

Wasim Khan vs Ut Of Ladakh on 3 April, 2024

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Bail App No.149/2023

Reserved on: 23.03.2024

Pronounced on: 03.04.2024

Wasim Khan

... Applicant(s)

Through: - Mr. Idrees Saleem, Adv.

vs.

UT OF Ladakh

... Respondent(s)

Through: - Mr. Vishal Sharma, DSGI.

CORAM: HON'BLE MR. JUSTICE MA CHOWDHARY, JUDGE

JUDGMENT

1) The applicant has invoked Section 439 of the Code of Criminal Procedure, 1973 („Cr.P.C for short), for his enlargement on bail in case arising out of FIR No.28/2022 of Police Station, Leh, for offences under Sections 8/21/22 of Narcotic Drugs and Psychotropic Substances Act (for short „NDPS Act), primarily on the grounds that the applicant has been falsely implicated without any rhyme or reason and rider of Section 37 of NDPS Act is not attracted and that applicant has no previous criminal record in any Court throughout India and that the applicant is the only earning member of the family and is newly wedded husband and his lodgement in jail will affect the whole family.

2) Pursuant to notice issued, respondent-UT of Ladakh has filed the objections asserting that the activities attributed to the applicant pose a serious threat to the health and welfare of the people of the area and since he indulged and motivated youth of the area for consumption of drugs, therefore, he does not deserve the concession of bail. It is also contended that illicit contraband psychotropic substances recovered from the possession of the applicant carries maximum punishment of 20 years and the case of the accused is at the stage of prosecution evidence and in case accused is enlarged on bail he will resort to influence the prosecution witnesses, therefore, present application is liable to be dismissed.

3) Before a closer look at the grounds urged in the application, it shall be apt to have an overview of the factual background of the case.

4) On 18.03.2022, while conducting the random checking of vehicles by the Naka Party of Police

Post, Housing Colony Leh by Inspector-Rigzin Gurmet along with ASI-Mohammad Ibrahim No. 35/L, ASI-Stanzin Nangail No. 271/CID and Sgct. Mohd. Ali No. 491/L at Airport Road near Skalzangling Leh, one taxi vehicle (Van) bearing Registration No. JK10A-5318 being driven by one person namely Rincen Dorje S/O Tsewang Konchok R/O Urbis was intercepted, wherein, one more person, namely, Wasim Khan S/O Karimullah R/O Skyanos Leh (applicant herein) was found travelling, who was found in possession of contraband suspected to be some narcotics Drugs and Psychotropic Substances namely i. Slight Wet Ganja like substances which was packed in 09 small polythene bags, ii. Spasmo Proxyon Plus Schedule H1 capsules black in colour found in two different plastic bags which was counted and found 760 numbers, out of which two capsules were found in strip, iii. Spasmo Proxyon Plus schedules H-1 total 570 capsules (Total 1330 capsules) were found and iv. Tablets ULTRACET (NRX Tramadol Hydrochloride and Acetaminophen) of 08 strips containing 15 tablets each (total 105 Tablets). All these items were seized marked and weighed on spot in presence of local Executive Magistrate. Besides above other items including Cigarette Marlboro 50 packets, Digital Weighing Machine, 02 Pen Drives, 01 Travelling Bag, Luggage Tag Go First, 01 Aadhar Card, 01 Mobile Phone, 01 Wallet and Indian Currency of Rs.4,000/- (500 x 8) were also seized from the possession of the accused. During preliminary questioning, he disclosed his name as Wasim Khan, the applicant herein. It is allegation of the investigating agency that applicant was selling the contraband substance among the youth of the area. Accordingly, on the receipt of this docket, FIR came to be registered and investigation commenced. During investigating, the Investigating Agency, besides other legal formalities, sealed/re-sealed the contraband and sent the same to FSL, Srinagar, for expert opinion. The FSL opinion was obtained and offences under Section 8/20/21 of NDPS Act were found to have been proved against the applicant. On completion of the investigation, final charge sheet has been filed in the Special Court of learned Principal Sessions Judge, Leh, on 17.06.2022 and applicant is presently lodged in Jail.

