

Ghulam Mohd Bhat Age 58 Years S/O Abdul ... vs Narcotics Control Bureau Through on 18 May, 2022

Author: Mohan Lal

Bench: Mohan Lal

Sr. No. 244

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Bail App. No. 409/2021
Reserved on : 27.04.2022
Pronounced on : 18.05.2022

Ghulam Mohd Bhat age 58 years S/O Abdul Gaffar
Bhat R/O Duroo Sabdan Bemina Budgam (J&K)
Through :- Mr. M.A. Bhat, Advocate
V/s

.... Applicant(s)

Narcotics Control Bureau through

....Respondent(s)

Intelligence Officer Jammu Zonal Unit 42 B/B 2nd Extension Gandhi Nagar Jammu Through :- Mr. Vishal Sharma ASGI Coram: HON'BLE MR. JUSTICE MOHAN LAL, JUDGE ORDE R

18. 05 .2022

1. Under the provisions of Sec. 439 of the Code of Criminal Procedure, petitioner has moved instant petition for seeking bail in his favour in case No. 18/2021/complaint of NCB Crime No. 06/2020 dated 11-08-2020 for commission of offences contrary to sections 8/20/29 of the Narcotics Drugs and Psychotropic Substances Act (hereinafter referred as the "NDPS Act"). It is averred, that there is not an iota of evidence against the petitioner in whole of the complaint and the documents attached therewith pending trial in the court of Ld. Addl. Sessions Judge Jammu, whereby, the petitioner is entitled to be admitted to bail in view of the law laid down by Hon'ble Supreme Court of India in case of Toofan Singh V/s State of Tamil Nadu (2020) 4 SCC 1, the complaint of the respondent before the Ld. Trial Court is that accused Mohd Sharief S/O Mohd Hussain R/O Budhal P.S. and Tehsil Budhal District Rajouri was apprehended on prior information alongwith his truck bearing registration No. JK 02BM 1963 near Ban Toll Plaza on 11.08.2020, upon search of the truck 35 packets ostensibly containing charas like material were recovered which was weighed with weighing machine and total weight found was 42.500 kgs including packeting material and the net weight of the recovered charas was found to be 41.200 kgs without packeting material and the seized contraband was put in three bags and sealed on spot. It is averred, that the vehicle was seized by NCB team by Deepak Kumar Intelligence Officer and on question from the accused Mohd Sharief his statement was shown to have been recorded u/s 67 of NDPS Act who disclosed that the seized contraband i.e. charas was handed over to him by two 2 persons namely, (i) Ghulam Mohd Bhat S/O

