

Satinder Kumar vs State Of Himachal Pradesh on 4 August, 2020

Author: Anoop Chitkara

Bench: Anoop Chitkara

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA Cr.MP(M) No. 391 of 2020 Reserved
on: 21.07.2020 .

Date of Decision: 04.08.2020

Satinder Kumar

...Petitioner.

Versus

State of Himachal Pradesh

...Respondent.

Coram:

The Hon'ble Mr. Justice Anoop Chitkara, Judge.

Whether approved for reporting?1 YES.

For the petitioner: Mr. Naresh Kumar Tomar Advocate.

For the respondent: Mr. Nand Lal Thakur Additional Advocate General.

Amicus Curiae: Mr. Lovneesh Kanwar Advocate.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE Anoop Chitkara, Judge.

An under-trial prisoner, in custody for being part of the chain for selling, and transporting 3.934 kilograms of charas (Cannabis), since Aug 2, 2019, has come up before this Court under Section 439 of the Code of Criminal Procedure, 1973 (CrPC), seeking bail, under Section 20 of Narcotics Drugs

and Psychotropic Substances Act, 1985 (NDPS Act).

2. The police arrested the petitioner, in FIR No. 03 of 2019, dated 12.07.2019, registered under Sections 20, 29 of the NDPS Act, and S. 177 of Motor Vehicle Act, in Police Station SV & ACB Mandi, District Mandi, Himachal Pradesh, disclosing cognizable and non-bailable offenses.

3. The co-accused Ram Lal (A-1) had filed a bail petition before this Court. Vide order dated 5-12-2019, passed in CrMPM 2060 of 2019, a co-ordinate bench of this Court dismissed it having been withdrawn. The petitioner had also filed a similar petition, CrMPM No. 190 of 2020, which met the similar fate.

Whether reporters of Local Papers may be allowed to see the judgment?

4. I have read the status report(s) and heard counsel for the parties as well as Ld. Amicus Curiae.

FACTS:

5. The gist of the Prosecution's case is that on 12 th July 2019, the Inspector of Police received secret information about transportation of charas through a Motorcycle. After that, the Investigator complied with the procedural requirements of the NDPS Act and associated independent witnesses. The Police set up a trap on the route of the bike and spotted it. The pillion rider had a bag on his lap, and he tried to throw it, but the Police were able to grab it. After that, both the riders of the bike scuffled with the Police party. On inquiry, the motorcycle driver revealed his name as Narain Dass (A-3), and the pillion rider as Hem Raj (A-2). The search of the bag led to the recovery of 3.934-kilo grams of charas. On interrogation, the Police came to know about the involvement of its seller Ram Lal alias Raju (A-1). In the meantime, when the accused were scuffling with the Police, passersby made a video recording of the incident, which became viral on social media.

One Manish saw such video and informed the Police that the accused persons had also transported particular articles, including the bag containing charas, in his taxi. He recognized the accused as the persons. On this, the Police produced Manish before Ld. Judicial Magistrate, where he made a statement under S. 164 CrPC, implicating the accused. The Police traced calls on 9th July 2019, between the accused Ram Lal (A-1) and the bail petitioner Satinder, and arraigned him as an accused with the aid of S. 29 of NDPS Act.

PREVIOUS CRIMINAL HISTORY

6. The counsel for the petitioner states that the accused has no criminal history, except one similar case, where he was acquitted.

SUBMISSIONS:

7. The learned counsel for the bail petitioner submits that the evidence collected against the petitioner is legally inadmissible. He also places reliance upon the decisions of this Court in Budhi Singh v. State of H.P., CrMPM 595 of 2020; Rehmat Ali v. State of Himachal Pradesh, Cr.MP(M) No.203 of 2019, Naveen Bura v. State of HP, 2018 Law Suit (HP) 478, Thakur Dass v. State of H.P., CrMPM 167 of 2010; Stynder Singh v. State of

Himachal Pradesh, 2010(1) SimLC 490, and Nisar Ahmed Thakkar v. State of H.P., CrMPM 672 of 2008.

8. On the contrary, Mr. Nand Lal Thakur, Additional Advocate General, submitted that the Police have collected sufficient evidence by tracing frequent calls made by the bail petitioner, the main accused, and the seller of charas, which prima facie points out towards his involvement. He also relies upon the decision of this Court in CrMPM 126 of 2018, Manohar Lal v. State of H.P.; CrMPM 1084 of 2020, Om Parkash v. State of H.P.; and Cr.MP(M) No. 469 of 2020, Sandeep Kumar v. State of HP. He also contended that the accused has yet not discharged the presumption under S. 35 of NDPS Act, and further that the quantity involved is commercial, and restrictions of S. 37 of the NDPS Act do not entitle the accused for bail.

