

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CrMP(M) No. 2796 of 2022

Reserved on : 20.01.2023

Decided on : 27.01.2023

Khem Raj @ Hem Raj

...Applicant

Versus

Union of India

...Respondent

Coram

The Hon'ble Mr. Justice Virender Singh, Vacation Judge.

Whether approved for reporting?¹

For the applicant : Mr. Vikash Sharma, Mr. Ajit Sharma
and Mr. Prashant Sharma, Advocates.

For the respondent : Mr. Ashwani Pathak, Senior Advocate,
with Mr. Tek Chand, Advocate.

Virender Singh, Vacation Judge.

Applicant-Khem Raj @ Hem Raj has filed the present application under Section 439 of the Code of Criminal Procedure (hereinafter referred to as 'CrPC'), for releasing him on bail, during the pendency of trial, in NCB Crime No. 31 of 2022, dated 22nd April, 2022, registered with Police Station

¹ *Whether Reporters of local papers may be allowed to see the judgment? Yes.*

NCB Mandi, District Mandi, H.P., under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act'), on the ground that the case of the prosecution is based upon the imaginary story, as, there is nothing on the record, to connect the applicant, with the commission of the offence, for which, he has been arrested, in this case.

2. According to the applicant, he is an innocent person and has falsely been implicated, in this case, as, no iota of evidence could be collected by the investigating agency against him, in this case.

3. The investigation, in the case, is stated to be completed. It is contended that the report under Section 172 (2) of the CrPC has already been presented in the competent Court of law and the trial against the applicant will take sufficient long time, as such, no useful purpose would be served by keeping the applicant, in judicial custody for indefinite time.

4. Alleging that keeping him in the judicial custody amounts to violation of his fundamental right, especially under Article 21 of the Constitution of India, it has been

pleaded on behalf of the applicant and the rigors of Section 37 of the NDPS Act are not applicable, in this case, as the applicant is having no criminal history and there is no likelihood of the applicant committing any offence, if he is released on bail.

5. It is his further case that he has falsely been implicated, in this case, on the ground that he was in touch with the main accused and some cash was transferred by the main accused to the account of one Hira Lal, who is the brother-in-law of the applicant.

6. Bail has also been sought on the ground that the contraband allegedly recovered, in this case, does not belong to the applicant, as, he has falsely been roped in, in this case, on the allegation that he had exchanged phone calls with other accused persons.

7. It has also been pleaded in the application that the financial transactions are a matter of evidence and the same are not to be entered into, at the stage of bail. It has further been pleaded in the application that the applicant has falsely been implicated, in this case, on the basis of the confession statement of the main accused, recorded under Section 67 of

the NDPS Act, which is not admissible as evidence and apart from the said statement, there is nothing on the record, to connect the applicant with the commission of the alleged crime.

8. Lastly, the applicant has given certain undertakings, for which, the he is ready to abide by, in case, ordered to be released on bail, during the pendency of the trial.

9. When put on notice, the NCB has filed the status report, disclosing therein that the bail application is not maintainable, in view of the bar, under Section 37 of the NDPS Act, as the contraband recovered, in this case, falls in the category of 'commercial quantity', i.e. *charas*, weighing 1.688 kg. The said contraband was recovered on 22nd April, 2022, from the conscious possession of co-accused Sukhchain @ Kaka, s/o Sh. Sadi, r/o Samudhgarh, P.O. Kanargadh, P.S. Dhuri, Distt. Sangroor, Punjab; and Virender Mahendroo @ Sunny, s/o Prem Kumar, r/o H.No. 127, Gyani Zail, Singh Colony, Vill. Amargadh, Tehsil Malerkotla, Distt. Sangroor, Punjab, as such, the case vide NCB Crime No. 31/2022 under Sections 20 and 29 of the NDPS Act, has been registered against them.

10. It is the further case of the NCB that accused-Sukhchain and Virender Mahendroo had disclosed the name of applicant-Khem Raj @ Hem Raj, as supplier of the contraband, as they had disclosed that they were instructed by one person, namely Laskar Singh, uncle of accused-Sukhchain Singh, who is stated to be absconding, to procure charas from Khem Raj @ Hem Raj (applicant). Accused- Sukhchain Singh and Virender Mahendroo had also disclosed the mobile number of the applicant as '80912 18693' and that of receiver Laskar Singh as '62394 12587'. During the analysis of the CDRs of the accused persons, namely Khem Raj, Sukhchain Singh and Laskar Singh, it was found that they were in touch with each other. They have reproduced the CDR analysis as under:

Applicant-Khem Raj contacted Laskar Singh 14 times on the date of seizure of contraband, i.e. 22nd April, 2022, and Laskar Singh contacted applicant-Khem Raj 16 times.

Applicant-Khem Raj contacted Laskar Singh on his mobile phone once, on 28th January, 2022.

Applicant-Khem Raj contacted Sukhchain once, and Sukhchain contacted applicant-Khem Raj once, on the date of seizure of the contraband.

