

(2018) 11 J&K CK 0096

In the Jammu And Kashmir High Court

Case No : BA No. 80 Of 2018, IA No. 01 Of 2018

Mohammad Tajamul Masoodi @APPELLANT@Hash State Of Jammu & Kashmir And Ors

Date of Decision : 22-11-2018

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 8, 21, 21(c), 29, 37
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 201

Citation : (2018) 11 J&K CK 0096

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Mir Manzoor Ahmad, Shah Amir

Judgement

1. The petitioner herein is praying for being admitted to bail in case FIR No. 54/2017, Police Station Uri, registered against him under Section 8/21 read with Section 29 NDPS Act.

2. It appears from the perusal of the file that the petitioner is facing trial in the court of learned Additional Sessions Judge, Baramulla at present, wherein he has been prima facie held guilty and charged for the commission of offence punishable under Sections 8/21(c), 29 NDPS Act, 201 RPC in terms of the order dated 04.08.2018. He has pleaded not guilty and, as such, the prosecution was asked to lead evidence.

3. The accusations have been levelled against the petitioner in terms of the charge framed on 04.08.2018 in the case as:-

"That you conspired with other accused and enticed accused 2 to dispatch consignment from this side of the State on a forged invoice prepared in the name of Kalu suppliers and accused No.2 under the guise of impersonated documents belonging to M/S Kalu suppliers, dispatched the shipment at your behest after you texted him the name of consignee(Imtiyaz Traders) along-with his mobile number. The receipt details of consignment obtaining on false and forged documents of Kalu suppliers containing illicit drugs (brown sugar weighing 66.5 kilograms) that were recovered concealed in the wrappings of ladies suits were

actually received by you from Pakistan. Cell phones recovered from your possession(four in number) disclosed your close association with accused 2 and 4 besides suspects from across the border and other parts of the country. However, before your arrest you had destroyed all the content from your mobile phone to escape suspicion.

That you have committed the offences which are punishable under sections 8/21(c), 29 NDPS Act, 201 RPC and I hereby direct that you be tried by this court on the said charge."

4. It appears that the petitioner has moved the court of learned Additional Sessions Judge, Baramulla for grant of bail which has been rejected by the said court in terms of the order dated 04.08.2018 with the observations that

"in order to examine the merit of contentions of the parties, it would be proper herein to take note of provisions contained in Section 37 of NDPS Act. The said Section circumscribes the jurisdiction of the courts while considering the entitlement of accused involved in commercial quantity to bail unless court is satisfied to believe that he is not involved in such offence. The word ? satisfaction? here recognizes the absolute belief regarding non-involvement of accused in the offence he or she has been booked in. This section limits the scope for liberation of accused on bail and the injunction contained in said section makes it intricate to consider divergent opinion arising from grounds other than stipulated in the provision.

Rigor of section 37 does create a bar even for interim bail in cases involving commercial quantity even if the same is sought on medical or humanitarian grounds. Although this court is alive to the contention raised by Id. Counsels for accused persons but in view of legislative injunction contained in Section 37 of the NDPS Act, it appears highly improbable to exercise the powers to consider the entitlement of accused to bail at this stage because, it is manifest on perusal of the charge sheet that there are reasonable grounds for believing that accused are guilty of offence they have been charged for. As such, since conditions of Section 37 NDPS Act are not satisfied therefore petitioners/accused are not entitled to any liberation on bail."

The court, while relying on various judgments ordered that "resultantly the grounds taken by the Id. Counsel for the petitioners for their admission to bail are found without any merit and all the applications are held as such liable for rejection at this stage. The applications are accordingly rejected and shall form part of the main challan."

5. In the petition herein the petitioner has precisely pleaded that he was arrested in case FIR No.54 of 2017 registered in Police Station, Uri under Section 8/21 read with section 29 NDPS Act on 03.09.2017 and since then is behind the bars. According to the petitioner, he, at the behest of some false and fabricated information has been arrayed as an accused. The police have completed the investigation of the case and have produced the challan before the trial court on

23.11.2017 but according to the petitioner, the trial court has not framed the charge against him till date. Furthermore, the petitioner states that as per the statements of the witnesses recorded by the investigating officer, he is not involved in commission of any offence. It is also pleaded in the petition that the petitioner being innocent can claim bail as a matter of right. The petitioner, as pleaded by him in the petition, is the sole bread earner for his entire family as such his detention will lead his family to starvation.

6. Heard learned counsel for the parties and perused the record.

7. Learned counsel for the petitioner contended that the petitioner is to be admitted to bail as otherwise he would suffer incarceration for his no fault.

