

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Cr. MP (M) No. 564 of 2020

Decided on April 29, 2020

Chander Joshi

...Petitioner

Versus

State of Himachal Pradesh

...Respondent

Coram:

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

Whether approved for reporting?¹ Yes.

For the petitioner

Mr. Balram Sharma, Advocate,
for the petitioner, through video
conferencing.

For the respondent

Ms. Ritta Goswami, Additional
Advocate General through video
conferencing.

Sandeep Sharma, J. (Oral)

By way of present petition filed under S.439 CrPC, prayer has been made on behalf of the bail petitioner namely Chander Joshi, who is behind bars since 1.2.2020, for grant of regular bail in case FIR No. 96, dated 16.12.2019, registered at Police Station New Shimla, under Ss. 22 and 29 Narcotic Drugs and Psychotropic Substances Act and section 18C of Drugs and Cosmetics Act.

2. Sequel to orders dated 22.4.2020 and 27.4.2020, respondent-State has filed status report, perusal whereof reveals that on 16.12.2019, Police party present near Phase III bifurcation, BCS, New Shimla apprehended a person namely Aman Gupta with the contraband. Since above named person,

¹ Whether reporters of the local papers may be allowed to see the judgment?

after having seen the Police present on the spot, got perplexed, Police conducted his personal search in the presence of two independent witnesses and allegedly recovered 10 strips of tablet namely Nitrosun-10. Since no plausible explanation came to be rendered on record by the above named person for possessing and carrying the above drug, Police, after completion of necessary codal formalities, lodged an FIR, detailed herein above, against the petitioner under aforesaid provisions of law. During investigation, above named person i.e. Aman Gupta, revealed that he purchased prohibited drug named herein above by making call on mobile number 98678-91720, mentioned on website i.e. *www.sexmeds*. Aforesaid person disclosed to the police that he had received above said drug via DTDC courier. During investigation, Police found that DTDC express courier was dispatched from Preet Vihar, Delhi. On 25.1.2020, Police apprehended co-accused Chintu, who had come to DTDC office Preet Vihar, for sending two parcels. Police recovered 13 strips of Nitrosun-10 tablets from the co-accused Chintu, who further disclosed that he was asked to send courier from DTDC Express Preet Vihar, by another co-accused Sonu, resident of Sidharth Nagar, Uttar Pradesh. On 30.1.2020, above named accused Sonu, came to Police Station Anand Vihar, Delhi, where he was investigated in the presence of co-accused Chintu. Police after having checked the laptop and mobile phone of the accused

Sonu, found that he had been purchasing prohibited drug from Meor Pharma, Hargobind Enclave, near Anand Vihar. Investigation reveals that the accused Chintu used to purchase medicines from the above named shop at Hargobind Enclave on the askance of co-accused Sonu, who further used to give Rs.50/- to Chintu for each parcel. On 1.2.2020, Police took accused Chintu to Meor Pharma, Hargobind Enclave, near Anand Vihar, where he disclosed that he used to purchase the medicines from the present bail petitioner, Chander Joshi. Owner of shop Mr. Harbinder Singh Sethi, feigned his ignorance with regard to sale, if any, made from his shop by his salesman, Chander Joshi i.e. present bail petitioner. Bail petitioner, Chander Joshi disclosed to the police that he used to give medicines to Chintu and Sonu, in the absence of owner of shop, Shri Harbinder Singh Sethi. He also disclosed to the Police that he used to give 20% discount to Sonu and Chintu on the sale of drug namely Nitrosun-10. In the aforesaid background, present bail petitioner came to be arrested in the FIR mentioned herein above on 1.2.2020 and since then he is behind the bars.

3. As per chemical analysis report submitted by FSL Junga, total weight of Nitrosun-10 tablets (230 tablets) recovered from conscious possession of Aman Gupta and Chintu is 128.40 gram. State Forensic Science Laboratory Junga, in its report also

opined that each tablet of Nitrosun contains 10.0 mg of prohibited drug i.e. Nitrazepam.

4. Mr. Balram Sharma, learned counsel for the petitioner contends that since the investigation in the case is complete and nothing remains to be recovered from the bail petitioner, present bail petition having been filed by Chander Joshi may kindly be accepted. Mr. Balram Sharma, learned counsel for the bail petitioner further contends that as per status report, recovery, if any of prohibited drugs i.e. Nitrosun-10 never came to be made from the present bail petitioner, who otherwise is a salesman in the shop i.e. Meor Pharma, Delhi. Learned counsel for the petitioner further contends that prohibited drug, if any, has been recovered from the conscious possession of co-accused Aman Gupta, who otherwise stands enlarged on bail. Mr. Balram Sharma, further contends that the factum with regard to purchase, if any, made by the co-accused from Meor Pharma, Delhi is yet to be established on record by the investigating agency by leading cogent and convincing evidence. Mr. Sharma, learned counsel for the petitioner, further contends that mere statement of the co-accused that he was sold the medicine in question by the present bail petitioner, is not sufficient to conclude guilt, if any, of the present bail petitioner at this stage, especially when no invoice/bill has been produced by the co-accused regarding the sale of the prohibited drug to him

by the bail petitioner, who at that time was working as a salesman in Meor Pharma, Delhi. Lastly, Mr. Sharma also contends that though the present bail petitioner has been falsely implicated but even if otherwise, quantity of prohibited drug recovered from co-accused is seen, same is a small quantity, as such, rigours of S. 37 of the Narcotic Drugs and Psychotropic Substances Act are not attracted in the present case.

