**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CRM-M-22697-2020
Reserved on: 07.09.2022
Pronounced on: 28.09.2022**

Amrik Singh ...Petitioner

Versus

State of Punjab …Respondent

CORAM: HON'BLE MR. JUSTICE ANOOP CHITKARA

Present: Mr. Raj Kumar Kaushik, Advocate for the petitioner.

Mr. Harsimar Singh Sitta, DAG, Punjab.

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ANOOP CHITKARA, J.

FIR No.	Dated	Police Station	Sections
163	15.08.2019	Sadar Ferozepur, District Ferozepur	22 & 29 of NDPS Act, Section 25 of Arms Act and Section 66 (D) of the Information Technology Act.

1. The petitioner, incarcerating upon his arrest for possessing a commercial quantity of 15 kg 112 grams Heroine, in violation of Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act), has come up before this Court under Section 439 of Cr.P.C., seeking bail.

2. In paragraph 6 of the bail application and custody certificate dated 06.09.2022, the accused declares the following criminal antecedents:

Sr. No.	FIR No.	Dated	Offences	Police Station
1.	103	10.09.2018	21,22,25,29,61,85 of NDPS Act & 66 F/I.T. Act	Kulgarhi, District Ferozepur
2.	1	07.01.2019	21,23,29,61,85 of NDPS Act	Gajsinghpur (Rajasthan)
3.	22	04.03.2017	8, 21,29 of NDPS Act	Gajsinghpur (Rajasthan)
4.	53	26.04.2017	307, 324, 323 IPC	Kulgarhi
5.	179	14.10.2020	21, 23, 29, 61, 85 NDPS Act	Mamdot
6.	35	28.01.2020	52-A Prison Act	Ferozepur
7.	84	29.02.2020	52-A Prison Act	Ferozepur
8.	34	20.02.2021	52-A Prison Act & 07 PC Act	City Ferozepur

3. Ld. Counsel for the petitioner contends that the pre-trial incarceration would cause an irreversible injustice to the petitioner and family.

4. While opposing the bail, the contention on behalf of the State is that the quantity of contraband involved in the case falls in the commercial category, and given the criminal past, the accused is likely to indulge in crime once released on bail.

REASONING:

5. In Paramjeet Singh v. State of Punjab, CRM-M 50243 of 2021, this court observed,

> While considering each bail petition of the accused with a criminal history, it throws an onerous responsibility upon the Courts to act judiciously with reasonableness 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 prosecutions resulting in acquittal or discharge, or when Courts quashed the FIR; the prosecution stands withdrawn, or prosecution filed a closure report; cannot be included. Although crime is to be despised and not the criminal, yet for a recidivist, the contours of a playing field are marshy, and graver the criminal history, slushier the puddles.

6. A perusal of the petition does not refer to any averment based on which this court is assured that if this recidivist is released on bail, then he shall not indulge in criminal behavior.

7. The substance involved in the present case is Heroin [Diacetyl morphine], and weighs 15.112 kg. The entry no. 56 of the table specifying small and commercial quantities, specifies the quantity greater than 250 grams as commercial quantity and lesser than 5 grams as small. Thus, the quantity allegedly involved in this case is 6000% of commercial, i.e., 60 times more than commercial. Given this, the rigours of S. 37 of the NDPS Act apply in the present case. The burden is on the petitioner to satisfy the twin conditions put in place by the Legislature under Section 37 of the NDPS Act.

8. On 15th Aug 2019, the police had recovered 15.112 kg of heroin from Harjinder Singh, who was arrested. During his interrogation, he disclosed that he had taken this consignment from Munir Ahmed, a Pakistan national, and it had to be handed over to Amrik Singh (Petitioner) and Nishan Singh. On this the police arraigned both of them as accused in the FIR and arrested them. The investigation revealed that Amrik Singh was lodged in Amritsar jail, and at that time Harjinder was also in the same jail. On his release Amrik Singh had visited jail and met Harjinder Singh on 8.7.2019 and 13.7.2019, and the entries of jail corroborate the same. Thus, there is a primafacie unclenching evidence connecting the petitioner with Harjinder Singh.

9. Ld. counsel for the petitioner submits that the investigator conducted search and seizure violating the mandatory provisions of the NDPS.

10. Whether the Investigator complied with the mandatory provisions of sections 42 and 50 of the NDPS Act is a question of fact to be adjudicated in the trial. However, before this court treats the compliances as illegal, the prosecution needs an opportunity to prove that they had complied with the mandatory provisions per law. Such stage would come only during the trial and certainly not at the bail stage, where it would be hit by the maxim *Audi alteram partem*. The exception to this would be applicable only when the non-compliance of the mandatory provisions of sections 42 and 50 of the NDPS Act is apparent on the face of the special report under section 57 of the NDPS Act and other documents of search and seizure, and in the opinion of the court, the lapse is non-rectifiable, after recording a finding that it is an incurable defect, the court might consider granting bail on such violations.

