

Reserved On: 17.10.2024 vs State Of Himachal Pradesh on 25 October, 2024

2024:HHC:10291 IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA Cr. MP (M) No. 1164 of 2024 Reserved on: 17.10.2024 Date of Decision: 25.10.2024.

Ganesh Chand

Versus

...Peti

State of Himachal Pradesh

...Resp

Coram

Hon'ble Mr Justice Rakesh Kainthla, Judge. Whether approved for reporting?1 No. For the Petitioner : Mr. Sarthak Mehta, Advocate. For the Respondent : Mr. Ajit Sharma, Deputy Advocate General.

Rakesh Kainthla, Judge The petitioner has filed the present petition for seeking regular bail. It has been asserted that the petitioner was arrested vide FIR No.57 of 2023 dated 05.11.2023 registered for the commission of offences punishable under Sections 22, 25 & 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act') at Police Station Nerwa, District Shimla, H.P. The petitioner has nothing to do with the commission of crime. He is a permanent resident of Tehsil Chopal, District Shimla, H.P. As per Whether reporters of Local Papers may be allowed to see the judgment? Yes.

the prosecution, the recovery was made from the car owned by the co-accused. The report of the SFSL Junga shows that the contraband had codeine in it. The allegations against the petitioner are false. The police had not arrested the petitioner on the spot, which casts doubt regarding the prosecution case. The report does not mention the test conducted in the laboratory to determine the Codeine Phosphate in the contraband. The police have filed the challan and no recovery is to be effected from the petitioner. No useful purpose would be served by detaining the petitioner in custody. The petitioner would abide by all the terms and conditions, which the Court may impose. Hence, the present petition.

2. The petition is opposed by filing a status report asserting that the police were checking the vehicles at Jhadmajri check post on 5.11.2023. A car bearing registration No. HP08A-3201 (Alto) came at about 9:20 p.m. from Fadesepul. The police signalled the driver to stop the vehicle. The driver revealed his name as Ramesh Chand and the person sitting on the side of the driver revealed his name as Ganesh Chand (present petitioner). A completely filled plastic bottle and one-half half-filled transparent plastic bottle were found in the vehicle. The driver and the petitioner could not give any satisfactory answer about the contents of the bottles. The police seized the bottles, documents and the vehicle. The bottles were sent to the SFSL, Junga, District Shimla, H.P. The suspicious liquid was found to be Codeine syrup weighing 1.283 kg. The police arrested the petitioner and Ramesh Chand on 08.12.2023. The police filed the challan, which was listed on

17.06.2024 for proper order. Ganesh Chand had filed a petition before the Court, which was withdrawn. The petitioner would indulge in the commission of a similar offence in case of release on bail. Hence, it was prayed that the present petition be dismissed.

3. I have heard Mr. Sarthak Mehta, learned counsel for the petitioner and Mr. Ajit Sharma, learned Deputy Advocate General for the respondent/State.

4. Mr. Sarthak Metha, learned counsel for the petitioner submitted that the petitioner is innocent and he was falsely implicated. The report of the chemical analysis does not mention the quantity of codeine phosphate in the syrup. The question whether the codeine phosphate was within the definition of a manufactured drug is pending adjudication before the Hon'ble Larger Bench; therefore, he prayed that the present petition be allowed and the petitioner be released on bail. He further submitted that there is a delay in the progress of the trial and the petitioner is entitled to bail on this ground as well. He relied upon the judgments of Hon'ble Supreme Court in Union of India vs Ashok Kumar, Criminal Appeal No(s) 115 of 2018; Bharat Chaudhary vs Union of India along with connected matter in Criminal Appeal No. 5703 of 2021 decided on 13.12.2021 and Javed Gulab Nabi Shaikh vs State of Maharashtra and another, Crl.A.2787/2024 dated 3rd July 2024 and judgments of this Court in Kesar Singh vs State of H.P. along with connected matter 2024:HHC 943; Bablu vs State of H.P. 2024:

HHC:1714 and Chirag vs State of H.P. along with connected matter, 2024:HHC: 8534 in support of his submission.

6. Mr. Ajit Sharma, learned Deputy Advocate General submitted that the petitioner was occupying the vehicle from which 1.283 kg of codeine syrup was recovered. It is commercial quantity and rigours of Section 37 of the NDPS Act apply to the present case. The petitioner cannot claim the bail without satisfying the rigours of Section 37 of the NDPS Act. The trial is progressing normally and there is no delay in the progress of the trial. Hence, he prayed that the present petition be dismissed.

