

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-39445-2024
Reserved on: 11.09.2024
Pronounced on: 27.09.2024

Mohammad Azam @ Ganja ...Petitioner

Versus

State of Punjab ...Respondent

CORAM: HON'BLE MR. JUSTICE ANOOP CHITKARA

Present: Ms. Kamlesh, Advocate for the petitioner.
Mr. Sukhdev Singh, A.A.G., Punjab.

ANOOP CHITKARA, J.

FIR No.	Dated	Police Station	Sections
26	15.03.2024	City-II, Malerkotla, District Malerkotla	21/61/85 of NDPS Act

1. The petitioner incarcerated in the FIR captioned above had come up before this Court under Section 439 CrPC, seeking regular bail.
2. In paragraph 13 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 March 15, 2024, based on prior information, the Police spotted three persons, including the petitioner. On noticing the Police, all three persons tried to flee after throwing a packet. However, they were nabbed. The Investigator claims to have acted following the provisions of the NDPS Act. Subsequently, a Gazetted Officer was called, and in their presence, the said polythene was opened, and the contraband was weighed and measured 270 grams. Subsequently, it was stated to be heroin. The Investigator claims to have complied with all the statutory requirements of the NDPS Act, 1985, and CrPC, 1973.
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. Petitioner's counsel referred to the following paragraphs of the bail petition:

“4. That the brief facts of the case are that applicant was called by the co-accused Azam @ Vakil by making call from his mobile No. 90416-25100 for some urgent work and petitioner was not aware about anything and in this way, the applicant/accused has been falsely implicated in the present case.

5. *That the Petitioner has been falsely implicated in the present case and as per the prosecution the alleged recovery has been effected from the black color polythene and admittedly the petitioner has no link with the above said polythene and contraband and thus the petitioner has been falsely implicated in the above said case and petitioner is entitled for regular bail during the pendency of trial.*

6. *That from the bare perusal of the FIR it clearly depicts that search was not conducted in the presence of Gezatted officer or Magistrate. The mandatory provision of the NDPS Act has not been complied and thus, the petitioner seeks kind indulgence of this Hon'ble Court that the present petition be accepted and the petitioner be granted regular bail in the abovesaid case. That except the story cooked up by the prosecution, there is no iota of evidence available on the record which could connect the present petitioner with the alleged commission of crime.*

7. *That from the further perusal of the FIR, it shows no independent witness has been joined by the prosecution while conducting the search of the petitioner. It is the clear violation of section 100 (4) Cr.p.c. in the present case, while police had the sufficient time to join an independent witness. Moreover, the alleged recovery of 270 Gms of Chitta/Heroin is along with the plastic bag, therefore, It is highly probable, that in case the weight of plastic bag was separated, the actual weight of the recovered Chitta/Heroin would be less than 270 Gms, which is non-commercial quantity. Petitioner is behind the bars since 15.03.2024. Keeping in view of the above said facts petitioner may kindly be released on regular bail.*

8. *That conscious possession of the petitioner over the alleged narcotic contraband is not proved in the present set of fact and the benefit of the same may be extended to the petitioner. Therefore, no further custodial interrogation is required. The trial is likely to take a long time to conclude, as such no useful purpose would be served by keeping the petitioner behind the bars.*

9. *That it is pertinent to mention here that the challan has been presented in the present case on dated 10.06.2024, however from the bare perusal of the challan it reveals that when the alleged ruka was sent in the police station, by hand SC Arshdeep Singh no. 911/Pati: on dated 15.03.2024 for the registration of the FIR no acknowledgment was given by ASI on ruka, therefore, it can be considered as a fake document. Copy of the ruka is annexed herewith as Annexure P-2."*

6. The State's counsel opposes bail.

7. The possession is prima facie established because of the allegations of the petitioner's conduct in attempting to run away after they threw the packet, which was found to have heroin.

8. The non-joining of independent witnesses is subject to various factors that are the subject matter of trial. The petitioner is not entitled to bail on this ground.

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

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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 270 grams of Heroin is a punishable offense under the NDPS Act in the following terms:

Substance Name	Heroin/ Chitta/ Smack/ Brown Sugar
Quantity detained	270 Gram
Quantity type	Commercial
Drug Quantity in % to upper limit of Intermediate	108.00%

Specified as small & Commercial in S.2(viia) & 2(xxiii) NDPS Act, 1985	
Notification No	S.O.1055(E)
dated	10/19/2001
Sr. No.	56
Common Name (Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN)	Heroin
Other non-proprietary name	*****
Chemical Name	Diacetylmorphine
Small Quantity	5 Gram
Commercial Quantity	250 Gram

Declared as punishable under NDPS Act and as per schedule defined in S.2(xi) & 2(xxiii) NDPS Act, 1985	
Notification No	S.(xvi)(d) NDPS Act, 1985 (61 of 1985), S.O. 821 (E)
dated	11/14/1985
Sr. No.	2(xvi)(d)
Common Name (Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN)	*****
Other non-proprietary name	*****
Chemical Name	2(xvi)(d) diacetylmorphine, that is, the alkaloid also known as dia-morphine or heroin and its salts; Explanation.-- For the purposes of clauses (v) (vi), (xv) and (xvi) the percentages in the case of liquid preparations shall be calculated on the basis that a preparation containing one per cent. of a substance means a preparation in which one gram of substance, if solid, or one mililitre of substance, if liquid, is contained in every one hundred mililitre of the preparation and so on in proportion for any greater or less percentage: Provided that the Central Government may, having

	regard to the developments in the field of methods of calculating percentages in liquid preparations prescribed, by rules, any other basis which it may deem appropriate for such calculation.
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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 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

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.

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. Thus, the grant or denial of bail for possessing commercial quantity would vary from case to case, depending upon its facts, and the parameters for anticipatory bail are stringent compared to the regular bail when the accused is in judicial custody.

15. 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 anticipatory bail. Any detailed discussions about the evidence may prejudice the case of the petitioner, the State, or the other accused.

16. 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.

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

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

27.09.2024
Jyoti Sharma

(ANOOP CHITKARA)
JUDGE

Whether speaking/reasoned: Yes
Whether reportable: No.