

*Before Vikas Bahl, J.*

**ROHIT JOSHI @ BAMAN—Petitioners**

*versus*

**STATE OF PUNJAB—Respondents**

**CRM-M No. 41977 of 2021**

October 12, 2021

*Code of Criminal Procedure, 1973—S. 439—Narcotic Drugs and Cosmetics Act, 1985—S.42—Arms Act, 1959—S.25—Secret information not detailed in ruqa or intimated to higher authorities—Non-compliance of S.42 of NDPS Act—Recovery memo of weapon dated 18.02.2020 and FIR 19.02.2020—Possibility of fabrication of documents not ruled out—Granted bail.*

*Held that*, this Court had noticed the fact that the statement dated 18.02.2020 of Inspector Sukhwinder Singh, wherein the details of the FIR which was registered on 19.02.2020 had been mentioned and, thus, the arguments to the effect that the said documents / memos seem to have been fabricated carry weight, more so in light of judgment of Division Bench in *Didar Singh @ Dara's case* (supra), the relevant part of which has been reproduced hereinabove. The Division Bench of this Court in the said judgment had observed that a case of such fabrication / insertion seriously reflects on the integrity of prosecution version and the same would be a serious lapse in the prosecution case, thereby creating doubt as to the prosecution story.

(Para 10)

Rishu Mahajan, Advocate, *for the petitioner.*

Saurav Khurana, DAG, Punjab.

**VIKAS BAHL, J. (Oral)**

(1) This is a first petition under Section 439 Cr.P.C. for grant of regular bail to the petitioner in case/FIR No.41 dated 19.02.2020 under Sections 21/25/29 of NDPS Act, 1985 (in short 'the Act of 1985') and Sections 25/54 of the Arms Act, 1959, registered at Police Station Ranjit Avenue, District Amritsar.

(2) The case of the prosecution in brief is that Inspector Sukhwinder Singh, Incharge CIA Staff, Amritsar, along with other police officials, was present at Hartej Hospital, Amritsar, in connection

with patrolling in search of bad elements. At around 9:45 PM, a secret informer informed that one Bikram Singh @ Bikkar, Shivam @ Nannu and the petitioner, who were all dealing in the business of heroin, were sitting in one white Safari car without number plate and were carrying a huge quantity of heroin and were also having pistols with them. On the basis of said information, Sukhwinder Singh along with the police officials reached at the place where one Tata Safari car was present and the three persons who were sitting in the car, tried to run away on seeing the police party but were surrounded and apprehended. After following the procedure under Section 50 of the Act of 1985, the recovery from Bikram Singh @ Bikkar was that of 500 grams of heroin. 1 kg. of heroin was recovered from the petitioner. Pistol was also recovered from the petitioner. Further, from the third accused Shivam @ Nannu, 500 grams of heroin and one pistol was recovered. It is further the case of the prosecution that on basis of disclosure statement made by the petitioner to the effect that he had got the heroin from Aman Sharma, the name of Aman Sharma was also included in the array of accused persons. It is submitted that the petitioner was arrested on 18.02.2020 and the challan in the present case has been presented and there are as many as prosecution 25 witnesses out of which only one has been examined. All these witnesses are stated to be police officials. Learned counsel for the petitioner has submitted that the petitioner has been in custody since 18.02.2020 i.e., 01 years, 07 months and 19 days, and the co-accused of the petitioner i.e., Bikram Singh @ Bikkar, Aman Sharma and Raghu Kumar have already been granted the concession of regular bail. Bikram Singh @ Bikkar and Aman Sharma were granted regular bail vide order dated 20.09.2021 passed in CRM-M-5374-2021 and Raghu Kumar was granted regular bail vide order dated 27.09.2021 passed in CRM-M- 6629-2021.

(3) Learned counsel for the petitioner has argued that in the present case, there is a complete non-compliance of Section 42 of the Act of 1985. Reference has been made to the order dated 20.09.2021 passed in CRM-M-5374-2021 vide which the concession of regular bail was granted to the co-accused and it has been submitted that in the said order, this Court had taken note of the fact that in the ruqa dated 18.02.2020, it had been mentioned that the same had been sent after recording the fact that there is "secret informer" who had given information as to the whereabouts of the accused persons and that on the basis of said ruqa, the present FIR had been registered and the secret information had not been taken down in writing independently nor was the same sent in writing to a superior police

officer. Learned counsel for petitioner has referred to the judgment of the Hon'ble Supreme Court dated 08.08.2011 titled as *Rajender Singh versus State of Haryana in Criminal Appeal no.1051 of 2009*, which was also a case in which ruqa had been sent to the police station but however, the Hon'ble Supreme Court has held that since PW-6 Kuldip Singh had not prepared any record about the secret information received by him in writing and nor sent the same to the higher authorities and thus, the same was considered as one of the main grounds for allowing the appeal. The relevant portion of the said judgment is reproduced hereinbelow:-

“This appeal arises out of the following facts.

