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**(2003) 11 GUJ CK 0053**  
**In the Gujarat High Court**

**Case No :** Criminal Miscellaneous Application No. 7862 of 2003

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|----------------------------------------|------------|
| Saiyed Babar Saiyed Abdul Hamid Chisty | APPELLANT  |
| Vs                                     |            |
| State of Gujarat                       | RESPONDENT |

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**Date of Decision :** 12-11-2003

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 164, 227, 437, 439, 482  
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 22, 29, 37, 37(1)

**Citation :** (2003) 11 GUJ CK 0053

**Hon'ble Judges :** H.K. Rathod, J

**Bench :** Single Bench

**Advocate :** P.J. Yagnik, for the Appellant; R.C. Kodekar, APP, for the Respondent

**Final Decision :** Dismissed

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## Judgement

H.K. Rathod, J.—Heard learned advocate Mr. P.J. Yagnik for the petitioner and Mr. R.C. Kodekar, learned APP for the respondent State. Before starting the judgment, it would be profitable to make reference to few observations made by the Hon'ble apex court in the matter of The Chairman, Railway Board and Others Vs. Mrs. Chandrima Das and Others, as the same are relevant and material in the facts and circumstances of the present case. Therefore, the observations made in para 36 of the said decisions are reported as under:

"36. The Rights guaranteed under Part III of the Constitution are not absolute in terms. They are subject to reasonable restrictions and, therefore, in case of non citizen also, those Rights will not be available subject to such restrictions as may be imposed in the interest of the security of the State or the other important considerations. Interest of the Nation and security of the State is supreme. Since 1948 when the Universal Declaration was adopted till this day, there have been many changes political, social and economic while terrorism has disturbed the global scenario. Primacy of the interest of Nation and the security of the State will have to be read into the Universal Declaration as also in every Article dealing

with Fundamental Rights, including Art. 21 of the Indian Constitution."

2. Brief facts of the present case are to the effect that the PSI Mr. AJ Baloch filed a complaint dated 17.1.2003 on receiving an information DATED 16.1.2003 evening that on search from Saroli Jakatnaka to Police Check Post, at about 10.30 a.m., one Maruti Fronty and Maruti Zen, passengers travelled in those vehicles contraband goods of 24 kgs. and mobile phone and cash amount of Rs.10,00.00 were found and seized, and 7 accused persons were arrested u/s 8C, 21, 22, 29 of the Narcotics and Psychotropic Substance Act. As per the case of the prosecution, accused no.1 to 7 as mentioned in the charge sheet were arrested on 17.1.2003 and they were taken on remand upto 1.2.2003 and, thereafter, on the basis of the statements made by the other accused persons, the present petitioner was arrested on 27.1.2003 by the respondent police authority. Thereafter, he was taken on remand initially upto 4.2.2003 and thereafter again he was taken on remand upto 10.2.2003. The petitioner alongwith other accused persons, was arrested later on. Thereafter, during the course of investigation, nothing was recovered from the petitioner nor did he have any knowledge about the possession of the contraband goods which is alleged to have been recovered from the remaining accused persons. According to the petitioner, as such, there is no evidence against the petitioner that the petitioner was found with the possession of the narcotic drugs. The petitioner has also submitted that only on the basis of the statements made by two persons and other co accused persons, he has been arrested. According to the petitioner, initially, FIR being DCB Police Station 3rd CR No. 5088 of 2003, NDPS u/s 8C, 22, 29 was filed against accused no. 1 to 7. Thereafter, on the basis of the statements made by the co accused persons and other persons, the petitioner was falsely implicated by the police authority. According to the petitioner, he is a student of 10th Standard and studying in St. John's Diocean School, Ajmer and thereafter, he was admitted in St. Anselm's Senior Secondary School, Ajmer on 5.7.1993 where he studied upto standard 9th. Thereafter, he filled up a form for secondary school examination, 2003 for standard 10. Since the petitioner was in jail since 27.1.2003, he filed his criminal miscellaneous application no. 296 of 2003 dated 3.3.2003 for his regular bail before the sessions court, Surat wherein he prayed for his regular bail and alternatively, he also prayed for allowing him to appear in the examination which was scheduled to be held in March, 2003 by the Rajasthan Madhyamik Shikshan Board. It was also prayed for by the petitioner that he did not keep well because of liver problems and for further treatment, he prayed for his release on regular bail. Said application of the petitioner was rejected by the trial court on 7.3.2003. Thereafter, the petitioner approached this court by filing criminal misc. application no. 1739 of 2003. According to the petitioner, as the said application was filed by the petitioner before this court prior to the filing of the charge sheet, same was withdrawn by the petitioner with the leave of the court and it was, therefore, disposed of as withdrawn at that stage by this court by order dated 20.3.2003. According to the petitioner, unfortunately, due to shortage of time, he could not appear in the examination

