
(2020) 10 J&K CK 0027

In the Jammu And Kashmir High Court

Case No : Bail Application No. 133, 140 Of 2020, Criminal Miscellaneous No. 744, 745, 789, 790 Of 2020

Sunil Singh And Others

APPELLANT

Vs

Union Territory Of J&K And Others

RESPONDENT

Date of Decision : 13-10-2020

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 8, 15, 20, 29, 37
Code Of Criminal Procedure, 1973 — Section 437, 439

Citation : (2020) 10 J&K CK 0027

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Suyash Singh Chandel, Ayjaz Lone

Final Decision : Allowed

Judgement

Sanjay Dhar, J

1) As per the prosecution case, on 05.06.2020 at about 1.20 PM, a police party of Police Station, Samba, while on Naka checking at Plah Morh National Highway, Samba, spotted a person who was carrying a polythene bag. On seeing the police party, the said person tried to run away from the spot. The person in question was nabbed by the police and upon search of the polythene bag that was being carried by him, 20 pieces of charas like substance weighing 300/350 grams packed in maize cover were recovered from his possession. The said person disclosed his identity as Roshan Lal, one of the petitioners herein. The police registered FIR No.145/2020 for offence under Section 8/20 NDPS Act at P/S Samba. The recovered substance (charas) weighing 350 grams including the maize cover was seized and accused/petitioner Roshan Lal was subjected to interrogation. It is the further case of the prosecution that during interrogation, accused/petitioner Roshan Lal disclosed that he had purchased the recovered charas from one Sunil Singh, the other petitioner herein, who was also arrested and subjected to interrogation. On the basis of disclosure of accused/petitioner

Sunil Singh, 150 grams of charas packed in maize cover and 4.50 kgs of Poppy Straw were recovered. According to the prosecution case, after investigation of the case, offences under Section 8/15/29 of NDPS Act stand established against both the petitioners/accused who are in police/judicial custody since 05.06.2020. Challan against the petitioners has already been filed before the Court of Principal Sessions Judge, Samba.

2) It appears that the petitioners had filed an application for grant of bail in their favour in the aforesaid FIR before the Court of Principal Sessions Judge, Samba, and the same was rejected by the Court vide order dated 14.07.2020. Being aggrieved of the said order, the petitioners have filed the instant petitions before this Court for grant of bail in their favour on the grounds that the investigation in the case is complete and nothing is to be recovered from the petitioners, as such, there is no reason to keep the petitioners behind the bars; that on account of outbreak of pandemic COVID-19 and due to over crowding of jails, the petitioners deserve to be enlarged on bail so as to prevent a situation whereby they would be exposed to infection; that the learned trial court while rejecting the bail petition of the petitioners has not properly appreciated the legal position attending the issue of grant of bail inasmuch as the rule is bail not jail which in other words means that grant of bail is a rule and its refusal an exception; that the observations of the learned trial court regarding apprehension of the petitioners tampering with the prosecution evidence is without any basis and that in case bail is granted in favour of the petitioners, they are ready to abide by all terms and conditions that may be imposed by the Court.

3) The respondents have resisted the bail petitions by filing objections thereto. In their objections, respondents have contended that the petitioners are involved in non-bailable offences under NDPS Act as intermediate quantity of contraband/narcotics has been seized from them which act of the petitioners is punishable with imprisonment for a term extending to 10 years and payment of fine up to Rs.1.00 lac, thus the petitioners do not deserve the concession of bail; that the order rejecting the bail petition of the petitioners passed by the learned trial court is based on cogent and sound reasons and that the petitioners have committed a heinous crime, inasmuch as their acts put the lives of young people and their families at risk.

4) I have heard learned counsel for the parties and perused the record.

5) In the instant case, learned Principal Sessions Judge, Samba, has rejected the bail petition of both the petitioners. The question that arises for consideration is whether or not successive bail applications will lie before this Court. The law on this issue is very clear that if an earlier application was rejected by an inferior court, the superior court can always entertain the successive bail application. In this behalf, it will be profitable to quote the following observations of the Supreme Court in the case titled *Gurcharan Singh & Ors vs State (Delhi Administration)*, AIR 1978 SC 179:

"It is significant to note that under Section 397, Cr.P.C of the new Code while the High Court and the Sessions Judge have the concurrent powers of revision, it is expressly provided under sub-section (3) of that section that when an application under that section has been made by any person to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them. This is the position explicitly made clear under the new Code with regard to revision when the authorities have concurrent powers. Similar was the position under Section 435(4), Cr.P.C of the old Code with regard to concurrent revision powers of the Sessions Judge and the District Magistrate. Although, under Section 435(1) Cr.P.C of the old Code the High Court, a Sessions Judge or a District Magistrate had concurrent powers of revision, the High Court's jurisdiction in revision was left untouched. There is no provision in the new Code excluding the jurisdiction of the High Court in dealing with an application under Section 439(2), Cr.P.C to cancel bail after the Sessions Judge had been moved and an order had been passed by him granting bail. The High Court has undoubtedly jurisdiction to entertain the application under Section 439(2), Cr.P.C for cancellation of bail notwithstanding that the Sessions Judge had earlier admitted the appellants to bail. There is, therefore, no force in the submission of Mr Mukherjee to the contrary.

