IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.MP(M) No. 2052 of 2020

Date of Decision: 23.11.2020

Raj Devender ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Coram:

The Hon'ble Mr. Justice Anoop Chitkara, Judge.

Whether approved for reporting?[1] ***NO****.*

For the petitioner: Mr. Maan Singh, Advocate.

For the respondent: Mr. Nand Lal Thakur, Additional Advocate General, Mr. Ram Lal Thakur, Assistant A.G.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

Anoop Chitkara, Judge.

The petitioner, allegedly got planted approximately 1 lac plants of cannabis and is now apprehending his imminent arrest on being arraigned as an accused, has come up under section 438 CrPC, seeking anticipatory bail.

2. Based on the complaint, the police registered FIR No. 268 of 2020, dated 27.9.2020, under Section 8, 20, 29, 27A of NDPS Act, in Police Station, Bhuntar, District Kullu, Himachal Pradesh, disclosing cognizable and non-bailable offences.

3. The petitioner's criminal history relating to the offences prescribing sentence of greater than seven years of imprisonment or when on conviction, the sentence imposed was more than three

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

years: The contents of the petition and the status report do not reveal any criminal history.

4. Briefly, the allegations against the petitioner are that on 27.9.2020, police party noticed the plantation of cannabis and also noticed that seven persons were extracting cannabis from the cannabis plants. After that, the police officials rushed towards the field. However, they could catch only four persons and three persons were able to run away taking advantage of the adjacent forest and rough terrain. Thereafter, the police arrested those four persons. After that, the police conducted proceedings under NDPS Act and after taking samples of cannabis plants, destroyed the remaining plants. In the interrogation of the accused, who were nabbed from the spot, they named the bail petitioner Raj Devender as the person at whose assistance, they had planted cannabis plants. Thus, the said Raj Devender has come up before this Court seeking anticipatory bail.

5. The Counsel for the petitioner contends that incarceration before the proof of guilt would cause grave injustice to the petitioner and family.

6. While opposing any protection, the alternative contention on behalf of the State is that if this Court grants bail, such order must be subject to conditions, especially of not repeating the criminal activities.

ANALYSIS AND REASONING:

7. Section 2 (vii-a) of the NDPS Act defines commercial quantity as the quantity greater than the quantity specified in the schedule. S. 2 (xxiii-a) defines a small quantity as the quantity less than the quantity specified in the table of the NDPS Act. The remaining quantity falls in an undefined category, which is now generally called as intermediate quantity. All Sections in the NDPS Act, which specify an offense, also mention that minimum and maximum

sentence, depending upon the quantity of the substance. Commercial quantity mandates minimum sentence of ten years of imprisonment and a minimum fine of Rupees One hundred thousand, and bail is subject to the riders mandated in S. 37 of NDPS Act.

8. The contraband involved is plants of cannabis, which prima facie is not a Commercial quantity. As such, the rigors of Section 37 of the NDPS Act shall not apply in the present case. Resultantly, the present case is similar to other instances of the grant of bail in a penal offence.

9. In intermediate quantity the rigors of the provisions of Section 37 may not be justified- (Sami Ullaha v. Superintendent Narcotic Control Bureau, (2008) 16 SCC 471). In the present case, the quantity of substance seized is less than the commercial quantity. Therefore, the bail application stands on different parameters and is similar to bail petitions under regular statutes.

10. In **Gurbaksh Singh Sibbia and others v. State of Punjab**, 1980 (2) SCC 565, (Para 30), a Constitutional bench of Supreme Court held that the bail decision must enter the cumulative effect of the variety of circumstances justifying the grant or refusal of bail. In **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav**, 2005 (2) SCC 42, (Para 18) a three-member bench of Supreme Court held that the persons accused of non-bailable offences are entitled to bail, if the Court concerned concludes that the prosecution has failed to establish a prima facie case against him, or despite the existence of a prima facie case, the Court records reasons for its satisfaction for the need to release such persons on bail, in the given fact situations. The rejection of bail does not preclude filing a subsequent application, and the Courts can release on bail, provided the circumstances then prevailing requires, and a change in the fact situation. In **State of Rajasthan, Jaipur v. Balchand**, AIR 1977 SC 2447, (Para 2 & 3), Supreme Court

