

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA  
ON THE 29<sup>th</sup> DAY OF JULY 2022

BEFORE

HON'BLE MS. JUSTICE JYOTSNA REWAL DUA  
CRIMINAL MISC. PETITION (MAIN) No. 1254 OF 2022

Between:-

VINOD KUMAR MISHRA,  
(AGED ABOUT 43 YEARS)  
S/O LATE PRAMOD KUMAR MISHRA,  
R/O VILLAGE KACHORA BAZAR,  
P.O. BELAN GANJ, PS- CHATTA,  
DISTT. AGRA, UP PRESENTLY  
UNDER JUDICIAL CUSTODY IN DISTT. JAIL HAMIRPUR,  
H.P. PRESENTLY IN JUDICIAL CUSTODY AND CONFINED  
IN DISTT.JAIL HAMIRPUR, DISTT. MANDI, H.P.

.....PETITIONER

(BY SH. VARUN CHANDEL, ADVOCATE)

AND

NARCOTICS CONTROL BUREAU  
THROUGH ASHOK KUMAR PRAJAPATI,  
INTELLIGENCE OFFICER, NARCOTICS  
CONTROL BUREAU, SUB-ZONE MANDI, H.P.

.....RESPONDENT

(BY SH. ASHWANI PATHAK, SR. ADVOCATE WITH  
SH. SANDEEP SHARMA, ADVOCATE)  
WHETHER APPROVED FOR REPORTING OR NOT?

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*This petition coming on for orders this day, the  
Court passed the following:*

**ORDER**

Petitioner is a co-accused in Crime No.58/2021,  
dated 05.09.2021, registered under Sections 20 and 29 of the

Narcotic Drugs & Psychotropic Substance Act, 1985 (in short the Act) at Narcotics Control Bureau (NCB) Sub Zone Mandi, H.P. He was arrested on 06.09.2021 and seeks his enlargement on bail by means of present petition filed under Section 439 of the Code of Criminal Procedure.

2. Prosecution case against the petitioner is that:-

2(i). A secret and reliable information was received by the Narcotics Control Bureau (NCB) officials on 4.9.2021 that two persons namely Prashant Kumar and Vinod Kumar (petitioner herein) were involved in trafficking of cannabis and that they would carry cannabis on 5.9.2021 at around 08.00 hours from Naggar area of Kullu and would go towards Agra U.P. by hiding it in the cavity of a car having registration No. No.UP-80-DY-5898. The information was also to the effect that on search of the vehicle considerable quantity of cannabis might be seized. In view of the information, a nakka was placed by the respondent/NCB Officials at about 1015 hours on 5.9.2021 at Kataula Chowk Bajaura, Kullu, H.P. The private vehicle mentioned in the secret information was noticed coming from Kullu side. It was signalled to stop. The vehicle had five occupants. It was being driven by Prashant Kumar alias Pankaj (co-accused). The petitioner-Vinod Kumar was sitting on the

backseat of the vehicle. One Megh Singh and two ladies were also there in the vehicle in question.

2(ii) During interrogation, it came out that the petitioner and Prashant Kumar had knowledge about the contraband kept in the vehicle. They also disclosed about the cavity created in the vehicle for this purpose. On the basis of interrogation carried out from these two accused persons, respondent/NCB officials summoned a local mechanic for opening the gearbox and hand break etc. Search of the vehicle was carried out in accordance with law. During search, four packets wrapped with polythene were found in the cavity of the gearbox and hand break of the vehicle. These were opened in the presence of independent witnesses, apprehended persons and the NCB officials. Cannabis weighing 1.080 kg was recovered from the packets.

2(iii). The recovery of commercial quantity of contraband led to registration of the FIR in question. The petitioner and co-accused Prashant Kumar were arrested on 06.09.2021.

### 3. **Contentions**

3(i). Learned counsel for the petitioner argued that the petitioner was only a traveller in the vehicle that was being used as a taxi. He had no control over the same. The petitioner was

not aware about the presence of contraband in the vehicle. Learned counsel also highlighted the fact that one Megh Singh and two ladies sitting in the vehicle have not been made accused in the crime, whereas as per statement made by one Ankit Basal (the owner of the vehicle), said Megh Singh was his driver. Learned counsel further submitted that the petitioner had no role whatsoever to play in the allegations levelled against him in the crime. In support of his arguments, learned counsel placed reliance upon **2008(1) SLC 455**, titled ***Mahant Bal Giri and another Vs. State of H.P.*** and several other cases, where persons accused of possessing commercial quantity of contraband were enlarged on regular bail. Raising the plea of innocence & false implication of the petitioner, learned counsel submitted that the petitioner has completed over six months in custody and prayed for allowing the present bail petition.