5) It appears that the applicant had approached the trial court for grant of bail on the ground that he is only earning member of the family and is newly wedded husband but while dismissing the said application, the learned trial Court has also observed that since contraband recovered from the applicant falls under commercial quantity and there being statutory bar in terms of Section 37 of NDPS Act, plea of the accused for enlarging him on bail was rejected.

6) Heard learned counsel for both the sides, perused the material placed on record and considered the matter.

7) Mr. Idrees Saleem, learned counsel appearing for the applicant, has urged that the contraband, alleged to have been recovered from the possession of the applicant, was not weighed properly and there is no clarity on the quantitative analysis of the sample whether seized material falls under small, intermediate or commercial quantity. According to learned counsel for the applicant, the quantity of contraband recovered from the individual accused was less than the commercial quantity and, as such, the learned trial court was not justified in invoking the provisions of Section 37 of the NDPS Act for rejecting the bail application of the applicant.

8) It has been further contended that the mandatory provisions regarding search and seizure as contained in the NDPS Act have not been adhered to by the police while conducting investigation of

the case and this aspect of the matter has not been taken note of by the Trial Court. Learned counsel, in addition to reiteration of the grounds of bail urged in the application, submits that contraband alleged to have been recovered from the possession of the applicant does not fall within the meaning of NDPS Act because, as per Notification-Standing Order No. 1/89 dated 13.06.1989 issued by the Government of India, in exercise of powers conferred by sub-Section (1) of Section 52A of the NDPS Act, the procedure for sampling, storage etc. has not been followed by the Police on the spot of seizure. Learned counsel also seeks enlargement of the applicant on bail on the ground of violation of mandatory provisions of Sections 42 and 50 of the NDPS Act. In support of his contentions, learned counsel for the applicant has relied upon the judgments of the Supreme Court, Allahabad High Court, State of Telangana and of this Court reported as Noor Aga v. State of Punjab and anr. [Criminal Appeal No. 1034 of 2008 arising out of SLP (Crl.) No. 5597 of 2006], Om Prakash Verma, v. State of U.P. [Criminal Misc. Bail Application No. 9660 of 2021 decided on 11.03.2022], Baba Sow Chandekar & Anr. V. The State of Telangana [Criminal Petition No. 4428 of 2022], Lovedeep Nath v. UT of J&K and anr. [Bail Application No. 296 of 2021 decided on 28.01.2022] and Deepak Gupta & Ors. v. UT of J&K & Anr. [Bail App. No. 7/2022 decided on 26.04.2022].

9) Mr. Vishal Sharma, learned DSGI appearing for the respondent has argued that applicant/accused is involved in a heinous offences under Sections 8/20/21 of NDPS Act as he has been arrested by the Police of Police Station Leh and a huge quantity of contraband i.e. 60 grams of Ganja, Spasmol Proxyvon Plus 1330 capsules and Tramadol, Hydro Chloride and Acetaminoten 120 tablets were recovered from his possession which falls under commercial quantity and rigor of Section 37 of NDPS Act are applicable; that there has been complete compliance of the requirement under section 53-A of the NDPS Act; that compliance of procedure laid down under Section 42 of the NDPS Act is question of fact and can only be raised during the course of trial; that conditions laid down in section 37 of the NDPS Act are not satisfied in the instant case; that the impugned order passed by the court below is perfectly in accordance with law and does not call for any interference and that sampling procedure is proper and no defect can be attributed to the procedure adopted by the investigating officer and that issue whether the sampling procedure was in accordance with the Notification-Standing Order No. 1/89 dated 13.06.1989 or not, is a matter of evidence to be appreciated at the time of trial and therefore, cannot be examined at this stage and that if the entire quantity of the contraband is taken into consideration, the contraband alleged to have been recovered from the applicant falls within the purview of "commercial quantity"

and the bar created under Section 37 of the NDPS Act is attracted, therefore, present application is liable to be dismissed. In support of his contention, learned counsel relied upon judgements passed by High Court of Delhi in case titled Somdutt Singh @ Shivam v. Narcotic Control Bureau [Bail App No. 2754 of 2022 decided on 01.12.2023] and Quentin Decon v. Customs [Bail Appln. No. 71 of 2023 decided on 31.05.2023].

