

UNION OF INDIA THROUGH NARCOTICS CONTROL
BUREAU, LUCKNOW

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v.

MD. NAWAZ KHAN

(Criminal Appeal No. 1043 of 2021)

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SEPTEMBER 22, 2021

**[DR. DHANANJAYA Y. CHANDRACHUD AND
B. V. NAGARATHNA, JJ.]**

Narcotic Drugs and Psychotropic Substances Act, 1985 – ss.8, 21, 27A and 29 – On receiving information, a vehicle was intercepted by the NCB officers in which respondent and other two accused persons were travelling – Nothing objectionable was found in the course of personal search – However, search of car revealed two packets together weighing 3.300 kg hidden under the place where wiper is connected to the front bonnet of the car – The application for bail of the respondent was rejected by the Additional District and Sessions Judge – The High Court allowed the application for bail by the respondent – On appeal, held: The impugned order of the High Court, apart from observing that no contraband was found from the personal search and observed that twin conditions contained in s.37(1)(b) of the NDPS Act were satisfied – The High Court ignored the following circumstances: (i) The respondent was travelling in the vehicle all the way from Dimapur in Nagaland to Rampur in Uttar Pradesh with the co-accused; (ii) The complaint notes that the CDR analysis of the mobile number used by the respondent indicated that he was in regular touch with the other accused persons who were known to him; (iii) The quantity of contraband found was of commercial quantity; and (iv) The contraband was concealed in the vehicle in which the respondent was travelling with the co-accused – The High Court overlooked crucial requirements and glossed over the circumstances which were material to the issue as to whether a case for grant of bail was established – In failing to do so, the order of the High Court becomes unsustainable – Moreover, after the respondent was enlarged on bail he has consistently remained away from the criminal trial resulting in the issuance of a non-bailable warrant against him –

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- A *Therefore, the impugned judgment and order of the High Court is set aside – Accordingly, the respondent is directed to surrender.*

Allowing the appeal, the Court

- B **HELD: 1. This Court has referred to the precedents to reiterate the governing principles. At this stage of the proceedings, it needs only to be clarified that the trial is to take place this Court where evidence will be adduced. [Para 23][833-G-H; 834-A]**

- C *Prasanta Kumar Sarkar v. Ashis Chatterjee* (2010) 14 SCC 496 : [2010] 12 SCR 1165; *Mahipal v. Rajesh Kumar @ Polla & Anr.* (2020) 2 SCC 118 : [2019] 14 SCR 529; *Union of India v. Shiv Shanker Kesar* (2007) 7 SCC 798 : [2007] 9 SCR 964; *Madan Lal and Another v. State of Himachal Pradesh* (2003) 7 SCC 465 : [2003] 2 Suppl. SCR 716 – relied on.

- D *Prabhakar Tewari v. State of Uttar Pradesh* (2020) 11 SCC 648; *Union of India v. Prateek Shukla* (2021) 5 SCC 430; *Mohan Lal v. State of Rajasthan* (2015) 6 SCC 222 : [2015] 5 SCR 435 – referred to.

- E **2. As regards the finding of the High Court regarding absence of recovery of the contraband from the possession of the respondent, in *Union of India v. Rattan Mallik*, a two-judge Bench of this Court cancelled the bail of an accused and reversed the finding of the High Court, which had held that as the contraband (heroin) was recovered from a specially made cavity above the cabin of a truck, no contraband was found in the ‘possession’ of the accused. The Court observed that merely making a finding on the possession of the contraband did not fulfil the parameters of Section 37(1)(b) and there was non-application of mind by the High Court. [Para 24][834-A-C]**

- G **3. In line with the decision of this Court in *Rattan Mallik*, this Court is of the view that a finding of the absence of possession of the contraband on the person of the respondent by the High Court in the impugned order does not absolve it of the level of scrutiny required under Section 37(1)(b)(ii) of the NDPS Act. With regard to the statement under Section 67 of the NDPS Act, the**

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High Court has placed abundant reliance on the inclusion of ‘AK’s name in place of the respondent’s name in the endorsement of translation on the statement of the respondent. In Tofan Singh, a three judge Bench of this Court held that a statement under Section 67 of the NDPS Act is inadmissible. The ASG submitted that independent of the statement, there are valid reasons to deny bail on the basis of the material which has emerged at this stage. [Paras 25-26][834-C-F]

