

**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA**

**Cr.MP(M) No. 299 of 2020**

**Reserved on: 16<sup>th</sup> June, 2020**

**Date of Decision: 29<sup>th</sup> June, 2020**

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Satish Singh ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

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*Coram:*

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

*Whether approved for reporting?<sup>1</sup> YES.*

For the petitioner: Mr. Naresh Kaul, Advocate.

For the respondent: Mr. Ram Lal Assistant A.G. & Mr. Rajat Chauhan,  
Law Officer.

Ms. Richa Thakur, Advocate as Amicus Curiae.

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**Anoop Chitkara, Judge**

The petitioner, who is under incarceration for the last one year and one month, for purchasing 6 kilograms and 324 grams of charas, and 413 grams of opium, and after that transporting it through another accused, has come up before this Court seeking bail.

**2.** Based on a First Information Report (FIR), the police arrested the petitioner, on 27.5.2019, in FIR No.83 of 2019, dated 27.5.2019, registered under Sections 18, 20 & 29 of the NDPS Act, read with S. 181, 192, 196 of Motor Vehicles Act, 1860, (MV Act), in Police Station, Jogindernagar,, District Mandi, Himachal Pradesh, disclosing cognizable and non-bailable offenses.

**3.** Earlier, the petitioner filed a petition under Section 439 CrPC before Special Judge-III, Mandi, HP. However, vide order dated 5.11.2019, the Court dismissed the petition, because in the opinion of the Court, the Petitioner could not cross the rigors of S. 37 of NDPS Act.

**4.** Mr. Nand Lal Thakur learned Additional Advocate General had filed the status report through e-mail, printout of which is available on file. He further submits that he had sent a copy of the status report to learned counsel for the petitioner on WhatsApp number.

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<sup>1</sup> **Whether reporters of Local Papers may be allowed to see the judgment?**

**5.** I have read the status report(s) and heard Mr. Naresh Kaul, Advocate for the petitioner, Mr. Nand Lal Thakur, Ld. Additional Advocate General for the State of H.P., and Ms. Richa Thakur, Advocate, Amicus Curiae.

**FACTS:**

**6.** The allegations in the First Information Report and the gist of the evidence collected by the Investigator are:

a) On 26th May 2019, the Police party headed by inspector/in charge of Police Station Jogindernagar, District Mandi, has erected/laid a barrier on National Highway No.154. At around 8.15 p.m., one car came from the side of Mandi towards Jogindernagar. The Inspector signaled the driver of the said car to stop, and on this, the driver of the car brought it to a halt and parked it on the side of the road. After this, the Inspector checked the said car, which was Maruti Alto, and told him to show the car's documents. On this, the driver of the vehicle became perplexed and could not produce the registration certificate and other records of the car. He also started stammering and was extremely baffled. On inquiry, he revealed his name as Tule Singh.

b) The body language and gesture of said Tule Singh raise suspicion in the mind of the Investigating Officer, (I.O.), that he is most likely possessing some contraband or drugs. After that, the I.O. sent one of the constables to bring an independent witness, who returned after 20 minutes and brought two persons Rakesh Kumar and Gaurav Kumar for being associated as independent witnesses for the ensuing search. In the presence of these witnesses, the I.O. searched the vehicle, and below the front left seat, they noticed one cloth bag. The Police took it out and opened it. It had three taped packets. On opening these three packets, the Police detected charas.

c) Similarly, the Police recovered a bag from the dickey of the said car. This bag also contained one polythene, and one envelop and further contained five taped packets. On opening, the Police recovered charas from four packages and opium from one pack.

**d)** After that, the I.O. procured the weighing scale, and after weighing, the total quantity of charas measured as 6 kilograms and 324 grams and opium as 413 grams. After that, the police put back the charas and the opium in the same packets and in a similar way and sealed the same. After that, the police completed the other procedural requirement of the NDPS Act and CrPC and proceeded to arrest the accused. The police also took into possession of said Alto Car.

