

Rehmatullah Age 40 Yrs. S/O Bashir Ahmed ... vs U.T Of J&K Through Sho Police Station ... on 7 February, 2022

Sr. No. 32

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

(Through Virtual Mode)

Bail App 421/2021

Reserved on : 03.02.2022

Pronounced on :07-02-2022

Rehmatullah age 40 yrs. S/O Bashir Ahmed R/O Manchar Tehsil Bhagwa
District Doda. Applicant

Through:- Sh. S.A. Hashmi Advocate.

Versus

U.T of J&K through SHO Police Station Doda.

Respondent

Through:-Sh. Suneel Malhotra GA.

CORAM:-HON'BLE MR. JUSTICE MOHAN LAL MANHAS JUDGE

ORDER

07.02.2022

1. Instant bail application has been moved by applicant/accused through his counsel for his enlargement on bail on the grounds, that applicant is a bona-fide citizen of the country entitled to all the constitutional and legal rights; applicant has been arrested by police station Doda on 03-12-2021 in an absolutely false and frivolous case in FIR No. 208/2021 u/ss 8/15 NDPS Act on the basis of a concocted story that 1 ½ kg of Bhukki (Poppy straw) has been recovered from his possession; applicant is innocent, has not committed any offence nor violated any law of the land; the quantity of alleged contraband recovered from the possession of applicant is below the commercial quantity and little more than small quantity as such rigor of section 37 of NDPS Act does not apply; applicant filed an application for grant of bail in the court of Addl. Session Judge Doda which was dismissed on 17-12-2021 on the ground of gravity of offence and its impact on the society; applicant is a poor person and is dependent upon his daily earned wages, has to support himself and his family as he is the sole bread earner of the family; the object of bail is to secure the attendance of accused at trial by reasonable amount of bail; deprivation of personal liberty must be considered as a punishment which can only be inflicted after the trial and if the accused is found guilty; applicant is ready to abide by all the terms and conditions imposed by the court if enlarged on bail.

2. Respondent through its counsel by filing objections has opposed the bail on the grounds, that from the possession of accused contraband poppy straw weighing 1 kg 900 grams has been recovered on 03-12-2021 by police station Doda and consequently FIR 208/2021 u/s 8/15 NDPS Act stood registered; there is no material before the court to believe that accused is not involved in commission of offence; FSL report confirms that contraband recovered from accused is morphine; all the rigors of NDPS Act are applicable; negation of bail is a rule and grant is an exception; accused belongs to organized group operating in the manner to destroy the social fiber of the society and spoil the younger generation by the misuse of drugs; curtailment of liberty of such a person has time and again been held by the Hon'ble courts as justified; the trial court has passed a detailed order and considered all the aspects while rejecting the bail application of the accused; bail in NDPS Act is an exception and not a rule, prayer has been made for rejection of the bail.

3. Heard and considered. From the objections filed by the respondent, it is abundantly clear, that the applicant/accused has been found in possession of 1 kg and 900 grams of poppy straw (Bhukki) on 03-12-2021 by police station Doda. Serial No. 110 of the Table appended to the NDPS Act depicts that 1 kg (1000 grams) of poppy straw is "small quantity" while 50 kg of poppy straw is "commercial quantity". As mandated u/s 37 of NDPS Act, a rigor is imposed and bail to the accused in commercial quantity can only be granted, (i) when the Public Prosecutor is given an opportunity to oppose the bail, and (ii) the court is satisfied that the accused is not guilty of offence and is not likely to commit any offence on bail. As the applicant/accused in the case in hand is found in possession of "intermediate quantity" of poppy straw of 1 kg & 900 grams, therefore, rigor contained in section 37 of NDPS Act does not apply to the case in hand, and the bail application of applicant/accused is to be governed by the provisions of section 497 (437) Cr.p.c.

In case law titled Vishal Joshi -(Appellant) Vs. State of J&K

-(Respondent), a bail application decided on 28.09.2018, wherein Hon'ble Mr. Justice M.K Hanjura (His Lordships the then was) while granting bail to an accused indicted for carrying 9 Kg Poppy Straw (Intermediate quantity) for infraction of offence U/S 8/15 NDPS Act in case FIR No. 50/2018 while discussing the scope of section 37 NDPS Act vis-à-vis personal liberty of the accused, in Paras 8, 9, 11 & 12 held as under:-

8. What gets revealed from the order of the trial court is 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 and, therefore, the application of the applicants had to be considered under the provisions of 497 Cr. PC.