5. Ms. Ritta Goswami, learned Additional Advocate General, while fairly admitting the factum that the investigation in the case is complete and nothing remains to be recovered from the bail petitioner, contends that keeping in view the gravity of the offence alleged to have been committed by bail petitioner, he does not deserve any leniency. While making this court peruse the status report, learned Additional Advocate General strenuously argues that the present bail petitioner is a part of a drug cartel, which is playing with lives of so many innocent persons. While referring to the statement of co-accused Chintu, that he purchased Nitrosun-10 tablets from present bail petitioner, Ms. Goswami, learned Additional Advocate General contends that the complicity of the present bail petitioner in the commission of offence punishable under Narcotic Drugs and Psychotropic Substances Act and Drugs and Cosmetics Act, stands duly proved on record and as such, his prayer for grant of bail, deserves to be rejected outrightly. While fairly admitting that

the quantity of the prohibited drug allegedly recovered from the conscious possession of co-accused Aman Gupta and Chintu is a 'small' quantity, Ms. Goswami, learned Additional Advocate General contends that in the event of petitioner being enlarged on bail, there is every likelihood of his fleeing from justice, as he hails from Delhi.

6. Having heard learned counsel for the parties and perused the material available on record, this court finds that the co-accused Aman Gupta, who came to be apprehended on 16.12.2019, with ten strips of Nitrosun-10 tablets, already stands enlarged on bail. It is also not in dispute that in total 23 strips of Nitrosun-10 tablets, which contained prohibited drug namely Nitrazepam, were recovered from the conscious possession of co-accused Aman Gupta and Chintu. Present bail petitioner, who at the time of his arrest was working as a salesman in Meor Pharma, Delhi has been named in the FIR in question, merely on the statement of co-accused Chintu and Sonu, who have stated that they had been purchasing drug in question from the present bail petitioner, Chander Joshi. Record also reveals that the co-accused Sonu, used to take orders of medicines on *Whatsapp* and then supply the same to the respective customers through courier. Though the statements having been made by co-accused Sonu and Chintu suggest that 23 strips of Nitrosun-10 tablets allegedly recovered in the case at hand, were sold by present bail

petitioner, but such fact is yet to be established on record by the investigating agency, by way of cogent and convincing evidence. Mere statement of co-accused, who has been apprehended with the prohibited drug Nitrosun-10, may not be sufficient at this stage to conclude complicity, if any, of the present bail petitioner in the case at hand. Leaving everything aside, perusal of report of the State Forensic Science Laboratory made available to this Court itself reveals that there is 2.3 grams (2300 mg) of Nitrazepam, i.e. prohibited drug in 230 tablets allegedly recovered from conscious possession of co-accused Aman Gupta and Chintu. As per the report of SFSL, 230 tablets were sent to it for chemical examination and though the total weight of tablets was found to be 55.900 grams but each tablet contains 10.0 mg of the prohibited drug i.e. Nitrazepam. If the aforesaid conclusion drawn by State Forensic Science Laboratory Junga is taken into consideration, total quantity of Nitrazepam in 230 tablets comes to 2300 mg or 2.3 grams. 'Commercial' quantity of the prohibited drug as prescribed under the Narcotic Drugs and Psychotropic Substances Act is 500 grams and as such, rigours of S. 37 of the Narcotic Drugs and Psychotropic Substances Act are not attracted in the present case. No doubt, offence alleged to have been committed by the present bail petitioner along with other co-accused is of serious nature, but having taken note of the fact that complicity, if any, of the present bail petitioner is yet to be

established on record, there is no justification for this court to curtail freedom of the present bail petitioner during trial, especially when nothing remains to be recovered from the bail petitioner. Apprehension expressed by learned Additional Advocate General that in the event of bail petitioner being enlarged on bail, he may flee from justice or may again indulge in such activities, can be best met by putting bail petitioner to stringent conditions.

7. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh vs. State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

“2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever

expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by

incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in *In Re-Inhuman Conditions in 1382 Prisons*.”

8. By now it is well settled that gravity alone cannot be a 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; 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."

9. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be

granted or refused is whether it is probable that the party will appear to take his trial. 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.

10. In Manoranjana Sinh alias Gupta versus CBI, (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

“This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, 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 a 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 and 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 that 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.”

11. 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;
- (vii) reasonable apprehension of the witnesses being influenced; and
- (viii) danger, of course, of justice being thwarted by grant of bail.

12. In view of above, bail petitioner has carved out a case for himself. Consequently, present petition is allowed. Bail petitioner is ordered to be enlarged on bail, subject to furnishing bail bonds in the sum of Rs.2,00,000/- with one surety in the like amount, to the satisfaction of the learned Chief Judicial Magistrate or any other Magistrate available at Shimla, besides the 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 passport, if any, held by him.

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

14. 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 this petition alone.

The petition stands accordingly disposed of.

Copy *Dasti*.

(Sandeep Sharma)
Judge

April 29, 2020
(vikrant)