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# A COMPREHENSIVE ANALYSIS ON THE PROVISION OF BAIL UNDER SECTION 37 OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES, 1985

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Athul V. Vadakkedom, Law Center I, Faculty of Law, Delhi University

## ABSTRACT

As per the data released by the National Crime Records Bureau in its annual 'Crime in India' report, the number of cases booked under the NDPS Act for possession of drugs and psychotropic substances for personal use & trafficking has increased considerably over the years from 2014. However, it was the recent arrest of the son of a Bollywood actor on the set of allegations arrayed by the NCB & the seizure of 2988 kgs 'Heroin' from the Mundra port that have once again brought the issue of drugs into the forefront. This has raised a serious question about the performance of the enforcement agencies in controlling the menace of illegal trade & usage of the banned contrabands as provided under the schedule of NDPS Act.

As per a report <sup>1</sup>by FCLTY, the pendency rate which was 84% by the end of 2019 increased further to reach 93.5% by the end of 2020. The closure of the courts for a considerable period in 2020 due to the COVID-19 has severely affected their functioning, resulting in increased pendency. In the light of the above data, the pressing questions to be answered are, whether a person charged with an offence under the NDPS Act is entitled for bail as if he was charged under an offence in the Penal Code? Whether such a person can be released under the proviso to section 167(2)(a) of CrPC, i.e., after the passing of the stipulated period? And this is where understanding the nuances of bail under the NDPS Act becomes imperative.

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<sup>1</sup> Bharath Kancharla, Data: Pendency rate of NDPS cases in Courts crosses 90% in 2020 (OCTOBER 19, 2021), <https://factly.in/data-pendency-rate-of-ndps-cases-in-courts-crosses-90-in-2020/>

## Introduction

The NDPS Act was adopted in 1985 with an object to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances. Even with the existence of this legislation, the courts in the country have always taken a much stringent and rigid stand when it comes to upholding the law relating to narcotic drugs. The Supreme Court in **Durand Didier v. Chief Secy., Union Territory of Goa**<sup>2</sup>, while dealing with the contention concerning punishment under the NDPS Act, has succinctly observed the following:

"With deep concern, we may point out that the organized 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, 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."

At the same time, the legislature has also envisaged that the provisions are to be strictly observed to avoid harm to the innocent and to minimize the allegations of planting or foisting of false cases by the law enforcement agencies. It is thus imperative on the part of the empowered officers to apprise the person intended to be searched of his right to be searched before a Gazetted officer or a Magistrate and adhere to the other procedures as contemplated in the NDPS Act.

## Offences and penalties under the NDPS Act

The NDPS Act categorizes the quantity of contraband seized from an accused person into three heads so as to determine the severity of punishment associated with a specific quantity and also for determining the eligibility for enlargement of bail to such accused persons.

As mentioned above the quantum of punishment varies with the quantity of contraband seized, which are notified under small quantities, commercial quantities and quantities in between

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<sup>2</sup> (1990 (1) SCC 95: 1990 SCC (Cri) 65)

small and commercial quantities. As explained in Section 2(xxiii) of the NDPS Act, small quantity concerning narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette and as mentioned in Section 2(viii) of the NDPS Act, commercial quantity, in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette

According to the NDPS Act, whoever, in contravention of any provisions of this Act or any rule or order made or condition of a license granted thereunder, produces, possesses, transports, imports inter-State, exports inter-State, sells, purchases, uses, or omits to warehouse any contraband under the definition of 'narcotic drugs' as mentioned in Section 2(xiv) of the NDPS Act or removes or does any act in respect of such warehoused narcotic drug shall be punishable,

- (i) where the contravention involves small quantity, with rigorous imprisonment for a **term which may extend to one year, or with fine which may extend to ten thousand rupees, or with both;**
- (ii) where the contravention involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a **term which may extend to ten years, and with fine which may extend to one lakh rupees;**
- (iii) where the contravention involves commercial quantity, with rigorous imprisonment for a **term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees.**

Under the NDPS Act, abetment, criminal conspiracy, and even attempts to commit an offence attracts the same punishment as the offence itself. Preparation to commit an offence attracts half the penalty. Repeat offences attract **one and half times** the penalty and in some cases the **death penalty**. Since the penalties under this Act are very stiff, several procedural safeguards have been provided in the Act, which would be talked about further in this article.

As observed by the Supreme Court, it should be borne in mind that in a murder case, the accused murders one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death blow 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<sup>3</sup>.

### **Bail under the NDPS Act**

As mentioned in the section 37(1) of the NDPS Act, all the offences as mentioned therein are cognizable and non-bailable, therefore the police can arrest any accused person without a warrant and can detain such person for a period of 24 hours, after which the person will have to be produced before the magistrate.

