

(2021) 05 SHI CK 0171

In the High Court Of Himachal Pradesh

Case No : Criminal Miscellaneous Petition (M) No.930 Of 2021

Tochukwa Nwalwa @ Jimmy Tabo

APPELLANT

Vs

State Of H.P

RESPONDENT

Date of Decision : 31-05-2021

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 437A, 439, 446, 446A
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 37
Immoral Traffic (Prevention) Act, 1956 — Section 4, 5, 8

Citation : (2021) 05 SHI CK 0171

Hon'ble Judges : Anoop Chitkara, J

Bench : Single Bench

Advocate : Mandeep Chandel, Nand Lal Thakur, Ram Lal Thakur, Assistant Rajat Chauhan

Final Decision : Allowed

Judgement

Anoop Chitkara, J

1. An under-trial prisoner, holder of Nigerian Passport, who is incarcerating w.e.f. 21st February 2021, for selling 36 grams of Diacetyl Morphine

(Heroin), has come up before this Court under Section 439 of CrPC, seeking bail, on the grounds that the quantity of contraband allegedly seized is

intermediate quantity and does not restrict bail, because the quantity greater than 250 grams of Diacetyl Morphine, falls in the category of the

commercial quantity; hence the restrictions for bail imposed in S. 37 of NDPS Act, do not apply, and in the present case he is in custody for a

considerable time.

2. A perusal of the petition reveals that the petitioner straightaway filed the bail petition before High Court, which is permissible given the decision of a

three Judges Bench of HP High Court, in Mohan Lal v Prem Chand, AIR 1980 HP 36, (Para 9 & 15), wherein the Full bench holds that a person can

directly apply for an anticipatory bail or regular bail to the High Court without first invoking the jurisdiction of the Sessions Judge.

3. The bail petition is silent about criminal history, however, Mr. Mandeep Chandel, Ld. Counsel for the bail petitioner states on instructions that the

petitioner has no criminal past relating to the offences prescribing sentence of seven years and more, or when on conviction, the sentence imposed

was more than three years. The status report also does not mention any criminal past of the accused.

4. Briefly, the allegations against the petitioner are that on 11.12.2020, police officials of the aforesaid police station led by ASI were patrolling the

area to enforce COVID restrictions. At around 9:45 a.m., they noticed one person without mask. On this, the police officials went towards him. On

noticing the police officials walking towards him, he threw something from the pocket of his trouser and after throwing the same, he started walking

briskly. It raised suspicion in the mind of the police officials and they nabbed him. When they inquired about the substance which he had thrown, then

he looked pale and became perplexed. After that the police officials searched for some person to be associated as independent witness and after

fifteen minutes, they associated two persons and in their presence, lifted that packet. On opening the same, it was found to be containing heroine.

When the same was weighed on electronic scale, it measured 36 grams. After that the police allegedly conducted procedural requirements under

NDPS Act and arrested the accused. Based on these allegations, the Police registered the FIR mentioned above.

5. Ld. Counsel for the petitioner contends that incarceration before the proof of guilt would cause grave injustice to the petitioner and family.

6. On the contrary, the contention on behalf of the State is that the accused is a proven habitual offender, and given his past conduct; he is likely to

repeat the offence. He further insists that if this Court is inclined to grant bail, then such a bond must be subject to very stringent conditions.

7. In Sami Ullaha v Superintendent Narcotic Control Bureau, (2008) 16 SCC 471, the Honâ??ble Supreme Court holds that in intermediate quantity,

the rigors of the provisions of Section 37 may not be justified. In Sunny Kapoor v State of HP, CrMPM 2168 of 2020, (Para 15), this Court observed

that when the quantity is less than commercial, the rigors of Section 37 of the NDPS Act will not attract, and factors become similar to bail petitions

under regular statutes. Thus, when the maximum sentence cannot exceed ten years, and the accused is yet to be proved guilty, the grant of bail is

normal, unless the Prosecution points towards the exceptional circumstances, negating the bail.

