THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Jurisdiction)

DATED : 26th MAY, 2020

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Bail Appln. No.03 of 2020

Petitioner/Accused : Dharmaan Rai

versus

Respondent : State of Sikkim

Petition under Section 439 of the
Code of Criminal Procedure, 1973

Appearance

Mr. Leonard Gurung and Ms. Rachhitta Rai, Advocates for the Petitioner/Accused.

Mr. Yadev Sharma, Additional Public Prosecutor and Mr. Sujan Sunwar, Assistant Public Prosecutor for the State-Respondent.

O R D E R

Meenakshi Madan Rai, J.

1. The Petitioner, aged about 55 years, seeks to be enlarged on bail having been arrested in connection with Melli P.S. Case No.9/2020, dated 12-04-2020, under Section 7/9/14 of the Sikkim Anti Drugs Act, 2006 (for short, "SADA, 2006") read with Section 7(1)(c)/7(4) [*sic*] of the Sikkim Anti Drugs (Amendment) Act, 2017.

2. During the course of hearing Learned Counsel for the Petitioner canvassed the contention that the Petitioner has been falsely implicated in the instant matter with no proof whatsoever of his complicity in the offence, save the statement of the truck driver, who is also arrayed as an accused, stating

that a total of 598 bottles of Cough Syrup of various brands, recovered and seized from the truck driven by him, belonged to the Petitioner and had been transported in his truck on the Petitioner's request. That, neither the controlled substances were seized from the possession of the Petitioner nor is there any other evidence to establish that the Petitioner had requested the truck driver to transport the controlled substances for him, besides which no proof emanates as to the use or sale of the controlled substances by the Petitioner. That, the Petitioner was arrested from "Melli" although the driver had allegedly informed the Police that the Petitioner would be waiting for the alleged consignment of controlled substances near "Rolu" temple, which is however situated between Melli and Jorethang, South Sikkim, thereby revealing the falsity of the driver's statement and the Prosecution case, while the Petitioner is completely innocent. The Petitioner is infact a well known and respected permanent resident of Daragaon, Jorethang, South Sikkim and has been falsely implicated sans grounds by the Prosecution. Owing to his permanent residence in Sikkim the question of him absconding does not arise neither does he intend to tamper with the Prosecution evidence or the witnesses. He undertakes to cooperate with the Investigating Agency and to appear before the Investigating Officer as and when required and in Court at the time of trial. That, this Court may take into consideration that the Petitioner is depressive and a patient of vertigo as fortified by the Medical Certificate, Annexure 7, issued by Dr.

Subhash Tamang, ENT, Head and Neck Surgery, District Hospital, Namchi, South Sikkim. That, the owner of the truck was never arrested to examine his involvement, while the Petitioner has been wrongly arrested. That, in view of the grounds put forth the Petitioner be enlarged on furnishing bail, on any condition as deemed appropriate by this Court. In support of his submissions, Learned Counsel relied on the ratio of ***Sanjay Chandra*** vs. ***Central Bureau of Investigation***[1], ***Prakash Kumar alias Prakash Bhutto*** vs. ***State of Gujarat***[2], ***Pancho*** vs. ***State of Haryana***[3], ***Dataram Singh*** vs. ***State of Uttar Pradesh and Another***[4], ***Union of India*** vs. ***Niyazuddin Sk. and Another***[5], ***State of Kerala etc.*** vs. ***Rajesh etc.***[6], ***Rupa Gurung*** vs. ***State of Sikkim***[7].

3. Learned Additional Public Prosecutor while repudiating the contentions of Learned Counsel for the Petitioner submitted that the accused was indeed arrested on the basis of the statement of the driver of the truck, the accused No.1 in the instant matter, who divulged that the Petitioner had requested him to bring the bottles of Cough Syrup, which are controlled substances in terms of the SADA, 2006. That, the First Information Report also reveals that on recovery of the controlled substances valid bills could not be furnished by the driver, who then made the aforestated revelation adding that the Petitioner would be waiting for him

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1 (2012) 1 SCC 40
2 (2007) 4 SCC 266
3 (2011) 10 SCC 165
4 (2018) 3 SCC 22
5 (2018) 13 SCC 738
6 2020 SCC OnLine SC 81
7 2020 SCC OnLine Sikk 20 (Bail Appln. No.02 of 2020)

near Rolu Temple, in his vehicle, to receive the consignment of controlled substances. That, on the basis of such revelation the Police team went towards Rolu Temple and intercepted the Petitioner with his vehicle at a bridge before the said Temple. The question of arresting the owner is ruled out as he is not involved in the offence. As the controlled substances are large in number, should the accused be enlarged on bail there is every likelihood that he will tamper with the evidence as admittedly he is an influential person in the locality. That, the Petitioner has criminal antecedents having in the past been involved in a rioting case under the jurisdiction of the Jorethang Police Station and later in Hingdam Police Station case also for a similar offence. Hence, considering his antecedents his involvement in the offence is a foregone conclusion. That, the investigation is still underway and enlarging the Petitioner on bail at this stage would prejudice the Prosecution case. Besides, the menace of drug peddling has to be curbed in the State and on these grounds, the Petition for bail deserves a dismissal. To augment his submissions, Learned Additional Public Prosecutor relied on ***Nabin Manger*** vs. ***State of Sikkim***[8].

