

(2019) 11 SHI CK 0093

In the High Court Of Himachal Pradesh

Case No : Criminal Miscellaneous Petition (M) No. 1590 Of 2019

Shanta Bahadur

APPELLANT

Vs

State Of Himachal Pradesh

RESPONDENT

Date of Decision : 19-11-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 439

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 2(xvi), 2(xv), 2(xi)
(a), 19, 20, 21(c), 24, 27A, 37

Citation : (2019) 11 SHI CK 0093

Hon'ble Judges : Chander Bhusan Barowalia, J

Bench : Single Bench

Advocate : R.S. Chandel, D.N. Sharma, P.K. Bhatti, Raju Ram Rahi, Gaurav Sharma, Dharam Singh

Final Decision : Dismissed

Judgement

Chander Bhusan Barowalia, J

1. The present bail application has been maintained by the petitioner under Section 439 of the Code of Criminal Procedure seeking his release in case FIR No. 91 of 2019, dated 07.04.2019, under Section 20 of the ND&PS Act, registered in Police Station Sadar Kullu, District Kullu, H.P.

2. As per the averments made in the petition, the petitioner is innocent and has been falsely implicated in the present case. He is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. No fruitful purpose will be served by keeping him behind the bars for an unlimited period, so he be released on bail.

3. Police report stands filed. As per the prosecution story, on 07.04.2019, at about 03:45 p.m., a police team had laid a nakka at place Kainchi Mod, Jari Main Road. Police spotted a Nepali person coming and he was carrying a carry bag. On seeing police, the said person took a slew and started running. He was chased

and approximately ½ km away apprehended. Police asked him as to why he ran, but he could not give any satisfactory reply. Police searched for independent witnesses, but no one could be found. The nabbed person divulged his name as Shanta Bahadur (petitioner herein). The bag, being carried by him, was checked and it was found stuffed with black substance, which was charas. On weighment the recovered contraband was found to be 1 kg and 210 grams. Thereafter, the police completed all the codal formalities and the petitioner was arrested. Police prepared the spot map and recorded the statements of the witnesses. During the course of investigation, the petitioner divulged that a Nepali person gave the contraband to him for selling. Despite extensive search, the police could not trace the person who, as per the petitioner, gave the contraband to him. The chemical report revealed that the contraband is charas. As per the police, on 08.07.2019 challan was presented in the learned Trial Court and now the case is listed on 23.11.2019 for PWs. Lastly, it is prayed that the bail application of the petitioner be dismissed, as the petitioner committed a serious crime. The quantity recovered from the petitioner is commercial quantity. The trial is in initial stage and there is possibility that in case at this stage if the petitioner is enlarged on bail, he may flee from justice, as he resident of Nepal. The petitioner can also tamper with the prosecution evidence, so his application be dismissed.

4. I have heard the learned Counsel for the petitioner, learned Additional Advocate General for the State and gone through the record, including the police report, carefully.

5. Learned Counsel for the petitioner has argued that the petitioner has been falsely implicated in the present case. He has further argued that the petitioner is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. He has further argued that no fruitful purpose will be served by keeping the petitioner behind the bars for an unlimited period. He has argued that the resin content is less than commercial quantity. The petitioner is ready and willing to abide by the terms and conditions of bail, in case granted. He has further argued that keeping in view the overall aspects of the case, the petition be allowed and the petitioner be enlarged on bail. Conversely, the learned Additional Advocate General has argued that the petitioner has committed a serious offence and commercial quantity of charas was recovered from him. He has further argued that trial is in initial stage and in case the petitioner is enlarged on bail, he may tamper with the prosecution evidence and may also flee from justice, as he is resident of Nepal. He has further argued that petitioner could jump over the bail, in case granted. He has prayed that the bail application of the petitioner be dismissed.

6. In rebuttal the learned Counsel for the petitioner has argued that the petitioner cannot be kept behind the bars for an unlimited period, keeping in view the fact that the investigation is complete, challan stands presented in the learned Trial Court and the custody of the petitioner is not at all required by the police. He has further argued that the petitioner is neither in a position to tamper

with the prosecution evidence nor in a position to flee from justice, so the application be allowed and the petitioner be enlarged on bail. The learned Counsel for the petitioner has relied upon the judgments of the Hon'ble Supreme Court rendered in *E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau*, (2008) 5 Supreme Court Cases 161 and in *Hira Singh & another vs. Union of India & another* (Arising Out of SLP (Crl.) No. 6092 of 2014). He has argued that the matter is still under consideration, so the petitioner be released on bail.