scheduled to be held in March, 2003. According to the petitioner, the charge sheet was filed by the police authority and thereafter, the petitioner had moved an application no. 1270 of 2003 before the trial court on the ground that as per the FIR, his name was not there and during the course of remand period, nothing was found against him and there was no direct or indirect evidence against him as regards the possession of the narcotic drugs and psychotropic substance. The petitioner also made a mention of the fact that looking to the statement of the deponents, panchanama and the FSL Report and on the basis of the new facts and change of circumstances, he should be released on bail. Said Criminal Misc. Application no. 1270 of 2003 was rejected by the trial court on 5th September, 2003 and, thereafter, present application has been filed by the petitioner before this court for his release on bail in connection with the aforesaid offence under the NDPS Act, on various grounds as mentioned in the memo of petition. According to the petitioner, the IO has not proved the prima facie case against the petitioner and he was not involved in having possession and sold the narcotic drugs. According to the petitioner, the trial court has not considered the age and relevant documents of the petitioner and the trial court has committed error in rejecting his application. According to the petitioner, he was falsely implicated in the commission of the so called offence but that part has not been properly appreciated by the trial court while considering his application for bail. According to him, certain documents were produced by him before the trial court for proving his innocence but those documents were also ignored by the trial court while considering his application for bail. According to him, his name has been implicated only because of the statement given by the co-accused and other independent persons and, therefore, the order of the trial court is suffering from the vice of non application of mind. His date of birth is 9th January, 1984 and he is belonging to highly religious family whose work is to serve the devotees of Sufi Saint Khwaja Sharif Chisty Dargah, Ajmer. According to the petitioner, at this place, his family members and other relatives are serving as Khadims i.e. sewaks since long. According to him, there is no antecedent in respect of any criminal activity or involvement of any dispute but his family back ground has not been taken into consideration by the trial court while considering his application for bail. According to him, investigation of the matter is already over and the charge sheet has also been filed and nothing is left out by the IO and, therefore, there is no scope of tampering with the investigation and inducement to the witnesses and, therefore, the trial court ought to have released him on regular bail. According to the petitioner, if the bail is not granted, then, it would amount to pre trial punishment before he is given an opportunity to prove his innocence. He has also emphasized that he is prepared for complying with any conditions that may be imposed by this court while releasing him on bail. The petitioner has also produced copy of the FIR at page 17 to 25. The petitioner has also produced transfer certificate page 26, receipt for membership at page 27, page 28 of the compilation is the certificate from the school relating to the petitioner and page 29 thereof is the letter of admission from the Madhyamik Shikshan Board, Rajasthan, Ajmer. Page 30 thereof is the form for secondary examination of

2004. Similarly, page 32 is also different kind of form for secondary examination of the year 2004. Page 34 thereof is a form and 36 thereof is also a prescribed form for secondary education Board of the State of Rajasthan. Page 37 is the receipt. Page 38 is an application for bail submitted before the trial court. Page 48 is the order passed by the trial court on 5th September, 2003. Certified copy of the FIR is at page 54 to 61. Certified copy of the bail application is from page 62 to 71. Certified copy of the order dated 5th Sept. 2003 has also been produced by the petitioner. These are the documents annexed to the petition by the petitioner while filing the present application for bail before this court.

3. Page 54 is the affidavit of the father dated 17th October, 2003. Page 60 is the birth certificate of the petitioner. Page 61 is the progress record of the petitioner. Page 63 to 65 are also the progress reports of the petitioner. Page 67 is the certificate given by the school at Ajmer in favour of the petitioner. Page 68 is the I Card. Page 69 is the certificate dated 13th October, 2003. Page 70 is the mark sheet of the secondary examination board held in 2003. Page 71 is the I Card. Page 72 is the event card. Pages 73, 74, 75 and 76 are the photographs welcoming Shanti Yatra in presence of the Film Star Sunil Dutt. Page 77 is the affidavit of the mother of the petitioner. Except that, no other documents have been produced by the petitioner on record.

4. During the course of hearing, while making his oral submissions, it was submitted by the learned advocate Mr.Yagnik for the petitioner that the petitioner was not involved in the said offence because his name was not mentioned in the FIR and he was arrested only in view of the statement given by one accused No.5 Mohamad Rais on 27th January, 2003. He has made reference of two statements of independent persons namely Jalaluddin Hasamkhan Chita and Salim Ajmal Chita wherein, according to him, some involvement has been pointed out by the said two independent persons and one co accused. He has read over said two statements before this court. He has raised some objection about the non supply of the statement of accused no. 5 Mohamad Rais alongwith the charge sheet. Necessary answer to the said grievance has been given by the learned APP Mr. Kodekar for the State that the statement of accused No.5 Mohamad Rais was recorded u/s 164 of the Code of Criminal Procedure before the Magistrate and the said statement has been put in a sealed cover which can be opened only at the time of trial. He has also submitted that the said Magistrate before whom the statement of accused No.5 Mohamad Rais has been recorded has been cited as a witness no. 70 in the charge sheet and, therefore, the petitioner will be having an opportunity to cross examine the Magistrate before whom the statement of Mohamad Rais has been recorded. It was his submission that since the said statement has presently been placed in a sealed cover, copy thereof cannot be given to the petitioner alongwith the charge sheet. Learned advocate Mr.Yagnik has further submitted that the statements of the two independent persons have not been translated in Hindi language and the independent persons are not having the know ledge of Gujarati and, therefore, such statements considered against the petitioner. He also submitted that in all,