7. I have given considerable thought to the submissions made at the bar and have gone through the records carefully.

8. The parameters for granting bail were considered by the Hon'ble Supreme Court in Manik Madhukar Sarve v. Vitthal Damuji Meher, 2024 SCC OnLine SC 2271, wherein it was observed as under: -

"19. Courts while granting bail are required to consider relevant factors such as the nature of the accusation, the role ascribed to the accused concerned, possibilities/chances of tampering with the evidence and/or witnesses, antecedents, flight risk et al. Speaking through Hima Kohli, J., the present coram in Ajwar v. Waseem, 2024 SCC OnLine SC 974, apropos relevant parameters for granting bail, observed: "26. While considering as to whether bail ought to be granted in a matter involving a serious criminal offence, the Court must consider relevant factors like the

nature of the accusations made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, the role attributed to the accused, the criminal antecedents of the accused, the probability of tampering of the witnesses and repeating the offence, if the accused are released on bail, the likelihood of the accused being unavailable in the event bail is granted, the possibility of obstructing the proceedings and evading the courts of justice and the overall desirability of releasing the accused on bail. (Refer: Chaman Lal v. State of U.P. (2004) 7 SCC 525; Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav (supra) (2004) 7 SCC 528; Masroor v. State of Uttar Pradesh (2009) 14 SCC 286; Prasanta Kumar Sarkar v. Ashis Chatterjee (2010) 14 SCC 496; Neeru Yadav v. State of Uttar Pradesh (2014) 16 SCC 508; Anil Kumar Yadav v. State (NCT of Delhi) (2018) 12 SCC 129; Mahipal v. Rajesh Kumar @ Polia (supra) (2020) 2 SCC 118.

27. It is equally well settled that bail once granted, ought not to be cancelled in a mechanical manner. However, an unreasoned or perverse order of bail is always open to interference by the Superior Court. If there are serious allegations against the accused, even if he has not misused the bail granted to him, such an order can be cancelled by the same Court that has granted the bail. Bail can also be revoked by a Superior Court if it transpires that the courts below have ignored the relevant material available on record or not looked into the gravity of the offence or the impact on the society resulting in such an order. In P v. State of Madhya Pradesh (supra) (2022) 15 SCR 211 decided by a three- judge bench of this Court [authored by one of us (Hima Kohli, J)] has spelt out the considerations that must be weighed with the Court for interfering in an order granting bail to an accused under Section 439(1) of the CrPC in the following words:

"24. As can be discerned from the above decisions, for cancelling bail once granted, the court must consider whether any supervening circumstances have arisen or the conduct of the accused post grant of bail demonstrates that it is no longer conducive to a fair trial to permit him to retain his freedom by enjoying the concession of bail during trial [Dolat Ram v. State of Haryana, (1995) 1 SCC 349: 1995 SCC (Cri) 237]. To put it differently, in ordinary circumstances, this Court would be loathe to interfere with an order passed by the court below granting bail but if such an order is found to be illegal or perverse or premised on material that is irrelevant, then such an order is susceptible to scrutiny and interference by the appellate court." (emphasis supplied)

20. In State of Haryana v. Dharamraj, 2023 SCC OnLine SC 1085, speaking through one of us (Ahsanuddin Amanullah, J.), the Court, while setting aside an order of the Punjab and Haryana High Court granting (anticipatory) bail, discussed and reasoned:

"7. A foray, albeit brief, into relevant precedents is warranted. This Court considered the factors to guide the grant of bail in Ram Govind Upadhyay v. Sudarshan Singh,

(2002) 3 SCC 598 and Kalyan Chandra Sarkar v. Rajesh Ranjan, (2004) 7 SCC 528. In Prasanta Kumar Sarkar v. Ashis Chatterjee, (2010) 14 SCC 496, the relevant principles were restated thus: '9. ... It is trite that 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 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 that the accused had committed the offence;
- (ii) nature and gravity of the accusation;
- (iii) severity of the punishment in the event of conviction;
- (iv) danger of the accused absconding or fleeing, if released on bail;
- (v) character, behaviour, means, position and standing of the accused;
- (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.'

8. In Mahipal v. Rajesh Kumar alias Polia, (2020) 2 SCC 118, this Court opined as under:

'16. The considerations that guide the power of an appellate court in assessing the correctness of an order granting bail stand on a different footing from an assessment of an application for the cancellation of bail. The correctness of an order granting bail is tested on the anvil of whether there was an improper or arbitrary exercise of discretion in the grant of bail. The test is whether the order granting bail is perverse, illegal or unjustified. On the other hand, an application for cancellation of bail is generally examined on the anvil of the existence of supervening circumstances or violations of the conditions of bail by a person to whom bail has been granted. ...'

