

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CrMP(M) No. 1977 of 2019
Decided on November 18, 2019

Harish Kumar ... Petitioner

Versus

State of Himachal Pradesh

Respondent

Coram:

Hon'ble Mr. Justice Sandeep Sharma, Judge.

Whether approved for reporting? ¹ Yes.

For the petitioner : Mr. Divya Raj Singh, Advocate.

For the respondent : Mr. Sudhir Bhatnagar, Mr. Sumesh Raj and Mr. Sanjeev Sood, Additional Advocates General.

ASI Rajinder Singh, Police Station, Una, District Una, Himachal Pradesh.

Sandeep Sharma, Judge (oral):

Instant bail petition filed under Section 439 CrPC has been preferred by the bail petitioner namely Harish Kumar, who is in custody since 24.7.2019, praying therein for grant of bail in FIR No. 250, dated 24.7.2019, under S.21 of the Narcotic Drugs & Psychotropic Substances Act (hereinafter, 'Act') registered at Police Station Sadar, Una, Himachal Pradesh.

2. Sequel to order dated 31.10.2019, ASI Rajinder Singh has come present with the record. Mr. Sumesh Raj, learned Additional Advocate General has also placed on record status

¹ Whether the reporters of the local papers may be allowed to see the judgment?

report, prepared on the basis of investigation carried out by the investigating agency. Record perused and returned.

3. Record/status report reveals that on 24.7.2019, Police patrolling party apprehended bail petitioner, who allegedly after having seen Police, threw his bag on the side of the road, and recovered 157 strips of Lomotil (9420 tablets). Since the bail petitioner failed to produce valid licence/permit, if any, to keep aforesaid drugs, Police, after completion of necessary codal formalities, registered case under S.21 of the Act against the bail petitioner on 24.7.2019 and, since then, bail petitioner is behind the bars.

4. Mr. Divya Raj Singh, learned counsel for the petitioner, while referring to the judgments rendered by this Court in CrMP(M) No. 792 of 2017 titled **Surjeet Kumar vs. State**, decided on 17.7.2017 and CrMP(M) No. 1592 of 2017 titled **Karnail Singh vs. State**, decided on 12.1.2018, contended that the drug namely Lomotil does not fall within the definition of 'manufactured drug' as contained under S.2(xi) of the Act. He further contended that Notifications bearing Nos. 826(E), dated 14.11.1985, S.O. 49(E), dated 29.1.1993 and S.O. 1431(E), dated 21.6.2011 issued by Government of India, clearly provide that the preparation of Diphenoxylate calculated as base and a quantity of Atropine Sulphate equivalent to at least one percent of the dose of the Diphenoxylate does not fall under the

definition of 'manufactured drug' as notified vide Notifications referred to hereinabove. While referring to SFSL report, which is annexed with the report, Mr. Divya Raj Singh, Advocate contended that though Lomotil has been shown to be a sample of Diphenoxylate Hydrochloride tablet but it has been categorically stated in the report that 2.50 mg Diphenoxylate Hydrochloride is found alongwith 0.026 mg of Atropine Sulphate per tablet as such, no case, if any, could have been filed against the bail petitioner under various provisions of the Act, rather, case, if any, for possessing aforesaid tablets of Lomotil without there being licence could have been filed under the provisions of Drugs and Cosmetics Act, 1940.

5. Mr. Sumesh Raj, learned Additional Advocate General, fairly acknowledged the factum with regard to passing of aforesaid two judgments by this Court, wherein having taken note of the Notifications, referred to herein above, this court in **Surjeet Kumar** (supra) held as under:

“8. I have heard the learned counsel for the parties and gone through the record carefully.

9. In the instant case, as per report of SFSL, prohibited drug namely “Diphenoxylate hydrochloride” has been found to be 2.492 mg per tablet, meaning thereby quantity of prohibited drug, if taken into consideration qua 12000 tablets allegedly recovered from the petitioner, comes out

to be 29.754 grams i.e. above than small quantity and less than commercial quantity'. SFSL, while concluding that 2.492 mg Diphenoxylate hydrochloride has been found per tablet, has nowhere rendered any opinion with regard to remaining contents/mixture contained in the tablet namely lomotil, hence, inference can be drawn that 29.754 grams Diphenoxylate hydrochloride is present in recovered tablets.

