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IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. MP(M) No. 2804 of 2023
Reserved on: 16.11.2023
Date of Decision: 01.12.2023.

Satish Kumar ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

Coram
Hon'ble Mr. Justice Rakesh Kainthla, Judge.
Whether approved for reporting?[1] No.

For the Petitioner : M/s Ankita and Atul Sharma Advocates.

For the Respondent : Ms Avni Kochhar, Deputy Advocate General with HC Harish Kumar, No. 20, IO, Police Post Saproon, Police Station, District Solan, H.P.

Rakesh Kainthla, Judge

The petitioner has filed the present petition seeking the grant of regular bail. It has been asserted that FIR No. 188 of 2023, dated 6.9.2023 was registered against the petitioner for the commission of offences punishable under Sections 21 and 29

[1] Whether reporters of Local Papers may be allowed to see the judgment? Yes.

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of the Narcotic Drugs and Psychotropic Substances Act (in short 'the ND&PS Act'). As per the police version on 6.9.2023 at around 2:10 PM. The police stopped a vehicle bearing registration no. UP-24-AT-1960 and recovered 101 grams of heroin from it. Arun Yadav was driving the vehicle. He was arrested. He disclosed on inquiry that the heroin was supplied by the present petitioner-Satish Kumar. The petitioner is innocent and he was falsely implicated. The petitioner would abide by all the terms and conditions, which may be imposed by the Court. Hence, the present petition.

2. The petition was opposed by filing a status report, asserting that the police recovered 101 grams of heroin from the vehicle bearing registration no. UP-24-AT-1960 being driven by Arun Yadav. Arun Yadav disclosed during the interrogation that heroin was supplied by present petitioner Satish Kumar on 5.9.2023. He also identified the place where the heroin was supplied. The mobile phone disclosed the transfer of ₹6,500/- from the account of Satish Kumar to Sai African Super Market. Satish Kumar disclosed on inquiry that he had transferred ₹70,000/- to Sai African Super Market. The involvement of the owner Sameer Shrivastva was found, who was also arrested on

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16.9.2023. Satish Kumar had handed over the heroin to Arun Yadav who was apprehended with the same. The SIM in the mobile phone of Satish Kumar was in the name of Sonu, who issued a certificate that Satish Kumar was using the SIM. The involvement of Sonu, Prem Chand, Arun Yadav, Udayveer Singh, Sameer Shrivastava and Ndiaye Bassirou was found in the commission of the offence. The petitioner is a resident of a different State and he would abscond. He was earlier involved in the commission of a similar offence and FIR No. 71 of 2023 was registered against him in the Police Station, Dhalli for the commission of an offence punishable under Sections 21 and 29 of ND&PS Act. Therefore, it was prayed that the present petition be dismissed.

3. I have heard Ms. Ankita and Mr. Atul Sharma, learned Counsel for the petitioner and Ms. Avni Kochhar, Deputy Advocate General for the respondent-State.

4. Ms. Ankita and Mr. Atul Sharma, learned Counsel for the petitioner submitted that there is no evidence against the petitioner except the statement made by the co-accused. The same is inadmissible and cannot be used. Therefore, they prayed

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that the present petition be allowed and the petitioner be released on bail.

5. Ms Avni Kochhar, learned Deputy Advocate General for the respondent-State submitted that the money was transferred by the petitioner to the co-accused which corroborates the prosecution version regarding the involvement of the petitioner. Arun Yadav identified the place where the heroin was supplied by the petitioner. These are admissible under Section 27 of the Indian Evidence Act. Therefore, she prayed that the present petition be dismissed.