51 statements were recorded by the IO and save and except these two statements of the independent persons and the statement of co accused, nowhere the involvement of the petitioner has been found. He has also made a reference to page 26 to 77, each page with identification before this court which includes the photographs and other relevant documents relating to age and educational qualification of the petitioner. He also submitted that the trial court has not believed these documents to be genuine and has doubted the genuineness thereof but the investigating officer has submitted a report before this court where there is nothing pointed out by the investigating officer against those documents and doubt has not been created by him about the genuineness of the said documents. He also submitted that this being a mercy petition, may be considered in view of the age of the petitioner and also in view of the culture and family back ground of the petitioner. These were his oral submissions made before this court. After completion of the oral submissions, written submissions have been placed on record and copy thereof has been supplied by him to the learned APP Mr. Kodekar. This Court has taken on record the written submissions submitted by the learned advocate Mr. Yagnik. I fail to understand the conduct of the learned advocate Mr. Yagnik that why he has submitted written submissions because he was given full and more than enough opportunity to make the oral submissions before this court. While making the written submissions on an application for bail, learned advocate Mr. Yagnik was allowed by the court without even a slightest disturbance by raising any question or quarry and he was permitted to make submissions in the mode and manner liked by him upto his satisfaction and yet he has an audacity to submit written submissions. Why ? I fail to understand such an approach and conduct of Mr. Yagnik. He accordingly made his oral submissions before this court at length and during the course of his submissions, he referred to each and every documents and read before this court relevant portion of each and every documents produced by him alongwith the memo of petition. Then, what is the necessity of submitting the written submissions before this court? Whether the written submissions are permissible or not ? I am not entering into that aspect but this is not proper on his part to submit the written submissions after completion of the oral submissions at length. It may be an attempt by an advocate just to raise contention before the higher forum that though the written submissions were made, the concerned court has not considered it in its proper perspective. This may be an effort on the part of an advocate appearing for the petitioner so that they may emphasize the same before the higher forum while producing copy of such written submissions. In other way also, he is not justified in making the written submissions because after completion of the oral submissions, this court has not kept the matter pending for orders nor has reserved it for order but this court was dictating the oral order in the open court in presence of the advocates for the parties wherein he was having opportunity to hear the dictation of the oral order and if any submission is left out, then, he was having opportunity to point out that some particular submission has not been considered. All this was open for him and yet he has made his written submissions over and above the oral submissions made

by him before this court at considerable length. After taking the written submissions on the record of this matter, one question was asked by this court as to whether there is any change or addition in the written submissions in comparison to the oral submissions made by him before this court. In response to this question, he fairly answered that as such, there is no change or addition in comparison to the oral submissions made by him before this court. He also fairly submitted that he was given fair and fullest opportunity for making the oral submissions before this court. Except that, he then, made reference of one decision of the supreme Court in the matter of Prahlad Singh Bhati v. NCT Delhi and Anr. reported in AIR 2001 SCW 1263 which was earlier referred to by him during the course of his oral submissions. Therefore, when there is no any change and/or addition in the written submissions in comparison to the oral submissions made by him, I am not recording the submissions made by him in writing as there is no change. Except the oral submissions made by Mr.Yagnik as recorded hereinabove and the written submissions, no other submissions made by Mr. Yagnik for the petitioner.

5. On the other hand, while opposing the present bail application, it was submitted by the learned APP Mr. Kodekar that while considering the bail application under the provisions of the NDPS Act, the court is required to keep in mind the object of the NDPS Act. According to his submissions, the normal concession which is being given to the accused persons u/s 437/439 of the Code of Criminal Procedure is not available to the accused persons under the NDPS Act. He also submitted that the strict view is required to be taken in such a serious offence, otherwise, it will cause lot of damage to the society to such an extent that the most of the families in the society will be ruined; young generation will be the victim of such drugs and it will be a loss to the society and the country as a whole. He also submitted that the defence is not relevant at this stage while considering an application for bail in such an offence. He also submitted that the statement given by the co accused No.5 Mohammad Rais before the Magistrate u/s 164 of the Code in the month of February, 2003 is put in a sealed cover and it cannot be said that the non supply of such a statement to the petitioner alongwith the copy of the charge sheet would not cause any prejudice to the petitioner because the magistrate before whom such statement was recorded has been cited as a witness in the charge sheet and, therefore, at the time of trial, the petitioner will get an opportunity to cross examine the said witness who has recorded the statement of accused No.5 and at this stage, non supply of such a statement would not cause any prejudice to the petitioner. He also submitted that this is not a mere solitary incident but it is based on an international racket and therefore, it is required to be viewed seriously. He also submitted that the status of the person is not relevant factor while considering the application for bail in such a serious offence. He also submitted that the total amount of the narcotic drugs as valued by the IO is coming to more than Rs. 24 crores as mentioned in the FIR by the IO and, therefore, considering the quantity found and the value thereof as above, some strict view is required to be taken.

