

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

Bail App No. 153/2023

Abdul Hamid Th. Mohammad Asif

.....Appellant(s)/Petitioner(s)

Through: Mr. Bari Abdullah, Advocate &
Ms. Anisa Naik, Advocate

Vs

UT of J&K and anr.

..... Respondent(s)

Through: Mr. Dewakar Sharma, Dy. AG

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

ORDER

22.12.2023

1. The applicant figures as one of the accused in the charge sheet titled, '*UT of J&K vs. Gagandeep Singh and ors.*' pending before the Court of Sessions Judge, Udhampur (hereinafter to be referred as 'the trial court') arising out of FIR No. 497/2019 under Section 8/15/29 NDPS Act. The applicant had earlier approached the learned trial court for grant of bail on the ground that he had been falsely implicated in the said case and none of the witnesses examined by the prosecution had deposed in respect of involvement of the applicant in the commission of offence and further that the applicant had been in custody since 22.10.2019. The learned trial court after seeking response from the other side and hearing the parties, dismissed the bail application vide order dated 14.03.2023.
2. After dismissal of the said bail application, the applicant has filed the present application for grant of bail on the ground that the contraband was not recovered from the actual possession of the applicant and the

applicant has been arrayed as accused solely on the statement of the driver and when he came to Udhampur for release of the vehicle, he too was arrested. It is further stated that five witnesses have already turned hostile and the applicant has been in custody for the last many years and the continuous incarceration of the applicant amounts to pre trial conviction.

3. The respondents have filed the response thereby stating that the applicant is not entitled to grant of bail in view of Section 37 of NDPS Act. Besides, it is stated that on 21.10.2019, Constable Yudhvair Singh submitted a docket in Urdu on behalf of Sg. CT Sanjay Kumar, wherein it was stated that Sg. CT Sanjay Kumar along with other officials had laid a Naka at Jakhani and while checking the vehicles at about 14:45 hours, one truck bearing Registration No. PB13X/9382 was stopped and during checking it was found to be loaded with apples in the wooden box. The contraband poppy straw was recovered from the roof of the said truck. On enquiry, the driver of the truck disclosed his name as Gagandeep Singh. On receipt of this docket, FIR bearing No. 497/2019 was registered for commission of offences under Section 8/15 NDPS Act. Thereafter the applicant was also arrested and after the completion of investigation, the charge sheet for commission of offence under Section 8/15/29 NDPS Act was laid before the court on 28.12.2019.
4. Mr. Bari Abdullah, learned counsel appearing for the applicant submitted that no contraband was recovered from the applicant and the same was allegedly recovered from the truck owned by the applicant, which was being driven by the accused-Gagandeep Singh. He further submits that the applicant has been roped in as accused solely on the statement of the

driver, which is not admissible in the eyes of law and except that there is no evidence against the applicant. He further submits that despite lapse of four years, the prosecution has not been able to conclude the evidence, which has resulted into violation of fundamental right of the applicant to speedy trial. He placed reliance upon the judgment of the Hon'ble Apex Court in **Criminal Appeal No(s). of 2023 [Special Leave Petition (CRL.) NO(S). 915 of 2023]** titled, '**Mohd. Muslim@Hussain vs. State (NCT of Delhi)**'.

5. Per contra, Mr. Dewakar Sharma, learned Dy. AG submits that the applicant was the owner of the vehicle from where 60 Kg of poppy straw was recovered and the complicity of the applicant was found in the commission of offence being conspirator for transporting the contraband. He further submits that rigors of Section 37 of NDPS Act are applicable in the case, therefore, the applicant is not entitled to bail.
6. Heard learned counsels for the parties and perused the record.
7. A perusal of the record reveals that initially the FIR was registered for commission of offence under Section 8/15 NDPS Act when the poppy straw weighing 60 Kg was found to be loaded in the truck bearing registration No. PB13X-9382. A perusal of the charge sheet reveals that after the accused-Gagandeep Singh was apprehended, he disclosed that the applicant was also with him and he alighted off the truck prior to naka and the poppy straw was being taken to Punjab. It is on the basis of this statement that the applicant was also arrayed as accused with the aid of Section 29 of NDPS Act. This Court has also examined the record of the trial court and its perusal would reveal that the contraband has been

recovered from the truck, which was being driven by the accused-Gagandeep Singh. This Court has neither come across any evidence in respect of involvement of the applicant nor any such evidence has been brought to the notice of this Court, which would persuade this Court that there is a evidence against the applicant in respect of the commission of offence mentioned above. Also, nothing has been brought to the notice of this Court that the applicant was earlier found involved in the commission of any such offence. In case titled, '**Mohd. Ashraf Sheikh vs. U.T. of J&K**' 2022(1) J.K.J. 32, after taking note of the judgment of the Hon'ble Supreme Court, this Court had observed as under:-