10. Mr. Kapil Sharma, Assistant Director SFSL, categorically stated before this court that though average weight of tablet namely "lomotil" was found 63.0 mg and as such. if this weight is taken into consideration qua all recovered tablets 11940, total weight of tablets comes around 752.20 grams. Mr. Kapil Sharma, fairly stated before this court that if pure drugs i.e. Diphenoxylate hydrochloride is taken into consideration then quantity of the same qua 11940 tablets comes to be 297.54 grams, which is more than small quantity and less than commercial quantity. Though, aforesaid aspect of the matter is to be considered and examined in detail by trial Court during the course of trial, but, after having carefully perused opinion rendered by SFSL, as well as judgments rendered by the Hon'ble Full Bench in **Mehboob Khan's case (supra)**, which has been further followed by a coordinate Bench of this Court in **Ankush Chauhan's case and Prashant Chauhan's case (supra)**, this Court

is of the view that rigors of Section 37 of the Act are not attracted in the case at hand.

11. This Court after taking note of the submissions made by Mr. Chandel, learned counsel for the petitioner that the tablet i.e. 'Iomotil' does not fall under the definition of manufactured narcotic drugs, as notified by the Government of India by way of separate notification, as referred above, carefully perused notification, referred above, wherein at Sr. No.58, it has been stated as under:-

“Elthy 1-(3- Cyano-3, 3-diphenylpropyl)-4 - phenylpiperidine-4-carboxylic acid ethyl ester (the international non-proprietary name of which is Diphenoxylate) and its salts and preparations, admixture, extracts or other substances containing any of these drugs except preparations of Diphenoxylate calculated as base, and a quantity of Atropine Sulphate equivalent to at least one percent of the dose of Diphenoxylate.

12. Careful perusal of aforesaid entry at Sr. No.58 in the notification, as referred hereinabove, clearly suggests that Diphenoxylate and its salts and preparations, admixture, extracts or other substances containing any of these drugs are manufactured narcotic drugs, but save and except preparations of Diphenoxylate calculated as base, and a quantity of Atropine Sulphate equivalent to at least one percent of the dose of Diphenoxylate. Mr. Chandel, while referring to the report submitted by SFSL, contended that drugs namely Diphenoxylate hydrochloride has been found to be 2.5 mg per tablet and similarly quantity of Atropine 0.025 mg i.e. 1% of dose of Diphenoxylate hydrochloride

has been also found in each tablet, meaning thereby tablet namely 'lomotil' having Diphenoxylate hydrochloride 2.5 mg does with 0.025 mg of Atropine sulphate does not fall under the definition of manufactured narcotic drugs and as such, does not come under the preview of NDPS Act.

13. At this stage, it would be profitable to reproduce Section 2(xi) of the Act, herein:-

“Manufactured drugs” means:-

- (a) all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;
- (b) any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drugs;

14. Careful perusal of aforesaid provisions of law suggest that all the coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate any other narcotic substance or preparation which central government may notify in the official Gazette would be termed as manufactured drugs, but it further suggests that it will not include any narcotic substance or preparation which the central government may having regard to the available information or to a decision, if any, under any International Convention by notification in the Official Gazette, declared not to be manufactured drugs. Aforesaid provisions of law, clearly suggest that narcotic substance or preparation declared by central government by issuing

notification in the official gazette shall only be deemed to be manufactured drugs save and except of coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate, as prescribed under Section 2(xi) of the Act. Aforesaid provisions of law i.e. section 2(xi)(b), certainly suggest that narcotic substance or preparations not included in the notification, if any, issued by the central government declaring certain narcotic substance or preparation to be manufactured drugs shall not be considered as manufactured drugs in terms of Section 2(xi) of the Act. In the instant case, entry made at Sr. No.58 of notification, as referred above, certainly suggests that Diphenoxylate hydrochloride and its salts and preparation and admixture, extracts or other substances containing any of these drugs are to be treated as manufactured narcotic drugs save and except preparations of Diphenoxylate calculated as base, and a quantity of Atropine sulphate equivalent to at least one percent of the dose of Diphenoxylate.

