



THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA
ON THE 20TH DAY OF MAY 2022
BEFORE

HON'BLE MR. JUSTICE SANDEEP SHARMA
CRIMINAL MISC. PETITION(MAIN) NO. 957 OF 2022

Between:-

ANKIT ASHOK NISAR,
AGED 30 YEARS,
SON OF SH. ASHOK,
RESIDENT OF SANTOSH NIWAS ROM NO. 5
S.N. DUBE ROAD, BAGH DEVI NAGGAR,
DAHISAR EAST MUMBAI,
MAHARASHTRA-400 068
THROUGH HIS SISTER
MS. URVI RUPEN GALA,
WIFE OF SHRI RUPEN GALA
RESIDENT OF BUILDING NO. 20, A-61,
SHRI SAHAJANAND KRIPA CHS
MANISH NAGAR, 4 BUNGLOWS,
ANDHERI WEST, MUMBAI,
MUMBAI SUBURBAN,
MAHARASHTRA-400 053

(BY MR. AZAD KAITH AND MR. ASHOK KUMAR
ADVOCATES)

PETITIONER

AND

STATE OF HIMACHAL PRADESH

RESPONDENT

(BY MR. SUDHIR BHATNAGAR,
ADDITIONAL ADVOCATE GENERAL)

ASI VIJ RAM, POLICE STATION BHUNTER,
DISTRICT KULLU, HIMACHAL PRADESH.

Whether approved for reporting:

This petition coming on for orders this day, the court passed the following:

ORDER

By way of instant petition filed under S. 439 CrPC, prayer has been made on behalf the bail petitioner namely Ankit Ashok Kumar, who is behind the bars for grant of regular bail in case FIR No. 315, dated 20.12.2020, under

Sections 20 & 29 of the Narcotic Drugs and Psychotropic Substances Act (in short "the Act") registered at Police Station Bhuntar, District Kullu, Himachal Pradesh.

2. Respondent-State has filed status report and ASI Vij Ram, Police Station Bhuntar, District Kullu, Himachal Pradesh has also come Present with record. Record perused and returned.

3. Close scrutiny of the record as well as status report made available to this Court reveals that on 19.12.2020, police party present at TCP Bajaura in connection with traffic checking, stopped Volvo Bus bearing registration No. HR38Z- 0003 for checking. Allegedly, police party after having associated two independent witnesses, i.e. driver and conductor of the bus namely Pawan Kumar and Suresh Kumar, started checking of the luggage of the passengers. Since, person sitting on seat No.3, got perplexed after having seen police and passed over one rucksack/Pithu bag to his co-passenger sitting on seat No.4, i.e. Mihi Ojha; and passenger sitting on seat No.4, tried to hide the same below his seat, police deemed it necessary to cause personal search of the passengers sitting on seat Nos. 3 & 4 as well as rucksack kept by them under their seats. On checking police allegedly recovered commercial quantity of contraband, i.e. 1.816 grams charas from the bag. Since, no plausible explanation came to be rendered on record qua the possession of aforesaid commercial quantity of contraband from the passengers sitting on seat Nos. 3 & 4, police after having de-boarded them from bus and after completion of necessary codal formalities, lodged FIR, detailed hereinabove against both the accused namely Mihir Oza and Ankit i.e. present bail petitioner and since then, present bail petitioner is behind the bars and co-accused Mihir Ojha stands enlarged on bail. Allegedly, both the above-named persons

disclosed to the police during investigation that some unknown persons had handed over rucksack/Pithu to them for further delivering the same to somebody at Delhi and they were told that in lieu of that, they would get Rs.40,000/-. Since, police was not satisfied with the aforesaid disclosure made by above-named persons, it deemed necessary to investigate the matter with regard to financial transactions, if any, from the bank accounts of the persons named hereinabove. During investigation, police found that both the above-named persons sent Rs. 49,000/- each on 18.12.2020 to person namely Sonam Dorje, owner of Shanti Cafe situate at Kasol Manikaran. Apprehending that aforesaid transaction was made with regard to illegal trade of narcotics, police also interrogated Sonam Dorje, owner of the Shanti Cafe, who allegedly admitted that the aforesaid amount was received by him for sale/purchase of contraband allegedly recovered from the conscious possession of the persons, namely Mihir Ojha and Ankit, i.e. the present bail petitioner. Since investigation in the case is complete and nothing remains to be recovered from the present bail petitioner, he has approached this Court in the instant proceedings, for grant of regular bail

4. It may be noticed that prior to filing of petition at hand, petitioner had earlier approached this Court by way of CrMP(M) No. 2469 of 2021, but the same was dismissed as withdrawn on 5.1.2022, reserving liberty to the petitioner to file appropriate proceedings in appropriate court of law at an appropriator stage.