**e)** After that, on the spot itself, the I.O. made inquiries from Tule Ram, and upon this, he confessed before the Police that persons, namely Ram Singh s/o Tek Singh, R/o Village Manhon, P.O. Palahach, Tehsil Banjar; Tanu R/o Village Manhon, P.O. Palahach, Tehsil Banjar; and Satish Singh (bail petitioner) S/o Kishore Singh, R/o Village Dhanpatan, P.O. Matlahar, Tehsil Jawali, District Kangra are also involved. He further told the I.O. that they were escorting the Alto Car in Satish Singh's white color Scorpio bearing registration No. HP54B-3622. Immediately on receipt of such information, the I.O. informed Police Post Ghattu, District Mandi, to detain the said vehicle.

**f)** On this H.C. Swami Nand of Police Post, Ghattu informed that they had detained such vehicle, and in this Scorpio, only one person, namely Satish Singh (bail Petition), is present and none-else. H.C. Swami Nand further told the I.O. that Satish Singh had said to him that those two persons have alighted from the vehicle at Jogindernagar. After that, the I.O. arrested Tule Singh and sent the report to the police station to register the FIR mentioned above. Thus, the Police arraigned Tule Ram, Satish Singh, Tanu, and Ram Singh @ Om Chand as accused and subsequently arrested all of them.

**g)** During the investigation, the Police procured call details between accused persons. Tule Singh. The Police also procured the CCTV footage wherein, in the Scorpio vehicle, the Police could notice three persons.

**h)** On seizure of the Scorpio mentioned above, the police recovered its registration certificate, which showed Scorpio's registration in the name of Satish Singh, petitioner herein. Subsequently, the police sent the charas and opium mentioned above and opium to SFL Junga, which tested positive for charas and opium after conducting the scientific examination.

i) In the investigation, the police concluded that Satish Singh, the bail petitioner, went to accused Om Chand accused No.4 at the spot known as Palahach, and there he purchased charas and opium from him. It further came in the investigation that after that, both the accused hired taxi of Tule Singh accused No.1 and told him that he has to transport the charas and opium at a place ahead of Jogindernagar. They settled the fare as INR 12,000/- it further came in the investigation that accused No.3 Tiwan Singh, was also present there. They put the charas and opium in the Alto Car, and themselves started escorting the Alto in the Scorpio owned and driven by Satish Singh. While driving, these people kept on talking to Tule Singh. It further came in the investigation that on the evening of 26th May 2019, all these persons had taken food together in one place.

### **PREVIOUS CRIMINAL HISTORY**

7. As per the police report the accused Satish Singh involved himself in the following cases:

- 1). FIR No. 178/97, dated 10/09/1997, under Section 324, 323, 506 IPC, Police Station Jawali, District Kangra, H.P
- 2). FIR No.26/98, dated 28.1.1998, under Section 452, 323, 34, IPC, Police Station Jawali, District Kangra, H.P
- 3). FIR No.242/98, dated 10.12.1998, under Section 325, 34 IPC, Police Station Jawali, District Kangra, H.P
- 4). FIR No.93/99, dated 24.5.1999, under Section 61-1-14 of the Excise Act, Police Station Jawali, District Kangra, H.P .
- 5). FIR No. 141/05, dated 12.09.2005, under Section 61-1-14 of the Excise Act, Police Station Jawali, District Kangra, H.P.

8. According to learned Counsel for the petitioner, in all such cases, the petitioner stands acquitted and as on date, no case is pending against him. Learned Counsel further submits that after acquittal he stands absolved from all accusation and no reliance can be placed on such cases, which resulted into his acquittal.

### **SUBMISSIONS:**

9. The learned counsel for the bail petitioner submits that the allegations are false and concocted.

10. On the contrary, Mr. Nand Lal Thakur, Additional Advocate General, contends that the investigating officer has collected sufficient prima facie evidence. He further submits that if this Court is inclined to grant bail, then such a bond must be subject to very stringent conditions.

11. Ms. Richa Thakur, Learned Amicus Curiae very vehemently argued and also drew attention to the orders of this Court in *Budhi Singh v. State of H.P.*, CrMPM 595 of 2020; *Manohar Lal v. State of H.P.*, CrMPM 126 of 2018; *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.

**ANALYSIS AND REASONING:**

12. Pre-trial incarceration needs justification depending upon the 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.

