

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

**Cr. MP (M) No. 40 of 2020
Reserved on : 21.09.2020
Date of Decision : 22.09.2020**

Innocent Oluchukwu**Versus****State of Himachal Pradesh****...Petitioner.****...Respondent.***Coram:***The Hon'ble Mr. Justice Anoop Chitkara, Judge.***Whether approved for reporting?*¹ **No.**For the petitioner: **Mr. Akshay Katoch, Advocate.**For the respondent: **Mr. Nand Lal Thakur, Additional Advocate General.****Mr. Arjun Lal, Advocate as Amicus Curiae.****COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE****Anoop Chitkara, Judge.**

An under-trial prisoner, holder of Nigerian Passport, has come up before this Court under Section 439 of the Code of Criminal Procedure, 1973 (CrPC), seeking bail, under Sections 21 & 29 of Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act), Section 12 of Passport Act, 1967, Section 14 of Foreigners Act 1946, Sections 420, 468, 471 IPC, for selling 13.95 grams of heroin (Diacetylmorphine).

2. The police arrested the petitioner, in FIR No. 115 of 2019, dated 2.09.2019, registered under Sections 21 & 29 of the NDPS Act, Section 12 of Passport Act, 1967, Section 14 of Foreigners Act 1946, Sections 420, 468, 471 IPC, in Police Station, Dharampur, District

¹ Whether reporters of Local Papers may be allowed to see the judgment?

Solan, Himachal Pradesh, disclosing cognizable and non-bailable offenses.

3. Earlier, the petitioner had filed a petition under Section 439 CrPC before the Special Judge-II, Solan. However, vide order dated 2.11.2019, Learned Special Judge, Solan, District Solan, HP, dismissed the petition.

4. I have read the status report(s) and heard counsel for the parties.

FACTS:

5. Briefly, the allegations against the petitioner are that the police had arrested one Naresh Kumar for possessing 13.95 grams of heroin (Diacetylmorphine). After his arrest, when the police conducted investigation, he revealed to the police that he had purchased this substance from two persons, who belong to Nigeria namely Innocent Oluchukwo and Stephen Chidubem. After that the police has arrested the present petitioner for abetting the said offence.

PREVIOUS CRIMINAL HISTORY

6. The counsel for the petitioner states that the accused has no criminal history.

SUBMISSIONS:

7. Learned counsel for the bail petitioner submits that the allegations are false and concocted. He states that in the status report, the Investigator has admitted the Passport's genuineness, which implies that his identity stands ascertained.

8. On the contrary, Mr. Nand Lal Thakur, learned Additional Advocate General, contend that the investigating officer has collected sufficient prima facie evidence. He further submits that if this Court is inclined to grant bail, then such a bond must be subject to very stringent conditions.

9. Mr. Arjun Lal, Ld. Amicus Curiae submits that the significant challenge qua grant of bail to foreign nationals is, the question of securing their presence during trial in relation to the applicability of Article 21 of the Constitution of India.

ANALYSIS AND REASONING:

10. The decision of this Court in Cr.MP (M) No. 39 of 2020, titled **Stephen Chidubem versus State of H.P.**, decided on 22.09.2020, applies on the present case on all fours. In the said case, this Court had granted bail in intermediate quantity of substance in NDPS Act.

11. Although the maximum sentence attracted in FIR exceeds imprisonment of more than seven years, yet an analysis of the facts makes out a case for bail. Reference be also made to the decisions of Hon'ble Supreme Court in (a) **Gurbaksh Singh Sibia and others v. State of Punjab**, 1980 (2) SCC 565, (Para 30); (b) **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav**, 2005 (2) SCC 42, (Para 18); (c) **State of Rajasthan, Jaipur v. Balchand**, AIR 1977 SC 2447, (Para 2); (d) **Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh**, (1978) 1 SCC 240, (Para 16); (e). **Dataram Singh v. State of Uttar Pradesh**, (2018) 3 SCC 22, (Paras 1 & 6).

12. Pre-trial incarceration needs justification depending upon the offense's heinous nature, terms of the sentence prescribed in the statute for such a crime, probability of the accused fleeing from justice, hampering the investigation, criminal history of the accused, and doing away with the victim(s) and 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.

13. In **Lachhman Dass v. Resham Chand Kaler**, (2018) 3 SCC 187, Supreme Court holds,

"10. ...The law under section 439Cr.P.C is very clear and in the eye of the law every accused is the same irrespective of their nationality."

14. In the present case, a perusal of evidence taken on record so far leads to the following inference:

- a) The petitioner is a Nigerian National, holding a Passport of Federal Republic of Nigeria, bearing Passport No.A09594435. The State has already verified from the concerned Embassy about the genuineness of the Passport.
- b) The quantity of drug involved is less than Commercial Quantity but greater than Small Quantity. As such the rigors of Section 37 of NDPS Act shall not apply in the present case. Resultantly, the present case has to be treated like any other case of grant of bail in a penal offence.
- c) The petitioner is in judicial custody since 5.9.2019.
- d) The investigation is complete and the report under section 173(2) CrPC stands filed.

15. 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.

16. The possibility of the accused influencing the course of the investigation, tampering with evidence, intimidating witnesses, and the likelihood of fleeing justice, can be taken care of by imposing elaborate conditions and stringent conditions.

17. Given the above reasoning, 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.
18. 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.

