

(2005) 08 J&K CK 0010
In the Jammu And Kashmir High Court
Case No : Criminal Rev. No. 1 of 2005

Excise Commissioner

APPELLANT

Vs

Hilal Ahmed and Another

RESPONDENT

Date of Decision : 04-08-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167(1), 167(2), 173, 437(1)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 15, 19, 2, 24, 27A

Citation : (2006) 1 JKJ 71

Hon'ble Judges : Nirmal Singh, J

Bench : Single Bench

Advocate : M.A. Bhat, for the Appellant; P.N. Bhat, for the Respondent

Judgement

Nirmal Singh, J.—This revision has been filed by Excise Commissioner, J&K, Government against the order passed by learned Sessions

Judge, Kathua, by which the respondents have been allowed bail in a case under Narcotic Drugs and Psychotropic Substances, Act, 1985

(hereinafter referred to as the Act).

2. The case of the prosecution is that on 21.11.2003 poppy straw weighing 7 quintals was recovered from the respondents. After completion of

the investigation challan was presented before the learned Sessions Judge, Kathua in which both the respondents were charge sheeted u/s 15 of

the Act to which they pleaded not guilty. The prosecution cited 14 witnesses to prove its case, out of which three witnesses were examined.

Respondents moved an application for bail and bail was granted to them vide order dated 10.11.2004 on two counts i.e. chalan was not presented

within the prescribed period in terms of Section 167(2) of the Criminal Procedure

Code and the report of Forensic Science Laboratory sample

reveals the characteristics features of Poppy plant itself is not sufficient to constitute contravention of the Act, aggrieved by which order the Excise

Commissioner has preferred this revision for quashing the order of learned Sessions Judge and canceling the bail granted to the respondents.

3. Mr. M.A. Bhat, learned Counsel appearing for the petitioner contended that the learned Sessions Judge has passed the order in contravention

of the provisions of Section 37 of the Act by observing that the characteristic features of poppy plant itself is not sufficient to constitute the

contravention of the Act. He submitted that poppy plant comes under the definition of Narcotic drugs as defined in Sub-sections xvii and xviii of

Section 2 of the Act. He further pleaded that the other ground taken by the learned Sessions Judge for granting the bail is that challan was not

presented within the prescribed period and, therefore, respondents were entitled to bail u/s 167(2) of the Code of Criminal Procedure. He

contended that this ground taken by the learned Sessions Judge is without perusing the record. He pointed out that challan was presented within

the prescribed period of 90 days, therefore, defence u/s 167(2) of the Cr.P.C was not available to the accused persons.

4. On the other hand learned Counsel for the respondents submitted that the learned Sessions Judge has rightly allowed the bail to the respondents

as the Poppy plant does not come under the definition of the narcotic drugs under the Act. He also submitted that the challan was not presented

within the prescribed period i.e. 60 days. He pointed out that even after the presentation of the challan, when the respondents were charge sheeted

and evidence was recorded, respondents have not forfeited their right to bail u/s 167(2) of the Cr.P.C.

5. I have given my thoughtful consideration to the respective submissions made by learned Counsel for the parties and perused the record.

6. The Legislature enacted the Act in order to eradicate the abuse of the drug which is causing serious affect on the society as a whole and to

effectively control the smuggling activities of illegal trafficking in the narcotic, drug and psychotropic substances. The drug trafficking has led to drug

addiction in the young generation, therefore, a deterrent punishment has been prescribed under the Act a) where the contravention involves small

quantity, with rigorous imprisonment for a term which may extend to six months or with fine which may extend to ten thousand rupees, or with both;

b) where the contravention involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term

which may extend to ten years and with fine which may extend to one Lakh rupees; c) where the contravention involves commercial quantity, with

rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which

shall not be less than one Lakh rupees but which may extend to two Lakh rupees; provided that the Court may, for reasons to be recorded in the

judgment, impose a fine exceeding Lakh rupees. Keeping in view deterrent punishment for drug trafficking offences, a stringent provision has been

added for bail in the Act in Section 37 which reads as under:

37. Offences to be cognizable and non-bailable: (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974).

(a) every offence under this Act shall be cognizable;

(b) no person accused of an offence punishable for (offences u/s 19 or Section 24 or Section 27A and also for offences involving commercial

quantity) shall be released on bail or on his own bond unless:

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and (ii) where the Public Prosecutor oppose the

application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to

commit any offence while on bail;

(2) The limitation on granting of bail specified in Clause (b) of Sub-section (1) are in addition to the limitations under the Code of Criminal

Procedure 1973 (2 of 1974) or any other law for the time being in force on grant of bail.

7. A perusal of the Section shows that before granting bail, the Court is to give an opportunity to oppose the application by the Public Prosecutor

and the Court is to satisfy itself that there are reasonable grounds for believing that the accused is not guilty of the offence under the Act and the

Court is further satisfied that the accused is not likely to commit the offence while on bail. Section 37 of the Act make it virtually clear that where

the Court prima facie find the involvement of the accused then the bail is not to

be allowed.

8. The learned Sessions Judge, while allowing the bail, has taken into consideration the FSL report and has observed as under:

The FSL report being that the sample revealed the characteristics features of Poppy plant itself is not sufficient to constitute contravention of the

Act because it is only opium poppy plant except seeds after harvesting whether in the original form, cut, crushed or powdered form that constitutes

contravention of (poppy straw) as per entry 110 of the notification and no other poppy plant unless notified by Central Government in the Official

Gazette to be opium poppy can constitute contravention of NDPS Act.