9. In Bhagwan Singh v. Dilip Kumar @ Deepu @ Depak, 2023 INSC 761, this Court, in view of Dolat Ram v. State of Haryana, (1995) 1 SCC 349; Kashmira Singh v. Duman Singh, (1996) 4 SCC 693 and X v. State of Telangana, (2018) 16 SCC 511, held as follows:

'13. It is also required to be borne in mind that when a prayer is made for the cancellation of the grant of bail cogent and overwhelming circumstances must be present and bail once granted cannot be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it in conducting to allow fair trial. This proposition draws support from the Judgment of this Court in Daulat Ram v. State of Haryana, (1995) 1 SCC 349, Kashmira Singh v. Duman Singh (1996) 4 SCC 693 and XXX v. State of Telangana (2018) 16 SCC 511.'

10. In XXX v. Union Territory of Andaman & Nicobar Islands, 2023 INSC 767, this Court noted that the principles in Prasanta Kumar Sarkar (supra) stood reiterated in Jagjeet Singh v. Ashish Mishra, (2022) 9 SCC 321.

11. The contours of anticipatory bail have been elaborately dealt with by 5-Judge Benches in Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 and Sushila Aggarwal v. State (NCT of Delhi), (2020) 5 SCC 1. Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694 is worthy of mention in this context, despite its partial overruling in Sushila Aggarwal (supra). We are cognizant that liberty is not to be interfered with easily. More so, when an order of pre-arrest bail already stands granted by the High Court.

12. Yet, much like bail, the grant of anticipatory bail is to be exercised with judicial discretion. The factors illustrated by this Court through its pronouncements are illustrative, and not exhaustive. Undoubtedly, the fate of each case turns on its own facts and merits." (emphasis supplied)

21. In Ajwar (supra), this Court also examined the considerations for setting aside bail orders in terms below: "28. The considerations that weigh with the appellate Court for setting aside the bail order on an application being moved by the aggrieved party include any supervening circumstances that may have occurred after granting relief to the accused, the conduct of the accused while on bail, any attempt on the part of the accused to procrastinate, resulting in delaying the trial, any instance of threats being extended to the witnesses while on bail, any attempt on the part of the accused to tamper with the evidence in any manner. We may add that this list is only illustrative and not exhaustive.

However, the court must be cautious that at the stage of granting bail, only a prima facie case needs to be examined and detailed reasons relating to the merits of the case that may cause prejudice to the accused, ought to be avoided. Suffice it to state that the bail order should reveal the factors that have been considered by the Court for granting relief to the accused.

29. In Jagjeet Singh (supra) (2022) 9 SCC 321, a three- judge bench of this Court, has observed that the power to grant bail under Section 439 Cr. P.C. is of wide amplitude and the High Court or a Sessions Court, as the case may be, is bestowed with considerable discretion while deciding an application for bail. But this discretion is not unfettered. The order passed must reflect the due

application of the judicial mind following well-established principles of law. In the ordinary course, courts would be slow to interfere with the order where bail has been granted by the courts below. But if it is found that such an order is illegal or perverse or based upon utterly irrelevant material, the appellate Court would be well within its power to set aside and cancel the bail. (Also refer: *Puran v. Ram Bilas* (2001) 6 SCC 338; *Narendra K. Amin (Dr.) v. State of Gujarat* (2008) 13 SCC

584)" (emphasis supplied)

9. The present petition has to be decided as per the parameters laid down by the Hon'ble Supreme Court.

10. As per the status report the petitioner was found present in the vehicle from which 1.283 kg of Codeine Syrup was recovered. In *Madan Lal versus State of H.P.* (2003) 7 SCC 465: 2003 SCC (Cri) 1664: 2003 SCC OnLineSC 874, the contraband was recovered from a vehicle and it was held that all the occupants of the vehicle would be in conscious possession of the contraband. It was observed:

"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.

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 conscious possession.

21. It is highlighted that unless the possession was coupled with the requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

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" uniformly applicable to all situations in the context of all statutes.

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

24. As noted in *Gunwantlal v. State of M.P.* [(1972) 2 SCC 194:

1972 SCC (Cri) 678: AIR 1972 SC 1756] possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given holds it subject to that power or control.

25. The word "possession" means the legal right to possession (see *Heath v. Drown* [(1972) 2 All ER 561: 1973 AC 498 : (1972) 2 WLR 1306 (HL)]). In an interesting case it was observed that where a person keeps his firearm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See *Sullivan v. Earl of Caithness* [(1976) 1 All ER 844: 1976 QB 966 : (1976) 2 WLR 361 (QBD)] .)

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.

27. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act."

