
(2019) 07 J&K CK 0003

In the Jammu And Kashmir High Court

Case No : Bail Application (B.A) No. 176 Of 2018, IA No. 01 Of 2018

Saddam Hussain Reshi

APPELLANT

Vs

State Of Jammu & Kashmir Through SHO P/S Bandipora

RESPONDENT

Date of Decision : 01-07-2019

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 8, 21(c), 22, 29, 37, 50, 52, 57
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 120B
Code Of Criminal Procedure, 1973 — Section 161, 164A
Code Of Criminal Procedure, 1898 — Section 497

Citation : (2019) 07 J&K CK 0003

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : M.S.Reshi, Feroz Ahmad

Final Decision : Disposed Off

Judgement

Rashid Ali Dar, J

1. Learned Principal District & Sessions Judge, Bandipora, who is seized of the case titled Sadam Hussain Shah & Ors. Vs. State through SHO P/S

Bandipora, has rejected the bail application of the accused persons which include the present petitioner in terms of the order dated 15.09.2018 with the

following observations:-

â??....After appreciating the arguments put-forth by the Id. counsel for the parties, I am unable to agree with the contentions raised by the Id. counsel

for the accused petitioners. It is true that the accused are presumed to be innocents till their guilt is proved but the contentions that the accused are

innocents and have not committed any offence is neither sufficient nor can be categorized as a special circumstances to admit the accused on bail.

Moreover, it is worth to mention here that in the wake of evidence led by the prosecution so far in the case prima facie do not suggest that there are reasonable grounds for believing that the accused applicants are not guilty of the offence for which they have been charge sheeted and that they are not likely to commit any offence while on bail. Keeping in view the above facts and circumstances and the considerations of the rival sides contentions raised at the bar no good ground for granting the instant application is made out. The application as such is devoid of merit and is accordingly refused and rejected. Dismissal of the instant application shall not debar the accused/applicants for filing the fresh application in the competent court of law at any changed situation hereafter. Application is disposed of and shall form part of the main file.â??

2. The grounds taken in the present petition to admit the petitioner to bail are precisely as:-

â??...That, the petitioner has been implicated in a false and frivolous case and is behind the bars since last more than ten months. It is further

contended that the allegation levelled against the petitioner that 30 strips of Spasmo Plus tablets and 03 Max Caff-T bottles were recovered from his possession, is also false.

That, the petitioner has filed bail application before the learned trial court, which has been rejected.

That, the petitioner is innocent and has not indulged in any act or conduct constituting an offence punishable under the penal law of the land. There is no cause, reason or warrant in law for the continuous detention of the petitioner in the lockup/jail.

That the petitioner is the sole bread earner of his family and has to support them. They have been looking for the safe return of the petitioner who has been detained by the police for none of his fault.

That the petitionerâ??s mother is a differently abled female(deaf and dumb) and is suffering from lung cancer and the petitioner has to look after her ailing mother.

3. Objections stand filed on behalf of the respondents, wherein it is contended that:-

â??....That on 22.02.2018 a police party of P/S Bandipolra who was on Naka checking duty at Mangnipora, Bandipora found three persons in a

suspicious manner on the way from Aloosa to Bandipora. On seeing police party, they tried to conceal themselves but were apprehended tactfully by the police party.

That, on questioning they disclose their names as 1) Saddam Hussain Shah S/o Gh.Rasool Shah R/o Kaloosa, 2) Rayees Ahmad Bhat S/o Ghulam

Ahmad Bhat R/o Aloosa, 3) Tahir Rashid Matta S/o Ab. Rashid Matta R/o Ashtnagoo, Bandipora. On search, narcotic drugs, 1) Spasmo Proxyvon

Plus 30 strips containing 240 tabs. Mas Coff-T 03 bottles(100 ml), 2) Spasmo Proxyvon Plus 27 strips containing 216 tabs. Mas Coff-T 03 bottles(100

ml), 3) Spasmo Proxyvon Plus 25 strips containing 200 tabs. Mas Coff-T 01 bottle(100 ml) have been recovered from their possession respectively

and they could not give any justification for possessing the aforesaid drugs.

That, on investigation it was found that these persons are selling these narcotic drugs illegally to the youth of Bandipora to push them towards drug use

and make them addict in this regard.

That, the statement of some witnesses have also been recorded. Statement under Section 164-A Cr.PC of one eye witness has been recorded before

the court of law at Bandipora. On these statements the accused persons have been found involved in the commission of offences u/s 8/21-29 NDPS

Act and accordingly have been booked.

