HIGH COURT OF JAMMU &KASHMIR AND LADAKHAT SRINAGAR

CrlA (D) No. 52/2024

Reserved on: 07.04.2025
Pronounced on: 31.05.2025

Burhan Din Wani
s/o Mushtaq Ahmad wani
r/o Talwari Langate
through his father Mushtaq Ahmad ...APPELLANT(S)

Through: Mr. S.T Hussain, sr. adv with Ms. Nida, adv.

vs.

1.UT of J&K through Principal Secretary, Home Department civil Secretariat, Srinagar

2. SHO Police Station Kupwara ...RESPONDENT(S)

Through: Mr. Faheem Nissar Shah, GA

CORAM:

HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE
HON'BLE MR. JUSTICE MOHD. YOUSUF WANI, JUDGE

JUDGMENT

Mohd Yousuf Wani-J

1. Impugned in the instant Appeal filed under the provisions of Section 21 of the National Investigation Agency Act, 2008 (hereinafter referred to as the " NIA Act" for short) is the common order dated 01.07.2024 passed by the Court of learned Special Judge under NIA Act (Addl. Sessions Judge) Kupwara (hereinafter referred to as the trial Court) on the bail applications of the Appellant and co-accused whereby the said applications came to be rejected.

2. The Appellant/accused has assailed the impugned common order to his extent on the grounds that same is suffering from illegality for having been passed contrary to the provisions of the law governing the field. That he is innocent and has been falsely and frivolously implicated in the case FIR No. 104/2020 of Police Station Handwara. That he has been facing incarceration in the case since April 2020 despite being innocent. That he, has been involved in the case FIR on the alleged disclosure of co-accused Azad Ahmad Bhat and Altaf Ahmad Baba, which is totally inadmissible under law for not having been proceeded by the alleged recovery of a 'Hand Grenade' from him. That the witnesses cited by the Investigation Agency as regards the alleged disclosure and the recovery from him have not at all incriminated him. That the charge alleged against him escapes the embargo under Section 43-D (5) of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as "ULA (P) Act" for short); as well as under Section 437 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "Code"). That the denial of bail to him tantamounts to his pretrial conviction. That it is a settled legal position that an accused is presumed to be innocent until proved guilty at the trial and the grant of bail is a Rule in cases where there is no apprehension of the accused person's misusing the concession of the bail. That the appellant has been suffering from detention in the case since last more than 5 years and his health condition has seriously deteriorated in custody. That the learned

trial Court has not appreciated the law and the evidence in correct perspective. That he shall abide by any conditions that may be imposed by this Court.

3. The respondents have resisted the instant appeal on the grounds *inter alia* that the learned trial Court has through a legal and reasoned order rejected the bail applications of the accused persons in the case FIR No. 104/2020 of Police Station Handwara including that of the Appellant; that the Appellant/accused along with his guilty partners is involved in a serious non-bailable Anti National Offences touching the sovereignty and integrity of the country; that the prosecution has led sufficient incriminating evidence at the trial against the appellant, which cannot be weighed and scrutinized at this stage; that the Appellant, was apprehended on 03.04.2020 in the case FIR upon the disclosure of the co-accused namely Azad Ahad Bhat and Altaf Ahmad Baba who were first in point of time, arrested from the house of one Ab. Razaq Bhat S/o Gh. Ahmad Bhat of Shalipora Langate, Handwara and from whom arms and ammunitions came to be recovered; that subsequent to the disclosure of the afore named accused, the Appellant was arrested and recovery of 'Hand Grenade' was made at his instance; that there is every apprehension of the accused person's misusing the concession of bail and repeating the commission of crime; that the case of the Appellant, for consideration of bail is hit by the provisions of Section 43-D (5) of the ULA (P) Act as also by the provisions of Section 437 of the Code;

that the trial against the Appellant and co-accused is going on before the learned trial court which is at its final stage and that the liberty of an individual is to be balanced against the interests of the state and the society.

