IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.
Cr.MP(M) No.2092 of 2020
Decided on: 31.12.2020

Rajesh Kumari .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

Coram:
Hon'ble Mr. Justice Sandeep Sharma, Judge.
Whether approved for reporting? [1] Yes.

For the Petitioner	**:**	Mr. Gobind Korla, Advocate.
For the Respondent	**:**	Mr. Sudhir Bhatnagar, Additional Advocate General.

Sandeep Sharma, Judge (oral):

Through Video Conferencing

By way of present bail petition filed under Section 439 Cr.PC, prayer has been made on behalf of the bail petitioner namely Rajesh Kumari, who is behind bars since 7.3.2020, for grant of regular bail in FIR No. 38/2020 dated 7.3.2020, under Sections 21-61-85 of the ND&PS Act, registered at Police Station Indora, District Kangra, Himachal Pradesh.

2. Respondent State has filed the Status report in terms of order dated 27.11.2020. Record/status report reveals that on 7.3.2020, police after having received secrete information raided the house of the present bail petitioner and allegedly, recovered 11.6 grams Chita/Heroin. Since no plausible explanation came to be rendered on record on behalf of the

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

bail petitioner qua the possession of the aforesaid quantity of contraband, police party after completion of necessary codal formalities, registered FIR detailed herein above, against the present bail petitioner and since then, she is behind bars. After completion of investigation, challan stands filed in the competent court of law and at present, bail petitioner is in judicial custody.

3. Before adverting to the factual matrix of the case, it may be noticed that prior to filing of the petition at hand, petitioner had approached earlier this Court by way of Cr.MP(M) No. 1482 of 2020 , but same was dismissed as withdrawn on 23.9.2020, reserving liberty to the petitioner to file afresh at an appropriate stage. It has been averred in the instant petition that there is none in the family to take care of two minor children of the bail petitioner. Besides above, it has been also averred that one of the daughter of the bail petitioner is suffering from tuberculosis and sister of the petitioner, who was taking care of the bail petitioner's family has expired on 5.8.2020. In the aforesaid background, this court with a view to ascertain factum with regard to illness of minor daughter of the bail petitioner as well as death of her sister, directed the respondent-State to verify the contents of para-5 of the application. In fresh status report filed in terms of order dated 18.12.2020, respondent-State has submitted that all the children save and except one son namely

Hritik aged 14 years, are major. It has been further disclosed in the status report that daughter of the petitioner namely Komal alias Sujana, is suffering from tuberculosis and at present is under treatment from Gurdaspur, Punjab. It has been further averred that Promila Kumari i.e. sister of the bail petitioner, who had been taking care of the family of the petitioner in her absence, has expired.

4. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while fairly admitting factum with regard to filing of challan in the competent court of law, contends that though nothing remains to be recovered from the bail petitioner, but keeping in view the gravity of offence alleged to have been committed by her, she does not deserve any leniency and as such, bail petition having been filed on her behalf may be rejected outrightly. Learned Additional Advocate General further contends that since two children of the bail petitioner are major, it cannot be said that there is none to take care of her minor daughter, who is admittedly suffering from tuberculoses. Lastly, learned Additional Advocate General contends that since two cases under NDPS Act already stand registered against the bail petitioner and despite that, bail petitioner had been caught in third case i.e. present case, there is every likelihood of her indulging in the illegal trade of Narcotics in the event of her being enlarged on bail in the instant proceedings.

