

Shiv Kumar Nagpal Vs State of Haryana

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Aug. 30, 2004

Acts Referred: Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) " Section 37

Citation: (2004) CriLJ 4682 : (2004) 4 RCR(Criminal) 189

Hon'ble Judges: Rajive Bhalla, J

Bench: Single Bench

Advocate: V.S. Rathore, for the Appellant; D.S. Brar, A.A.G., for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Rajive Bhalla, J.

The petitioner seeks grant of regular bail in case FIR No. 114, dated 21-6-2003, under Sections 409/483/218 of the

Indian Penal Code and Section 29 of the N.D.P.S. Act, registered at Police Sector 19, Panchkula.

2. A brief narrative of the facts that have led to the lodging of the present F.I.R. and the detention of the petitioner would be appropriate.

3. On 25-5-2001, upon receipt of secret information, one Tajudeen Ahesula, a Nigerian National was apprehended with 30 packets of smack,

total weighing 3 kgs. Out of these packets, two were sealed as samples, whereas the remaining 28 were sealed in a separate parcel. Recovery

memo, was prepared on the spot and signed by Onkar Singh, ASI Rattan Singh, an independent witness and Sh. Jagparvesh Dahiya, the then

DSP, Hqrs.

4. The case properly, containing the sealed parcels bearing seal BR, were entrusted to MHC Zile, Singh, Incharge of the Malkhana, Police Station,

Sector 19, Panchkula, on 25-5-2001.

5. On 29-5-2001, he handed over one parcel to Constable Rejinder Singh No. 449 for deposit with the Forensic Science Laboratory, Madhuban.

The sample was tested on 13-7-2001, by the petitioner, and found to be heroin. The petitioner submitted his report dated 13-7-2001.

6. During the course of the trial, the trial Court forwarded 28 packets, which had been separately sealed, to the Forensic Science Laboratory,

Madhuban for analysis. HC Ishwar Singh was deputed to deliver a parcel containing 28 packets of smacks weighing 100 grams each, which was

duly sealed with the seal of BR and JP. The said parcel was received in the Laboratory by Kishore Kumar, Lab. Assistant. A receipt FSL No. 02/

G-3706, dated 24-9-2002 was issued to HC Ishwar Singh, in token of the receipt of the parcels. Kishore Kumar deposited the parcels in a

cupboard and locked it.

7. On 19-5-2003, S.K. Sangwan, Asstt. Dirctor , along with Mange Ram, Lab Assistant and Kiran Kumar, Senior Scientific Officer, Forensic

Science Laboratory, Madhuban checked the parcels and discovered that 2 packets had been pilfered. One contained a silver foil, whereas the

other contained 1/2 a gram of smack. The seals were checked and recorded. The Superintendent of Police, Panchkula was immediately informed

and thereafter, the present FIR registered, which reads as under :--

Sir from the letter No. 541 /PL dated 21 -5-2003 from your office and report dated 6-6-2003 of Sh. Babu Ram, Sub Inspector, Former S.H.O.

of Sector 19, Panchkula was minutely studied and it was found that Sub Inspector Babu Ram, S.H.O. Police Station Sector 19, Panchkula with

the help of other officials had apprehended accused Tajtdeen Ahesula son of Alobare Milikane, resident of Marco Drive 2, Oni and Sons, Ring

Road, Nigeria and found 30 packets of smack brown sugar and 18,30,000/- Rupees of Indian currency and 1650 American Dolloars, smack on

weighing was found to be 3 kgs and each packet was weighing 100 grams each. Out of which two packets were separately kept as for samples

and remaining 28 packets were kept in the same polythene and sample as well as case property was sealed with DR and seal of D.S.P.