19. Following the decision of this Court in **Abhishek Kumar Singh v. State of HP**, Cr.MP(M) No. 1017 of 2020, the petitioner shall be released on bail in the FIR mentioned above, subject to his furnishing a personal bond of Rs. One hundred thousand only (Rs. One Lac) (INR 100,000/-), and shall either furnish two sureties of a similar amount to the satisfaction of the Chief Judicial Magistrate/Ilaqua Magistrate/Duty Magistrate/the Court exercising jurisdiction over the concerned Police Station where FIR is registered, or the aforesaid personal bond and fixed deposit(s) for Rs. One hundred thousand only (Rs. One Lac) (INR 100,000/-), made in favour of Chief Judicial Magistrate, Solan, District Solan, H.P., from any of the banks where the stake of the State is more than 50%, or any of the stable private banks, e.g., HDFC Bank, ICICI Bank, Kotak Mahindra Bank, Bank of America, Chase, City bank, etc., with

the clause of automatic renewal of principal, and liberty of the interest reverting to the linked account. Such a fixed deposit need not necessarily be made from the account of the petitioner. If such a fixed deposit is made manually, then the original receipt has to be deposited. If made online, then the copy attested by any Advocate has to be filed, and the depositor shall get the online liquidation disabled. It shall be total discretion of the petitioner to choose between surety bonds and fixed deposits. During the trial's pendency, it shall be open for the petitioner to apply for substitution of fixed deposit with surety bonds and vice-versa. 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). The Court shall have a lien over the deposits until discharged by substitution, and otherwise up to the expiry of the period mentioned under S. 437-A CrPC, 1973. In case the petitioner opts for surety bonds instead of fixed deposit, then the concerned Court shall ascertain the reasons for such persons to stand as sureties and shall accept such sureties only if the Court is convinced that the sureties are not the stock sureties, and in case of default, are capable of producing the petitioner.

20. 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 give security to the concerned Court(s) for attendance. Once the trial begins, the petitioner shall not, in any manner, try to delay the trial. The petitioner undertakes to appear before the concerned Court, on the issuance of summons/warrants by such Court. The petitioner shall attend the trial on each date, unless exempted, and in case of appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.

b) The attesting officer shall mention on the reverse page of personal bonds, the permanent address of the petitioner along with the phone number(s), WhatsApp number (if any), email (if any), and details of personal bank account(s) (if available). ◇

c) **The petitioner shall deposit his passport, if not already seized by the Police.**

d) 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.

e) The petitioner shall join investigation as and when called by the Investigating Officer or any Superior Officer. Whenever the investigation takes place within the boundaries of the Police Station or the Police Post, then the petitioner shall not be called before 8 AM and shall be let off before 5 PM. The petitioner shall not be subjected to third-degree methods, indecent language, inhuman treatment, etc.

f) The petitioner shall cooperate with the investigation at all further stages as may be required, and in the event of failure to do so, it will be open for the prosecution to seek cancellation of the bail granted by the present order.

g) 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.

h) In addition to standard modes of processing service of summons, the concerned Court may serve the accused through E-Mail (if any), and any instant messaging service such as WhatsApp, etc. (if any). [Hon'ble 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) The concerned Court may also inform the accused about the issuance of bailable and non-bailable warrants through the modes mentioned above.

j) In the first instance, the Court shall issue summons and may send such summons through SMS/ WhatsApp message/ E-Mail.

k) In case the petitioner fails to appear before the Court on the specified date, then the concerned Court may issue bailable warrants, and to enable the accused to know the date, the Court may, if it so desires, also inform the petitioner about such Bailable Warrants through SMS/ WhatsApp message/ E-Mail.

l) Finally, if the petitioner still fails to put in an appearance, then the concerned Court may issue Non-Bailable Warrants to procure the petitioner's presence and send the petitioner to the Judicial custody for a period for which the concerned Court may deem fit and proper to achieve the purpose.

m) 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.

n) The petitioner shall immediately intimate about the change of residential address and change of phone numbers, WhatsApp number, e-mail accounts, and not later than 10 days from such modification, to the Police Station of this FIR, and also to the concerned Court.

o) The petitioner shall abstain from all criminal activities. If done, then while considering bail in the fresh FIR, the Court shall take into account that even earlier, the Court had cautioned the accused not to do so.

p) In case of violation of any of the conditions as stipulated in this order, the State/Public Prosecutor may apply for cancellation of bail of the petitioner. Otherwise, the bail bonds shall continue to remain in force throughout the trial and also after that in terms of Section 437-A of the CrPC.

q) During the trial's pendency, if the petitioner repeats the offence or commits any offence where the sentence prescribed is seven years or more, then the State may move an appropriate application for cancellation of this bail.

21. The learned Counsel representing the accused and the Officer in whose presence the petitioner puts signatures on personal bonds shall explain all conditions of this bail order to the petitioner, in vernacular and if not feasible, in English.

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 before 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 in accordance with law.

24. 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.

25. 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.

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

27. 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.

28. 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.

29. The Court attesting the bonds shall not insist upon the certified copy of this order. Any Advocate for the petitioner may download this order from the website of this Court, and attest it, which shall be sufficient for furnishing bonds and the record. The Court Master shall handover an authenticated copy of this order to the Counsel for the Petitioner and the Learned Advocate General if they ask for the same.

30. In return of the freedom curtailed for breaking the law, the Court believes that the accused shall also reciprocate through desirable behavior.

31. While deciding the propositions of law involved in this matter, I have considered all my similar decisions, and without any deviation this decision is more comprehensive and up to date. Resultantly, there is no point in citing all previous judgments/orders pronounced by me, where the proposition of law was similar, or somewhat similar.

32. I express my gratitude to Mr. Arjun Lal Advocate for rendering excellent assistance and conducting this case *Pro Bono*.

The petition stands allowed in the terms mentioned above. All pending applications, if any, stand closed.

**(Anoop Chitkara),
Judge.**

September 22, 2020 (ps)