSS], seeking regular bail.
2. In paragraph 6 of the bail petition, the accused declares that he has no criminal antecedents.
3. The facts and allegations are taken from the reply filed by the State. On September 30, 2023, based a chance recovery, the Police seized 245 grams of powder containing Alprazolam from a packet that fell from the handle of a motorbike, which the petitioner was driving and had tried to flee after noticing the police. 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 bail petition and specifically to para 10, which reads as follows:
- “10. That it has become common practice for the Police to forego procedural mandates of search and seizure in NDPS Cases much to the detriment of accused persons in NDPS cases, where generally the Prosecution version is taken to be a*

truer and more reliable version of events. The possibility of the Alprazolam being planted is high, and the probability of it increases further by the fact that the Petitioner has clear antecedents and there is no reason for him to start indulging in peddling all of a sudden that too of commercial quantities of banned or regulated substances.”

5. The petitioner's counsel further argued as follows:

- The Petitioner has clear antecedents.
- The Police Party does not mention whether they were patrolling on a Govt. vehicle or a private vehicle, details of which are not mentioned. Further, no public witness was joined by the Police Party.
- Alleged recovery is from both the accused and the entire recovery cannot be attributed to a single person.
- That the challan was presented on 07.03.2024 and charges framed on 03.04.2024. As of now no PWs stand examined and trial is not likely to conclude anytime soon.
- That the Petitioner has of now been in custody for a full year and the challan has been given and charges have been framed in the months of March and April respectively. However, no PWs have been examined so far.
- That the PWI who is the investigating officer is being repeatedly sent summons on 10-05-2024, 03-06-2024, 23-07- 2024, 07-09-2024 and 11-10-24 which have been received back as unserved on the last 5 dates and is deliberately not coming and is hence delaying the trial which further solidifies the fact that the petitioner has been falsely implicated in this present FIR. Zimni Orders have been annexed as Annexure P-3 and were placed on record in a separate CRM-40029-2024.
- That the Petitioner has been falsely implicated as he owed a lot of money to the people who got him implicated. He had taken money from them to get work visa and all other formalities. Petitioner had payed back half the amount, however got into a heated argument and told the people who he borrowed the money from that he wont give back the remaining amount.
- Since the lenders are influential people in the area they got him implicated in a false case in connivance with the SHO Mukerian and further instructed him to delay the trial as long as possible hence, the IO (PW1) not appearing before the trial court on the last 5 dates spanning 6 months.

6. 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.

7. Petitioner's counsel referred to the following paragraphs of the bail petition:

"4. That the Petitioner approached the learned trial court for Regular Bail, which was dismissed on 10.01.2024 vide Case no. BA/102/2024. Order is Annexure P-2.

5. That the Petitioner again approached the learned trial court via Second Application for Regular Bail, which was dismissed on 21.06.2024 vide Case no BA/1668/2024. Order is the impugned order and forms a part of this petition.

6. That the Petitioner has clear antecedents.

7. That the challan was presented on 07.03.2024 and charges framed on 03.04.2024. As of now no PWs stand examined and trial is not likely to conclude anytime soon. In the judgment delivered in CRM-M-29764-2023 titled Sandeep Gupta vs State of Haryana on 11.09.2023, this Hon'ble Court observed that:-

"7. In the instant case, the recovery is of 109.23 grams of Alprazolam which is marginally above the commercial quantity of 100 grams. The petitioner is in custody since 26.04.2023 and none of the 16 prosecution witnesses have been examined so far. In such a situation, the provisions of Section 37 of the NDPS Act can be relaxed to an extent and the case of the petitioner can be considered for the grant of bail"

8. That the alleged recovery is said to be effected from 2 persons and the Petitioner alone cannot be attributed possession of 245 grams of Alprazolam to exaggerate the amount allegedly recovered to keep him behind bars. Even if the Prosecution version is to be believed in its entirety, the quantity recovered only marginally exceeds the prescribed limit of commercial quantity since it is from 2 persons and the entire amount cannot be attributed to one person. When multiple accused are involved in a recovery, the principle of individual attribution applies.