Headquarters JP and thereafter duly making an entry in the police station was handed over to MHC Zile Singh No. 58 Panchkula in a safe

condition and which as per record of register No. 19 the sample has been sent to Forensic Science Laboratory, Madhuban,, Haryana for the

purpose of ascertaining the case property. That from sealed case property 28 packets of smack instead of 26 packets have been recovered and

the seal of the case property is broken, this packet has been got sealed and the seal is not clear and the packets of smack have been tampered

with and were tied again and two packets of smacks weighng 100-100 grams each have been taken out. One packet containing sample of smack

brown sugar, weighing 100 grams, in which there was seal of BR for the purposes of result was sent through C. Rajinder Kumar 499 to Director

Forensic Science Laboratory, Madhuban as per RC No. 149 dated 29-5-2001 through MHC Zile Singh 58, Police Station Sector 19,

Panchkula. That Constable Rajinder Kumar No. 499 had deposited this sample in Forensic Science Laboratory, Haryana Madhuban vide dated

29-5-2003. After this one sample seal bearing Mark BR and JP upon which there were five seals of BR and in total 7 seals, one sample parcel of

smack weighing 100 grams bearing 5 seals of BR and two seals of JP duly sealed and in total 7 seals and one parcel smack containing 28 packets

weighing 100 grams each, in which 2.800 kgs. smack sealed with seal of BR 10 in number and case property vide docket No. 3850 dated 23-9-

2002 from order of the Court of Sh. H.S. Bhangu, Addl. Sessions Judge, Panchkula for the purposes of result through HC Ishwar Singh 93 was

sent to Director Forensic Science Laboratory Madhuban as per RC No. 234 dated 24-9-2002. On 19-5-2003 Forensic Science Laboratory

Madhuban opened the parcel and by opening the same 26 packets were found instead of 28. As per report of S.I. Babu Ram SHO Police Station

Sector 19, Panchkula, this act has been done in the Malkhana itself for the purpose of helping the accused and two packets of smack weighing

100 grams each were taken out. During this period, from 25-5-2001 to 24-9-2002, MHC Zile Singh from 8-3-2001 to 4-6-2001, MHC Shashi

Pal 585, dated 27-5-2001 to 25-7-2001, MHC Laxmi Narain 59, Panchkula, from dated 25-7-2001 to 23-8-2001 MHC Anant Ram 118,

Panchkula, from 23-9-2001 to 3-8-2002 MHC Suraj Mal 54, Panchkula from 29-7-2002 to 15-11-2002 SI/SHO Babu Ram, from 17-3-2002

to 15-6-2001, SI/SHO Avtar Singh from 15-6-2001 to 16-3-2001 SI/SHO Babu Ram, from 16-3-2002 to 5-6-2002 SI/SHO Hari Pal, from 5-

6-2002 to 27-11-2002 remained posted there. And necessary legal action be taken against the concerned officials.

8. Despite the fact that the FIR implicated various Constables of Police, the petitioner, as also the other employees of the FSL, Madhuban were

arrested.

9. Counsel for the petitioner contends that the FIR clearly and categorically states that the pilferage of smack took place at the Malkhana of Police

Station, Sector 19, Panchkula. The FIR records the names of the MHCs, who remained posted in the Malkhana, during the relevant period. The

police intentionally and with the object of protecting its Constables, held the employees of the F.S.L. Madhuban responsible and falsely implicated

the petitioner, as also Manju Rani and Kishore Kumar. There is no explanation forthcoming as to how and in what manner, the police arrived at a

conclusion contrary to the categorical assertion, recorded in the F.I.R.

10. It is further contended that even if it is presumed that the pilferage took place during the time the smack was in the custody of the F.S.L.

Madhuban, there is no evidence direct or substantial to implicate the petitioner. Attention of the Court was invited to two statements of Shri S.K.

Sangwan, Assistant Director, FSL, Madhuban dated 26-6-2003 (Annexure P-8) and dated 8-3-2004 (Annexure P-9) . The first statement is to

the effect that the parcel was received at the Laboratory on 24-9-2003 through HC Ishawar Singh by the Lab Assistant Kishore Kumar who,

thereafter, issued a receipt and placed the parcel in a cupboard and locked it. The second statement is to the effect that the keys were generally in

the custody of the petitioner. However, he proceeded on two months leave from 1-10-2002 and during this period, the keys remained with Satish

Kumar Sangwan. It is further recorded that whenever he (Satish Kumar Sangwan) proceeded on leave, the keys were entrusted to Kiran Kumar,

SSA. The petitioner retired on 30-4-2003, whereas the pilferage was detected on 19-5-2003.