6. I have given considerable thought to the rival submissions at the bar and have gone through the record carefully.

7. The Hon'ble Supreme Court discussed the parameters for granting the bail in ***Bhagwan Singh v. Dilip Kumar, 2023 SCC OnLine SC 1059*** as under:-

> **12.** The grant of bail is a discretionary relief which necessarily means that such discretion would have to be exercised in a judicious manner and not as a matter of course. The grant of bail is dependent upon contextual facts of the matter being dealt with by the Court and may vary from case to case. There cannot be any exhaustive

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parameters set out for considering the application for a grant of bail. However, it can be noted that;

> (a) While granting bail the court has to keep in mind factors such as the nature of accusations, severity of the punishment, if the accusations entail a conviction and the nature of evidence in support of the accusations;
>
> (b) reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the Court in the matter of grant of bail.
>
> (c) While it is not accepted to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought to be always a prima facie satisfaction of the Court in support of the charge.
>
> (d) Frivility of prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to have an order of bail.

13. We may also profitably refer to a decision of this Court in ***Kalyan Chandra Sarkar** v. **Rajesh Ranjan @ Pappu Yadav (2004) 7 SCC 528*** where the parameters to be taken into consideration for the grant of bail by the Courts have been explained in the following words:

> "11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie

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> concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:
>
> > (*a*) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.
> >
> > (b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.
> >
> > (c) Prima facie satisfaction of the court in support of the charge. (See ***Ram Govind Upadhyay v. Sudarshan Singh [(2002) 3 SCC 598: 2002 SCC (Cri) 688] and Puran v. Rambilas [(2001) 6 SCC 338: 2001 SCC (Cri) 1124]***.)"

8. A similar view was taken in ***State of Haryana vs Dharamraj*** 2023 ***SCC Online 1085***, wherein it was observed:

> **7.** A foray, albeit brief, into relevant precedents is warranted. This Court considered the factors to guide the grant of bail in ***Ram Govind Upadhyay*** v. ***Sudarshan Singh***, *(2002) 3 SCC 598* and ***Kalyan Chandra Sarkar*** v. ***Rajesh Ranjan***, ***(2004) 7 SCC 528***. In ***Prasanta Kumar Sarkar*** v. ***Ashis Chatterjee***, ***(2010) 14 SCC 496***, the relevant principles were restated thus:
>
> > '*9. … It is trite that this Court does not, normally, interfere with an order passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other*

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circumstances, the factors to be borne in mind while considering an application for bail are:

(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.'

9. The police have relied upon the statement made by Ajay Kumar to implicate the petitioner. It was laid down by the Hon'ble Supreme Court in ***Dipakbhai Jagdishchandra Patel v. State of Gujarat, (2019) 16 SCC 547 : (2020) 2 SCC (Cri) 361: 2019 SCC OnLine SC 588*** that a statement made by co-accused during the investigation is hit by Section 162 of Cr.P.C. and cannot be used as a piece of evidence. Further, the confession made by the co-accused will be inadmissible because of Section 25 of the Indian Evidence Act. It was observed at page 568:-

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> **44.** Such a person viz. person who is named in the FIR, and therefore, the accused in the eye of the law, can indeed be questioned and the statement is taken by the police officer. A confession, which is made to a police officer, would be inadmissible having regard to Section 25 of the Evidence Act. A confession, which is vitiated under Section 24 of the Evidence Act would also be inadmissible. A confession unless it fulfils the test laid down in ***Pakala Narayana Swami [Pakala Narayana Swami v. King Emperor, 1939 SCC OnLine PC 1 : (1938-39) 66 IA 66: AIR 1939 PC 47]*** and as accepted by this Court, may still be used as an admission under Section 21 of the Evidence Act. This, however, is subject to the bar of admissibility of a statement under Section 161 CrPC. Therefore, even if a statement contains admission, the statement being one under Section 161, it would immediately attract the bar under Section 162 CrPC."

