



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

**Cr.MP(M) No. 2757 of 2023
Reserved on: 22.11.2023
Date of Decision: 12.12.2023.**

Onyeka Samuel	Versus	...Petitioner
State of Himachal Pradesh		...Respondent

Coram

Hon'ble Mr. Justice Rakesh Kainthla, Judge.

Whether approved for reporting?¹ Yes

For the Petitioner : Mr. Sarvedaman Rathore, Advocate.

For the Respondent : Mr Jitender Sharma, Additional Advocate General with ASI Ram Lal, I.O. P.S. Sadar Solan.

Rakesh Kainthla, Judge

The petitioner has filed the present petition for seeking regular bail. It has been asserted that an FIR No. 176/2023, dated 23.08.2023 was registered against the petitioner for the commission of offences punishable under Sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act (in short 'NDPS Act') and Section 14 of the Foreigners Act at Police Station, Sadar, Solan. The petitioner is innocent and he was falsely implicated. The

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

petitioner is not required for investigation. Nothing is to be recovered from the petitioner. The petitioner has been in custody since his arrest. He would abide by all the terms and conditions, which may be imposed by the Court. Hence, the petition.

2. The petition is opposed by filing a status report asserting that the police party was on patrolling duty on 23.08.2023 when a secret information was received at 6:00 pm that Shivam was selling heroin and in case of his search, a huge quantity of heroin could be recovered. The police associated independent witnesses and found Shivam. He threw something on seeing the police and tried to run away. The police apprehended him and found 5.42 grams of heroin. The police arrested him and recovered the heroin. The police conducted the investigation. Shivam revealed on enquiry that he had purchased heroin from Saurav. The police arrested Saurav, who revealed that heroin was sold to him by the present petitioner. The police arrested the petitioner and recovered 15.95 grams of heroin from him. The police seized the heroin. As per the result of the analysis, the substance found in the possession of the petitioner and Saurav was confirmed to be Diacetylmorphine (Heroin). The petitioner could not produce any passport or visa.

Therefore, the offence punishable under Section 14 of the Foreigners Act was also added.

3. I have heard Mr Saravedaman Rathore, learned counsel for the petitioner and Mr Jitender Sharma, learned Additional Advocate General for the respondent/State.

4. Mr. Saravedaman Rathore, learned counsel for the petitioner submitted that there is no evidence against the petitioner except the statement made by Gaurav, the co-accused, which is not a legal piece of evidence. Therefore, he prayed that the present petition be allowed and the petitioner be released on bail.

5. Mr Jitender Sharma, learned Additional Advocate General for the respondent/State submitted that the police had recovered a mobile phone containing a chat between Gaurav and the petitioner, which clearly shows that the petitioner had supplied heroin to Gaurav. The consumption of narcotics is adversely affecting the young generation of the society, therefore, he 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 parameters for granting bail were considered by the Hon'ble Supreme Court in *Bhagwan Singh v. Dilip Kumar @ Deepu @ Depak, 2023 SCC OnLine SC 1059*, wherein it was observed 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 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) Frivolity 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 has 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 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 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 present case has to be decided as per the parameters laid down by the Hon'ble Supreme Court.

10. The police have specifically stated that Section 14 of the Foreigners Act was added because the petitioner could not produce his passport and visa. It was laid down by this Court in *Imtizor*

Imamova versus State of H.P. [2010 (2) Shim. LC 63 = Latest HLJ 2010(2) 754 (HP) = 2010(2) Him. L.R. 801] that no foreigner has any right to enter or remain in India. He can enter only with a visa, which is kind of a limited leave. Once, the visa expires, the person has no right to remain on Indian soil and if he remains so, he commits an offence. Therefore, bail cannot be granted to a foreigner accused of committing an offence punishable under Section 14 of the Foreigners Act. It was observed:

“5. It is quite shocking that when the petitioner and other co-accused were found without any valid passport and visa, why the learned trial Court granted bail to them because every minute stay of a "foreigner" within the territory of the country is a recurring offence. On examining the record, while granting bail to the petitioner and other co-accused, the learned Magistrate was oblivious of the provisions of the Foreigners Act, 1946 and the order passed under Section 3 of the Foreigners Order, 1948 and the Rules framed thereunder.

6. No foreigner has any right, as such, to enter or remain in India, as he/she likes and his entry into and stay in this country are regulated by the provisions of the Foreigners Act, 1946 and Rules made thereunder, for a variety of reasons.

7. A visa issued to a foreigner is in the nature of a limited leave to enter in this country or stay there, for a duration controlled and limited by the terms of the visa issued. Such leave also carries with it certain responsibilities, obligations and discipline and the machinery by which such leave to enter or remain is regulated, in the larger interest of the country, cannot be lightly tampered with, particularly by foisting anything that would destroy that

machinery.

8. The learned Judicial Magistrate could not have equipped them with a license by passing an order of bail to stay in India without any passport and valid visa. Rather the Judicial Magistrate, instead of granting bail, should have taken the case on a day-to-day basis and decided the case on merits. In case the accused having found to be not guilty or guilty of the offence, they shall have to be ordered to be deported after the completion of the sentence, if any imposed.”

11. Therefore, in view of this precedent, the petitioner is not entitled to bail, hence, the present petition fails and the same is dismissed.

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

(Rakesh Kainthla)
Judge

12th December, 2023
(saurav pathania)