9. That the Police Party does not mention whether it was patrolling on a Govt. vehicle or a private vehicle, as well as a consistent disregard for the inclusion of a public witness is also seen in NDPS Cases. It is pertinent to mention the opinion of this Hon'ble Court in the judgment delivered in case no. CRM-M-4624-2024 titled Bhupesh Kumar @ Happy vs State of Punjab:-

5. probability of his false implication cannot be ruled out particularly in the light of the fact that the police party was in a private vehicle, details of which have not been mentioned...."

8. The State's counsel opposes bail and refers to para 10 and 11 of the reply, which reads as follows:

"10. ROLE OF PETITIONER

That it is submitted that the present FIR was registered at P.S. Mehtiana, District Hoshiarpur against the petitioner and Kamlesh Kaur on recovery of 245 gram intoxicant powder, while the petitioner was driving the motorcycle and co-

accused Kamlesh Kaur was sitting behind the motorcycle. The petitioner turned his motorcycle to the backside on seeing the police party and then one black colour polythene fell down from the handle of motorcycle. Recovery of 245 grams of intoxicated powder was found after checking the black polythene. During the investigation of this case it was verified that petitioner and co-accused Kamlesh Kaur are in live in relationship with each other and are also involved in the drug smuggling business. Subsequently, offence U/s 29-NDPS Act, 482, 379, 411 IPC was added to the present FIR. As per FSL report, recovery effected from the petitioner contains Alprazolam salt and as such recovery effected from the petitioner falls within the category of commercial quantity. Therefore, the present petition is liable to be dismissed.

EVIDENCE AGAINST THE PETITIONER:

11. That it is submitted that in the present case, 245 grams intoxicant powder was recovered from the petitioner and his co-accused Kamlesh Kaur, subsequently offence U/s 22/29-61-85 NDPS Act, 482, 379, 411 IPC. As per FSL report, contraband recovered from the petitioner and his co-accused Kamlesh Kaur contains Alprazolam salt and the recovery effected from the petitioner and his Co accused Kamlesh Kaur falls within the category of commercial quantity.”

9. 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 an illegality, and its outcome depends upon the nature of evidence tendered in the examination in chief and its cross-examination.

10. Dealing in 245 grams of Alprazolam is a punishable offense under the NDPS Act in the following terms:

Substance Name	ALPRAZOLAM
Quantity detained	245 Gram
Quantity type	Commercial
Drug Quantity in % to upper limit of Intermediate	245.00%

Specified as small & Commercial in S.2(viia) & 2(xxiiia) NDPS Act, 1985	
Notification No	S.O.1055(E)
dated	10/19/2001
Sr. No.	178
Common Name (Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN)	ALPRAZOLAM
Other non-proprietary name	*****
Chemical Name	8-chloro-1-methyl-6-phenyl-4H-s-triazolo[4,3-a][1,4]benzodiazepine

Small Quantity	5 Gram
Commercial Quantity	100 Gram
0	
Declared as punishable under NDPS Act and as per schedule defined in S.2(xi) & 2(xxiii) NDPS Act, 1985	
Notification No	NDPS Act, 1985 (61 of 1985), S.O. 821(E)
dated	11/14/1985
Sr. No.	30
Common Name (Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN)	ALPRAZOLAM
Other non-proprietary name	*****
Chemical Name	8-Chloro-1-methyl-6-phenyl-4H-s-triazolo [4, 3-a] [1, 4] benzodiazepine

11. 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.

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

13. 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

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;
(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.

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.

14. 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 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.

15. 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.

16. Per the custody certificate, the petitioner's custody is one year and thirteen days, which cannot be considered prolonged, and the ratio of Dheeraj Shukla does not apply.

17. 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.

18. 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.

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

20. Petition dismissed. All pending applications, if any, stand disposed of.

(ANOOP CHITKARA)
JUDGE

22.10.2024
Sonia Puri

Whether speaking/reasoned:	Yes
Whether reportable:	No.