10. Similarly, it was held in ***Surinder Kumar Khanna Versus Intelligence Officer Directorate of Revenue Intelligence 2018 (8) SCC 271*** that a confession made by a co-accused cannot be taken as a substantive piece of evidence against another co-accused and can only be utilized to lend assurance to the other evidence. The Hon'ble Supreme Court subsequently held in ***Tofan Singh Versus State of Tamil Nadu 2021 (4) SCC 1*** that a confession made to the police officer during the investigation is hit by Section 25 of the Indian Evidence Act and will not be saved by the provisions of Section 67 of NDPS Act. It was laid down in ***Union of India v. Khalil Uddin, 2022 SCC OnLine SC 2109*** that the

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benefit of ***Tofan Singh (supra)*** can be taken during the bail proceedings. It was observed:

> **8.** The answer to said question could be the statement recorded of Md. Nizam Uddin. The statement of Md. Jakir Hussain recorded under Section 67 of the Act has also named his owner accused Abdul Hai. We are conscious of the fact that the validity and scope of such statements under Section 67 has been pronounced upon by this Court in ***Tofan Singh v. State of Tamil Nadu(2021) 4 SCC 1***. In ***State by (NCB) Bengaluru v. Pallulabid Ahmad Arimutta 2022 (12) SCC 633***, the rigour of law laid down by this Court in Tofan Singh was held to be applicable even at the stage of grant of bail.

11. Therefore, no advantage can be derived by the prosecution from the confessional statement made by the co-accused implicating the petitioner. This is not a legally admissible piece of evidence and cannot be used against the petitioner.

12. A similar situation arose before this Court in ***Dinesh Kumar @ Billa Versus State of H.P. 2020 Cri.L.J.4564*** and it was held that a confession of the co-accused and the phone calls are not sufficient to deny bail to a person.

13. It was laid down by this Court in ***Saina Devi vs. State of Himachal Pradesh2022 LawSuit(HP) 211***, that where the police have no material except the call details record and the disclosure

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statement of the co-accused, the petitioner cannot be kept in custody. It was observed:-

> "**[16]** In the facts of the instant case also the prosecution, for implicating the petitioner, relies upon firstly the confessional statement made by accused Dabe Ram and secondly the CDR details of calls exchanged between the petitioner and the wife of co-accused Dabe Ram. Taking into consideration, the evidence with respect to the availability of CDR details involving the phone number of the petitioner and the mobile phone number of the wife of coaccused Dabe Ram, this Court had considered the existence of a prime facie case against the petitioner and had rejected the bail application as not satisfying the conditions of Section 37 of NDPS Act.
>
> **[17]** Since, the existence of CDR details of accused person(s) has not been considered as a circumstance sufficient to hold a prima facie case against the accused person(s), in ***Pallulabid Ahmad's case*** (supra), this Court is of the view that petitioner has made out a case for maintainability of his successive bail application as also for grant of bail in his favour.
>
> **[18]** Except for the existence of CDRs and the disclosure statement of the co-accused, no other material appears to have been collected against the petitioner. The disclosure made by the co-accused cannot be read against the petitioner as per the mandate of the Hon'ble Supreme Court in ***Tofan Singh Vs State of Tamil Nadu, 2021 4 SCC 1***. Further, on the basis of aforesaid elucidation, the petitioner is also entitled to the benefit of bail.

14. A similar view was taken by this Court in ***Dabe Ram vs. State of H.P., Cr.MP(M) No. 1894 of 2023, decided on 01.09.2023, Parvesh Saini vs State of H.P., Cr.MP(M) No. 2355 of 2023, decided on 06.10.2023, Relu Ram Vs. State of H.P.,*** and ***Relu***

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Ram vs. State of H.P. Cr.MP(M) No. 1061 of 2023, decided on 15.05.2023,

15. Therefore, the petitioner cannot be detained in custody based on a statement made by the co-accused and the call details as these do not constitute a legally admissible piece of evidence.

