

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Crl A(D) No. 14/2023

Reserved on : 24.07.2023

Pronounced on: 01.08.2023

Mohd Sharief, age 65 years S/o Abdul Ghani
Shah R/o Village Syedpura Larnno Kokernag
District Anantnag.

....Petitioner(s)

Through :- Sh. Anil Sethi, Advocate

V/s

1. Union Territory of Jammu & Kashmir
Through I.O Police Station Gandhi Nagar,
Jammu;
2. Superintendent, Central Jail Kot Bhalwal,
Jammu;
3. State Investigating Agency, Jammu (J&K).

....Respondent(s)

Through:- Ms. Monika Kohli, Sr. AAG.

**Coram: HON'BLE MR. JUSTICE TASHI RABSTAN, JUDGE
HON'BLE MR. JUSTICE MOHAN LAL, JUDGE**

O R D E R

1. Appellant/accused has preferred an appeal against the impugned order dated 08.04.2023 rendered by the Court of learned 3rd Additional Sessions Judge (NIA Court) Jammu in Bail Application titled 'Mohd. Sharief vs UT of J&K & Ors bearing FIR No. 73/2022 of Police Station Gandhi Nagar Jammu for commission of offences punishable under sections 13/17/18 of Unlawful Activities Prevention (UAPA) Act 1967, whereby, the relief claimed by the appellant/accused seeking his release on bail on the ground of ill and critical health condition of his wife has been dismissed.

2. Aggrieved of and dissatisfied with the impugned order dated 08.04.2023, appellant has questioned it's legality, propriety and correctness and has sought his release on interim bail on the grounds, that appellant is law abiding citizen of India and Domicile of J&K, his bail application has been dismissed by the trial court on untenable grounds, he has been arrested on 31.03.2022 for the allegations that he is involved in raising funds for supporting unlawful/anti-national activities, he has been implicated in well planned conspiracy hatched by some unknown persons with whom he has no links and has never been part of any anti-national activities. It is averred, that wife of appellant is suffering from metastasis (4th stage cancer) who is on death bed and Doctors have advised that there is no further treatment of his

wife who is undergoing treatment i.e. chemotherapy from SKIMS Soura Srinagar, she is counting her last breaths and is in a hope to meet her husband so that she can spend the final moments/last days of her life with her husband, appellant has two sons who are in government service and are posted out of hometown and they are living separately thus not able to devote much time to take care of the well being of their mother. It is contended, that the trial court has rejected the bail application of the appellant on the ground, that accusation against appellant are prima-facie true which is against basic tenets of law and is against the principle of innocence unless proven guilty, appellant may be granted opportunity to meet his ailing wife whose condition is deplorable and is in dying state which is causing immense mental and physical trauma to the appellant and whole family. It is stated, that prosecution will neither suffer any road block nor any prejudice if appellant is released on interim bail, appellant has served his life as an honest officer in forest department, he has no criminal antecedents whatsoever, the money which is alleged to have been recovered from him was not used for any offence as alleged by investigating agency, appellant undertakes that he will provide sufficient sureties and abide by all the terms and conditions imposed by the court if released on interim bail.

3. Respondents have opposed the bail by filing objections wherein it has been contended, that the instant case was registered in Police Station Gandhi Nagar Jammu on 31.03.2022 on the basis of a docket written on behalf of SI Rohit I/C PP Nehru Market Jammu for the allegations, “that information received from reliable sources reveal that on the directions of ISI and their agents in Pakistan one Mohd Shareef Shah S/o Abdul Ghani Shah R/o Syedpora Larnoo Kokernag (appellant/accused) was coming from Kashmir to Jammu to handover hawala money to one Jatinder @ Babu Singh (EX MLA/Ex Minister) R/o Kathua for the purpose of financing Jammu based activist and secessionist groups/parties to carry out subversive activities against sovereignty, integrity and security of India. Upon this information, a naka was laid down alongwith HC Rajinder Kumar No. 608/J, Sgct. Vijay Kumar No. 3092/J, SPO Deepak Kumar No. 763/J near the Tawi Bridge Bikram Chowk at about 23.00 hrs. during checking, one individual namely Mohd Shareef was stopped and during frisking Rs.6.90 lacs were found from his possession concealed in a black coloured bag. On this, offences under section 13,17,18, of the UA(P) Act have been made out, cognizance report has been entered in DD of PP Nehru Market and extract has been submitted

