

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.MP(M) Nos.1303 & 1321 of 2020

Reserved on: 26th August, 2020

Decided on: 31st August, 2020

1. **Cr.MP(M) No.1303 of 2020**

Sunil Kumar

.....Petitioner

Versus

The State of Himachal Pradesh

.....Respondent

2. **Cr.MP(M) No.1321 of 2020**

Sunil Kumar

.....Petitioner

Versus

State of Himachal Pradesh

.....Respondent

Coram

The Hon'ble Ms. Jyotsna Rewal Dua, Judge

Whether approved for reporting?¹ Yes

For the Petitioner:

Mr. Vijender Katoch and Mr. Gobind Korla, Advocates, through Video Conference.

For the Respondent:

Mr. Anil Jaswal, Additional Advocate General with Mr. Manoj Bagga, Assistant Advocate General, through Video Conference.

Mr. Virender Singh Chauhan, Senior Advocate as Amicus Curiae, through Video Conference.

Jyotsna Rewal Dua, Judge

Two separate bail petitions under Section 439 of the Code of Criminal Procedure have been preferred by the

¹ Whether reporters of print and electronic media may be allowed to see the order?

same petitioner, i.e. Sunil Kumar, through two different lawyers. In both these petitions, prayer is for release of petitioner on bail in FIR No.164 of 2019, registered on 01.11.2019 under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act') at Police Station Dharamshala, District Kangra, HP.

2. Facts regarding simultaneous filing of two bail petitions by one petitioner:-

2(i). Bail Petition, being CrMP(M) No.1303 of 2020, was instituted through an e-mail on 04.08.2020 on a Power of Attorney signed by the petitioner with endorsement of the Assistant Superintendent Jail, Lala Lajpat Rai District & Open Air Correctional Home, Dharamshala, Himachal Pradesh, dated 14.07.2020. Alongwith this bail petition, an order passed on 02.01.2020 by the learned Special Judge-III, Kangra at Dharamshala, in Bail Application No.1-D/2020, titled Atul Chambyal Versus The State of Himachal Pradesh, has been appended. Vide this order, Atul Chambyal, a co-accused in the FIR was enlarged on bail. Another order dated 14.07.2020 passed by the learned Special Judge-II, Kangra at Dharamshala, declining the bail application of the petitioner has also been appended. In para 26 of bail petition, an averment has been made that *"no other same or similar pending application for the grant of*

bail save and except the bail application No.171-D/XXII/2020, which was filed before the Ld. Special Judge-III, Kangra at Dharamshala as mentioned at para-4 of the bail petition, and neither is the same or similar application/petition for grant of bail pending adjudication before any other Court of law including the Hon'ble Apex Court". The bail petition is not supported by any affidavit.

2(ii). Second bail petition, being Cr.MP(M) No.1321/2020, was also instituted through an e-mail on 06.08.2020. It is also on the power of attorney signed by the petitioner with the endorsement of the same Assistant Superintendent Jail, Lala Lajpat Rai District & Open Air Correctional Home, Dharamshala, Himachal Pradesh, dated 30.07.2020. Though no order or document has been appended alongwith the bail petition, but the petition records the factum of rejection of bail application of the petitioner by the learned Special Judge-II, Kangra at Dharamshala, vide order dated 14.07.2020 and enlargement on bail of co-accused Atul Chambyal by the learned Special Judge-III, Kangra at Dharamshala, vide order dated 02.01.2020. In para-9 of this petition, there is a specific averment to the effect that no similar petition had been previously preferred by the petitioner in this Court on

same cause of action. It is apposite to reproduce para-9 of the second bail petition hereinafter:-

“9. That no such or similar petition has earlier been filed by the petitioner either in this Hon’ble Court or in the Hon’ble Supreme Court of India or any other court on the same cause of action except the one mentioned above which was dismissed by the Ld. Special Judge-II, Kangra at Dharamshala, District Kangra (H.P.) vide order dated 14.07.2020.”

This bail petition is also not supported by any affidavit.