That during the course of investigation samples from seized property have been taken before the Executive Magistrate 1st Class, Bandipora and send

to FSL for expert opinion. After obtaining FSL opinion in the matter, the case has been challaned against the accused persons on 21.04.2018 before

the court of law at Bandipora.

That, in view of the factual position, the accused persons are involved in heinous offences under NDPS Act, as such, the bail application preferred by

the petitioner is misdirected and misconceived and propriety demands that law should be allowed to take its own course as the petitioner is facing trial

before the competent court of law.â??

4. Learned counsel for the petitioner on being heard submits that one of the witnesses namely Constable Bilal Ahmad No. 774/BPR had turned hostile

before the learned trial court while making his statement as a prosecution witness. In his earlier statement recorded under Section 161 Cr.PC, he had

stated that during Naka duty at Magnipora, Bandipora, a suspicious vehicle was stopped and three persons were found boarding in the said vehicle,

who were carrying banned drugs, accordingly they were apprehended.

5. Be it so, the ground projected in the present petition is that the petitioner is innocent and has no criminal background nor has ever been involved or

convicted by any court of law. The bail cannot be refused as a matter of punishment as the petitioner having no criminal background, according to the

learned counsel for the petitioner.

6. Learned counsel for the petitioner has taken reliance on the following judgments to substantiate his arguments:-

a) 2004 CRI.L.J. 4682, Shiv Kumar Nagpal v. State of Haryana;

b) 2008 CRI.L.J. 3584, Tariq Ahmad Dar & Anr. Vs. State of J&K & Ors.

7. In Tariq Ahmad Dar's case, the contraband allegedly recovered from the accused was 20 kgs. of poppy straw, so Section 37 of NDPS Act

was not applicable. The learned trial court rejected the bail application on the ground that few witnesses are yet to be examined. This Court while

disposing of the application, observed:-

“The prolonged incarceration unless justified cannot be permitted. The accused has admittedly been arrested on 2.4.2007, means the accused

are in the 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 the 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 conditions stipulated

therein.”

8. In Shiv Kumar's case, Section 37 of NDPS Act had been discussed. Para 18 & 19 of the said judgment would be apt to reproduce hereunder:-

18. A perusal of Section 37 of the NDPS Act, reproduced above, reveals that prior to the grant of bail to an accused, the following conditions

have to be satisfied :--

(1) The Public Prosecutor has to be given an opportunity to oppose the application.

(2) The Court has to be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence.

(3) The accused is not likely of commit any offence, while on bail.

19. A perusal of Section 37 of the N.D.P.S. Act makes it abundantly apparent that prior to release of an accused, charged of an offence under the

aforementioned Act, the Court is mandatorily required to comply with the three conditions, laid down in Section 37 of the N.D.P.S. Act. The first

condition, namely, a notice to the Public Prosecutor would obviously present no difficulty. The second condition, mandates the Court to record its

satisfaction that there are "reasonable grounds" to believe that the accused is "not guilty". In my opinion, the words "reasonable grounds" are a key to

the true import of the intention of the legislature in enacting the aforementioned condition. The words "reasonable grounds" cannot be read to mean

proved" as used in the Indian Evidence Act. Such an interpretation would, in my opinion, set at naught the power vested in a Court to grant bail

pending trial. The expression "reasonable grounds" would obviously mean something more than mere suspicion and conjectures and something less

than "proved". It would necessarily mean such grounds or material that would, prima facie, enable a person of ordinary prudence to believe that the

accused is not guilty. It is no doubt true that the object of the legislature, while enacting the stringent provisions of Section 37 of the NDPS Act, was to

prevent offenders from being granted bail easily but the said intent expressed in Section 37 of the NDPS Act cannot be construed to take away the

power of the Court to grant bail. The aforementioned condition does not breach or suspend the presumption of innocence that must follow an accused,

in our system of criminal jurisprudence. In this view of the matter, a Court is required to examine the material, placed before it, and then to arrive at a

conclusion that there exist "reasonable grounds" to believe that the accused is

not guilty.â??

9. It is emphatically submitted by the learned counsel for the petitioner that rigor of Section 37 of NDPS Act would not be attracted in the instant

case. Furthermore, learned counsel for the petitioner submits that the mandate of Section 50 of NDPS Act has not been complied with by the

investigating agency and so detention is unwarranted. It is his further submission that the recovery having not been corroborated by any independent

witness, the investigating agency cannot be believed to have recovered the substance. The petitioner who is behind the bars since last more than ten

months is entitled to bail, according to learned counsel for the petitioner.

