

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-55633-2024
Reserved on: 02.04.2025
Pronounced on: 28.04.2025

Sonu @ Rinka ...Petitioner

Versus

State of Punjab ...Respondent

CORAM: HON'BLE MR. JUSTICE ANOOP CHITKARA

Present: Mr. Ruhani Chadha, Advocate
for the petitioner.

Mr. Sukhdev Singh, A.A.G., Punjab.

ANOOP CHITKARA, J.

FIR No.	Dated	Police Station	Sections
222	28.07.2023	Special Task Force, STF Wing, District SAS Nagar	21-C and 29 of NDPS Act

1. The petitioner incarcerated in the FIR captioned above had come up before this Court under Section 483 of Bharatiya Nagarik Suraksha Sanhita, 2023, [BNSS], seeking regular bail.

2. Per paragraph 14 of the bail application and paragraph 9 of status report, the accused has the following criminal antecedents:

Sr. No.	FIR No.	Date	Offenses	Police Station
1.	44	05.04.2022	21 of NDPS Act	Khanna City-2
2.	196	28.07.2023	21 and 29 of NDPS Act and 52-A of Prisons Act	Division No.8, Jalandhar

3. The facts and allegations are taken from the status report filed by the State. On 28.07.2023, based on a chance recovery, the Police seized 305 grams of Heroin from the petitioner and co-accused. The Investigator claims to have complied with all the statutory requirements of the NDPS Act, 1985, and CrPC, 1973.

4. The petitioner's counsel prays for bail by imposing any stringent conditions and contends that further pre-trial incarceration would cause an irreversible injustice to the petitioner and their family.

5. The State's counsel opposes bail and refers to the status report.

REASONING:

6. Counsel for the petitioner submits that there is dis-parity in the colour of the Heroin which was shown to have been recovered from the colour of the substance as noticed in the laboratory. State counsel submits that there is no difference of colour and infact, in Punjabi language, off white can also be termed as brown (bhura). These are the shades of colours which would depend upon the perception of person and even some people can be colour blind to the extent of noticing the exact colour. State counsel submits that as such, all these have to be tested during trial and petitioner is not entitled to bail on the ground of dis-parity of colour.

7. An analysis of the pleadings would lead to the following outcome. Petitioner counsel's argument that initial colour was off white material whereas as per the seizure memo Annexure P-2 the material which was recovered was brown in colour, as such there is huge difference between off white and brown and it means that what was shown to have been recovered was changed from what was actually recovered. To analyse the arguments and counter arguments, it would be appropriate to refer to relevant portion of FSL report which reads as follows:

“6. *Articles Received:* One yellow coloured paper envelope (s/v Sonu and others) lavelled as 'Secret Drug Sample Parcel Test Memo' sealed with four deals, two each of 'JS' and 'PS', which on opening found to contain another yellow coloured paper envelope labelled as 'Duplicate Drug Sample Parcel' sealed with four seals, two each of 'JS' and 'PS' and alleged to contain Heroin. Seals on the envelopes were found intact and tallied with the specimen seal impressions.

7. *Quantity of Sample:* On opening the 'Duplicate' envelope was found to contain a plastic container, wrapped in silver foil, having a zip lock polythene pouch containing Five (05) grams of off white coloured lumpy material.

8. *Purpose of reference: Analysis and Report.*

9. *Identification and Tests:*

<i>Diacetylmorphine</i>	<i>:</i>	<i>Found present in the content of the envelope</i>
<i>Quantity of Diacetylmorphine</i>	<i>:</i>	<i>67.96%</i>

REPORT

The content of the envelope under reference has been analyzed by chemical, TLC and instrumental analysis. On the basis of analysis, 67.96% Diacetylmorphine (Heroin) has been found present in the content of the envelope.”

8. Perusal of the translated copy of Annexure P-2 mentions the colour of the powder to be brown (bhura). To analyse this argument, it would be better to understand colours a little bit and for that, reference has been made to two following web pages:

<https://www.britannica.com/science/primary-color>, [downloaded on 07 Apr 2025 at 08:40 hours at Chandigarh]

primary colour, any of a [set](#) of [colours](#) that can be used to mix a wide range of [hues](#). There are three commonly used primary colour models: [RGB](#) (red, [green](#), and blue), CMY (cyan, magenta, and [yellow](#)), and RYB (red, yellow, and blue). The [colour](#) variations between the models are due to the differences between additive and subtractive colour mixing.

