

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

Bail App No. 53/2025

Reserved on: 24.09.2025

Pronounced on: 07.10.2025

Gurdev Singh

.....Applicant

Through :- Mr. Jagpaul Singh, Advocate.

v/s

UT of J&K

.....Respondent

Through S.H.O, Police Station Samba

Through :- Mr. Vishal Bharti, Dy. AG with
Mr. Vivek Mattoo, Advocate.

CORAM: HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE

JUDGMENT

01. The applicant, who is an undertrial in case titled "*UT of J&K vs. Gurdev Singh and Anr*", under Sections 8/15/25/29 NDPS Act, has approached this Court for bail, after a similar plea came to be declined by learned Additional Sessions Judge, Samba ["the trial court"].

02. An overview of the background facts is that on 11.12.2019, a police party of Police Station, Samba laid a nakka at Supwal NHW. At about 0915 hours, a truck bearing Registration No. UP38AT/7396, which was being driven by the applicant, on its way from Jammu to Kathua/Punjab, came to be intercepted and checked. It was found that half of the truck was loaded with apples and the rest half was loaded with 16 plastic bags of Poppy Straw. Since applicant failed to furnish satisfactory explanation, a docket was flashed to Incharge PP Supwal, who lodged a DD report and DDR was sent to Police Station Samba, on the receipt whereof, FIR No. 261/2019 for offences under Sections 8/15 NDPS Act came to be registered.

03. As per the investigating agency, the applicant during investigation revealed that he got the truck underloaded with apples so as to facilitate the loading of huge amount of contraband and conceal it behind the apple boxes for transportation from Pulwama, Kashmir to Punjab. He also revealed that he had bought the contraband from an unknown person, whom he met through Rashid Ahmed Thoker of Pulwama. Said Rashid Ahmed Thoker also came to be arrested and he disclosed during interrogation that poppy straw loaded in the truck belongs to Mukhtiar Ahmed Bhat, a transporter, whose trucks were earlier also caught with contraband. On the scrutiny of the documents of the truck, it surfaced that fruit loaded in the truck was sold by Sajad Fruit Company, fruit Mandi Pulwama to Naag Pal fruit Company Jeend Haryana. As per the expert opinion, Morphine was detected in the exhibits, which was identified as poppy straw (Plant Material of *Papaver Somniferum*).

04. While investigation, regarding the source and destination of the contraband, recovered from the possession of the applicant, bought from accused Rashid Ahmed Thoker, and roles of Nahar Singh, Mukthair Ahmed Bhat and the truck owner Raunak Khan were under investigation, charge-sheet against the applicant and accused Rashid Ahmed Thoker came to be filed in the trial court.

05. Pertinently, the applicant, relying upon **Supreme Court Legal Aid Committee representing Undertrial Prisoners vs. Union of India and Ors.; 1994(6) SCC 731**, approached the trial court with the plea that since he had already completed 05 years of judicial custody, as an undertrial, i.e. one half of the minimum punishment, prescribed for the offences, with which he is charged, he was entitled to be released on bail under Section 436-A CrPC.

06. Learned trial court relied upon **Re-inhumane conditions in 1382 Prisons; 2024 live law (SC) 632**, to reject the bail application on the premise that applicant had moved the bail plea after the enforcement of BNSS, which replaced Section 436-A CrPC with Section 479 BNSS and since Section 479 BNSS provides that where a person has, during the period of investigation, inquiry or trial for offences not punishable with death or life imprisonment, undergone detention for a period extending up to **one half of the maximum period of imprisonment**, shall be released on bail, therefore, after the enactment of BNSS, one half of the period is to be calculated on the basis of the maximum period of punishment, provided for the offence, which is 20 years, and since applicant had not completed one half of the maximum period of imprisonment, he was not entitled to bail.

07. According to the applicant, learned trial court has failed to appreciate the legal position in its correct perspective and aforesaid observation of learned trial court is superficial and vacuous as it lacks reasoning. It is contention of the applicant that if interpretation provided by learned trial court, to the provisions of Section 479 BNSS is accepted, then no person can be enlarged on bail, until he completes one half or one third of the maximum sentence prescribed for the offence, which according to the applicant, is not the intent of the beneficial provision of Section 479 BNSS.

08. It is contended that Hon'ble Supreme Court, in **Re-inhumane conditions**, while holding that Section 479 BNSS is applicable to the pending matters, nowhere overruled the ratio of **Supreme Court Legal Aid Committee**, which provided that a specific category of undertrials after completion of 05 years of custody deserve to be released on bail.