### **Whether the Magistrate have the power to consider the question of Bail or is it exclusively exercised by the Special Courts as notified under the NDPS Act?**

As mentioned above, when an accused is arrested for an offence under the NDPS Act, he/she is produced before the magistrate, even if the offence he/she is charged with, is one that is exclusively triable by the special Courts as mentioned in Section 36A of the NDPS Act. It is at this stage that the magistrate decides to remand the accused to judicial or police custody or considers whether the accused is entitled for bail under section 437 of the CrPC.

It can be seen from the wordings of the Section 437 of CrPC that there is no bar for release of the accused person on bail by the Magistrate unless the person is accused of commission of the offence punishable with death or life imprisonment. Nevertheless, the fact remains that there is no total prohibition against grant of bail merely because a person is accused of commission of offence of serious nature.

On a perusal of Section 209 of the CrPC which deals with the committal proceedings, it is apparent that even in the course of the committal proceedings there is no bar imposed upon the powers of Magistrate in the matter of grant or refusal of bail. Clause (b) of Section 209 of CrPC clearly provides that while dealing with the accused persons appearing and brought before the Magistrate having committed the matter as the same is triable exclusively by the Court of Sessions, while the Magistrate is enjoined to commit the proceedings to the Court of Sessions or the Special Court constituted under any special statute, the accused may be remanded to the custody until such committal proceedings are complete, subject to the provisions of the Code relating to the bail. In other words, while the Magistrate is empowered to remand the accused to the custody until the conclusion of the committal proceedings, that is to say, till the

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<sup>3</sup> Union of India v. Ram Samujh and Another, 1999 (9) SCC 429

proceedings are placed before the Court of Sessions or the Special Court, as the case may be, the powers of the Magistrate either to grant the bail if asked for or to refuse the same are not restricted in any manner.

But the same rule as explained in the above paragraphs will not apply for an offence as mentioned under Section 36A of the NDPS Act i.e., for all offences punishable under the NDPS Act with three or more years of imprisonment. The proviso to Section 36A(1)(b) provides that:

- (i) when such person is forwarded to him as aforesaid; or
- (ii) upon or at any time before the expiry of the period of detention authorized by him, that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction.

The same has also been reiterated in the judgment of the Bombay High Court in **Mr. Sanjay Narhar Malshe vs State of Maharashtra**<sup>4</sup>, wherein it observed that:

“This apparently discloses that the Magistrate in case of the persons accused of commission of the offence under NDPS Act and in cases which are triable by the Sessions Court even if he considers the remand of such person to the custody to be unnecessary, *he cannot grant the bail, but he will have to direct the person to be forwarded to the Sessions Court having jurisdiction.*”

Therefore, placing reliance on the proviso to Section 36A(1)(b) of the NDPS Act, the Bombay High Court in **Mr. Sanjay Narhar Malshe** (supra) observed that the legislature in the NDPS Act had thought it fit to bring in an embargo over the powers of the Magistrate in the matters of bail under Section 167 of the CrPC.

### **Conditions for Bail under Section 37 of the NDPS Act**

The general law with regard to bail is mentioned under the Code of Criminal Procedure, however, the NDPS Act provides for certain special provisions for bail. To check the menace of dangerous drugs flooding the market, Parliament has provided that, the person accused of all the offences as mentioned under the Section 37 of the NDPS Act should not be released on bail during the trial unless the mandatory conditions are provided therein are satisfied.

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<sup>4</sup> 2005 CriLJ 2984

A perusal of Section 37 of the NDPS Act would show that, it begins with a non-obstante clause which states that, notwithstanding anything contained in the Code of Criminal Procedure, 1973 every offence punishable under this act would be cognizable, and that a person accused of an offence prescribed under **section 19 or section 24 or section 27A and also for offences involving commercial quantity** shall be released on Bail unless the two conditions contained in section 37(1)(b) were satisfied. Both the grounds must be satisfied before granting Bail under section 37(1)(b) of the act i.e.

- (i) The Public Prosecutor must be 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.

In addition to the above conditions, the bail under section 37(1)(b) is subjected to the limitations as under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail.

When the Public Prosecutor opposes the bail application, to enlarge on bail any person accused of committing an offence mentioned in section 37(1)(b)(ii), for such release on bail, the following twin conditions need to satisfy viz;

- (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and
- (ii) that he is not likely to commit any offence while on bail, have to be satisfied.

It is manifest that the conditions are cumulative and not alternative. The recording of satisfaction on both the aspects, noted above, is a sine qua non for granting of bail under the NDPS Act<sup>5</sup>. The satisfaction contemplated regarding the accused being not guilty has to be based on "reasonable grounds".