1. At about 4 p.m. on the 30th January 1997, PW- 6 Inspector Kuldip Singh of the CIA Staff, Hisar sent Ruqa Ex. PG to Police Station Bhuna that while he was present at the Bus Adda of village Bhuna in connection with the investigation of a case, he had received secret information that the appellant Rajinder Singh @ Chhinder, was an opium addict and also dealing in its sale, and that he had kept some opium in the shed used for storing fodder in his farm house, and if raid was organized, the opium could be recovered. On the basis of the aforesaid Ruqa, a formal First Information Report was drawn up for an offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called the "Act"). A wireless message was also sent to the DSP, Fatehabad PW-5 Charanjit Singh to reach the spot. The effort of the police party, however, to join some independent witnesses from the public was unsuccessful. In the meanwhile, PW-5 also reached that place and the police party made its way to the farm house of the appellant. The lock on the fodder room was opened after taking the key from the appellant and searched which led to the recovery of 3.500 kilograms of opium. ....

.....The court further observed that it was clear from the evidence of PWs.5 and 6 that the provisions of Section 42 of the Act had been complied with as the secret information received by PW-6 had been recorded by him in a Ruqa which had been sent to the Police Station for registration of a FIR and that he had also informed PW-5 on wireless about the information received by him on which the latter

had reached the place of search and seizure. The trial court further noted that as the appellant was a previous convict, a lenient view could not be taken in his case. He was accordingly sentenced to undergo 20 years RI and to pay a fine of Rs.2,00,000/- and in default of payment of fine to undergo RI for 2 years. The judgment of the trial court had been confirmed in appeal by the High Court leading to the present proceedings before us.

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We have gone through the evidence of PW-6 Kuldip Singh. He clearly admitted in his cross examination that he had not prepared any record about the secret information received by him in writing and had not sent any such information to the higher authorities. Likewise, PW-5 DSP Charanjit Singh did not utter a single word about the receipt of any written information from his junior officer Inspector Kuldip Singh. It is, therefore, clear that there has been complete non-compliance with the provisions of Section 42(2) of the Act which vitiates the conviction.

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In the light of the fact what has been held above, we are not inclined to go to the other issues raised by Mr. Sadiqui. We, accordingly allow the appeal, set aside the judgments of the courts below and order the appellant's acquittal.”

(4) Learned counsel for petitioner has also submitted that in the present case, fabrication with respect to the memos prepared cannot be ruled out. Reference has been made to the order dated 20.09.2021 passed in CRM-M-5374-2021, wherein this Court has taken note of the fact that the statement of Inspector Sukhwinder Singh dated 18.02.2020 would show that in the head note of the said document, the FIR dated 19.02.2020 along with other details of the FIR had been mentioned and that the said fact, in itself, would show that the same was not genuinely prepared on 18.02.2020. To support the said argument, learned counsel has relied upon the judgment of Division Bench of this Court in *Didar Singh @ Dara versus The State of Punjab*<sup>1</sup> to contend that in such kind of a situation, only two inferences can be drawn that, either the FIR was registered prior to the alleged recovery of contraband or the

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<sup>1</sup> 2010(3) RCR (CrI.) 337

number of the FIR has been inserted in the document after its registration and both the situations seriously reflect upon the integrity of the prosecution version and the same is a serious lapse and creates a doubt with respect to the prosecution story. The relevant part of aforesaid judgment is reproduced hereinbelow:-