Abdul Gaffar Bhat R/O Duroo Sabdan Bemina Budgam (petitioner herein) & (ii) Ghulam Muhi Uddin Tak S/O Ghulam Ahmed Tak R/O Tak Mohalla Bijbehara (accused No.3) and on the basis of statement of accused Mohd Sharief he was placed under arrest at 2200 hours on 19-03-2019, the seized contraband was got resealed from Executive Magistrate and remand of the accused was obtained from competent court of law, as per the contents of challan petitioner and Ghulam Muhi Uddin Tak disclosed that the seized contraband in connection with NCB case crime No. 06/2020 dated 11.08.2020 has been handed over to them by three persons namely Mohd Shagir (Mob. 9906951154), Farooq Ahmad (Mob. 8899897021) & Nazir @ Mukdam (Mob. 8491809195), after recording the statements of some of the witnesses and obtaining the call details reports of the mobile phone Nos. of the accused the investigation was concluded by filing a complaint before the court of Ld. Pr. Session Judge Jammu alleging therein commission of offences punishable u/s 8/20/29 & 60 of the NDPS Act. It is averred, that Ld. Addl. Sessions Judge Jammu after hearing the arguments on charge from the prosecution and defence has framed charges against the petitioner and the other two accused vide order dated 09-11-2020, and the petitioner is aggrieved of the order of the Ld. Addl. Sessions Judge Jammu dated 09-11-2021 pertaining to the framing of charges against the petitioner for commission of offences u/ss 8/20/29 of NDPS Act. It is moreso averred, that petitioner is implicated in the case merely on the basis of confessional statement of co-accused and on his own confession u/s 67 of NDPS Act as there is no other evidence to substantiate allegations against petitioner and in view of the latest judgment rendered by Hon'ble Supreme Court in Toofan Singh's Case the statement u/s 67 of NDPS Act is hit by the provisions of section 25 of Evidence Act and the said confessions cannot be used as evidence against the co-accused, once the material of confessional statements relied by the prosecution cannot be translated into evidence no charge can be framed against accused, trial court has erred in holding that there are reasonable grounds to presume that accused persons have prima-facie committed offences u/ss 8/20/29 of the Act, except the statement u/s 67 of NDPS Act nothing remains against petitioner/accused and even presumption of prima-facie case cannot be drawn against the petitioner who therefore becomes entitled to the bail, bar created u/s 37 of NDPS Act does not apply to the case in hand as there is no prima-facie evidence against the petitioner/accused, petitioner is permanent resident of U.T. of J&K has deep roots in the society and being a respectable person in the society if not admitted to bail it will lower down his image in the society, petitioner is not involved in any other case, there is no chance of his fleeing from the trial, petitioner undertakes to abide by all the terms and conditions imposed by the court, undertakes to furnish bail and personal bonds to the satisfaction of the court and also undertakes to remain present on each and every date of hearing.

2. Respondents have opposed the bail on the grounds, that the offence so committed is very heinous and against the society at large and involves harsh punishment and therefore in order to restore the confidence of the general public in the administration of justice system the present bail application deserves to be dismissed. It is contended, that the liberty of an individual is subject to reasonable exceptions and in the present case the petitioner is guilty of offences under the NDPS Act having found in possession of commercial quantity of Narcotics contraband and therefore does not deserve any leniency of granting him any liberty, thus the bail application deserves to be dismissed/rejected. It is moreso contended that the gravity of offence committed by the petitioner in the present case and under especially in view of the bar created u/s 37 of NDPS Act no bail application lies in case of such like offence to be granted, petitioner does not deserve the concession of bail as such the bail

application of the petitioner may kindly be rejected out rightly, petitioner had earlier filed application for grant of bail in the present case which has been dismissed by the court of Ld. 1st Addl. Session Judge Jammu, the actual weight of the charas found from the possession of accused Mohd Sharief is 41.200 kg, during investigation notice u/s 67 of NDPS Act 1985 was issued to accused Mohd Sharief and his voluntary statement was recorded by Intelligence Officer PW-7 Satish Kumar wherein accused Mohd Sharief disclosed that the seized drugs i.e. charas was handed over to him by two persons namely, Ghulam Mohd Bhat S/O Abdul Gaffar Bhat R/O Duroo Sabdan Bimna Budgam (J&K) (accused No.2, petitioner herein) & Ghulam Muhi Uddn Tak S/O Ghulam Ahmed Tak R/O TaK Mohalla Bijbehara J&K (accused No.3) who gave their mobile Nos. and further more accused Mohd Sharief disclosed that the seized contraband was to be delivered to Mumbai. It is contended, that during further investigation letters were addressed to Nodal Officers of Bharti Airtel Limited, Reliance Jio Infocom Limited and BSNL Limited to provide the CDRs and CAFS of suspected Mobile Nos. and on analyzing CDRs received from respective service providers it was found that all the accused persons including the petitioner and the suspected persons were in regular contact with each other which clearly establish that petitioner has direct involvement with accused Mohd Sharief and others in commission of offence u/s 8 punishable u/s 8/20/60 of NDPS Act and there are no reasonable grounds to come to conclusion that petitioner is not guilty of offence under NDPS Act. It is further contended, that the trial of the case is at crucial stage and there is every possibility of accused tempering the evidence if released on bail, there is a statutory embargo contained in sec. 37 of NDPS Act for granting bail to the accused as per notification specifying commercial quantity of charas the seized contraband is 41.200 kg, if the petitioner is released on bail he may flee to the other state/place and may not turn up and give a slip to law and can indulge in similar drug crimes.