5. Mr. Sudhir Bhatnagar, learned Additional Advocate General while fairly admitting the factum with regard to filing of challan in the competent court of law, contends that though nothing remains to be recovered from the present bail petitioner, but keeping in view the gravity of the offences alleged

to have been committed by him, he does not deserve any leniency. Mr. Bhatnagar further states that there is overwhelming evidence adduced on record by respondent-State suggestive of the fact that the bail petitioner transferred money in the account of person namely Sonam Dorje, who in turn provided them commercial quantity of *Charas* and as such, it cannot be said that they have been falsely implicated. While making this Court to peruse the record made available by investigating agency, Mr. Bhatnagar, also states that the commercial quantity of contraband was recovered from the bag of the present bail petitioner and co-accused Mihir Ojha in the presence of independent witnesses. He states that though independent witnesses were declared hostile, but if cross-examination conducted upon these witnesses is perused in its entirety, it clearly establishes the case of the prosecution and as such, prayer made on behalf of the petitioner deserves outright rejection.

6. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that the case of the prosecution is that on 19.12.2020, police officials present at TCP Bajaura stopped Volvo Bus bearing No. HR-38Z-0003 for checking and allegedly recovered one bag kept under seats Nos. 3 and 4 occupied by present bail petitioner and co-accused Mihir Ojha in the presence of two independent witnesses namely Suresh Kumar and Pawan Kumar, i.e. driver and conductor of the bus, but if the statements made by these witnesses in the trial court are perused juxtaposing each other, it creates serious doubt with regard to recovery of contraband that too, from the bag/luggage of present bail petitioner and co-accused Mihir Ojha. As per police, person sitting on seat No. 3, got perplexed after having seen the police and handed /passed over bag to his co-passenger sitting on seat No.4 i.e. Mihir Ojha, who in turn tried to hide

the same below his seat, but such claim of the police is otherwise contrary to the fard/recovery memo, which reveals that the police officials pulled out the bag from below the seat of passengers sitting on seat Nos. 3 and 4 in the presence of independent witnesses. Both the above named independent witnesses have categorically stated that the bus was stopped for checking by Narco officials and bag was recovered from the rack over the seats No.3 & 4.

7. PW-10 Suresh Kumar, stated that the officials searched the bus along with Pawan Kumar, i.e. Conductor of the Bus and recovered one bag kept on the rack above seat Nos. 3 & 4. He further deposed that police inquired the passengers as well as conductor about the bag, but they disowned the same and thereafter officials took out black colour bag inside TCP Bajaura and on opening the same, black colour substance was found in the polythene packet. He deposed that police officials came after one and half hour on the spot and thereafter, papers were prepared by them. Police also procured our signatures on the papers and cloth. Since the passengers sitting in the bus were pressurizing them to take the bus, as such, they were allowed to take the bus. Though this witness was declared hostile, but cross-examination conducted upon this witnesses nowhere suggests that the prosecution was able to extract anything contrary to what this witness stated in his cross-examination. Though learned Public Prosecutor made a serious effort to get it extracted from this witness that bus was got stopped for checking by police officials, but repeatedly he voluntarily stated that the bus was stopped by Narco officials and after one and half hour police came on the spot.