4. I have heard *in extenso* the rival contentions of Learned Counsel and the citations placed at the Bar have been carefully perused. I have also perused carefully the documents furnished before me.

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[8] SLR (2018) Sikkim 1454 : MANU/SI/0078/2018 (Bail Appln. No.03 of 2018)

5. The FIR was lodged by Sub-Inspector (SI) Prashant Rai of the Melli P.S. on 12-04-2020, before the Station House Office Melli Police Station on 12-04-2020, a wireless signal having been received from the Assistant Sub-Inspector deployed at the Melli Check Post on 11-04-2020 at around 2245 hours informing him that on checking of the incoming and outgoing vehicles at Melli Check Post the ASI had intercepted truck bearing registration No.SK 04 D 0092 along with the driver. Bottles of Cough Syrup were discovered concealed in the storage compartment above the driver's seat. The SI reached the Melli Check Post and the vehicle was searched in terms of the legal provisions laid down in the SADA, 2006 which led to the recovery of 10 bottles of 100 ml. Rexdryl Cough Syrup and 588 bottles of 100 ml. each of Ownrex Cough Syrup, concealed inside four sacks of rice. Pursuant to the said recovery the driver divulged the involvement of the Petitioner. The Arrest Memo indicates that the Petitioner was booked under Section 7/9/14 of the SADA, 2006 read with Section 7(1)(c)/7(4) of the Sikkim Anti Drugs (Amendment) Act, 2017.

6. Pausing here momentarily, it is necessary to clarify that Section 7 of the SADA, 2006, reads as follows;

"CHAPTER III
PROHIBITION, CONTROL AND REGULATION

Prohibition of certain operations 7. No person shall –

(a) sale, stock for sale or trade in any controlled substance; or

(b) transport either inter-State or intra-State any controlled substance,

Without a valid license under the Drugs and Cosmetics Act, 1940 or Sikkim Trade License Act:

Provided that, and subject to the other provisions of the Act and the rules made thereunder, the possession of verifiable quantities, as prescribed in the rules of controlled substances for medicinal purposes with a valid prescription, or for a legal use of the substance, shall be permissible:

Provided further that the amount of controlled substance in possession shall not be beyond the limit prescribed in prescription slip/card, or in cases of other substances other than drugs, the amount permissible shall be proportionate to its purported use.**"**

7. By the Sikkim Anti Drugs (Amendment) Act, 2017, in Chapter IV pertaining to Offences and Penalties, Section 9 which deals with punishment for contravention of controlled substances, of the SADA, 2006, came to be substituted by the following;

Substitution of Section 9

7. In the Principal Act, for Section 9, the following Section shall be substituted, namely:-

"9.(1) Whoever, in contravention of any provision of this Act or any rule or order made thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses,-

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which shall not be less than two years but may extend to five years and shall also be liable to pay fine which shall not be less than twenty thousand rupees but may extend to fifty thousand rupees;

(b) where the contravention involves large quantity, with rigorous imprisonment for a term which shall not be less than seven years but may extend to ten years and shall also be liable to pay fine which shall not be less than fifty thousand rupees but may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment which shall not be less than ten years but may extend to fourteen years and shall also be liable to pay fine which shall not be less than

one lakh rupees but may extend to two lakh rupees.

(2) ……..

(3) ……..

(4) Where the contravention involves a person using a mode of transport or any other form of conveyance, either inter-State or intra-State, such person shall be liable to imprisonment for a term which shall not be less than ten years but which may extend to fourteen years and shall also be liable to fine which shall not be less than one lakh but may extend to ten lakhs rupees and the conveyance as used, shall be liable to be seized and confiscated, which may be released on payment in the following manner:-

(a) Heavy motor vehicle – Rupees two lakhs

(b) Light motor vehicle – Rupees one lakh

(c) Two-or-three wheeled – Rupees fifty thousand

(d) Any other form of conveyance – Rupees twenty-five thousand

(5) ……..**”**

8. During the substitution of Section 9 made vide the Act of 21 of 2017 with effect from 19-09-2017, it is seen that the numerical 7 appears a little above the substituted Section 9. In this regard, it appears that there is some confusion in the Arrest and Surrender Memo pertaining to the Section under which the Petitioner was booked, viz., Section 7/9/14 of the SADA, 2006, read with Section 7(1)(c)/7(4) of the Sikkim Anti Drugs (Amendment) Act 2017. The numerical 7 above the Section 9 does not denote a Section, viz., 7, but is the serial number inserted to indicate the substitution of Section 9 by the said amending Act. Infact, there is no Section 7(1)(c) or Section 7(4) for the reasons enumerated hereinabove and ought to be read as Section 9 and its Sub-Sections, the

amending Act of 2017 having substituted Section 9 and not Section 7. The air having been cleared on this aspect, I proceed to examine the matter at hand.