3(ii). Learned Senior Counsel on behalf of NCB/respondent opposed the bail plea. It was submitted that the respondent/NCB has sufficient evidence of active involvement of the petitioner in the crime in question. The seized contraband fell in the commercial quantity, which attracts the provisions of Section 37 of the Act. The petitioner has not been able to satisfy the conditions imposed under Section 37 of

the Act for his enlargement on bail. Accordingly, prayer was made for dismissing the bail petition.

#### 4. **Observations**

4(i). According to the status report, cannabis weighing 01.080 kgs was recovered from the vehicle in question on 05.09.2021. 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.*

4(ii). 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."*

***Union of India Vs Md. Nawaz Khan (2021) 10***

**SCC 100** was a case where commercial quantity of contraband was recovered from a car from a place, where its wiper was connected to its front bonnet. The respondent (one of the



accused persons) was also travelling in the said car. One of the arguments raised before the Hon'ble Apex Court was that the respondent was not in conscious possession of the contraband since it had been recovered from the wiper fitted on the front bonnet of the vehicle, of which he had no knowledge. Relying upon **(2010) 9 SCC 608**, titled ***Dharampal Singh Versus State of Punjab***, **(2015) 6 SCC 222**, titled ***Mohan Lal Versus State of Rajasthan*** and various other precedents, Hon'ble Apex Court in **(2021) 10 SCC 100**, titled ***Union of India Versus Md. Nawaz Khan***, held as under with respect to 'conscious possession' of the contraband:-

*"25. We shall deal with each of these circumstances in turn. The respondent has been accused of an offence under Section 8 of the NDPS Act, which is punishable under Sections 21, 27-A, 29, 60(3) of the said Act. Section 8 of the Act prohibits a person from possessing any narcotic drug or psychotropic substance. The concept of possession recurs in Sections 20 to 22, which provide for punishment for offences under the Act. In Madan Lal v. State of H.P., this Court held that: (SCC p.472, paras 19- 23 & 26)*

*"19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record are that all the accused persons were travelling in a vehicle and as noted by the trial court they were known to each other and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.*

20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

21. It is highlighted that unless the possession was coupled with the requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

22. The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Supt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja* to work out a completely logical and precise definition of "possession" uniforml[y] applicable to all situations in the context of all statutes. 23. The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended.

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26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles."

26. What amounts to "conscious possession" was also considered in *Dharampal Singh v. State of Punjab*, where it was held that the knowledge of possession of contraband has to be gleaned from the facts and circumstances of a

*case. The standard of conscious possession would be different in case of a public transport vehicle with several persons as opposed to a private vehicle with a few persons known to one another. In Mohan Lal v. State of Rajasthan, this Court also observed that the term “possession” could mean physical possession with animus; custody over the prohibited substances with animus; exercise of dominion and control as a result of concealment; or personal knowledge as to the existence of the contraband and the intention based on this knowledge.”*

Regarding absence of recovery of the contraband from possession of the respondent (therein) it was held that even a finding of absence of possession of contraband on the person of the respondent by the High Court in the impugned order does not absolve it of the level of scrutiny required under Section 37(1)(b)(ii) of the NDPS Act. Relevant observations of the Hon’ble Apex Court are as under:-

*“29. In line with the decision of this Court in Rattan Mallik (supra), we are of the view that a finding of the absence of possession of the contraband on the person of the respondent by the High Court in the impugned order does not absolve it of the level of scrutiny required under [Section 37\(1\)\(b\)\(ii\)](#) of the NDPS Act.*

*30. With regard to the statement under [Section 67](#) of the NDPS Act, the High Court has placed abundant reliance on the inclusion of Mohd. Arif Khan’s name in place of the respondent’s name in the endorsement of translation on the statement of the respondent. In Tofan Singh, a three judge Bench of this Court held that a statement under Section 67 of the NDPS Act is inadmissible. The ASG submitted that independent of the statement, there are valid reasons to*

*deny bail on the basis of the material which has emerged at this stage.*

*31-33.....*

*34. The following circumstances are crucial to assessing whether the High Court has correctly evaluated the application for bail, having regard to the provisions of [Section 37](#):*

*34.1. The respondent was travelling in the vehicle all the way from Dimapur in Nagaland to Rampur in Uttar Pradesh with the co-accused.*

