

CRR-661-2023

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRR-661-2023 (O&M)
Reserved on: 04.05.2023
Pronounced on: 17.05.2023

Hardeep Kumar alias Pappu
... Petitioner(s)

Versus

State of Punjab
...Respondent (s)

CORAM: HON'BLE MR. JUSTICE ANOOP CHITKARA

Present:- Mr. Manoj R. Sharma, Advocate
for the petitioner(s).

Mr. Virat Rana, AAG, Punjab.

ANOOP CHITKARA, J.

FIR No.	Dated	Police Station	Sections
203	5.8.2022	Civil Lines, Batala	21(c) and 29 NDPS Act

1. Aggrieved by dismissal of default bail petition filed under section 167(2) of the Code of Criminal Procedure, 1973, [CrPC], the accused has come up before this court.
2. On Aug 5, 2022, the police had recovered 300 grams of heroin from the petitioner, and NDPS Act defines it as commercial quantity and makes it a punishable offence in the following terms:

Substance Name	Heroin/ Chitta/ Smack
Quantity detained	300 Gram
Quantity type	Commercial
Drug Quantity in % to upper limit of Intermediate	120.00%

<i>Specified as small & Commercial in S.2(viia) & 2(xxiii) NDPS Act, 1985</i>	
Notification No	S.O.1055(E)
dated	10/19/2001
Sr. No.	56
Common Name (Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN)	Heroin
Other non-proprietary name	*****
Chemical Name	Diacetylmorphine
Small Quantity	5 Gram
Commercial Quantity	250 Gram

Declared as punishable under NDPS Act and as per schedule defined in S.2(xi) & 2(xxiii) NDPS Act, 1985	
Notification No	S.(xvi)(d) NDPS Act, 1985 (61 of 1985), S.O. 821 (E)
dated	11/14/1985
Sr. No.	2(xvi)(d)
Common Name (Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN)	*****
Other non-proprietary name	*****
Chemical Name	2(xvi)(d) diacetylmorphine, that is, the alkaloid also known as dia-morphine or heroin and its salts; Explanation.-- For the purposes of clauses (v) (vi), (xv) and (xvi) the percentages in the case of liquid preparations shall be calculated on the basis that a preparation containing one per cent. of a substance means a preparation in which one gram of substance, if solid, or one mililitre of substance, if liquid, is contained in every one hundred mililitre of the preparation and so on in proportion for any greater or less percentage: Provided that the Central Government may, having regard to the developments in the field of methods of calculating percentages in liquid preparations prescribed, by rules, any other basis which it may deem appropriate for such calculation.

CRR-661-2023

3. Given above, the quantity involved in the present case falls in the category of commercial.

4. While opposing the bail, the contention on behalf of the State is that the quantity of contraband involved in the case falls in the commercial category.

REASONING:

5. After arrest in a cognizable and non-bailable offence, in most of the penal statutes, the time to file a chargesheet/ Police Report/ Challan, under section 173 CrPC, is prescribed under section 167(2) CrPC as 60 days or 90 days as per the sentence prescribed. However, as per section 32-A (4) of NDPS Act, in respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of CrPC thereof to "ninety days," where they occur, shall be construed as a reference to "one hundred and eighty days." It further provides that if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.

6. In Enforcement Directorate, Government of India v. Kapil Wadhawan, MANU/SC/0329/2023, a three-Judge bench of Supreme Court holds,

[36]. Section 57 of the Code of Criminal Procedure mandates that the Accused be produced before a Magistrate within 24 hours of arrest and Under Section 167(2) the Judicial Magistrate is required to scrutinize the executive action and determine whether the rights of the Accused are not subjugated by police action. The separation of the Executive and the Judicial exercise of power, ultimately protects an individual's personal liberty which is also constitutionally protected Under Articles 21 and 22(2). If the date of remand ordered by a Magistrate is ignored, then an Accused even though in custody, the same will not be counted within the 60/90 day period. The custody on the date of remand is distinct from the arrest of an Accused Under Section 56 Code of Criminal Procedure as that is considered as a period prior to production before the Magistrate. By this logic, even if the Accused is under custody it would neither be Under Section 56, nor Under 167(2) of the Code of Criminal Procedure. This will lead to an apparent legal vacuum. This can however be avoided if the remand period is considered from the very day of the remand order. Furthermore, if an Accused is remanded by a Magistrate on say, 01.01.2023, then, the police, post judicial

