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IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Cr.MP(M) No.2833 of 2024
Reserved on : 19.12.2024
Decided on: 24.12.2024

Sunny ...Applicant

Versus

State of Himachal Pradesh ...Respondent

Coram

The Hon'ble Mr. Justice Virender Singh, Judge.

Whether approved for reporting?

For the applicant : Mr. K.S. Gill, Advocate.

For the respondent : Mr. Mohinder Zharaick, Additional Advocate General, assisted by HC Om Prakash No.511, Police Station Nahan.

Virender Singh, Judge

By way of the present application, filed under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as 'BNSS'), applicant-Sunny has sought his release, on bail, during the pendency of the trial, in case FIR No.138 of 2024, dated 23.08.2024,

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registered under Sections 21, 25 and 29 of the Narcotic Drugs & Psychotropic Substances Act (hereinafter referred to as the 'NDPS Act'), with Police Station Sadar Nahan, District Sirmaur, H.P.

2. According to the applicant, he is innocent person and has falsely been implicated, in the present case. The contraband, allegedly shown to be recovered, in the present case, is stated to be 11 grams of chitta/heroin, which, according to the applicant, does not fall within the definition of 'commercial quantity'. As such, according to him, rigors of Section 37 of NDPS Act are not applicable.

3. As per applicant, he is from a respectable family, having deep roots in the society. Investigation, in the present case, is stated to be complete and nothing is to be recovered from the applicant or at his instance.

4. According to the applicant, he had earlier tried his luck by moving similar application, before the Court of learned Special Judge-II, Nahan, District Sirmaur, Himachal Pradesh. However, the same was dismissed vide order dated 07.11.2024.

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5. Apart from this, Mr. K.S. Gill, Advocate, appearing for the applicant, has given certain undertakings, for which, the applicant is ready to abide by, in case, ordered to be released on bail, during the pendency of the trial.

6. On the basis of the above facts, a prayer has been made to allow the bail application.

7. When, put to notice, the police has filed the status report, disclosing therein, that on 23.08.2024, Constable Vinod No.21 sent a ruqqa to the Police Station Sadar Nahan, District Sirmaur, through HC Babu Ram No.644 (IO), AHTU/WPS Detection Cell, mentioning therein that the IO, along with other police officials, was on patrolling duty, as well as, the duty to detect the crime, relating to excise, narcotics, anti-human trafficking, force labour and illegal mining, towards Kala Amb.

8. It is the case of the police that at about 08:08pm, when, on their way back to Nahan, at about 10:00pm, they were present at Kanshiwala Vegetable Market, then, a secret information was received regarding the indulgence of a boy,

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namely Sunny S/o Krishan Chand R/o Balmiki Basti, Nahan (applicant), in the business of selling charas and according to the information, the said boy, in vehicle bearing No.HR05-BC-0452, is coming from Ambala side to Nahan side.

9. As per the said information, if the said vehicle is intercepted and search is conducted, then, the large quantity of contraband could be recovered, in this case. According to the IO, in case, he would have made efforts to obtain the search warrant or authorization letter, in that eventuality, there were chances of removing the contraband. As such, he has complied with the provisions of Section 42(2) of the NDPS Act and prepared the report on his laptop and has taken out the print and submitted the same to SDPO (Headquarter), Nahan.

10. It is the further case of the police that thereafter, they had waited for the said vehicle and in the meanwhile, a boy was seen coming on motorcycle from Nahan side, upon which, he was signaled to stop. Subsequently, his name was enquired and he disclosed his name as Ishan, S/o Fakir

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Mohammad, R/o H.No.1150/4, Amarpur Mohalla, Nahan and he was associated as independent witness, in this case. Efforts were also made to request the persons, who were travelling on the road to join as an independent witness, but, all of them have shown their inability.

