
(2020) 11 J&K CK 0025

In the Jammu And Kashmir High Court

Case No : Bail Application No. 184 Of 2020, Criminal Miscellaneous No. 1062 Of 2020

Muzamil Rafiq Ganai

APPELLANT

Vs

Union Territory Of J&K

RESPONDENT

Date of Decision : 12-11-2020

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 2(viia), 2(xxiii)a)8, 20, 21, 22, 37
Code Of Criminal Procedure, 1973 — Section 497

Citation : (2020) 11 J&K CK 0025

Hon'ble Judges : Ali Mohammad Magrey, J

Bench : Single Bench

Advocate : Zulker Nain Sheikh, F. A. Natnoo

Final Decision : Disposed Of

Judgement

Ali Mohammad Magrey, J

1. By medium of this application, the applicant/ accused is seeking bail in connection with case bearing FIR No. 166/2019 registered against him by Police Station, Bhaderwah, District Doda, for the commission of offences punishable under Sections 8/20/21/22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act of 1985").

2. The brief facts of the case, as come to the fore from the perusal of the pleadings on record, are that on 12th of September, 2019, a Police patrol party, during a routine checking, stopped the applicant/ accused and, from his possession, recovered 'Heroin' weighing 10/15 grams and 'Charas' 50/60 grams, alongwith Rs. 17000/- cash, one steel spoon, one plastic syringe and some medicine. Consequently, offences under Sections 8/20/21 of the Act of 1985 were found to have been made out against the applicant/ accused and, accordingly, a case bearing FIR No. 166/2019 was registered against him for the commission of the aforesaid offences at Police Station, Bhaderwah District Doda,

with which the investigation ensued. Thereafter, Challan came to be presented before the Court of competent jurisdiction on 23rd of December, 2019, whereafter the matter is pending trial before the said Court. The applicant/accused filed an application for the grant of bail in his favour in the FIR aforesaid before the Court of learned Principal Sessions Judge, Bhaderwah which came to be rejected by an order dated 10th of July, 2020. Aggrieved by the said order, the applicant has filed the instant application before this Court for the grant of bail in his favour, inter alia, on the grounds that he was in possession of an 'intermediate quantity' of the contraband, that is 'Heroin' weighing 10/15 grams and 'Charas' 50/60 grams, which does not fall within the scales of the 'commercial quantity', therefore, rigor of Section 37 of the Act of 1985 is not applicable. It is also stated that the applicant will not tamper with the prosecution evidence and will abide by the conditions whatsoever are imposed on him, in case he is admitted to bail.

3. Objections stand filed on behalf of the respondents, resisting and controverting the averments made by the applicant/accused in his application. It is stated that 'Heroin' weighing 10/15 grams and 'Charas' 50/60 grams were recovered from the possession of the applicant/accused. The applicant has committed a heinous offence. The menace of the drugs has eaten into the vitals of the society. It is a crime against the society and the societal concerns have to be guarded with zeal and zest. The motion so preferred by the applicant seeking admission to bail in relation to the above referred crime is devoid of any merit and, as such, the same deserves to be rejected.

4. Heard learned counsel for the parties, perused the pleadings on record and considered the matter.

5. At the outset, what requires to be stated is that in exercise of the powers conferred by Clauses (viiia) and (xxiiia) of Section 2 of the Act of 1985 and, in supersession of Ministry of Finance, Department of Revenue notification S.O. 527(E) dated 16th July, 1996, except in respect of things done or omitted to be done before such supersession, the Central Government specified the quantity mentioned in Columns 5 and 6 of the Table, in relation to the narcotic drug or psychotropic substance mentioned in the corresponding entry in Columns 2 to 4 of the said Table, as the 'small quantity' and the 'commercial quantity', respectively, for the purposes of the said clauses of that Section. Column 5 provides that a quantity upto 5 grams of Heroin falls within the parameters of 'small quantity' and a quantity of 250 grams of the same substance falls within the scales of the 'commercial quantity'. Likewise, Column 5 also stipulates that a quantity upto 100 grams of Charas falls within the parameters of 'small quantity' and a quantity of 1 kg of the same substance falls within the scales of the 'commercial quantity'. In the case on hand, the contraband seized from the applicant/accused, as is repeated herein, is 'Heroin' weighing 10/15 grams and 'Charas' 50/60 grams, which does not fall within the scales of the 'commercial quantity' to which the rigor of Section 37 of the Act of 1985 applies.