8. In *Lachhman Dass v. Resham Chand Kaler*, (2018) 3 SCC 187, (Para 10), Honâ??ble Supreme Court held that the law under section 439CrPC is

very clear and in the eye of the law every accused is the same irrespective of their nationality.

9. The possibility of the accused influencing the investigation, tampering with evidence, intimidating witnesses, and the likelihood of fleeing justice, can

be taken care of by imposing elaborative and stringent conditions. In *Sushila Aggarwal*, (2020) 5 SCC 1, Para 92, the Constitutional Bench held that

unusually, subject to the evidence produced, the Courts can impose restrictive conditions.

10. Regarding the identity of the petitioner, who is Nigerian National, reference be made to order dated 20.04.2021, passed by Special Judge-II, Kullu,

District Kullu. The petitioner had filed an application for issuance of duplicate passport No. A02394380 and prayed for its renewal. The State of H.P.

filed reply to that application and did not object to such renewal. A perusal of the order reveals that the concerned Embassy did not raise any objection

about its authenticity.

11. Given above, it can safely be presumed that the passport pertains to the petitioner, which establishes his identity . The State has already verified

from the concerned Embassy about the genuineness of the Passport.

12. The quantity of substance involved in this case does not restrict bail. The incarceration of the accused during the period of trial is neither

warranted, nor justified, or going to achieve any significant purpose. Any detailed discussions about the evidence may prejudice the case of the

prosecution or the accused. Suffice it to say that due to the reasons mentioned above, this Court believes that further incarceration of the accused

during the trial is neither warranted nor will achieve any significant purpose. In the facts and circumstances peculiar to this case, the petitioner makes

out a case for release on bail.

13. In *Shokhista v. State*, 2005 LawSuit (Del) 1316, Delhi High Court observed:-

5. The accused is a foreign national and is not able to furnish a local surety. The same does not debar her from being admitted to bail. The provision

of local surety is nowhere mentioned in the Code of Criminal Procedure and surety can be from any part of the country or without. In the present

case, since the accused is a foreign national and is facing investigation under Sections 4, 5 and 8 of the I. T. P. Act and in view of the fact that the

Petitioner is ready and willing to make a deposit in cash in lieu of the surety in addition to a personal bond, I am of the opinion that the ends of justice

would be met in permitting her to do so. Consequently, I admit the Petitioner to bail on her furnishing a personal bond in the sum of Rs. 20,000/- and a

cash deposit of the like amount in lieu of the surety to the satisfaction of the Trial Court. The Petitioner shall not leave the country without prior

permission of the trial court and shall deposit her pass-port with the trial court.

14. Given the above reasoning, coupled with the peculiar facts and circumstances of the case, the Court is granting bail to the petitioner, subject to

strict terms and conditions, which shall be over and above and irrespective of the contents of the form of bail bonds in chapter XXXIII of CrPC, 1973.

15. In *Manish Lal Shrivastava v State of Himachal Pradesh*, CrMPM No. 1734 of 2020, after analysing judicial precedents, this Court observed that

any Court granting bail with sureties should give a choice to the accused to either furnish surety bonds or give a fixed deposit, with a further option to

switch over to another.

16. The petitioner shall be released on bail in the FIR mentioned above, subject to his furnishing a personal bond of Rs. Ten thousand (INR 10,000/-),

and shall furnish two sureties of Rs. Twenty-five thousand (INR 25,000/-) each, to the satisfaction of the Judicial Magistrate having the jurisdiction

over the Police Station conducting the investigation, and in case of non-availability, any Ilaka Magistrate. Before accepting the sureties, the concerned

Magistrate must satisfy that in case the accused fails to appear in Court, then such sureties are capable to produce the accused before the Court,

keeping in mind the Jurisprudence behind the sureties, which is to secure the presence of the accused.