11. Thereafter, at about 10:30pm, from Kala Amb side, a vehicle bearing No.HR05-BC-0452, make Santro, colour white, being driven by its driver, reached there, which was made to stop, by parking the official vehicle in the centre of the road. Thereafter, IO has shown his identity card to him and on enquiry, he has disclosed his name as Sunny, S/o Krishan Chand, R/o H.No.282/13, Balmiki Basti, Nahan, District Sirmaur (applicant). Subsequently, IO and other police officials had given their search to the applicant and the search of the said vehicle was conducted. During search, near the bottle holder, an empty bag was found to be containing granule-shaped light brown substance. On testing the said substance on the Drug Detection Kit, the same was found to be heroin/chitta and on weighment, it was found to be 11 gms. Thereafter, the

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said contraband was taken into possession and other codal formalities were completed.

12. After registration of the FIR, the police has arrested the applicant. Later on, co-accused Kashish @Shanki Kandhara R/o Ambala was also associated and arrested, in this case. The contraband, so recovered, was sent to FSL, Junga, after complying with the provisions of Section 52A of the NDPS Act and after receiving positive report from there, the police prepared the challan, in this case and submitted the same to the Court of learned Special Judge-II, Nahan, District Sirmaur, H.P.

13. As per the status report, following cases are stated to have been registered, against the applicant:-

> *"(i) CASE FIR No.120/04 dated 05.06.2004 u/s 341,323,506 IPC PS Nahan, Compromised Ld. CJM Nahan on 24-09-2004.*
> *(ii) CASE FIR No.103/05 dated 23/05/05 u/s 504,451,506,34 IPC PS NAHAN Accused Acquitted by Ld.JMIC, Nahan on 22.09.2006*
> *(iii) CASE FIR No.24/05 dated 3/02/05 u/s 452,323 506,325,34 IPC PS NAHAN Accused Convicted By LD CJM Nahan on 31-05-2007*
> *(iv) CASE FIR No.144/13 dated 30/09/13 U/S 22,61-85 ND&PS ACT PS NAHAN Accused Convicted By LD CJM Nahan for six month and fine RS 10,000/- on 07-09-2016*
> *(v) CASE FIR No.55/2014 U/S 39(1)A HP EX ACT PS NAHAN Accused Acquitted by LD ADJ Nahan on*

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21-03-2022
(vi) CASE FIR No.146/15 dated 26/08/15 U/S 363, 366, 342,323, 120B,506 IPC SEC 4,5,(GI) 6 POCSO ACT and SEC 376(2) IPC PS Nahan Accused Acquitted by LD Session Judge Nahan on 15-03-2019
(vii) CASE FIR No.38/2020 dated 25/04/20 U/S 188,269,270 IPC PS Nahan Accused Convicted By LD JMFC Nahan and fine RS 300/- on 12-05-2022
(viii) CASE FIR No.04/21 dated 09/01/21 U/S 21 ND&PS ACT PS Nahan on 22-02-2021 LD Session Judge Nahan which is pending for 30.12.2024 fixation of evidence.
(ix) CASE FIR No.89/2022 dated 10/08/2022 U/S 21-61-85 ND & PS ACT. PS Nahan on 10-10-2022 LD Session Judge Nahan which is pending for 27.12.2024 fixation of evidence."

14. On the basis of the above facts, a prayer has been made to dismiss the bail application.

15. As per the details, reproduced above, in cases, at Sr. No.(i), (ii), (v) and (vi), the applicant was acquitted, whereas, in case, at Sr. No.(iii), which was registered, under Sections 452, 323, 506, 325, 34 of IPC, the applicant has been convicted by the Court of learned CJM, Nahan and in case, at Sr. No.(iv) also, the applicant was convicted for the offence, punishable under Section 22-61-85 of NDPS Act and was sentenced to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs.10,000/-.

16. Similarly, the applicant has been convicted for

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the offence, punishable under Section 188, 269, 270 of IPC, by the Court of learned JMFC, Nahan, whereas, other two cases, which have been registered, under the NDPS Act, are pending adjudication.