4. It is needful to give the brief facts of the prosecution case as being relevant for disposal of the instant appeal.

5. A reliable information was received by Police Station Handwara during intervening night of 2/3 April 2020 to the effect that at Village Shalipora Langate some terrorists are staying hidden in the house of one Ab. Razaq Bhat S/o Gh. Ahmad Bhat who are likely to commit any terrorist's activity. That on the receipt of the said information a police team consisting of the personnel from police Chowki Langate, 30 RR and CRPF headed by Dy SP operations left for the spot who during the search of the suspected house apprehended two persons namely Azad Ahmad Bhat S/o Ab. Razaq Bhat R/o Shalipora, Langage and Altaf Ahmad Baba S/o Salamu din Baba R/o Rafi Abad Baba Gund Selo Sopore from whose possession illegal arms and ammunitions as well as a Letter Pad of banned organization LeT came to be recovered. That on the apprehension of the said persons and the recovery of arms and ammunitions from them, the Incharge Police Post Langate issued a docket through the hands of SG Constable Firdous Ahmed No. 412/H to the Police Station Handwara for registration of FIR and deputation of the Investigation Officer on spot, where upon case FIR No. 104/2020

came to be registered with the said Police station initially under Section 7/25 Arms Act and 18 ULA (P) Act. That during the investigation of the case and on the disclosure of the said two persons, co-accused Mohd Rafi Sheikh S/o Mohd Ahsan Sheikh, Parviz Ahmad Chopan S/o Ab. Rashid Chopan, Mudasir Ahmad Pandit S/o Ab. Rehman R/o Langate, **Burhan Mushtaq Wani S/o Mushtaq Ahmad Wani all residents of Langate** and Irshad Ahamd Chalku S/o Saifu din R/o Sericot Uri, came to be apprehended with the recovery of arms and ammunitions. That the mobile phones of the accused persons were seized and send for FSL analysis, which phones as per the disclosure of the accused persons were used to contact the persons namely Mohd Sultan Bhat S/o Ali Mohd Bhat R/o Karalpora Kupwara and Javid Ahmad War S/o Ali Mohd War R/o Hatlango POK in connection with the procurement of arms and ammunitions under the guidance of Whats App messages from unknown persons to cause terrorists activities in the Kashmir. The investigation in the case FIR came to be finally concluded in the form of the final report/challan against the accused persons including the Appellant under Sections 7/25 Arms Act and 13, 18, 20, 23, 38 ULA (P) Act.

6. We have heard the learned counsel for the parties, who reiterated their respective stands already taken by them in the memo of appeal and the objections filed in rebuttal to the same.

7. We have also perused the scanned copy of the trial court record. The order impugned in this appeal dated 01.07.2024 has also been gone through.

8. Keeping in view aforementioned perusal and the consideration of the rival arguments advanced on both the sides, in light of law on the subject, we are of the opinion that the impugned order does not suffer from any illegality.

9. The Appellant/accused came to be formally charged in the case under sections 13,18,20,23,38 ULA (P) Act and 7/25 Arms Act vide order dated 18.12.2020 of the Learned trial Court. The Appellant with co-accused who also came to be charged through the same order dated 18.12.2020 pleaded not guilty to the charge pursuant to which the learned trial court directed the prosecution to lead evidence in the case. The prosecution till date has examined 17 witnesses out of the total of 21 listed witnesses.

10. The learned trial Court through the order impugned has *inter alia* observed that the bail applications filed by the accused including the Appellant are primarily hit by the provisions of Section 43-D (5) of the ULA (P) Act and secondly having regard to the heinousness of the crime charged against them, they do not deserve to be enlarged on the bail. The learned trial Court has also observed in the impugned order that contradictions and discrepancies, if any, occurring in the prosecution

evidence recorded at the trial cannot be looked into at the stage of consideration of the bail application. It has been observed by the learned trial Court that there is every apprehension of the Appellant's, misusing the concession of bail by repeating the commission of the crime, intimidating unexamined prosecution witnesses and absconding at the trial.

11. The offences punishable U/ss 18, 20, & 23 fall under the Chapter IV of the ULA (P) Act when the offence punishable U/s 38 falls under the Chapter VI of the Act.

12. The provisions of clause (5) of Section 43-D ULA (P) Act place an embargo on the grant of bail to an accused involved in the offence(s) falling under the Chapters IV and VI of ULA (P) Act when, the accusation against him appears to be ***prima facie* true** . Such restrictions imposed by the ULA (P) Act are an addition to the restrictions under the Code or any other law for the time being in force on granting bail.

13. It is apt to reproduce the provisions of clauses (5) and (6) of the Section 43D of ULA (P) Act for ready reference: -

> **"43D. Modified application of certain provisions of the Code.**
>
> (1)……
> (2)……
> (3)……
> (4)……
>
> (5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on

bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release: Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

(6) The restrictions on granting of bail specified in sub-section (5) are in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

(7)……."