15. In the present case, as has been taken note of above, Diphenoxylate hydrochloride 2.5 mg has been found in one tablet, whereas Atropine sulphate 2.025 mg i.e 1 % of dose of Diphenoxylate hydrochloride has been found in the tablet namely lomotil. Though, this court after having carefully perused the aforesaid provisions of law as well as entry contained at Sr. No.58 of the notification, sees substantial force in the arguments of Mr. N.S.Chandel,

learned counsel representing the petitioner that tablet namely lomotil does not fall under the definition of manufactured drugs, as defined under Section 2(xi) of the Act, but aforesaid aspect of the matter shall be considered/examined in detail by trial court during the course of trial.”

6. Similar view has been taken by this Court in subsequent judgment in Karnail Singh (supra). It is not in dispute that aforesaid judgments rendered by this Court qua the issue at hand, have attained finality because till date no appeal whatsoever has been filed.

7. Leaving everything aside, this Court finds that the investigation in the case is complete and *Challan* has been filed in the competent Court of law. Since nothing remains to be recovered from the bail petitioner, no fruitful purpose would be served by keeping him behind the bars for an indefinite period especially when he has already suffered for approximately four months. Guilt, if any, of the bail petitioner is yet to be determined in the totality of the evidence collected on record by the prosecution and it would not be fair to let bail petitioner incarcerate in jail for an indefinite period during trial. Otherwise also, Hon'ble Apex Court and this Court have held in

a catena of judgments that a person is deemed to be innocent till such time, his/her is proved in accordance with law.

8. By now it is well settled that gravity alone cannot be decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that 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. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been 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.”

9. Law with regard to grant of bail is now well settled. The Apex Court in **Siddharam Satlingappa Mhetre** versus **State of Maharashtra and others**, (2011) 1 SCC 694, while relying upon its decision rendered by its Constitution Bench in **Gurbaksh Singh Sibbia vs. State of Punjab**, (1980) 2 SCC 565, laid down the following parameters for grant of bail:-

“111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or the other offences.

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;
(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail." (Emphasis supplied)

10. Hon'ble Apex Court, in **Sundeep Kumar Bafna** versus **State of Maharashtra** (2014)16 SCC 623, has held as under:-

"8. Some poignant particulars of Section 437 CrPC may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being "brought before a Court", the present provision postulates the accused being "brought before a Court other than the High Court or a Court of Session" in respect of the commission of any non-bailable offence. As observed in *Gurcharan Singh vs State (Delhi Admn)* (1978) 1 SCC 118, there is no provision in the CrPC dealing with the production of an accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts. The Legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Courts of Sessions and High Court are bereft of this jurisdiction or if they were so empowered under the Old Code now stood denuded thereof. Our understanding is in conformity with *Gurcharan Singh*, as perforce it must. The scheme of the CrPC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a Court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in *State of Haryana vs Bhajan Lal*, 1992 (Supp)1 SCC 335, that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. CrPC severely curtails the powers of the Magistrate while

leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 of the CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that the CrPC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this Section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in the CrPC or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail. Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim, viz. 'where there is a right there is a remedy'. The universal right of personal liberty emblazoned by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two

higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the CrPC."

11. In Manoranjana Sinh alias Gupta versus CBI, (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

"This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that 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 found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat 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 a conduct whether an 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. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

12. Needless to say object of the bail is to secure the presence of the accused in the trial and 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 its trial. Otherwise also, normal rule is of bail and not jail. Apart from above, 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.

13. 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.

14. In view of above, present petition is allowed and the petitioner is ordered to be enlarged on bail in the aforementioned FIR, subject to his furnishing personal bonds in the sum of Rs.2,00,000/- (Rupees Two Lakh) with two local sureties in the like amount to the satisfaction of concerned Chief Judicial Magistrate, 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 deposit passport, if any, held by him, with the Investigating Officer.

15. 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.

16. 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 petition alone.

The petition stands accordingly disposed of.

Copy dasti.

(Sandeep Sharma)
Judge

November 18, 2019
(vikrant)