

(2022) 06 SHI CK 0060

In the High Court Of Himachal Pradesh

Case No : Criminal Miscellaneous Petition (Main) No. 880 Of 2022

Ajay Thakur (In Jail)

APPELLANT

Vs

State Of Himachal Pradesh

RESPONDENT

Date of Decision : 22-06-2022

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 19, 20, 24, 27A, 37, 42(2), 52, 52A
Code Of Criminal Procedure, 1973 — Section 439

Citation : (2022) 06 SHI CK 0060

Hon'ble Judges : Jyotsna Rewal Dua, J

Bench : Single Bench

Advocate : S.K. Banyal, Desh Raj Thakur

Final Decision : Dismissed

Judgement

Jyotsna Rewal Dua, J

1. Petitioner seeks regular bail in FIR No.199/2021, dated 21.11.2021, registered at Police Station, Bhuntar, District Kullu, H.P. under Section 20 of the Narcotic Drugs & Psychotropic Substance Act, 1985 (in short the Act).

2. Prosecution case against the petitioner is that:-

2(i). On 20.11.2021, a police party was on routine patrol duty in its jurisdictional area. At around 7.30 pm, it received an information about a person namely Ajay Thakur resident of Malana, Tehsil Bhunter, District Kullu, H.P. being in possession of cannabis, coming from 'Jari' towards 'Hathithan Chowk'. The information was to the effect that the said Ajay intended to sell the contraband to certain persons at Hathithan. His search at that very time could yield to recovery of huge quantity of contraband. The description of this person was also provided in the information.

2(ii). Treating the information as reliable, procedure in terms of Section 42(2) of the Act was complied with. Independent witnesses were also associated with the

raiding party constituted by the police.

2(iii). The search party reached Hathithan Chowk. At around 8.40 p.m., it noticed a person coming towards Hathithan Chowk parking. His description matched with the one given in the secret information. The person was holding a carry bag in his right hand. The police personnel asked certain questions from the said person, who gave his identity as Ajay Thakur (bail petitioner). He did not give satisfactory responses to the questions put to him. The police personnel searched the carry bag held by the petitioner. Search was carried out in accordance with law, which led to recovery of 1.104 kgs of cannabis.

2(iv). The recovery led to registration of the FIR in question. The petitioner was arrested on 21.11.2021.

3. Contentions

3(i). Learned counsel for the petitioner contended that:- 1.104 kgs of cannabis was allegedly recovered from the petitioner in the form of round cakes and square cakes. Whereas during proceedings held under Section 52 of the Act before the learned Magistrate weight of recovered cannabis was determined as 1.183 kgs. There was variation in the weight of contraband allegedly recovered from the possession of the petitioner.

3(ii). As per status report, two samples of 25 grams each were taken out from 1.183 kgs of cannabis during proceedings conducted under Section 52 before the learned Magistrate. There is no mention in the status report that the samples were drawn from a homogeneous mixture of the contraband which at the time of alleged recovery was statedly consisting of round & square cakes. Learned counsel submitted that since the sample was not taken from the homogeneous mixture, therefore, petitioner is entitled to bail. In support of this argument, learned counsel for the petitioner placed reliance upon a judgment of a Division Bench of this Court rendered on 7.4.2022 in a bunch of criminal appeals with lead case being Criminal Appeal No.15/2009, titled Shri Ashok Kumar Vs. State of Himachal Pradesh.

3(iii). Opposing the bail plea, learned Additional Advocate General submitted that the contentions put-forth by learned counsel for the petitioner are absolutely incorrect. The contention raised are matters to be considered and adjudicated during trial. Learned Additional Advocate General further submitted that samples of 25 grams each were taken out from cannabis, which was recovered by the police personnel from the bail petitioner on 20.11.2021 and that samples were drawn in accordance with law.

4. I have heard learned counsel for the petitioner and learned Additional Advocate General for the respondent-State and considered the relevant material.

5. Observations

5(i). According to the status report, cannabis weighing 1.104 kgs was recovered

from the petitioner on the spot on 20.11.2021. This quantity falls under the 'commercial quantity' notified under the NDPS Act. Therefore, rigors of Section 37 of the NDPS Act get attracted, which reads 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 [offences under section 19 of 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 subsection (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."

In order to make out a case for release on bail, petitioner has to satisfy the following twin conditions imposed in the aforesaid section:-

(i) Court should be satisfied that there are reasonable grounds for believing that the petitioner is not guilty of such offence; and

(ii) Petitioner is not likely to commit any offence while on bail.

With regard to Section 37 of the Act, Hon'ble Apex Court in AIR 2020 SC 721, State of Kerala Etc. Versus Rajesh Etc., held as under vide paras 19 and 20:-

"19. This Court has laid down broad parameters to be followed while considering the application for bail moved by the accused involved in offences under NDPS Act. In Union of India Vs. Ram Samujh and Ors. 1999(9) SCC 429, it has been elaborated as under:-"7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting deathblow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in Durand Didier v. Chief Secy., Union Territory of Goa [(1990) 1 SCC

95)] as under:

24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine. 8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

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

(ii) that he is not likely to commit any offence while on bail are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended."

20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

In reference to meaning of the words 'reasonable grounds' following was observed in para 21 of the judgment:-

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 in addition to the limitations

provided under the Cr.PC, 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 indeed uncalled for.”

5(ii). The contention advanced by learned counsel for grant of bail to the petitioner is that the quantity allegedly recovered from the petitioner on the spot was 1.104 kgs, whereas during proceedings under Section 52A before the learned Magistrate, the quantity of cannabis allegedly recovered from the petitioner became 1.183 kgs. There is not much substance in this contention. Petitioner at this stage has not made out any case that the commercial quantity of contraband was not recovered from him by the investigating agency on 20.11.2021. Whether the alleged recovery of commercial quantity of cannabis from the petitioner was to the extent of 1.104 kgs or 1.183 kgs will not make any difference in respect of considering his case for grant of bail at this stage.

5(iii). The next contention put-forth by the learned counsel for the petitioner for release of petitioner on bail is that during proceedings under Section 52A of the Act, respondents had drawn two samples of 25 grams each from 1.183 kgs of cannabis. Learned counsel contended that aforesaid two samples were not drawn from a homogeneous mixture, therefore, petitioner is entitled to bail. Reliance in this regard was placed upon Ashok Kumar’s case *supra*. This ground can not be appreciated at this stage. This is a matter to be considered after appreciating the evidence to be advanced by the parties. It cannot be said at this stage that the samples were not drawn in accordance with law or that homogeneous mixture was not made of contraband recovered from the petitioner. Reliance upon Ashok Kumar’s case is also misplaced. The said judgment was passed in a criminal appeal after conclusion of the trial, whereas in the present case, it is the bail petition, which is being adjudicated. The questions raised by the petitioner are the ones that should be raised during the course of trial.

Since the petitioner has not satisfied the requirements laid down under Section 37 of the NDPS Act, therefore, he has failed to make out a case for enlargement on bail. Accordingly, there is no merit in the bail petition, which is dismissed at this stage, reserving liberty to the petitioner to file a fresh petition at an appropriate stage in accordance with law, if so advised.

It is clarified that observations made above are confined only to the adjudication of the present petition and shall have no effect on the merits of the matter. Learned trial Court shall decide the matter without being influenced by above observations.