<https://www.canva.com/colors/color-meanings/brown/> [downloaded on 07 Apr 2025 at 08:47 hours at Chandigarh]

Information about Brown / #964B00

In a RGB color space (made from three colored lights for red, green, and blue), hex #964B00 is made of 58.8% red, 29.4% green and 0% blue. In a CMYK color space (also known as process color, or four color, and used in color printing), hex #964B00 is made of 0% cyan, 50% magenta, 100% yellow and 41% black. Brown has a hue angle of 30 degrees, a saturation of 100% and a lightness of 29.4%.

9. A simple reference to the above reveals that the little bit of fiction would change the shade and it is very difficult for an ordinary person to state whether the colour is off white or bhura. Further bhura does not mean brown. It is somewhat a shade between off white and brown. Simply because in the laboratory, the word used was off white, it would not mean that the sample was initially brown. The laboratory people having scientific temperament would analyse the colour in a better way than the normal person and the only exception is being the colour artist. Needless to say that the police officer/Investigator were not expert of colours nor proved to be somebody who has scientific background to understand the difference in colour nor is shown to have been artist of colour. As such, without giving an opportunity to the Investigator to explain the difference in colour, it shall be extremely unjust for this Court to grant bail simply on the minute difference of bhura (dark off white) as stated in the recovery and off white as stated by the laboratory. Thus, the petitioner is not entitled to bail on this ground. Petitioner's next ground is custody. As per custody certificate dated 01.04.2024, petitioner's custody is 01 year, 08 months and 01 day. In addition to that, petitioner has two criminal antecedents of NDPS which shows his criminal bent of mind that the petitioner would be entitled to bail on prolonged custody only when the petitioner is able

to justify his custody in the present trial to be excessive in the background of his two criminal antecedents under NDPS. Thus, petitioner is not entitled to bail even on custody.

10. The quantity allegedly involved in this case is commercial. Given this, the rigors of S. 37 of the NDPS Act apply in the present case. The petitioner must satisfy the twin conditions put in place by the Legislature under Section 37 of the NDPS Act.

11. Section 37¹ of the NDPS Act mandates under sub-section (1) (b) of section 37 that no person accused of an offense punishable for offenses involving commercial quantity shall be released on bail unless- (i) the Public Prosecutor has been given an opportunity to oppose the application of release, and (ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that accused is not guilty of such offense and is not likely to commit any offense while on bail. Thus, the rigors of S. 37 of the NDPS Act apply in the present case, and the burden is on the petitioner to satisfy the twin conditions put in place by the Legislature under Section 37 of the NDPS Act. Given the legislative mandate of S. 37 of the NDPS Act, the Court can release a person accused of an offense punishable under the NDPS Act for possessing a commercial quantity of contraband only after recording reasonable satisfaction of its rigors.

12. The State's Counsel argues that a plain reading of Section 37 reveals that the legislature intends to make the law stringent to curb the drug menace. It is further to be noticed that the provisions are couched in negative language, meaning that to grant bail, the Court needs to record a finding that there are reasonable grounds for believing that the petitioner is not guilty of the offense. The burden of proof is also on the petitioner to satisfy the Court about his non-involvement in the case. While interpreting the provisions of Section 37 of the NDPS Act, the Court must be guided by the objective sought to be achieved by putting these stringent conditions.

13. Satisfying the fetters of S. 37 of the NDPS Act is candling the infertile eggs. The stringent conditions of section 37 placed in the statute by the legislature do not create a bar for bail for specified categories, including the commercial quantity; however, it creates hurdles by placing a reverse burden on the accused, and once crossed, the rigors no more exist, and the factors for bail become similar to the bail petitions under general penal statutes like IPC. Thus, both the twin conditions need to be satisfied before a

¹ **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.

person accused of possessing a commercial quantity of drugs or psychotropic substance is to be released on bail. The first condition is to provide an opportunity to the Public Prosecutor, enabling them to take a stand on the bail application. The second stipulation is that the Court must be satisfied that reasonable grounds exist for believing that the accused is not guilty of such an offense and is not likely to commit any offense while on bail. If either of these conditions is not met, the ban on granting bail operates. The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing the accused is not guilty of the alleged offense. Even on fulfilling one of the conditions, the reasonable grounds for believing that the accused is not guilty of such an offense, the Court still cannot give a finding on the assurance that the accused is not likely to commit any such crime again.