to P/S Gandhi Nagar for the registration of FIR and investigation handed over to Competent Supervisory Officer on the basis of contents of the docket and request made therein case FIR No. 73/2022 U/S 13,17,18, of the UA(P) Act, stand registered in P/S Gandhi Nagar Jammu.” The initial investigation of the case was taken up by Dy.SP Sachit Sharma SDPO Gandhi Nagar Jammu, later on instant FIR has been transferred to State Investigation Agency (SIA) for further investigation vide Police Headquarters J&K order No. 1337 of 2022 dated 12.04.2022 issued under endorsement No. 11/SIA/CMC/2022/1104-06 dated 12.04.2022, the investigation conducted has revealed that petitioner/appellant Mohd. Shareef Shah had brought terror funds amounting Rs.6.90 lacs from a Kashmir based person namely @ Umar for Jatinder Singh who had formed Nature Mankind Friendly Global Party with the VISION DOCUMENT which acknowledged, suggested, and advocated an ideology to make J&K, PoK, Gilgit and Baltistan an Independent Country suggesting secession of Jammu and Kashmir from the Union of India as resolution of Kashmir dispute, the above named party further carried forward the unlawful agenda of Kashmir separatists to bring about the secession of Jammu and Kashmir from Union of India, Mohd. Hussain Khateeb is originally resident of J&K and had illegally crossed over to Pakistan/PoK in 1990s and is now operating from PoK and is instrumental in pumping terror funds to India through Hawala operators in UAE and has provided money to @ Umar for its onward transmission to Mohd. Shareef Shah and Jatinder Singh for the Anti-National activities, ultimately offences U/S 17,18,20,21,38 & 40 of the UA(P) Act have been proved against the appellant Mohd. Shareef Shah and charge sheet has been produced against him in the Court of Learned 3rd Additional Sessions Judge Jammu (Special Judge u/s 22 of NIA Act). Besides preliminary charge sheet, 03 supplementary charge sheets have also been produced in the learned Trial Court against various accused persons. It is contended, and denied that wife of the appellant is on death bed and doctors have advised that there is no further treatment for the wife of the appellant/accused, since wife of the appellant/accused is already undergoing chemotherapy treatment and same is the prescribed treatment for cancer, the medical record annexed with the appeal nowhere suggests that the wife of appellant/accused is on death bed, two sons of the appellant/accused are taking due care of their mother (wife of the appellant) and one daughter-in-law of the appellant is constantly attending to the ailing wife of the appellant, so it is un-true to say that sons of

the appellant are not able to devote much time to take care of the well being of their mother, there is every apprehension that if enlarged on bail appellant/accused may jump over the bail and may even try to intimidate/win over the prosecution witnesses, the supplementary/final charge sheet is to be filed and the investigation is under progress, the accused is likely to fiddle with the ongoing investigation.

4. Sh. Anil Sethi, learned counsel for the appellant/accused reiterating the grounds urged in the memo of bail application has sought interim bail for appellant/accused by vehemently canvassing arguments, that appellant/accused since his arrest on 31.03.2022 for the last more than one (1) year is languishing in jail on false and frivolous charges, and the charge sheet stands already presented by the Investigating Agency before the Court of 3rd Additional Sessions Judge Jammu against the appellant and other co-accused alleged to be involved in the FIR. It is argued, that appellant has been implicated in a well planned conspiracy hatched by some unknown persons with whom he has no links whatsoever and he has never been a part of any anti-national activities, wife of appellant is suffering from last stage cancer i.e. metastasis (Stage 4th Cancer) and is on death bed, the bail application has been rejected by the trial Court vide order dated 08.04.2023 on untenable grounds, there is no apprehension that accused will influence the prosecution witnesses and give a slip to law, denial of bail would amount to infliction of pre-trial punishment which is against the mandate of criminal jurisprudence as every accused is presumed to be innocent till proved guilty and convicted.

