

(2020) 10 J&K CK 0056
In the Jammu And Kashmir High Court
Case No : Bail Application No. 44 Of 2020

**Tanveer Ahmad Rather And Others @APPELLANT @Has Union Territory
Of J&K**

Date of Decision : 28-10-2020

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 2, 8, 22, 29, 37, 42, 50, 57, 67

Citation : (2020) 10 J&K CK 0056

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : N. A. Ronga, Sheikh Feroz

Final Decision : Dismissed

Judgement

Sanjay Dhar, J

1) Through the medium of instant bail application, petitioners are seeking bail in FIR No.47/2020 for offences under Section 8/22/29 of NDPS Act of Police Station, Sumbal, Bandipora.

2) The facts giving rise to the filing of the instant petition are that on 22.03.2020, a police party of Police Station, Sumbal, while on patrolling, spotted three persons carrying bags in their hands coming towards Sumbal. These three persons on seeing the police party tried to run away but the police party chased them and out of the three, two persons were nabbed whereas the third one left his bag on spot and ran away. One of the persons nabbed was identified as accused Mushtaq Ahmad Bhat whereas other one was identified as accused Tanveer Ahmad Rather. Upon enquiry from these two accused persons, the third accused, who had fled away from the spot, was identified as Hilal Ahmad Wani. The bag recovered from accused Mushtaq Ahmad Bhat contained 15 bottles of Omrex (Codeine Phosphate) and 8 bottles of Rexorid (Codeine Phosphate) whereas the bag recovered from accused Tanveer Ahmad contained 13 bottles of Omrex (Codeine Phosphate), 4 bottles of Rexorid (Codeine Phosphate) and 4 bottles of Sivzcodiene (Codeine). The bag left behind by accused Hilal Ahmad Wani

contained 8 bottles of Rexorid (Codeine Phosphate), 21 bottles of Omrex (Codeine Phosphate) and 6 bottles of Sivzcodiene (Codeine Phosphate). The recovered material was seized on spot and samples were taken and sealed. All the three accused were arrested and during the investigation of the case, accused Hilal Ahmad Wani made a disclosure statement on the basis of which 22 more bottles of Sivzcodiene (Codeine Phosphate) were recovered and seized.

3) After investigation of the case, offences under Section 8/22/29 of the NDPS Act were found established against all the three accused and charge sheet was laid before the trial court. Bail application of all the three accused stands dismissed by the learned trial court vide its order dated 02.06.2020 on the ground that commercial quantity of Narcotic Drugs has been recovered from the petitioner and, as such, they are not entitled to the concession of bail.

4) Petitioners Tanveer Ahmad Rather and Hilal Ahmad Wani have, in the instant petition, contended that they have been falsely implicated in the case; that the investigation of the case is complete; that the mandatory provisions of Section 50 of the NDPS Act have not been followed in the instant case; that the provisions contained in Section 42 and 57 of the NDPS Act have been observed in breach; that the quantity of Narcotic Drugs recovered from the petitioners does not fall in the category of commercial quantity; that the petitioners are suffering from multiple ailments and that petitioners are prepared to abide by all the conditions that may be imposed by this Court in case they are enlarged on bail.

5) The respondent has resisted the bail application of the petitioners by filing objections thereto. In the objections, respondent has contended that the application of the petitioners is without any merit; that the petitioners are involved in heinous offences which are against the society; that quantity of banned drugs recovered from the petitioners falls in the category of commercial quantity and, as such, rigor of Section 37 of the NDPS Act is applicable to the case of the petitioners and that enlarging the petitioners on bail will be against the public interest.

6) I have heard learned counsel for the parties and perused the record of the case including the record of the trial court.

7) The main contention raised by learned counsel for the petitioners during the course of arguments is that in the instant case investigating agency has not complied with the mandatory provisions contained in Sections 42, 50, 57 and 67 of the NDPS Act. On this ground it is urged that the petitioners are entitled to the concession of bail. In order to support his contention, the learned counsel has relied upon the judgments of this Court in the cases of Abdul Rashid Dar v. State reported in 1998 SLJ 409 and Mohammad Ashiqeen v. State reported in 2007(3) JKJ (HC) 362.

8) So far as the provision contained in Section 50 of the NDPS Act are concerned, it provides the conditions under which the search of persons is to be conducted by an officer duly authorized under Section 42 of the Act. As per this

provision, an option has to be given to the person sought to be searched for his search in the presence of a Gazetted Officer. According to the learned counsel in the instant case, the petitioners were not given the requisite option.

9) As is clear from the facts narrated in the charge sheet in the instant case, the first recovery of contraband drugs has been made from the petitioners as a chance recovery. It is not a case where the police party was knowing before hand or had suspicion that the petitioners were carrying the contraband drugs in their possession. In the instant case, the police were on patrolling and when the accused started running away from the police upon spotting them, they were nabbed and upon their search the contraband drugs were recovered. Thus, this is a case of chance recovery.

10) The Supreme Court in the case of *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172, has clearly laid down that in the cases of chance recovery, the procedure contemplated in Section 50 of the NDPS Act is not required to be followed. The said ratio has been followed by the Supreme Court in the case of *State of Himachal Pradesh v. Sunil Kumar*, (2014) 4 SCC 780.