9. These observations of the learned Sessions Judge are palpably erroneous and contrary to the definition given in Section 2 of the Act. Clause

(xiv), (xv), (xvii) and (xviii) of Section 2 of the Act, reads as under:

(xiv): "narcotic drug" means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured drugs;

(xv) "opium" means;-

(a) the coagulated juice of the opium poppy; and

(b) any mixture, with or without any neutral material, of the coagulated juice of the opium poppy, but does not include any preparation containing

not more than 0.2 per cent of morphine;

(xvii) "opium poppy" means:

(a) the plant of the species *papaver somniferum* L; and

(b) the plant of any phenanthrene alkaloid can be extracted and which the Central Government may, by notification in the official Gazette declare to

be opium poppy for the purpose of this Act.

(xviii) "poppy straw" means all parts (except the seeds) of the opium poppy after harvesting whether in their original form or cut, crushed or

powdered and whether or not juice has been extracted there from;

10. Perusal of these clauses makes it clear that possession, production, transportation of a substance which shall have the characteristic features of

a poppy plant shall be deemed to be contravention of provisions of Section 15 of the Act, unless it is proved that the contravention seized is not

covered under the definition of the Act. The learned Sessions Judge on the same report by finding a prima facie case against the respondents have

charge sheeted them but when as per the observations of learned Sessions Judge, poppy plant does not constitute the contravention of the Act,

then instead of charge sheeting the accused they should have been discharged as now the observations of the learned Sessions Judge will certainly

effect the merits of the case.

11. As it has been observed above that poppy plants comes under the definition of narcotic drugs, as defined in Section 2 of the Act the recovery

effected from the respondents comes under the definition of commercial quantity as per the amendment by Act 9 of 2001. When the quantity

recovered from the respondents is commercial quantity then the provisions of Section 37 of the Act with regard to bail are applicable and in

violation of any of the conditions as envisaged in Section 37 of the Act, the bail cannot be allowed, as has been laid down in Union of India v.

Merajuddin 2000 (1) Cri 95 (SC).

12. The other ground taken by the learned Sessions Judge is that challan was not presented within the prescribed period. This observation of the

learned Sessions Judge is without looking into the record. From the perusal of the record, it is clear that respondents were arrested on 21.11.2003

and the challan was presented on 15.1.2004 where after the accused were charge sheeted and three witnesses were examined but before the

presentation of the challan respondents have not moved application for bail u/s 167(2) Cr.P.C.

13. Section 167(2)(a) Cr.P.C provides that the Magistrate may authorize detention of the accused person, otherwise than in custody of the police,

beyond the period of fifteen days if he is satisfied that adequate grounds exists for doing so, but no Magistrate shall authorize the detention of the

accused person in custody under this section for a total period exceeding sixty days and on the expiry of the said period of sixty days the accused

persons shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this section shall be deemed to

be so released under the provisions of Chapter XXXIX for the purpose of that Chapter

14. Perusal of the above section shows that the accused has a right to bail by default in case the report, as prescribed under Sub-clause 2 of

Section 173 Cr.P.C has not been filed within a period of 60 days but the accused

has to move the application for bail and should be ready to furnish bail bond. In case the accused has not filed the application immediately after expiry of 60 days, the right of the accused to be released on bail after the expiry of stipulated period is subject to one exception i.e. on the filing of the charge sheet the accused forfeits his right to bail under Sub-section (2)(a) of Section 167 Cr.P.C. The Apex Court in State of Uttar Pradesh Vs. Lakshmi Brahman and Another, has held as under:

Section 167 (1) and (2) with the proviso rightly concluded that, on the expiry of 60 days from the date of arrest of the accused, his further detention does not become ipso facto illegal or void, but if the charge-sheet is not submitted within the period of 60 days, then notwithstanding anything to the contrary in Section 437(1), the accused would be entitled to an order for being released on bail if he is prepared to and does furnish bail.

15. The contention raised by the learned Counsel for the respondent that Public Prosecutor was given the opportunity to oppose the bail application and the learned Sessions Judge was satisfied that there is reasonable ground for believing that the accused are not guilty of the offence under the Act, are factually wrong. From the report of FSL the poppy plants were recovered from the possession of the respondents, which comes under the definition of the Act, so it prima facie cannot be said that the accused are not guilty of the offence u/s 15 of the Act when they have been charge sheeted and the respondents have not impugned the order of charge sheeting them.

16. For the reasons mentioned above the impugned order is set aside and the accused are directed to be taken into the custody during the pendency of the trial. Any observation made in this order will not effect the merits of the case. A copy of this order be sent to Shri S.L. Pandita, District & Sessions Judge, wherever he is posted. Registry is also directed to circulate a copy of this order amongst all the District and Sessions Judges.

17. Before parting with this order it has become necessary to point out that Forensic Science Laboratory in its report has not indicated as to under what definition of Section 2 of the Act the seized drug would fall. Under the Narcotic Drugs and Psychotropic Substances Act, 1985 there are

large number of drugs which fall under different clauses. Many a times it is not possible for the police and the Courts to bring the seized item under

a particular clause, therefore, it will be appropriate that while conducting chemical examination the analyst should mention that under which clause

of Section 2 of the Act the drug falls. Registry is, therefore, directed to sent a copy of this order to Financial Commissioner Home, J&K

Government so that the order can be brought to the notice of FSL.