

(2019) 08 J&K CK 0029

In the Jammu And Kashmir High Court

Case No : Bail Application (B.A) No. 74 Of 2019

Hilal Ahmad Lone

APPELLANT

Vs

State Of Jammu & Kashmir And Anr

RESPONDENT

Date of Decision : 27-08-2019

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 8, 21, 29, 37
Code Of Criminal Procedure, 1973 — Section 161, 164A, 164A(1), 268, 269

Citation : (2019) 08 J&K CK 0029

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : A.M.Mir, Feroz Ahmad Sheikh

Final Decision : Dismissed

Judgement

Rashid Ali Dar, J

1. The petitioner herein has not been held entitled to concession of bail by the learned Principal Sessions Judge, Bandipora as can be gathered from the perusal of the order passed on 25.05.2019, copy annexed with the instant petition. Learned trial court has quoted the facts relevant for appreciation of the merit of the petition filed before it along-with the objections. It has also referred to the order passed by the said court with regard to grant of bail to the co-accused namely Meraj ud din Lone on 05.06.2012. The relevant observation appearing in Para-7 of the said order is:-

"Before vetting with the facts of the instant petition, it is apt to mention here that vide order dated 05.06.2012 the other co-accused namely Mehraj ud din Lone has been released on bail by this court who was involved in the same FIR. While admitting the said accused on bail this court has inadvertently interpreted the law and has held that one bottle of the contraband contains 10 mg., therefore 90 bottles contains 900 grams by multiplying 10 x 90 bottles = 900 grams of codene. As per the notification of 2009 only pure drug content is not to

be considered. The whole content of the preparation is to be reckoned for working out its quantity. The notification of 2009 issued by the Central Government has specified small quantity and commercial quantity of the narcotic drugs and psychotropic substance. In the instant challan 90 bottles of codene(codorex) were recovered from the possession of the accused persons. As per table of NDPS Act at serial No.28 the contraband substance which falls under the small quantity is mentioned as 10 grams and the commercial quantity is mentioned as 1.00 kg. The total quantity of the drug recovered from the possession of the accused persons is $90 \times 100 = 9000$ grams. On analysis it is, thus found that the drug recovered from the possession of the accused persons falls within the category of commercial quantity and therefore, the rigor of Section 37 is attracted. It is also apt to mention here that the other co-accused who has been enlarged on bail by this court vide order dated 05.06.2012 and is facing trial in this court has remained absent from the proceeding. The Id CPO has sought time to file the application for cancellation of the bail on the grounds that the said accused is involved in the case of NDPS Act which falls under the category of commercial quantity."

2. It has also framed the opinion that the evidence on record is self-explanatory which suggests the involvement of accused in the illegal trade of narcotics which is a heinous offence. It is being also observed that the trial of the case is at infancy stage and the accused persons are yet to be charge-sheeted. It is being conceded that the co-accused namely Meraj ud din Lone, who was arrested on spot, has been released on bail. The opinion has also been framed by the learned trial court that the recovery made from the accused persons falls under commercial quantity but due to the oversight and inadvertence it has been wrongly interpreted in the order passed on 05.06.2012 that one bottle contains only 10 ml of codene. The embargo provided by Section 37 of the NDPS Act which creates bar to grant of bail in such offence has to be kept in mind, according to the learned trial court. For this, the learned trial court found the bail petition liable for dismissal and has been dismissed thus.

3. In the first information report which has been lodged on 29.04.2012 before the concerned police station by Head Constable Mohammad Akram, it is being stated that two sacks were recovered on spot during naka checking and one of the persons namely Mehraj-ud-din Lone(presently on bail) who was carrying the same was arrested on spot and another person absconded. He has been identified as Hilal Ahmad Lone S/o Mohammad Afzal Lone in FIR.