9. Ld. Amicus Curiae, Mr. Lovneesh Kanwar Advocate has drawn the attention of this Court to the provisions of S. 35 & 37 of NDPS Act, while considering bails involving the commercial quantity of substance.

ANALYSIS AND REASONING:

Pre-trial incarceration needs justification depending upon the statutory

10. restrictions, heinous nature of the offence, terms of the sentence prescribed in the statute for such a crime, probability of the accused fleeing from justice, hampering the investigation, and doing away with the victim(s) and witnesses. The Court is under an obligation to maintain a balance between all stakeholders and safeguard the interests of the victim, accused, society, and State.

11. In Gurbaksh Singh Sibbia and others v. State of Punjab, 1980 (2) SCC 565, a Constitutional bench of Supreme Court holds in Para 30, as follows, It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail.

12. In Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav, 2005 .

(2) SCC 42, a three-member bench of Supreme Court holds,

18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee.

However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled for bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the courts can do so.

13. In *State of Rajasthan, Jaipur v. Balchand*, AIR 1977 SC 2447, Supreme Court holds,

2. The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like by the petitioner who seeks enlargement on bail from the court. We do not intend to be exhaustive but only illustrative.

3. It is true that the gravity of the offence involved is likely to induce the petitioner to avoid the course of justice and must weigh with us when considering the question of bail. So also the heinousness of the crime.

14. In *Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh*, (1978) 1 SCC 240, Supreme Court in Para 16, holds, The delicate light of the law favours release unless .

countered by the negative criteria necessitating that course.

15. In *Dataram Singh v. State of Uttar Pradesh*, (2018) 3 SCC 22, Supreme Court holds,

1. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception.

6. However, we should not be understood to mean that bail should be granted in every case. The grant or refusal of bail is entirely within the discretion of the judge hearing the matter and though that discretion is unfettered, it must be exercised judiciously and in a humane manner and compassionately. Also, conditions for the grant of bail ought not to be so strict as to be incapable of

compliance, thereby making the grant of bail illusory.

S. 35 OF NDPS ACT IS NOT APPLICABLE IN BAILS:

16. S. 35 of NDPS Act reads as follows:

35. Presumption of culpable mental state .(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation. In this section culpable mental state includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

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17. Section 35 opens restrictively with the usage of specific words, 'In any prosecution for an offence...'. Thus, it applies only after the launch of prosecution, which impliedly starts when the Court takes cognizance of the offence under the NDPS Act.

18. Black's Law Dictionary, 6th edition, St. Paul, MN, USA, (1990), defines prosecution as, "Prosecution. A criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime. U.S. v. Reisinger, 128 U.S. 398, 9 S.Ct. 99, 32 L.Ed.480. The continuous following up, through instrumentalities created by law, of a person accused of a public offence with a steady and fixed purpose of reaching a judicial determination of the guilt or innocence of the accused. By an extension of its meaning "prosecution" is also used to designate the government (state or federal) as the party proceeding in a criminal action, or the prosecutor, or counsel; as when we speak of 'the evidence adduced by the prosecution'."

19. Shorter Oxford English Dictionary, 6th Edition, defines prosecution, having originated from Old French, as 1. "The following up, continuation, or pursuit of a course of action etc. with a view to its completion." 5. LAW "The institution and conducting of legal proceedings in respect of a criminal charge in a court; the institution and conducting of legal proceedings against a person or in pursuit of a claim; an instance of this. Also, the prosecuting party in a case."

20. The New Lexicon Webster's Dictionary of the English Language, New York, (1988), defines prosecution as, "prosecuting or being prosecuted; the prosecuting party or his legal representatives; the bringing of formal criminal charges against an offender in court."

21. In *Thomas Dana v. State of Punjab*, AIR 1959 SC 375, A Constitutional Bench of Supreme Court holds,

9. It was vehemently argued on behalf of the petitioners that the prosecution of the petitioners under the provisions of the Acts aforesaid, and their convictions and imposition of sentences by the courts below, .

infringe the protection against double jeopardy enshrined in Article 20(2) of the Constitution, which is in these terms :-

"No person shall be prosecuted and punished for the same offence more than once."