5. Ms. Monika Kohli, learned Sr. AAG *per contra*, has vehemently opposed the bail by articulating arguments, that appellant/accused is involved in terror funding/financing activities, as an amount of Rs. 6.90 lacs have been recovered from his possession during Naka laid by I/C PP Nehru Market Jammu, the said terror fund was to be handed over to co-accused Jatinder @ Babu Singh EX-MLA/Ex-Minister R/o Kathua for carrying out secessionist/subversive activities against the sovereignty, integrity and security of India for secession of Jammu & Kashmir from Union of India, hence, appellant indicted for commission of offences U/Ss 17,18,20,21,38 & 40 of the UA(P) Act. It is argued, that the offences u/ss 17/18 of UA(P) Act are punishable upto life imprisonment while section 40 is punishable with imprisonment for a term upto 14 years, the offences indicted against appellant are so grave and severe in nature and against the public at large, if

the appellant is enlarged on interim bail even, there is every possibility that appellant may repeat the offence and abscond from trial and give slip to law causing grave prejudice to the case of prosecution. It is enthusiastically argued and denied that wife of the appellant is on death bed and doctors have advised that there is no further treatment for her, wife of the appellant is already undergoing chemotherapy treatment and same is the prescribed treatment for cancer and the medical record annexed with the appeal nowhere suggests that the wife of appellant/accused is on death bed, two sons of the appellant are taking due care of their mother (wife of the appellant) and one daughter-in-law of the appellant is constantly attending to the ailing wife of the appellant, so it is un-true to say that sons of the appellant are not able to devote much time to take care of the well being of their mother. It is vehemently argued, that the criminal acts of appellant/accused are so horrible/dreadful and against the sovereignty, territorial integrity of the country, therefore, the bail application deserves dismissal.

6. We have heard learned counsel for the appellant/accused and learned Sr.AAG for the respondents. We have gone through the contents of the appeal, objections filed by the respondents and the record made available on the file.

7. Learned counsel for the respondents has relied upon a judgment of the High Court of Karnataka at Bangaluru passed in **CRL.A No. 124/2023 [SRI MOHAMMED TAHIR ADVOCATE—APPELLANT VERSUS NATIONAL INVESTIGATING AGENCY (NIA)]** wherein the High Court while rejecting the grant of bail to the appellant/ accused for commission of offences u/ss 16,18,20 of UA(P) Act 1967 r/w Sections 120-B,143,145,147,188,3453,426,34,149 of IPC at pages 22, 23, 24, 25, & 26 held as under:

“E. AS TO ‘BAIL IS A RULE AND JAIL IS AN EXCEPTION’, ITS LIMITATIONS & INVOCABILITY:

(a) The Apex Court speaking through Justice Krishya Iyer in **GUIDIKANTI NARASIMHALU vs. PUBLIC PROSECUTOR, AIR 1978 SC 429** evolved a lenient norm of Bail Jurisprudence ‘Bail is a rule & jail is an exception’; that was decades ago and in a case that involved offences punishable under the provisions of Macaulay’s Code i.e., IPC, 1860; terrorism & terrorists, were the subject matter with which the novels were composed. Much water has flowed under the bridges and we are living in different times; every daily newspaper will have some report or photograph about the terrorist acts. Legislative changes have been brought about to several penal statutes. Liberty of an individual as constitutionally guaranteed is important; however, what is even more important is, the safety of civil society. It hardly needs to be reiterated that the interest of an

individual cannot march over the collective interest of the society. The writings of the jurists since centuries say this and Apex Court rulings in this regard galore in the law reports.

(b) Almost all the norms in a legal system, be it civil or criminal, are relative; they are bound to the Society's Calendar. With ceaseless run of Time, these norms undergo change in their texture & colour for retaining their relevance as a living law of the people. "The old order changeth, yielding place to new, And God fulfils Himself in many ways, Lest one good custom should corrupt the world..." poetically said Lord Alfred Tennyson (1809-1892) in 'The Passing of Arthur'. Norms of the kind cannot be chanted like mantra or slogans, in every bail petition out of the contextual circumstance. Etymology of a norm is ever the arbiter of its worth. The norms which govern behaviour of individuals ordinarily cannot transcend the social conditions that obtained when they were evolved. Added, their efficacy level and invocability potential do not remain constant; variable, they are. All this cannot be lost sight of by the courts. Otherwise, **invoking such principles to the sole benefit of an accused detainee, involved in heinous offences, may result into a huge 'law & order' issue, and also cause a massive detriment to the societal interest.**