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4. In the complaint that was filed on 16 October 2019 it is alleged that at about 1400 hours on 26 March 2019, information was received that between 1500-1700 hours on the same day, the three accused persons would be reaching Uttar Pradesh. The complaint states that the information was immediately reduced to writing. Therefore, the contention that Section 42 of the NDPS Act was not complied with is prima facie misplaced. The question is one that should be raised in the course of the trial. [Para 29][836-C-E]

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5. The following circumstances are crucial to assessing whether the High Court has correctly evaluated the application for bail, having regard to the provisions of Section 37: (i) The respondent was travelling in the vehicle all the way from Dimapur in Nagaland to Rampur in Uttar Pradesh with the co-accused; (ii) The complaint notes that the CDR analysis of the mobile number used by the respondent indicates that the respondent was in regular touch with the other accused persons who were known to him; (iii) The quantity of contraband found in the vehicle is of a commercial quantity; and (iv) The contraband was concealed in the vehicle in which the respondent was travelling with the co-accused. [Para 30][836-E-H]

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6. The High Court has clearly overlooked crucial requirements and glossed over the circumstances which were material to the issue as to whether a case for the grant of bail was established. In failing to do so, the order of the High Court becomes unsustainable. Moreover, it has emerged, during the course of the hearing that after the respondent was enlarged on bail he has consistently remained away from the criminal trial resulting in the issuance of a non-bailable warrant against him.

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- A **The High Court ought to have given due weight to the seriousness and gravity of the crime which it has failed to do. [Para 32][837-C-D]**

- B *Tofan Singh v. State of Tamil Nadu* (2021) 4 SCC 1; *Dharampal Singh v. State of Punjab* (2010) 9 SCC 608 : [2010] 10 SCR 1160; *Union of India v. Rattan Mallik* (2009) 2 SCC 624 : [2009] 1 SCR 533; *Karnail Singh v. State of Haryana* (2009) 8 SCC 539 : [2009] 11 SCR 470; *Boota Singh v. State of Haryana* (2021) SCC OnLine SC 324 – referred to.

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Case Law Reference

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|---|-------------------------|-------------|---------|
| | [2010] 12 SCR 1165 | relied on | Para 13 |
| | [2019] 14 SCR 529 | relied on | Para 14 |
| D | [2007] 9 SCR 964 | relied on | Para 16 |
| | [2003] 2 Suppl. SCR 716 | relied on | Para 22 |
| | [2010] 10 SCR 1160 | referred to | Para 22 |
| | [2015] 5 SCR 435 | referred to | Para 22 |
| E | [2009] 1 SCR 533 | referred to | Para 24 |
| | [2009] 11 SCR 470 | referred to | Para 27 |

- F **CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.1043 of 2021.**

From the Judgment and Order dated 01.10.2020 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Bail Application No.7379 of 2019.

- G **S. V. Raju, ASG, Ms. Sairica Raju, Annam Venkatesh, Ms. Sunita Sharma, Anshuman Singh, B. V. Balaram Das, Advs. for the Appellant.**

Rakesh Dahiya, Adv. for the Respondent.

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The Judgment of the Court was delivered by

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DR DHANANJAYA Y CHANDRACHUD, J.

1. This appeal arises from a judgment of a Single Judge at the Lucknow Bench of the High Court of Judicature at Allahabad dated 1 October 2020. NCB Case Crime No 14 of 2019 registered at Police Station, NCB, Lucknow for alleged offences under Sections 8, 21, 27A, 29 of the Narcotic Drugs and Psychotropic Substances Act 1985¹. The High Court has allowed an application for bail.