scrutiny, is empowered to investigate, starting on the same day, as per Section 167 Code of Criminal Procedure, irrespective of whether the police actually commence investigation on the same day. So, if the police is empowered to investigate an Accused person on the day of the remand order itself, the 60/90 day stipulated period, upon whose expiry, the right of default bail accrues to the Accused, should logically be calculated from that day itself. Ignoring the date of remand Under Section 167 Code of Criminal Procedure in the 60/90 day period, would in our opinion, militate against the legislative intent of providing an Accused protection from being in prolonged custody, because of slothful investigation.

[42]. The 60/90 day limit is a statutory requirement which allows the State agencies to investigate serious offences beyond the 15-day police custody. In case the State fails to file chargesheet or supplementary request for remand within the stipulated 60/90 day period, we need to strike a balance between the rights of the individual and the restriction on those rights and prevent prolonged incarceration without legal support. The very instance, the statutory remand period ends, an indefeasible right to default bail accrues to the Accused and same needs to be guarded. The liberty of the individual is surely relative and regulated. Absolute liberty is something that cannot be conceived in a societal setting. The law therefore allows authorities to detain Accused persons and facilitate investigation. However, it is the duty of this Court to discourage prolonged incarceration. Further, the right to default bail is not extinguished by the subsequent filing of the chargesheet, and the Accused continues to have the right to default bail.

[50]. Since there exists vacuum in the application and details of Section 167 Code of Criminal Procedure, we have opted for an interpretation which advances the cause of personal liberty. The Accused herein were remanded on 14.05.2020 and as such, the chargesheet ought to have been filed on or before 12.07.2020 (i.e. the sixtieth day). But the same was filed, only on 13.07.2020 which was the 61st day of their custody. Therefore, the right to default bail accrued to the Accused persons on 13.07.2020 at 12:00 AM, midnight, onwards. On that very day, the Accused filed their default bail applications at 8:53 AM. The ED filed the chargesheet, later in the day, at 11:15 AM. Thus, the default bail Applications were filed well before the chargesheet. In Ravindran(supra) and Bikramjit (supra), which followed the Constitution Bench in Sanjay Dutt(supra) it was rightly held that if the Accused persons avail their indefeasible right to default bail before the chargesheet/final report is filed, then such right would not stand frustrated or extinguished by any such subsequent filing. We therefore declare that the stipulated 60/90 day remand period Under Section 167 Code of Criminal Procedure ought to be computed from the date when a Magistrate authorizes remand. If the first day of remand is excluded, the remand period, as we notice will extend beyond the permitted 60/90 days' period resulting in unauthorized detention beyond the

period envisaged Under Section 167 Code of Criminal Procedure. In cases where the chargesheet/final report is filed on or after the 61st/91st day, the Accused in our considered opinion would be entitled to default bail. In other words, the very moment the stipulated 60/90 day remand period expires, an indefeasible right to default bail accrues to the Accused.

7. The quantity recovered from the petitioner in the present case was 300 grams of heroin, and the FSL on testing found it to be diacetyl morphine (Heroin). The quantity greater than 250 grams of heroin falls in commercial quantity and thus the quantity in the present case was commercial and time to file police report was within 180 days of remand.

8. After the arrest, in compliance with section 57 of CrPC, the police had produced the accused before the concerned Judicial Magistrate on Aug 06, 2022. The Officer-in-charge of the police station did not file chargesheet (Challan) within 180 days of arrest. Thus, an indefeasible right of bail had accrued to the accused on the expiry of 180th day. As per paragraph 7 of the reply affidavit filed by the concerned DySP, the challan was filed on Feb 4, 2023. As per paragraph 4 of the impugned order passed by Special Judge, dismissing the prayer for default bail, the petitioner had filed bail under section 167(2) CrPC on Feb 4, 2023, and on the same day, after the filing of the bail, the police had also filed police report at 3:35 PM.

