

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.MP(M) No. 960 of 2020

Date of Decision : 30.06.2020

Pawan Kumar

...Petitioner.

Versus

State of Himachal Pradesh

...Respondent.

Coram:

The Hon'ble Mr. Justice Anoop Chitkara, Judge.

Whether approved for reporting?¹ No

For the petitioner : Mr. Anirudh Sharma, Advocate.

For the respondent : Mr. Ashwani K. Sharma and Mr. Nand Lal Thakur,
Additional Advocates General, for the State.

Anoop Chitkara, Judge

An under-trial prisoner, who is in custody since 17.2.2020, has come up before this Court under Section 439 of the Code of Criminal Procedure, 1973 (CrPC), seeking bail, under Sections 21 and 29 of Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act), for possessing 5.52 grams of Heroin (Diacetylmorphine).

2. Based on a First Information Report (FIR), the police arrested the petitioner, on 17.2.2020, in FIR No.33 of 2020, dated 17.2.2020, registered under Sections 21, 29 of the NDPS Act, in Police Station Sadar Bilaspur, District Bilaspur, Himachal Pradesh, disclosing cognizable and non-bailable offenses.

3. Earlier, the petitioner filed a petition under Section 439 CrPC before Special Judge, Bilaspur, District Bilaspur, HP. However, vide order dated 7.3.2020, the Court dismissed the petition, on the grounds that the bail petitioner misused the bail earlier granted to him.

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

4. I have read the status report(s) and heard counsel for the parties.

FACTS:

5. The allegations in the First Information Report and the gist of the evidence collected by the Investigator are:

- a) That on 17th February, 2020, the Police Party was conducting patrolling and had erected a post at Kandrore in the jurisdiction of Police Station, Sadar Bilaspur. At around 1:50 p.m., day time, the Police signaled one truck to stop. In the said truck, two persons were sitting, who on noticing the Police became perplexed. In the meanwhile, the Police also stopped one Alto car and associated its occupants as independent witnesses. In their presence, the Police inquired from the persons sitting in the truck, who revealed their names as Ankesh Kumar and Pawan Kumar (petitioner herein). On opening the cabin, near the driver seat, the Police noticed a polythene pouch. On checking the same, *prima facie*, it was Heroin. After that, when weighed on electronic weighing machine, it was found to be 5.52 grams.
- b) Subsequently, the Police completed all procedural requirements under the provisions of NDPS Act and Cr.PC and arrested the accused.

PREVIOUS CRIMINAL HISTORY

6. As per the status report, following cases are pending against the bail petitioner:-

- (i) FIR No.61/17 dated 19.4.2017 under Sections 379, 34 IPC, registered at Police Station, Barmana, Bilaspur.
- (ii) FIR No.221/19 dated 20.8.2019, under Section 21, 29/61/85 of ND&PS Act, registered at Police Station, Sundernagar, Mandi.
- (iii) FIR No.238/19 dated 12.11.2019, under Section 21/61/85, of ND&PS Act.

- (iv) FIR No.153/06 dated 24.4.2006, under Sections 341, 323, 506, 34 of the Indian Penal Code, resigered at Police Station, Sadar Bilaspur, H.P.

SUBMISSIONS:

7. The learned counsel for the bail petitioner submits that the allegations are false and concocted.
8. On the contrary, Mr. Ashwani Sharma, Ld. Additional Advocate General, contends that the investigating officer has collected sufficient *prima facie* evidence. He further submits that if this Court is inclined to grant bail, then such a bail must be subject to stringent conditions.