4. In the statement recorded under Section 164-A Cr.PC, copy of which has been placed on record, P/W Constable Hamid-ullah had stated that Mehraj ud din Lone was caught on spot while he tried to flee and the second person escaped. No further explanation is given about the second person who, according to him, escaped from the spot. P/W HC Mohammad Akram, who has lodged the information with the police station, had stated in his statement recorded under Section 164-A Cr.PC that name of the second person was divulged as Hilal

Ahmad Lone by the arrested accused namely Mehraj ud din Lone.

5. The other witnesses namely Constable Shujat Rashid and Constable Abdul Hamid, have been examined by the Investigating officer under Section 161 Cr.PC and in the memo of their statements it has been stated in general terms that they had spotted both the accused i.e petitioner herein and Mehraj-ud-din Lone at the venue where recovery was made.

6. Section 164-A of Cr.PC, however, provides that cases wherein commission of offence would entail punishment of more than seven years the witnesses relied on by the prosecution have to be produced before the Magistrate for recording of their statements. It is being also indicated in Section 161 Cr.PC that the statement under Section 161 Cr.PC of any witness has not to be reduced in writing by the police officer, where Sub Section-1 of Section 164-A of Cr.PC is attracted.

7. On consideration of the material available, it is evident that the accused, who is stated to have been arrested on spot and found to be in possession of the contraband, continues to be at large from June, 2012. The learned trial court has opined that there had been mistake/inadvertence in calculating the quantum of the substance at the time bail was granted in favour of the co-accused Mehraj ud din Lone, but if it was so then concrete steps were to be taken to rectify such an inadvertence. Providing time to the CPO for filing application for cancellation of bail of the co-accused Mehraj ud din Lone, does not appear to be an adequate follow up. Learned trial court had not framed the charge against the accused (till the time bail application was rejected on 25.05.2019). The bail application has been filed by the present petitioner on 06.05.2019 and disposed of on 27.05.2019 by the trial court. Recovery, admittedly as noted above, has been made from only one of the accused. The present petitioner is shown to be involved in view of what was divulged by the arrested accused namely Mehraj ud din Lone, who appears to be at large for last more than six years while as the petitioner herein continues to be in detention.

8. In the order of rejection of bail so far it relates to the petitioner herein, these facets of prosecution case do not appear to have been given a proper thought. Learned trial court has not stated that in the light of the material on record it was of the opinion that reasonable grounds exist for involvement of the accused-petitioner herein in the commission of offence under Sections 8/21 and 29 of NDPS Act. It is being conceded that charge has not been framed against the accused and so at the time of rejection of bail the material on record had not been considered in terms of the mandate of Section 268 and 269 of Cr.PC either for proceeding ahead with trial or otherwise framing contrary opinion of non-involvement of the petitioner herein in the commission of offence.

9. The bail application of the petitioner herein, as noted above, has been rejected having regard to the seriousness of the charge and the impact on the society in case the prayer of the petitioner was acceded to. As a matter of fair-play, the

learned trial court was under obligation to examine the material on record and to see whether or not a reasonable ground existed for framing the opinion as referred to in Section 37 of the NDPS Act. It was also to consider whether the statements of the witnesses other than those recorded under Section 164-A Cr.PC would be taken into consideration in viewing the involvement of the petitioner herein in the commission of offence coupled with the fact as to whether isolated confession of the co-accused could be relied on in order to prima facie hold involvement of the petitioner herein in the commission of offence.

10. In the absence of consideration of these points, reference to the allegedly recovered contraband as commercial and applicability of Section 37 of NDPS Act was misplaced.

11. In the light of what is stated hereinabove, I am of the opinion that the approach of the learned Principal Sessions Judge, Bandipora in rejecting the bail application of the petitioner herein was not proper. For securing the ends of justice inherent powers are required to be invoked and so are invoked suo-moto. Therefore, in exercise of the same, the order dated 27.05.2019 passed by learned Principal Sessions Judge, Bandipora, is quashed. The matter requires consideration afresh by the learned trial court. Accordingly, the learned trial court is directed to consider the bail application afresh after affording due opportunity of being heard to the parties and decide the same in accordance with law. Let the same be done with a reasonable promptitude.

12. Copy of this order be supplied to the learned Principal Sessions Judge, Bandipora.