14. Thus, it is clear that an accused alleged to have committed the offences falling under the Chapters IV and VI of the ULA (P) Act, whether facing investigation or trial has to first come out of the embargo placed by the Section 43D (5) of the Act, whereafter his case for grant of bail can be considered under the provisions of Sections 437 & 439 of the "Code" respectively corresponding to the Sections 480 & 483 of "BNSS". If the court is of the opinion on the perusal of the Case Diary file or the record of the police report/challan in case of pendency of the trial, that accusation against the accused appears to be *prima facie* true, bail cannot be granted. The inference regarding the **"*Prima facie Truth*"** or "otherwise" of the prosecution case during the investigation stage can be drawn from the perusal of the case diary and during trial from the record of the Police report/challan.

The words **"*prima facie* truth**" cannot be read and understood to mean proved as used in the Indian Evidence Act. Such an interpretation would set at naught the power vested in a Court to grant bail pending trial. The expression "***Prima facie* true**" would obviously mean something more than mere suspicion/conjectures and something less than "proved". The inference regarding "***Prima facie* true**" would vary from case to case and from one accused to another. What may be "***Prima facie true***" in one case may not be so in another and therefore, the said expression cannot on account of a discretion vested in the Court be put in a straight jacket. Each case would have to be dealt with and examined on its own facts and decided.

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15. The consideration at the time of taking up a bail application for consideration, is different from the consideration to be adopted at the end of the trial for holding an accused, guilty or not guilty.

In considering an application for bail, the court is not required to conduct a preliminary trial of the case and consider the probabilities of the accused being found guilty or innocent.

The Courts while deciding the bail applications in respect of which the Code/BNSS or some Special Statute places embargo/limitations as in the instant case, will be traversing beyond their proper ambit and would be exceeding the limit of their functions, if they get engaged in discovering

the guilt or innocence of the Applicant/accused, which can only be determined at the conclusion of the trial.

16 Obviously the standard applied for grant of bail is higher than the standard to be applied for framing of charge. To say in *juxtaposition* while as in framing charge, Court may be of *prima facie* opinion that offence has been committed by the accused, for refusing bail, Court should be of the opinion also that accusation is" ***Prima facie* true**".

17. The restrictions on granting of bail specified sub section (5) of Section 43D ULA (P) Act are in addition to the restrictions under the Code or any other law for the time being in force for granting bail.

18. The provisions of section 437 of the Code corresponding to Section 480 BNSS again place an embargo on the grant of bail to an accused in respect of whom there appear to be "***reasonable grounds*** "regarding his involvement in an offence punishable with death or imprisonment for life. However, such bar does not operate where imprisonment for life is provided disjunctive of death penalty. Even if one escapes the embargo placed under aforesaid provisions of the Code/BNSS, his case is subject to the discretion of the Court, which is to be exercised on the sound judicial principles being evolved from time to time by the Hon'ble Apex Court and the different High Courts of the country. The use of words "**may**" in Sections 437 and 439 of the Code

(corresponding to 480 & 483 BNSS) implies the discretion of the Court for grant of bail in ordinary non-bailable offences.

19. There is no single golden rule or any single litmus test for consideration of a bail application. However, the following guidelines/governing principles, which are not exhaustive are to be kept in mind while considering a bail application.

i) The judicial discretion must be exercised with the utmost care and circumspection.

ii) That the Court must duly consider the nature and the circumstances of the case including:
   a) reasonable apprehension of the witnesses being tampered;
   b) investigation being hampered or
   c) the judicial process being impeded or subverted.

iii) The liberty of an individual must be balanced against the larger interests of the society and the State.

iv) The court must weigh in the judicial scales, pros and cons varying from case to case all along bearing in mind two paramount considerations viz:
   i) grant of bail quo an offence punishable with death or imprisonment for life is an exception and not the Rule;
   ii) the court at this stage is not conducting a preliminary trial;
   iii) the nature of the charge is the vital factor, the nature of evidence is also pertinent, the punishment to which the party may be liable also bears upon the matter and

the likelihood of the applicant interfering with the witnesses or otherwise polluting the course or justice;

iv) the facts and circumstances of the case play a predominant role.

20. Admittedly, it is now well settled by a catena of judgments of the Hon'ble Supreme Court that the power to grant bail is not to be exercised as if punishment before trial is being imposed. The only material consideration in such situation is whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour by tampering with evidence.

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21. It is also settled controversy that the bar imposed under Section 437 of the Code corresponding to Section 480 BNSS on the exercise of the discretion in the matters of bail subject to proviso contained in the section is confined to the offences providing sentence of death or imprisonment for life in alternate of the death and the cases covered by the offences carrying sentences of imprisonment for life disjunctive of death sentence are exempted from the embargo.