The roaming status of his mobile phone shows his presence in the State of Himachal Pradesh during seizure of the contraband.

11. It is the further case of the NCB that during investigation, the mobile number of accused-Khem Raj

(applicant) was found to be registered in the name of his brother-in-law, Hukum Chand, s/o Dagu Ram. Statement of said Hukum Chand has been recorded under Section 67 of the NDPS Act, wherein he has confessed that he had supplied the sim, issued in his name, to his brother-in-law (applicant).

12. During investigation, it has also been found that on the instructions of applicant, on 22nd April, 2022, an amount of ₹ 50,000/- was transferred from the account of Laskar Singh to the SBI Bank Account of Hira Singh, s/o Nok Singh, who is brother-in-law of the applicant. At the further instructions of the applicant, his brother-in-law has transferred this amount to Karam Singh, father of the applicant, on 27th April, 2022, by way of two transactions of ₹ 25,000/- each. This fact has been disclosed by Hira Singh (brother-in-law of the applicant), in his voluntary statement, recorded under Section 67 of the NDPS Act.

13. Mentioning the criminal history of the applicant, it has been contended on behalf of the respondent, that the applicant is a habitual offender, as a case, vide FIR No. 283 of 2017, under Sections 20 and 29 of the NDPS Act, has already

been registered against the applicant in Police Station Sadar, District Mandi.

14. Heavily relying upon the above facts, it has been prayed that the rigors of Section 37 of the NDPS Act are applicable, in this case, and, as such, the bail application is liable to be dismissed.

15. Heard.

16. The accused (applicant), in the present case, has been arrested under the provisions of NDPS Act. The legislature, in its wisdom, has enacted this statute to curb the menace of drug abuse with stringent punishment. Certain conditions are there in the NDPS Act in the shape of Section 37 of NDPS Act, which are, in addition to the conditions, as contained in Section 439 Cr.P.C. Before releasing a person on bail, those conditions, as enumerated under Section 37 of the NDPS Act, are to be fulfilled, if the accused has been arrested for the offence, involving commercial quantity of contraband.

17. Once, it has been held that the contraband allegedly recovered from the possession of the accused falls in the category of 'commercial quantity', as per the Notification

issued by the Central Government, then the rigors of Section 37 of the NDPS Act come into play.

18. The question, regarding the applicability of Section 37 of the NDPS Act, has been discussed by a three Judges' Bench of the Hon'ble Supreme Court, way back in the year 2004, in cases, titled as **Collector of Customs, New Delhi versus Ahmadalieva Nodira**, reported in (2004) 3 Supreme Court Cases 549, and **Narcotics Control Bureau versus Dilip Pralhad Namade**, reported in (2004) 3 Supreme Court Cases 619. The relevant paras 9 to 11 of the judgment in **Dilip Pralhad Namade's case (supra)**, are reproduced, as under:

"9. As observed by this Court in Union of India v. Thamisharasi & Ors. (JT 1995(4) SC 253) clause (b) of sub-section (1) of Section 37 imposes limitations on granting of bail in addition to those provided under the Code. The two limitations are (1) an opportunity to the public prosecutor to oppose the bail application and (2) satisfaction of the Court that 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.

10. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the public prosecutor, the other twin conditions which really have relevance so far the present accused-respondent is concerned, are (1) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on

bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based for reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence and he is not likely to commit any offence while on bail. This nature of embargo seems to have been envisaged keeping in view the deleterious nature of the offence, necessitates of public interest and the normal tendencies of the persons involved in such network to pursue their activities with greater vigour and make hay when, at large. In the case at hand the High Court seems to have completely overlooked the underlying object of Section 37 and transgressed the limitations statutorily imposed in allowing bail. It did not take note of the confessional statement recorded under Section 67 of the Act.

11. A bare reading of the impugned judgment shows that the scope and ambit of Section 37 of the NDPS Act was not kept in view by the High Court. Mere non-compliance of the order passed for supply of copies, if any, cannot as in the instant case entitle an accused to get bail notwithstanding prohibitions contained in Section 37."

19. The term 'reasonable' has elaborately been discussed by the Hon'ble Supreme Court, in case titled as **Union of India versus Shiv Shanker Kesari**, reported in **(2007) 7 Supreme Court Cases 798**. The relevant paras-8 to 11 of the judgment are reproduced, as under:

"8. The word "reasonable" has in law the prima facie meaning of reasonable in regard to those

circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word “reasonable”.

“7. ... In Strouds Judicial Dictionary, Fourth Edition, page 2258 states that it would be unreasonable to expect an exact definition of the word ‘reasonable’. Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child’s toy.

(See: Municipal Corporation of Delhi v. M/s Jagan Nath Ashok Kumar and another (1987) 4 SCC 497. and Gujarat Water Supplies and Sewerage Board v. Unique Erectors (Gujarat) Pvt. Ltd. and another [(1989) 1 SCC 532].