7. As far as the facts of the present case are concerned, the petitioner was found involved in commercial quantity of contraband and he is behind the bars. The Hon'ble Supreme Court in *E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau*, (2008) 5 Supreme Court Cases 161, held as under:

"15. It appears from the Statement of Objects and Reasons of the amending Act of 2001 that the intention of the legislature was to rationalize the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterred sentence, the addicts and those who commit less serious offences are sentenced to less severe punishment. Under the rationalized sentence structure, the punishment would vary depending upon the quantity of offending material. Thus, we find it difficult to accept the argument advanced on behalf of the respondent that the rate of purity is irrelevant since any preparation which is more than the commercial quantity of 250 gm and contains 0.2% of heroin or more would be punishable under Section 21(c) of the NDPS Act, because the intention of the legislature as it appears to us is to levy punishment based on the content of offending drug in the mixture and not on the weight of the mixture as such. This may be tested on the following rationale. Supposing 4 gm of heroin is recovered from an accused, it would amount to a small quantity, but when the same 4 gm is mixed with 50 kg of powdered sugar, it would be quantified as a commercial quantity. In the mixture of a narcotic drug or a psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance. It is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute small quantity or commercial quantity. The intention of the legislature for introduction of the amendment as it appears to us is to punish the people who commit less serious offences with less severe punishment and those who commit grave crimes, such as trafficking in significant quantities, with more severe punishment."

The case of the petitioner is not that something was mixed with the contraband recovered or the contraband recovered was mixed with some external substance, so it cannot be said that the contraband was of commercial quantity, as it was mixed with some other substance. Admittedly, the present is a case with respect to recovery of charas and the judgment (*supra*) is qua recovery of opium, so the judgment is not applicable to the facts of the present case.

8. Noticeably, the Hon'ble Supreme Court in Harjeet Singh vs. State of Punjab, 2011(4) SCC 441, vide paras 22 and 23, has held as under:

"22. Thus, as the case falls under clause (a) of Section 2(xv), no further consideration is required on the issue. More so, opium derivatives have to be dealt with under Entry 93, so in case of pure opium falling under clause (a) of Section 2(xv), determination of the quantity of morphine is not required. Entry 92 is exclusively applicable for ascertaining whether the quantity of opium falls within the category of small quantity or commercial quantity.

23. The judgment in E. Micheal Raj (Supra) has dealt with heroin i.e., Diacetylmorphine which is an "Opium Derivative" within the meaning of the term as defined in Section 2(xvi) of the NDPS Act and therefore, a 'manufactured drug' within the meaning of Section 2(xi)(a) of the NDPS Act. As such the ratio of the said judgment is not relevant to the adjudication of the present case."

9. Further more, a Co-ordinate Bench of this High Court in Sandeep Vs. State of Himachal Pradesh, Cr.MP(M) No. 1608 of 2018, has held as under:

"22. In case titled as Harjeet Singh's case the Apex Court was dealing with recovery of 7.10 kilograms opium. In this case, the Apex Court had held that the ratio of E. Michal Raj's case is not applicable for opium. Relevant observations of the Apex Court are as under:-

"23. The judgment in E. Micheal Raj has dealt with heroin i.e. diacetylmorphine which is an "opium derivative" within the meaning of the terms as defined in Section 2 (xvi) of the NDPS Act and therefore, a "manufactured drug" within the meaning of Section 2(xi) (a) of the NDPS Act. As such the ratio of the said judgment is not relevant to the adjudication of the present case.

26. Thus, the aforesaid judgment in E. Micheal Raj has no application in the instant case as it does not relate to a mixture of narcotic drugs or psychotropic substances with one more substances".....

23. Full Bench of this Court in Mehbood Khan's case has held that charas is a resin mass and presence of resin in stuff, unless there being any evidence qua the nature of the natural substance, entire ass has to be taken as charas."

10. Now, it would be apt to extract Section 37 of the ND&PS Act, which is as under:

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

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

(b) no person accused of an offence punishable for 2[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."

11. In view of the above, the judgment rendered by Hon'ble Supreme Court in E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau, (2008) 5 Supreme Court Cases 161, is of no help to the petitioner and the same is not applicable to the facts of the present case. In fact, the rigors of Section 37 of the ND&PS Act are applicable to the facts of the present case. Further this Court finds that the petitioner cannot be granted bail, as the commercial quantity of charas was recovered from him. Otherwise also the trial is in its initial stage and the petitioner is likely to flee from justice in case he is granted bail and he is likely to tamper with the prosecution evidence.

12. After exhaustively discussing the facts and the settled position of law, this Court finds that the present is not a fit case where the judicial discretion to admit the petitioner on bail is required to be exercised in his favour. The petition which sans merits, deserves dismissal and is accordingly dismissed.

14. Needless to say that the observations made hereinabove shall not be construed as an opinion expressed on the merits of the main case, which shall be adjudicated on its own by the learned Trial Court and the decision rendered in this petition shall have no bearing on the same.