It is manifest that in order to bring the petitioners' case within the prohibition of Article 20(2), it must be shown that they had been "prosecuted" before the Collector of Customs, and "punished" by him for the "same offence"

for which they have been convicted and punished as a result of the judgment and orders of the courts below, now impugned. If any one of these three essential conditions is not fulfilled, that is to say, if it is not shown that the petitioners had been "prosecuted" before the Collector of Customs, or that they, had been "punished"

by him in the proceedings before him, resulting in the confiscation of the properties aforesaid, and the imposition of a heavy penalty of Rs. 25,00,000, each, or that they had been convicted and "sentenced" for the "same offence", the petitioners will have failed to bring their case within the prohibition of Article 20(2). It has been argued, in the first instance, on behalf of the petitioners that they had been "prosecuted" within the meaning of the article. On the other hand, the learned Additional Solicitor-General has countered that argument by the contention that the previous adjudication by the Collector of Customs, was by an administrative body which has to act judicially, as held by this Court in *F.N. Roy v. Collector of Customs, Calcutta*, AIR 1957 Supreme Court 648, and reiterated in, AIR 1958 Supreme Court 119; but the Collector was not a criminal court which could, in law, be said to have tried the petitioner for an offence under the Indian Penal Code, or under the penal provisions of the other Acts mentioned above.

10. It is, therefore, necessary first to consider whether the petitioners had really been prosecuted before the Collector of Customs, within the meaning of Article 20(2). To "prosecute", in the special sense of law, means, according to Webster's Dictionary, "(a) to seek to obtain, enforce, or the like by legal process; as, to prosecute a right or a claim in a court of law. (b) to, pursue (a person) by legal proceedings for redress or punishment; to proceed against judicially; esp., to accuse of some crime or breach of law, or to pursue for redress or punishment of a crime or violation of law, in due legal .

form before a legal tribunal ; as to prosecute a man for trespass, or for a riot."

According to "Wharton's Law Lexicon", 14th edn., p. 810, "prosecution" means "a proceeding either by way of indictment or information, in the criminal courts, in order to put an offender upon his

trial. In all criminal prosecutions the King is nominally the prosecutor". This very question was discussed by this Court in the case of Maqbool Hussain v. State of Bombay, 1953 SCR 730 at pp. 738, 739, 743, with reference to the context in which the word "prosecution" occurred in Article 20. In the course of the judgment, the following observations, which apply with full force to the present case, were made :

".....and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure."

ANALYSIS OF THE RIGORS OF S. 37 OF NDPS ACT:

22. Section 2 (vii-a) of the NDPS Act defines commercial quantity as the quantity greater than the quantity specified in its schedule, and S. 2 (xxiii-a), defines a small quantity as the quantity lesser than the quantity specified in the schedule. The remaining quantity falls in an undefined category, which is now generally called as intermediate quantity. All Sections in the NDPS Act, which specify an offence, also mention the minimum and maximum sentence, depending upon the quantity of the substance. When the substance falls under commercial quantity, the statute mandates minimum sentence of ten years of imprisonment and a minimum fine of INR One Lac, and bail is subject to the riders mandated in S. 37 of NDPS Act.

23. In the present case, as per the contentions of the State, the quantity of substance seized is commercial quantity. Given the legislative mandate of S. 37 of NDPS Act, the Court can release a person, accused of an offence punishable under the NDPS Act for possessing a commercial quantity of contraband only after passing its rigors. Section 37 of the Act is extracted as under: -

"37. Offences to be cognizable and non-bailable.

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(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 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.

(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."

24. A reading of Section 37(1)(b)(ii) mandates that two conditions are to be satisfied before a person/accused of possessing a commercial quantity of drugs or psychotropic substance, is to be released on bail.

25. The first condition is to provide an opportunity to the Public Prosecutor, enabling her to take stand on the bail application. The second stipulation is that the Court must be satisfied that reasonable grounds exist for believing that the accused is not guilty of such offence, and is not likely to commit any offence while on bail. If either of these two conditions is not met, the ban on granting bail operates. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. Be that as it may, if such a finding is arrived at by the Court, it is equivalent to giving a certificate of discharge to the accused. Even on fulfilling one of the conditions, the reasonable grounds for believing that during the bail period, the accused is not guilty of such an offence, the Court still cannot give a finding or assurance that the accused is not likely to commit any such crime. Thus, the grant of bail or denial of bail for possessing commercial quantity would depend on facts of each case.