ANALYSIS AND REASONING:

9. Pre-trial incarceration needs to be justified depending upon the heinous nature of the offence, terms of the sentence prescribed in the Statute for such a crime, accused fleeing from justice, hampering the investigation, and doing away with witnesses. The Court is under a Constitutional obligation to safeguard the interests of the victim, the accused, the society, and the State.
10. Section 2 (vii-a) of the NDPS Act defines commercial quantity as the quantity greater than the quantity specified in the schedule, and S. 2 (xxiii-a), defines a small quantity as the quantity lesser than the quantity specified in the schedule of NDPS Act. The remaining quantity falls in an undefined category, which is now generally called as intermediate quantity. All Sections in the NDPS Act, which specify an offence, also mention the minimum and maximum sentence, depending upon the quantity of the substance. When the substance falls under commercial quantity statute mandates minimum sentence of ten years of imprisonment and a minimum fine of INR One hundred thousand, and bail is subject to the riders mandated in S. 37 of NDPS Act.
11. In the present case, the quantity of substance seized is less than the commercial quantity. Therefore, the bail application stands on different parameters and is similar to bail petitions under regular statutes.

JUDICIAL PRECEDENTS:

12. In Gurbaksh Singh Sibbia and others v. State of Punjab, 1980 (2)

SCC 565, a Constitutional bench of Supreme Court holds in Para 30, as follows:

“It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail.”

13. In Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240, Supreme Court holds:

“ "Bail or jail ?" - at the pre-trial or post-conviction stage - belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion. The Code is cryptic on this topic and the court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process. As Chamber Judge in this summit court I have to deal with this uncanalised case-flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of 'procedure established by law'. The last four words of Article 21 are the life of that human right.

2. The doctrine of Police power, constitutionally validates punitive processes for the maintenance of public order, security of the State, national integrity and the interest of the public generally. Even so, having regard to the solemn issue involved, deprivation of personal freedom, ephemeral or enduring, must be founded on the most

serious considerations relevant to the welfare objectives of society, specified in the Constitution.”

16. ...The delicate light of the law favours release unless countered by the negative criteria necessitating that course.”

14. In Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav, 2005 (2) SCC 42, a three-member bench of Supreme Court holds:

“18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled for bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the courts can do so.”

15. As per the FIR, the substance involved is Heroin, mentioned at Sr. No. 56 of the Notification, issued under Section 2(viia) and (xxiia) of NDPS Act, specifying small and commercial quantities of drugs and psychotropic substances. The quantity of drug involved is less than Commercial Quantity but greater than Small Quantity. As such the rigors of Section 37 of NDPS Act shall not apply in the present case. Resultantly, the present case has to be treated like any other case of grant of bail in a penal offence.

16. Given the above reasoning, and keeping in view the quantity of contraband, in my considered opinion, the judicial custody of the

petitioner/accused is not going to serve any purpose whatsoever, and I am inclined to grant bail on the following grounds, but subject to stringent conditions.

17. As a result, the present petition is allowed. The petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on his furnishing a personal bond in the sum of INR 10,000/, (INR Ten thousand only), to the satisfaction of the trial Court, by depositing it in the official account, as per the details and directions of the trial Court. The petitioner shall also furnish one surety bond in the sum of INR 5000 (INR Five thousand only), to the satisfaction of the trial Court. The furnishing of bail bonds shall be deemed acceptance of all stipulations, terms, and conditions of this bail order:

- a) The petitioner to give security to the concerned Court(s), for attendance on every date, unless exempted, and in case of Appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.
- b) The petitioner shall give details of AADHAR number, phone number(s) (if available), WhatsApp number (if available), e-mail (if available), personal bank account(s) (if available), on the reverse page of the personal bonds and the officer attesting the personal bonds shall ascertain the identity of the bail-petitioner, through these documents.**
- c) The Attesting officer shall on the reverse page of personal bonds, mention the permanent address of the petitioner along with the above-mentioned information, whatever is available.**
- d) The petitioner shall not influence, threaten, browbeat, or pressurize the complainant, witnesses, and the Police official(s).
- e) The petitioner shall not make any inducement, threat, or promise, directly or indirectly, to the Investigating officer, or any other person acquainted with the facts of the case, to dissuade them from disclosing such facts to the Police, or the Court, or to tamper with the evidence.
- f) Once the trial begins, the appellant shall not in any manner try to delay the trial. The petitioner undertakes to appear before the concerned Court, on the issuance of summons/warrants by such Court. The petitioner

shall attend the trial on each date, unless exempted, and in case of Appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.