10) Learned counsel appearing for the applicant has primarily relied upon Standing Order No. 1/89 dated 13.06.1989 issued under Sub Section (1) of Section 52A of the NDPS Act to argue that no sooner the seizure of contraband is effected, the same shall be forwarded to the officer in charge of the nearest Police Station or the officer

empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52A of the Act, which shall be allowed by the Magistrate as may be required under sub Section 3 of Section 52A; that the Central Government and its agencies and also the State Government shall within six months from the date of seizure of alleged contraband take appropriate steps to set up storage facilities for the exclusive storage of seized narcotic Drugs and Psychotropic substances and conveyances duly equipped with vaults and double locking system to prevent theft, pilferage or replacement of seized drugs. He has heavily relied upon the case of Baba Sow Chandekar and anr. (supra).

11) Since the entire controversy revolves around Standing Order No. 1/89 dated 13.06.1989 referred in the preceding paras, it shall be apt, at the outset, to reproduce the general procedure for sampling, storage etc. as a ready reference.

It reads thus:

□S.O. No. 1/89. - Whereas the Central Government considers it necessary and expedient to determine the manner in which the narcotic drugs and psychotropic substances, as specified in Notification No. 4/89 dated 29th May, 1989 (F. No. 664/23/89-Opium, published as I.O. 381(E)] which shall, as soon as may be, after their seizure, be disposed of, having regard to their hazardous nature, vulnerability to theft, substitution and constraints of proper storage space;

Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), (hereinafter referred to as □the Act'), the Central Government hereby determines that the drugs specified in the aforesaid Notification shall be disposed of in the following manner, namely:-

xxx xxx xxx 2.2 Drawl of samples:

All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drug and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses, Panchas and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot. 2.3 Quantity to be drawn for the sampling.-

The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make it homogenous and representative before the sample (in suplicate) id drawn. xxx xxx xxx

12) Section 37 of the NDPS Act regulates the grant of bail in cases involving offences under the NDPS Act. Section 37 reads as follows:

☐Offences to be cognizable and non bailable (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)--

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless--

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

13) There is no dispute that the applicant is involved in a case relating to possession of commercial quantity of drugs and there is also no dispute to the fact that applicant can be granted bail on merits only if he is able to carve out a case after fulfilling the conditions laid down in Section 37 of the NDPS Act. It emerges from the copy of the final report that applicant/accused has been indicted for commission of offences similar to commercial quantity where embargo for grant of bail under Section 37 of NDPS is not attracted. Under Section 37 of the NDPS Act an accused person indicted for commission of offences under Sections 8/21/22 for commercial quantity shall not be enlarged on bail unless the public prosecutor is given opportunity of being heard and court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and he is not likely to commit any offence while on bail. No doubt, 60 grams ganja was recovered from the possession of the applicant which, as per Specification of the Small and Commercial Quantity of Narcotic Drug or Psychotropic Substance (SO 1055 (E) dated 19.10.2001 as amended) mentioned at Serial No. 55, does not fall in commercial quantity, however, the other narcotic substances i.e 105 tablets of Ultracet (NRX Tramadol Hydrochloride and Acetaminophen) and 1330 capsules of Spasmo Proxyvon Plus Schedule H-1 recovered from the possession of the applicant, as per aforesaid table at Serial No. 238ZH fall within commercial quantity, as such, rigour of Section 37 of NDPS Act is attracted.

14) The procedure followed in the present case appears to be distinguishable as seized drugs were weighed in presence of Executive Magistrate, Leh and other witnesses through digital weighing machine and on weighing the seized ganja which was slightly wet along with plastic, it was found to be 60 grams.

On spot samples were taken for the purpose of FSL examination which were separately sealed in presence of the Executive Magistrate and sealed items were marked as Exhibits S.T.G.A, whereas the samples were marked as S1, T1, G1 and A1 and seals and signatures of the Executive Magistrate was taken on all the sealed packets. It appears that during investigation the recovered Spasmo capsules which were kept in two different plastic bags were counted on the spot and found to be 1330 in number out of which 02 capsules were found in a strip on which Spasmo Proxyon Plus Schedule H1 was written and two eight strips of Tab Ultracet (NR Tramadol Hydrochloride and Acetaminophen) containing 15 tab in each strip were recovered which were 120 in total. Section 57 of NDPS Act was complied and report was submitted to District Police Office, Leh. During investigation, site plan was prepared and photographs of the seized drugs were taken through photographer Crime Branch Leh.