26. JUDICIAL PRECEDENTS ON S. 37 OF NDPS ACT:

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a) In Union of India v. Merajuddin, (1999) 6 SCC 43, a three Judges Bench of Supreme Court while cancelling the bail, observed in Para 3, as follows, The High Court appears to have completely ignored the mandate of Sec. 37 of the Narcotic Drugs and Psychotropic Substances Act while granting him bail. The High Court overlooked the prescribed procedure."

b) In Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549, a three Judges Bench of Supreme Court holds,

7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the public prosecutor, the other twin conditions which really have relevance so far the present accused-respondent is concerned, are (1) the satisfaction of the Court that there are

reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based for reasonable grounds. 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 existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.

c) In *Union of India v. Sanjeev v. Deshpande*, (2014) 13 SCC 1, a three- judges bench of Supreme Court holds,

5. ...In other words, Section 37 departs from the long established principle of presumption of innocence in favour of an accused person until proved otherwise.

d) In *Satpal Singh v. State of Punjab*, (2018) 13 SCC 813, a bench of three judges of Supreme Court directed that since the quantity involved was commercial, as such High Court could not have and should not have passed the order under sections 438 or 439 CrPC, without reference to Section 37 of the NDPS Act.

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e) In *Narcotics Control Bureau v Kishan Lal*, 1991 (1) SCC 705, Supreme Court holds,

6. Section 37 as amended starts with a non-obstante clause stating that notwithstanding anything contained in the Code of Criminal Procedure, 1973 no person accused of an offence prescribed therein shall be released on bail unless the conditions contained therein were satisfied. The Narcotic Drugs And Psychotropic Substances Act is a special enactment as already noted it was enacted with a view to make stringent provision for the control and regulation of operations relating to narcotic drugs and psychotropic substances. That being the underlying object and particularly when the provisions of Section 37 of Narcotic Drugs And Psychotropic Substances Act are in negative terms limiting the scope of the applicability of the provisions of Criminal Procedure Code regarding bail, in our view, it cannot be held that the High Court's powers to grant bail under Section 439 Criminal Procedure Code are not subject to the limitation mentioned under Section 37 of Narcotic Drugs And Psychotropic Substances Act. The non-obstante clause with which the Section starts should be given its due meaning and clearly it is intended to restrict the powers to grant bail. In case of inconsistency between Section 439 Criminal Procedure Code and Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 Section 37 prevails.

f) In *Babua v. State of Orissa*, (2001) 2 SCC 566, Supreme Court holds, [3] In view of Section 37(1)(b) of the Act unless there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail alone will entitle him to a bail. In the present case, the petitioner attempted to secure bail on various grounds but failed. But

those reasons would be insignificant if we bear in mind the scope of Section 37(1)

(b) of the Act. At this stage of the case all that could be seen is whether the statements made on behalf of the prosecution witnesses, if believable, would result in conviction of the petitioner or not. At this juncture, we cannot say that the accused is not guilty of the offence if the allegations made in the charge are established. Nor can we say that the evidence having not been completely adduced before the Court that there are no grounds to hold that he is not guilty of such offence. The other aspect to be borne in mind is that the liberty of a citizen has got to .

be balanced with the interest of the society. In cases where narcotic drugs and psychotropic substances are involved, the accused would indulge in activities which are lethal to the society. Therefore, it would certainly be in the interest of the society to keep such persons behind bars during the pendency of the proceedings before the Court, and the validity of Section 37(1)(b) having been upheld, we cannot take any other view.

In *Bijando Singh v. Md. Ibocha*, 2004(10) SCC 151, Supreme Court

g) holds,

3. Being aggrieved by the order of the Special Court (NDPS), releasing the accused on bail, the appellant moved the Guwahati High Court against the said order on the ground that the order granting bail is contrary to the provisions of law and the appropriate authority never noticed the provisions of Section 37 of the Narcotic Drugs And Psychotropic Substances Act. The High Court, however, being of the opinion that if the attendance of the accused is secured by means of bail bonds, then he is entitled to be released on bail. The High Court, thus, in our opinion, did not consider the provisions of Section 37 of the Narcotic Drugs And Psychotropic Substances Act.

h) In *N.C.B.Trivandrarum v. Jalaluddin*, 2004 Law Suit (SC) 1598, Supreme Court observed,

3. ...Be that as it may another mandatory requirement of Section 37 of the Act is that where Public Prosecutor opposes the bail application, the court should be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and he is not likely to commit any offence while on bail. In the impugned order we do not find any such satisfaction recorded by the High Court while granting bail nor there is any material available to show that the High Court applied its mind to these mandatory requirements of the Act.

i) In *Union of India v. Shiv Shanker Kesari*, (2007) 7 SCC 798, Supreme Court holds,

6. As the provision itself provides no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and. that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these .

two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

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 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.