11) However, so far as the recovery of the contraband drugs made by the police during the investigation of the case on the basis of disclosure statement made by accused Hilal Ahmad Wani is concerned, the provisions contained in Section 50 of the NDPS Act would come into play as it is not a case of chance recovery. Perusal of the material attached to the charge sheet reveals that there are documents to show that option of search in presence of a Gazetted officer has been given to the petitioner Hilal Ahmad Wani and that recovery has been effected in the presence of a Gazetted Officer. However, it does appear from the record that disclosure statement has been made by petitioner Hilal Ahmad Wani on 23.03.2020 whereas the date reflected on the memo of recovery is 22.03.2020 i.e. a day prior to the date of disclosure statement.

12) Even if it is assumed that there has been non-compliance with certain provisions of the NDPS Act, the question arises whether these matters and the discrepancies in the dates of disclosure and recovery can be gone into while considering a bail application. The Supreme Court in the case of *Superintendent Narcotics Central Bureau v. R. Paulsamy*, AIR 2000 SC 3661, has, while considering this aspect, observed that the said matters cannot be gone into while considering an application for grant of bail. Para 6 of the said judgment is relevant to the context and the same is reproduced as under:

"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."

13) From the aforesaid enunciation of law on the subject, it is manifest that even if there appears to be some non-compliance to the procedure prescribed under the provisions of NDPS Act, the same cannot be gone into in these proceedings at this stage. The judgments referred to by the learned counsel for the petitioners are of no help to the petitioners' case in the face of the law laid down by the Supreme Court in R. Paulsamy's case (supra).

14) It has been next contended by learned counsel for the petitioners that there is no evidence of conspiracy in the instant case, as such, the petitioner Hilal Ahmad Wani could not have been booked in the case. According to the learned counsel, petitioner Hilal Ahmad Wani has been implicated on the basis of the information given to the police by the co-accused while in custody, which is inadmissible in evidence. In support of his contention, the learned counsel has relied upon the judgment of Kerala High Court in the case of Jiju Hasan v. Narcotic Control Bureau, 2004 Cri. L. J. 3517 and the judgments reported in AIR 2004 SC 3022 and AIR 2007 SC (Suppl) 408.

15) The contention of the learned counsel for the petitioners' is without any merit for the reason that not only contraband drugs have been recovered from the bag that was thrown away by petitioner Hilal Ahmad Wani on spot but the contraband drugs have also been recovered on the basis of his disclosure statement. Thus, there is enough evidence on record to connect the petitioner Hilal Ahmad Wani with the crime.

16) The contention of the petitioners that they are suffering from serious ailments is not borne out from the record as no such record has been placed before the Court by the petitioners. Thus, petitioners' claim to concession of bail on health grounds is without any merit.

17) It has also been contended that the quantity of contraband drugs recovered from the petitioners does not fall in the category of commercial quantity and, as such, the rigor of Section 37 of the NDPS Act is not attracted to their case.

18) So far as petitioner Tanveer Ahmad is concerned, 13 bottles of Omrex (Codeine Phosphate), 4 bottles of Rexorid (Codeine Phosphate) and 4 bottles of Sivzcodiene (Codeine Phosphate), total 21 bottles (100 ml each) containing Codeine Phosphate have been recovered from him. In the case of petitioner Hilal Ahmad, 8 bottles of Rexorid (Codeine Phosphate), 21 bottles of Omrex (Codeine Phosphate) and 6 bottles of Sivzcodiene (Codeine Phosphate) were recovered from the bag which he threw on spot. In addition to this, 22 bottles of Sivzcodiene (Codeine Phosphate) were recovered on the basis of disclosure statement made by him. Thus, in all 57 bottles (100 ml each) were recovered

from petitioner Hilal Ahmad Wani.

19) As per the notification issued under Section 2 of the NDPS Act, one Kg of Codeine has been categorized as 'commercial quantity'. Petitioner Tanveer Ahmad has been found to be in possession of 21 bottles (100 ml each) containing solution of Codeine whereas petitioner Hilal Ahmad has been found in possession of 57 bottles (100 ml each) containing solution of Codeine.

20) Mili liter is a unit of volume whereas gram is a unit of mass. Each substance has a separate formula for conversion depending upon its density. In the case of water, one mili liter is equivalent to one gram. Higher the density of liquid, more will be the mass of one mili liter of such liquid. So far as the solution of Codeine is concerned, its density is higher than that of water. Therefore, even if we use the conversion applicable to water, both the petitioners were found to be in possession of more than one kg of Codeine solution which falls under the category of as 'commercial quantity'. Thus, the rigor or Section 37 of the NDPS Act is applicable to the case of both the petitioners.

21) Section 37 of the NDPS Act provides for fulfillment of two conditions before a bail can be granted to an accused. Firstly, the Public Prosecutor has to be given an opportunity to oppose the application and secondly, if the Public Prosecutor opposes the application, the Court has to be satisfied that there are reasonable grounds for believing that the accused person is not guilty of such offence and that he is not likely to commit any offence while on bail. The conditions laid down in Section 37 of the NDPS Act are mandatory in nature. I am supported in my aforesaid view by the ratio laid down by the Supreme Court in the case of Union of India v. Ram Samujh and another, (1999) 3 SCC 429.

22) Adverting to the facts of the instant case, the learned counsel for the State has opposed the bail application. Upon perusal of the material on record, I am unable to find any ground, much less a reasonable ground, for believing that the petitioners are not guilty of the offence. The petitioners have not been able to make out a case of such nature. Thus there is no merit in the application of the petitioners.

23) For the foregoing reasons, the bail petition of the petitioner is dismissed at this stage. However, the petitioners shall be at liberty to move the trial court if during the trial of the case some material comes before the said Court which would go on to show reasonable grounds for believing that the petitioners are not guilty of the offences of which they have been charged.