g) There shall be a presumption of proper service to the petitioner about the date of hearing in the concerned Court, even if it takes place through SMS/ WhatsApp message/ E-Mail/ or any other similar medium, by the Court.

h) In the first instance, the Court shall issue summons and may inform the Petitioner about such summons through SMS/ WhatsApp message/ E-Mail.

i) In case the petitioner fails to appear before the Court on the specified date, then the concerned Court may issueailable warrants, and to enable the accused to know the date, the Court may, if it so desires, also inform the petitioner about such Bailable warrants through SMS/ WhatsApp message/ E-Mail.

j) Finally, if the petitioner still fails to put in an appearance, then the concerned Court may issue Non-Bailable warrants to procure the petitioner's presence and send the petitioner to the Judicial custody for a period for which the concerned Court may deem fit and proper.

k) In case of Non-appearance, then irrespective of the contents of the bail bonds, the petitioner undertakes to pay all the expenditure (only the principal amount without interest), that the State might incur to produce him before such Court, provided such amount exceeds the amount recoverable after forfeiture of the bail bonds, and also subject to the provisions of Sections 446 & 446-A of CrPC. The petitioner's failure to reimburse the State shall entitle the trial Court to order the transfer of money from the bank account(s) of the petitioner. However, this recovery is subject to the condition that the expenditure incurred must be spent to trace the petitioner and it relates to the exercise undertaken solely to arrest the petitioner in that FIR, and during that voyage, the Police had not gone for any other purpose/function what so ever.

l) The petitioner shall abstain from all criminal activities. If done, then while considering bail in the fresh FIR, the Court shall take into account

that even earlier, the Court had cautioned the accused not to do so.

m) The petitioner shall intimate about the change of residential address and change of phone numbers, WhatsApp number, e-mail accounts, within 10 days from such modification, to the police station of this FIR, and also to the concerned Court.

n) During the pendency of the trial, if the petitioner commits any offence under NDPS Act, even if it involves small quantity, then it shall be open for the State to apply for cancellation of this bail order.

o) In case of violation of any of the conditions as stipulated in this order, the State/Public Prosecutor may apply for cancellation of bail of the petitioner, and even the concerned Court shall be competent to cancel the bail. Otherwise, the bail bonds shall continue to remain in force throughout the trial and also after that in terms of Section 437-A of the CrPC.

p) The learned counsel for the petitioner, as well as the attesting officer, shall explain the conditions of this bail to the petitioner.

18. In case the petitioner finds the bail condition(s) as violating fundamental, human, or other rights, or causing difficulty due to any situation, then for modification of such term(s), the petitioner may file a reasoned application before this Court, and after taking cognizance, even before the Court taking cognizance or the trial Court, as the case may be; such Court shall also be competent to modify or delete any condition.

19. The officer in whose presence the petitioner puts signatures on personal bonds shall explain all conditions of this bail order to the petitioner, in English.

20. Consequently, the petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on his furnishing bail bonds in the terms described above.

21. This order does not, in any manner, limit or restrict the rights of the Police or the investigating agency, from further investigation in accordance with law.

22. The present bail order is only for the FIR mentioned above. It shall not be a blanket order of bail in any other case(s) registered against the petitioner.

23. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments.

24. The Court Master shall handover this order to the concerned branch of the Registry of this Court, and the said official shall immediately send a copy of this order to the District and Sessions Judge, concerned, by e-mail. The Court attesting the bonds shall not insist upon the certified copy of this order and shall download the same from the website of this Court, or accept a copy attested by an Advocate, which shall be sufficient for the record. The Court Master shall handover an authenticated copy of this order to the Counsel for the Petitioner and the Learned Advocate General if they ask for the same.

25. In return for the freedom curtailed by the State for breaking the law, the Court believes that the accused shall also reciprocate through desirable behavior.

The petition stands allowed in accordance with the terms mentioned above.

**(Anoop Chitkara),
Judge.**

(KS)