13. 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

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 ***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.”

16. Section 2 (vii-a) of the NDPS Act defines commercial quantity as the quantity greater than the quantity specified in the schedule, and S. 2 (xxiii-a), defines a small quantity as the quantity lesser than the quantity specified in the schedule of NDPS Act. 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 statute mandates minimum sentence of ten years of imprisonment and a minimum fine of INR One hundred thousand, and bail is subject to the riders mandated in S. 37 of NDPS Act.

17. In the present case, 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.

(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.”

18. 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.

19. The first condition is to provide an opportunity to the Public Prosecutor and clear her 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 that he 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 it may, if such a finding is arrived at by the Court, then 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 period of bail, 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.

**20. JUDICIAL PRECEDENTS ON S. 37 OF NDPS ACT:**

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. Ahmadaliev 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 **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.

d) 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.

e) 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.

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

g) 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.

h) 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 *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.

i) 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.

j) In **Union of India v. Rattan Malik @ 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.

k) 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.

1) 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:**

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

- a) **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].
- b) **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].
- c) **Apart from the grant 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].
- d) **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].
- e) **Twin conditions of S. 37 are cumulative and not alternative.** [Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549].
- f) **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].

- g) **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 Mallik @ Habul, (2009) 2 SCC 624].
- h) **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].
- i) **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].
- j) **Bail must be subject to stringent conditions.** [Sujit Tiwari v. State of Gujarat, 2020 SCC Online SC 84].

22. 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 rigors of S. 37 of the NDPS Act is candling the infertile eggs.

23. In the present case, a perusal of evidence collected so far, and as placed in the Police report filed under section 173(2) CrPC, connects the petitioner with the principal accused with three circumstances. Firstly, by his presence with other accused in the same evening taking meals together, as recorded in CCTV footage. Secondly, through confession of main accused before Police, and lastly from the seizure of his Scorpio, soon after the confession of the main accused.

24. Even if all the accused took meals together in the evening, as recorded in CCTV, there is nothing to infer the time and place where he had kept the contraband in his Alto car. There is no legal evidence that he had placed contraband prior to the CCTV recording. The only evidence qua the placing of the contraband prior to taking meals is by way of the confession of the main accused before Police, which is legally inadmissible. Moreover, perusal of the phone records show no calls exchanged between Tule Ram and petitioner.

25. In **Surinder Kumar Khanna v. Intelligence Officer Directorate of Revenue Intelligence, (2018) 8 SCC 271**, Supreme Court holds,

“13. In the present case it is accepted that apart from the aforesaid statements of co-accused there is no material suggesting involvement of the appellant in the crime in question. We are thus left with only one piece of material that is the confessional statements of the co-accused as stated above. On the touchstone of law laid down by this Court such a confessional statement of a co-accused cannot by itself be taken as a substantive piece of evidence against another co-accused and can at best be used or utilized in order to lend

assurance to the Court. In the absence of any substantive evidence it would be inappropriate to base the conviction of the appellant purely on the statements of co-accused.”

**26.** Given the factual matrix, considerable time must have passed (Initial inquiry, twenty minutes in arranging independent witnesses, search, seizure, weighing by procuring a weighing machine, sampling, and preparation of search memo, seizure memo, information to Police, preparation of NCB forms) between the confession of Tule Ram of being escorted by the petitioner in his Scorpio, and the interception of Scorpio at Police Post Ghattu, the vehicle would have traveled a substantial. The investigation is silent about the time as well as the distance between the place of a search of Tule Ram's Alto and stoppage of Scorpio at Police Post Ghattu. The distance between these two places assumes importance. Coupled with the fact that the Police noticed and arrested only one person traveling in SUV, prima facie points out Scorpio's interception, driven by the petitioner, possibly a setup. However, the investigation is still not complete. It is for the Investigating Officer to look into this aspect and conduct further investigation per law.

**27.** The report under Section 173(2) CrPC does not restrict the police's powers to investigate further by following the law. Needless to say, that the Prosecution has all the rights of further investigation under S. 173(8) CrPC, following the law. However, the missing links mentioned above, take the case out of the rigors of S. 37 of the NDPS Act and makes out a case for bail.