It is only on the application of the rigor of or of NDPS Act 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 NDPS Act, grant of bail has to be considered on the agility and celerity of Section 497 Cr. PC. Therefore, a realistic view and a pragmatic approach has to be taken in such a case.

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.

11. Testing at the instant application from the above perspective, it requires to be recapitulated that the rigor of Section 37 of the NDPS Act 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 falls within the scales of an intermediary quantity, for which the punishment provided is upto 10 years and a fine of rupees one lac is "bail and not jail".

12. Deprivation of liberty is tantamount to punishment. The principal 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 has been languishing in the jail for the last more than three months by now. The 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 gets swayed by sentiments. Temper and passion have no role to play in exercising the discretion for the grant of bail. An individual cannot be denied the concession of bail on the pretext that he is the resident of a particular area. Grant of bail is the general rule and the accused cannot be discriminated against on the basis of the place of residence wherever he resides as long as he is a citizen of India. Mere apprehension that the accused

will evade trial is not sufficient to deny bail".

4. In Santosh Kumar Gupta Vs U.T. Of J&K [bail application No. 25/2020 decided on 05-06-2020] Hon'ble Mr. Justice Puneet Gupta of J&K High Court while relying upon the judgment referred in 2017 Legal Eagle 1077 [Bhupinder Singh Vs State of J&K] granted bail to the accused found in possession of intermediate quantity of 180 grams of Heroin by observing, that in the case of intermediate quantity rigor contained in Section 37 of NDPS Act is not applicable. In Raj Kumar Vs. U.T of J&K [bail application 168/2020 decided on 12-11-2020], Hon'ble Mr. Justice Sanjay Dhar of J&K High Court also granted bail to applicant/accused found in possession of 500 grams of chars by observing, that the accused was found in possession of intermediate quantity of chars and the rigor of section 37 was not attracted. It is unambiguously reiterated here, that the legal position is well settled, that the rejection of bail of applicant/accused by Ld. Addl. Session Judge Doda on 17-12-2021 does not operate as bar for the High Court in entertaining a similar application u/s 439 of Code of Criminal Procedure on the same facts and for the same offence.

5. Ratios of the Judgments (Supra) of Vishal Joshi' case, Santosh Kumar Gupta's case, Bhupinder Singh's case & Raj Kumar's Case make the legal proposition abundantly clear, that in case of intermediate quantity of contraband the rigor of Section 37 of NDPS Act does not apply and the bail application has to be considered in terms of provisions of Section 497 (437) of Cr.PC. In the case in hand, applicant/accused has been found in possession of 1 kg and 900 grams of poppy straw which is intermediate quantity, therefore, the bail application of applicant/accused has to be governed by provisions of Section 497(437) Cr.PC. Deprivation of personal liberty is tantamount of punishment, the principle is that punishment begins after conviction and every accused is presumed to be innocent unless duly tried and found guilty. The object of bail is to secure attendance of the accused at the time of trial. Bail cannot be withheld as matter of punishment. Grant of bail is general rule and it's refusal is an exception. Mere apprehension that accused will evade trial and remain absent is not sufficient to deny the bail. In view of law enumerated in the case laws (supra) applicant/accused has carved out a strong case for bail in his favour. Applicant/accused at present, from the date of his arrest on 03.12.2021 for the last more than 60 days, is lying in judicial custody in District Jail Bhaderwah, therefore, he is admitted to bail subject to furnishing of bail bond in the sum of Rs.50,000/- to the satisfaction of Ld. Additional Session Judge, Doda and personal recognizance of the same amount before Superintendent District Jail Bhaderwah subject to the following terms and conditions:-

(i) that the applicant/accused shall present himself before the trial Court on each and every date of hearing except for special circumstances beyond his control;

(ii) that the applicant/accused shall not tamper or hamper with the prosecution witnesses or threaten the prosecution witnesses or dissuade them from deposing before the court.

6. Disposed off accordingly.

Rehmatullah Age 40 Yrs. S/O Bashir Ahmed ... vs U.T Of J&K Through Sho Police Station ... on 7 February, 2022

(Mohan Lal Manhas)
Judge

Jammu
07-02-2022
Vijay