17. In such situation, the first question, which arises for determination, before this Court, is as to whether in view of the above cases, the relief, for which, the applicant is otherwise entitled for, can be given to him or not.

18. No doubt, the applicant has been convicted in a case, registered under Sections 22-61-85 of the NDPS Act, vide FIR No.144 of 2013 dated 30.09.2013 and the judgment of conviction and order of sentence of the said case was passed, way back on 07.09.2016, whereas, two other cases have been registered, in the years 2021 and 2022 (cases at Sr. No.viii and ix).

19. Merely, the applicant has been convicted in a case, which was registered, in the year 2013, is too short to bring the applicant, within the ambit of 'habitual offender'.

20. The Hon'ble Supreme Court in '***Dhanji Ram Sharma v. Superintendent of Police, North District***

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Delhi Police', reported in ***1966 AIR SC 1766***, has considered the powers of the police officials to make entries in the surveillance register and also held, as under:-

> *"7. A habitual offender or a person habitually addicted to crime is one who is a criminal by habit or by disposition formed by repetition of crimes. Reasonable belief of the police officer that the suspect is a habitual offender or is a person habitually addicted to crime is sufficient to justify action under Rules 23.4(3)(b) and 23.9(2). Mere belief is not sufficient. The belief must be reasonable, it must be based on reasonable grounds. The suspect may or may not have been convicted of any crime. Even apart from any conviction, there may be reasonable grounds for believing that he is a habitual offender."*

21. In this regard, it is further apt for this Court to rely upon the decision of the Hon'ble Supreme Court in '***Vijay Narain Singh v. State of Bihar'***, reported in ***1984(3) SCC 14***. Relevant paragraphs 11 and 12 of the said judgment are reproduced, as under:-

> *"**11**. According to its ordinary meaning, the word 'habitual' as given in Shorter Oxford English Dictionary, Vol. 1, P.910 is :*
> *"A. adj (1) Belonging to the habit or inward disposition, inherent or latent in the mental constitution;*
>
> *(2) of the nature of a habit; fixed by habit; constantly repeated, customary.*
>
> *B. A habitual criminal, drunkard, etc."*

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> ***12***. *A person is a habitual criminal who by force of habit or inward disposition, inherent or latent in him, has grown accustomed to lead a life of crime. It is the force of habit inherent or latent in an individual with a criminal instinct, with a criminal disposition of mind, that makes him dangerous to the society in general. In strengthen language the word 'habitually' means 'by force of habit'.”*

22. Judging the facts and circumstances of the present case, in the light of the above two decisions of the Hon’ble Supreme Court, this Court is of the view that merely the fact that the applicant has been convicted for the offence, punishable under the provisions of the IPC and in one case, which has been registered under Sections 22-61-85 of NDPS Act, that too, in the year 2013, is not sufficient to hold that the applicant is a habitual offender.

23. Mere registration of two other cases, under the provisions of Section 21 of the NDPS Act, is also not sufficient to take away the presumption of innocence, which is still available to the applicant.

24. Moreover, the applicant cannot be penalized, before conclusion of the trial, merely, on the basis of the conviction, which was recorded, in the case of NDPS Act, way back on 07.09.2016.

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25. Learned Additional Advocate General, appearing for the State, could not satisfy the judicial conscience of this Court, whether, any efforts have been made by the police to approach the appropriate Court for cancelling the bail, granted to the applicant in earlier cases.