11. It was laid down by the Hon'ble Supreme Court in *Union of India v. Mohd. Nawaz Khan*, (2021) 10 SCC 100: (2021) 3 SCC (Cri) 721: 2021 SCC OnLine SC 1237 that a person is in possession if he is in a position to exercise control over the article. It was observed on page 111:

"25. 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, 27-A, 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 v. State of H.P.* [*Madan Lal v. State of H.P.*, (2003) 7 SCC 465: 2003 SCC (Cri) 1664] this Court held that: (SCC p. 472, paras 19-23 & 26) "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.

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

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 Supt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja [Supt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja, (1979) 4 SCC 274: 1979 SCC (Cri) 1038] to work out a completely logical and precise definition of "possession" uniform[ly] applicable to all situations in the context of all statutes.

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

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."

26. What amounts to "conscious possession" was also considered in Dharampal Singh v. State of Punjab [Dharampal Singh v. State of Punjab, (2010) 9 SCC 608 : (2010) 3 SCC (Cri) 1431], 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 the 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 [Mohan Lal v. State of Rajasthan, (2015) 6 SCC 222: (2015) 3 SCC (Cri) 881], 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."

12. It was submitted that this Court has referred the question whether codeine phosphate falls within the definition of manufactured drugs to the Larger Bench and the Larger Bench has given liberty to the persons to approach the Court for a grant of bail. This submission will not assist the petitioner. It was held in Union Territory of Ladakh v. Jammu & Kashmir National Conference, 2023 SCC OnLine SC 1140 that mere reference to a Larger Bench does not unsettle the declared law. The High Courts and the Tribunals should not stay their hands merely because a reference was

made to a Larger Bench. It was observed:

"32.[I]t is settled that mere reference to a larger Bench does not unsettle declared law. In Harbhajan Singh v. State of Punjab, (2009) 13 SCC 608, a 2-judge Bench said:

"15. Even if what is contended by the learned counsel is correct, it is not for us to go into the said question at this stage; herein cross-examination of the witnesses had taken place. The Court had taken into consideration the materials available to it for the purpose of arriving at a satisfaction that a case for exercise of jurisdiction under Section 319 of the Code was made out. Only because of the correctness of a portion of the judgment in Mohd. Shafi [(2007) 14 SCC 544: (2009) 1 SCC (Cri) 889: (2007) 4 SCR 1023: (2007) 5 Scale 611] has been doubted by another Bench, the same would not mean that we should wait for the decision of the larger Bench, particularly when the same instead of assisting the appellants runs counter to their contention." (emphasis supplied)

33. In Ashok Sadarangani v. Union of India, (2012) 11 SCC 321, another 2-Judge Bench indicated:

"29. As was indicated in the Harbhajan Singh case [Harbhajan Singh v. State of Punjab, (2009) 13 SCC 608: (2010) 1 SCC (Cri) 1135], the pendency of a reference to a larger Bench, does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. The reference made in Gian Singh's case [(2010) 15 SCC 118] need not, therefore, detain us. Till such time as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field." (emphasis supplied)

34. On the other hand, when it was thought proper that other Benches of this Court, the High Courts and the Courts/Tribunals below stay their hands, the same was indicated in as many words, as was the case in State of Haryana v. G D Goenka Tourism Corporation Limited, (2018) 3 SCC 585:

"9. Taking all this into consideration, we are of the opinion that it would be appropriate if in the interim and pending a final decision on making a reference (if at all) to a larger Bench, the High Courts be requested not to deal with any cases relating to the interpretation of or concerning Section 24 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. The Secretary-General will urgently communicate this order to the Registrar General of every High Court so that our request is complied with.

10. Insofar as the cases pending in this Court are concerned, we request the Benches concerned dealing with similar matters to defer the hearing until a decision is rendered one way or the other on the issue whether the matter should be referred to a larger Bench or not. Apart from anything else, deferring the consideration would

avoid inconvenience to the litigating parties, whether it is the State or individuals."

(emphasis supplied)

35. We are seeing before us judgments and orders by High Courts not deciding cases on the ground that the leading judgment of this Court on this subject is either referred to a larger Bench or a review petition relating thereto is pending. We have also come across examples of High Courts refusing deference to judgments of this Court on the score that a later Coordinate Bench has doubted its correctness. In this regard, we lay down the position in law. We make it absolutely clear that the High Courts will proceed to decide matters on the basis of the law as it stands. It is not open unless specifically directed by this Court, to await an outcome of a reference or a review petition, as the case may be. It is also not open to a High Court to refuse to follow a judgment by stating that it has been doubted by a later Coordinate Bench. In any case, when faced with conflicting judgments by Benches of equal strength of this Court, it is the earlier one which is to be followed by the High Courts, as held by a 5-Judge Bench in *National Insurance Company Limited v. Pranay Sethi*, (2017) 16 SCC 680. The High Courts, of course, will do so with careful regard to the facts and circumstances of the case before it." (Emphasis supplied)

13. Thus, mere a reference to the Larger Bench will not entitle the petitioner to bail. The court has to be guided by the earliest judgment holding the field.