“29. There is another infirmity on the record which further creates a doubt about the entire prosecution case. As per the prosecution, at the time of the recovery, various documents were prepared. Those documents are Ex.PA, Ex.PB, Ex.PC, Ex.PD, Ex.PE and Ex.PF. All these memos bear the FIR number of the case. It is admitted case of the prosecution that when these documents were prepared, the FIR was not registered and FIR No. was not available as the same was registered later on, on the request by the police. It has not been explained how all these memos contained the FIR number, which was not existing at the time when these memos were prepared. In *Ajay Malik & Ors. v. State of U.T. Chandigarh*, 2009(3) RCR (Cr.) 649, this Court while dealing with similar situation has observed that two inferences could be drawn from such situation, i.e. either the FIR was registered prior to the alleged recovery of the contraband or number of FIR was inserted in the document after its registration. But in both situations, it seriously reflects upon the integrity of the prosecution version. While relying upon several other decisions, it was held that such serious lapses in the prosecution case create a doubt to the prosecution theory.

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32. In view of the aforesaid discussion, the appeal is allowed and the impugned judgment of conviction and order of sentence passed by the Judge, Special Court, Amritsar are set aside. The appellant, who is in custody, be set at liberty forthwith if not required in any other case.

(5) Learned counsel for the petitioner, in order to overcome the bar under Section 37 of the NDPS Act, has relied upon several judgments. The said judgments have been collated hereinbelow:

- Judgment of the Hon'ble Supreme Court in Criminal Appeal No.965 of 2021 titled as *Dheeren Kumar Jaina versus Union of India*.

- Judgment of a Co-ordinate Bench titled as *Ankush Kumar @ Sonu versus State of Punjab*<sup>2</sup>; which was further challenged in the Hon'ble Supreme Court vide SLP (Criminal) Diary No.42609 of 2018 and the same was upheld.
- Judgment of a Co-ordinate Bench in CRM-M-20177-2020 titled as *Narcotic Control Bureau versus Vipran Sood and another* and the same was upheld by the Hon'ble Supreme Court vide order dated 24.08.2021 in a Petition for Special Leave to Appeal (Crl.) No.5852/2021.
- Judgment of the Hon'ble Supreme Court in Criminal Appeal No.668 of 2020 titled as "*Amit Singh @ Moni versus Himachal Pradesh*."
- Judgment of the Hon'ble Supreme Court in Criminal Appeal No.827 of 2021 titled as *Mukarram Hussain versus State of Rajasthan and another*.
- Judgment of a Co-ordinate Bench of this Court in CRM-M 10343 of 2021 titled as "*Ajay Kumar @Nannu versus State of Punjab*".

(6) Further, reliance has also been placed upon the judgment of a Division Bench of this Court in CRM-8262-2021 in CRA-S-3721-SB of 2015 titled as, *Harpal Singh versus National Investigating Agency and another*, dated 31.08.2021, wherein the Division Bench was pleased to grant suspension of sentence in a case where the recovery was of commercial quantity. It has been argued that in the said Division Bench judgment, it had been noticed that the grounds for regular bail stand on better footing than for suspension of sentence, which is after conviction.

(7) Learned counsel for the petitioner has pointed out that the petitioner is not involved in any other case and there are several arguable points in the present petition and, thus, prays for grant of regular bail to the petitioner.

(8) Learned State counsel has opposed the present bail application of the petitioner and has submitted that commercial quantity of heroin to the extent of 1 kg had been recovered from the

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<sup>2</sup> 2018 (4) RCR (Crl.) 84

petitioner and even one 32 bore pistol with live cartridges had also been recovered from the petitioner. As far as the fact that bail has been granted to the co-accused of the petitioner as well as the fact that the petitioner is not involved in any other case are concerned, the same have not been disputed.

(9) This Court has heard the learned counsel for the parties.

(10) Learned counsel for the petitioner has raised several arguments on the merits of the case. The first and primary issue raised is the non-compliance of Section 42 of the Act of 1985. The contention of learned counsel for the petitioner to the effect that secret information had not been taken down in writing independently and had not been sent to senior officer in writing is weighty. Reliance sought to be placed upon the judgment of Hon'ble Supreme Court of India in **Rajender Singh's case (supra)**, which has been reproduced hereinabove, would also affirm that the said point would be a substantial point during trial so as to plead for acquittal of the petitioners. A perusal of judgment of the Hon'ble Supreme Court in **Rajender Singh's case (supra)** would show that although in the said case, a ruqa was recorded after the secret information was received and the said ruqa was sent to the police station for registration of the FIR, it was held that since there was no record prepared with respect to the secret information received by him in writing and, thereafter, such information was not sent to the higher authorities, thus, the appeal of the accused therein was allowed by taking the ground of non-compliance of Section 42 of the Act of 1985 as one of the relevant grounds. Even the argument of the learned counsel for the petitioner to the effect that in the order dated 20.09.2021 passed in CRM-M-5374-2021, this Court had noticed the fact that the statement dated 18.02.2020 of Inspector Sukhwinder Singh, wherein the details of the FIR which was registered on 19.02.2020 had been mentioned and, thus, the arguments to the effect that the said documents / memos seem to have been fabricated carry weight, more so in light of judgment of Division Bench in **Didar Singh @ Dara's case (supra)**, the relevant part of which has been reproduced hereinabove. The Division Bench of this Court in the said judgment had observed that a case of such fabrication / insertion seriously reflects on the integrity of prosecution version and the same would be a serious lapse in the prosecution case, thereby creating doubt as to the prosecution story.