09. It is thus, contention of the applicant that where an undertrial charged with offences under NDPS Act, punishable with minimum imprisonment of 10 years and fine of Rs. 1.00 lakh, has been in jail for not less than 05 years, he is entitled to be released on bail.

10. The plea has been opposed by the respondent-UT primarily on the ground of gravity of the charge. It is contention of the respondent that since commercial quantity of contraband has been recovered from the conscious possession of the applicant, and rigor of Section 37 is attracted, he is not entitled to bail merely on the ground of prolonged trial.

11. Heard arguments and perused the record.

12. Mr. Jagpaul Singh, learned counsel for the applicant has relied upon **Supreme Court Legal Aid Committee** (supra), to reiterate the grounds urged in the memo of petition.

13. *Per contra*, Mr. Vishal Bharti, learned Dy. AG, has reiterated the stand of the respondent-prosecution in his arguments.

14. I am of the view that learned trial court has not only overlooked the legislative mandate of Section 479 BNSS but also the import of the observations of Hon'ble Supreme Court in **Re-inhumane Conditions**.

15. Before a closer look at the observations of Hon'ble Supreme Court in **Supreme Court Legal Aid Committee** and **Re-inhumane Conditions**, it shall be expedient to have a look at the provisions of Section 436 A CrPC and Section 479 BNSS, which for the ease of reference have been extracted below:-

"436A. Maximum period for which an undertrial prisoner can be detained.

Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties; Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or

without sureties: Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation.—In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded.”

“Section 479. Maximum period for which undertrial prisoner can be detained.

(1) Where a person has, during the period of investigation, inquiry or trial under this Sanhita of an offence under any law (not being an offence for which the punishment of death or life imprisonment has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on bail:

Provided that where such person is a first-time offender (who has never been convicted of any offence in the past) he shall be released on bond by the Court, if he has undergone detention for the period extending up to one-third of the maximum period of imprisonment specified for such offence under that law:

Provided further that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail bond instead of his bond:

Provided also that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation.—In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded.

(2) Notwithstanding anything in sub-section (1), and subject to the third proviso thereof, where an investigation, inquiry or trial in more than one offence or in multiple cases are pending against a person, he shall not be released on bail by the Court.

(3) The Superintendent of jail, where the accused person is detained, on completion of one-half or one third of the period mentioned in sub-section (1), as the case may be, shall forthwith make an application in writing to the Court to proceed under sub-section (1) for the release of such person on bail.”

(Emphasis supplied)

16. In Supreme Court Legal Aid Committee, the petitioner -society invoked Article 32 of the Constitution of India for a mandate to deal with the inordinate delay in disposal of cases of undertrials. Hon’ble Supreme Court, realising that due to the strict language employed to Section 37 NDPS Act, very few undertrials under the Act would be able to secure bail from the competent courts, emphasized that to refuse bail due to the stringent conditions of Section 37 of the Act on the one hand and allow the trial to procrastinate for years on the other, is unfair and unreasonable. It was observed that such a situation is not only contrary to the spirit of Section 36(1) of the Act, which contemplates the

creation of Special Courts under the Act to speed up the trial of undertrials, but also contrary to Section 309 of CrPC and Articles 14, 19 and 21 of the Constitution. Conscious of the statutory provision finding place in Section 37 NDPS Act, which prescribed certain conditions to be satisfied before a person accused of an offence under the Act could be considered on bail, the Apex Court ruled that deprivation of personal liberty of an individual without ensuring speedy trial would not be in consonance with the right of liberty guaranteed by Article 21 of the Constitution. It was in this background that Hon'ble Supreme Court directed as under:-

“We, therefore, direct as under:

(i) Where the undertrial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the Special Judge concerned with two sureties for like amount.

(ii) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs 50,000 with two sureties for like amount.

(iii) **Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail** if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.

(iv) Where an undertrial accused is charged for the commission of an offence punishable under [Sections 31](#) and [31 A](#) of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order.

The directives in clauses (i), (ii) and (iii) above shall be subject to the following general conditions:

(i) The undertrial accused entitled to be released on bail shall deposit his passport with the learned Judge of the Special Court concerned and if he does not hold a passport he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;

(ii) the undertrial accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under clause (i) once in a fortnight in the case of those covered under clause (ii) and once in a week in the case of those covered by clause (iii), unless leave of absence is obtained in advance from the Special Judge concerned;

(iii) the benefit of the direction in clauses (ii) and (iii) shall not be available to those accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;

(iv) in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High

Commission of the country to which the foreigner-accused belongs, that the said accused shall not leave the country and shall appear before the Special Court as and when required;

(v) the undertrial accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;

(vi) the undertrial accused may furnish bail by depositing cash equal to the bail amount;

(vii) the Special Judge will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out; and

(viii) after the release of the undertrial accused pursuant to this order, the cases of those under-trials who have not been released and are in jail will be accorded priority and the Special Court will proceed with them as provided in Section 309 of the Code.”

