

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-54845-2024
Reserved on: 09.01.2025
Pronounced on: 30.01.2025

Narender Kumar ...Petitioner

Versus

State of Haryana ...Respondent

CORAM: HON'BLE MR. JUSTICE ANOOP CHITKARA

Present: Mr. Sanjeev Sharma, Advocate
for the petitioner.

Ms. Harpreet Kaur, A.A.G., Haryana.

ANOOP CHITKARA, J.

FIR No.	Dated	Police Station	Sections
0057	16.02.2024	Hodal, District Palwal	20 (b) (ii) (C) 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. Per paragraph 10 of the status report, the accused has no criminal antecedents.
3. The facts and allegations are taken from the status report filed by the State, which reads as follows:

“2. That brief facts of the case are that on 15.2.2024, ASI Rajbir alongwith other police officials was present at Ghari turn, Hodal on crime detection duty, where a secret informer happened to meet him and provided specific inputs to the effect that Vicky son of Gangadhar and Narender son of Jagdish, both resident of Deshal Mohalla, Hodal, sale and supply SULFA in Deshal Mohalla. Today also, they have brought SULFA in huge quantity from somewhere and they are still selling the same at Ramlila Ground, Deshal Mohalla. If a raid is conducted immediately, they can be overpowered with their SULFA. The information was provided by a trustworthy informer. The accompanying police officials were apprised of the circumstances and facts and a notice under section 42 of NDPS was sent to CIA Staff Hodal through Constable Praveen 415/Palwal and ASI Rajbir alongwith other accompanying police officials reached at Deshal Mohalla, Ram Lila Ground, where two persons were noticed sitting on a bench, one of them was seen holding a white polythene in his hands and the other was noticed taking some

substance out of it. On noticing the police coming to them, he had put the substance back into the polythene. ASI Rajbir with the help of accompanying persons overpowered both of them alongwith their polythene. On being asked about their names and parentage, the person who was taking substance out from the polythene disclosed his name as Virky son of Gangadhar, resident of Deshal Mohalla, Hodal and the other person disclosed his name as Narender son of Jagdish, resident of Deshal Mohalla, Hodal. ASI told both of them that he had suspicion over them to possess some narcotic substance in their polythene; therefore, they are required to be searched and they had a right to get searched their polythene either by a Gazetted Officer or a Magistrate. The Gazetted Officer or the Magistrate may be called to the spot or else they could be taken to them. ASI Rajbir served both of them individually with notices under section 50 of NDPS Act. To which, both of them replied in writing that they wanted to be searched by the Gazetted Officer. Resultantly, ASI Rajbir made a call from his mobile number 9991xxxxx to the Nodal Officer Sh. Naresh Kumar, HPS, DSP, HQ Palwal on his mobile number 89303xxxxx who responded to reach shortly. After a while, Constable Praveen no. 415/Palwal reached back and produced a copy of RAPAT no. 42 to ASI Rajbir. Further Sh Naresh Kumar, HPS, DSP HQ Palwal reached at the spot and he was apprised of the notice u/s 50 of NPDS Act and the overpowered persons were introduced to him. The Nodal Officer Sh. Naresh Kumar, HPS, DSP HQ Palwal returned the notice under section 42 of NDPS Act after certifying it. The persons and polythene were searched into. ASI Rajbir searched both of them one after other and also checked into the polythene, wherein a bale of SUFLA was found. An electronic weighing machine was arranged for and it was measured alongwith the polythene and it weighed to be 1 kg 200 gms. The SULFA alongwith polythene was converted into a parcel and sealed with the seal of MN and the Nodal officer also put his seal impression MS on the same. ASI Rajbir handed over his seal to Constable Kuldeep after using it and the Nodal Officer had kept his seal with him. The recovered SULFA was taken into police possession as evidence and it was signed by the accused and witnesses. In this way, the accused Vicky and Narender have committed a crime punishable under section 20(b)(ii) (C) of NDPS Act.”

4. The Investigator claims to have complied with all the statutory requirements of the NDPS Act, 1985, and CrPC, 1973.
5. The petitioner's counsel refers to the bail petition.
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. The State's counsel opposes bail and refers to the status report.
8. Counsel for the petitioner submits that no independent witness was joined despite place of recovery being public place which creates doubt in the entire investigation.

Section 42 and 50 of NDPS Act were not complied with and the petitioner is in custody

from 16.02.2024 and is 45% disabled and unable to walk without support and has referred to disability certificate Annexure P-2. Counsel for the petitioner further submits that the petitioner seeks bail on parity with co-accused Vicky who has been granted bail by the Additional Sessions Judge.

9. Regarding non-association of independent witness, it is a matter of trial. Regarding arguments of non-compliance of Section 50 of NDPS Act, the recovery was not from person and the same would not apply. Regarding the bail on parity with co-accused, it has come in evidence that petitioner was holding the packet and co-accused was taking the substance from it. On this ground, the petitioner is not on parity with co-accused Vicky.

10. The police had sent 50 grams of contraband for testing to the laboratory. As per laboratory report, the tests were positive for the presence of Tetrahydrocannabinol, Cannabinol and Cannabidiol in the sample. Characteristics trichomes of Charas were present in the sample. The tests were positive for the presence of Charas in the sample. Thus prima facie the contraband is charas and the total weight of the contraband was 1 kg 200 gms.

