

(2012) 10 J&K CK 0001
In the Jammu And Kashmir High Court
Case No : Criminal P.C. No. 153 of 2012

Firdous Ahmad Gazi

APPELLANT

Vs

State of J. and K.

RESPONDENT

Date of Decision : 16-10-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167(2)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2, 2(viia),
20, 36A(4), 37

Citation : (2013) CriLJ 255

Hon'ble Judges : Virender Singh, J

Bench : Single Bench

Advocate : Aazim Pandith, for the Appellant; S.A. Naik, AAG, for the Respondent

Final Decision : Allowed

Judgement

Virender Singh, J.—Petitioner-Firdous Ahmad Gazi, who is booked in case FIR No. 37 of 2012 registered u/s 8/20 of Narcotic Drugs and

Psychotropic Substances Act, 1985, (for short 'NDPS ACT') in Police Station, Tarjuan (District Baramulla), is praying for the concession of

regular bail, primarily on the following two grounds:--

(i) the quantity allegedly recovered from the Petitioner falls under the head, 'non-commercial quantity' and as such, severity of Section 37 of NDPS

Act and

(ii) the petitioner was entitled to bail as the challan in this case was not filed by the Prosecution Agency within the stipulated period (90 days), as

contained in Section 36A(4) of NDPS Act.

Pursuant to notice, Mr. Naik has filed objections. He is, however, fair enough in admitting that the contraband (1 Kg. of Charas) allegedly

recovered from the petitioner does not fall under the head, 'Commercial quantity'.

2. Learned counsel for the petitioner also draws the attention of this Court to Section 2 (viia), which reads:

Commercial quantity", in relation to Narcotic Drugs and Psychotropic Substances, means any quantity greater than quantity specified by the

Central Government by notification in the Official Gazette.

3. As per the notification small quantity of charas is described as 100 grams, whereas commercial quantity of charas is described as one Kg.

4. Strengthening his arguments vis-a-vis the quantity of contraband, learned counsel relies upon the judgment of High Court of Himachal Pradesh in

case titled "Ratto v. State of H. P." in which, in paras 41 and 42 of the said judgment, it is observed as under:--

41. As already noted there is hardly any ambiguity, muchless conflict between Section 2(viia) and the notification as extracted hereinabove for

determination of what would be the commercial quantity. By virtue of powers conferred under Sub-section (viia) of Section 2. Central Government

is authorized to notify as to what would be the commercial quantity. Because the "commercial quantity" on a plain reading of its definition amongst

other things has to be "...greater than the quantity specified by the Central Government by notification....". Under 2001 Act, notification supra was

issued specifying the quantity for the purpose of Section 2(viia) of the Act. A perusal of this notification indicates that quantity specified is one

kilogram. Various columns of the notification extracted hereinabove have to be read in conjunction with the substantive provision of Section 2(viia)

of the Act. This also puts a harmonious construction on both, notification as well as Section 2(viia). While determining the quantity under this sub-

section, it has to be greater than One Kg. There is hardly any doubt regarding either the words one Kg.", or the 'commercial quantity' which has to

be 'greater than', which in our considered view would always mean any quantity more than/bigger than/larger than one Kg. We are further of the

view that this provision, and for that matter, notification admits of no other interpretation on its reading. Thus, it cannot be said that one Kg. would

be the commercial quantity for the purpose of Section 2(viia), as added by 2001 Act.

42. Another reason to take this view is, that substantive and main provision of

the Act is Section 2(viia) which is subject-matter of the discussion in this judgment. It is also well known and accepted rule of interpretation of status that rules, regulations as well as notification issued thereunder are meant to subserve the purpose of main provision of law and not other way round. Notification in the instant case, as extracted hereinabove, is a delegated legislation. Therefore, it can in no case bye-pass or over-ride the substantive provision of law and case of conflict, delegated legislation has to give way to the main provision of law.

5. Learned counsel also relies upon an order of Punjab and Haryana High Court dated 3-5-2012 passed in Cri. Misc. No. 7566 of 2012 in case titled 'Karan Singh v. State of Punjab', in which the recovery of the contraband (one Kg. of charas) was considered as non-commercial in nature on the ground that only a quantity higher than one Kg. charas would fall in the category of 'commercial' and not otherwise. Considering that fact into consideration, the petitioner therein was granted the concession of regular bail. He places on record the photostat copy of the aforesaid judgment and order.