8. Learned counsel for the petitioner has taken reliance on the judgment rendered in the case Aijaz Ahmad Bhat & ors. Vs. State of J&K through SHO P/S Kulgam decided on 09.10.2018 passed by the Single Bench of this Court. Other judgments, as relied upon by the learned counsel for the petitioner are, i) Gurdev Sing Vs. State of Punjab, reported in 2017 Legal

Eagle 270, ii) Tariq Ahmad Dar & anr. Vs. State of J&K & ors. reported in 2008 Legal Eagle 62.

9. In Aijaz Ahmad Bhat's case (supra), the Court has concluded with the following observations:-

"....Taking into consideration the above judicial dictums, there is a conflict of opinion as to whether the Buprenorphine IP 2 ml injections seized by the police authorities in the instant case fall within the definition of Drugs and Cosmetics Act, 1940 as it has not been included in the Schedule(1) of the NDPS Rules or that the same fall within the ambit and scope of the NDPS Act. Therefore, this application is allowed and the applicants are ordered to be enlarged on bail subject to their furnishing bails bonds to the satisfaction of the trial court."

10. In Tariq Ahmad Dar's case(supra), the Court has made certain observations, which read as under:-

"...The prolonged incarceration unless justified cannot be permitted. The accused has admittedly been arrested on 2.4.2007, means the accused are in teh jail for last more than ten months. The detention or custody cannot be by way of punishment. Continuous incarceration in the facts and circumstances of teh case may amount to sentencing the accused before conviction. After all in Criminal Jurisprudence the accused is presumed to be innocent until guilt is brought home. This cherished principle cannot be ignored. It is fact that Narcotic drugs have the effect of polluting social environment. The offenders are required to be dealt with iron hand i.e. to say if the charge is proved, exemplary punishment can be awarded. While viewing the object of Section 497 Cr.PC grant of bail in the given circumstances cannot be withheld especially, when the restraint clause is not applicable. Accused deserve to be admitted to bail Application as such succeeds. Accused are ordered to be released on furnishing bail to the tune of

Rs.30,000/- each to the satisfaction of learned Sessions Judge, Pulwama and the personal bond of like amount subject to the following conditions:

- i. that they will ensure their presence before the trial court on each and every date of hearing except for just cause;
- ii. that they will not in any way tamper with the prosecution evidence.

Application is accordingly disposed of."

11. On the other hand, Mr. Amir, learned AAG, submits that each case has to be examined in the light of its own facts and circumstances and having regard to the nature of the allegations levelled against the petitioner, bail cannot be granted to him. In this regard, he has relied on the observations made in paragraphs 3 to 5 judgment rendered in case Aasif Ishtiyag & anr. Vs. State of J&K & ors. reported in 2017(5) JKLT 333(J&K), the said paragraphs reads as under:-

"3. The menace of narcotic and psychotropic substance has to be controlled because use of such drugs has devastative impact on the society. More particularly when supply of such drugs or its distribution amongst the youngsters is made, the supplier thereof darkens the proper growth of the youth.

4. Use and abuse of narcotic drug in its any form has tremendous negative impacts. It is in the same background, stringent provisions are in place. Furthermore, it is in the same background quantity of drug when falls within the commercial quantity attracts rigour of Section 37 of the Act even though it is harsh but has to be applied harshly against such person.

5. Every case has its own facts and features and every case has to be judged in its own background at every level, be it at the stage of grant or otherwise of the bail or be it at the stage of conviction and sentence."

12. Considered the rival arguments.

13. It is evident from the perusal of record, which has been called in terms of the earlier order passed by this Court and the attested copies of which have been submitted, that the involvement of the petitioner herein for the commission of offence under Sections 8/21 (c), 29 NDPS Act, 201 RPC, has been prima facie established. The learned trial Court has also framed the opinion that there is no material to dislodge the presumption to be raised in terms of Section 37 NDPS Act. Therefore, on going through the material on record, I am of the opinion that the satisfaction recorded by the learned trial Court does not suffer on account of any impropriety or erroneous at this stage. Since the petitioner has already been found prima facie to be involved in the commission of offences under Sections 8/21 (c), 29 NDPS Act, 201 RPC and there is nothing to controvert the same while considering the entitlement of the petitioner to bail, petitioner, thus, has not been able to carve out the case for his admission to bail. The judgments, relied upon by the learned counsel for the petitioner, are wholly inapplicable to

the instant case. There is no ambiguity regarding the fact that the contraband involved in the instant case is commercial in nature, so it was for the petitioner to come out of the rigor of Section 37 NDPS Act. The defence taken in terms of the instant case by the petitioner herein for not having participated at any time in the conspiracy attributed to him, cannot be gone into by this Court as it is for the learned trial Court to examine the credibility and acceptability of this revision at appropriate stage. Precisely to state that no reasonable ground has been found for opining that the petitioner is not guilty for the offences as referred above, and as a sequel of which, the petition merits rejection which, is, accordingly, rejected along-with connected IA.