14. The earliest judgment dealing with the question whether codeine phosphate falls within the definition of a manufactured drug or not is *Praduman Justa Vs. State of H.P.* (2016) Cr.LJ 3639 wherein this Court after the exhaustive analysis of the various sections of the NDPS Act, concluded that codeine phosphate falls within the definition of a manufactured drug.

Hence, pending a decision by the Larger Bench, this Court has to follow the judgment of *Praduman Justa* (supra) and hold that the codeine phosphate falls within the definition of a manufactured drug.

15. Once it is so held, the rigours of Section 37 of the ND&PS Act will apply to the present case and the Court would be unable to grant bail to the petitioner without holding that the petitioner had complied with the requirements of Section 37 of the NDPS Act.

16. Section 37 of the NDPS Act provides that in an offence involving commercial quantity, the court should be satisfied that the accused is not guilty of the commission of an offence and is not likely to commit any offence while on bail. Section 37 of the NDPS Act reads as under:

"37. Offences are 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 section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or 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 an 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."

17. This section was interpreted by the Hon'ble Supreme Court in Union of India Versus Niyazuddin & Another (2018) 13 SCC 738 and it was held that in the absence of the satisfaction that the accused is not guilty of an offence and he is not likely to commit an offence while on bail, he cannot be released on bail. It was observed:

"7. Section 37 of the NDPS Act contains special provisions with regard to the grant of bail in respect of certain offences enumerated under the said Section. They are :

(1) In the case of a person accused of an offence punishable under Section 19, (2) Under Section 24, (3) Under Section 27A and (4) Of offences involving commercial quantity.

8. The accusation in the present case is with regard to the fourth factor namely, commercial quantity. Be that as it may, once the Public Prosecutor opposes the application for bail to a person accused of the enumerated offences under Section 37 of the NDPS Act, in case, the court proposes to grant bail to such a person, two conditions are to be mandatorily satisfied in addition to the normal requirements under the provisions of the Cr.P.C. or any other enactment. (1) The court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence;

(2) that person is not likely to commit any offence while on bail."

18. This position was reiterated in State of Kerala Versus Rajesh AIR 2020 SC 721 wherein it was held:

"19. This Court has laid down broad parameters to be followed while considering the application for bail moved by the accused involved in offences under the NDPS Act. In Union of India vs. Ram Samujh and Ors., (1999) 9 SCC 429, it has been elaborated as under:-

"7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the

accused commits the murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. The reason may be the large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in *Durand Didier vs. Chief Secy., Union Territory of Goa*, (1990) 1 SCC 95) as under:

24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing Act 81 of 1985 specifying mandatory minimum imprisonment and fine.

8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

(i) there are reasonable grounds for believing that the accused is not guilty of such offence;

and

(ii) that he is not likely to commit any offence while on bail are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent accused on bail.

Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended."

20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC but is also subject to the limitation placed by Section 37 which commences with the non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of

an offence under the Act unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application, and the second is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such an offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

21. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires the existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for."

19. A similar view was taken in *Union of India v. Mohd.*

Nawaz Khan, (2021) 10 SCC 100: (2021) 3 SCC (Cri) 721: 2021 SCC OnLine SC 1237 wherein it was observed at page 110:

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

(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 to commit any offence while on bail.

22. 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* [*Union of India v. Shiv Shanker Kesari*, (2007) 7 SCC 798 : (2007) 3 SCC (Cri) 505], held that : (SCC pp. 801-02, paras 7-8 & 10-11) "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 contemplated in turn points to the existence of such facts and circumstances as are sufficient in themselves to justify the recording of satisfaction that the accused is not guilty of the offence charged.

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".

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

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. [Municipal Corpn. of Greater Mumbai v. Kamla Mills Ltd. (2003) 6 SCC 315]

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."

(emphasis supplied)

23. 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."

20 It was held in Union of India v. Ajay Kumar Singh, 2023 SCC OnLine SC 346 that the bail cannot be granted without complying with the requirement of Section 37 of the NDPS Act. It was observed:

4. This apart, it is noticed that the High Court, in passing the impugned order of bail, had lost sight of Section 37 of the NDPS Act, which, inter alia, provides that no person accused of an offence involving commercial quantity shall be released on bail unless the twin conditions laid down therein are satisfied, namely, (i) the public prosecutor has been given an opportunity to oppose the bail application; and (ii) the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any such offence while on bail.