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2. The complaint was filed on 16 September 2019 through the Intelligence Officer at the Lucknow Zonal Unit of the Narcotics Control Bureau². The allegation is that the NCB, Zonal Unit received information at 1400 hours that three persons namely Md. Arif Khan, Rafiuddin and Md. Nawaz Khan (the respondent), who are residents of Manipur were proceeding with heroin/morphine in a Maruti Ritz vehicle bearing registration No.UK 06 AA 25823 from Dimapur in Nagaland to Rampur in Uttar Pradesh and that the vehicle would be passing through Banarasi Das College, Lucknow. The information was reduced into writing and was produced before the Zonal Director, NCB Lucknow. A team of NCB officers was formed and it was directed to liaise with the team of the Uttar Pradesh Special Task Force, Lucknow³. A surveillance was conducted in the area around Babu Banarasi Das College and at 1600 hours, the car in which the respondent was travelling with the other two co-accused was intercepted. A search was conducted in the presence of a gazetted officer in view of the provisions of Section 50 of the NDPS Act but nothing objectionable was recovered in the course of the personal search. However, a search of the car revealed two polythene packets hidden under the place where the wiper is connected to the front bonnet of the car. The first packet weighed 1.740 kg, while the second packet weighed 1.750 kg. Samples were taken and upon testing with the drug detection kit, the samples tested positive for heroin.

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3. Since the occupants of the car were not well-versed with Hindi or English, an official belonging to the Shasatra Seema Bal⁴ was summoned at the spot for the purpose of translation as he hailed from Manipur and was conversant with the Manipuri language. The statements

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¹ “NDPS Ac”

² “NCB”

³ “UP-STF”

⁴ “SSB”

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A of the three accused persons were recorded in English and were translated in Manipuri by the official from the SSB and the accused were placed under arrest. However, while certifying the statement of the respondent, the official of the SSB mentioned the name of Mohd. Arif Khan in place of the respondent (Md. Nawaz Khan).

B 4. The sample packets marked as P1S1 and P2S1 were sent to the Chief Examiner, Central Revenues Control Laboratory, New Delhi⁵ on 27 March 2019. A chemical examination report dated 25 April 2019 was prepared by CRCL which stated that the samples did not test positive for diacetylmorphine that is heroin, however, it tested positive for morphine.

C 5. Letters dated 10 July 2019 were sent to Airtel Private Limited, Lucknow; Vodafone Idea Limited, Lucknow; and Reliance JIO Info Communication Limited Lucknow, to obtain certified copies of call detail records⁶ and customer application forms⁷ relating to certain mobile numbers. The CDR analysis of the said mobile numbers indicates that the respondent was regularly corresponding with the co-accused and one Anish @ Abbas, who is a resident of Dimapur and is also suspected to be involved in drug trafficking.

E 6. The application for bail moved by the respondent was rejected by the Seventh Additional District and Sessions Judge, Lucknow on 27 June 2019, observing that a huge quantity of heroin weighing 3.300 kg was recovered and that having regard to the seriousness and gravity of the crime, no case for the grant of bail was established. The respondent moved the High Court and by the impugned order dated 1 October 2020, the application for bail was allowed.

F 7. The submission of the respondent before the High Court was that he was only a companion in the vehicle which was driven by co-accused Rafiuddin and was not in conscious possession of the contraband since it had been recovered from the wiper fitted on the front bonnet of the vehicle, of which he had no knowledge. Moreover, it was urged that the provisions of Sections 42 and 50 of the NDPS Act were not complied with. According to the respondent, the statement under Section 67 had not been duly explained to him, which was evident from the fact that the official of the SSB who signed it had certified that the translation had been explained in Manipuri to Mohd. Arif Khan (co-accused). The name

⁵ “CRCL”

⁶ “CDR”

H ⁷ “CAF”

of the respondent as noted earlier is Md. Nawaz Khan. The High Court allowed the application for bail and observed thus: A

“Considering the rival submissions of learned counsel for parties, going through the recovery memo, alleged statement of the applicant recorded under Section 67 of the NDPS Act and the certification of Shri L.H. Kapin, it is evident that indisputably the alleged contraband was recovered from the wiper fitted on the front bonnet of the vehicle, which was being driven by Rafiuddin and the applicant was sitting in the said vehicle along with Arif Khan. Admittedly, nothing was recovered from the possession of the applicant. Further, in the search memo prepared by the officials, they categorically mentioned that, since the persons were not well conversed with the Hindi or English language, Shri LH. Kapin, personnel of SSB IV Battalion, Lucknow was requested to arrive on the spot for explaining the contents. A perusal of Annexure No. 3 of the counter affidavit goes to show that the name of the applicant is mentioned on the statement, but it also reveals that while certifying this statement, Shri LH. Kapin mentioned in his certification that “Translated the statement as stated by Md. Arif Khan and after recording of stated readover the statement and made understand in Manipuri Language.” Thus, since the statement was explained to Mohd. Arif Khan and not to the applicant as also that this statement was filed along with the complaint before the court below, oral argument of the learned counsel for the respondent at this juncture, cannot be accepted that due to mistake, the name of Mohd. Arif Khan is mentioned in place of Mohd. Nawaz (applicant). It is also undisputed that the applicant does not have any criminal antecedent.” B C D E F