8. PW-11 Pawan Kumar, conductor of bus, deposed that when bus reached at TCP Bajaura, officials signalled the bus to stop and told that they

are Narco officials. This witness stated that they parked the bus on the side of the road and he and driver of bus got down from the bus; and 3-4 officials entered the bus. They checked the bus and found one bag in the bus. They inquired from the passengers about the bag and passengers disowned the bag. This witness further stated that thereafter officials of Narco asked him about the bag, then he again asked the passengers about the bag and they again disowned the same. He deposed that since the bag was found above seats Nos. 3 and 4, the officials suspected the passengers sitting on seat Nos. 3 and 4 and thereafter they took both the passengers alongwith bag to the room of TCP Bajaura. It is deposed by this witness that the officials opened the bag and found black coloured substance in a polythene bag and thereafter, the officials telephonically called the police officials, who came on the spot after one and half hour. Police officials interrogated the accused and thereafter, this witness was asked about their luggage. He took out the luggage of both the passengers, sitting on seat Nos. 3 and 4 and thereafter, police checked the same. He deposed that on personal search of both the passengers, police recovered their PAN cards, DL and Adhaar cards etc.

9. If the statements made by the aforesaid independent witnesses are read in conjunction, it cannot be said that there are any inconsistencies and contradictions, rather both these witnesses in unison have stated that the bus was stopped by Narco officials and on checking contraband was recovered from the bag kept on rack above the passengers sitting on seats Nos. 3 and 4, not from below the seats Nos. 3 and 4. Most importantly, PW-11 Pawan categorically stated that on personal search of both the passengers, police recovered their DL, Pan Cards, Adhaar Cards etc.

10. Interestingly, the case of the prosecution is that DL, PAN Cards and Adhaar Cards of both the accused were recovered from the bag containing the contraband, which fact is totally contradictory to the statements made by independent witnesses. Record reveals that the police officials after having effected personal search of the accused prepared Fard/Jama Talashi and allegedly recovered wallet, watch, currency notes, one ATM card and One Mobile Phone. Once, the bail petitioner was found carrying the wallet, it is not understood, rather is highly unbelievable that a person would keep his driving licence and Adhaar card in a bag containing the contraband. Had one of the accused kept his DL /Adhaar card in bag containing contraband, this court may have accepted that version, but it is highly unbelievable that both the accused had kept their Adhaar Card and DL card in the bag, allegedly recovered by the police, containing commercial quantity of the contraband.

11. Leaving everything aside, independent witnesses namely Pawan Kumar PW-11 has categorically stated that DL, PAN Cards and Adhaar Cards were recovered on personal search of the accused persons. Similarly, PW-10 has categorically stated in his examination-in-chief that the documents referred to hereinabove, were recovered by the Police during personal search of the accused persons. As per both the above said independent witnesses, bus for checking was stopped at the first instance by Narco officials, who in turn, after one and half hour of seizure of the contraband, telephonically informed the police. It is not understood that why such facts are totally missing in the status report as well as record made available to this court, rather, specific case of the prosecution as has been canvassed before this Court is that the Police party at TCP Bajaura, stopped the vehicle for checking and allegedly recovered the commercial quantity of contraband, from the bag kept

by the passengers sitting on Seats Nos. 3 and 4 below their seats. Both the independent witnesses have categorically stated that the bag was recovered from the rack above seats Nos. 3 and 4 and none of the passengers sitting in the bus owned the bag and as such, same was taken to TCP Bajaura and after some time, the police made the passengers sitting on seat Nos. 3 and 4 alight from the bus. No doubt, both these witnesses have admitted their signatures on recovery memo, but they have also stated that their signatures were obtained on blank papers and since the passengers sitting in the bus were pressurizing them to take the bus, as such, they were allowed to take the bus. These witnesses have also stated that since some of the passengers had to take flight from Chandigarh and were to appear in examination, police permitted them to take the bus and as such, they left the place. There is no cross-examination qua aforesaid aspect of the matter conducted by the prosecution upon these two witnesses, who nowhere supported the case of the prosecution.