17. In the alternative, the petitioner may furnish aforesaid personal bond and fixed deposit(s) for Rs. Ten thousand only (INR 10,000/-), made in

favour of ""Chief Judicial Magistrate, District Kullu, H.P.,

a) Such Fixed deposits may be made from any of the banks where the stake of the State is more than 50%, or any of the stable private banks, e.g.,

Bank of America, Chase, HSBC, HDFC Bank, ICICI Bank, Kotak Mahindra Bank, etc., with the clause of automatic renewal of principal, and liberty

of the interest reverting to the linked account.

b) Such a fixed deposit need not necessarily be made from the account of the petitioner and need not be a single fixed deposit.

c) If such a fixed deposit is made in physical form, i.e., on paper, then the original receipt shall be handed over to the concerned Court.

d) If made online, then its printout, attested by any Advocate, and if possible, countersigned by the accused, shall be filed, and the depositor shall get

the online liquidation disabled.

e) The petitioner or his Advocate shall inform at the earliest to the concerned branch of the bank, that it has been tendered as surety. Such information

be sent either by e-mail or by post/courier, about the fixed deposit, whether made on paper or in any other mode, along with its number as well as FIR

number.

f) After that, the petitioner shall hand over such proof along with endorsement to the concerned Court.

g) It shall be total discretion of the petitioner to choose between surety bonds and fixed deposits. It shall also be open for the petitioner to apply for

substitution of fixed deposit with surety bonds and vice-versa.

h) Subject to the proceedings under S. 446 CrPC, if any, the entire amount of fixed deposit along with interest credited, if any, shall be

endorsed/returned to the depositor(s). Such Court shall have a lien over the deposits up to the expiry of the period mentioned under S. 437-A CrPC,

1973, or until discharged by substitution as the case may be.

18. The furnishing of the personal bonds shall be deemed acceptance of the following and all other stipulations, terms, and conditions of this bail order:

a) The petitioner to execute a bond for attendance to the concerned Court(s). Once the trial begins, the petitioner shall not, in any manner, try to delay

the proceedings, and undertakes to appear before the concerned Court and to attend the trial on each date, unless exempted. In case of an appeal, on

this very bond, the petitioner also promises to appear before the higher Court in terms of Section 437-A CrPC.

b) The attesting officer shall, on the reverse page of personal bonds, mention the permanent address of the petitioner along with the Passport number

and other details, Visa to India and its other details, phone number(s), WhatsApp number (if any), e-mail (if any), and details of personal bank

account(s) (if available), and in case of any change, the petitioner shall immediately and not later than 10 days from such modification, intimate about

the change of residential address and change of phone numbers, WhatsApp number, e-mail accounts, to the Police Station of this FIR to the

concerned Court.

c) The petitioner shall, within thirty days of his release from prison, procure a Smartphone, and inform its IMEI number and other details to the

SHO/I.O. of the Police station mentioned before. He shall keep the phone location/GPS always on the "ON" mode. Before replacing his mobile

phone, he shall produce the existing phone to the SHO/I.O. of the police station and give details of the new phone. Whenever the Investigating officer

asks him to share his location, then he shall immediately do so. The petitioner shall neither clear the location history nor format his phone without

permission of the concerned SHO/I.O. He shall also not clear the WhatsApp chats and calls without producing the phone before the concerned

SHO/I.O.

d) The petitioner shall not influence, browbeat, pressurize, make any inducement, threat, or promise, directly or indirectly, to the witnesses, the Police

officials, 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.

e) The petitioner shall join the investigation as and when called by the Investigating Officer or any Superior Officer; and shall cooperate with the

investigation at all further stages as may be required. In the event of failure to do so, it will be open for the prosecution to seek cancellation of the bail.

Whenever the investigation occurs within the police premises, the petitioner shall not be called before 8 AM and shall be let off before 5 PM, and shall

not be subjected to third-degree, indecent language, inhuman treatment, etc.

f) In addition to standard modes of processing service of summons, the

concerned Court may serve or inform the accused about the issuance of summons, bailable and non-bailable warrants the accused through E-Mail (if any), and any instant messaging service such as WhatsApp, etc. (if any).