2(iii). Both these petitions, i.e. Cr.MP(M) Nos.1303 of 2020 and 1321 of 2020, were listed on 06.8.2020 and 07.8.2020, respectively and incidentally before this Court, when the respondent-State was directed to file status reports in both these matters before the next date of hearing, given as 19.08.2020 and 20.08.2020, respectively. On 19.08.2020, when the first bail petition (Cr.MP(M) No.1303/2020) was listed, it was pointed out by the Court Reader that Cr.MP(M) No.1321 of 2020, arising out of the same FIR, is listed on 20.08.2020. Resultantly, both the above petitions were ordered to be listed together on 20.08.2020. On 21.08.2020, both the learned counsel representing the same petitioner in separate bail petitions professed to have separate and positive instructions for proceeding ahead with their separate bail petitions. In view of emergence of serious related issues, Mr. Virender Singh

Chauhan, learned Senior Counsel graciously accepted the request to assist as an amicus curiae in the matter.

3. During hearing of the case, learned counsel for the petitioner in Cr.MP(M) No.1303 of 2020 stated that the brief was handed-over to him by a local lawyer, whereas learned counsel for the petitioner in Cr.MP(M) No.1321 of 2020 submitted that he got the brief from the parents/relatives of the bail petitioner. How in quick succession and at whose instance, the Power of Attorneys of the petitioner (in custody) were obtained is not forthcoming. Learned Additional Advocate General has also stated at the bar that the Assistant Superintendent Jail, Lala Lajpat Rai District & Open Air Correctional Home, Dharamshala, Himachal Pradesh, has not maintained any record that at whose instance, he had endorsed, attested and issued two Power of Attorneys signed and thumb impressed by the same petitioner. While hearing of the case was in progress, learned counsel for the petitioner in Cr.MP(M) No.1321 of 2020 requested for permission to withdraw the bail petition while marking his presence as counsel in Cr.MP(M) No.1303 of 2020 alongwith the original counsel therein. This request was not opposed by learned counsel for the petitioner in Cr.MP(M) No.1303 of 2020.

Institution of two bail petitions arising out of the same FIR by one petitioner is a matter of serious concern. Both these petitions have been filed almost simultaneously in this Court. Though, incidentally, these two petitions have been listed before this Court, but there was always a chance of theirs being listed in different Hon'ble Courts. This Court expresses serious concern over the misconduct of the bail petitioner in simultaneously filing two parallel bail petitions before this Court in the same case without divulging the complete details. The conduct of the petitioner is appalling. Filing of two petitions by same petitioner arising out of same FIR amounts to abuse of judicial process and is strongly condemned. The Court expresses its disapproval over the manner in which simultaneously two bail petitions have been filed in this Court and records its indignation. The Court was inclined to take action against such conduct. However, on the fervent request made by learned counsel for the petitioner(s) and supported by the learned Amicus Curiae, Cr.MP(M) No.1321 of 2020 is ordered to be closed as withdrawn with strong warning to the petitioner/his relatives not to indulge in such activities in future. However, before proceeding with the merits of the case in Cr.MP(M) No.1303 of 2020, in order to ensure that

such like incidents do not happen in future, following observations and consequent directions need to be noticed:-

3(a). Separate status reports in both these bail petitions have been filed by the respondent-State. These status reports are verbatim the same. There is no reference in either of the status reports about the same petitioner having filed another bail petition in this Court under the same FIR. These are serious lapses. It has also come to the notice of this Court that invariably, the status reports filed by the respondent-State do not reflect any history of previous bail petitions filed by the concerned petitioner. Such record should also be maintained by the investigating agency. It is necessary that the status report filed by the State should reflect details of all previous bail petitions filed by the petitioner irrespective of the fact whether the same were eventually withdrawn by him or not. Status reports should also clearly indicate criminal history of the accused persons involved in the FIR, as available with the investigating agency. Directed accordingly. Director General of Police, Himachal Pradesh, is therefore directed through the learned Additional Advocate General to forthwith issue necessary orders in this regard to all concerned and ensure compliance.