He also submitted that the apprehension voiced on behalf of the petitioner that the trial will take long time is ill founded in view of the appointment of the Fast Track Courts in the State and in view of that, it cannot be said that the trial will be delayed and the petitioner will have to remain more time behind the bars as an under trial prisoner. According to him, if the petitioner is believing that he is not involved in the offence and he has been falsely implicated, then, he is having two options for the present. One is to file an application before this court u/s 482 of the Code of Criminal Procedure for quashing of the charge sheet and the another is an opportunity to file appropriate application at the time of framing of the charge u/s 227 of the Code of Criminal Procedure. Therefore, according to his submissions, looking to his involvement, considering the statement of two persons who are independent persons, at this stage, this court cannot examine the merits of the matter and this court must follow the provisions of section 37 of the NDPS Act which are mandatory in nature. According to his submissions, if the case is not falling within the exceptions, then, this court is not having the powers to exercise the discretion in favour of the petitioner. According to him, this case is not falling within the exceptions provided in section 37 of the NDPS Act and, therefore, present application is required to be rejected.

6. I have considered the submissions made by the learned advocates for the parties. I have also considered the averments made by the petitioner in the memo of petition and the written submissions made by the learned advocates for the parties. I have also perused the relevant records placed before this court for consideration. I have also considered the report of the IO about the genuineness of the documents which have been produced by the petitioner. I have also kept in view the report of the IO about the genuineness of the documents produced by the petitioner which suggests that the documents produced by the petitioner are genuine and the same have not been doubted by the IO. Said report has been placed for consideration of this court by the APP which is dated 5th November, 2003. I have also perused the orders passed by the trial court and the decision relied upon by Mr. Yagnik in the matter of Babua alias Tazmul Hossain versus State of Orissa reported in AIR 2001 SCW 682. I have considered the decision of this Court in the matter of Sandeep Pritpal Sing Khanuja versus Shri CDR Wellington, Inspector of Customs (Pre), Ahmedabad and Another reported in 1993 (1) GLH 656. Learned advocate Mr. Yagnik has placed reliance on para 4 of the said decision, in particular. I have also considered the decision of the apex court in the matter of AK Mehaboob versus Intelligence Officer, Narcotics Control Bureau reported in 2002 SCC 1035. I have also considered the decision of the Bombay High Court in the matter of Prajesh Shantilal Vaghani Vs. The Intelligence Officer, Narcotics Control Bureau and another Bombay, . Lastly, learned advocate Mr. Yagnik has relied upon the decision in the matter of Prahlad Singh Bhati v. NCT Delhi and Anr. reported in AIR 2001 SCW 1263. Except the above decisions, he has not relied upon any decisions. Except the aforesaid oral submissions which he has reiterated in the written submissions, no other submissions have been made by him.

7. I have considered the aforesaid decisions cited by the learned advocate Mr. Yagnik for the petitioner. None of the decisions are applicable to the facts of the present case. The decision of this Court in the Wellington, Inspector of Customs (Pre), Ahmedabad and Another reported in 1993 (1) GLH 656 is not a matter under the provisions of the NDPS Act and, therefore, the ratio laid down by this court in the said judgment will not apply to the facts of the present case considering the mandatory provisions of section 37 of the NDPS Act.

8. As per the decision of the apex court in the matter of AK Mehaboob versus Intelligence Officer, Narcotics Control Bureau reported in 2002 SCC 1035, the apex court has considered the statement of the co accused that the prosecution case is based on the statement made by the appellant u/s 67 that he went to the house of the co accused having been informed that the brown sugar could be supplied to him there but the prosecution admitted that neither any brown sugar has been given to the appellant nor did he part with any money as a consideration nor any money was recovered from him and considering such admissions made by the prosecution, conviction u/s 21 and 29 of the Act cannot be sustained and, therefore, the apex court set aside the conviction made under the NDPS Act. At this stage, it is required to be noted that as stated above, in the aforesaid decision, the apex court was not considering the matter under the NDPS Act for bail but was considering the conviction recorded by the trial court and in the peculiar facts of that matter, the apex court set aside the order of conviction. Here, this court is not considering the conviction but this court is considering the matter for bail of an accused under the NDPS Act and, therefore, the ratio laid down by the apex court in the aforesaid decision cannot be made applicable to the facts of the present case.

