



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Criminal Miscellaneous Bail Application No. 95/2021

1. Kayum S/o Gani Mohammed, Aged About 45 Years, By Caste Musalman, R/o Laduna, Police Thana Seemamau, Mandisor, Madhya Pradesh. (At Present Lodged In Sub Jail Phalodi).
2. Jabbar Husain S/o Allabux, Aged About 34 Years, By Caste Musalman, R/o Laduna, Police Thana Seemamau, Mandisor, Madhya Pradesh. (At Present Lodged In Sub Jail Phalodi).

----Petitioners

Versus

State Of Rajasthan, Through P.P.

----Respondent

Connected With

S.B. Criminal Miscellaneous Bail Application No. 94/2021

Kayum S/o Gani Mohammad, Aged About 45 Years, By Caste Musalman, R/o Laduna, Police Station Seemamau, Mandsaaur, Madhya Pradesh.

(At Present Lodged In Sub Jail Phalodi, District Jodhpur).

----Petitioner

Versus

State, Through P.P.

----Respondent

For Petitioner(s) : Mr. B.R. Godara.
Mr. R.N. Bishnoi.

For Respondent(s) : Mr. B.R. Bishnoi, AGC.

HON'BLE MR. JUSTICE SANDEEP MEHTA

Order

25/01/2021

Reportable

1. Two bail applications have been filed on behalf of the accused Kayum. Shri R.N. Bishnoi, Advocate, who presented the Bail Application No.94/2021 on behalf of the accused Kayum after



submission of the bail application No.95/2021 by Shri B.R. Godara, prays that he may be allowed to withdraw the same. Accordingly, the Bail Application No.94/2021 is dismissed as withdrawn.

2. The bail application No.95/2021 has been filed on behalf of the petitioners Kayum and Jabbar Husain who are in custody in connection with F.I.R. No.144/2019, registered at Police Station Lohawat, District Jodhpur for the offences under Sections 8/18, 8/21 & 8/29 of the NDPS Act and Section 3/25 of the Arms Act.

3. Brief facts relevant and essential for disposal of the case are noted herein below:

4. The SHO, Police Station Lohawat received a source information regarding transportation of narcotics in a car on which, a *nakabandi* was undertaken at the Jodhpur-Phalodi Road near the Panchayat Samiti, Lohawat. At about 06.45 pm., an Alto Car No.MP-09-WB-0640 came near the *nakabandi* and was flagged down. Four persons were present in the car namely Iqbal, Kayum, Toshib and Jabbar Husain. As the car was suspected to be carrying narcotics, its search was undertaken. On opening the hood of the car, just underneath the dashboard, five plastic packets were found concealed. The first packet was containing opium weighing 1 Kg. The second packet was containing brown coloured powder suspected to be heroin which weighed 700 gms. with the packaging. The third packet contained a country-made pistol without licence. The fourth packet contained 40 cartridges of 7.65 mm. each and the fifth packet was containing 10 cartridges of 8 mm. each. On the basis of the above recovery, FIR No.144/2019



came to be registered against the petitioners and two others for the offences under Sections 8/18 & 21 of the NDPS Act and Section 3/25 of the Arms Act.

5. The instant bail application has been filed on the ground that the Seizure Officer (PW-1) Sunil Tada admitted in his cross-examination that each of the accused had an equal share in the recovered brown sugar and thus, the net weight of the brown sugar attributable to each accused would be 175 gms. only, which is below commercial quantity. Learned counsel has further urged that the Seizure Officer breached the mandatory requirement of Section 50 of the NDPS Act as the third option for search was given to the accused. It was further submitted that as the search and seizure was undertaken after sunset, the investigating officer was under an obligation to comply with the mandatory requirement of Sections 41 and 42 of the NDPS Act which were not followed and thus, the entire search and seizure proceedings are vitiated. It was further contended that percentage of morphine has not been mentioned in the FSL report while examining the sample of brown sugar and as such, no conclusion can be drawn that the recovered contraband heroin/brown sugar falls within the meaning of manufactured drug as defined in Section 2(xvi) of the NDPS Act. It was further contended that the bail applications of similarly situated co-accused Iqbal and Toshib have been accepted by Coordinate Bench of this Court and thus, the petitioners also deserve indulgence of bail under Section 439 Cr.P.C. on parity.



6. Learned Public Prosecutor, on the other hand, vehemently and fervently opposed the submissions advanced by the petitioners' counsel. He pointed out that the recovery of contraband was effected from a vehicle in transit and thus, provisions of Section 50 of the NDPS Act would have no application because it is not a case involving recovery of contraband during personal search of the accused. It was further submitted that as the recovery was from a vehicle in transit, provisions of Section 43 of the NDPS Act would operate and there was no requirement for the Seizure Officer to comply with the provisions of Section 50 of the NDPS Act or to record the information and to forward the same to the superior officer or to obtain a warrant or authorisation before conducting the search. He further submitted that 700 gms. of heroin was recovered carefully concealed under the hood of the car which is a manufactured drug for which, punishment is provided under Section 21 of the NDPS Act. As diacetyl-morphine was detected by the Forensic Science Laboratory after analysis of the drug in question, there was no requirement to mention the percentage of morphine therein. Learned Public Prosecutor thus urged that the petitioners do not deserve indulgence of bail.

