

(2020) 06 SHI CK 0085

In the High Court Of Himachal Pradesh

Case No : Criminal Miscellaneous Petition (M) No. 808 Of 2020

Tivalu @ Shiv Chand

APPELLANT

Vs

State Of Himachal Pradesh

RESPONDENT

Date of Decision : 17-06-2020

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 2(xxiiia), 2(viia), 20, 35, 37, 37(1)(b)(ii), 54
Code Of Criminal Procedure, 1973 — Section 439

Citation : (2020) 06 SHI CK 0085

Hon'ble Judges : Anoop Chitkara, J

Bench : Single Bench

Advocate : Kush Sharma, Ashwani K. Sharma, Nand Lal Thakur, Ram Lal Thakur, Rajat Chauhan

Final Decision : Dismissed

Judgement

Anoop Chitkara, J

1. For possessing 5 kilograms of Charas, the petitioner, who is under arrest, on being arraigned as an accused, in FIR Number 113 of 2019, dated Oct 5, 2019, registered under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (after now called "NDPS Act"), in Police Station Patlikuhal, District Kullu, HP, disclosing non-bailable offenses, has come up before this Court under Section 439 CrPC, seeking regular bail.

2. While issuing notices to the State, the Court had requested Mr. Nand Lal Thakur, Additional Advocate General to procure status report either through WhatsApp/e-mail and forward the same to this Court on e-mail id hicourt-hp@nic.in and also send the scanned copy or PDF copy of the status report to the learned Counsel for the petitioner on his WhatsApp number.

3. Mr. Nand Lal Thakur learned Additional Advocate General states that he has filed the status report through e-mail. He further submits that he has sent a copy

of the status report to learned Counsel for the petitioner on his WhatsApp number. A printout of the status report is available on file.

4. I have read the status report(s) and heard Mr. Kush Sharma, learned counsel for the petitioner, Mr. Nand Lal Thakur, learned Additional Advocate General, for the respondent/State, through video conferencing.

5. The petitioner had earlier moved an application for regular bail before the learned Additional District and Sessions Judge-I, Kullu, HP. However, the same was dismissed as withdrawn vide order dated Mar 7, 2020.

FACTS

6. The gist of the First Information Report and the status report is that on Oct 5, 2019 Police Party was conducting patrolling. At about 7.00 a.m., when the Police Party in their vehicle reached at a place named Bhulang Vihal Bridge, then they noticed two persons sitting on the side of the road. The police stopped the vehicle on which both these persons immediately stood up. They had placed a bag in between them. The conduct of the two persons arose suspicion in the mind of the Investigating Officer of this bag containing some contraband or illegal substance. After that the police intended to conduct search of the said bag and tried to associate independent witnesses but could not find any. Subsequently, on inquiry the said persons revealed their names as Tivalu @ Shiv Chand (petitioner herein) and the second person as Biru.

On opening the bag, police recovered Charas which, when weighed, measured 5 kilograms. Subsequently, the police party seized the contraband, complied with the procedural requirements under the NDPS Act, and the CrPC and arrested the petitioner and his co-accused. The Forensic Science Report tested the said substance to be cannabis.

PREVIOUS CRIMINAL HISTORY

7. As per the learned counsel for the petitioner, the petitioner has no criminal history.

SUBMISSIONS:

8. Mr. Kush Sharma, the Counsel for the petitioner submits that the evidence collected by the Investigator is insufficient to fasten his guilt. He has relied upon the judgment rendered in Sujit Tiwari vs. State of Gujarat, 2020 (2) SCALE 587. However, without going further the said judgment is clearly distinguishable on its facts and is not applicable in the present case.

9. Mr. Nand Lal Thakur, Additional Advocate General submits that the quantity recovered is Commercial Quantity and the petitioner must cross the riders of S. 37 of NDPS Act. Once he is able to satisfy the twin conditions of S. 37 of NDPS Act, only after that he may be entitled for bail.

ANALYSIS AND REASONING:

10. As per the case of the prosecution, the bail petitioner Tivalu @ Shiv Chand was present on the road with a bag lying in between him and the co-accused Biru and on seeing the police both of them had perplexed. Therefore, the burden had shifted upon them in view of Sections 35 and 54 of the NDPS Act.

11. Pre-trial incarceration needs justification depending upon the heinous nature of the offence, terms of the sentence prescribed in the Statute for such a crime, probability of the accused fleeing from justice, hampering the investigation, and doing away with victim(s) and/or witnesses. The Court is under an obligation to maintain a balance between all stakeholders and safeguard the interests of the victim, accused, society, and State.

12. 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 offense, also mention that minimum and maximum sentence, depending upon the quantity of the substance. Commercial quantity mandates minimum sentence of ten years of imprisonment and a minimum fine of Rupees One hundred thousand, and bail is subject to the riders mandated in S. 37 of NDPS Act.

13. The law is well settled that the two conditions that need to be satisfied are that the prosecution must be given the opportunity to oppose the application and that court must be satisfied that there are reasonable grounds for believing that he is not guilty of such and offence. If either of these two conditions are not satisfied, the ban of granting bail operates. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence.

14. In other words, Section 37(1)(b)(ii) mandates twin conditions to be satisfied before a person/ accused to be released on bail the first is when the public prosecutor does not oppose the bail. Secondly, the court must be satisfied that there exists a reasonable ground for believing that the person/ accused is not guilty of such offense and is not likely to commit any crime while on bail.

15. Therefore, at this stage, the petitioner has not made a special case to get bail. However, the petitioner shall be at liberty to file a fresh bail application either before this Court or before the trial Court. Needless to say, that at that time, the Court considering the bail application shall not get influenced by the observations made hereinbefore.

Resultantly, there is no merit in the present petition and the same is accordingly dismissed.