*34.2. The complaint notes that the CDR analysis of the mobile number used by the respondent indicates that the respondent was in regular touch with the other accused persons who were known to him.*

*34.3. The quantity of contraband found in the vehicle is of a commercial quantity.*

*34.4. The contraband was concealed in the vehicle in which the respondent was travelling with the co-accused.*

*35. The impugned order of the High Court, apart from observing that no contraband was found from the personal search of the respondent has ignored the above circumstances. The High Court has merely observed that: (Mohd. Nawaz Khan case, SCC Online All para 10)*

*“10. In view of the above, the twin conditions contained under [Section 37\(1\)\(b\)](#) of the NDPS Act stand satisfied. This Court is of the view that if there is reasonable ground, the applicant is entitled to be released on bail.”*

*36. The High Court has clearly overlooked crucial requirements and glossed over the circumstances which were material to the issue as to whether a case for the grant of bail was established. In failing to do so, the order of the High Court becomes unsustainable. Moreover, it has emerged, during the course of the hearing that after the respondent was enlarged on bail he has consistently remained away from the criminal trial resulting in the*

*issuance of a non-bailable warrant against him. The High Court ought to have given due weight to the seriousness and gravity of the crime which it has failed to do.”*

In Criminal Appeal Nos.1001-1002 of 2022 decided on 19.07.2022 (***Narcotics Control Bureau Vs. Mohit Aggarwal***), the appellant-NCB was aggrieved of an order passed granting post-arrest bail to the respondent-accused in a case involving recovery of commercial quantity of the contraband. The Hon'ble Supreme Court allowed the appeal filed by NCB by holding that 'the Court is not required to record a finding that the accused person is not guilty. The Court is also not expected to weigh the evidence for arriving at a finding as to whether the accused has committed an offence under the [NDPS Act](#) or not. The entire exercise that the Court is expected to undertake at this stage is for the limited purpose of releasing him on bail. The focus is on the availability of reasonable grounds for believing that the accused is not guilty of the offences that he has been charged with and he is unlikely to commit an offence under the Act while on bail'. On facts of that case, it was observed as under:-

*“16. Coming back to the facts of the instant case, the learned Single Judge of the High Court cannot be faulted for holding that the appellant- NCB could not have relied on the confessional statements of the respondent and the other co-accused recorded under [Section 67](#) of the NDPS*

*Act in the light of law laid down by a Three Judges Bench of this Court in Tofan Singh (supra), wherein as per the majority decision, a confessional statement recorded under [Section 67](#) of the NDPS Act has been held to be inadmissible in the trial of an offence under the [NDPS Act](#). Therefore, the admissions made by the respondent while in custody to the effect that he had illegally traded in narcotic drugs, will have to be kept aside. However, this was not the only material that the appellant- NCB had relied on to oppose the bail application filed by the respondent. The appellant-NCB had specifically stated that it was the disclosures made by the respondent that had led the NCB team to arrive at and raid the godown of the co-accused, Promod Jaipuria which resulted in the recovery of a large haul of different psychotropic substances in the form of tablets, injections and syrups. Counsel for the appellant-NCB had also pointed out that it was the respondent who had disclosed the address and location of the co-accused, Promod Jaipuria who was arrested later on and the CDR details of the mobile phones of all co-accused including the respondent herein showed that they were in touch with each other.*

*17. Even dehors the confessional statement of the respondent and the other co-accused recorded under [Section 67](#) of the NDPS Act, which were subsequently retracted by them, the other circumstantial evidence brought on record by the appellant-NCB ought to have dissuaded the High Court from exercising its discretion in favour of the respondent and concluding that there were reasonable grounds to justify that he was not guilty of such an offence under the [NDPS Act](#). We are not persuaded by the submission made by learned counsel for the respondent and the observation made in the impugned order that since nothing was found from the possession of the respondent, he is not guilty of the offence for which he*

*has been charged. Such an assumption would be premature at this stage.*

*18. In our opinion the narrow parameters of bail available under [Section 37](#) of the Act, have not been satisfied in the facts of the instant case. At this stage, it is not safe to conclude that the respondent has successfully demonstrated that there are reasonable grounds to believe that he is not guilty of the offence alleged against him, for him to have been admitted to bail. The length of the period of his custody or the fact that the charge-sheet has been filed and the trial has commenced are by themselves not considerations that can be treated as persuasive grounds for granting relief to the respondent under [Section 37](#) of the NDPS Act.”*

