

HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Cr.MP(M) No.29/2018

Date of decision: January 22, 2018

Mandeep Kumar

.....Petitioner

Versus

State of H.P.

...Respondent

Coram:

The Hon'ble Mr. Justice Sandeep Sharma, Judge.

*Whether approved for reporting?*¹ No

For the petitioner :Mr. Vikas Chandel, Advocate vice
Mr. Vinil Thakur, Advocate

For the respondent :Mr. Rajat Chauhan, Law Officer.

Sandeep Sharma, J. (Oral)

Bail petitioner, namely, Mandeep Kumar, who is behind bars since 26.11.2015 has approached this Court, by way of instant bail petition filed under Section 439 Cr.PC, praying therein for grant of regular bail in case FIR No.126/2015, dated 26.11.2015 registered at Police Station Barotiwala, District Solan (H.P.), under Section 21 of NDPS Act.

2. Sequel to order dated 12/19.01.2018, ASI Tulsi Dass, I.O, Police Station Barotiwala, District Solan, H.P. has come present alongwith the record. Mr. Rajat Chauhan, learned Law Officer has also placed on record status report prepared on the basis of investigation carried out by the Investigating Agency. Records perused and returned.

¹ Whether the reporters of Local Papers may be allowed to see the judgment?

3 Careful perusal of the record/status report reveals that on 26.11.2015, police party having received secret information searched vehicle bearing No. HR-02AA-1684 after procuring key from the bail petitioner. Though, vehicle referred to above was later on found to be owned and possessed by Vikram Singh, but as per investigation, bail petitioner had purchased the vehicle in question from the original owner on the affidavit and the same was yet to be transferred in the name of the bail petitioner. Police party allegedly recovered 19 bottles of Cough Syrup namely Corex one hundred ml. each and 300 tablets of Lomotil. Police also recovered three strips of capsules, namely, Spasmo Proxyvon Plus. Since the bail petitioner was unable to produce valid documents, if any, possessed by him for keeping aforesaid drugs, he was taken into custody and since then he is behind bars. As per report of FSL, drugs namely Corex and Lomotil contained prohibited drugs namely Codeine Phosphate and Diphenoxylate Hydrochloride. Report of FSL further revealed that 1.981 Mg Codeine Phosphate was found in one hundred ml. bottle of Corex Syrup whereas 2.517 Mg Diphenoxylate Hydrochloride was found in tablet of Lomotil. Since capsule Spasmo Proxyvon Plus was not found to be a sample of Narcotic drug, no report was submitted by FSL. After aforesaid recovery of contraband allegedly recovered from the bail petitioner, FIR detailed hereinabove came to be registered against him under Section 21-61-85 of NDPS Act and 18 of Drug and Cosmetics

Act at Police Station Barotiwala on the complaint of Sub Inspector, In-charge SIU Raju.

4. Mr. Vikas Chandel, learned counsel representing the petitioner, while inviting attention of this Court to report submitted by SFSL Junga, contended that the psychotropic substance is less than commercial quantity and as such bail petitioner is entitled to be released on bail. Mr. Vikas Chandel, learned counsel further contended that as per report of SFSL, prohibited drug namely Codeine Phosphate has been found to be 1.911 mg per hundred ml., meaning thereby, quantity, if taken into consideration qua 19 bottles allegedly recovered from the bail petitioner, comes to less than commercial quantity and as such petitioner is entitled to be released on bail. Similarly quantity of prohibited drug Diphenoxylate Hydrochloride contained in 300 tablets namely Lomotil, has been found to be 2.517 Mg per tablet, which also, if taken into consideration qua 300 tablets, comes out to be less than commercial quantity and as such rigors of Section 37 of NDPS Act are not attracted. Learned counsel further contended that only psychotropic substance contained in the contraband is required to be taken into consideration while determining quantity of prohibited drug i.e. Codeine Phosphate and not the whole of the mixture contained in cough syrup namely Corex. Mr. Chandel further contended that petitioner is in custody since 26.11.2015 and more than two years have passed. While concluding his arguments, Mr.

Chandel also invited attention of this Court to judgment passed by a coordinate bench of this Court in Cr.MP(M) No. 432 of 2017 titled **Ankush Chauhan versus State of H.P.**, decided on 25.4.2017 as well as in CrMP(M) No. 817 of 2016 titled **Prashant Chauhan versus State of H.P.** decided on 15.7.2016.

5. Mr. Rajat Chauhan, learned Law Officer, while inviting attention of this Court to status report, as referred above, opposed the prayer having been made by the learned counsel representing the petitioner, for grant of bail. Mr. Chauhan strenuously argued that the contraband/ psychotropic substance recovered from bail petitioner is more than small quantity and as such no leniency can be shown while considering petitioner's prayer for grant of bail. Mr. Chauhan, further stated that as per settled law, entire material contained in the recovered contraband is required to be taken into consideration, while determining quantity of psychotropic substance. While inviting attention of this Court to the report of SFSL, Mr. Chauhan contended that if report of SFSL is read in its entirety, it has been clearly concluded that Codeine Phosphate is present in the exhibit, as such, by no stretch of imagination, it can be contended that contraband /psychotropic substance recovered from the petitioner is less than commercial quantity.