6. Apart from the above, in terms of well settled position of law, as evolved by the Supreme Court in a catena of judicial dictums on the subject governing the grant of bail, there is no strait jacket formula or settled rules for the use of discretion, but, at the time of deciding the question of 'bail or jail' in non-bailable offences, the Court concerned has to utilize its judicial discretion, not only that, as per the settled law, the discretion to grant bail in cases of non-bailable offences has to be exercised according to the rules and principles as laid down by the Code and various judicial decisions. In bail applications, generally, it has been laid down, from the earliest times, that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative, but the learned trial Court appears to have applied it in the reverse. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earliest times, it was appreciated that detention in custody, pending completion of trial, could be a cause of great hardship. From time to time, necessity demanded that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial, but, in such cases, 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which he has not been convicted or that, in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses, if left at liberty, save in the most extraordinary circumstances. Besides the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

7. It is not disputed that the quantity of the contraband recovered from the possession of the accused does not fall within the parameters of 'commercial quantity', but it is an intermediary one. On the face of such an eventuality, the application of the applicant/ accused had to be considered under the provisions of Section 497 of the Code of Criminal Procedure (Cr. P.C.). It is only on the application of the rigor of Section 37 of the Act of 1985 to a given case that bail can be withheld. In any case, which does not fall within the purview, scope and definition of Section 37 of the Act of 1985, grant of bail has to be considered on the agility and celerity of Section 497 of the Code of Criminal Procedure (Cr. P.C.). Therefore, a realistic view and a pragmatic approach has to be taken in such a case.

8. To categorize the materials in terms of quantity as small, medium and commercial is to allow escape routes for those to whom the rigor of Section 37 of

the Act of 1985 does not apply. Had the intention of the Legislators been to treat those who are found to be in possession of the small and medium quantity of the drugs and Narcotic substances on par with those from whom 'commercial quantity' of such substances is recovered, it could not have pierced and scaled it in different categories. The conflict between the human tendencies and the rules of society is an eternal one which cannot ever be solved or ended to the entire satisfaction of idealistic puritans. World of human society will always remain imperfect. It creates a false ethical self-importance on the part of the Courts who sit in judgment to decide or determine such cases not in accordance with the law, but by sentimental proverbs.

9. Testing the instant application from the above perspective, it requires to be recapitulated that the rigor of Section 37 of the Act of 1985 does not apply to the instant case. It also needs to be said that the case of the applicant does not fall within the parameters of the offences that are punishable with death or imprisonment of life. Therefore, there appears to be no reasonable ground for declining bail to the applicant. The maxim of the law of bails, which has its application to the case on hand where the quantity of narcotics recovered from the applicant/ accused falls within the scales of an intermediary one, is "bail and not jail".

10. Deprivation of liberty is tantamount to punishment. The principle that punishment begins after conviction and that every man is deemed to be innocent unless duly tried and duly found guilty, has its application to the facts of the instant case in all the fours. The object of the bail is to seek attendance and appearance of the accused at the trial by a reasonable amount of bail. Bail cannot be withheld as a means of punishment. Prison hell destroys the tender sentiments of a person. The applicant/ applicant has been languishing in the jail for so many months by now. The applicant/ accused has to prepare for his defence which is of an essence in a criminal trial. The discretion has to be exercised on well based foundations of law and one cannot get swayed by sentiments. Temper and passion have no role to play in exercising the discretion for the grant of bail.

11. The aforesaid view is fortified by the law laid down by two Coordinate Benches of this High Court, one passed at this wing; 'Kishore Sharma V. State; BA No. 151/2017' and the other at the Srinagar wing; 'Firdous Ahmad Payer V. State of JK; BA No. 133/2018'.

12. For all what has been said and done hereinabove, the applicant is admitted to bail, in case he furnishes a personal bond to the tune of Rs.1.00 lac (rupees one lac only) with a surety of the like amount to the satisfaction of the Superintendent of the jail wherein the applicant is lodged at the present moment, on the following terms and conditions:

i. That he shall present himself before the trial Court, as and when asked to do so;

ii. That he shall not leave the territorial limits of the jurisdiction of the trial Court without seeking permission; and

iii. That he shall not tamper or intimidate the prosecution witnesses.

13. Bail Application disposed of as above, alongwith the connected CrIM(s).

14. Registry, besides conveying a copy of this order to the learned trial Court for information, shall also forthwith send a copy of this order to the concerned Jail Superintendent for compliance.