9. The decision in the matter of Prajesh Shantilal Vaghani Vs. The Intelligence Officer, Narcotics Control Bureau and another Bombay, is also not applicable to the facts of the present case on the ground that the confessional statement which was relied by the prosecution has been obtained by physical assault and that was the relevant consideration while granting bail by the Bombay High Court which are not the facts in the present case. In view of that, this decision is also not helpful to the petitioner.

10. The observations made by the apex court in para 3 of the matter of Babua alias Tazmul Hossain versus State of Orissa reported in AIR 2001 SCW 682, which has been relied upon by the learned advocate Mr. Yagnik, are enough for rejecting the present application. Therefore, the observations made in para 3 of the said decision are reproduced as under:

"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 believed, 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."

11. Before considering the submissions at length, relevant provisions contained in section 37 of the NDPS Act are required to be considered. Therefore, section 37 of the NDPS Act is reproduced 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 u/s 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."

12. It is not the case of the petitioner before this court that the offence which has been alleged against the petitioner is not for the offence involving commercial quantity. Therefore, the offence which has been alleged against the petitioner and other accused persons is relating to the commercial quantity and in view of that, section 37 of the NDPS Act is applicable. The section itself has been very much clear that the Court can consider the section and can grant the bail if the court is satisfied that there are reasonable ground for believing that he is not the guilty of such an offence and that he is not likely to commit any offence while on bail. Considering these mandatory provisions in section 37 of the Act and looking to the statements of two independent persons Jalaluddin Chita and Salim Chita, those who are independent persons who have specifically pointed out the involvement of the present petitioner on the date of incident that

he was found in the place where narcotics drugs were arranged and adjusted in two car by certain persons including the petitioner, when the involvement of the petitioner is apparent as well as clear in view of the said statements, when there is no contrary statement produced by the petitioner before this court, then, this court cannot grant bail in favour of the petitioner because on the basis of this two statement of independent persons, this court is prima facie satisfied about the involvement of the petitioner in the alleged offence and, therefore, the petitioner is not entitled for the exercise of the discretion vested in this court in favour of the petitioner. When the Court is prima facie satisfied about the involvement of the petitioner, then, the second part of section 37 of the Act about his likelihood to commit such similar offence will not arise for consideration of this court because this court is prima facie satisfied about the involvement of the petitioner in such a serious offence under the NDPS Act. This aspect has been examined by this court in great detail in the matter of *Sohil Safi Mohammad Vohra Vs. State of Gujarat*, . Relevant observations made by this court in para 5, 6 and 7 are reproduced as under:

"5. However, considering the observations made by the Additional Sessions Judge, Nadiad on page 27 in para 3, after perusing the police papers, one fact has been clearly established prima facie and there is reasonable ground to the effect that the present petitioner is a person from whom the main accused has purchased charas. This fact has been born out from the police papers and it has been rightly considered by the concerned Additional Sessions Judge. However, this is a prima facie case established against the present petitioner and a person who is selling charas in the society and from the police papers, if this has been found on the record that the main accused has purchased charas from the present petitioner, that is enough to consider the mandate of section 37. Apex Court in case of *Union of India (UOI) Vs. Ikram Khan and Others*, , the Apex Court has observed that while considering the question of bail, the Court was not borne in mind the provisions of section 37 of the NDPS Act which are mandatory in nature and the Court must bear in mind the said provisions before deciding an application of bail in case an accused is facing a trial under the provisions of the NDPS Act and in that view of the matter, ultimately, bail has been cancelled by the Apex Court which has been granted by the concerned High court. Thereafter, recently, the apex court has also considered the very same question in case of *Babua @ Tazmul Hossai v. State of Orissa* reported in AIR 2001 SCW 682 where the apex court has observed in NDPS Act, bail petition for charge for abetting offence punishable under sec. 20(b), 21 and 29, evidence not completely adduced, cannot be said at such stage that accused is not guilty of the offence charged. Moreover, it would be in interest of society to keep the accused involved in activities lethal to society, behind bars and accordingly, the petition was dismissed by the apex court. In the present case also, learned advocate Mr. Pandey has argued on merits and contended as regards the samples - muddamal that the same has not been properly sealed by the police authority. But so far as this contention is concerned, this court is of the opinion that still the trial is yet to

be commenced and this contention can be raised by the petitioner before the concerned court at the time of trial. However, this aspect has been considered by this court in case of *Shirish Madhavdas Parikh Vs. State of Gujarat*, . This Court while dealing with the contention raised with regard to production of the petitioner before the Magistrate or Sessions Judge ultimately if the trial court holds that there is some illegality, the court may not convict the petitioner but when the question of prima facie case is to be decided, this irregularity on the point of investigation or producing before the Sessions Judge would not be of any avail. It may be mentioned that the said contentions on behalf of the petitioner will be required to be examined from the point of view of section 36(d) and also section 74 of the Act, and, therefore, at this juncture, it cannot be said that the prosecution has failed to establish a prima facie case.