10. According to learned counsel for the petitioner, the assertions of the statement of witnesses being not in accordance with fundamentals of the

story as projected in the final report. Presumption is carved out in terms of Section 37 of NDPS Act to hold that the charge against the accused-

petitioner herein, being not true. Same is also being done due to non-corroboration of prosecution case by PW-3 Constable Bilal Ahmad, It is being

submitted that some other witnesses have also not supported the recovery of the seized contraband as relied on by the investigating agency.

11. On the other hand, Mr. Feroz, learned Dy.AG submitted that rigor of Section 37 of NDPS Act would be attracted in the instant case. He submits

that the petitioner herein is involved in the commission of serious offences and the edifice of the case of the prosecution is laid on the recovery of the

commercial quantity of banned drugs from the petitioner herein on the pertinent date. The said recovery took place by chance during Naka duty at

Mangnipora, Bandipora. Learned Dy.AG has taken reliance on the judgment reported in AIR 2000 SC 3661, Superintendent Narcotics Central Bureau

Vs. R. Paulsamy, whereby their lordshipsâ?? have made observations that under Section 37 of the Narcotic Drugs and Psychotropic Substances

Act, 1985, no accused can be released on bail when the application is opposed by the Public Prosecutor unless the Court is satisfied that there are

reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. Para-6 of the said

judgment shall be advantageous to be quoted herein:-

â??6. In the light of Section 37 of the Act no accused can be released on bail when the application is opposed by the public prosecutor unless the

Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence

while on bail. It is unfortunate that matters which could be established only in offence regarding compliance with Sections 52 and 57 have been pre-

judged by the learned single Judge at the stage of consideration for bail. The minimum which learned single Judge should have taken into account was

the factual presumption in law position that official acts have been regularly performed. Such presumption can be rebutted only during evidence and

not merely saying that no document has been produced before the learned single Judge during bail stage regarding the compliance of the formalities

mentioned in those two sections.â??

12. Learned Dy.AG has also made reliance on the judgment of Honâ??ble Apex Court reported in(2017) 8 SCC, Hira Singh & Anr. Vs. Union of

India & Anr., wherein their lordships have made observations as:-

â??â?|We have heard Shri Manoj Swarup, Shri R.K. Kapoor, Shri Sangram S. Saron and Shri R.B. Singhal for the appellants/petitioners and Shri

Ranjit Kumar Solicitor General assisted by Ms. Binu Tamta for the respondents - Union of India. Before we embark upon the course to be adopted,

we deem it apposite to advert to the relevant portion of the exposition of this Court in E. Micheal Raj (supra). This is a decision of two Judges Bench.

In paragraph 15 of the reported judgment, the Court observed thus:

â??15. It appears from the Statement of Objects and Reasons of the amending Act of 2001 that the intention of the legislature was to rationalize the

sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentence, the

addicts and those who commit less serious offences are sentenced to less severe punishment. Under the rationalised sentence structure, the

punishment would vary depending upon the quantity of offending material. Thus, we find it difficult to accept the argument advanced on behalf of the

respondent that the rate of purity is irrelevant since any preparation which is more than the commercial quantity of 250 gm and contains 0.2% of

heroin or more would be punishable under Section 21 (c) of the NDPS Act, because the intention of the legislature as it appears to us is to levy

punishment based on the content of the offending drug in the mixture and not on the weight of the mixture as such.

This may be tested on the following rationale. Supposing 4 gm of heroin is recovered from an accused, it would amount to a small quantity, but when the same 4 gm is mixed with 50 kg of powdered sugar, it would be quantified as a commercial quantity. In the mixture of a narcotic drug or a psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance. It is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute small quantity or commercial quantity. The intention of the legislature for introduction of the amendment as it appears to us is to punish the people who commit less serious offences with less severe punishment and those who commit grave crimes, such as trafficking in significant quantities, with more severe punishment.â? (emphasis supplied) The principle stated in this decision is that the rate of purity of the drug is decisive for determining the quantum of sentence â?" for â?"smallâ?", â?"intermediaryâ?" or â?"commercialâ?" quantity. The punishment must be based on the volume or content of the offending drug in the mixture and not on the aggregate weight of the mixture as such. In other words, the quantity of the neutral substance is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance. It is only the actual content by weight of the narcotic drug, which is relevant for the purpose of determining the quantity with reference to the quantum of punishment.