5. Having heard learned counsel for the parties and perused the material available on record, this Court finds that present bail petitioner, who is 45 years old lady, is habitual offender and had been repeatedly indulging in illegal trade of narcotics, as a consequence of which, two criminal cases under the NDPS Act are already pending against her. In the case at hand, police allegedly recovered 11.6.grams of Chita/heroin from the house of the bail petitioner in the presence of independent witnesses and as such, this Court finds no force in the statement of learned counsel for the petitioner that petitioner has been falsely implicated. However, having taken note of the fact that the bail petitioner is behind bars for almost more than 9 months and till date, trial has not commenced in the case at hand, prayer made on behalf of the bail petitioner for grant of bail deserves to be considered. Otherwise also, contraband allegedly recovered from the house of the petitioner is of intermediate quantity and as such, rigors of Section 37 of the Act are not attracted in the present case. No doubt, as per status report, two cases under the NDPS Act already stand registered against the bail petitioner and as such, there is force in the submission of learned Additional Advocate General that in the event of petitioner's being enlarged on bail, she may again indulge in such like activities again, but having taken note of the fact that there is none in the family of the petitioner to take

care of her children, one of whom is suffering from tuberculoses, this Court sees no reason to let the bail petitioner incarcerate in jail for indefinite period during trial. Trial is yet to commence in the case at hand and as such, there is every likelihood of further delay in conclusion of the trial on account of COVID-19. This Court cannot loose sight of the fact that on account of COVID-19, courts below though have resumed normal working, but still evidence is being recorded in limited cases. Petitioner has already suffered for more than nine months and in case, she is not enlarged on bail at this stage during trial, her further detention in judicial custody would amount to pre-trial conviction. It has been also brought to the notice of this court that husband of the present bail petitioner has been taken to the hospital at Amritsar, Punjab on account of serious ailment and his condition is serious and as such, there appears to be no justification to let the bail petitioner incarcerate in jail for indefinite period during trial. Moreover, bail petitioner in the case at hand is a woman and as such, her prayer for grant of bail is required to be considered in the light of the provisions contained under proviso 1 to Section 437 Cr.PC, wherein it has been provided that court can direct a person referred to in clause (i) or clause (ii) of Section 437 Cr.PC to be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm. Apprehension expressed by learned Additional Advocate General that in

the event of bail petitioner being enlarged on bail, she may flee from justice, can be best met by putting her to stringent conditions.

6. 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.

7. 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."***

8. In **Manoranjana Sinh Alias Gupta** versus **CBI** 2017 (5) SCC 218, The Hon'ble Apex Court has held as under:-

> ***" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that 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 found guilty. It was underlined that the object of bail is neither punitive or preventive. This Court sounded a caveat 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 a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him to taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care ad caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."***

9. The Hon'ble Apex Court in ***Prasanta Kumar Sarkar v. 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.***

10. Reliance is placed on judgment passed by the Hon'ble Apex Court in case titled ***Umarmia Alias Mamumia v. State of Gujarat***, **(2017) 2 SCC 731**, relevant para whereof has been reproduced herein below:-

> ***"11. This Court has consistently recognised the right of the accused for a speedy trial. Delay in criminal trial has been held to be in violation of the right guaranteed to an accused under Article 21 of the Constitution of India. (See: Supreme Court Legal Aid Committee v. Union of India, (1994) 6 SCC 731; Shaheen Welfare Assn. v. Union of India, (1996) 2 SCC 616) Accused, even in cases under TADA, have been released on bail on the ground that they have been in jail for a long period of time and there was no likelihood of the completion of the trial at the earliest. (See: Paramjit Singh v. State (NCT of Delhi), (1999) 9 SCC 252 and Babba v. State of Maharashtra, (2005) 11 SCC 569).***

11. 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.***

12. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, petitioner has carved out a case for grant of bail, accordingly, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to her furnishing personal bond in the sum of Rs. 50,000/- with one local surety in the like amount to the satisfaction of concerned trial Court, with following conditions:

> ***a. She shall make herself 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. She shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;***
> ***c. She shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade her from disclosing such facts to the Court or the Police Officer; and***
> ***d. She shall not leave the territory of India without the prior permission of the Court.***
> ***e. She shall report to the concerned police station twice in a month.***

13. It is clarified that if the petitioner misuses her liberty or violates any of the conditions imposed upon her, the investigating agency shall be free to move this Court for cancellation of the bail.

14. 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 bail petition stands accordingly disposed of.

Copy **dasti.**

31st December, 2020 **(Sandeep Sharma),**
Manjit **Judge**