6. Recently, the apex court has considered the relevant principles which required to be kept in mind by the concerned court while considering the anticipatory bail application filed by the accused in case of *Prahlad Singh Bhati v. NCT Delhi and Anr.* reported in AIR 2001 SCW 1263 and more particularly in para 8 has observed as under:

"The jurisdiction to grant bail has to be exercised on the basis of well settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behavior means and standing of the accused, circumstances which are peculiar to the accused reasonable opportunity of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interest of the public or State and similar other considerations. It has also to be kept in mind that for the purpose of granting the bail, the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the Court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt. "

7. In light of the above observations made by the Apex Court and considering the facts of the present case, according to my opinion, there is prima facie evidence as discussed by the Additional Sessions Judge, Nadiad in para 3 against the present petitioner, and therefore, at this juncture, contention which has been raised by the learned advocate Mr. Pande cannot be considered because the same can be considered by the trial court at the time of trial. However, at the last, learned advocate Mr. Pande has relied upon one order passed by the Additional Sessions Judge, Nadiad in favour of Hayatkhan Sardarkhan Pathan in Misc. Criminal Application NO. 143 of 2001. Considering the order relied by the learned advocate Mr. Pande, this Court is of the opinion hat the order relied is

passed by the Sessions Judge and the same cannot be considered to be binding to the High Court and even the same cannot be considered for the purpose of parity. If the order is passed by the concerned Sessions Judge ignoring the mandate of section 37 of the NDPS Act, this Court cannot pass such orders on the ground of parity because prima facie, such order is contrary to the mandate of section 37 of the NDPS Act and, therefore, even this contention as to claiming parity for identical situation in case with said Hayatkhan Sardarkhan Pathan cannot be of no assistance to the present case. Moreover, considering the seriousness of the offence committed by the present petitioner of selling contraband articles to the main accused and especially when this fact has been found from the record, prima facie against the present petitioner and it is necessary to note that if the accused released by the court and his presence in the society adversely affect or having adverse impact in the mind of society petitioner cannot be enlarged on bail, otherwise lethal activities to the society carried out by the petitioner will be released which ultimately adversely affects the Society as a whole. Moreover, it is also observed that the present application and while granting the bail, the Court has to keep in mind the nature of punishment which conviction will entail, the character, behaviour, circumstances of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interest of the public or State and similar other considerations. Moreover, this Court has to keep in mind that for the purposes of granting the bail, the Legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the Court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. However, it is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

13. Looking to the charge sheet filed against the petitioner, the prima facie involvement as well as the active participation of the petitioner in a transaction has been established which is having international racket. At the time when the narcotic drugs were adjusted in both the cars at the relevant time, the presence of the petitioner has also been established, of course, prima facie, in view of the statements of two independent persons namely Jalaluddin Chita and Salim Chita. The presence of the said two independent persons at the site was natural because both of them were preparing the food as per the requirement of the accused. Therefore, naturally, both the independent persons rightly identified the presence of the petitioner on the site at the relevant time for doing the work of adjustment of the narcotic drugs in a secret place and/or box of the cars. Therefore, when the activity of the petitioner, his active participation with narcotic drugs has been prima facie established and proved on the basis of the statements of two independent witnesses, that itself is enough to say that prima facie, it cannot be said that the petitioner is falsely implicated in the said offence. Not only that, but accused no.5 Mohammad Rais initially gave statement before the police authority wherein also, involvement of the present petitioner in the