16. Reliance was also placed upon the fact that the petitioner had shown the house where the charas was stated to have been sold by the petitioner to the co-accused. It was submitted that the same is admissible under Section 27 of the Indian Evidence Act as it led to the discovery of the place where the heroin was supplied by the petitioner. This submission is not acceptable. It was laid down in ***Gajrani vs. Emperor AIR 1933 Allahabad 394*** that pointing out the place from where the accused had purchased something does not lead to the discovery of any fact. It was observed:

> "We do not consider that the pointing out of the shop in this statement can be held to amount to the discovery of a fact, and consequently, we do not consider that this evidence is admissible under Section 27, Evidence Act."

17. Similarly, in ***H.P. Administration vs. Om Parkash AIR 1972 SC 975,*** the accused pointed out the witness from whom he

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had purchased the dagger. This was held to be outside the purview of Section 27 of the Indian Evidence Act. It was observed:

> 12. Thereafter on the information furnished by the accused that he had purchased the weapon from Ganga Singh P. W. 11 and that he would take them to him, they went to the thari of P. W. 11 where the accused pointed him out to them. It is contended that the information given by the accused that he purchased the dagger from P. W. 11 followed by his leading the police to his thari and pointing him out is inadmissible under Section 27 of the Evidence Act. In our view, there is a force in this contention. A fact discovered within the meaning of Section 27 must refer to a material fact to which the information directly relates. In order to render the information admissible, the fact discovered must be relevant and must have been such that it constitutes the information through which the discovery was made. What is the fact discovered in this case? Not the dagger but the dagger hidden under the stone, which is not known to the police. (***See PulukuriKottaya v. King-Emperor,*** *74* ***Ind App*** *65* ***= (AIR*** *1947* ***PC*** *67*). But thereafter can it be said that the information furnished by the accused that he purchased the dagger from P. W. 11 led to a fact discovered when the accused took the police to the thari of P. W. 11 and pointed him out. A single Bench of the Madras High Court in ***Public Prosecutor v. India China Lingiah, AIR 1954 Mad 433***, and ***In re Vellingiri, AIR 1950 Mad 613***, seems to have taken the view that the information by an accused leading to the discovery of a witness to whom he had given stolen articles is a discovery of a fact within the meaning of Section 27. In ***Emperor v. RamanujaAyyanger, AIR 1935 Mad 528*** a full Bench of three Judges by a majority held that the statement of the accused "I purchased the mattress from this shop and it was this Woman (another witness) that carried the mattress" as proved by the

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witness who visited him with the police was admissible because the word 'fact' is not restricted to something which can be exhibited as a material object. This judgement was before ***PulukuriKattaya's case*** when as far as the Presidency of Madras was concerned law laid down by the Full Bench of the Court, In ***Re AthappaGoundan, ILR (1937) Mad 695 = (AIR 1937 Mad 618)*** prevailed. It held that where the accused's statement connects the fact discovered with the offence and makes it relevant, even though the statement amounts to a confession of the offence. It must be admitted because it is that that has led directly to the discovery. This view was overruled by the Privy Council in ***PulukariKottaya's case*** and this Court had approved the Privy Council case in ***RamkishanMithanlal Sharma v. The State of Bombay, (1955) 1 SCR 903 = (AIR 1955 SC 104)***.

13. In the Full Bench Judgment of Seven Judges in ***Sukhan v. The Crown, ILR 10 Lah 283 = (AIR 1929 Lah 344) (FB)*** which was approved by the Privy Council in ***PulukuriKotaya's case, 74 Ind App 65 = (AIR 1947 PC 67)***Shadi Lal C.J, as he then was speaking for the majority pointed out that the expression 'fact' as defined by Section 3 of the Evidence Act includes not only the physical fact which can be perceived by the senses but also the psychological fact or mental condition of which any person is conscious and that it is in the former sense that the word used by the Legislature refers to material and not to a mental fact. It is clear therefore that what should be discovered is the material fact and the information that is admissible is that which has caused that discovery so as to connect the information and the fact with each other as the cause and effect.' That information, which does not distinctly connect with the fact discovered or that portion of the information, which merely explains the material thing discovered is not admissible under Section 27 and cannot be proved. As explained by this Court as well as by the Privy Council, normally Section 27 is brought into operation where a