12. Learned Additional Advocate General, while inviting attention of this court to the visitors' register of Shanti Cafe, contended that present bail petitioner alongwith co-accused Mihir Ojha not only visited Shanti Cafe with a purpose to purchase contraband from Sonam Dorje, owner of Shanti Coffee House, but in that regard, they also transferred money on-line. However, having carefully perused the visitors' register, this court finds that all the entries except at Sr. No.71 have been made by one person, having specific handwriting, but entry made at Sr. No.71 is altogether different from the entries made at other serial numbers. Aforesaid fact gains significance because of statement given by PW-9, Pawan, Cook working in the Shanti Coffee House. This witness deposed that on 17.12.2020, Ankit Kumar son of

Ashok resident of Santosh Naggar, i.e. present bail petitioner, alongwith co-accused Mihir Ojha visited the Cafe and during evening at 7.00 p.m made entry in the register in this regard and they departed from the Cafe on next day at 9/10 A.M. In his cross-examination, this witness admitted that there is cutting in the column of date and time of arrival (Ext. PW- 9/A) at Sr. Nos. 69, 71 & 72. He also admitted that in the column of date and time of arrival in Ext. PW-9/A, date "15" has been written over figure "19", similarly, "18" has been converted into "16" at Sr. No. 70 and date "18" has been written by cutting date "28". Most importantly, this witness in his cross-examination self stated that three police personnel had come to Cafe and asked him to make entry at Sr. No. 71 in the register and he has done so at their instance.

13. No doubt, financial transactions placed on record by the prosecution reveals that the present bail petitioner and co-accused Ashok Ankit, transferred some amount in the name of Sonam Dorje, but that may not be sufficient to conclude complicity, if any, of the bail petitioner in the case, especially, when they specifically set up a case that they do tour, travelling and event management business.

14. Though the case at hand is to be decided by learned trial court in the totality of the facts and evidence led on record by prosecution, but keeping in view aforesaid glaring aspects of the matter, especially with regard to mode and manner of recovery coupled with the fact that both the independent witnesses have nowhere supported the case of the prosecution that the bag containing contraband was recovered from below the seats Nos. 3 and 4, this Court sees no reason to let bail petitioner incarcerate in jail for an indefinite period during trial.

15. Leaving everything aside, as has been taken note herein above, it is highly unbelievable that the persons carrying/transporting commercial quantity of contraband, would keep documents relating to his/her identity in the bag containing contraband, which itself creates suspicion with regard to correctness of the prosecution story, as normally, Adhaar card is kept in purse or pocket not in bag.

16. Since, in the case at hand, commercial quantity of contraband came to be recovered, rigors of Section 37 are attracted, but bare perusal of Section 37 of the Act, nowhere suggests that there is complete bar for this Court to grant bail in cases involving commercial quantity, rather, in such like cases, court after having afforded an opportunity of being heard to the public prosecutor can proceed to grant bail in cases involving commercial quantity, if it is satisfied that the accused has been falsely implicated and there is no likelihood of his indulging in such activities again during trial. In the case at hand, for the facts/reasons noted/stated hereinabove, this Court has a reason to presume and believe that recovery is doubtful and perusal of status report clearly reveals that at present no other case save and except the case at hand stands registered against the bail petitioner under Narcotic Drugs & Psychotropic Substances Act.

17. Hon'ble Apex Court as well as this Court in catena of cases have repeatedly held that till the time, guilt of a person is proved in accordance with law, he/she is deemed to be innocent and as such, no fruitful purpose would be served by keeping the bail petitioner behind the bars for an indefinite period during trial, especially when nothing remains to be recovered from him. Apprehension expressed by learned Additional Advocate General that in the

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

18. Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh vs. State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has been further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty.

19. Hon'ble Apex Court in **Sanjay Chandra versus Central Bureau of Investigation** (2012)1 Supreme Court Cases 49 has held that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that 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.

20. In **Manoranjana Sinh alias Gupta versus CBI**, (2017) 5 SCC 218, Hon'ble Apex Court has held that the 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 also, normal rule is of bail and not jail. Apart from above, 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.

21. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496, has laid down various principles to be kept in mind, while deciding petition for bail viz. prima facie case, nature and gravity of accusation, punishment involved, apprehension of repetition of offence and witnesses being influenced.

22. In view of above, bail petitioner has carved out a case for himself, as such, present petition is allowed. Bail petitioner is ordered to be enlarged on bail, subject to furnishing bail bonds in the sum of Rs.2.00 Lakh with one local surety in the like amount, to the satisfaction of the learned trial Court, besides the following conditions:

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

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

24. 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 petition alone. The petition stands accordingly disposed of.

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May 20, 2022
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**(Sandeep Sharma),
Judge**

High Court of H.P.