8. Mr SV Raju, Additional Solicitor General⁸ appearing on behalf of the appellant submitted that in view of the decision in **Tofan Singh v. State of Tamil Nadu**⁹, where it was held that a confessional statement made under Section 67 of the NDPS Act will not be admissible in evidence, he does not seek to place reliance on the statement of the respondent. At the same time, it was urged that the High Court while granting bail has lost sight of three crucial circumstances namely: G

⁸ “ASG”

⁹ (2021) 4 SCC 1.

- A (i) A huge contraband of morphine weighing 3.300 kg has been recovered from the vehicle;
- (ii) The respondent was admittedly travelling in the vehicle all the way from Dimapur in Nagaland to Rampur in Uttar Pradesh; and
- B (iii) The complaint tabulates the call data records of the cell phones used by the accused. The accused persons were found to have been in touch with each other and a flow chart has been set out in the complaint.
- C 9. In addition, it was urged that:
- (i) The decisions of this Court have held that compliance with the provisions of Section 42 of the NDPS Act is warranted where a private vehicle is sought to be searched in a public place;
- D (ii) As a matter of fact the contents of the complaint would indicate that there was compliance with the provisions of Section 42 of the NDPS Act;
- (iii) Several decisions of this Court indicate that whether the provisions of Section 42 of the NDPS Act have been complied with is a matter of trial; and
- E (iv) A presumption under Section 54 of the NDPS Act would arise in respect of the possession of a narcotic drug which is found to be in the conscious possession of the accused.

F On the above grounds, the learned ASG submitted that no case for the grant of bail exists, particularly, having regard to the provisions of Section 37(1)(b)(ii) of the NDPS Act.

G 10. Apart from the above circumstances, it has been submitted that the respondent, after having been released on bail, has consistently avoided appearing before the Sessions Judge at Lucknow as a result of which charges could not be framed and eventually a non-bailable warrant has been issued against the respondent.

H 11. On the other hand, Mr Rakesh Dahiya, learned Counsel appearing on behalf of the respondent submitted that the contraband in the present case was found concealed in the vehicle in which the respondent was travelling. Thus, it cannot be stated that it was the

respondent who was in conscious possession of the contraband. Learned A
counsel submitted that the respondent is neither the driver nor the owner
of the vehicle and in this backdrop, the order of the High Court enlarging
him on bail cannot be faulted.

12. At the present stage, it is material to note that:

- (i) The vehicle which was intercepted at Lucknow was B
proceeding from Dimapur (Nagaland) towards Rampur (Uttar
Pradesh);
- (ii) The quantity of 3.300 kg of a narcotic substance which is a
commercial quantity was found concealed in the vehicle; C
- (iii) The respondent is not an unknown passenger but a person
who, according to the prosecution, was closely in contact with
the co-accused.

13. The principles that guide this Court while assessing an order
of the High Court granting bail have been succinctly laid down in D
Prasanta Kumar Sarkar v. Ashis Chatterjee¹⁰. In **Prasanta Kumar**
(supra), while the trial court dismissed several bail applications that were
filed by the accused who was charged for the commission of an offence
punishable under Section 302 of the Indian Penal Code 1860¹¹, the High
Court allowed the bail application. Justice DK Jain, speaking for the
two-judge Bench, observed: E

“9. ... this Court does not, normally, interfere with an order passed
by the High Court granting or rejecting bail to the accused.
However, it is equally incumbent upon the High Court to exercise
its discretion judiciously, cautiously and strictly in compliance with F
the basic principles laid down in a plethora of decisions of this
Court on the point. It is well settled that, among other
circumstances, the factors to be borne in mind while considering
an application for bail are:

- (i) whether there is any prima facie or reasonable ground to believe G
that the accused had committed the offence;
- (ii) nature and gravity of the accusation;
- (iii) severity of the punishment in the event of conviction;

¹⁰ (2010) 14 SCC 496

¹¹ “IPC”

- A (iv) danger of the accused absconding or fleeing, if released on bail;
- (v) character, behaviour, means, position and standing of the accused;
- B (vi) likelihood of the offence being repeated;
- (vii) reasonable apprehension of the witnesses being influenced; and
- (viii) danger, of course, of justice being thwarted by grant of bail.”