15. For the sake of convenience Section 37(1) is reproduced hereinbelow:--

"37. Offences to be cognizable and nonbailable.- (1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for 2[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."

16. In view of the above provisions, it is implicit that no person accused of an offence involving trade in a commercial quantity of narcotics is liable to be released on bail unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any offence while on bail.

21. It was held in *State of Meghalaya v. Lalrintluanga Sailo*, 2024 SCC OnLine SC 1751 that the grant of bail without considering Section 37 of the NDPS Act is impermissible. It was observed:

"5. There cannot be any doubt with respect to the position that in cases involving the commercial quantity of narcotic drugs or psychotropic substances while considering the application of bail, the Court is bound to ensure the satisfaction of conditions under Section 37(1)(b)(ii) of the NDPS Act. The said provision reads thus:--

"37(1)(b)(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."

6. While considering the cases under the NDPS Act, one cannot be oblivious of the objects and reasons for bringing the said enactment after repealing the then existing laws relating to Narcotic drugs. The object and reasons given in the acts itself reads thus:--

"An act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances and for matters connected therewith."

In the decision in *Collector of Customs, New Delhi v. Ahmadaliev Nodira* (2004) 3 SCC 549, the three-judge bench of this Court considered the provisions under Section 37(1)(b) as also 37(1)(b)(ii) of the NDPS Act, with regard to the expression "reasonable grounds" used therein. This Court held

that it means something more than the prima facie grounds and that it contemplates substantial and probable causes for believing that the accused is not guilty of the alleged offence. Furthermore, it was held that the reasonable belief contemplated in the provision would require the existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. As relates to the twin conditions under Section 37(1)(b)(ii) of the NDPS Act, viz., that, firstly, there are reasonable grounds for believing that the accused is not guilty of such offence and, secondly, he is not likely to commit any offence while on bail it was held therein that they are cumulative and not alternative. Satisfaction of the existence of those twin conditions had to be based on the 'reasonable grounds', as referred to above.

7. In the decision in *State of Kerala v. Rajesh* (2020) 12 SCC 122, after reiterating the broad parameters laid down by this Court to be followed while considering an application for bail moved by an accused involved in offences under the NDPS Act, in paragraph 18 thereof this Court held that the scheme of Section 37 of the NDPS Act would reveal that the exercise of power to grant bail in such cases is not only subject to the limitations contained under Section 439 of the Code of Criminal Procedure, but also subject to the limitation placed by Section 37(1)(b)(ii), NDPS Act. Further, it was held that in case one of the two conditions thereunder is not satisfied the ban for granting bail would operate.

8. Thus, the provisions under Section 37(1)(b)(ii) of the NDPS Act and the decisions referred supra revealing the consistent view of this Court that while considering the application for bail made by an accused involved in an offence under NDPS Act a liberal approach ignoring the mandate under Section 37 of the NDPS Act is impermissible. Recording a finding mandated under Section 37 of the NDPS Act, which is sine qua non for granting bail to an accused under the NDPS Act cannot be avoided while passing orders on such applications."

22. In the present case, the petitioner was found in possession of 1.283 kg of syrup containing codeine phosphate.

Hence, the rigours of Section 37 of the NDPS Act apply to the present case. There are no reasonable grounds to believe that the petitioner has not committed the offence or that he would not commit the offence in case of his release on bail. Thus, he has not satisfied the twin conditions of the NDPS Act and he cannot be held entitled to the concession of bail.

23. It was submitted that the report of the analysis is silent regarding the quantity of the codeine phosphate and the petitioner is entitled to bail. Reliance was placed upon the judgment of *Kesar Singh* (supra) and *Bablu* (supra). Both these judgments have been referred to the Hon'ble Larger Bench and therefore, the Court has to consider the earliest judgment of this Court in *Praduman Justa v.*

State of H.P., 2016 SCC OnLine HP 1058.

24. It was held in *Praduman Justa* (supra) that the quantity shown in column 5 will apply to the whole mixture or solution and not to the pure drug in dosage form etc. It was held:

"21. Thus, the effect of the notification dated 19.10.2001 was that the quantity shown in column No. 5 that relates to 'small quantity, and column No. 6 that relates to 'commercial quantity' of the table relating to respective drugs shown in column No. 2 that relates to the name of narcotic drug and psychotropic substance, is to apply to the entire mixture or any solution or any one or more of narcotic drugs or psychotropic substances of that particular drug in dosage form etc. wherever existence of such substance is possible and not just its pure drug content. This was so held by me in Om Pal's case (supra) and the relevant observations read as under:

"14. The sum and substance of the arguments raised by learned counsel for the petitioner is that in case of seizure of narcotic substance, the Court is to rely upon the report of the Chemical Examiner in order to find out the pure drug content per dosage and if it is found to be below the exempted limit, i.e. less than commercial quantity, then the petitioner is entitled to statutory bail under Section 167(2) Cr.P.C. and since the prosecution had failed to file the final report within the statutory period of 90 days.