11. On the basis of the above undisputed facts, counsel for the petitioner contends that during the relevant period, the keys were in the possession

of the petitioner, Mr. Satish Kumar Sangwan and Mr. Kishore Kumar for different period of times. In this view of the matter, it is a moot point, to

be determined during the course of trial, as to who pilfered the smack and removed two packets. In criminal jurisprudence, there is no assumption

of guilt, though circumstances can always be used to establish culpability. In the present case, the role of the aforementioned persons, as also the

Clerk and the Peon, who have already been cited as accused, would be under scrutiny and, thus, the matter as to who was responsible, for the

commission of offence, would be decided only during the course of trial. To incarcerate the petitioner, on the basis of suspicions and assumptions

is alien to criminal jurisprudence.

12. The next contention, raised by counsel for the petitioner, is that the recovery memo. (Annexure P-2), entries of Malkhana register (Annexure

P-11), the report of the FSL (Annexure P-4), the statements of Shri S.K. Sangwan (Annexures P-8 and P-9), as also the statement of Shri Jag

Parvesh (Annexure P-10) reveal serious discrepancies regarding identity, the number and the initials on the seals, and, thus, it cannot be said, with

any degree of certainty, that the pilferage occurred in FSL, Madhuban or that the petitioner was responsible for the pilferage. It is further urged that

in case the petitioner has been arrayed as an accused and is to be denied bail on the ground that he was the custodian of the keys for a part of the

relevant time, in that eventuality, all the officers of the Malkhana, named in the F.I.R. were custodians of the packets of smack and, therefore,

should have been arrayed as accused. The prosecution has applied different standards of culpability to the petitioner and the police officers, named

in the F.I.R.

13. Counsel for the petitioner further states that the petitioner is the only accused, who is still in custody, as Manju Rani, Kishore Kumar and Babu

Ram, co-accused, have already been released on bail.

14. The investigation is complete, trial is in progress and there is no reason to detain the petitioner . It is further contended that the petitioner has

retired from service and is handicapped, as he has lost the fingers of his hands in an accident. The petitioner was a ballistic expert. During the

course of a controlled explosion, the petitioner suffered an accident and lost his fingers. On the basis of the aforesaid facts, the petitioner, states

that his culpability is in serious doubt and his innocence can be easily inferred. There is no likelihood of the petitioner committing another offence,

should he be released on bail.

15. Counsel for the respondent, on the other hand, contends that upon a thorough investigation, it was discovered that pilferage of smack had

taken place at FSL, Madhuban. The petitioner was the custodian of the parcel, as the keys had remained with him and, therefore, an inference of

the petitioner's culpability can be drawn. In these circumstances, there can be no direct evidence. With respect to the question of discrepancies

between various documents visa-vis the number and identity of the seals, counsel for the respondent contends that these are simple errors that can

easily be explained and, therefore, no significance can be assigned thereto at the stage. The fact that the other co-accused, who are already on bail,

is not denied. It is further contended that prior to releasing the petitioner on bail, the Court is required to comply with the conditions of Section 37

of the N.D.P.S. Act. Counsel for the respondent contends that while considering the case, for grant of bail, under the NDPS Act, this Court is

required to take into consideration the provisions of Section 37 of the N.D.P.S. Act. Pursuant to Section 37 of the N.D.P.S. Act, the Court is

required to return a finding that it has reasonable grounds for believing that accused is not guilty. Thereafter , the Court is also required to come to

a finding that the accused is not likely to commit any offence, while on bail. The petitioner has not been able to place on record any material that

would enable this Court to satisfy the ingredients of Section 37 of the N.D.P.S. Act and, therefore, the present petition be dismissed.

16. I have heard the learned counsel for the parties, perused the pleadings, as also the various documents placed on record.

17. Section 37 of the N.D.P.S. Act reads 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 u/s 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-

(1) 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.