C 14. The decision in **Prasanta Kumar**(supra) was referred to in a judgment of this Court in **Mahipal v. Rajesh Kumar @Polla & Anr.**¹², where the High Court had granted bail to an accused who was charged with the commission of an offence punishable under Section 302 of the IPC. One of us (Justice DY Chandrachud), speaking for the Court held and laid down the standard for adjudicating a plea for the cancellation of bail :

- D “14. The provision for an accused to be released on bail touches upon the liberty of an individual. It is for this reason that this Court does not ordinarily interfere with an order of the High Court granting bail. However, where the discretion of the High Court to grant bail has been exercised without the due application of mind or in contravention of the directions of this Court, such an order granting bail is liable to be set aside. The Court is required to factor, amongst other things, a prima facie view that the accused had committed the offence, the nature and gravity of the offence and the likelihood of the accused obstructing the proceedings of the trial in any manner or evading the course of justice. The provision for being released on bail draws an appropriate balance between public interest in the administration of justice and the protection of individual liberty pending adjudication of the case. However, the grant of bail is to be secured within the bounds of the law and in compliance with the conditions laid down by this Court. It is for this reason that a court must balance numerous factors that guide the exercise of the discretionary power to grant bail on a case-by-case basis. Inherent in this determination is whether, on an analysis of the record, it appears that there is a

H ¹² (2020) 2 SCC 118

prima facie or reasonable cause to believe that the accused had committed the crime. It is not relevant at this stage for the court to examine in detail the evidence on record to come to a conclusive finding. A

[...]

16. Where a court considering an application for bail fails to consider relevant factors, an appellate court may justifiably set aside the order granting bail. **An appellate court is thus required to consider whether the order granting bail suffers from a non-application of mind or is not borne out from a prima facie view of the evidence on record.** It is thus necessary for this Court to assess whether, on the basis of the evidentiary record, there existed a prima facie or reasonable ground to believe that the accused had committed the crime, also taking into account the seriousness of the crime and the severity of the punishment.” B C

(emphasis supplied) D

15. The dual test propounded in **Mahipal** (supra) was subsequently followed by this Court in **Prabhakar Tewari v. State of Uttar Pradesh**¹³.

16. With regard to the grant of bail for offences under the NDPS Act, in **Union of India v. Shiv Shanker Kesari**¹⁴ this Court observed that bail may be cancelled if it has been granted without adhering to the parameters under Section 37 of the NDPS Act. Further, in **Union of India v. Prateek Shukla**¹⁵, one of us (Justice DY Chandrachud), speaking for a two-judge Bench, noted that non-application of mind to the rival submissions and the seriousness of the allegations involving an offence under the NDPS Act by the High Court are grounds for cancellation of bail. E F

17. Section 37 of the NDPS Act regulates the grant of bail in cases involving offences under the NDPS Act. Section 37 reads as follows: G

“(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

¹³(2020) 11 SCC 648

¹⁴ (2007) 7 SCC 798

¹⁵ (2021) 5 SCC 430 H

A (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—

B (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
 C 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.

D (emphasis supplied)

18. Under Section 37(1)(b)(ii), the limitations on the grant of bail for offences punishable under Sections 19, 24 or 27A and also for offences involving a commercial quantity are :

E (i) The Prosecutor must be given an opportunity to oppose the application for bail; and
 (ii) There must exist ‘reasonable grounds to believe’ that (a) the person is not guilty of such an offence; and (b) he is not likely
 F to commit any offence while on bail.