3. Mr. M.A. Bhat Ld. Counsel has sought the release of applicant/accused on bail by vehemently canvassing arguments, that on the questioning of accused Mohd Sharief S/O Mohd Hussain R/O Budhal Tehsil Budhal District Rajouri who was apprehended with his truck bearing registration No. JK02BM-1963 near Ban Toll Plaza (Nagrota) on 11-08-2020 alongwith 35 packets of charas weighing 41.200 kg his statement was recorded u/s 67 of NDPS Act who disclosed that charas was handed over to him by applicant/accused (Ghulam Mohd) and other accused namely (Ghulam Muhi Uddin Tak), and only on the basis of confessional statement of co-accused Mohd Sharief and on his own confession u/s 67 of NDPS Act the applicant/accused has been taken into custody and indicted for commission of offences u/ss 8/20/29/60 of NDPS Act. It is argued, that there is no other evidence substantiating the allegations against applicant/accused, and in view of the judgment of Hon'ble Supreme Court rendered in Tofan Singh's case (2021) 4 SCC 1, the confessional statement will remain inadmissible in trial for an offence under NDPS Act while the CDR details of some of the accused will be examined at the stage of trial, and as no recovery has been effected from the possession of applicant/accused rigor contained in Sec. 37 of NDPS Act is not applicable, therefore, applicant/accused requires to be admitted to bail.

4. Mr. Vishal Sharma Ld. ASGI for respondent, has opposed the bail of applicant/accused by strenuously arguing, that applicant/accused is the source who has supplied the contraband charas to principle accused Mohd Sharief who has been found in conscious possession of carrying 41.200 kg of commercial quantity of contraband charas in his truck bearing No. JK02BM-1963 near Ban Toll

Plaza, rigor contained in section 37 of NDPS Act applies to the case in hand, principle accused Mohd Sharief during investigation has disclosed in his statement recorded u/s 67 of NDPS Act 1985 that he was supplied the commercial quantity of contraband charas by applicant/accused, the CDRs & CAFS of suspected mobile Nos. on analysis received from various service providers depict that all the accused persons were in regular contact with each other which clearly establish that applicant/accused had direct involvement with principle accused Mohd Sharief and others in commission of offence punishable u/s 8/20/60 of NDPS Act, there is no reasonable ground to believe that applicant/accused is not guilty of offence.

5. I have heard Ld. Counsel for the applicant/accused and Ld. ASGI for respondents. I have bestowed my thoughtful consideration to the material aspects involved in the case and have gone through the relevant law on the subject matter meticulously. Hon'ble Apex Court in Tofan Singh Vs. State of Tamil Nadu [(2021) 4 SCC 1] while discussing and appreciating the scope of statement of an accused recorded u/s 67 of NDPS Act has held as under:-

"158.1. That the officers who are invested with powers under section 53 of the NDPS Act are police officers within the meaning of section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."

Again Hon'ble Apex Court in a bunch of petitions viz; petition for special leave to appeal (Crl) Nos. 242 of 2022, 1569 of 2021, 1454 of 2021, 1465 of 2021 2080 of 2021 & 1773-74 of 2021 in cases titled State by (NCB) Bengaluru.....Petitioner Versus Pallulabid Ahmad Arimutta & Anr.....