noticeably illustrated that the basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like by the petitioner who seeks enlargement on bail from the court. It is true that the gravity of the offence involved is likely to induce the petitioner to avoid the course of justice and must weigh with us when considering the question of jail. So also the heinousness of the crime. In **Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh**, (1978) 1 SCC 240, (Para 16), Supreme Court in Para 16, held that the delicate light of the law favours release unless countered by the negative criteria necessitating that course. In **Dataram Singh v. State of Uttar Pradesh**, (2018) 3 SCC 22, (Para 6), Supreme Court held that the grant or refusal of bail is entirely within the discretion of the judge hearing the matter and though that discretion is unfettered, it must be exercised judiciously and in a humane manner and compassionately. Also, conditions for the grant of bail ought not to be so strict as to be incapable of compliance, thereby making the grant of bail illusory.

11. 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. However, while deciding bail applications, the Courts should discuss evidence relevant only for determining bail. The difference in the order of bail and final judgment is similar to a sketch and a painting. However, some sketches are in detail and paintings with a few strokes.

12. The petitioner has been arraigned as accused on the basis of the statement of the co-accused.

13. An analysis of the evidence does not justify further incarceration of the accused, nor is it going to achieve any significant purpose, making out a case for bail.

14. 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 elaborative conditions and stringent conditions. In **Sushila Aggarwal**, (2020) 5 SCC 1, Para 92, the Constitutional bench held that unusually, subject to the evidence produced, the Courts can impose restrictive conditions.

15. Given the above reasoning, the Court is granting bail to the petitioner, subject to the imposition of following stringent conditions, which shall be over and above, and irrespective of the contents of the form of bail bonds in chapter XXXIII of CrPC. Consequently, the present petition is allowed, and in the event of arrest the petitioner shall be released on bail in the FIR mentioned above, on his furnishing a personal bond of INR 50,000/, (INR Fifty thousand only), with one surety for INR 5,000 (INR Five thousand only), to the satisfaction of the Investigator/ SHO of the concerned Police Station. The furnishing of bail bonds shall be deemed acceptance of all stipulations, terms, and conditions of this bail order:

a) 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).

b) 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.

c) The petitioner shall join and cooperate in the

investigation, and failure to do so shall entitle the prosecution to seek cancellation of the anticipatory bail granted by the present order. (Kala Ram v. State of Punjab, 2018 (11) SCC 350).

d) 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.

e) 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.

f) There shall be a presumption of proper service to the petitioner about the date of hearing in the concerned Court, even if it takes place through SMS/ WhatsApp message/ E-Mail/ or any other similar medium, by the Court.

g) In the first instance, the Court shall issue summons and may inform the Petitioner about such summons through SMS/ WhatsApp message/ E-Mail.

h) 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.

i) 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.

j) 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 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.

k) The petitioner shall intimate about the change of

residential address and change of phone numbers, WhatsApp number, e-mail accounts, within thirty days from such modification, to the police station of this FIR, and the concerned Court, if such stage arises.

l) 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.

m) 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.

n) 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 following the mandate of the Constitutional Bench in **Sushila Aggarwal,** (2020) 5 SCC 1, Para 92, wherein the Constitutional bench held that anticipatory bail can continue until the end of the trial; however, the Courts can limit the bail period's tenure if unique or peculiar features require.

16. 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 Hindi or English.

17. 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.

18. 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.

19. The present bail order is only for the FIR mentioned above. It shall not be a blanket order of bail in any other case(s) registered against the petitioner.

20. 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.

21. The Investigating Officer attesting the bonds shall not insist upon the certified copy of this order and shall download the same from the website of this Court, or accept a copy attested by an Advocate, which shall be sufficient for 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.

22. In return for the protection from incarceration, the Court believes that the accused shall also reciprocate through desirable behavior.

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

Copy *Dasti*.

(Anoop Chitkara),
Judge.

23.11.2020 (mamta)