22. The presumption of the innocence of the accused till the proof of guilty will not be affected even if the bail is rejected and it is for the prosecution to establish the guilt of the accused beyond any shadow of doubt.

23. Hon'ble Apex Court in Gur Bakash Singh vs State of Punjab AIR 1980 SC 1632, REFERRED TO THE FOLLOWING EXTRACT FROM THE American jurisprudence having bearing on the subject of bail, "where the grant of bail lies within discretion of the court, granting or denial is regulated to a large extent, by the facts and circumstances of each particular case. Since the object of detention order/ imprisonment of the accused is to secure his appearance and submission to jurisdiction and the judgment of the court, the preliminary enquiry is whether a recognizance or bond would affect that end.It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter the judicial verdict. Any one single circumstance cannot be treated as of universal validity or necessarily justifying the grant or refusal of bail."

24. It has been held in State of Rajasthan Jaipur vs. Balchand AIR 1977 SC 2447, that it is true that the gravity of the offence involved is likely to induce the petitioner to avoid the course of justice and must weigh with the court when considering the question of bail."

25. Admittedly, in case of non-bailable offence, which do not carry the sentence of death or imprisonment for life in alternative, bail is a rule and its denial an exception especially where there is nothing

on record to show that the accused if admitted to bail will jump over the concession of bail and will tamper with the prosecution witnesses.

26. It is a trite that two paramount considerations viz: likelihood of accused fleeing from justice and his tampering with prosecution evidence relate to the ensuring of fair trial of the case in a court of justice, it is essential that due and proper weightage should be bestowed on these two factors apart from others. The requirements as to bail are merely to secure the attendance of the accused at the trial.

27. Bail or jail at the pre-trial or post-conviction stage belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion. Personal liberty deprived when bail is refused is too precious a value of our constitutional system recognized under Article 21 that the crucial power to negate it is a great trust exercisable not casually but judiciously with lively concern for the cost to the individual and the community. After all personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law (Per Hon'ble Mr. Justice V. R. Krishna Iyer in G. N. Nara Simhula vs Public Prosecutor Andhra Pradesh AIR 1978 SC 429).

28. The learned trial court was required to draw his *prima facie* satisfaction in respect of the truth or otherwise of the accusation against the appellant/accused and he was not expected to conduct a roving enquiry or semi trial, as appears to have been rightly done.

It is true, that the learned counsel for the Appellant, has contended before the learned Special Court that the alleged disclosure and the consequent recovery in relation to the Appellant was not at all proved at the trial of the case which is at the advanced stage. It is the stand of the Appellant that as against 21 prosecution witnesses 17 witnesses have been examined including the material witnesses cited in respect of the disclosure and recovery, who have not supported the same as their testimonies recorded at the trial are full of material contradictions and discrepancies.

29. As hereinbefore mentioned, the learned trial court at the stage of consideration of the bail application was not required to scan and weigh the evidence as is being done at the conclusion of the trial but had to see only whether the involvement of the Appellant appears to be Prima *facie* true.

30. In the backdrop of the aforementioned legal scenario, we are of the opinion that the learned trail court has passed a legally maintained order, which does not admit of any interference. While

hesitating to comment on the nature and quality of the evidence so far adduced at the trial, we agree with the opinion of the learned trial court that he was not required at the stage of the consideration of a bail application to weigh and scan the evidence to find out contradictions and conjectures.

31. The Appeal is accordingly ***dismissed***.

However, it is needful to mention that the prosecution evidence in the case was called vide order dated 18.12.2020 when upon framing the formal charges against the accused in the case FIR including the Appellant, they pleaded not guilty. A list of 21 prosecution witnesses is still to be fully exhausted as only 17 witnesses have been examined by the prosecution, during a period of about **four and half years**. An accused person has got his fundamental right to speedy trial guaranteed under Article 21 of our Constitution. Learned trial court is directed to expedite the trial of the case for its conclusion at an earliest.

32. Pending conclusion of the trial, the Appellant shall be at liberty to move a successive bail application for consideration by the learned trial Court as with the advancement of the trial, more evidence is likely to be recorded. In case any subsequent bail applications filed, upon recording of further evidence, the learned

trial court shall consider the same strictly in accordance with law, uninfluenced by the observations made by us, in this order.

(MOHD. YOUSUF WANI)
JUDGE

(RAJNESH OSWAL)
JUDGE

Srinagar
31.05.2025
"Ayaz"

Whether the Judgment is reportable: ? ***Yes.***
Whether the judgment is speaking:? ***Yes.***

HIGH COURT
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KARAM CHAND
2025.06.02 10:53
I attest to the accuracy and
integrity of this document