6. Learned counsel further submits that while declining the bail application of the petitioner, learned Principal Sessions Judge has considered the quantity allegedly recovered from the Petitioner (1 Kg. of Charas) as 'commercial quantity' and primarily for this reason, he has dismissed the bail application on both counts, whereas it was specifically pleaded before the learned Sessions Judge that the charge-sheet against the petitioner was not filed within the statutory period and that the petitioner deserves bail as a matter of right.

7. Learned counsel, however, fairly states that at the time of filing of the petition before the learned Principal Sessions Judge, the plea raised for default clause was based on non-filing of the challan within 60 days, on the strength of the provisions contained in Section 167(2) of Cr. P.C. (State Code), whereas during the pendency of the said bail application, even 90 days had elapsed and considering the fact that the alleged recovery of contraband falls within the non-commercial quantity, the petitioner was entitled to the concession of bail.

8. Learned counsel then submits that learned Principal Sessions Judge, Baramulla in another case relating to one Rafiqua Begum, in which also the

alleged recovery of contraband was one kg. of charas, the same very Judge has considered the said quantity as 'non-commercial quantity' and

refused the police remand of the accused. He places on record the photostat copy of the said order dated 25-7-2012 passed in Rafiq Begum's

case.

9. Learned counsel for the petitioner on the basis of aforesaid admitted fact position submits that the indefeasible right of bail application before the

learned Principal Sessions Judge in terms of Section 36-A(4) of NDPS, Act and the said right once accrued would not stand extinguished by

subsequently filing the charge sheet. In support of his submission learned counsel relies upon the judgment of Hon'ble Supreme Court in case Uday

Mohanlal Acharya Vs. State of Maharashtra, .

10. Learned counsel further submits that had the learned Sessions Judge taken into consideration the fact that the quantity allegedly recovered from

the petitioner did not fall under the head 'commercial quantity', perhaps he might have granted the bail to the petitioner for default of the State in not

filing the challan within the stipulated period.

11. Mr. Naik has not been able to controvert the stand taken by learned counsel for the petitioner on factual as well as legal aspect of the matter.

He fairly admits that before the disposal of the bail application by the learned Principal Sessions Judge, 90 days had already expired. He further

admits that till 13-8-2012, the date of dismissal of the application, the challan was not filed before the Court concerned, which fact is otherwise

mentioned in the impugned order. However, he opposes the bail application stating that may be the quantity allegedly recovered from the petitioner

does not fall under the head, 'commercial quantity', still he is not entitled the concession of bail. He submits that the challan has now been filed

before the Court concerned and the Prosecution Agency would make a sincere endeavour to produce the prosecution evidence at the earliest and

even direction can be issued in this regard to the Court concerned to wrap up the trial expeditiously by fixing the time frame.

12. Conceded position before the Court is that the petitioner in his petition before learned principal Sessions Judge, Baramulla has raised the

aforesaid two points/issues, on which he is still banking upon. This fact is otherwise evident from the impugned order wherein the learned Principal

Sessions Judge has observed that the petitioner has sought bail on a further ground that the prosecution has failed to produce the charge-sheet

against the accused within a period of two months. In the aforesaid factual backdrop, it can be safely said that the petitioner has asked for bail on

the ground of non filing of challan within the stipulated period.

13. Keeping in view the admitted position that the quantity allegedly recovered from the petitioner does not fall under the heard 'commercial

quantity' and therefore, severity of Section 37 of NDPS Act is not attracted, coupled with the fact that the challan in this case was not filed within

the statutory period of 90 days, as contained in Section 36-A(4) of NDPS Act and the fact that the petitioner admittedly agitated this point before

the Learned Sessions Judge for seeking bail as a matter of right, which plea was repelled by the learned Sessions Judge primarily on the ground

that the recovery of contraband is 'commercial quantity' and the fact that the trial of the present case is at its initial stage whereas the petitioner is

linguishing in jail for the last more than six months, he is entitled to concession of bail on both the counts.

14. Viewed thus, the petition on hand is allowed This also puts a harmonious construction on Gazi S/o Sannaullah R/o Khushalmatoo, Sopore is

directed to be released on bail on his furnishing bail bond to the tune of Rs. 2,00,000/- (Rs. two lacs), with one surety of the like amount before

learned Principal Sessions Judge, Baramulla, (Trial Court). The Court concerned shall be at liberty to impose any other condition, as it deems fit

and proper in the present case.

15. The learned Trial Judge is requested to wrap up the trial of this case, at the earliest within three months time from the next date before it, for the

reason that the cases of this nature are, otherwise, to be put on fast track. Disposed of in the aforesaid terms along with IA (Cr.) No. 317/2012.