17. While the Supreme Court’s afore-quoted guiding principles in **Supreme Court Legal Aid Committee** were in effect, CrPC came to be replaced by BNSS and several procedural changes came to be introduced. Though BNSS introduced restrictive provisions for denying bail to those facing multiple pending cases and inhibited mandatory bail for many prisoners, a proviso came to be appended to Section 479 BNSS regarding first-time offenders. The said proviso mandates that if an undertrial, who is a first-time offender, has already served one-third of the maximum sentence, he should be released on bail. BNSS, as such, has not only retained but expanded the provisions of Cr.P.C., for releasing undertrial prisoners who had already served a significant portion of their potential sentence.

18. In **Re-inhumane conditions**, the attention of Hon’ble Supreme Court was drawn to the first proviso of Section 479 BNSS to urge that a first-time offender could only be released on bond by the Court, if he had undergone detention for the period extending up to one half of the maximum period of imprisonment specified for such offence under that law. The Additional Solicitor informed the Court that aforesaid provision of BNSS was applicable to all undertrials, irrespective whether the case was registered against them before 15.07.2024, the

date when the new amended legislation had come into effect. Relevant excerpts of the verdict, for the facility of reference, have been extracted below:-

“1. This order is in continuation of the order passed on 13th August, 2024. On the last date of hearing, Mr. Gaurav Agrawal, learned Amicus Curiae had submitted that the Bharatiya Nagarik Suraksha Sanhita, 20231, which has replaced the Criminal Procedure Code, 1973 w.e.f. 01st July, 2024, contains a provision under Section 479 relating to the Maximum period for which an undertrial prisoner can be detained.. The attention of this Court was drawn to the first proviso to Section 479 to urge that a first-time offender (who has never been convicted for any offence in the past) is required to be released on bond by the court, if he has undergone detention for the period extending up to one-third of the maximum period of imprisonment specified for such an offence under a particular law.

2. Having regard to the fact that the substituted provision under the BNSS is more beneficial vis-a-vis Section 436A of the Criminal Procedure Code, 1973, wherein the period undergone by the first time Offender was prescribed as up to half of the maximum period of imprisonment specified for such an offence, this Court had called upon the learned Additional Solicitor General to obtain instructions from the Department and submit a clarification regarding application of the said provision to all undertrials across the country.

3. Today, Ms. Aishwarya Bhati, learned Additional Solicitor General, submits that pursuant to the aforesaid order, instructions have been obtained from the Department to the effect that the aforesaid provision under the BNSS shall apply to all undertrials in pending cases irrespective of whether the case was registered against them before 15th July, 2024, the date when the newly minted legislation has come into effect.

4. In that view of the matter, it is deemed appropriate to direct immediate implementation of Section 479 of the BNSS by calling upon Superintendents of Jails across the country wherever accused persons are detained as undertrials, to process their applications to the concerned Courts upon their completion of one-half/one-third, as the case may be, of the period mentioned in sub-section (1) of the said provision, for their release on bail. This step will go a long way in easing overcrowding in jails which is the primary focus of this Court in the present petition.”

(Emphasis supplied)

19. It is confirmed from the aforesaid decision of the Apex Court in **Re-inhumane conditions** that relaxed bail provisions for undertrial prisoners under BNSS are applicable to both new and pending cases. Though the Code of Criminal Procedure came to be replaced by BNSS w.e.f. 01.07.2024, the Supreme Court has clearly ruled that the beneficial provisions for the undertrials will apply retrospectively.

20. Learned trial court, despite being conscious of the aforesaid observation of Hon’ble Supreme Court in **Re-inhumane conditions**, has failed to fathom the clear import of law that first proviso appended to Sub-Section 1 of Section

479 BNSS regarding the first-time offender applies retrospectively to the pending cases.

21. In **Narcotic Control Bureau vs. Lakhwinder Singh; 2025 SCC Online SC 366**, order of the High Court, whereby the sentence awarded by the trial court was suspended and the convict-appellant, who had undergone four and a half years of sentence out of the substantive sentence of ten years, was admitted to bail in a case under NDPS Act, came to be upheld by Hon'ble Supreme Court, by holding that in cases of fixed term sentences, Appellate Court can exercise the power of releasing the accused on bail, who have undergone substantial part of the substantive sentence. Relevant observations captured in Paras 6 and 7 of the judgment for the facility of reference are reproduced below:-

“6. In the case of fixed-term sentences, if the Courts start adopting a rigid approach, in a large number of cases, till the appeal reaches the stage of the final hearing, the accused would undergo the entire sentence. This will be a violation of the rights of the accused under Article 21 of the Constitution. Moreover, it will defeat the right of appeal.