26. Furthermore, the present case can be seen from another angle that a person, who has been convicted for the offence punishable, under the provisions of NDPS Act, is also easy prey, to be named as an accused in other cases also. Moreover, the previous conviction is a factor, which can only be considered, by the Court, in case of trial, before the Court of Sessions, under the provisions of Section 236 of the Code of Criminal Procedure (hereinafter referred to as the 'CrPC') and in case of trial of warrant cases, before the Magistrate, under Section 248(3) of the CrPC. Relevant provisions of Sections 236 and 248(3) are reproduced, as under:-

> "***236. Previous conviction.***—*In a case where a previous conviction is charged under the provisions of sub-section (7) of section 211, and the accused does not admit that he has been previously convicted as alleged in the charge, the Judge may, after he has convicted the said accused under section 229 or*

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> *section 235, take evidence in respect of the alleged previous conviction, and shall record a finding thereon: Provided that no such charge shall be read out by the Judge nor shall the accused be asked to plead thereto nor shall the previous conviction be referred to by the prosecution or in any evidence adduced by it, unless and until the accused has been convicted under section 229 or section 235.*
>
> ***248****(****3****).* ***Acquittal or conviction****.—*
> *Where, in any case under this Chapter, a previous conviction is charged under the provisions of sub-section (7) of section 211 and the accused does not admit that he has been previously convicted as alleged in the charge, the Magistrate may, after he has convicted the said accused, take evidence in respect of the alleged previous conviction, and shall record a finding thereon:*
> *Provided that no such charge shall be read out by the Magistrate nor shall the accused be asked to plead thereto nor shall the previous conviction be referred to by the prosecution or in any evidence adduced by it, unless and until the accused has been convicted under sub-section (2).”*

Moreover, the relief of bail cannot be declined to a person, who is otherwise entitled for it, merely on the ground of his previous conviction, until or unless, he does not fall, within the definition of ‘habitual offender’.

27. At the time of deciding the bail application, a delegate balance has to be maintained, as, detailed discussions about the case of the prosecution would cause prejudice to the prosecution’s case, as well as, to the case of the accused.

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28. In the present case, investigation is complete and this fact is sufficient to demonstrate that the custodial interrogation of the applicant is no longer required by the police. Even otherwise, the applicant cannot be kept in the judicial custody, as a matter of punishment or prevention/detention, as, for the prevention/detention, specific provisions have been provided, under the relevant Act/Rules.

29. Moreover, the applicant is the permanent resident of Nahan, District Sirmaur and as such, it cannot be apprehended that in case, he is ordered to be released on bail, he may not be available for the trial.

30. Considering all these facts, this Court is of the view that the bail application is liable to be allowed and is accordingly allowed.

31. Consequently, the applicant is ordered to be released, on bail, in case FIR No.138 of 2024, dated 23.08.2024, registered under Sections 21, 25 and 29 of the NDPS Act, with Police Station Sadar Nahan, District Sirmaur, H.P., on his furnishing personal bonds in the sum

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of Rs.50,000/- with two sureties of the like amount, to the satisfaction of the learned trial Court.

32. This order, however, shall be subject to the following conditions:-

> *a) The applicant shall make himself 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 the appropriate application;*
>
> *b) The applicant shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;*
>
> *c) The applicant shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade them from disclosing such facts to the Court or the Police Officer, and*
>
> *d) The applicant shall not leave the territory of India without the prior permission of the Court.*

33. Any of the observations, made hereinabove, shall not be taken, as an expression of opinion, on the merits of the case, as these observations are confined, only to the disposal of the present bail application.

34. It is made clear that respondent-State is at liberty to move an appropriate application, in case, any of the bail conditions is found violated by the applicant.

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35. The Registry is directed to forward a soft copy of the bail order to the Superintendent of Jail, Model Central Jail, Nahan, through e-mail, with a direction to enter the date of grant of bail in the e-prison software.

36. In case, applicant is not released within a period of seven days, from the date of grant of bail, the Superintendent of Jail, Model Central Jail, Nahan, is directed to inform this fact to the Secretary, DLSA, Sirmaur at Nahan. The Superintendent of Jail, Model Central Jail, Nahan, is further directed that if the applicant fails to furnish the bail bonds, as per the order passed by this Court, within a period of one month from today, then, the said fact be submitted to this Court.

(Virender Singh)
Judge

November 24, 2024
(*Gaurav Thakur*)

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