**28.** Criminal conspiracies are hatched in secrecy. The recovery did not take place directly from the petitioner. Suffice to say that the quantity involved in this case is the commercial quantity, and the petitioner has crossed the riders of Section 37 of the NDPS Act.

**29.** The petitioner is a permanent resident of District Kangra, therefore, his presence can always be secured.

**30.** Without commenting on the merits of the evidence collected so far, the fact that initial interception of the petitioner appears to be not above board, coupled with the fact that the confession against co-accused is inadmissible, and the silence on the points extracted mentioned above would create reasons to make this Court believe that till now, the petitioner has made out a case for bail secondly. Thus, acquittal absolves him of all charges. To fulfill the second part

of Section 37 of the NDPS Act, this Court can impose stringent conditions to ensure and satisfy that the accused does not repeat the offence.

**31.** 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, this Court believes that further incarceration of the accused during the period of trial is neither warranted, nor justified, or going to achieve any significant purpose:

**32.** To ensure that the petitioner does not get an opportunity to commit an offence while on bail and the Court is putting the following stringent conditions and this bail shall be subject to the strict terms.

**33.** Given the above reasoning, the Court is granting bail to the petitioner, subject to the imposition of following stringent conditions, which shall be over and above, and irrespective of the contents of the form of bail bonds in chapter XXXIII of CrPC. Consequently, the present petition is allowed. The petitioner shall be released on bail in the present case, connected with the FIR mentioned above, on his furnishing a personal bond of INR 10,000/, (INR Ten thousand only), to the satisfaction of the Trial Court. The petitioner shall also furnish one surety for INR 5000 (INR Five thousand only), to the satisfaction of the Sessions Court/Special Court/ Chief Judicial Magistrate/Ilacqua Magistrate/Duty Magistrate/the Court, which is exercising jurisdiction over the concerned Police Station where FIR is registered. Trial Court. The furnishing of bail bonds shall be deemed acceptance of all stipulations, terms, and conditions of this bail order:

- a)** The petitioner to give security to the concerned Court(s)/ Investigating Officer, for attendance on every date, unless exempted, and in case of Appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.
- b)** The Attesting officer shall mention on the reverse page of personal bonds, the permanent address of the petitioner along with the phone number(s), WhatsApp number (if any), email (if any), and details of personal bank account(s) (if available).
- c)** The petitioner shall join the investigation as and when called by the Investigating Officer or any superior officer.

**d)** The petitioner shall not influence, threaten, browbeat, or pressurize the witnesses and the Police officials.

**e)** The petitioner shall not make any inducement, threat, or promise, directly or indirectly, to the Investigating officer, or any other person acquainted with the facts of the case, to dissuade them from disclosing such facts to the Police, or the Court, or to tamper with the evidence.

**f)** Once the trial begins, the appellant shall not in any manner try to delay the trial. The petitioner undertakes to appear before the concerned Court, on the issuance of summons/warrants by such Court. The petitioner shall attend the trial on each date, unless exempted, and in case of Appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.

**g)** There shall be a presumption of proper service to the petitioner about the date of hearing in the concerned Court, even if it takes place through SMS/ WhatsApp message/ E-Mail/ or any other similar medium, by the Court.

**h)** In the first instance, the Court shall issue summons and may inform the Petitioner about such summons through SMS/ WhatsApp message/ E-Mail.

**i)** In case the petitioner fails to appear before the Court on the specified date, then the concerned Court may issueailable warrants, and to enable the accused to know the date, the Court may, if it so desires, also inform the petitioner about suchailable warrants through SMS/ WhatsApp message/ E-Mail.

**j)** Finally, if the petitioner still fails to put in an appearance, then the concerned Court may issue Non-ailable warrants to procure the petitioner's presence and send the petitioner to the Judicial custody for a period for which the concerned Court may deem fit and proper.

