

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

**Cr.MP(M) No. 1084 of 2020**

**Reserved on: 09<sup>th</sup> July, 2020**

**Date of Decision: 10<sup>th</sup> July, 2020**

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Om Parkash

...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. Vinod Chauhan, Advocate.

For the respondent: Mr. Nand Lal Thakur and Mr. Ashwani Sharma, Additional Advocates General, with Mr. Ram Lal Thakur, Asstt. A.G. & Mr. Rajat Chauhan, Law Officer.

**COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE**

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**Anoop Chitkara, Judge**

The petitioner, who along with the main accused, is under incarceration from 25<sup>th</sup> Sep 2019, for allegedly selling 6 kilograms and 324 grams of charas, and 413 grams of opium, and after that supervising its transportation through another accused, has again come up before this Court seeking bail, on the grounds that this Court has granted bail to one of his co-accused.

2. Based on a First Information Report (FIR), the police arrested the petitioner, in FIR No.83 of 2019, dated 27.5.2019, registered under Sections 18, 20 & 29 of the of the Narcotic Drugs and Psychotropic Substances Act, 1985 (after now called "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.

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

3. The petitioner filed a petition under Section 439 CrPC before Special Judge (I), Mandi, District Mandi, HP. However, vide order dated 31.10.2019, the Court dismissed the petition, because, in the opinion of the Court, the petitioner could not cross the rigors of S. 37 of the NDPS Act. After that, the petitioner filed a bail petition under Section 439 CrPC in this Court. Vide order dated Feb 28, 2020, passed in CrMPM No. 29 of 2020, this Court had dismissed the said petition because the petitioner and the main accused Tule Ram, from whose possession the Investigator had recovered the charas, had made multiple phone calls between them, which calls immediately preceded such seizure.

4. The Petitioner has now come up before this Court seeking bail on parity because this Court has granted bail to co-accused Satish Kumar.

5. I have read the status report(s) and heard Ld. Counsel for the parties.

**FACTS:**

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

a) On 26<sup>th</sup> May 2019, the Police party headed by inspector/in charge of Police Station Jogindernagar, District Mandi, had 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 was 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 dicky 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) On weightment, the first packet contained 3kg & 35 grams charas and the second packet contained 3kg & 289 grams charas and also 413 grams opium. 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 alias Om Parkash (bail petitioner), 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 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. 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 was 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 Satish Singh, and sent the report to the police station to register the FIR mentioned above.

g) In the investigation police found that Satish Singh had visited the present bail petitioner Om Parkash @ Ram Singh at a place known as Palahach (Banjaar) and had purchased the said Charas and Opium from Om Parkash. After that these persons had hired the taxi of Tule Singh and told him that they had to carry this charas & opium to Jogindernagar. On this Tule Singh agreed to transport the same to Jogindernagar by charging rupees ten to twelve thousand as fare. It further came in investigation that another person namely Tiwan Singh @ Tanu was also present with Om Parkash @ Ram Singh. It further came investigation that accused Satish Singh, Om Parkash and Tiwan Singh had carried the charas and the opium up to the vehicle of Tule Singh. It further transpired that while travelling, these people were regularly in touch with Tule Singh on his mobile. The police also conducted the CDR and CAF of the mobile phones and conducted financial investigation of these persons.

h) The investigation further reveals that while driving, these people kept on talking to Tule Singh. It further came in the investigation that on the evening of 26<sup>th</sup> May 2019, all these persons had taken food together in one place.

i) Subsequently, it transpired in investigation that Tule Singh had misled the Police and told the incorrect name of Om Parkash by wrongly naming him as Ram Singh. After that on 25.09.2019, the Police arrested the bail petitioner Om Parkash @ Ram Singh.

j) The Police procured call details between accused persons. The Police also procured the CCTV footage.

k) Subsequently, the police sent the charas and opium mentioned above to SFL Junga, which tested positive for charas and opium after conducting the scientific examination.