9. *“9. ...It is often said that “an attempt to give a specific meaning to the word “reasonable” is trying to count what is not number and measure what is not space”. The author of Words and Phrases (Permanent Edition) has quoted from Nice & Schreiber 123 F. 987, 988 to give a plausible meaning for the said word. He says,*

‘the expression “reasonable” is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes reasonable can be determined’.

It is not meant to be expedient or convenient but certainly something more than that.”

10. *The word “reasonable” signifies “in accordance with reason”. In the ultimate analysis it is a question of fact, whether a particular act is reasonable or not depends on the circumstances in a given situation. (See: Municipal Corporation of Greater Mumbai and another v. Kamla Mills Ltd. (2003) 6 SCC 315).*

11. *The Court while considering the application for bail with reference to Section 37 of the Act is not*

called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the Court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.”

20. This view has again been reiterated by the Hon’ble Supreme Court in a latest decision, in case titled as **State of Kerala and others versus Rajesh and others**, reported in **(2020) 12 Supreme Court Cases 122**. The relevant paras 18 to 21 of the judgment are reproduced, as under:

“18. 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.”

19. *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.*

20. *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 that in addition to the limitations provided under the CrPC, 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 is indeed uncalled for.*

21. *We may further like to observe that the learned Single Judge has failed to record a finding mandated under Section 37 of the NDPS Act which is a sine qua non for granting bail to the accused under the NDPS Act.”*

21. In a recent decision, in case titled as **Narcotics Control Bureau versus Mohit Aggarwal**, reported in **AIR 2022 SC 3444**, the Hon’ble Supreme Court has reiterated the

earlier view regarding compliance of the conditions, as enumerated in Section 37 of the NDPS Act. The relevant paras 10 to 15 of the judgment are reproduced, as under:

“10. The provisions of Section 37 of the NDPS Act read as follows:

*“[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 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.

11. It is evident from a plain reading of the non-obstante clause inserted in sub-section (1) and the conditions imposed in subsection (2) of Section 37 that there are certain restrictions placed on the power of the Court when granting bail to a person

accused of having committed an offence under the NDPS Act. Not only are the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973 to be kept in mind, the restrictions placed under clause (b) of sub-section (1) of Section 37 are also to be factored in. The conditions imposed in sub-section (1) of Section 37 is that (i) the Public Prosecutor ought to be given an opportunity to oppose the application moved by an accused person for release and (ii) if such an application is opposed, then the Court must be satisfied that there are reasonable grounds for believing that the person accused is not guilty of such an offence. Additionally, the Court must be satisfied that the accused person is unlikely to commit any offence while on bail.

12. The expression “reasonable grounds” has come up for discussion in several rulings of this Court. In “Collector of Customs, New Delhi v. Ahmadalieva Nodira”, (2004) 3 SCC 549, a decision rendered by a Three Judges Bench of this Court, it has been held thus:

*“7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused respondent is concerned, are: the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. **The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts***

and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.” [emphasis added]

13. The expression “reasonable ground” came up for discussion in “State of Kerala and others Vs. Rajesh and others” (2020) 12 SCC 122 and this Court has observed as below:

“20. 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 that in addition to the limitations provided under the CrPC, 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 is indeed uncalled for.” [emphasis added]

14. To sum up, the expression “reasonable grounds” used in clause (b) of Sub-Section (1) of Section 37 would mean credible, plausible and grounds for the Court to believe that the accused person is not guilty of the alleged offence. For arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Dove-tailed with the aforesaid satisfaction is an additional consideration that the accused person is unlikely to commit any offence while on bail.

15. We may clarify that at the stage of examining an application for bail in the context of the Section 37 of the Act, 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. Thus, 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.”

22. While deciding the question of bail, it is the duty of the Court to maintain a delicate balance between individual liberty and larger interest of the society. Releasing a person involved in such a crime, will give a wrong signal to the society that the person, after being arrested, in such a crime, is still moving freely in the society.

23. Moreover, the applicant himself has pleaded, in the bail application, that the question of financial transactions, is a matter of evidence and the same is not to be entered into at the stage of bail. This fact supports the case of the NCB, in this case, as it is yet to be proved during the trial, about the financial transactions, as relied upon by the investigating agency, in this case.

24. Keeping in view of the entire facts and circumstances of the present case, this Court is not in agreement with the submissions of the learned counsel, appearing for the applicant, that the twin conditions, as enumerated in Section 37 of the NDPS Act, are in favour of the applicant. In other words, at this stage, it cannot be said that the applicant has not committed the offence, nor, it can be said that if released on bail, he may not indulge in such type of activities.

25. Considering all these facts, there is no ground to pass any order in favour of the applicant, under Section 439 CrPC. Consequently, the bail application of the applicant is dismissed.

26. Any of the observations, made hereinabove, shall not be taken as an expression of opinion, on the merits of the case, as these observations, are confined, only, to the disposal of the present bail application.

(Virender Singh)
Vacation Judge

January 27, 2023
(rajni)