[Honâble Supreme Court of India in Re Cognizance for Extension of Limitation, Suo Moto Writ Petition (C) No. 3/2020, I.A. No. 48461/2020- July 10, 2020]:

- i. At the first instance, the Court shall issue the summons.
- ii. In case the petitioner fails to appear before the Court on the specified date, in that eventuality, the concerned Court may issue bailable warrants.
- iii. Finally, if the petitioner still fails to put in an appearance, in that eventuality, the concerned Court may issue Non-Bailable Warrants to procure the petitioner's presence and may send the petitioner to the Judicial custody for a period for which the concerned Court may deem fit and proper to achieve the purpose.

19. During the trial's pendency, if the petitioner repeats or commits any offence where the sentence prescribed is more than seven years or violates any condition as stipulated in this order, it shall always be permissible to the respondent to apply for cancellation of this bail. It shall further be open for any investigating agency to bring it to the notice of the Court seized of the subsequent application that the accused was earlier cautioned not to indulge in criminal activities. Otherwise, the bail bonds shall continue to remain in force throughout the trial and after that in terms of Section 437-A of the CrPC.

20. 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 alone 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.

21. Any advocate for the petitioner and the Officer in whose presence the petitioner puts signatures on personal bonds shall explain all conditions of this bail order, in vernacular and if not feasible, in Hindi.

22. 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 to the Court taking cognizance or the trial Court, as the case may be, and such Court shall also be competent to modify or delete any condition.

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

24. In *Stephen Chidubem v State of Himachal Pradesh*, CrMP(M) No. 39 of 2020, this Court observed,

[27]. Although the Court has granted bail in favour of accused, still neither the issue comes to an end, nor do the terms of justice. In the interest of

equity and fair play, the matter needs further consideration. Given the following reasoning, this Court is requesting the Trial Court to expedite the trial.

[28]. Every visitor to our country comes for a specific purpose and for a limited time. However, if during the period of her stay, they get arraigned as

an accused in a criminal case, then she gets stuck up here. It may be traumatic to her, and to her education, family, friends, business, and a number of

things, which an ordinary human being cannot even imagine. The answer lies in the speedy disposal of cases of foreign nationals, whether they are in

custody or on bail.

[29]. Learned Additional Advocate General, submits that a few Foreign Nationals, while in India, deal in substance trade.

[30]. The solution to this lies not in denying bail. It lies in verifying the antecedents of these types of suspects, before approving or granting Visa, and

once accused in substance abuse, then revoking the Visa. Synergy of law with technology is the next big thing.

25. Thus, this Court requests the concerned Courts to expedite the trial.

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equity and fair play, the matter needs further consideration. Given the following reasoning, this Court is requesting the Ld. Trial Court to expedite the

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27. Every visitor to our country comes for a specific purpose and for a limited time. However, if during the period of her stay, they get arraigned as an accused in a criminal case, then she gets stuck up here. It may be traumatic to her, and to her education, family, friends, business, and N number of things, which an ordinary human being cannot even imagine. The answer lies in the speedy disposal of cases of foreign nationals, whether they are in custody or on bail.

28. Learned Additional Advocate General, submits that a few Foreign Nationals, while in India, deal in substance trade.

29. The solution to this lies not in denying bail. It lies in verifying the antecedents of these types of suspects, before approving or granting Visa, and once accused in substance abuse, then revoking the Visa. Synergy of law with technology is the next big thing.

30. 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.

31. In return for the protection from incarceration, the Court believes that the accused shall also reciprocate through desirable behavior.

32. There would be no need for a certified copy of this order for furnishing bonds. Any Advocate for the petitioner can download this order along with the case status from the official web page of this Court and attest it to be a true copy. In case the attesting officer or the Court wants to verify the authenticity, such an officer can also verify its authenticity and may download and use the downloaded copy for attesting bonds.

The petition stands allowed in the terms mentioned above.

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