9. The petitioner was produced before Judicial magistrate under section 57 of CrPC on 6th Aug 2022, when he was remanded to police custody. On 8th Aug 2022, the petitioner was remanded to judicial custody. Thus, on 4th February 2023, at 3:35 PM, when the police had filed its report under section 173 CrPC, an indefeasible right of bail had already accrued in favour of the petitioner and the petitioner had sought to exercise his right by filing a bail petition prior to filing of the police report. Given above, the petitioner was entitled to statutory bail, sprouting from Article 21 of Constitution of India. Consequently, the order of Special Judge is not in consonance with law and is quashed and set aside, and the petitioner is held entitled to bail, subject to attending the trial without even a single default.

10. The possibility of the accused influencing the investigation, tampering with evidence, intimidating witnesses, and the likelihood of fleeing justice, can be taken care of by imposing elaborative 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.

11. Without commenting on the case's merits, in the facts and circumstances peculiar to this case, and for the reasons mentioned above, the petitioner makes a case for bail, subject to the following terms and conditions, which shall be over and above and irrespective of the contents of the form of bail bonds in chapter XXXIII of CrPC, 1973.

12. In Mahidul Sheikh v. State of Haryana, Neutral Citation No: 2022:PHHC:003277, [Para 53], [Law Finder Doc Id # 1933969], this Court observed,

[53]. The pragmatic approach is that while granting bail with sureties, the "Court" and the "Arresting Officer" should give a choice to the accused to either furnish surety bonds or to handover a fixed deposit, or direct electronic money transfer where such facility is available, or creating a lien over his bank account. The accused should also have a further option to switch between the modes. The option lies with the accused to choose between the sureties and deposits and not with the Court or the arresting officer.

13. Given above, provided the petitioner is not required in any other case, the petitioner shall be released on bail in the FIR captioned above, in the following terms:

(a). Petitioner to furnish personal bond of Rs. Ten thousand (INR 10,000/-); AND

(b) To give one surety of Rs. Twenty-five thousand (INR 25,000/-), to the satisfaction of the concerned court, and in case of non-availability, any nearest Ilaqa Magistrate/duty Magistrate. Before accepting the surety, the concerned court must satisfy that if the accused fails to appear in court, then such surety can produce the accused before the court.

OR

(b) Petitioner to hand over to the concerned court a fixed deposit for Rs. Ten Thousand only (INR 10,000/-), with the clause of automatic renewal of the principal and the interest reverting to the linked account, made in favor of the 'Chief Judicial Magistrate' of the concerned district. Said fixed deposit may be made from any of the banks where the stake of the State is more than 50% or any of the well-established and stable private sector banks. The fixed deposit need not necessarily be made from the petitioner's account.

(c). Such court shall have a lien over the deposit until the case's closure or discharged by substitution, or up to the expiry of the period mentioned under S. 437-A CrPC, 1973, and at that stage, subject to the proceedings under S. 446 CrPC, the entire amount of fixed deposit, less taxes if any, shall be endorsed/returned to the depositor.

(d). It shall be the total discretion of the petitioner to choose between surety bond and fixed deposit. It shall also be open for the petitioner to apply to the Investigator

CRR-661-2023

or the concerned court to substitute the fixed deposit with surety bonds and vice-versa.

(e). On the reverse page of personal bond, the petitioner shall mention her/his permanent address along with the phone number, preferably that number which is linked with the AADHAR, and e-mail (if any). In case of any change in the above particulars, the petitioner shall immediately and not later than 30 days from such modification, intimate about the change to the concerned police station and the concerned court.

(f). The petitioner is to also execute a bond for attendance in the concerned court(s) as and when asked to do so. The presentation of the personal bond shall be deemed acceptance of the declarations made in the bail petition and all other stipulations, terms, and conditions of section 438(2) of the Code of Criminal Procedure, 1973, and also of this bail order.

14. 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 and the circumstances of the case, to dissuade them from disclosing such facts to the police, or the court, or to tamper with the evidence.