19. The standard prescribed for the grant of bail is ‘reasonable ground to believe’ that the person is *not* guilty of the offence. Interpreting the standard of ‘reasonable grounds to believe’, a two-judge Bench of this Court in **Shiv Shanker Kesari** (*supra*), held that:

G “7. The expression used in Section 37(1)(b)(ii) is “reasonable grounds”. The expression means something more than *prima facie* grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief
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contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged. A

8. The word “reasonable” has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word “reasonable”. B

“7. ... In *Stroud’s Judicial Dictionary*, 4th Edn., p. 2258 states that it would be unreasonable to expect an exact definition of the word ‘reasonable’. Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child’s toy.” C

(See *Municipal Corpn. of Delhi v. Jagan Nath Ashok Kumar* [(1987) 4 SCC 497] (SCC p. 504, para 7) and *Gujarat Water Supply and Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd.* [(1989) 1 SCC 532] D

[...]

10. The word “reasonable” signifies “in accordance with reason”. In the ultimate analysis it is a question of fact, whether a particular act is reasonable or not depends on the circumstances in a given situation. (See *Municipal Corpn. of Greater Mumbai v. Kamla Mills Ltd.* [(2003) 6 SCC 315] E

11. The court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.” F
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(emphasis supplied)

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A 20. Based on the above precedent, the test which the High Court and this Court are required to apply while granting bail is whether there are reasonable grounds to believe that the accused has *not* committed an offence and whether he is likely to commit any offence while on bail. Given the seriousness of offences punishable under the NDPS Act and in order to curb the menace of drug-trafficking in the country, stringent parameters for the grant of bail under the NDPS Act have been prescribed.

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C 21. In the present case, the High Court while granting bail to the respondent adverted to two circumstances, namely (i) absence of recovery of the contraband from the possession of the respondent and (ii) the wrong name in the endorsement of translation of the statement under Section 67 of the NDPS Act.

D 22. We shall deal with each of these circumstances in turn. The respondent has been accused of an offence under Section 8 of the NDPS Act, which is punishable under Sections 21, 27A, 29, 60(3) of the said Act. Section 8 of the Act prohibits a person from possessing any narcotic drug or psychotropic substance. The concept of possession recurs in Sections 20 to 22, which provide for punishment for offences under the Act. In **Madan Lal and Another v. State of Himachal Pradesh**¹⁶ this Court held that

E “19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record are that all the accused persons were travelling in a vehicle and as noted by the trial court they were known to each other and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

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G 20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

21. It is highlighted that unless the possession was coupled with the requisite mental element i.e. conscious possession and not

H ¹⁶ (2003) 7 SCC 465

mere custody without awareness of the nature of such possession, Section 20 is not attracted. A

22. The expression “possession” is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Supdt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja* [(1979) 4 SCC 274 : 1979 SCC (Cri) 1038 : AIR 1980 SC 52] to work out a completely logical and precise definition of “possession” uniform[ly] applicable to all situations in the context of all statutes. B

23. The word “conscious” means awareness about a particular fact. It is a state of mind which is deliberate or intended. C

[...]

26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.” D

What amounts to “conscious possession” was also considered in **Dharampal Singh v. State of Punjab**¹⁷, where it was held that the knowledge of possession of contraband has to be gleaned from the facts and circumstances of a case. The standard of conscious possession would be different in case of a public transport vehicle with several persons as opposed to a private vehicle with a few persons known to one another. In **Mohan Lal v. State of Rajasthan**¹⁸, this Court also observed that the term “possession” could mean physical possession with animus; custody over the prohibited substances with animus; exercise of dominion and control as a result of concealment; or personal knowledge as to the existence of the contraband and the intention based on this knowledge. E F G

23. We have referred to the above precedents to reiterate the governing principles. At this stage of the proceedings, it needs only to be

¹⁷ (2010) 9 SCC 608

¹⁸ (2015) 6 SCC 222

- A clarified that the trial is to take place this Court where evidence will be adduced.

24. As regards the finding of the High Court regarding absence of recovery of the contraband from the possession of the respondent, we note that in **Union of India v. Rattan Mallik**¹⁹, a two-judge Bench of this Court cancelled the bail of an accused and reversed the finding of the High Court, which had held that as the contraband (heroin) was recovered from a specially made cavity above the cabin of a truck, no contraband was found in the 'possession' of the accused. The Court observed that merely making a finding on the possession of the contraband did not fulfil the parameters of Section 37(1)(b) and there was non-application of mind by the High Court.