15. Learned Advocate General on the other hand contended that once the petitioner admits the applicability of Section 21, then in so far as the Narcotic Drugs and Psychotropic Substance is concerned, it is not pure drug content which will have to be seen but it would be the entire weight of the drugs recovered which will have to be taken into consideration for calculating its quantity in view of the notification No. S.O. 294 (E) dated 18.11.2009.

16. Notification No. S.O. 1055 (E) dated 19.10.2001 was issued in terms of clauses (vii-a) and xxiii-a) of Section 2 of the Act, whereby and wherein the small quantity and commercial quantity of each of the substance had been stipulated as follows:

"Small quantity", in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette."

"Commercial quantity", in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette."

The said notification did not introduce a new psychotropic substance other than those mentioned in the schedule of the Act. Since the intention of the notification appears to be only to prescribe small and commercial quantities of psychotropic substances by maintaining its statutory definition. However, by notification No. S.O. 294 (E) dated 18.11.2009, the amendment was brought in the notification dated 19.10.2001 and in the table at the end after Note 3, the following Note was added:

"(4). The quantities shown in columns 5 and 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one

or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."

17. Thus, what is established from the perusal of the notification of 2009 is that the pure content test to ascertain the exact quantity of narcotic drugs and psychotropic substances or manufactured drugs is not required nor can it be used for any advantage, especially by the accused. Because now the whole contraband seized is required to be considered and not the quantity of drug or contraband reflected in the report of the Chemical Analyst.

18. In so far as the reliance placed by learned counsel for the petitioner on the judgment of the Full Bench in *State of H.P. v. Mehboon Khan*, decided on 24.9.2013 is concerned, the same cannot be read and interpreted in a manner as is sought by the petitioner. In fact, the reference to the Larger Bench was only to consider the correctness of the Division Bench Judgment which had held that it was the percentage of tetrahydrocannabinol (THC) which alone would determine the quantity of resin and not the entire stuff. In this background, the question has been answered and a reference to the judgment in *E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau* (2008) 5 SCC 161 has been made. The question of applicability of the amendment carried out in the notification No. S.O. 294 (E) dated 18.11.2009 was neither raised nor its applicability considered. Thus, no reliance whatsoever can be made upon reading a stray paragraph of the judgment.

20. It cannot be disputed that prior to the issuance of the notification, there was a controversy regarding what would constitute small, intermediate or commercial quantity which was set at rest by the Hon'ble Supreme Court in the *E. Micheal Raj* case (*supra*). The Hon'ble Supreme Court after analyzing the provisions of the Act and also the relevant entries made in the notification dated 19.10.2001 had held that "when any narcotic drugs or psychotropic substance is found mixed with one or more neutral substance for the purpose of imposition of punishment, it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration."

21. Probably it was this view of the Hon'ble Supreme Court which resulted in the issuance of notification dated 18.11.2009. Though, this Court is not going into the constitutional validity of this notification since it has not been raised, however, suffice it to say that it cannot be denied that the Central Government had the legislative mandate to issue such a notification as it has been given the power to specify by a notification in the Official Gazette the quantity representing the small quantity or commercial quantity in relation to each narcotic drugs and psychotropic substance.

22. The constitutional validity of the notification as observed earlier is not in question before this Court. However, to straighten the record, it may be observed that the same has already been upheld by the Delhi High Court in *Abdul Mateen v. Union of India*, WP (Crl.) 1552 of 2010 decided on 6.11.2012.

23. As observed above, while determining whether the quantity is small or commercial, the weight of the entire bulk contraband has to be taken into consideration and the pure content test cannot be

applied.

28. Since the petitioner admittedly has been found to be in possession of 229 vials of Rexcof (cough syrup) of 100 ml quantity and the entire quantity is now required to be taken into consideration to determine the quantity i.e. small, intermediate or commercial, therefore, the case of the petitioner admittedly does not fall within the purview of Section 167(2) of the Code and is covered by Section 36A(4) of the Act. Therefore, the present petition being premature is accordingly dismissed."