15. Within fifteen days of release from prison, the petitioner shall procure a smartphone and inform its IMEI number and other details to the SHO/I.O. of the Police station mentioned above. The petitioner shall always keep the phone location/GPS on the "ON" mode. Whenever the Investigating officer asks to share the location, the petitioner shall immediately do so. The petitioner shall neither clear the location history, WhatsApp chats, call logs nor format the phone without permission of the concerned SHO/I.O. This condition shall continue till the completion of the trial or closure of case, whichever is earlier. If the petitioners fail to comply with this condition, then on this ground alone. In that case, the bail might be canceled, and the complainant may file any such application for the cancellation of bail, and State shall file the said application.

16. Given the nature of the allegations and the other circumstances peculiar to this case, the petitioner shall surrender all weapons, firearms, ammunition, if any, along with the arms license to the concerned authority within fifteen days from release from prison and inform the Investigator about the compliance. However, subject to the Indian Arms Act, 1959, the petitioner shall be entitled to renew and take it back in case of acquittal in this case, provided otherwise permissible in the concerned rules.

17. During the trial's pendency, if the petitioner repeats or commits any offence where the sentence prescribed is more than seven years or violates any condition as stipulated in this order, it shall always be permissible to the respondent to apply for cancellation of this bail. It shall further be open for any investigating agency to bring it to the notice of the court seized of the subsequent application that the accused was earlier cautioned not to indulge in criminal activities. Otherwise, the bail bonds shall remain in force throughout the trial and after that in Section 437-A of the Cr.P.C., if not canceled due to non-appearance or breach of conditions.

18. In return for the protection from further incarceration at this stage, the Court believes that the accused shall also reciprocate through desirable behaviour. If the petitioner again indulges in drugs, then while considering grant of bail in such cases, the concerned Courts may keep it as a factor that this Court had granted a final opportunity to the petitioner to mend his ways.

19. The conditions mentioned above imposed by this court are to endeavour that the accused does not repeat the offence and to ensure the safety of the society. In Mohammed Zubair v. State of NCT of Delhi, Writ Petition (Criminal) No 279 of 2022, Para 29, decided on July 20, 2022, A Three-Judge bench of Hon'ble Supreme Court holds that "The bail conditions imposed by the Court must not only have a nexus to the purpose that they seek to serve but must also be proportional to the purpose of imposing them. The courts while imposing bail conditions must balance the liberty of the accused and the necessity of a fair trial. While doing so, conditions that would result in the deprivation of rights and liberties must be eschewed."

20. Any Advocate for the petitioner and the Officer in whose presence the petitioner puts signatures on personal bonds shall explain all conditions of this bail order in any language that the petitioner understands.

21. If the petitioner finds bond amount beyond social and financial reach, it may be brought to the notice of this Court for appropriate reduction. Further, if the petitioner finds 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 to 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.

22. This order does not, in any manner, limit or restrict the rights of the Police or

the investigating agency from further investigation as per law.

23. In case the Investigator/Officer-In-Charge of the concerned Police Station arraigns another section of any penal offence in this FIR, and if the new section prescribes maximum sentence which is not greater than the sections mentioned above, then this bail order shall be deemed to have also been passed for the newly added section(s). However, suppose the newly inserted sections prescribe a sentence exceeding the maximum sentence prescribed in the sections mentioned above, then, in that case, the Investigator/Officer-In-Charge shall give the petitioner notice of a minimum of seven days providing an opportunity to avail the remedies available in law.

24. **Irrespective of whatever has been mentioned above, it is clarified that if the petitioner does not attend the trial even for a single day, it shall be permissible for the concerned trial court to cancel this bail, send him to custody, and speed up the trial.**

25. 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.

26. *There would be no need for a certified copy of this order for furnishing bonds, and any Advocate for the Petitioner can download this order along with case status from the official web page of this Court and attest it to be a true copy. In case the attesting officer wants to verify the authenticity, such an officer can also verify its authenticity and may download and use the downloaded copy for attesting bonds.*

Petition allowed in aforesaid terms. All pending applications, if any, stand disposed.

(ANOOP CHITKARA)
JUDGE

May 17, 2023
AK

Whether speaking/reasoned	:	Yes
Whether reportable	:	No