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'. Stroud's Judicial Dictionary, Fourth Edition, page 2258 states that it would be unreasonable to expect an exact definition of the word "reasonable". Reason varies it, 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 : Municipal Corporation of Delhi v. M/s Jagan Nath Ashok Kumar and another, (1987)4 SCC 497 and Gujarat Water Supplies and Sewerage Board v.

Unique Erectors (Gujarat) Pvt Ltd and another [(1989)1 SCC 532].

9. It is often said "an attempt to give a specific meaning to the word 'reasonable' is trying to count what is not number and measure what is not space". The author of 'Words and Phrases' (Permanent Edition) has quoted from in re Nice &, Schreiber 123 F. 987, 988 to give a plausible meaning for the said word. He says, "the expression 'reasonable' is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes reasonable can be determined". It is not meant to be expedient or convenient but certainly something more than that.

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 Corporation of Greater Mumbai and another v. Kamla Mills Ltd., 2003(4) RCR(Civil) 265 : (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.

12. Additionally, the Court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion.

j) In N.R. Mon v. Md. Nasimuddin, (2008) 6 SCC 721, Supreme Court holds,

9. ...The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are: the satisfaction of the court that there are reasonable grounds for believing, that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. 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 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 hand the High Court seems to have completely overlooked underlying object of Section

37.

k) In Union of India v. Rattan Mallik @ Habul, (2009) 2 SCC 624, Supreme Court holds,

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the Narcotic Drugs and Psychotropic Substances Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the Narcotic Drugs And Psychotropic Substances Act. What is to be seen is whether there is reasonable ground for believing that the .

accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.

l) In Union of India v. Niyazuddin & Anr, (2018) 13 SCC 738, Supreme Court holds,

7. ...Section 37 of the NDPS Act contains special provisions with regard to 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. 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.

8. There is no such consideration with regard to the mandatory requirements, while releasing the respondents on bail.

9. Hence, we are satisfied that the matter needs to be considered afresh by the High Court. The impugned order is set aside and the matter is remitted to the High Court for fresh consideration. It will be open to the parties to take all available contentions before the High Court.

m) In *State of Kerala v. Rajesh*, AIR 2020 SC 721, Supreme Court holds, [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 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.

n) In *Sujit Tiwari v. State of Gujarat*, 2020 SCC Online SC 84, in the given facts, Supreme Court granted bail, by observing,

10. The prosecution story is that the appellant was aware of what his brother was doing and was actively helping his brother. At this stage we would not like to comment on the merits of the allegations levelled against the present appellant. But other than the few WhatsApp messages and his own statement which he has resiled from, there is very little other evidence. At this stage it appears that the appellant may not have even been aware of the entire conspiracy because even the prosecution story is that the brother himself did not know what was loaded on the ship till he was informed by the owner of the vessel. Even when the heroin was loaded in the ship it was supposed to go towards Egypt and that would not have been a crime under the NDPS Act. It seems that Suprit Tiwari and other 7 crew members then decided to make much more money by bringing the ship to India with the intention of disposing of the drugs in India. During this period the Master Suprit Tiwari took the help of Vishal Kumar Yadav and Irfan Sheikh who had to deliver the consignment to Suleman who had to arrange the money after delivery. The main allegation made against the appellant is that he sent the list of the crew members after deleting the names of 4 Iranians and Esthekhar Alam to Vishal Kumar Yadav and Irfan Sheikh through WhatsApp with a view to make their disembarkation process easier. Even if we take the prosecution case at the highest, the appellant was aware that his brother was indulging in some illegal activity because obviously such huge amount of money could not be made otherwise. However, at this stage it cannot be said with certainty whether he was aware that drugs were being smuggled on the ship or not, though the allegation is that he made such a statement to the NCB under Section 67 of the NDPS Act.

11. At this stage, without going into the merits, we feel that the case of the appellant herein is totally different from the other accused. Reasonable possibility is there that he may be acquitted. He has been behind bars since his arrest on 04.08.2017 i.e. for more than 2 years and he is a young man

aged about 25 years. He is a B.Tech Graduate. Therefore, under facts and circumstances of this case we feel that this is a fit case where the appellant is entitled to .

bail because there is a possibility that he was unaware of the illegal activities of his brother and the other crew members. The case of the appellant is different from that of all the other accused, whether it be the Master of the ship, the crew members or the persons who introduced the Master to the prospective buyers and the prospective buyers.