22. Thus, it is clear that 'manufactured drugs' of which there has been a contravention in the instant case is possessed without proper licence or authorization and in case the drugs which are carried in bulk form, the notification dated 18.11.2009 would apply and the question that these drugs contain an exception would not be applicable as the exceptions would only apply when the drugs are for medicinal or therapeutic use. Besides this, the quantity of manufactured drugs is not to be determined by the pure drug content, but the entire quantity is required to be taken into consideration to determine the quantity i.e. small, intermediate or commercial.

23. Therefore, the question of exceptions being provided in respect of drugs at serial No. 35 of the notification dated 14.11.1985 is inconsequential when these drugs are being carried in a bulk form because then the entire quantity of the bulk is to be taken into consideration and not the pure drug content as canvassed by the petitioner particularly when these are sold, purchased, distributed, stored, transported, carried etc. without a valid licence or kept without a valid authorization.

25. It was further held that the assessment of codeine content on a dosage basis will apply when the cough syrup is kept or transported for curing the disease. It was observed: -

"31. It would be noticed that the contention of the petitioner before the Hon'ble Supreme Court that the content of codeine phosphate in each 100 ml bottle if related to the permissible dosage, namely, 5 ml would only result in less than 10 mg of codeine phosphate thereby would fall within the permissible limit as stipulated in the notifications dated 14.11.1985 and 29.1.1993 was negated by observing that the said contention should have satisfied the twin conditions, namely that the contents of the narcotic substance should not be more than 100 mg of codeine, per dose unit and with a concentration of not more than 2.5% in undivided preparation apart from the other condition, namely, that it should be only for therapeutic practice which means for contributing to cure of disease. It was made absolutely clear that the assessment of codeine content on a dosage basis can be made only when the cough syrup is definitely kept or transported which is exclusively meant for curing a disease and as an action of remedial agent."

26. In the present case, the cough syrup was being transported in two plastic bottles and there is no evidence that it was being transported for therapeutic purposes, therefore, as per the judgment of Praduman Justa (supra) the quantity of pure drug would be irrelevant to the present case and no advantage can be derived from the fact that the quantity of the drug has not been mentioned in the report of the analysis.

27. Reliance was placed upon the judgment of the Hon'ble Supreme Court in Bharat Chaudhary (supra), in which it was found that when the quantitative analysis of the sample could not be carried out, the accused was entitled to bail. In the present case, the analysis was carried out and the report was issued and no advantage can be derived from the judgment cited on behalf of the petitioner.

28. It was submitted that the petitioner is entitled to interim bail as per the orders passed by the Coordinate Bench. This submission cannot be accepted. It was laid down by the Hon'ble Supreme Court in Mukesh Kishanpuria versus State of West Bengal, 2010 (15) SCC 154, that the power to grant regular bail includes the power to grant interim bail pending final disposal of the regular bail petition. Such a power is inherent in the power to grant bail. It was observed:

"3. However, the petitioner may apply for regular bail before the Court concerned and along with the said application, he may file an application for interim bail pending disposal of the regular bail application. We have made it clear on a number of occasions that the power to grant regular bail includes the power to grant interim bail pending the final disposal of the regular bail application. This power is inherent in the power to grant bail, particularly in view of Article 21 of the Constitution of India. We are of the opinion that in view of Article 21 of the Constitution, a person should not be compelled to go to jail if he can establish prima facie that in the facts of the case he is innocent."

(Emphasis supplied)

29. Therefore, interim bail can be sought in cases, where the Court has the power to grant regular bail and interim bail is granted to ensure that the petitioner is not sent to custody till the decision of the main case. In the present case, the rigours of Section 37 of the NDPS Act apply to the present case which has not been satisfied; hence, the petitioner is not entitled to regular bail and to interim bail as well.

30. It was submitted that there is a delay in the progress of the trial and the petitioner is entitled to bail on this ground alone.

Reliance was placed upon the judgment of the Hon'ble Supreme Court in Javed Gulam Nabi Shaikh (supra). In the present case, the petitioner was arrested on 8.12.2023. As per the status report, the charge sheet was filed before the Court on 27.01.2024. Only nine (9) months have elapsed since the filing of the charge sheet and there is no undue delay in the progress of the Trial. The copies of the order sheets were not filed to show that delay is on the part of the prosecution or the Court and not the petitioner, therefore, no advantage can be derived from the judgment cited on behalf of the petitioner.

31. No other point was urged.

32. In view of the above, the present petition fails and the same is dismissed.

33. The observation made herein before shall remain confined to the disposal of the instant petition and will have no bearing, whatsoever, on the merits of the case.

(Rakesh Kainthla) Judge 25th October, 2024 (ravinder)