9. Admittedly, the Petitioner was arrested on the seizure of the controlled substances having been made from the truck bearing No.SK 04 D 0092, driven by one Bimal Gurung, also arrayed as an accused in the Melli P.S. Case (*supra*). Admittedly, the truck in which the controlled substances were carried did not belong to the said accused driver nor to the Petitioner herein. It is also admitted by the Prosecution that the owner of the truck was not arrested, his complicity in the offence having been ruled out. On careful examination of the records placed before this Court and the submissions made by the Prosecution, no proof whatsoever emanates at this stage to establish that the consignment was ordered by the accused as allegedly disclosed by the driver Bimal Gurung nor recovery of any articles made from the possession of the Petitioner on his arrest. This is apparent also from Annexure 2, the Arrest/Court Surrender Memo pertaining to the arrest of the Petitioner which fails to disclose recovery of any articles from the Petitioner much less the controlled substances. All that the Prosecution is relying on after more than a month and two weeks of investigation is the statement of the driver that the Petitioner had asked him to bring the controlled substances. The FIR mentions that, according to the driver, the Petitioner was waiting at "Rolu Temple" for the consignment of controlled substances being transported in the

truck and consequent upon such revelation the Police team was immediately despatched towards Rolu, who successfully intercepted the Petitioner and his vehicle at a *pucca* bridge just before the Rolu temple. However, a careful perusal of the Arrest Memo reveals no such details which infact records that the Petitioner was arrested at 0240 hours at "Melli" after the FIR was lodged at 2245 hours and the driver arrested at 0155 hours. The Arrest Memo does not mention that the Rolu Temple is situated at Melli and the Prosecution on clarification sought by this Court, admits that Melli is in a different location, while the Rolu Temple is located elsewhere and not in Melli. It was also the specific plea of the Prosecution that the investigation is still being conducted in the matter and should he be enlarged on bail, the Petitioner is likely to tamper with evidence. While considering this aspect, it is worth noticing that the controlled substances post recovery have already been seized by the Police and remains in their custody. The Accused No.1 is also in judicial custody. There are only two other independent witnesses who evidently belong to Melli, South Sikkim and not to Jorethang of which the Petitioner is a resident. The question of evidence being tampered by the Petitioner, in my considered opinion, appears to be a little far-fetched in the absence of any materials placed in support of this allegation.

10. This Court has repeatedly observed that the sale of controlled substances by unconscionable people and the use of it by all age groups and more especially by the youth of Sikkim

has unequivocally had a deleterious effect on the society in the State at large and therefore deserves to be dealt with an iron hand. Having flagged this concern, I can well understand the anxiety of the Police in the present circumstances to ensure that the Petitioner remains in custody in view of the large quantity of controlled substances seized being prescription drugs, rampantly misused by sale at exorbitant rates, to users who become victims and in turn embroil their family and society to the negative aspects of its use. Nevertheless the dots must connect and the complicity of the accused/Petitioner in the offence must be shown. Surely, the statement of the driver with no other evidence whatsoever at this stage to link the Petitioner to the crime would not justify the confinement of the Petitioner in judicial custody. This Court is aware and conscious of the Judgment of the Hon'ble Supreme Court in ***Rajesh*** (*supra*) wherein while discussing Section 37 of the NDPS Act it has held has follows;

> **"20.** **The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause.** **The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied.** The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is **that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence.** **If either of these two conditions is not satisfied, the ban for granting bail operates.**
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> **21.** **The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence.** The reasonable belief

> contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.
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> 22. We may further like to observe that the learned Single Judge has failed to record a finding mandated under Section 37 of the NDPS Act which is a sine qua non for granting bail to the accused under the NDPS Act. **[emphasis supplied]"**

11. The exact same spirit of Section 37 of the NDPS Act finds place is Section 18 in the SADA, 2006 specifically Section 18(ii). However, in this context, I have to reiterate that despite investigation having stretched on for a month and two weeks the Prosecution has failed to place before this Court grounds indicating complicity of the Petitioner in the offence at this stage to justify his further detention in custody.

12. In the result, in consideration of the foregoing discussions, this is a fit case where the Petitioner ought to be enlarged on bail. It is accordingly ordered that the Petitioner be released on bail on furnishing PB&SB of Rs.50,000/- (Rupees fifty thousand) only, each, subject to the condition that;

(i) He shall report to the I.O. of the case as and when required until completion of investigation.

(ii) He shall not make attempts to contact the two independent witnesses or for that matter any witnesses pertaining to the instant matter.

(iii) He shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/them to disclose such facts to the Investigating Officer or to the Court.

(iv) He shall not leave Jorethang without the specific written permission of the I.O. of the Case.

13. The observations made herein are only for the purposes of the instant Bail Petition and shall not be construed as a finding on the merits of the matter which shall be considered at the time of trial, if any.

14. The Bail Appln. stands disposed of.

15. Copy of this Order be made available to all the Special Judges (Sikkim Anti Drugs Act, 2006) for information.

(Meenakshi Madan Rai)
Judge
26-05-2020

Approved for reporting : **Yes**

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