said offence was pointed out by him which alone was establishing his prima facie involvement and active participation in the offence. Thereafter, accused no.5 Mohammad Rais gave his statement before the Magistrate u/s 164 of the Code of Criminal Procedure and now, naturally, this is an additional piece of evidence against the petitioner which established clear involvement of the petitioner in the alleged offence. In view of such clear and apparent evidence on record, at this juncture, it cannot be said that there are reasonable grounds for believing that the petitioner is not guilty of such offence. In view of that, the submission made by the learned advocate Mr. Yagnik that the petitioner has falsely been implicated in such a serious offence cannot be accepted and, therefore, same is rejected. The submission made by the learned advocate Mr. Yagnik about the young age, education and the religious back ground of the petitioner has to be considered in light of the draconian effect of the narcotic drugs and psychotropic substance on the young generation of our country which is the wealth of the nation. If we see to the effect of such drugs in the society, then, lacs of the young people are becoming addicted of such drugs which is ultimately ruining the young generation and thereby destroying the wealth of the nation. After the boys of a young are being made addicted of such narcotic drugs, the operators of such racket are compelling them to indulge into anti social and anti national activities and the victims of such drugs are having no option but to surrender at the whims and caprice of such operators because if they would not surrender to them, then, they would not get the quantity for their consumption. By adopting such means, the operators of such international racket are also exploiting the young generation which is nothing but the wealth and hopes of our nation. Narcotic Drugs is concealed cancer in the society. Nobody is realizing the real effect of the said drugs in the society. It is like a slow poison which is ultimately resulting in death of such a person. Accused wants certain financial benefits by selling the commercial quantity in the society but the accused persons are not worried and are having no concern about the interest of the society. They are concerned and interested only in money and not in the society. Ultimately, by consuming such drugs and substances, society as a whole is becoming weak because the young generation is becoming addicted of such drugs and substances but nobody is looking from that angle because ultimately, young person, with the help of 8 to 10 persons, destroying settled society by selling the narcotic drugs. In view of that, considering the effect of such drugs and substances on the young generation of our country, the submission of Mr. Yagnik that the young age of the petitioner, his religious family back ground should be considered while considering this application cannot be accepted and the same is, therefore, rejected since the offence in question is not the offence against an individual but it is an offence against the society as a whole and the nation because when there is a conflict between an individual and the society at large, then, the law has given prima place to the society, State and the Nation. Means, the Society, State and the Nation are supreme in comparison to the fundamental right of any individual. Therefore, when it was found in two car about 24 kg. narcotic drugs in Gujarat, then, no leniency can be shown in favour of such a person and in view

of that, his age, his religious family back ground etc. cannot be taken into consideration while considering his bail application under the NDPS Act.

14. It has not been disputed by the learned advocate Mr.Yagnik that the quantity which is seized by the police authority is not a commercial quantity. It is also not disputed by him that the provisions of sec. 37 of the NDPS Act are not applicable. Once both the conditions are satisfied, prima facie, establishment of the petitioner is found to be clearly established and therefore, the case of the petitioner is squarely falling within the ambit of section 37 of the NDPS Act. Section 37 of the Act itself is mandatory providing exceptions. It is then not the case of the petitioner that his case is covered by any of the exceptions provided in section 37 of the NDPS Act. In view of that, the submission made by the learned advocate Mr.Yagnik that there is no proof about the prima facie involvement of the petitioner cannot be accepted and the same is, therefore, rejected. Learned advocate Mr. Yagnik has not been able to satisfy that the petitioner is not prima facie involved in the alleged offence and, therefore, there is no evidence produced by the petitioner which would satisfy the conscience of the court to the effect that the petitioner is not prima facie involved in the alleged offence and, therefore, this court cannot exercise the discretion in favour of the petitioner. The petitioner is, therefore, not entitled for the normal concessions entitled to the accused persons u/s 437/439 of the Code of Criminal Procedure. While considering the bail application, it is the duty of the court to see the seriousness of the offence, effect of such offence in the society at large and if the accused is released on bail, then, whether he will not indulge into the same or similar activities or not; whether he will tamper with the evidence or not and whether his presence could be secured at the time of trial or not. Therefore, when the whole young generation is now becoming victim of the international racket relating to narcotic drugs transaction which is running and going on to earn money only though their activities may be the offence under the NDPS Act or they may damage the society at large. This being the serious offence which will ruin the thousands of family and young generation and ultimately society at large will suffer and will be having adverse impact upon the nation and national level economy of the State will be adversely affected and, therefore, considering these entire facts and circumstances of the case, considering the fact that the offence itself is such which would justify the mandatory provisions of section 37 of the NDPS Act because the petitioner is prima facie involved in a transaction of the narcotic drugs having commercial quantity. Therefore, at this stage, this court has to consider the entire matter relying upon the apex court decisions in relevant cases where strict view has been taken even in well known case of Bipin SHantilal Panchal the apex court has not released him on bail though more than eight years have passed for completing trial before the trial court as otherwise, it would frustrate the aim and object of enacting section 37 of the NDPS Act. The very purpose of section 37 of the Act itself would suggest that in case of commercial qutntity, and in case of other relevant sections, bail should not be granted unless the accused is satisfying that the case would fall within the

exceptions. Here the petitioner is not able to prima facie satisfy this court about his non involvement. The petitioner has also not been able to establish prima facie that the quantity was not a commercial quantity and, therefore, his case is not falling within the exceptions provided in section 37 of the Act. Considering the weight and value of the quantity found, it is apparent that the alleged transaction is commercial transaction.

15. The contention of Mr. Yagnik that the name of the petitioner has not been mentioned in the FIR but has been added subsequently has no much relevance because the name of the petitioner has been disclosed by the co-accused at a later point of time after the police custody and, therefore, merely because the name has not been inserted initially in the FIR, that circumstance would not entitle the petitioner for any different treatment or sympathy in such a serious offence.