7. At this stage, the learned ASG appearing for the petitioner submitted that the power of the Court was constrained by Section 37 of the NDPS Act, which is applicable even at the stage of an appeal. He relies upon a decision of this Court in the case of Dadu v. State of Maharashtra?. There is no dispute about the fact that the Appellate Court is bound by constraints of Section 37 of the NDPS Act while considering the prayer for the grant of bail during the pendency of an appeal. However, if, in the facts of the case, an accused has undergone a substantial part of the substantive sentence and, considering the pendency of criminal appeals, his appeal is not likely to be heard before the accused undergoes the entire sentence, the Appellate Court can exercise the power of releasing the accused on bail pending the appeal. If the relief of bail is denied in such a factual situation only on the grounds of Section 37 of the NDPS Act, it will amount to the violation of the rights of the accused under Article 21 of the Constitution of India.”

22. It is manifest that while BNSS altered certain procedural provisions, the fundamental constitutional principles of liberty on which bail jurisprudence is based remain unchanged. In other words, the judgment and guidelines of Hon'ble Supreme Court, including **Supreme Court Legal Services Committee**, remain applicable to bail matters under the BNSS because the right

to life and personal liberty guaranteed under Article 21 of the Constitution of India is the basis of bail jurisprudence.

23. If the present case is approached with the aforesaid principles of law, 370 Kgs of poppy straw came to be recovered from the conscious possession of the applicant, which, of course, is a commercial quantity. The question which begs consideration of the Court is whether the embargo contained in Section 37 NDPS Act can be construed to have same efficacy throughout the pendency of the trial, notwithstanding the length of the trial and the period of incarceration of the undertrial.

24. Applicant came to be arrested on 11.12.2019 and came to be charged by the trial court on 02.12.2021, i.e., about four years back. The prosecution has so far succeeded in examining 09 witnesses out of total 15 listed in the charge-sheet. The accused is behind the bars for about 06 years now i.e. more than the minimum imprisonment provided for the offences, he has been charged with, and it is evident from the pace with which the trial is proceeding that examination of remaining 06 witnesses is likely to consume more time. In such circumstances and in view of salutary provision of Article 21 of the Constitution, prosecution cannot be allowed to invoke stringent provisions of Section 37 NDPS Act in perpetuity and dilute Fundamental Right of the applicant to speedy trial and personal liberty.

25. For what has been observed and discussed above, the present application is allowed and applicant is directed to be released on bail on his furnishing two surety bonds, each of the amount of Rs. 1.00 lac, to the satisfaction of the Registration Judicial of this Court and a bond of the personal recognizance of the like amount to the satisfaction of the Superintendent of the concerned jail, subject, however, to the following conditions that:-

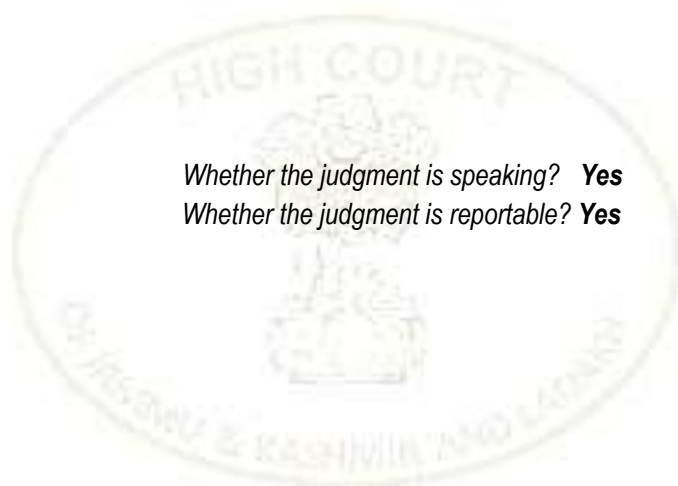
- i) he is not involved in any other offence of the like nature;
- ii) he shall not jump over bail or make an attempt to tamper with the prosecution witness or coerce them; and
- iii) he shall not leave the territorial jurisdiction without prior permission of the trial court.
- iv) he shall appear in the trial court, without fail on each and every date of hearing.

26. Violation of either of the conditions shall entail in forfeiture of the bail bonds.

27. Disposed of.

(Rajesh Sekhri)
Judge

JAMMU
07.10.2025
Abinash



Whether the judgment is speaking? Yes
Whether the judgment is reportable? Yes