14. The petitioner’s arguments did not point toward any material contradictions.

15. The submissions made above and the grounds in the bail petition do not shift the burden the legislature places on the accused under S. 37 of the NDPS Act. The petitioner has not stated anything in the bail petition to discharge the burden put by the stringent conditions placed in the statute by the legislature under section 37 of the NDPS Act. The investigation reveals sufficient prima facie evidence to connect the petitioner with the crime; thus, the petitioner fails to make out a case for bail. Any detailed discussions about the evidence may prejudice the case of the petitioner, the State, or the other accused.

16. Per the custody certificate, the petitioner's custody is 01 year and 08 months, which cannot be considered prolonged.

17. In Union of India (NCB) v. Khalil Uddin, decided on 21 Oct 2022, 2022 SCC OnLine SC 2109, Hon’ble Supreme Court holds,

[4]. According to the prosecution, contraband material weighing about 13 kgs. of morphine was found in a motor vehicle which was driven by co-accused named Md. Jakir Hussain. During the course of investigation, it was found that the motor vehicle was recorded in the name of Md. Nizam Uddin who had executed a sale letter and handed over the custody of the vehicle to accused Md. Abdul Hai and that accused Md. Jakir Hussain was the driver employed by accused Md. Abdul Hai and that contraband material in question was to be handed over to accused-Khalil Uddin, an owner of a tea shop.

[5]. The High Court by its order which is presently under challenge, directed release of both the accused as stated above on bail after they had undergone custody to the tune of about a year. Questioning grant of relief to said accused, the instant appeals have been preferred.

[7]. What emerges from the record is that large quantity of contraband weighing about 13 kgs of morphine was found in a car which was driven by Md. Jakir Hussain. Whether the role played

by said Md. Jakir Hussain could get connected with both the accused is a question.

[8]. The answer to said question could be the statement recorded of Md. Nizam Uddin. The statement of Md. Jakir Hussain recorded under Section 67 of the Act has also named his owner accused Abdul Hai. We are conscious of the fact that the validity and scope of such statements under Section 67 has been pronounced upon by this Court in *Tofan Singh v. State of Tamil Nadu*. In *State by (NCB) Bengaluru v. Pallulabid Ahmad Arimutta*, the rigour of law lay down by this Court in *Tofan Singh* was held to be applicable even at the stage of grant of bail.

[9]. However, going by the circumstances on record, at this stage, on the strength of the statement of Md. Nizam Uddin, though allegedly retracted later, the matter stands on a different footing. In our considered view, in the face of the mandate of Section 37 of the Act, the High Court could not and ought not to have released the accused on bail. We, therefore, allow these appeals, set aside the view taken by the High Court and direct that both the appellants be taken in custody forthwith.

[10]. We have been given to understand that the charge-sheet has been filed. In the circumstances, we direct the Trial Court to take up the matter and conclude the proceedings as early as possible and preferably within six months from the receipt of this order.

18. In *Narayan Takri v. State of Odisha*, decided on 10 Sep 2024, SLP (Crl.) 8198-2024, Hon'ble Supreme Court holds,

The petitioners are in custody since 28th May, 2022 for alleged commission of alleged offence under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985. As per the FIR allegation, 125.3 kg. of "Ganja" was recovered from the petitioners.

[3]. It is not in dispute that the trial has commenced and that three prosecution witnesses have been examined till date.

[4]. Learned counsel for the petitioners submits that the third prosecution witness was examined as far back as on 28th January, 2024 and since then, no other prosecution witness has been examined. There is, however, no such averment in the petition.

[5]. Learned counsel appearing for the respondent submits that every endeavor shall be made on behalf of the prosecution to have all the witnesses examined by the end of this year.

[6]. The trial court is encouraged to expedite the trial and give its decision as early as possible, in accordance with law.

[7]. We, however, do not see any reason to interfere the impugned judgment and order at this stage; however, it is clarified that in the event the trial is not completed by the end of this year, the petitioners shall be at liberty to renew their prayer for bail before the trial court.

19. A perusal of the bail petition and the documents attached prima facie points towards the petitioner's involvement and does not make out a case for bail. The impact of

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crime would also not justify bail. Any further discussions will likely prejudice the petitioner; this court refrains from doing so.

20. The petitioner's custody of around 01 year 08 months cannot be termed prolonged, given the minimum sentence prescribed for the offense, which is 10 years.

21. Any observation made hereinabove is neither an expression of opinion on the case's merits nor shall the trial Court advert to these comments.

22. **Petition dismissed.** All pending applications, if any, stand disposed of.

(ANOOP CHITKARA)
JUDGE

28.04.2025
Jyoti Sharma

Whether speaking/reasoned: Yes
Whether reportable: YES.