3(b). In bail matters, lawyers are being engaged, *inter-alia*, on the basis of Power of Attorney of the accused (in custody) endorsed and attested by the Jail Superintendents. In the present case also, both the bail petitions were filed on the strength of petitioner's Power of Attorneys attested and endorsed on different dates by the same concerned Jail Superintendent. Learned Additional Advocate General, as noticed above, has submitted that no record had been maintained by the concerned Jail Superintendent with respect to execution of power of attorneys by the persons in custody. Maintenance of such record is essential not only to avoid situations like the present one, but also to prevent mischief which may be caused to the accused in custody. It is directed that henceforth all Jail Superintendents will maintain proper records with respect to identification of the person at whose instance the power of attorney of the person in custody was being attested and endorsed by the Jail Superintendents. The record amongst others should contain details of name/address/Aadhar Card detail/telephone numbers/relation with accused/purpose for obtaining power of attorney etc. The Director General of Prisons & Correctional Services, Himachal Pradesh, through the learned Additional

Advocate General is directed to forthwith issue necessary orders in this regard to all the Jail Superintendents and ensure compliance.

3(c). There is no averment in any of the bail petitions that at whose instance and instructions, the bail petitions were filed. There is no affidavit alongwith the bail petitions. In the second bail petition, bearing Cr.MP(M) No.1321 of 2020, there is a specific averment of the petitioner's having not filed any similar bail petition in this Court on the same cause of action. The fact remains that a petition was filed in this Court at his instance just two days prior to filing of this petition arising out of the same FIR, which was pending for adjudication. Filing of the bail petitions in this Court at present is governed by Rule 5 under heading 'C' of Chapter 6 of The High Court of Himachal Pradesh (Appellate Side) Rules, 1997. The rule reads as under:-

"C. *Miscellaneous*

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"5. *In every application for bail presented to the High Court the petitioner shall state whether similar application has or has not been made to any other Court, and if made shall state the result thereof. An application which does not contain this information shall be returned for re-submission with the necessary information.*"

The situations similar to the one arising in the instant case perhaps could have been avoided had it been mandatory to plead in the petition that on whose instructions, the bail petition was being moved. Learned Amicus Curiae suggested that the persons who are authorised by the accused in custody for moving the bail application should be directed to file their personal affidavit stating therein that they have been authorised by the bail accused to move the bail application. Learned Amicus Curiae brought to the notice Chapter-13 of the Draft Rules and Order of H.P. High Court, Volume-III, pertaining to 'Bail and Re-cognizance', clause 2(i) of which reads as under:-

“(i) There should be a specific statement in the bail application regarding pendency or decision of any other bail application filed in any Court by the same accused in the same case. If the accused applicant is not in custody, he shall also file an affidavit, in this regard. However, if the accused-applicant is in custody, such an affidavit may be filed by any other person on his behalf being familiar with the facts.”

The above extract however is presently in draft state and has not been finalized.

However, taking cognizance of the situation, which arose in the instant case and to avoid its repetition in future, the Registry of this Court through the learned Registrar General is directed to try and evolve a software wherein filing of more than one bail petition in this Court

by the same petitioner during pendency of previous bail petition, arising out of same FIR can be detected and consequent steps can be taken at the threshold.

4. Main Case:-

4(i). As per the status report, on 01.11.2019, a Police Patrolling Party had placed a *naka* near Sudhed Khad. At around 4:00 pm, a motorcycle coming from Charhi side and going towards Dharamshala, came to the spot. Its driver was not wearing the helmet, therefore, it was signalled to stop. While the Driver was being asked to show the requisite documents, the pillion rider suddenly jumped and fled towards the khad. Seeing this, the driver also tried to flee away from the spot alongwith the motorcycle. He was, however, apprehended by the police party.

4(ii). Independent witnesses were associated in search of the motorcycle. During search, black brown coloured substance was recovered underneath the motorcycle seat. The drug detection kit confirmed the recovered article as contraband cannabis. The driver of the motorcycle gave his name as 'Atul Chambyal' and that of the pillion rider, who had fled away from the spot, as 'Sunil Kumar' (petitioner). The recovered cannabis measured 122 grams on electronic scale, which led to registration of the

instant FIR. Atul Chambyal (driver of the motorcycle in question) was arrested on 01.11.2019. Challan against him was presented on 18.01.2020.

4(iii). The petitioner, who had fled away from the spot, could be arrested on 29.05.2020. It has come in the status report that the petitioner was previously also involved in FIR No.256/2019, dated 06.10.2019, registered at Police Station Sadar, District Chamba, under Section 20 of the NDPS Act. Challan against the petitioner in the instant case was presented before the learned Sessions Judge, Kangra at Dharamshala, on 20.06.2020.