(c) We are not much impressed with Mr. Tahir's invocation of the oft quoted dicta that 'Bail is a rule and jail is an exception'. It would not much come to the aid of his client and reasons for this are not far to seek: firstly, such a dicta has to remain miles away when the class of offences which the accused is ascribed of, arise under a special statute of great significance, like the one at hands; secondly, the Parliament in its accumulated wisdom has enacted the clauses in the 1967 Act that severely restrict the claim for grant of bail; thirdly, the statute also enacts a 'negative burden' clause, which places the onus on the shoulders of accused, much in variance with the normal rule i.e., the burden of proof lies on the prosecution. For invoking such a negative burden, the prosecution initially has to discharge its onus, is true, but it is beside the point. As to negative burden what a Co-ordinate Bench of this Court in a matter arising under the very 1967 Act had observed, needs to be profitably noticed. That was in **ASIM SHARIEF vs. STATE BY NIA**³ [ILR 2019 KAR 4557], wherein para 24 reads as under:

"24. It is important to note that in case of offence invoked under the special enactment the burden is on the accused in terms of special provisions contained in Sec.43-D(5) of the UPA Act to demonstrate that the prosecution has not been able to show that there exist reasonable grounds to show that the accusation against the accused is prima facie true. ...This Court has to take note of the gravity of the offences alleged against the appellant and also severity in its nature and chance of the appellant fleeing away from justice".

Similarly, while treating a bail petition under the provisions of 1967 Act, what the Apex Court said is of immense importance. In **NIA vs. ZAHOR AHMED SHAH WATALI**⁴, at para 22, it observed: "When it comes to offences punishable under special enactments such as the 1967 Act, something more is required to be kept in mind in view of the special provisions contained in Sec.43-D of the 1967 Act inserted by Act 35 of 2008 w.e.f. 31.12.2008...". Again at para 26, the following observations occur:

"...once charges are framed, it would be safe to assume that a very strong suspicion was founded upon the materials before the Court, which prompted the Court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged against the accused, to justify the framing of charge. In that

situation, the accused may have to undertake an arduous task to satisfy the Court that despite the framing of charge, the materials presented along with the charge-sheet (report under Section 173 CrPC) do not make out reasonable grounds for believing that the accusation against him is prima facie true...”.

The law declared by the Apex Court coupled with what has been observed by the Coordinate Bench as above, do not lend any scope for the ready invocation of the said principle.”

8. We have very carefully considered every aspect of the matter keeping in mind the sanctity of human rights as recognized by the Apex Court in the light of constitutional guarantees. We are conscious to the possible societal implications should accused of the kind be enlarged from confinement. We are of the considered view, that the cause of justice would be served more by continuing appellant in confinement then setting him free. The trial court vide it's reasoned order dated 08.04.2023 has rejected the bail application of appellant as he has been indicted for commission of offences under Chapter IV & VI of UA(P) Act 1967 for raising the funds for commission of terrorists act and for hatching the conspiracy to secede UT of J&K from the Union of India. Para 6 of the objections filed by the respondent demonstrate that two (2) sons of appellant/accused are taking care of their mother (w/o appellant) and one daughter-in-law of appellant is also constantly attending to the ailing wife of the appellant. No rejoinder has been filed by the appellant to deny the aforesaid averments/contention, therefore, it can be safely held, that the wife of appellant is being properly looked after by her two sons and daughter-in-law.

9. In the above circumstances, we are of the firm view, that the instant Criminal Appeal filed by appellant/accused against the impugned order dated 08.04.2023 rendered by the Court of Ld. 3rd Addl. Sessions Judge (NIA Court) Jammu whereby appellant was denied bail is devoid of merits, even no case for interim bail has been carved out by appellant/accused, thereby, the instant appeal is out rightly rejected and dismissed.

10. Disposed of accordingly. Copy of this order be sent to the learned trial Court for information.

(MOHAN LAL)
JUDGE

(TASHI RABSTAN)
JUDGE

Jammu
01.08.2023
Vijay

Whether the order is speaking?
Whether the order is reportable?

Yes/No
Yes/No