



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. MP(M) No. 2776 of 2023

Reserved on: 10.11.2023

Date of Decision: 04.12.2023

Dildar Khan @ Sonu Khan

... petitioner

Versus

State of H.P

....Respondent

Coram

Hon'ble Mr Justice Rakesh Kainthla, Judge.

Whether approved for reporting?¹ Yes

For the Petitioner : Mr. Ashok Kumar Thakur,
Advocate.

For the Respondent : Mr. Prashant Sen, Deputy Advocate
General.

Rakesh Kainthla, Judge

The petitioner has filed the present petition for seeking pre-arrest bail. It has been asserted that FIR No. 176 dated 16.07.2022 was registered at Police Station Shimla (West) on 15.07.2022. The police party checked an HRTC Bus on the intervening night of 15/16.07.2022. They found a backpack on the iron rack near seat no. 12 13 14W containing 336.63 grams of intoxicating powder. The police could not find the name of the owner of the backpack. Subsequently, the police claimed that the petitioner was involved in the commission of the crime. The police had also found the clothes in the backpack and asked the

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

petitioner to wear the clothes but they were not found fit for him; hence, he was permitted to leave. The petitioner has an apprehension of his arrest; therefore, the petition.

2. The petition is opposed by filing a status report asserting that the police party was on patrolling duty on 16.07.2022. The police checked an HRTC Bus on 16.07.2023 at 12:15 am and found a backpack on the iron rack kept above seat no. 12 13 14W. The Police interrogated the passengers but nobody claimed the ownership of the backpack. The police checked the backpack and found 333.63 grams of heroin in it. The police seized the same. The police conducted the investigation and checked the CCTV footage in ISBT, Sector 43, Chandigarh. The police found one person boarding the bus with a backpack. The police matched the photograph with the CCTV footage and found it to be that of the petitioner. The police checked the CCTV footage of the motorcycle parking and found that a person carrying the backpack had got down the motorcycle bearing registration no. CH01-BW-7097. One person came to pick up the motorcycle on 16.7.2022 at 5:00 pm, who revealed his name as Raja Khan and disclosed on enquiry that the motorcycle belonged to Dildar Khan alias Sonu Khan who is his maternal uncle. The police searched for Dildar Khan alias Sonu Khan but could not find him. He had also switched off his mobile phone.

The police also obtained the non-bailable warrants of arrest from the Court. The Court has issued the proclamation under Section 82 of Cr.P.C. and declared the petitioner as a proclaimed offender on 21.08.2023. The petitioner is involved in the commission of a heinous offence and has been absconding for about one year; therefore, it was prayed that the present petition be dismissed.

3. I have heard Ashok Kumar Thakur, learned counsel for the petitioner and Mr. Prashant Sen, learned Deputy Advocate General, for the respondent/State.

4. Mr. Ashok Kumar Thakur, learned counsel for the petitioner submitted that the petitioner was falsely implicated. He was allowed to leave from the spot. There is no material to connect the petitioner with the commission of crime; therefore, he prayed that the present petition be allowed and the petitioner be released on pre-arrest bail.

5. Mr. Prashant Sen, learned Deputy Advocate General for the respondent/State submitted that the petitioner was declared a proclaimed offender by a Competent Court of law and cannot be granted pre-arrest bail. The police have collected the CCTV footage, which clearly shows the petitioner boarding the bus with the backpack containing heroin in it. Thus, there is

sufficient material to connect the petitioner with the commission of a crime. The quantity of heroin was commercial and the rigours of Section 37 of the NDPS Act apply to the present case. The petitioner had absconded after the incident and he will abscond again, in case, he is released on bail; therefore, he prayed that the present petition be dismissed.

6. I have given considerable thought to the rival submissions at the bar and have gone through the records carefully.

7. It was laid down by the Hon'ble Supreme Court in *P. Chidambaram vs. Directorate of Enforcement 2019 (9) SCC 24* that the power of pre-arrest is extraordinary and should be exercised sparingly. It was observed:

“67. Ordinarily, arrest is a part of the procedure of the investigation to secure not only the presence of the accused but several other purposes. Power under Section 438 Cr.P.C. is an extraordinary power and the same has to be exercised sparingly. The privilege of pre-arrest bail should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after application of mind as to the nature and gravity of the accusation; the possibility of the applicant fleeing justice and other factors to decide whether it is a fit case for grant of anticipatory bail. Grant of anticipatory bail to some extent interferes in the sphere of investigation of an offence and hence, the court must be circumspect while exercising such power for the grant of anticipatory bail. Anticipatory bail is not to

be granted as a matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy.”

8. It was specifically stated in the status report that the petitioner was declared a proclaimed offender by the learned JMFC-VIII, Shimla on 21.08.2023. It was laid down by the Hon’ble Supreme Court in *State of Haryana v. Dharamraj*, 2023 SCC OnLine SC 1085, that once a person was declared a proclaimed offender, he is not entitled to pre-arrest bail. It was observed:

“16. What the High Court (also) lost sight of was that the respondent was a declared proclaimed offender. The High Court notes, in Paragraph 28, that it was not dealing with the prayer seeking quashing of the proclamation proceedings as the same were not made part of the petition before it. As things were, the respondent was declared a proclaimed offender on 05.02.2021 and sought anticipatory bail from the High Court only in October 2021. As such, it was not correct for the High Court to brush aside such factum, on the basis of averments alone, purporting to explain the backdrop of such declaration by mere advertence to a similar-sounding name, in the petition before it, as recorded at Paragraphs 9 and 10 of the Impugned Order. The declaration of the respondent as a proclaimed offender, and such declaration subsisting on the date of the Impugned Order, we are unable to agree with the High Court that the respondent was entitled to ‘reform and course correct’.