5. Learned counsel for the petitioner submitted that:- the petitioner has been falsely implicated with the offences alleged against him in the FIR; co-accused Atul Chambyal has already been enlarged on bail by the learned Special Judge-III, Kangra at Dharamshala, vide order dated 02.01.2020; the quantity of the contraband allegedly recovered from the motorcycle in question was 122 grams cannabis, which falls in the 'intermediate quantity' and, therefore, rigors of Section 37 of the NDPS Act will not be attracted.

Learned Additional Advocate General submitted that the petitioner had fled away from the spot. He has

criminal history inasmuch as one FIR was registered against him in 2019 under Section 20 of the NDPS Act. Thus, he prayed for not accepting the bail petition.

6. The quantity of the contraband cannabis allegedly recovered from the motorcycle driven by one Atul Chambyal with the petitioner as pillion rider, was 122 grams. The recovered contraband though is more than 'small' and less than 'commercial' and falls in the commonly known as 'intermediate quantity', however, it is nearer to 100 grams notified as small quantity under the NDPS Act. Therefore, rigors of Section 37 of the NDPS Act are not attracted. The driver of the Motorcycle, Atul Chambyal, has already been enlarged on bail. In respect of the previous FIR registered against the petitioner under Section 20 of the NDPS Act at Police Station Sadar, District Chamba, a stringent condition can be imposed upon him that in case he, in future, is found to be involved in any offence under NDPS Act, then the instant bail being granted to him is liable to be cancelled on this count. Investigation in the case is complete and challan stands presented. His further continuation in custody will not serve any fruitful purpose. Trial of the case will take sufficient time and the petitioner cannot be kept behind the bars for an indefinite period.

Accordingly, the present petition is allowed and the bail petitioner is ordered to be released on bail in the aforesaid FIR on his furnishing personal bond in the sum of Rs.50,000/- (Rupees Fifty Thousand only) with one local surety in the like amount to the satisfaction of the learned trial Court having jurisdiction over the Police Station concerned, subject to the following conditions:-

- (i).** The petitioner shall join and cooperate the investigation of the case as and when called for by the Investigating Officer in accordance with law.
- (ii).** The petitioner shall not temper with the evidence or hamper the investigation in any manner whatsoever.
- (iii).** The petitioner will not leave India without prior permission of the Court.
- (iv).** The petitioner shall not make any inducement, threat or promise, directly or indirectly, to the Investigating Officer or any person acquainted with the facts of the case to dissuade him/her from disclosing such facts to the Court or any Police Officer.
- (v).** In case the petitioner is put to trial, then he shall attend the trial on every hearing, unless exempted in accordance with law.
- (vi).** Petitioner shall inform the Station House Officer of the concerned police station about his place of residence during bail and trial.

Any change in the same shall also be communicated within two weeks thereafter. Petitioner shall furnish details of his Aadhar Card, Telephone Number, E-mail, PAN Card, Bank Account Number, if any.

(vii). It is made clear that in case the petitioner is arraigned as an accused in future, in any FIR under NDPS Act, then this bail is liable to be cancelled. It is open for the Investigating Agency to move appropriate application in that regard.

7. In case of violation of any of the terms & conditions of the bail, respondent-State shall be at liberty to move appropriate application for cancellation of the bail. It is made clear that observations made above are only for the purpose of adjudication of instant bail petitions and shall not be construed as an opinion on the merits of the matter. Learned Trial Court shall decide the matter without being influenced by any of the observations made hereinabove.

Authenticated copy be supplied to learned counsel for the parties by the Secretary. A copy of this order be also sent to the Director General of Police, Himachal Pradesh, Director General of Prisons & Correctional Services, Himachal Pradesh and The Registrar General of High Court of Himachal Pradesh for compliance.

With the aforesaid observations, the present petitions stand disposed of, so also the pending miscellaneous applications, if any. Before parting, I place on record my appreciation for the assistance rendered by learned Amicus Curiae.

(Jyotsna Rewal Dua)
Judge

August 31, 2020
Mukesh

High Court of H.P.