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IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Cr.MP (M) No. 2177 of 2020

Date of Decision: 6.01.2021

Gaurav Kumar alias BuntyPetitioner

Versus

State of Himachal PradeshRespondent

Coram:

The Hon'ble Mr. Justice Sandeep Sharma, Judge.
Whether approved for reporting?¹

For the Petitioner: Mr. Gaurav Sharma, Advocate, through
video-conferencing.

For the Respondent: Mr. Sudhir Bhatnagar, Additional Advocate
General, through video-conferencing.

Sandeep Sharma, J (oral)

Bail petitioner, namely Gaurav Kumar alias Bunty, who is behind the bars since 10.10.2020, has approached this Court in the instant proceedings filed under Section 439 of the Code of Criminal Procedure, praying therein for grant of regular bail in case FIR No.158 of 2020, dated 10.10. 2020, under Sections 21, 29-61-85 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (***For short 'Act'***), registered at police Station, Damtal, District Kangra, Himachal Pradesh.

2. Perusal of status report filed by the respondent-State in terms of order dated 11.12.2020, reveals that on 10.10.2020, police allegedly apprehended one motorcycle coming from Bhadroya side.

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

Since, persons riding on the motorcycle got perplexed after having seen the police party, police associated two independent witnesses and carried out their personal search as well as search of the motorcycle and allegedly recovered 9.41grams heroin/chitta from the dickey of the motorcycle. Since, no plausible explanation came to be rendered on record by the present bail petitioner, who at that relevant time was driving the motorcycle as well as other person namely, Moksh qua the possession of aforesaid quantity of contraband, police after completion of necessary codal formalities, lodged a FIR, detailed hereinabove, against the present bail petitioner as well as other co-accused Moksh under Section 21,29-61-85 of the Act and since then present bail petitioner is behind the bars, whereas co-accused Moksh stands already enlarged on bail granted by learned Special Judge-II, Kangra at Dharamshala, H.P. Though, present bail petitioner had also applied for bail before the learned Special Judge-II, Kangra at Dharamshala, but his bail application came to be rejected on the ground that in past also, there was one case registered against him under the Act. The challan stands filed in the competent court of law and nothing remains to be recovered from the bail petitioner, petitioner has approached this Court in the instant proceedings under the changed circumstances.

3. Mr. Sudhir Bhatnagar, learned Additional Advocate General while fairly admitting the factum with regard to filing of the challan in the competent Court of law, contends that though

nothing remains to be recovered from the bail petitioner, but having taken note of his antecedents, he does not deserve any leniency and as such, prayer having been made on his behalf for grant of bail deserves outright rejection. Mr. Bhatnagar, further contends that in past also bail petitioner was found indulging in illegal trade of narcotics as such, was convicted for 10 months and it may not be in the interest of justice to enlarge him on bail at this stage because in the event of his being enlarged on bail, he may not only flee from justice, rather again indulge in such activities.

4. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that on 10.10.2020, police recovered 9.41 grams heroin/chitta from the dickey of the motorcycle being driven by the bail petitioner in the presence of two independent witnesses and as such, it cannot be said that he has been falsely implicated. However, this Court finds that the motorcycle involved in the incident was not in the name of the bail petitioner as such, it would be too premature to conclude complicity, if any, of bail petitioner in the crime allegedly committed by him, especially when 9.41 grams of heroin/chitta never came to be recovered from his conscious possession, rather from the dickey of the motorcycle, which belongs to some other person. Moreover, co-accused Moksh, who was also riding on the same motorcycle already stands enlarged on bail. Earlier bail petition having been filed by the bail petitioner has been rejected solely on the basis of past history of the bail petitioner.

5. Admittedly, record reveals that in the year 2014, bail petitioner was convicted and sentenced for 10 months for possessing contraband, but appeal against the aforesaid judgment of conviction and sentence is pending before the Punjab and Haryana High Court. No doubt, bail petitioner has committed the crime having adverse impact on the society, but this Court cannot lose the site of the fact that the bail petitioner has become a drug addict and as such is required to be taken to some rehabilitation centre, so that efforts are made for bringing the bail petitioner to the main stream. Otherwise also, contraband allegedly recovered from the motorcycle being driven by the petitioner is of intermediate quantity and as such, rigours of section 37 are not attracted in the present case. No doubt, registration of case under the NDPS Act, if any, in past is relevant factor for the Court to consider prayer for bail, but mere pendency of such cases or conviction therein, if any, cannot be a sole ground to reject the bail. In the case at hand, petitioner was convicted and sentenced for 10 months in the year, 2014 i.e six years back and there is nothing on record suggestive of the fact that in the last six years petitioner was indulging in illegal trade of narcotic save and except case at hand, which has been registered three months back.

6. It has been repeatedly held by Hon'ble Apex Court as well as this Court in catena of cases that one is deemed to be innocent till the time his /her guilt is not proved, in accordance with law. Since guilt, if any, of the bail petitioner is yet to be proved, in

accordance with law by the prosecution by leading cogent and convincing evidence, this Court sees no reason to curtail the freedom of the bail petitioner for indefinite period during the trial, especially when co-accused Moksh, who at that relevant time was also riding on the motorcycle already stands enlarged on bail. Apprehension expressed by learned Additional Advocate General that in the event of bail petitioner being enlarged on bail, he may flee from justice or may again indulge in such activities, can be best met by putting bail petitioner to stringent conditions.

7. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, ***Dataram Singh vs. State of Uttar Pradesh & Anr.***, decided on 6.2.2018, has categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Hon'ble Apex Court further held that if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general

conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to [Section 436](#) of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting [Section 436A](#) in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of [Article 21](#) of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in *In Re-Inhuman Conditions in 1382 Prisons*

8. The Hon'ble Apex Court in *Sanjay Chandra versus Central Bureau of Investigation* (2012)1 Supreme Court Cases 49; 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 propose of giving him a taste of imprisonment as a lesson.”

9. Needless to say object of the bail is to secure the attendance of the accused in the trial and the 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 his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. 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.

10. 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.

11. In view of above, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to his furnishing personal bonds in the sum of Rs.1.00 lakh with one local surety in the like amount each to the satisfaction of the learned trial Court 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 surrender passport, if any, held by him.
- (f) He shall report the concerned police station twice in a month.

12. 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.

13. 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 application alone.

The petition stands accordingly disposed of.

Copy dasti.

**(Sandeep Sharma),
Judge**

January 06, 2021
(shankar)

High Court of H.P.