(11) Learned counsel for the petitioner has also pointed out that even with respect to the recovery of the 32 bore pistol and live

cartridges, the recovery memo, the vernacular of which has been attached at page No.1112 of the paper book would show that although the date of the same is shown as 18.02.2020 but the details of the FIR, which is registered on 19.02.2020 has been shown on the top of the said document, which also does not rule out the possibility of fabrication of documents.

(12) The said facts would show that the petitioner has a strong case on merits but, however, no final opinion is being expressed with respect to the same as the same would cause prejudice to the case of prosecution during trial.

(13) In the present case, it would also be relevant to note that the petitioner was arrested on 18.02.2020 and has been in custody for the last 01 year, 07 months and 19 days and challan has been presented in the present case and there are 25 prosecution witnesses and out of which only one has been examined and, thus, the trial is likely to take time, moreso, in view of the COVID-19 pandemic. All the witnesses are stated to be official witnesses and, thus, the question of influencing them does not arise and the petitioner is not involved in any other case and the co-accused of the petitioner i.e. Bikram Singh @ Bikkar, Aman Sharma and Raghu Kumar have already been granted the concession of regular bail.

(14) Learned counsel for the petitioner has also highlighted the fact that in various cases where recovery of commercial quantity was involved, there the Hon'ble Supreme Court as well as this Court have, on the basis of arguable points in the bail application as well as by considering the period of custody and the merits of the case, granted bail/suspension of sentence. Some of the said judgments are being discussed hereinafter. In Criminal Appeal No.965 of 2021 titled as *Dheeren Kumar Jaina versus Union of India*, the Hon'ble Supreme Court in a case where allegation in the charge sheet was with respect to 120 kg of contraband i.e. "ganja", thus, being of commercial quantity, was pleased to grant bail after setting aside the order of the High Court where the said application for grant of regular bail had been rejected.

(15) A co-ordinate Bench of this Court in a detailed judgment titled as *Ankush Kumar @ Sonu versus State of Punjab*<sup>3</sup>, had considered the provision of Section 37 of the NDPS Act in extenso and had granted bail in a case which involved commercial quantity. The relevant portion of the said judgment is reproduced as under:

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<sup>3</sup> 2018 (4) RCR (Cr.) 84



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But, so far as second part of Section 37 (1) (b) (ii), i.e. regarding the satisfaction of the Court based on reasons to believe that the accused would not commit 'any offence' after coming out of the custody, is concerned, this Court finds that this is the requirement which is being insisted by the State, despite the same being irrational and being incomprehensible from any material on record. As held above, this Court cannot go into the future mental state of the mind of the petitioner as to what he would be, likely, doing after getting released on bail. Therefore, if this Court cannot record a reasonable satisfaction that the petitioner is not likely to commit 'any offence' or 'offence under NDPS Act' after being released on bail, then this court, also, does not have any reasonable ground to be satisfied that the petitioner is likely to commit any offence after he is released on bail. Hence, this satisfaction of the Court in this regard is neutral qua future possible conduct of the petitioner.”

(16) The Special Leave Petition (Criminal) Diary No.42609 of 2018 filed against the aforesaid judgment of the Co-ordinate Bench of this Court, was dismissed by the Hon'ble Supreme Court.

(17) Further, vide order dated 25.02.2021 in CRM-M-20177-2020, a Co-ordinate Bench of this Court granted regular bail to an accused who was involved in a case wherein recovery was of 3.8 kgs of “charas” (commercial quantity) after being in custody for 1 year and 7 months. The said order was upheld by the Hon'ble Supreme Court vide order dated 24.08.2021 in a Petition for Special Leave to Appeal (Crl.) No.5852/2021 titled as *Narcotic Control Bureau versus Vipran Sood and another*.