25. In line with the decision of this Court in **Rattan Mallik** (supra), we are of the view that a finding of the absence of possession of the contraband on the person of the respondent by the High Court in the impugned order does not absolve it of the level of scrutiny required under Section 37(1)(b)(ii) of the NDPS Act.

26. With regard to the statement under Section 67 of the NDPS Act, the High Court has placed abundant reliance on the inclusion of Mohd. Arif Khan's name in place of the respondent's name in the endorsement of translation on the statement of the respondent. In **Tofan Singh** (supra), a three judge Bench of this Court held that a statement under Section 67 of the NDPS Act is inadmissible. The ASG submitted that independent of the statement, there are valid reasons to deny bail on the basis of the material which has emerged at this stage.

27. Another submission that has been raised by the counsel for the respondent both before the High Court and this Court is that due to non-compliance of the procedural requirement under Section 42 of the NDPS Act²⁰, the respondents should be granted bail. Section 42 provides that on the receipt of information of the commission of an offence under the statute, the officer will have to write down the information and send it to a superior officer within 72 hours. It has been submitted by the respondent that though the information was received by the Zonal Director, the information was put down in writing by an officer who was a part of the team constituted on the receipt of the information. The

¹⁹ (2009) 2 SCC 624

²⁰ "42. Power of entry, search, seizure and arrest without warrant or authorisation: (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the

written information was then sent to the Zonal Director. This Court **Karnail Singh v. State of Haryana**²¹ held that though the writing down of information on the receipt of it should normally precede the search and seizure by the officer, in exceptional circumstances that warrant immediate and expedient action, the information shall be written down later along with the reason for the delay:

“35. [...] (c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of subsections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior,

departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act [...];
(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.”

²¹ (2009) 8 SCC 539

- A then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case.
- B The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.”

- C 28. Further, it was held that the issue of whether there was compliance of the procedure laid down under Section 42 of the NDPS Act is a question of fact. The decision in **Karnail Singh** (supra) was recently followed by this Court in **Boota Singh v. State of Haryana**²².

- D 29. In the complaint that was filed on 16 October 2019 it is alleged that at about 1400 hours on 26 March 2019, information was received that between 1500-1700 hours on the same day, the three accused persons would be reaching Uttar Pradesh. The complaint states that the information was immediately reduced to writing. Therefore, the contention that Section 42 of the NDPS Act was not complied with is *prima facie* misplaced. The question is one that should be raised in the course of the trial.

- E 30. The following circumstances are crucial to assessing whether the High Court has correctly evaluated the application for bail, having regard to the provisions of Section 37:

- F (i) The respondent was travelling in the vehicle all the way from Dimapur in Nagaland to Rampur in Uttar Pradesh with the co-accused;
- F (ii) The complaint notes that the CDR analysis of the mobile number used by the respondent indicates that the respondent was in regular touch with the other accused persons who were known to him;
- G (iii) The quantity of contraband found in the vehicle is of a commercial quantity; and
- (iv) The contraband was concealed in the vehicle in which the respondent was travelling with the co-accused.

H ²² 2021 SCC OnLine SC 324

31. The impugned order of the High Court, apart from observing that no contraband was found from the personal search of the respondent has ignored the above circumstances. The High Court has merely observed that

A

“[...]

In view of the above, the twin conditions contained under Section 37(1)(b) of the NDPS Act stand satisfied. This Court is of the view that if there is reasonable ground, the applicant is entitled to be released on bail.”

B

32. The High Court has clearly overlooked crucial requirements and glossed over the circumstances which were material to the issue as to whether a case for the grant of bail was established. In failing to do so, the order of the High Court becomes unsustainable. Moreover, it has emerged, during the course of the hearing that after the respondent was enlarged on bail he has consistently remained away from the criminal trial resulting in the issuance of a non-bailable warrant against him. The High Court ought to have given due weight to the seriousness and gravity of the crime which it has failed to do.

C

D

33. For the above reasons, we allow the appeal and set aside the impugned judgment and order of the High Court dated 1 October 2020 in Bail No. 7379 of 2019.

E

34. The application for bail filed by the respondent shall stand dismissed. The respondent shall accordingly surrender forthwith.

35. Pending application (s), if any, stand disposed of.