16. Recently, in the matter of State of Madhya Pradesh Vs. Kajad, , the apex court has the scope of section 37 of the NDPS Act and after considering section 37 of the NDPS Act, has considered the purpose for which the NDPS Act was enacted and observed as under in para 5, 6, 7 and 8 of the said judgment:

"The purpose for which the Act was enacted and the menace of drug trafficking which it intends to curtail is evident from its scheme. A perusal of section 37 of the Act leaves no doubt in the mind of the court that a person accused of an offence, punishable for a term of imprisonment of five years or more, shall generally be not released on bail. Negation of bail is the rule and its grant an exception under sub clause (ii) of clause (b) of section 37(1). For granting the bail the court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail. It has further to be noticed that the conditions for granting the bail, specified in clause (b) of sub section (1) of section 37 are in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail. Liberal approach in the matter of bail under the Act is uncalled for.

6. In Maktool Singh Vs. State of Punjab, , this court considered the scope of section 37 alongwith the scheme of the Act and held : (SCC p.326, para 17)

"17. The only offences exempted from the purview of the aforesaid rigours on the bail provisions are those u/s 26 and 27 of the Act. The former is punishable upto a maximum imprisonment for three other offences, the court's power to release an accused on bail during the period before conviction has been thus drastically curtailed by providing that if the Public Prosecutor opposes the bail application, no accused shall be released on bail, unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence.

To the same effect are the judgments of this Court in Intelligence Officer, Narcotics C. Bureau v. Sambhu Sonkar [(2001) 2 SCC 562 : 2001 SCC 346] and

D. Sarojini v. State of A.P. [2001] 4 Supreme 179 : (2001) 7 SCC 677, below].

7. In the instant case, the learned Single Judge of the High Court has granted the bail on his own sense of observation regarding the course of conduct adopted by the accused at the time of his interception and arrest. Merely because the accused was found to be counting to hold a bad containing opium during the period, the raiding party searched him in accordance with the provisions of the Act, the learned Judge was not justified to conclude "it is by itself unnatural". How the learned Judge concluded that the conduct of the accused or raiding party was unnatural is not discernible from the impugned order. A person, apprehended by a raiding party, who is sought to be searched is supported to hold the goods in his possession unless he opts to flee from the place of occurrence or is advised to throw the container in which the offending substance is contained. Section 37 of the Act has been referred to in the impugned order not for the purpose of showing of its compliance but to justify the passing of an apparently wrong order. If, besides referring to section 37 of the Act, the learned Judge would have referred to its provisions, he would not have fallen a prey to the ulterior designs of the respondent accused.

8. It has further to be noted that the factual of rejection of his earlier bail application being Miscellaneous Case No. 2052 of 2000 on 5.6.2000 has not been denied by the respondent. It is true that successive bail applications are permissible under the changed circumstances. But without the change in the circumstances, the second application would be deemed to be seeking review of the earlier judgment which is not permissible under criminal law as has been held by this Court in Hari Singh Mann v. Harbhajan Singh Bajwa [(2001) 1 SCC 169 : 2001 SCC 113] and various other judgments."

17. Thus, in the aforesaid decision, the apex court has, after considering the scope of section 37 of the Act as well as the menace of the drug trafficking which it intends to curtail, allowed the appeal by setting aside the order of bail granted in favour of the accused therein by the High Court.

18. After considering the relevant decisions cited by Mr.Yagnik and also after considering the oral as well as the written submissions made by the learned advocate Mr.Yagnik on behalf of the petitioner as well as the oral submissions made by the learned APP Mr. R.C. Kodekar on behalf of the State, and also after considering the two statements of independent persons referred to hereinabove, and also considering the fact that the statement of the accused No.5 Mohamad Rais has already been recorded before the Magistrate u/s 164 of the Code, according to my opinion, these aspects were rightly examined and appreciated by the trial court and the trial court was right in rejecting the application of the petitioner for bail after considering all these aspects of the matter. The only question is about the genuineness of the documents produced by the petitioner and that aspect has been clarified by the IO concerned before this court that the documents relating to the age, educational qualification of the petitioner etc. are genuine. However, according to my opinion, it makes no much difference and

would not, in any way, alter the situation save and except the factual aspect that the date of birth, educational qualification and the petitioner belonging to the religious family but these are not the relevant factors while considering such an application and that too in such a serious offence under the NDPS Act. Status of the person is immaterial and not relevant when the bail application in such a serious offence is being considered by the Court in view of the prima facie involvement of the petitioner while keeping in mind the mandatory provisions of section 37 of the NDPS Act and, therefore, according to my opinion, there is no substance in the present application and the trial court was perfectly right in rejecting the application. Therefore, present application is required to be rejected.

19. Before parting, it is hereby clarified that what observations made in this order have been made only for the purpose of deciding an application of bail and the observations made by this Court are prima facie. Therefore, the trial court, while deciding the matter after regular trial, will decide the matter on the basis of the evidence on record and in accordance with law without being influenced by the observations made by this Court, in any manner whatsoever since they are based on prima facie considerations.

20. In the result, this application is rejected. Notice is discharged.