The respondents have rightly pointed out that the expression â?"neutralâ?" substance has not been defined in the Act. That obviously has been coined by the Court to describe the other component of the mixture or preparation (other than the specified narcotic drug or psychotropic substance). We are also in agreement with the respondents that, the said decision nowhere makes reference to Note 2 (two) of the notification dated 19.10.2001 and that the same may have some bearing on the issue under consideration. This decision also does not refer to entry no. 239 and the interplay between the various provisions alluded to earlier while noting the argument of the respondents. That may have some bearing on the issue that has been finally answered. The judgment, however, after quoting the notification dated 19.10.2001 took note of the purpose for which Amendment Act of 2001 was

brought into force and then proceeded to hold that to achieve the said purpose of rationalisation of the sentence structure, the purity of the narcotic

drug from the recovery or seizure made from the offender would be a decisive factor. In other words, the actual content or weight of the narcotic

drug or psychotropic substance alone should be reckoned. For taking that view support was drawn from the observations made in another two Judges

Bench decision in the case of Ouseph @ Thankachan Vs. State of Kerala³ which, however, has also not elaborately dealt with the issue finally

answered in E. Micheal Raj (supra).â??

13. Reverting back to the instant case, it is evident from the perusal of record/ attested copies of relevant documents that the petitioner herein along-

with other two accused persons is involved in the commission of offences under Section 8/22-29 NDPS Act. The petitioner has been charged for

having in his possession a commercial quantity of contraband.

14. The investigating agency is relying on the list of eight witnesses to bring home the guilt of the accused. Among them, as is evident from the perusal

of the attested copies of the record called from the learned trial court, seven witnesses namely PW-1 SI Tariq Ahmad, PW-2 Constable Mohammad

Altaf Mir, PW-3 Constable Bilal Ahmad, PW-4 Sg.Ct. Gulzar Ahmad Mir, PW-5 Sg.Ct. Mubarak Ahmad, PW-6 Constable Farooq Ahmad and PW-7

SI Shahnawaz Ahmad, have been examined.

15. On perusal of the material available before me, at this stage it is quite evident that the petitioner herein has been allegedly in possession of Spasmo

Proxyin Plus tablets and codeine syrup. The learned Principle Sessions Judge after noticing the same had arrived at the conclusion that the said

quantity falls within the ambit of commercial slab. The Spasmo Proxyin tablet contains tramadol as is referred in the final report prepared by the

investigating agency.

16. Notification No. S.O. 2941(E) dated 18.11.2009 issued by Central Government is specifying small and commercial quantity of various narcotic

drugs or psychotropic substances. The whole content of preparation of mixture of a drug or substance is to be reckoned for working out its quantity,

and not the pure content of same.

17. FSL opinion, as is available, testifies the fact that the recovered substance prima facie being tramadol and codeine. While having regard to the

notification of 2009, preparation in aggregate is to be considered to see as to whether it falls within the ambit of commercial slab or not. Ex-facie it can be deduced that the recovered substance attributed to the petitioner herein is falling within the ambit of commercial slab and so the rigor of Section 37 of the Act is attracted prima facie in the instant case.

18. For what is stated above, I am of the opinion that it would be premature at this stage to have any view on the quality of the evidence produced by the prosecution, as the appropriate stage to deal with the same would be after the trial is concluded. In similar circumstance, the Honâ??ble Apex Court in Satish Jaggi v. State of Chatisgarh, reported in 2007 (56 AIC) 202 SC disapproved the tendency to mention, while disposing of the bail application, the value of the evidence put-forth by the prosecution. The tentative findings which have been recorded by the Lord Chief Justice were held virtually amount to the regular trial and so the bail granted was recalled.

19. Merit of infraction of procedural requirements too cannot be gone into having regard to the principle of law laid down in Paulsamyâ??s case noted above.

20. In view of the above, a view taken by the learned trial court while rejecting the bail petition cannot be faulted with. The judgments relied by the learned counsel for the petitioner is not applicable in the fact situation of the present case. In short no reasonable ground is made out for opining that the petitioner herein is not guilty under Sections 8/22 of NDPS Act and 120-B RPC. Petition merits rejection, same is accordingly rejected. The learned trial court shall proceed with the matter having regard to the fact that the petitioner is in custody from 22.02.2018. It is also clarified that the petitioner herein would be at liberty to move a motion afresh before the learned trial court for re-consideration of the matter, if further progress in the trial warrants such a motion to be laid.

21. Disposed of accordingly.