6) Relying upon the aforesaid observations of the Supreme Court, the High Court of Bombay in the case titled *Devi Das Raghu Nath Naik v. State*, (Crimes Volume 3 1987 363), has observed as under:

"The above view of the learned Single Judge of the Kerala High Court appears to me to be correct. In fact, it is now well-settled that there is no bar whatsoever for a party to approach either the High Court or the Sessions Court with an application for an ordinary bail made under Section 439 Cr.P.C. The power given by Section 439 to the High Court or to the Sessions Court is an independent power and thus, when the High Court acts in the exercise of such power it does not exercise any revisional jurisdiction, but its original special jurisdiction to grant bail. This being so, it becomes obvious that although under section 439 Cr.P.C. concurrent jurisdiction is given to the High Court and Sessions Court, the fact, that the Sessions Court has refused a bail under Section 439 does not operate as a bar for the High Court entertaining a similar application under Section 439 on the same facts and for the same offence. However, if the choice was made by the party to move first the High Court and the High Court has dismissed the application, then the decorum and the hierarchy of the Courts require that if the Sessions Court is moved with a similar application on the same fact, the said application be dismissed. This can be inferred also from the decision of the Supreme Court in *Gurcharan Singh's case* (above)."

7) From the aforesaid discussion of law on the subject, it is manifest that the rejection of a bail application by Sessions Court does not operate as a bar for the High Court in entertaining a similar application under Section 439 Cr. P. C on the same facts and for the same offence. Even otherwise when the application of the

petitioners was rejected by the learned trial court, the charge sheet against the petitioners/accused was yet to be filed. The same as per the objections filed by the respondents, has now been filed before the learned trial court on 31.08.2020. Thus, there is a definite change of circumstance since the rejection of earlier bail application of the petitioners.

8) Coming to the order of the learned Principal Sessions Judge, Samba, whereby application of the petitioners for grant of bail has been rejected, the learned Judge while rejecting bail application of the petitioners has observed that the quantity of contraband recovered from the petitioners fall in intermediate quantity, therefore, bar of Section 37 of NDPS Act is obviously not applicable to the case. It seems that severity of punishment and seriousness of offences alleged to have been committed by the petitioners has weighed with the learned Sessions Judge while rejecting bail application of the petitioners. According to the learned Judge, the menace of trade in use of narcotic drugs and psychotropic substances is required to be curbed with a heavy hand and for this reason bail application of the petitioners has been rejected.

9) There is no dispute to the fact that the quantity of contraband recovered from the possession of the petitioners does not fall within the parameters of commercial quantity and that the same is an intermediary one. The rigor of Section 37 of NDPS Act, therefore, is not attracted to the instant case. The bail petition of the petitioners is, as such, required to be considered on the touchstone of the principles governing grant of bail under Section 437 of Cr. P. C.

10) It is a settled position of law that grant of bail is a rule whereas its refusal is an exception. The question whether bail should be granted in a case has to be determined on the basis of the facts and circumstances of that particular case. A Coordinate Bench of this Court, while discussing the principles to be followed in a case where intermediary quantity of contraband was recovered from the accused, has, in the case of Mehraj-ud-Din Nadroo and others Vs. State of J&K (BA No.74/2018 decided on 07.07.2018), observed as under:

"9. The settled position of law as evolved by the Supreme Court in a catena of judicial dictums on the subject governing the grant of bail is that 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. Court 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 rules and principle 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. 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 demands 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. Apart from 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.

10. The word "judicial discretion" has been very well explained by an eminent jurist Benjamin Cardozo. In the words of Benjamin Cardozo "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system and subordinated to the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains." Even so, it is useful to notice the tart terms of Lord Camden that "the discretion of a Judge is the law of tyrants. It is always known, it is different in different men; it is causal, and depends upon constitution, temper and passion. In the best, it is oftentimes caprice, in the worst, it is every vice, folly and passion to which human nature is liable.

11) In the light of the afore-quoted principles, let us now advert to the facts of the instant case. As already noted, the quantity of contraband allegedly recovered from both the accused does not fall within the parameters of 'commercial quantity' and in view of the same is intermediary one. The rigor of Section 37 of the NDPS Act thus does not come into play. The observation of learned trial court while rejecting the bail application of the petitioners that the offences alleged to have been committed by the petitioners are serious in nature and the same affect the society in general and the young generation in particular, cannot be the sole reason for rejection of the bail application, particularly when the allegations are yet to be established. Allowing the petitioners to remain in custody because of the reason that the offences alleged to have been committed by them are serious in nature, would amount to inflicting pre-trial punishment upon them. Every person is presumed to be innocent unless duly tried and duly found guilty. Withholding of bail cannot be as a measure of punishment. The

petitioners are in custody for more than four months now and their further incarceration will be nothing but imposition of punishment without trial of the case. Therefore, a balanced view of the matter is required to be taken by enlarging the petitioners on bail.

12) Apart from this, the respondents have not placed on record anything to show that the petitioners are habitual offenders or that they have previously been either implicated or convicted of similar offences. If the petitioners are not enlarged on bail, it may also have an adverse impact on their preparation of defence against the charges that have been laid against them before the learned trial court. The discretion regarding grant or refusal of bail cannot be exercised against the petitioners on the basis of public sentiments or to teach them a lesson as their guilt is yet to be proved.

13) For the foregoing reasons, both the petitions are allowed and the petitioners are admitted to bail subject to the following conditions:

- (i) That they shall furnish personal bond in the amount of Rs.50,000/ each with one surety each of the like amount to the satisfaction of the learned trial court;
- (ii) That they shall appear before the trial court on each and every date of hearing;
- (iii) That they shall not leave the territorial limits of Union Territory of J&K without prior permission of the learned trial court;
- (iv) That they shall not tamper with prosecution witnesses

14) Copy of this order be provided to the learned counsel for the petitioners through available mode and copy be also sent to the learned trial Court.