11. In State of H.P. v. Prithi Chand, (1996) 2 SCC 37, Hon'ble Supreme Court holds,

> [3]. The question is whether the learned Sessions Judge was justified, at the stage of taking cognizance of the offence, in discharging the accused, even before the trial was conducted on merits, on the ground that the provisions of Section 50 of the Act had not been complied with. This Court in State of Punjab v. Balbir Singh [(1994)3 SCC 299] : (AIR 1994 SCW 1802) has considered the provisions of the Act. Section 50 has been held to be mandatory. In paragraph 16, this Court has held that it is obligatory on the part of the empowered or the authorised officer to inform the suspect that, if so required, he would be produced before a Gazetted Officer or a Magistrate and search would be conducted in his presence. It was imperative on the part of the Officer to inform the person of the above right and if he failed to do the same, it amounted to violation of the requirement of Section 50 of the Act. It was held that when the person was searched he must have been aware of his right and that it could be done only if the authorised or empowered Officer informed him of the same. Accordingly, this Court by implication read the obligation on the part of authorised Officer to inform the person to be searched of his right to information that he could be searched in the presence of the Gazetted Officer or the Magistrate. In Saiyad Mohd. Saiyaad Umar Saiyed v. State of Gujarat [1995(3) JT SC 489] a three-Judge Bench of this Court had reiterated the above view and held that having regard to the grave consequences that might entail the possession of illicit articles under the Act, viz., the shifting of the onus to the accused and the severe punishment to which he became liable, the Legislature had enacted safeguards contained in Section 50. Compliance of the safeguards in Section 50 is mandatory obliging the Officer concerned to inform the person to be searched of his right to demand that search could be conducted in the presence of a Gazetted Officer or a Magistrate. The possession of illicit article has to be satisfactorily established before the Court. The Officer who conducts search must state in his evidence that he had informed the accused of his right to demand, while he is searched, in the presence of a Gazetted Officer or a Magistrate and that the accused had not chosen to so demand. If no evidence to that effect is given, the Court must presume that the person searched was not informed of the protection the law gives him and must find that possession of illicit articles was not established. The presumption under Article 114,

> illustration (e) of the Evidence Act, that the official duty was properly performed, therefore, does not apply. It is the duty of the Court to carefully scrutinise the evidence and satisfy that the accused had been informed by the concerned Officer that he had a right to be searched before a Gazetted Officer or a Magistrate and that the person had not chosen to so demand.
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> [4]. It is to be seen whether the accused has been afforded such a right and whether the authorised Officer has violated the mandatory requirement, as a question of fact, has to be proved at the trial. In Pooran Mal v. Director of Inspection [(1974) 1 SCC 345] : (AIR 1974 SC 348) a Constitution Bench of this Court had held that power of search and seizure, is, in any system of jurisprudence, an overriding power of the State for the protection of social security and that power is necessarily regulated by law. A search by itself is not a restriction on the right to hold and enjoy property, though seizure is a temporary restriction to the right of possession and enjoyment of the property seized. However, the seizure will be only temporary and limited for the purpose of the investigation. The power of search and seizure is an accepted norm is our criminal law envisaged in Sections 96 to 103 and 165 of the Criminal Procedure Code, 1973 [for short, "the Code"]. The Evidence Act permits relevancy as the only test of admissibility of evidence. The evidence obtained under an illegal search and seizure does not exclude relevant evidence on that ground. It is wrong to invoke the spirit of Constitution to exclude such evidence. The decisions of the American Supreme Court spelling out certain Constitutional protections in regard to search and seizure are not applicable to exclude the evidence obtained on an illegal search. Courts in India refuse to exclude relevant evidence merely on the ground that it is obtained by illegal search and seizure. When the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search and seizure, is not liable to be shut out. Search and seizure are not a new weapon in the armoury of those whose duty it is to maintain social security in its broadest sense. If the safeguards are generally on the lines adopted by the Code, they would be regarded as adequate and render the restrictions imposed as reasonable measures.
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> [7]. It would thus be settled law that every deviation from the details of the procedure prescribed for search, does not necessarily lead to the conclusion that search by the police renders the recovery of the articles pursuant to the illegal search, irrelevant evidence nor the discovery of the fact inadmissible at the trial. Weight to be attached to such evidence depends on facts and circumstances in each case. The Court is required to scan the evidence with care and to act upon it when it is proved and the Court would hold that the evidence would be relied upon.

12. The stand that the accused is in custody for sufficient time is also not a legal ground to overcome the rigors of S. 37 of the NDPS Act at this stage.

13. The grounds taken in the bail petition do not shift the burden placed by the legislature on the accused under S. 37 of the NDPS Act. The petitioner has not stated anything to discharge the burden put by the stringent conditions placed in the statute

by the legislature under section 37 of the NDPS Act. Thus, the petitioner has failed to make a case for bail at this stage.

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

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

(ANOOP CHITKARA)
JUDGE

28.09.2022
Jyoti-II

Whether speaking/reasoned: Yes
Whether reportable: No.