“14. Thus, the Court while considering bail application in matters, where section 37 NDPS has its application, can simply look in to the material on record but cannot critically evaluate the same so as to find out the sufficiency of the material to detain the accused. Examining the case of the petitioner on touch stone of law laid down by Apex Court, this Court finds absence of any material evidence against the petitioner connecting the petitioner with the commission of offence for which he has been arrested as it is not forthcoming from the record or from the statement of any witness that petitioner has abetted the commission of offence or has been part of conspiracy to commit any offence under the Act. More so, the prosecution has not placed on record anything to demonstrate that the petitioner herein is earlier involved in similar type of offences as such this court is of opinion that the petitioner is not likely to commit such offence in future.”

8. In view of the above, this Court is of the considered view that the applicant has successfully qualified both the tests laid down in Section 37 of NDPS Act for the purpose of grant of bail. More so, the applicant was arrested on 22.10.2019. A perusal of the trial court record would reveal that the applicant was charged on 28.02.2020 for commission of offences under Section 8/15/29 NDPS Act. The prosecution has consumed more than three years but till date, the prosecution has not been able to conclude the evidence. The right to speedy trial is the fundamental right and once

the statutes prescribe stringent conditions for grant of bail, then inordinate delay in the trial of the case would result into denial of right of the accused to the speedy trial. In this context, it would be appropriate to take note of the observation of the Hon'ble Supreme Court in case titled, **'Mohd. Muslim@Hussain vs. State (NCT of Delhi)**, which is held as under:-

"13. When provisions of law curtail the right of an accused to secure bail, and correspondingly fetter judicial discretion (like Section 37 of the NDPS Act, in the present case), this court has upheld them for conflating two competing values, i.e., the right of the accused to enjoy freedom, based on the presumption of innocence, and societal interest-as observed in Vaman Narain Ghiya v. State of Rajasthan ("the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal...."). They are, at the same time, upheld on the condition that the trial is concluded expeditiously. The Constitution Bench in Kartar Singh vs. State of Punjab made observations to this effect. In Shaheen Welfare Association v. Union of India again, this court expressed the same sentiment, namely that when stringent provisions are enacted, curtailing the provisions of bail, and restricting judicial discretion, it is on the basis that investigation and trials would be concluded swiftly. The court said that Parliamentary intervention is based on:

"a conscious decision has been taken by the legislature to sacrifice to some extent, the personal liberty of an undertrial accused for the sake of protecting the community and the nation against terrorist and disruptive activities or other activities harmful to society, it is all the more necessary that investigation of such crimes is done efficiently and an adequate number of Designated Courts are set up to bring to book persons accused of such serious crimes. This is the only way in which society can be protected against harmful activities. This would also ensure that persons ultimately found innocent are not unnecessarily kept in jail for long periods."

18. The conditions which courts have to be cognizant of are that there are reasonable grounds for believing that the accused is "not guilty of such offence" and that he is not likely to commit any offence while on bail. What is meant by "not guilty" when all the evidence is not before the court? It can only be a prima facie determination. That places the court's discretion within a very narrow margin. Given the mandate of the general law on bails (Sections 436, 437 and 439 CrPC)

which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted reasonably. Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be assessed by courts, require that the court records its satisfaction that the accused might not be guilty of the offence and that upon release, they are not likely to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice: even in serious offences like murder, kidnapping, rape etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts: likely guilt of the accused and the likelihood of them not committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to-in cases when accused of offences enacted under special laws-be balanced against the public interest.

19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under [Section 37](#) of the NDPS Act.

20. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in *Union of India v. Rattan Malik*¹⁹). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by [Section 37](#) of the Act, given the imperative of Section 436A which is applicable to offences under the [NDPS Act](#) too (ref. *Satender Kumar Antil supra*). Having 19 (2009) 2 SCC 624 regard to these factors the court is of the opinion that in

the facts of this case, the appellant deserves to be enlarged on bail.”

9. As such, it is directed that the applicant be released on bail, subject to the following conditions:

- (i) subject to furnishing of two solvent sureties to the tune of Rs. 50,000/- to the satisfaction of trial court and personal bond of like amount.
- (ii) he shall not make any attempt to contact with any of the prosecution witnesses during bail either physically or through any other mode.
- (iii) he shall appear before the learned trial court on all dates of hearings.
- (iv) he shall not leave the territorial jurisdiction of UT of Jammu & Kashmir without prior permission of the trial court.

10. Any observation made by this Court would not come in the way of the trial court at the time of final appreciation of evidence.

11. Disposed of.

(RAJNESH OSWAL)
JUDGE

Jammu
22.12.2023
Neha-II