### **What are the aforementioned reasonable grounds?**

The expression used in S.37(1)(b)(ii) of the Act is "reasonable grounds" which expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief

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<sup>5</sup> Union of India v. Rattan Mallik @ Habul, 2009 (2) SCC 624

contemplated in turn points to the existence of such facts and circumstances as are sufficient in themselves to justify the recording of satisfaction that the accused is not guilty of the offence charged<sup>6</sup>.

Be that it may, whether a reasonable belief of non-guilty that is arrived at by the Court for the purpose of bail is equivalent to giving a certificate of discharge to the accused? To answer this question, it is pertinent to refer to the judgment of the the apex court in the case of **Union of India (UOI) v. Shri Shiv Shanker Kesari**<sup>7</sup>, wherein it was observed that, 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. In addition to the satisfaction of the aforementioned condition, the Court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion. Even on fulfilling one of the conditions, the reasonable grounds for believing that during the period of bail, the accused is not guilty of such an offence, the Court still cannot give a finding or assurance that the accused is not likely to commit any such crime. Thus, the grant of bail or denial of bail for possessing commercial quantity would depend on the facts of each case.

### **Whether the Higher Courts while granting the anticipatory bail under CrPC need to take into consideration the provisions as enumerated in Section 37 of the NDPS Act?**

In **Satpal Singh v. the State of Punjab**<sup>8</sup>, a bench of three judges of Supreme Court directed that since the quantity involved was commercial, as such High Court could not have and should not have passed the order under sections 438 or 439 CrPC, without reference to Section 37 of the NDPS Act.

The NDPS Act is a special enactment as already noted it was enacted to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances. That being the underlying object and particularly when the provisions

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<sup>6</sup> See Union of India (UOI) v. Shri Shiv Shanker Kesari, (2007) 7 SCC 798

<sup>7</sup> *ibid*

<sup>8</sup> (2018) 13 SCC 813

of Section 37 of NDPS Act are in negative terms limiting the scope of the applicability of the provisions of Criminal Procedure Code regarding bail, it cannot be held that the High Court's powers to grant bail under Section 439 Criminal Procedure Code are not subject to the limitation mentioned under Section 37 of NDPS Act. The non-obstante clause with which the Section is intended to restrict the powers to grant bail. In case of inconsistency between Section 439 Criminal Procedure Code and Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 Section 37 prevails<sup>9</sup>.

The other aspect to be borne in mind is that the liberty of a citizen has got to be balanced with the interest of the society. In cases where narcotic drugs and psychotropic substances are involved, the accused would indulge in activities that are lethal to the society. Therefore, it would certainly be in the interest of the society to keep such persons behind bars during the pendency of the proceedings before the Court<sup>10</sup>.

### **The provision of default bail under the NDPS Act**

According to the common legal parlance, the right to bail under the Proviso to Section 167(2) of CrPC is commonly referred to as 'default bail' or 'compulsive bail' as it is granted on account of the default of the investigating agency in not completing the investigation within the prescribed time, irrespective of the merits of the case.

Section 36A of the NDPS Act prescribes a modified application of the CrPC as indicated the proviso to Section 167(2). The effect of Sub Clause (4) of Section 36A, NDPS Act is to require that investigation into certain offences under the NDPS Act (i.e., for offences punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity) be completed within a period of 180 days instead of 90 days as provided under Section 167(2), CrPC. Hence the benefit of additional time limit is given for investigating a more serious category of offences. This is augmented by a further Proviso that the Special Court may extend time prescribed for investigation up to one year if the Public Prosecutor submits a report indicating the progress of investigation and giving specific reasons for requiring the detention of accused beyond the prescribed period of 180 days.<sup>11</sup>

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<sup>9</sup> Narcotics Control Bureau v Kishan Lal, 1991 (1) SCC 705

<sup>10</sup> In Babua v. State of Orissa, (2001) 2 SCC 566

<sup>11</sup> M. Ravindran v The Intelligence Officer, Directorate of Revenue Intelligence, S.L.P. (Criminal) No. 2333 of 2020



It has been held by the apex court that, once an accused files an application for bail under the Proviso to Section 167(2) he or she is deemed to have 'availed of' or enforced his right to be released on default bail, accruing after expiry of the stipulated time limit for investigation. Thus, if the accused applies for bail under Section 167(2), CrPC read with Section 36A(4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the Court must release him on bail forthwith without any unnecessary delay after getting the necessary information from the public prosecutor. That is, the right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding the pendency of the bail application or the subsequent filing of the chargesheet or the report seeking extension of time by the prosecution before the Court or filing of the chargesheet during the interregnum when challenge to the rejection of the bail application is pending before a higher Court. However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a chargesheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished. The Magistrate would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the CrPC.<sup>12</sup>

### **Safeguards provided under the NDPS Act.**

The safeguards provided under the Statute is to ensure that persons are searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. As very severe punishments are provided under the Act for mere possession of illicit drugs and narcotic substances, a procedure based on systematic and unconscionable violation of law by the official responsible for the enforcement of law cannot be considered to be a fair, just or reasonable procedure. As held by the Apex Court in many of its judgements, the more severe the punishment, greater has to be the care taken to ensure that all the safeguards provided in a Statute are scrupulously followed.