18. A perusal of Section 37 of the NDPS Act, reproduced above, reveals that prior to the grant of bail to an accused , the following conditions

have to be satisfied :--

(1) The Public Prosecutor has to be given an opportunity to oppose the application.

(2) The Court has to be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence.

(3) The accused is not likely to commit any offence, while on bail.

19. A perusal of Section 37 of the N.D.P.S. Act makes it abundantly apparent that prior to release of an accused, charged of an offence under the

aforementioned Act, the Court is mandatorily required to comply with the three conditions, laid down in Section 37 of the N.D.P.S. Act. The first

condition, namely, a notice to the Public Prosecutor would obviously present no difficulty. The second condition, mandates the Court to record its

satisfaction that there are ""reasonable grounds"" to believe that the accused is ""not guilty"". In my opinion, the words ""reasonable grounds"" are a key

to the true import of the intention of the legislature in enacting the aforementioned condition. The words ""reasonable grounds"" cannot be read to

mean ""proved"" as used in the Indian Evidence Act. Such an interpretation would, in my opinion , set at naught the power vested in a Court to grant

bail pending trial. The expression ""reasonable grounds"" would obviously mean some thing more than mere suspicion and conjectures and some

thing less than ""proved"". It would necessarily mean such grounds or material that would, prima facie, enable a person of ordinary prudence to

believe that the accused is not guilty. It is no doubt true that the object of the legislature, while enacting the stringent provisions of Section 37 of the

NDPS Act, was to prevent offenders from being granted bail easily but the said intent expressed in Section 37 of the NDPS Act cannot be

construed to take away the power of the Court to grant bail. The aforementioned condition does not breach or suspend the presumption of

innocence that must follow an accused, in our system of criminal jurisprudence. In this view of the matter, a Court is required to examine the

material, placed before it, and then to arrive at a conclusion that there exist ""reasonable grounds"" to believe that the accused is not guilty.

20. The ""reasonable grounds"" would vary from case to case and from one accused to another. What may be reasonable in one case may not be so

in another and, therefore, in my view, the words ""reasonable grounds"" cannot, on account of a discretion vested in the Court, be put into a strait-

jacket. Each case would have to be dealt with and examined on its own facts and decided, keeping in view the mandate of law.

21. The third condition, namely, whether the accused is likely to commit an offence, if released on bail, has also to be determined, in the facts and

circumstances of each case. No hard and fast rule can be set down that would enable the courts to determine whether an accused is likely to

commit an offence, if released on bail. The relevant consideration that may be taken into consideration is the background, the general character

and the records available with the police etc. There can be no instrument to assess human behaviour and no means are available with the Court to

predict with certainty the future course of events and, therefore, the aforementioned provisions, in my view, have to be read, taking into

consideration the circumstances already existing. The circumstances, explained above, are not exhaustive of the circumstances that may be taken

into consideration. As stated above, the circumstances would differ from case to case and from accused to accused. However, without recording

such a finding and order granting bail would be in gross violation of the mandate of law and, thus, void.

22. The crucial question to be decided is whether the petitioner was involved in the pilferage of the two packets of smack, which pilferage was

discovered on 19-5-2003. The parcel containing smack was received in the F.S.L., Madhuban on 24-9-2002 by Kishore Kumar, Lab. Assistant,

who issued a receipt of HC Ishwar Singh. Kishore Kumar, Lab. Assistant and Manju Rani placed the parcel in a cupboard and locked the same.

The cupboard was admittedly opened on 19-5-2003 by Shri S. K. Sangwan, Assistant Director, FSL, Madhuban, when it was discovered that

two packets of smack had been pilfered. It is not denied that during this period different individuals had access to the keys and the cupboard.

Apart from the petitioner Shri S.K. Sangwan, Kishore Kumar, Manju Rani, Babu Ram etc. had access to the keys/cupboard and, therefore, it

cannot be said that any degree of certainty as to who was responsible for the pilferage. The verdict of culpability must await the result of the trial.