4(iii) Against the backdrop of above legal position, I have heard learned counsel on both sides at length and have also carefully considered the record produced by the Investigating Agency. I have also considered the investigation carried out from the co-accused persons. Though detailed reference to the record is avoided at this stage, lest it causes prejudice to the case of either party, however, for the purpose of adjudication of the present bail petition, it may be observed here that, prima facie, it appears that respondent/NCB had received a secret information about involvement of the petitioner and co-accused Prashant Kumar in trafficking of cannabis. The vehicle in question was stopped by the respondent/NCB officials on the basis of the secret information. At this stage, it appears that it was the petitioner and co-accused Prashant Kumar, who had

knowledge about the contraband kept in the vehicle. On the basis of the interrogation carried out from the two accused persons, the search of the vehicle was carried out by the respondent/NCB Officials, which led to recovery of commercial quantity of contraband.

4(iv) The record shows that co-accused person Prashant Kumar has also stated that he alongwith bail petitioner had procured the contraband through one Nareshu from the supplier Virender Thakur. The supplier Virender Thakur is still stated to be absconding. The respondent/NCB officials have procured Call Detail Record of mobile phones used by Prashant Kumar, Vinod Kumar (bail petitioner) and the supplier Virender Thakur. The tabulation of calls exchanged between them as given in the status report is as under:-

<b><i>“8219020220 (of supplier Virender Thakur@ Viru):</i></b>	
<i>I.</i>	<i>He contacted carrier Prashant 115 times and Prashant contacted him 79 times.</i>
<i>ii.</i>	<i>He contacted accused person Vinod (petitioner) 47 times and Vinod (petitioner) contacted him 97 times.</i>
<i>lii.</i>	<i>Just before the seizure i.e. on 05.09.2021, there are several communication with both the accused person i.e. Prashant and Vinod.</i>
<i>iv.</i>	<i>His roaming status shows his presence in Himachal Pradesh during seizure.</i>

<b><i>9557424104 (accused Prashant Kumar)</i></b>	
<i>I.</i>	<i>He contacted supplier Virender Thakur @ Viru 79 times and Supplier</i>



	<i>Virender Thakur @Viru contacted him 115 times.</i>
<i>ii.</i>	<i>He contacted accused person Vinod (petitioner) 223 times and Vinod (petitioner) contacted him 717 times.</i>
<i>lii.</i>	<i>His roaming status shows his presence in Himachal Pradesh during seizure on 05.09.2021.</i>
<i>iv.</i>	<i>Just before the seizure on 05.09.2021, there are several communication with supplier Virender Thakura @Viru.</i>

<b>7906811078 (accused Vinod Kumar Mishra); (petitioner)</b>	
<i>i.</i>	<i>He contacted Supplier Virender Thakur @ Viru 97 times and Viru contacted Vinod 47 times.</i>
<i>ii.</i>	<i>Vinod contacted accused person Prashant 717 times and Prashant contacted Vinod 223 times.</i>
<i>lii.</i>	<i>Just before the seizure i.e. on 05.09.2021, there are several communication with supplier Virender Thakur @ Viru.</i>
<i>iv.</i>	<i>His roaming status shows his presence in Himachal Pradesh during seizure i.e, on 05.09.2021.”</i>

Virender Thakur, the alleged supplier of the contraband contacted accused Vinod Kumar ( present petitioner) 47 times and petitioner contacted him 97 times. Supplier Virender Thakur, contacted co-accused Prashant Kumar 115 times and Prashant Kumar contacted the supplier 79 times. The petitioner contacted co-accused person Prashant Kumar 717 times, whereas Prashant Kumar contacted the petitioner 223 times. Just before seizure i.e. on 5.9.2021, several calls have statedly been exchanged between the petitioner and the supplier Virender Thakur.

4(v) Learned Assistant Advocate General has also apprised that trial is now underway & statement of one witness

has already been recorded on 18.07.2022. The matter is scheduled to come up on 27.10.2022 for recording statements of prosecution witnesses.

For all the foregoing reasons, it cannot be said at this stage that the petitioner was not in conscious possession of the contraband in question alongwith other accused persons. It also cannot be said that there are reasonable grounds to believe that the petitioner did not commit the offences alleged against him in the crime. The judgments relied upon by the learned counsel pertain to the fact situations involved in the said cases and are not applicable to the case in hand. Each case is to be decided in accordance with law on the basis of fact situation of that case. 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.

**Jyotsna Rewal Dua**  
**Judge**

29<sup>th</sup> July 2022 (rohit)