11. Dealing in 1.2 kg of charas is a punishable offense under the NDPS Act in the following terms:

Substance Name	Cannabis and cannabis resin/ Charas/ Hashish/ Sulpha
Quantity detained	1.2 Kg
Quantity type	Commercial
<i>Drug Quantity in % to upper limit of Intermediate</i>	120.00%

<i>Specified as small & Commercial in S.2(viia) & 2(xxiii) NDPS Act, 1985</i>	
Notification No	S.O.1055(E)
dated	10/19/2001
Sr. No.	23
Common Name (Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN)	Cannabis and cannabis resin
Other non-proprietary name	CHARAS, HASHISH
Chemical Name	EXTRACTS and TINCTURES OF CANNABIS
Small Quantity	100 Gram (i.e. equivalent to 0.1 Kg)
Commercial Quantity	1000 Gram (i.e. equivalent to 1 Kg)

Declared as punishable under NDPS Act and as per schedule defined in S.2(xi) & 2(xxiii) NDPS Act, 1985	
Notification No	S.20 & S.2(iii) NDPS Act, S.O.821(E)
dated	11/14/1985
Sr. No.	S.2(iii)

Common Name (Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN)	*****
Other non-proprietary name	*****
Chemical Name	S.2(iii) “cannabis (hemp)” means— (a) charas, that is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish; (b) ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated; and (c) any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom; (iv) “cannabis plant” means any plant of the genus cannabis; S. 2(viii b)] “illicit traffic”, in relation to narcotic drugs and psychotropic substances, means— (i) cultivating any coca plant or gathering any portion of coca plant; (ii) cultivating the opium poppy or any cannabis plant; (iii) engaging in the production, manufacture, possession, sale, purchase, transportation, warehousing, concealment, use or consumption, import inter-State, export inter-State, import into India, export from India or transshipment, of narcotic drugs or psychotropic substances;

12. 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.

13. 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

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.

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.

14. 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.

15. 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.

16. 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.

17. Per the custody certificate, the petitioner's custody is around 11 months, which cannot be considered prolonged.

18. In *Union of India (NCB) v. Khalil Uddin*, decided on 21 Oct 2022, 2022 SCC OnLine SC 2109, Hon'ble Supreme Court holds,

[4]. According to the prosecution, contraband material weighing about 13 kgs. of morphine was found in a motor vehicle which was driven by co-accused named Md. Jakir Hussain. During the course of investigation, it was found that the motor vehicle was recorded in the name of Md. Nizam Uddin who had executed a sale letter and handed over the custody of the vehicle to accused Md. Abdul Hai and that accused Md. Jakir Hussain was the driver employed by accused Md. Abdul Hai and that contraband material in question was to be handed over to accused-Khalil Uddin, an owner of a tea shop.

[5]. The High Court by its order which is presently under challenge, directed release of both the accused as stated above on bail after they had undergone custody to the tune of about a year. Questioning grant of relief to said accused, the instant appeals have been preferred.

[7]. What emerges from the record is that large quantity of contraband weighing about 13 kgs of morphine was found in a car which was driven by Md. Jakir Hussain. Whether the role played by said Md. Jakir Hussain could get connected with both the accused is a question.

[8]. The answer to said question could be the statement recorded of Md. Nizam Uddin. The statement of Md. Jakir Hussain recorded under Section 67 of the Act has also named his owner accused Abdul Hai. We are conscious of the fact that the validity and scope of such statements under Section 67 has been pronounced upon by this Court in *Tofan Singh v. State of Tamil Nadu*. In *State by (NCB) Bengaluru v. Pallulabid Ahmad Arimutta*, the rigour of law lay down by this Court in *Tofan Singh* was held to be applicable even at the stage of grant of bail.

[9]. However, going by the circumstances on record, at this stage, on the strength of the statement of Md. Nizam Uddin, though allegedly retracted later, the matter stands on a different footing. In our considered view, in the face of the mandate of Section 37 of the Act, the High Court could not and ought not to have released the accused on bail. We, therefore, allow these appeals, set aside the view taken by the High Court and direct that both the appellants be taken in custody forthwith.

[10]. We have been given to understand that the charge-sheet has been filed. In the circumstances, we direct the Trial Court to take up the matter and conclude the proceedings as early as possible and preferably within six months from the receipt of this order.

19. In *Narayan Takri v. State of Odisha*, decided on 10 Sep 2024, SLP (Crl.) 8198-

2024, Hon'ble Supreme Court holds,

The petitioners are in custody since 28th May, 2022 for alleged commission of alleged offence under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985. As per the FIR allegation, 125.3 kg. of "Ganja" was recovered from the petitioners.

[3]. It is not in dispute that the trial has commenced and that three prosecution witnesses have been examined till date.

[4]. Learned counsel for the petitioners submits that the third prosecution witness was examined as far back as on 28th January, 2024 and since then, no other prosecution witness has been examined. There is, however, no such averment in the petition.

[5]. Learned counsel appearing for the respondent submits that every endeavor shall be made on behalf of the prosecution to have all the witnesses examined by the end of this year.

[6]. The trial court is encouraged to expedite the trial and give its decision as early as possible, in accordance with law.

[7]. We, however, do not see any reason to interfere the impugned judgment and order at this stage; however, it is clarified that in the event the trial is not completed by the end of this year, the petitioners shall be at liberty to renew their prayer for bail before the trial court.

20. 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.

21. The petitioner's custody of around 11 months cannot be termed prolonged, given the minimum sentence prescribed for the offense, which is 10 years.

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

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

(ANOOP CHITKARA)
JUDGE

30.01.2025
Jyoti Sharma

Whether speaking/reasoned: Yes
Whether reportable: No.