(18) The Hon'ble Supreme Court of India vide order dated 12.10.2020 passed in Criminal Appeal No.668 of 2020 titled as *Amit Singh @ Moni versus Himachal Pradesh* was pleased to grant regular bail in a case involving 3 kg and 800 grams of “charas” primarily on the ground of substantial custody and also, the fact that the trial would likely take time to conclude.

(19) In Criminal Appeal No.827 of 2021 titled as *Mukarram Hussain versus State of Rajasthan and another*, the Hon'ble Apex Court vide judgment dated 16.8.2021 was also pleased to grant bail wherein the quantity of the contraband was commercial in

nature.

(20) A Co-ordinate Bench of this Court in CRM-M 10343 of 2021 titled as *Ajay Kumar @ Nannu versus State of Punjab* and other connected matters, vide Order dated 31.03.2021, after taking into consideration the stipulations of Section 37 of the NDPS Act, was pleased to grant regular bail in a case involving commercial quantity and a condition was imposed on the petitioner therein while granting the said bail and the said condition was incorporated in para 21 of the said judgment, which reads as under:

“21. However, the petitioners are granted regular bail subject to the condition that they shall not commit any offence under the NDPS Act after their release on bail and in case of commission of any such offence by them after their release on bail, their bail in the present case shall also be liable to be cancelled on application to be filed by the prosecution in this regard.”

(21) Further, a Division Bench of this Court vide judgment dated 31.08.2021 passed in CRM-8262-2021 in CRA-S-3721-SB of 2015 titled as, *Harpal Singh versus National Investigating Agency and another*, granted suspension of sentence in a case where the recovery was of commercial quantity. In the abovementioned order, the Division Bench had taken into consideration the right vested with an accused person/convict under Article 21 of the Constitution of India with regard to speedy trial. Further, the judgment of Hon'ble the Supreme Court in *State (NCT of Delhi) versus Lokesh Chadha*<sup>4</sup> was also taken into account and the provisions of Section 37 of NDPS Act were considered and the sentence of the applicant-appellant therein was suspended after primarily considering the period of custody of the applicant-appellant therein and also the fact that the appeal was not likely to be heard in near future. Reference in the order was also made to the Division Bench judgment of this Court in *Daler Singh versus State of Punjab*<sup>5</sup> and the view taken in Daler Singh's case (supra) was reiterated and followed. In the above said judgment, it was also noticed that the grounds for regular bail stand on a better footing than that of suspension of sentence which is after conviction. It is apparent that to meet the requirement of Section 37 of the NDPS Act, various Courts have taken into consideration the merits of the case and the period of

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<sup>4</sup> (2021) 5 SCC 724

<sup>5</sup> 2007 (1) R.C.R. (CrI.) 316

custody and where in a case there are arguable points on merits and the custody is also adequate, the Hon'ble Supreme as well as various High Courts have granted bail even in cases involving commercial quantity. This Court feels that in the present case, there are several arguable points which have been raised by the learned counsel for the petitioner and the petitioner has been in custody for 01 year 07 months and 19 days and the same is sufficient to entitle the petitioner for grant of regular bail. Moreover, this Court proposes to impose such conditions that would meet the object of Section 37 of the NDPS Act.

(22) Accordingly, the present petition is allowed and the petitioner is directed to be released on regular bail on his furnishing bail/surety bonds to the satisfaction of the trial Court / Duty Magistrate, subject to his not being required in any other case. The petitioner shall also abide by the following conditions:-

1. The petitioner will not tamper with the evidence during the trial.
2. The petitioner will not pressurize / intimidate the prosecution witness(es).
3. The petitioner will appear before the trial Court on the date fixed, unless personal presence is exempted.
4. The petitioner shall not commit an offence similar to the offence of which he is accused, or for commission of which he is suspected.
5. The petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

(23) In case of breach of any of the above conditions, the prosecution shall be at liberty to move an application for cancellation of bail before this Court.

(24) However, nothing stated above shall be construed as a final expression of opinion on the merits of the case and the trial Court would proceed independently of the observations made in the present case which are only for the purpose of adjudicating the present bail application.