7. I have given my thoughtful consideration to the submissions advanced at bar and have gone through the material available on record.

8. Firstly, I would like to advert to the mandatory provision of bail postulated under Section 37 of the NDPS Act which reads as below:



“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 2 [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.

Hon'ble the Supreme Court has, on more than one occasions, considered the aspect of bail under the NDPS Act when commercial quantity of contraband is involved and it has been held that the scheme of Section 37 of the Act indicates that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the Code of Criminal Procedure, but is also subject to the limitation placed by Section 37 of the Act which commences with a *non-obstante* clause. The operative part of the said Section is in the negative form proscribing the enlargement of bail to any person accused of commission of an offence under the Act, unless the twin conditions are satisfied. Before granting bail to an accused arrested in



connection with recovery of commercial quantity of narcotic drugs, the Court has to record the findings mandated by Section 37 of the NDPS Act which is a *sine-qua-non* for grant of bail. This aspect regarding compliance of mandatory requirement of the NDPS Act was considered by Hon'ble the Supreme Court in the following Cases:

(i) State of Kerala & Ors. vs. Rajesh & Ors., reported in AIR 2020 SC 721,

(ii) Union of India vs. Ratan Malik, reported in (2009)2 SCC 624,

(iii) Narcotics Control Bureau vs. Kishan Lal & Ors., reported in AIR 1991 SC 558,

(iv) Union of India vs. Shiv Shanker Kesari reported in (2007)7 SCC 798, and

(v) Intelligence Officer, Narcotics C. Bueau vs. Sambhu Sonkar & Ors., Control reported in AIR 2001 SC 830.

In all these cases, Hon'ble the Supreme Court laid down that considering the parameters under Section 37 of the NDPS Act and recording a satisfaction in light thereof, is mandatory before grant of bail to an accused arrested in connection with the commercial quantity of narcotic drugs or psychotropic substances. In all these cases except the case of ***Kishan Lal (supra)***, the bail granted to the concerned accused by the High Court was cancelled on account of non-consideration of the mandatory requirement of Section 37 of the NDPS Act. It can thus be culled out that recording a satisfaction under Section 37 of the NDPS Act is imperative before granting bail to a person accused of the offence under the NDPS Act and failure to do so, would violate the



mandatory requirement of the statute and thereby vitiate the bail order.

9. On going through the orders passed by the Coordinate Bench of this Court on the bail applications of the co-accused Iqbal and Toshib, it is clear that satisfaction mandated by Section 37 of the NDPS Act has not been recorded before granting bail to the accused.

10. So far as the submission of the petitioners' counsel that the percentage of morphine is not mentioned in the Forensic Science Laboratory report is concerned, suffice it to say that as the recovered contraband is heroin which is a manufactured drug within the meaning of Section 2(xi) of the Act, only requirement for the FSL would be to detect the presence of diacetyl-morphine therein as per serial No.56 of the table under the NDPS Act which is indicated positively in the FSL report.

11. The contention of the learned counsel representing the petitioners that the admission made by the Seizure Officer in cross-examination would indicate that each accused was having a share of 175 gms. of smack/ heroin and 250 gms. of opium from the total recovered contraband, suffice it to say that all the four accused, who are residents of Madhya Pradesh, were travelling in the same car. The contraband substances were recovered in bulk concealed under the hood of the car and not from individual possession of the accused. The admission which was elicited from the Seizure Officer (supra), was in answer to the suggestion given by the defence counsel that the accused, in their interrogation



notes, disclosed that they had equal shares in the recovered contraband. Suffice it to say, an interrogation note of the accused as recorded by the police officer is hit by Section 25 of the Evidence Act and is not admissible in evidence for any purpose whatsoever. Section 35 of the NDPS Act lays the issue beyond discussion.

12. The contention of the learned counsel for the petitioners that the seizure is vitiated on account of non-compliance of Section 50 of the NDPS Act, suffice it to say that seizure was made from the vehicle while in transit and not during the personal search of an individual and thus, Section 50 of the Act would not be applicable and the search and seizure which was obviously made while exercising powers under Section 43 of the NDPS Act cannot be called in question.

13. In wake of the discussion made herein above, this Court is of the firm opinion that there are no reasons on the record of the case which can persuade the Court to record the mandatory finding in terms of Section 37(b)(2) of the NDPS Act which reads as below:

"37(b)(2)- 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."

14. As a consequence of the above discussion, this Court is not inclined to extend indulgence of bail to the petitioners under



Section 439 Cr.P.C. and hence, the Bail Application No.95/2021 stands dismissed as being devoid of merit.

15. A copy of this order be placed in each file.

(SANDEEP MEHTA),J



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