17. The respondent, without first successfully assailing the order declaring him as a proclaimed

offender, could not have proceeded to seek anticipatory bail. Looking at the factual prism, we are clear that the respondent's application under Section 438, CrPC should not have been entertained, as he was a proclaimed offender. We may note that in *Lavesh v. State (NCT of Delhi)*, (2012) 8 SCC 730, this Court was categorical against grant of anticipatory bail to a proclaimed offender. In the same vein, following *Lavesh (supra)* is the decision in *State of Madhya Pradesh v. Pradeep Sharma*, (2014) 2 SCC 171, where this Court emphasised that a proclaimed offender would not be entitled to anticipatory bail. Of course, in an exceptional and rare case, this Court or the High Courts can consider a plea seeking anticipatory bail, despite the applicant being a proclaimed offender, given that the Supreme Court and High Courts are Constitutional Courts. However, no exceptional situation arises in the case at hand. Following *Pradeep Sharma (supra)*, in *Prem Shankar Prasad v. State of Bihar*, 2021 SCC OnLine SC 955, this Court was unequivocal that the High Court therein erred in granting anticipatory bail ignoring proceedings under Sections 82 and 83, CrPC. In *Abhishek v. State of Maharashtra*, (2022) 8 SCC 282, this Court concluded:

'68. As regards the implication of the proclamation having been issued against the appellant, we have no hesitation in making it clear that any person, who is declared as an "absconder" and remains out of reach of the investigating agency and thereby stands directly in conflict with law, ordinarily, deserves no concession or indulgence. By way of reference, we may observe that in relation to the indulgence of pre-arrest bail in terms of Section 438 CrPC, this Court has repeatedly said that when an accused is absconding and is declared as proclaimed offender, there is no question of giving him the benefit of

Section 438 CrPC. [For example, *Prem Shankar Prasad v. State of Bihar*, (2022) 14 SCC 529, 2021 SCC OnLine SC 955] ...’

18. Accordingly, in view of the discussions made hereinabove, the Impugned Order granting anticipatory bail to the respondent is set aside. The respondent shall surrender before the Court concerned within four weeks from today and may seek regular bail which will be considered on its own merits without being prejudiced by the present judgment.”

9. Therefore, in view of these binding precedents, the petitioner cannot be granted the pre-arrest bail.

10. The status report clearly states that the petitioner boarded the bus with the backpack and he was seen in the CCTV footage. Therefore, there is sufficient material to connect the petitioner with the backpack recovered by the police. No explanation has been provided regarding the petitioner having the backpack at the time of the boarding of the bus. Just, because the backpack was not kept by the petitioner with him does not mean that he was not in possession of the same. It was laid down by the Hon’ble Supreme Court in *Union of India v. Mohd. Nawaz Khan*, (2021) 10 SCC 100: (2021) 3 SCC (Cri) 721: 2021 SCC OnLine SC 1237 that a person is in possession if he is in a position to exercise control over the article. It was observed at page 111:

25. We shall deal with each of these circumstances in turn. The respondent has been accused of an offence under Section 8 of the NDPS Act, which is punishable

under Sections 21, 27-A, 29, 60(3) of the said Act. Section 8 of the Act prohibits a person from possessing any narcotic drug or psychotropic substance. The concept of possession recurs in Sections 20 to 22, which provide for punishment for offences under the Act. In *Madan Lal v. State of H.P.* [*Madan Lal v. State of H.P.*, (2003) 7 SCC 465: 2003 SCC (Cri) 1664] this Court held that : (SCC p. 472, paras 19-23 & 26)

“19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record are that all the accused persons were travelling in a vehicle and as noted by the trial court they were known to each other and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

21. It is highlighted that unless the possession was coupled with the requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

22. The expression “possession” is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Supt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja* [*Supt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja*, (1979) 4 SCC 274: 1979 SCC (Cri) 1038] to work out a completely logical and precise definition of “possession” uniform[ly] applicable to all situations in the context of all statutes.

23. The word “conscious” means awareness about a particular fact. It is a state of mind which is deliberate or intended.

26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.”

26. What amounts to “conscious possession” was also considered in *Dharampal Singh v. State of Punjab* [*Dharampal Singh v. State of Punjab*, (2010) 9 SCC 608 : (2010) 3 SCC (Cri) 1431], where it was held that the knowledge of possession of contraband has to be gleaned from the facts and circumstances of a case. The standard of conscious possession would be different in the case of a public transport vehicle with several persons as opposed to a private vehicle with a few persons known to one another. In *Mohan Lal v. State of Rajasthan* [*Mohan Lal v. State of Rajasthan*, (2015) 6 SCC 222: (2015) 3 SCC (Cri) 881], this Court also observed that the term “possession” could mean physical possession with animus; custody over the prohibited substances with animus; exercise of dominion and control as a result of concealment; or personal knowledge as to the existence of the contraband and the intention based on this knowledge.

11. Therefore, the petitioner cannot claim that he was not in possession when he was able to exercise control over the backpack.

12. The police had found 333.63 grams of heroin, which is a commercial quantity. The report of the analysis shows that

the Exhibit stated that heroin was a sample of Diacetyl morphine (heroin) and its weight without the poly pieces and cello tape was 303.522 grams. Thus the rigours of Section 37 apply to the present case.

13. There is no material to show that the petitioner has committed the offence rather the CCTV footage clearly shows that the petitioner owned the backpack containing heroin.

14. Consequently, the petitioner is not entitled to pre-arrest bail; hence, the present petition fails and the same is dismissed.

15. The observations made hereinbefore shall remain confined to the disposal of the petition and will have no bearing, whatsoever, on the case's merits.

(Rakesh Kainthla)
Judge

4th December, 2023
(saurav pathania)