12. We, however, feel that some stringent conditions will have to be imposed upon the appellant.

SUM UP:

24. From the summary of the law relating to rigors of S.37 of NDPS Act, while granting bail involving commercial quantities, the following fundamental principles emerge:

i. The limitations on granting of bail come in only when the question of granting bail arises on merits. [Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549, Para 7].

ii. In case the Court proposes to grant bail, two conditions are to be mandatorily satisfied in addition to the standard requirements under the provisions of the CrPC or any other enactment. [Union of India v. Niyazuddin & Anr, (2018) 13 SCC 738, Para 7].

iii. Apart from granting opportunity to the Public Prosecutor, the other twin conditions which really have relevance are the Court's satisfaction that there are reasonable grounds for believing that the accused is not guilty of the alleged offence. [N.R. Mon v. Md. Nasimuddin, (2008) 6 SCC 721, Para 9].

iv. The satisfaction contemplated regarding the accused being not guilty has to be more than prima facie grounds, considering substantial probable causes for believing and justifying that the accused is not guilty of the alleged offence. [Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549, Para 7].

v. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. [State of Kerala v. Rajesh, AIR 2020 SC 721, Para 21].

vi. Twin conditions of S. 37 are cumulative and not alternative.

[Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549, Para 7].

vii. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed an offence under the NDPS Act and further that he is not likely to commit an offence under the said Act while on bail. [Union of India v. Rattan Malik @ Habul, (2009) 2 SCC 624, Para 14].

viii. If the statements of the prosecution witnesses are believed, then they would not result in a conviction. [Babua v. State of Orissa, (2001) 2 SCC 566, Para 3].

ix. While considering the application for bail concerning Section 37, the Court is not called upon to record a finding of not guilty. [Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798, Para 11].

x.

Section 37 departs from the long-established principle of presumption of innocence in favour of an accused person until proved otherwise. [Union of India v. Sanjeev v. Deshpande, (2014) 13 SCC 1, Para 5].

xi. In case of inconsistency, S. 37 of the NDPS Act prevails over S. 439 CrPC. [Narcotics Control Bureau v Kishan Lal, 1991 (1) SCC 705, Para 6].

xii. Bail must be subject to stringent conditions. [Sujit Tiwari v. State of Gujarat, 2020 SCC Online SC 84, Para 12].

25. The difference in the order of bail and final judgment is similar to a sketch and a painting. However, some sketches would be detailed and paintings with a few strokes. Satisfying the fetters of S. 37 of the NDPS Act is candling the infertile eggs.

26. A perusal of the status report reveals the details of calls between the accused, preceding the seizure of contraband.

27. S. 37 of the NDPS Act implies that the accused should satisfy its twin conditions and come out clean. In the bail petition, the petitioner did not explain the phone calls exchanged between him and the accused Ram Lal (A-1). His only contention is that he has been falsely roped in, but does not offer any reasons for such implication. Ld. Counsel offered some explanations, but it is impermissible to make such submissions in the absence of similar pleadings. Thus, the petitioner has failed to make out a case for bail.

28. Any detailed discussions about the evidence may prejudice the case of .

the prosecution or the accused. Suffice it to say that due to the reasons mentioned above, and keeping in view the nature of allegations, no case for bail is made out in favour of the petitioner.

29. 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.

Given the above reasoning, in my considered opinion, no case for bail

30. is made out at this stage. Resultantly, the present petition stands dismissed. All pending applications, if any, stand closed.

31. While deciding the propositions of law involved in this matter, I have considered all my similar decisions, and without any deviation this decision is more comprehensive and up to date. Resultantly, there is no point in citing all previous judgments/orders pronounced by me, where the proposition of law was similar, or somewhat similar, and those given under Section 37 of the NDPS Act, including Satish Singh v. State of HP Cr.MP(M) No. 299 of 2020, and Sandeep Kumar v. State of H.P., Cr.MP(M) No. 469 of 2020.

32. I express my gratitude to counsel for the parties, Ld. Amicus Curiae Mr. Lovneesh Kanwar Advocate for excellent assistance, and also to my Research Assistant Ms. Kalyani Acharya and my Law Intern Ms. Ananya Saxena for outstanding research.

Petition dismissed.

(Anoop Chitkara), Judge.

Aug 4, 2020 (ks/ps)