6. I have heard the learned counsel for the parties and gone through the record carefully.

7. In the instant case, as per report of SFSL, prohibited drug namely Codeine Phosphate has been found to be 1.981 mg/ml, in one bottle of Corex Cough Syrup, meaning thereby, quantity of prohibited drug, if taken into consideration qua 19 bottles and 300 tablets of Lomotil allegedly recovered from the petitioner, comes out to be less than commercial quantity. SFSL, while concluding that 1.981 mg Codeine Phosphate is found per ml, has nowhere rendered any opinion with regard to remaining contents/mixture of bottles, hence, inference can be drawn that quantity less than 'commercial quantity' of Codeine Phosphate is present in recovered bottles as well as tablets. Though, aforesaid aspect of the matter is to be considered and examined in detail by trial Court during the course of trial, but, after having carefully perused opinion rendered by SFSL, as well as judgments rendered by the Hon'ble Full Bench in Mehboob Khan's case (supra), which has been further followed by a coordinate Bench of this Court in Ankush Chauhan's case and Prashant Chauhan's case (supra), this Court is of the view that rigors of Section 37 of the Act are not attracted in the case at hand.

8. Indisputably, investigation in the case is complete and matter is pending before trial Court, as such, this Court is of the view that no fruitful purpose would be served in case petitioner is left to incarcerate in lock-up. Moreover, this Court can not lose sight of the fact that petitioner is in custody for two years and as such deserves

to be released on bail. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime. Petitioner is local resident of place mentioned in the application and he shall remain available to face the trial and to undergo imprisonment, if any, imposed upon him.

9. By now it is well settled that gravity alone cannot be decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)¹ Supreme Court Cases 49; wherein it has been held as under:-

" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be

a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

10. Law with regard to grant of bail is now well settled. The apex Court in ***Siddharam Satlingappa Mhetre versus State of Maharashtra and others***, (2011) 1 SCC 694, while relying upon its decision rendered by its Constitution Bench in *Gurbaksh Singh Sibbia vs. State of Punjab*, (1980) 2 SCC 565, laid down the following parameters for grant of bail:-

"111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible

guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or the other offences.

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

(Emphasis supplied)

11. In **Sundeep Kumar Bafna versus State of Maharashtra & another** (2014)¹⁶ Supreme Court Cases 623, wherein it has been held as under:-

"8. Some poignant particulars of Section 437 CrPC may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being "brought before a Court", the present provision postulates the accused being "brought before a Court other than the High Court or a Court of Session" in respect of the commission of any non-bailable offence. As observed in Gurcharan Singh vs State(Delhi Admn) (1978) 1 SCC 118, there is no provision in the CrPC dealing with the production of an

accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts. The Legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Courts of Sessions and High Court are bereft of this jurisdiction or if they were so empowered under the Old Code now stood denuded thereof. Our understanding is in conformity with Gurcharan Singh, as perforce it must. The scheme of the CrPC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a Court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in State of Haryana vs Bhajan Lal, 1992 (Supp)1 SCC 335, that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. CrPC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 of the CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that the CrPC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this Section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in the CrPC or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail. Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim, viz. 'where there is a right there is a remedy'. The universal right of personal liberty emblazoned by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to

be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the CrPC."

12. In **Manoranjana Sinh Alias Gupta** versus **CBI** 2017 (5)

SCC 218, The Hon'ble Apex Court has held as under:

" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him to taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care ad caution by balancing the valuable right of

liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

13. The Apex Court in **Prasanta Kumar Sarkar versus Ashis Chatterjee and another** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

- (i) **whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;**
- (ii) **nature and gravity of the accusation;**
- (iii) **severity of the punishment in the event of conviction;**
- (iv) **danger of the accused absconding or fleeing, if released on bail;**
- (v) **character, behaviour, means, position and standing of the accused;**
- (vi) **likelihood of the offence being repeated;**
- (viii) **reasonable apprehension of the witnesses being influenced; and**
- (ix) **danger, of course, of justice being thwarted by grant of bail.**

14. In view of above, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to furnishing personal bonds in the sum of ₹50,000/- with one surety in the like amount to the satisfaction of concerned Chief Judicial Magistrate/ACJM/JMIC, with following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender his passport also, if he possesses the same.

15. It is clarified that if the petitioner misuses the liberty or violate any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

16. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of the this petition alone. The petition stand accordingly disposed of.

Copy dasti.

**(Sandeep Sharma)
Vacation Judge**

22nd January, 2018
(rana/sushma)