**k)** In case of Non-appearance, then irrespective of the contents of the bail bonds, the petitioner undertakes to pay all the expenditure (only the principal amount without interest), that the State might incur to produce him before such Court, provided such amount exceeds the amount recoverable after forfeiture of the bail bonds, and also subject to the

provisions of Sections 446 & 446-A of CrPC. The petitioner's failure to reimburse the State shall entitle the trial Court to order the transfer of money from the bank account(s) of the petitioner. However, this recovery is subject to the condition that the expenditure incurred must be spent to trace the petitioner and it relates to the exercise undertaken solely to arrest the petitioner in that FIR, and during that voyage, the Police had not gone for any other purpose/function what so ever.

**l)** The petitioner shall abstain from all criminal activities. If done, then while considering bail in the fresh FIR, the Court shall take into account that even earlier, the Court had cautioned the accused not to do so.

**m)** The petitioner shall intimate about the change of residential address and change of phone numbers, WhatsApp number, e-mail accounts, within 10 days from such modification, to the police station of this FIR, and also to the concerned Court.

**n)** The petitioner shall, within ten days of his release from prison, procure a smartphone, and inform its IMEI number and other details to the SHO/I.O. of the Police station mentioned before. He shall keep the phone location always on the "ON" mode. Before replacing his mobile phone, he shall produce the existing phone to the SHO/I.O. of the police station and give details of the new phone. Whenever the SHO, I.O., or any officer of the concerned Police Station, ask him to share his location, then he shall immediately do so. The petitioner shall neither clear the location history nor format his phone without permission of the concerned SHO/I.O. or any officer of the concerned Police Station.

**o)** During the pendency of the trial, if the petitioner commits any offence under NDPS Act, even if it involves small quantity, then it shall be open for the State to apply for cancellation of this bail order.

**p)** In case of violation of any of the conditions as stipulated in this order, the State/Public Prosecutor may apply for cancellation of bail of the petitioner, and even the concerned trial Court shall be competent to cancel the bail. Otherwise, the bail bonds shall continue to remain in force throughout the trial and also after that in terms of Section 437-A of the CrPC.

**q)** The learned counsel for the petitioner, as well as the attesting officer, shall explain the conditions of this bail to the petitioner.

**r)** The petitioner shall surrender all firearms along with ammunitions, if any, along with the arms license to the concerned authority within 30 days from today. However, subject to the provisions of the Indian Arms Act, 1959, the petitioner shall be entitled to renew and take it back, in case of acquittal in this case.

**34.** In case the petitioner finds the bail condition(s) as violating fundamental, human, or other rights, or causing difficulty due to any situation, then for modification of such term(s), the petitioner may file a reasoned application before this Court, and after taking cognizance, even before the Court taking cognizance or the trial Court, as the case may be, and such Court shall also be competent to modify or delete any condition.

**35.** The officer in whose presence the petitioner puts signatures on personal bonds shall explain all conditions of this bail order to the petitioner, in vernacular.

**36.** The petitioner undertakes to comply with all the directions given in this order. Furnishing of bail bonds by the petitioner is the acceptance of all such conditions.

**37.** On the reverse page of the personal bonds, the officer attesting the personal bonds shall ascertain the identity of the bail-petitioner, through these documents.

**38.** Consequently, the petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on her/his furnishing bail bonds in the terms described above.

**39.** This order does not, in any manner, limit or restrict the rights of the Police or the investigating agency, from further investigation in accordance with law.

**40.** The present bail order is only for the FIR mentioned above. It shall not be a blanket order of bail in any other case(s) registered against the petitioner.

**41.** 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.

**42.** The Court Master shall handover this order to the concerned branch of the Registry of this Court, and the said official shall immediately send a copy of this

order to the District and Sessions Judge, concerned, by e-mail. The Court attesting the bonds shall not insist upon the certified copy of this order and shall download the same from the website of this Court, or accept a copy attested by an Advocate, which shall be sufficient for the record. The Court Master shall handover an authenticated copy of this order to the Counsel for the Petitioner and the Learned Advocate General if they ask for the same.

**43.** In return for the freedom curtailed for breaking the law, the Court believes that the accused shall also reciprocate through desirable behavior.

**44.** The petition stands allowed in the terms mentioned above.

**(Anoop Chitkara),  
Judge.**

**June 29, 2020 (ps)**

High Court