

(2020) 06 SHI CK 0267

High Court Of Himachal Pradesh

Case No: Criminal Miscellaneous Petition (M) No. 768 Of 2020

Ashwani Kumar

APPELLANT

Vs

State Of Himachal
Pradesh

RESPONDENT

Date of Decision: June 19, 2020

Acts Referred:

- Constitution Of India, 1950 - Article 21
- Code Of Criminal Procedure, 1973 - Section 436, 436A, 439
- Narcotic Drugs And Psychotropic Substances Act, 1985 - Section 19, 20, 22, 24, 27A, 37, 61, 85

Hon'ble Judges: Sandeep Sharma, J

Bench: Single Bench

Advocate: Dheeraj K. Vashisht, Sudhir Bhatnagar, Kunal Thakur

Final Decision: Disposed Of

Judgement

Sandeep Sharma, J

1. Bail petitioner namely, Ashwani Kumar, who is behind the bars since 8.12.2018, has approached this Court in the instant proceedings filed under

Section 439 of the Code of Criminal Procedure, praying therein for grant of regular bail in case FIR No. 324/2018 dated 8.12.2018, under Sections 20,

22 61, 85 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (For short Act), registered at police Station, Haroli, District Una,

Himachal Pradesh.

2. Sequel to order dated 3.6.2020, respondent/State has filed the status report prepared on the basis of the investigation carried out by the Investigating

Agency. Careful perusal of the status report reveals that on 8.12.2018, police party on suspicion stopped the present bail petitioner and took his

personal search in the presence of independent witnesses. In the aforesaid search, police allegedly recovered 15 strips of Lomotil tablets (840 tablets

of prohibited drugs). Since, the bail petitioner was unable to produce bill/licence qua the aforesaid huge quantity of prohibited drugs, police after

completion of necessary codal formalities, lodged a FIR, detailed herein above, against him and since then he is behind the bars.

3. Mr. Sudhir Bhatnagar, learned Additional Advocate General while fairly admitting the factum with regard to pendency of the trial before the

learned court below, contends that though material prosecution witnesses have been examined, but keeping in view the gravity of the offence alleged

to have been committed by bail petitioner, he does not deserve any leniency. Mr. Bhatnagar, further contends that bail petition having been filed by the

bail petitioner before the learned Court below stands rejected on 7.12.2019 and in the present case no changed circumstances, if any, has been

indicated and as such, present petition deserves dismissal being not maintainable. While referring to the judgment rendered by the Hon'ble Apex

Court in Criminal Appeal No.722 of 2017, titled as Hira Singh and another versus Union of India and another, decided on 22.4.2020, Mr. Bhatnagar,

submits that since entire bulk is to be taken into consideration while determining the quantity of drug allegedly recovered from the bail petitioner,

judgment passed by this Court in Cr.MP(M) No.792 of 2017 titled as Surjeet Kumar versus State of H.P., decided on 17.7.2017, has no application in

the present case. Lastly, Mr. Bhatnagar, contends that since quantity involved in the case is commercial in nature, rigours of Section 37 are attracted

and as such, bail petitioner is not entitled to be released on bail during the pendency of the trial before the learned court below.

4. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that on the date of alleged

incident bail petitioner came to be apprehended with 840 tablets of prohibited drugs namely "Lomotel" in the presence of the independent witnesses

and as such, there is no force in the submission made by learned counsel representing the bail petitioner that the petitioner has been falsely implicated.

No doubt in the case at hand, prohibited drugs allegedly recovered from the conscious possession of the bail petitioner, is of commercial quantity as

has been categorically concluded in the report of the Chemical analysis, but careful perusal of Section 37 of the Act, clearly provides that no person

accused of an offence punishable for offences under section 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 the public prosecutor is given an opportunity to oppose the application for such release. If the provisions

contained under Section 37 of the Act are read in its entirety, it cannot be said that there is a complete bar to grant bail to the person accused of

having committed offences punishable under Section 19 or section 24 or section 27A and also for offences involving commercial quantity. Rather

Court in such like cases after having afforded an opportunity of being heard to the public prosecutor may also proceed to grant bail, if there are

reasonable grounds for believing that the accused is not guilty of such offence and secondly that he is not likely to commit any offence while on bail.

5. At this stage, it would be profitable to reproduce Section 37 of the Act hereinbelow:

"37. Offences to be cognizable and non-bailable.. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)

(1) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 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:

(i) 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.

6. In the case at hand, it is not in dispute that nine prosecution witnesses out of total 16 prosecution witnesses have been examined. It is also not in

dispute that all the material prosecution witnesses i.e. independent witnesses associated by the Investigating Agency stand examined and at present

only official witnesses remained to be examined. Similarly, this Court finds that the bail petitioner is first offender because there is nothing in the status

report suggestive of the fact that bail petitioner had been indulging in illegal trade of narcotics in past also and as such, lenient view is required to be

taken in the case at hand, especially when bail petitioner is already behind the bars since 8.12.2018. Mr. Bhatnagar, learned Additional Advocate

General though has opposed the bail while placing reliance upon the provision of Section 37 of the Act, but he was unable to point out material, if any,

available on record suggestive of the fact that in the event of petitioner being enlarged on bail, he may again indulge in similar activities. Bail petitioner

is behind the bars since 8.12.2018 and on account of prevailing conditions in the wake of Covid-19, there is every likelihood of further delay in the

conclusion of the trial and as such, this Court sees no reason to let the bail petitioner incarcerated in bail for indefinite period during the trial, especially

when his guilt, if any, is yet to be proved in accordance with law.

7. It has been repeatedly held by Hon'ble Apex Court as well as this Court in catena of cases that one is deemed to be innocent till the time his

/her guilt is not proved, in accordance with law and as such, it would not be in the interest of justice to keep the present bail petitioner behind the bars

for indefinite period during the trial. 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.

8. 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 categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is

believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, 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. Hon'ble Apex Court further held that if an accused is not hiding from the investigating

officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an

appropriate case. The relevant paras of the aforesaid judgment are reproduced 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 A, & Inhuman Conditions in 1382 Prisons*

9. The Hon'ble Apex Court in Sanjay Chandra versus Central Bureau of Investigation (2012)¹ Supreme Court Cases 49; 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 purpose of giving him a taste of imprisonment as a lesson.”

10. 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, bail is not to be

withheld as a punishment. Otherwise also, normal rule is of bail and not jail. 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.

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, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to his furnishing personal

bonds in the sum of Rs.5.00 Lakh with one local surety in the like amount each to the satisfaction of the learned trial Court/ Magistrate available at the

station 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 passport, if any, held by him.

13. 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.

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 application alone.

15. The parties/competent authorities shall not insist upon for obtaining certified copy of this order and shall download the same from the website of

High Court. However, the Registry is directed to send copy of this order to learned counsel for the parties through email subject to their furnishing

email addresses, if so required.

The petition stands accordingly disposed of.