On the basis of the material, placed before me by both the parties, it would be a travesty of justice , to hazard the formation of an unimpeachable

opinion. It is not denied, as stated above, that various individuals, working with the FSL, Madhuban, had access to the cupboard, as also the keys,

during the period, the parcel remained in the custody of the FSL, Madhuban. It is not the case of the prosecution that the keys remained in the

exclusive custody of the petitioner. In fact, it is not denied that during a part of this period, the petitioner was on leave and thereafter retired on 30-

4-2003 i.e. before the discovery of the pilferage. It is, thus, apparent that the question of the petitioner's involvement in the pilferage of two

packets of smack is not without doubt.

23. The FIR itself is another aspect of the matter, which has been pressed into service to fortify the plea of innocence. The FIR clearly and in no

uncertain terms points an accusing finger at various police officials specifically named therein. It clearly and categorically states that the pilferage

occurred in the Malkhana of Police Station, Sector 19, Panchkula. A lame explanation has been trotted out by the respondents that on the basis of

further, investigation, they arrived at a conclusion that the police officials , referred to in the FIR, were innocent and it was the officials of the FSL,

Madhuban , who were guilty. The respondents were, however, unable to refer to any direct or substantive evidence which led to them to the

aforesaid conclusion. In my tentative opinion, the possibility of protecting the police officials and falsely implicating the officials of the FSL,

Madhuban cannot be ruled out, at this stage.

24. Apart from the fact that the packets of smack were entrusted to the FSL, Madhuban, there is no other circumstance cited against the

petitioner. If , this be the only circumstance, used to implicate the petitioner, then the counsel for the petitioner is not wrong in suggesting that the

same circumstance applies with equal vigour to the police officials of the Malkhana of Police Station, Sector 19, Panchkula and, therefore, there

was no reason for the State to have exonerated the police officials specifically named in the FIR. It is, thus, apparent that the question as to the

mode, the manner, the time, as also the identity of the accused, is a matter, which is within the realm of speculation and would obviously be

determined by the trial Court, during the course of trial.

25. Furthermore, the questions as to the nature, the identity, the number, as also the initials upon the seals, vary from document to document. No

satisfactory explanation is forthcoming from the respondent for these significant discrepancies. The seals, in the facts and circumstances of the

present case, assume great, significance and, therefore, the discrepancies, referred to by counsel for the petitioner, should have been prima facie

satisfactorily explained. The failure to do so lengthens the shadow falling upon the prosecution case.

26. The facts and circumstances explained above, namely, the marked difference between the allegations in the F.I.R. and the allegations now set

up i.e. exonerating the police officials of the Malkhana of Police Station, Sector 19, Panchkula and implicating the officials of the F.S.L.

Madhuban, the fact that the petitioner did not have exclusive custody of the keys to the cupboard containing the parcel of smack, the fact that there

are discrepancies in the number, the identity and the initials appearing on the seals, in various documents, the fact that three co-accused of the

petitioner have already been released on bail, lead me to a conclusion, in terms of Section 37 of the N.D.P.S. Act, that the petitioner, on the basis

of material, placed before me there are ""reasonable grounds"" to hold that the petitioner is not guilty of the offence charged. This opinion is,

however, tentative and based on the material placed before me in the present proceedings. The said opinion shall, obviously, not be a reflection on

the guilt/ innocence to be determined, during trial, and shall not be taken into consideration by the trial Court, while deciding the case on merits.

Furthermore, the petitioner, who was a ballistic expert, has retired from service. Admittedly, he is handicapped, as he has lost his fingers in an

simulated explosion. In this view of the matter, I am also of the opinion that the petitioner is not likely to commit another offence, while on bail.

Even otherwise, counsel for the State has not expressed any apprehension that the petitioner would, in any manner, interfere with the trial or

subvert the course of justice.

27. In view of what has been stated above, the present petition is accepted and the petitioner is directed to be released on bail to the satisfaction of

the trial Court/ Special Court/CJM/Duty Magistrate/ Panchkula.

28. Nothing, stated herein, shall be construed as an expression of opinion on the merits of the case.