The provisions in Section 41 and 42 regarding the authorization and recording of information, and the provisions of Section 50 regarding the notice to be given to the accused are held to be mandatory in nature by the Apex court of the country. The contraventions of these provisions

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<sup>12</sup> Ibid.

would not only vitiate the entire proceedings but will also entitle the accused for Bail and in certain cases for acquittal as well.

The Supreme Court has clearly declared that under Section 41(1) of the NDPS Act only an empowered Magistrate can issue a warrant for the arrest or search in respect of offences punishable under Chapter IV of the Act. Likewise, only empowered officers or duly authorized officers as enumerated in S.41 (2) and S.42(1) can act under the provisions of the Act. Under S. 41 (2) only the empowered officer can give the authorization to his subordinate officer to carry out the arrest of a person or search as mentioned therein. The Apex Court further holds that if an arrest or search contemplated under S.41 or 42 is made under a warrant issued by any other Magistrate or is made by any other officer not empowered or authorized, it would per se be illegal and would affect the Prosecution case and consequently, vitiate the trial.<sup>13</sup>

The Supreme Court has also opined that under S.42 of the NDPS Act, when an empowered officer who takes down any information in writing or records the grounds under proviso to S.42, shall forthwith send a copy thereof to his immediate official superior. If there is total non-compliance with this provision, the same affects the prosecution case and therefore, is mandatory.<sup>14</sup>

It was observed by the High Court of Kerala that the obligation of the authorized officer under Sub-Section (1) of S.50 is mandatory and requires a strict compliance. The failure to comply with the provision would hold the recovery of illicit article under suspicion. The right under S.50(1) of the NDPS Act, by way of a safeguard, has been conferred on the subject, viz., to check the misuse of power, to avoid harm to innocent persons and to minimize the allegations of planting or foisting false cases by the law enforcement agencies. However, when such inbuilt safeguards are violated with impunity and when the mandatory formalities are breached, it would be fallacious and pernicious to leave the question of their compliance to be looked into only at the stage of trial. Herein, the Hon'ble Court was of the considered view that the non-compliance of the mandatory provisions under S.50 would be sufficient to vitiate a conviction for illegal possession of the contraband. Therefore, it was held by the Hon'ble court that, within the meaning of the clause 1(b)(ii) of S.37 of the NDPS Act that there are reasonable grounds

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<sup>13</sup> State of Punjab v. Balbir Singh, 1994 (3) SCC 299

<sup>14</sup> Ibid.

for believing that the accused is not guilty of such offence, if there was non-compliance of section 50 of the NDPS Act.<sup>15</sup>

### **Conclusion**

It can be concluded that it is under Section 37 of the NDPS Act read with the CrPC that the bail for an offence that is charged under the NDPS Act. But if the offence is one which is mentioned under sub clause (1)(b) of Section 37, then it is only under the satisfaction of the conditions mentioned therein that bail is granted to an accused. It is also pertinent to notice that for every offence under the NDPS Act with an imprisonment for three or more years, the magistrate cannot exercise its powers to grant bail under Section 437 of the CrPC. This is for the reason that as per the proviso to section 36A(b) of the NDPS Act, the magistrate ought to order such person to be forwarded to the Special Court if he/she deems the detention of such persons unnecessary under section 167(2) of CrPC. But the magistrate can grant default bail to the accused under the provision mentioned in the proviso to section 167(2) of the CrPC read with Section 36A (4) of the NDPS Act if the chargesheet, an additional complaint or a report seeking extension of time is not preferred before the Magistrate even after the stipulated time.

As very severe punishments are provided under the NDPS Act, greater has to be the care taken to ensure that all the safeguards and rights as provided under this Statute are scrupulously followed. Therefore, as per the many decisions laid down by the courts, the contraventions of such provisions like Section 41, 42 and 50 would not only vitiate the entire proceedings but will also entitle the accused for Bail and in certain cases for acquittal as well.

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<sup>15</sup> Labeebul Mubarack v. State of Kerala and Another, 2018 (3) KLT 363