Respondents and Anrs. decided on January 10, 2022, while upholding/confirming the orders of High Court of Karnataka releasing respondents/accused on bail [except A-2 Mohd Afzal found in possession of commercial quantity of 4.525 kg of Hashish, 965 grams of Amphetamine and 30 grams of Cocaine] for the offences punishable u/ss 8(c) 8(A) r/w Sections 20(b), 21, 22,27-A,27-B,28 & 29 of NDPS Act on the grounds that that some of the accused were arrested on the basis of CDRs details and voluntarily confessional statements of the co-accused recorded under Section 67 of NDPS Act by NCB, in para 10 of the judgment/order held as under:-

10. It has been held in clear terms in Tofan Singh Vs. State of Tamil Nadu that a confessional statement recorded under Section 67 of the NDPS Act will remain inadmissible in the trial of an offence under the NDPS Act. In the teeth of the aforesaid decision, the arrests made by the petitioner-NCB, on the basis of the confession/ voluntary statements of the respondents or the co-accused under Section 67 of the NDPS Act, cannot form the basis for overturning the impugned orders releasing them on bail. The CDR details of some of the accused or the allegations of tampering of evidence on the part of one of the respondents is an aspect that will be

examined at the stage of trial. For the aforesaid reason, this Court is not inclined to interfere in the orders dated 16th September, 2019, 14th January, 2020, 16th January, 2020, 19th December, 2019 and 20th January, 2020 passed in SLP (Crl.) No@ Diary No. 22702/2020, SLP (Crl.) No. 1454/2021, SLP (Crl.) No. 1465/2021, SLP (Crl.) No. 1773-74/2021 and SLP (Crl.) No. 2080/2021 respectively. The impugned orders are, accordingly, upheld and the Special Leave Petitions filed by the petitioner-NCB seeking cancellation of bail granted to the respective respondents, are dismissed as meritless.

Ratios of the judgments of "Tufan Singh's Case" & "Pallulabid Ahmad Armutta's & Ors. Case" (Supra) make the legal proposition abundantly clear, that the officers of NCB are police officers within the meaning of Section 25 of Evidence Act, as such, a confessional statement recorded u/s 67 of NDPS Act will remain inadmissible in the trial of an offence under NDPS Act, CDR details of the accused will be examined at the stage of trial, and if no recovery of commercial quantity of contraband is effected from the accused, the rigor of Section 37 of NDPS Act is not applicable and the accused is/are entitled to bail. Ratio of the judgments (Supra) squarely apply to the facts of the case in hand. Applicant/accused in the case in hand has been taken into custody by the NCB on the basis of statement recorded u/s 67 of NDPS Act of principle accused Mohd Sharief found carrying commercial quantity of charas weighing 41.200 kgs on 11.08.2020 alongwith the evidence of CDRs collected from suspected mobiles of accused persons. As the confessional statement of principle accused Mohd Sharief recorded u/s 67 of NDPS Act indicting applicant/accused will remain inadmissible in the trial of offences against applicant/accused and the CDR details are to be examined at the stage of trial, and as no recovery of contraband charas has been effected from conscious possession of applicant/accused, a strong case for bail has been carved out by applicant/accused. Therefore, the bail application is allowed. Accordingly, applicant/accused is admitted to bail subject to his furnishing solvent surety bond in the sum of Rs. fifty (50000/-) thousand to the satisfaction of Registrar Judicial of this Court with the direction to furnish personal recognizance in the like amount before Incharge District Jail Ambphalla Jammu. Before parting the following conditions are imposed upon the accused:

- (i) that the applicant/accused shall appear before the trial court on each and every date of hearing unless exempted by the trial court;
- (ii) that the applicant/accused shall not leave the territorial jurisdiction of the High Court of U.T. of J&K and Ladakh till the conclusion of trial unless permitted by this court;
- (iii) that in case prosecution collects any material during the period the accused is on bail that he has influenced the witnesses or tried to intimidate them, the prosecution would be well within its right to move an application before this court for cancellation of his bail.

6. Disposed of accordingly.

(MOHAN LAL) JUDGE Jammu:

18.05.2022 Vijay Whether the order is speaking: Yes/No Whether the order is reportable: Yes/No