**SUBMISSIONS:**

7. The learned counsel for the bail petitioner submits that this Court has granted bail to co-accused Satish, hence the petitioner is also entitled for bail

on the grounds of parity. He also places reliance upon to the orders of this Court in *Budhi Singh v. State of H.P.*, CrMPM 595 of 2020; *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, contends that this Court had granted bail to Satish Singh after discussing evidence against him. Such order was because, in the opinion of the Court, the evidence against Satish Singh was not sufficient, and thus, he was able to cross the rider of S. 37 of the NDPS Act. Learned Additional Advocate General further states that the Police have collected sufficient evidence against bail petitioner Om Parkash. He contended that the main accused Tule Singh had misled the investigator by telling the wrong name of the bail petitioner, by naming him as Ram Singh, which shows his direct involvement with the main accused, from whose possession the Police had recovered the contraband. Learned Additional Advocate General further states that the bail petitioner Om Parkash and the main accused had been continuously in touch with each other through phone calls and such call details form part of the Police report. Mr. Nand Lal Thakur, also relies upon the decision of this Court in *Manohar Lal v. State of H.P.*, CrMPM 126 of 2018.

**ANALYSIS AND REASONING:**

9. Pre-trial incarceration needs justification depending upon the statutory 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.

10. 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

**11. 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.”

**12. 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 jail. So also the heinousness of the crime.

**13.** 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.

**14.** 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.

**15.** 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 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.

**16.** 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.

(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.”

**17.** 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.

**18.** 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 as 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.

**19. 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. 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 **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, 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 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.

**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.

I) 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:**

**20.** 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. Ahmadalievā 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 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].
- 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. Ahmadalievā Nodira, (2004) 3 SCC 549].
- e) **Twin conditions of S. 37 are cumulative and not alternative.** [Customs, New Delhi v. Ahmadalievā 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].

21. 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.

22. In this case the report under Section 173(2) stands filed. In the final police report, it has been mentioned that the bail petitioner had talked with Tule Singh, from whose car, the Police had seized the contraband. Tule Ram had talked from his mobile number 80917-85144 with the Petitioner Om Parkash on his mobile number number 85447-14658, which is in the name of Tek Singh, father of petitioner Om Parkash @ Ram Singh. In fact, the petitioner Om Parkash @ Ram Singh, at that time, was using the phone taken in the name of his father. The address of said Tek Singh s/o Sohan Lal as mentioned on the prepaid customer application form, which is at page No. 71 of the police report, is Ward No. 1, Manhaon, P.O. Kalwari, Distt. Kullu, HP. It is not the case of the learned counsel for the petitioner that Tek Singh s/o Sohan Lal is not father of the bail petitioner Om Parkash @ Ram Singh.

23. Perusal of the call details as mentioned at page numbers 67 and 68 of the police reports reveals that on May 26, 2019, eleven phone calls were made between Tule Singh and Om Parkash @ Ram Singh. Accused Tule Singh from whose possession police had recovered the charas was using phone No. 80917-85144. Investigation also revealed that petitioner Om Parkash @ Ram Singh was using the phone of his father Tek Singh and the said phone number was 85447-14658. It is for this reason the Investigating Officer did not arrest Tek Singh but instead arrested Om Parkash @ Ram Singh @ Kaka. Perusal of the call details reveals that on May 26, 2019 before accused Tule Singh was arrested, he and the petitioner had talked with each other on as many as eleven occasions. There is exchange of calls

between phone numbers 80917-85144 of Tule Singh and 85447-14658 which was used by petitioner Om Parkash @ Ram Singh.

**24.** Thus, there is a substantial difference in the evidence available against the accused Satish Singh, whom this Court had granted bail, primarily because the perusal of the phone records showed no calls exchanged between Tule Singh and Satish Singh, which is not the case with the present bail petitioner.

**25.** Another reason to deny bail is that the main accused Tule Singh had misled the investigator by telling the wrong name of the bail petitioner, by naming him as Ram Singh, which shows his direct involvement with the main accused.

**26.** Given above, the petitioner has failed to cross the rigors of S. 37 of the NDPS Act. The evidence against Satish Singh was lacking and it had crossed the rigors of S. 37 of NDPS Act, so far as it relates to Satish Singh. The line of distinction between the evidence collected against Satish Singh and the present bail petitioner is not thin but huge.

**27.** Without commenting on the merits of the evidence collected so far, this Court has reasons to believe that the petitioner has failed to cross the hurdle of S. 37 of NDPS Act, and is not entitled 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.

**30.** Given the above reasoning, in my considered opinion, no case for bail 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 the similar orders/judgments pronounced by me. Thus, this order is more comprehensive and up to date. Given above, all previous

decisions/orders passed by me, where the proposition of law was similar, or somewhat similar, and also those passed under Section 37 of NDPS Act, be not cited as precedents.

Petition dismissed.

(Anoop Chitkara),  
Judge.

July 10, 2020 (ps)

High Court of HP