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> person in police custody produces from some place of concealment some object said to be connected with the crime of which the informant is the accused. The concealment of the fact which is not known to the police is what is discovered by the information and lends assurance that the information was true. No witness with whom some material fact, such as the weapon of murder, stolen property or other incriminating article is not hidden, sold or kept and which is unknown to the police can be said to be discovered as a consequence of the information furnished by the accused. These examples, however, are only by way of illustration and are exhaustive. What makes the information leading to the discovery of the witness admissible is the discovery from him of the thing sold to him or hidden or kept with him, which the police did not know until the information was furnished to them by the accused. A witness cannot be said to be discovered if nothing is to be found or recovered from him as a consequence of the information furnished by the accused and the information which disclosed the identity of the witness will not be admissible.

18. It was held in ***State of Maharashtra Versus Damu Gopinath Shinde AIR 2000 S.C. 169*** that where the statement of the accused did not lead to the discovery of any fact, the same is not admissible. It was observed:-

> "The information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered." But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understand ability. In this case, the fact discovered by P.W. 44 is that A-3 Mukinda Thorat had carried the dead body of Dipak to the spot on the motorcycle.

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> 38. How particular information led to the discovery of the fact? No doubt, the recovery of the dead body of Dipak from the same canal was antecedent to the information, which P.W. 44 obtained. *If nothing more was recovered pursuant to and subsequent to obtaining the information from the accused, there would not have been any discovery of any fact at all.* But when the broken glass piece was recovered from that spot and that piece was found to be part of the tail lamp of the motorcycle of A-2 Guruji, it can safely be held that the Investigating Officer discovered the fact that A-2 Guruji had carried the dead body on that particular motorcycle up to the spot."
> (Emphasis supplied)

19. Therefore, the statement made by Arun Yadav that he had purchased charas from the petitioner is not, prima facie, admissible and since the pointing out of the house did not lead to the discovery of any fact, therefore, no advantage can be derived from the same.

20. Hence, there is force in the submission that there is no legally admissible evidence against the petitioner and there are no reasonable grounds to believe that the petitioner is, prima facie, involved in the commission of the offence.

21. There is no material on record to show that the petitioner would commit the offence in case he is released on bail. Thus, the twin conditions laid down under Section 37 of the ND&PS Act are duly satisfied in the present case.

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22. In view of the above, the present petition is allowed and the petitioner is ordered to be released on bail subject to his furnishing bail bonds in the sum of ₹50,000/- with two sureties to the like amount to the satisfaction of the learned Trial Court while on bail. The petitioner will abide by the following terms and conditions:-

(i) The petitioner will join the investigation as and when directed to do so by means of a written *hukamnama.*

(ii) The petitioner will not intimidate the witnesses nor will he influence any evidence in any manner whatsoever.

(iii) The petitioner shall attend the trial in case a charge sheet is presented against him and will not seek unnecessary adjournments.

(iv) The petitioner will not leave the present address for a continuous period of seven days without furnishing the address of intending visit to the SHO, the Police Station concerned and the Trial Court.

(v) The petitioner will furnish his mobile number, and social media contact to the Police and the Court and will abide by the summons/notices received from the Police/Court through SMS/WhatsApp/Social Media Account. In case of any change in the mobile number or social media accounts, the same will be intimated to the Police/Court within five days from the date of the change.

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23. It is expressly made clear that in case of violation of any of these conditions, the prosecution will have the right to file a petition for cancellation of the bail.

24. The observation made herein before shall remain confined to the disposal of the petition and will have no bearing, whatsoever, on the merits of the case.

(Rakesh Kainthla)
Judge

1st December, 2023
(Chander)

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