15) Now, before adverting to the merits of the case, it is pertinent to mention that Hon ble Supreme Court in Noor Aga v. State of Punjab & Anr. (supra) had observed that guidelines issued should not be substantially complied, but also in a case involving penal proceedings viz-a-viz a departmental proceeding, rigours of such guidelines may be insisted upon. It was also observed that when a direction is issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

16) Hon ble High Court of Delhi in Quentin Decon v. Customs (supra) has observed that investigating agency is bound by the procedural instructions and has to follow the same, and in case non compliance thereof, and if no proper explanation is forthcoming then the same would have adverse impact on the prosecution case. Therefore, it is premature to say that samples drawn are not true representative samples of the contraband seized. Similarly in Somdutt Singh @ Shivam v. Narcotics Control Bureau (supra), it has been observed that the twin conditions of section 37 of the NDPS Act are not satisfied and bail cannot be granted to the applicant at this stage as the sampling of the seized psychotropic substances was carried out in the presence of the Magistrate and samples were directed to be sent for testing.

17) Admittedly, the status report filed by the respondent discloses the percentage of the narcotic content or weight of the capsules recovered from the possession of the accused. In the present case, the sampling of the seized contraband was carried out in the presence of Magistrate and the samples were directed to be sent for testing. The applicant has failed to show the prejudice caused to him on account of the delayed compliance of the Section 52A of the NDPS Act. The reliance placed upon judgments cited by the learned counsel for the applicant is misplaced as the rigours of Section 37 of the NDPS Act were not applicable therein.

18) In the present case, the investigation officer has prepared the inventory of the seized narcotic drugs and then made an application to the Magistrate to permit him to draw the representative samples of such contraband in the presence of the Magistrate so as to certify the correctness of the

inventory so prepared. If the contraband is found in packages or containers, such packages/containers shall be weighed separately and serially numbered for the purpose of identification and one sample, in duplicate, shall be drawn from each package/container seized, which procedure appears to have been properly followed by the investigating officer. When the statutory provisions mandate a particular procedure to be followed, the Investigating Officer is duty bound to follow the prescribed procedure. No person can assume the nature of the substance on speculation and conjectures.

19) The applicant is stated to have been charge-sheeted by the trial court vide interim order dated 01.07.2022, for having in his possession commercial quantity of contraband. The prosecution has examined as many as six witnesses out of total cited fifteen witnesses so far.

20) All the points that have been raised by learned counsel appearing for the applicant relate to the questions to be considered during trial and at the final hearing of the main case and are not relevant for the purpose of deciding the bail application. Since the applicant has been charged to have in his possession commercial quantity of the contraband, there is statutory bar under Section 37 of the NDPS Act for grant of bail, without recording satisfaction that applicant has not committed the offence. However, since applicant has not placed on record any of the statements recorded either during investigation or during trial so as to appreciate this aspect of the matter, no such opinion can be made, otherwise. The applicant, for the afore-stated reasons, in the considered opinion of this Court, is not entitled to grant of bail at this stage.

21) Considering the aforesaid facts and circumstances, including the fact that the commercial quantity of contraband has been recovered from the possession of the applicant, it is not possible for this court to form a prima facie view at this stage that the applicant is not guilty of the offences or that he would not commit similar offences if released on bail. Therefore, twin conditions of Section 37 of the NDPS Act are not satisfied and bail cannot be granted to the applicant at this stage.

22) Viewed thus, application filed by the applicant is hereby rejected. Applicant shall be, however, at liberty to move to the trial court for grant of bail, as and when advised to do so, under the change of circumstances. Any observation made in this order shall be no impediment for consideration of bail by the Trial Court, if approach with such a plea.

23) The present bail application is thus disposed of as dismissed.

(MA CHOWDHARY) JUDGE Jammu 03.04.2024 Paramjeet Whether the order is speaking? Yes/No. Whether the order is reportable? Yes/No.