

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

Bail App No. 89/2025

Date of Pronouncement: 03.07.2026

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**Mushtaq Ahmed, aged 45 Years,
S/o Gulab Din,
R/o Murrah, Tehsil Surankote,
District Poonch,
presently lodged in
Jail Rajouri**

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

Through:- Mr. Ajay Bakshi, Advocate with
Mr. Ankush Sharma, Advocate

V/s

**Union of India
through Narcotics Control Bureau,
Zonal Unit, H. No. 322, Sector-C,
Sainik Colony, Jammu**

.....Respondent(s)

Through:- Mr. Vishal Sharma, DSGI with
Mr. Karan Sharma, CGSC

**CORAM: HON'BLE MR. JUSTICE SANJAY PARIHAR, JUDGE
ORDER**

1. The petitioner is facing trial in a complaint instituted by the respondent—Narcotics Control Bureau (NCB), Jammu, arising out of Crime Case No. 07/2024 of Police Station NCB, Jammu, for offences punishable under Sections 8, 21, 25, 27 and 29 read with Section 60 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "the NDPS Act"), which is presently pending before the Court of the learned Principal Sessions Judge, Rajouri.
2. The petitioner had earlier sought regular bail before the learned trial Court, which came to be rejected vide order dated 24.02.2025. Aggrieved thereof, the petitioner has approached this Court by way of the present bail application.

3. The prosecution case, in brief, is that on 19.03.2024, the respondent-NCB received specific secret information that a consignment of narcotic substance was likely to be transported on 20.03.2024. Acting upon the said information, an NCB team laid a naka and, at about 5:00 p.m. on 20.03.2024, intercepted a vehicle coming from Lam. Shortly thereafter, another vehicle also reached the spot. Upon search of one of the vehicles, the NCB allegedly recovered 1.370 kilograms of heroin, constituting a commercial quantity under the NDPS Act.
4. The prosecution further alleges that the petitioner was in constant telephonic contact with co-accused Mohd. Farooq, who had allegedly received the consignment, and that the Call Detail Records (CDRs) reveal approximately twenty telephonic conversations between them. On the strength of the petitioner's presence at the spot and the alleged telephonic communication, it is asserted that the petitioner had entered into a criminal conspiracy with the co-accused for transportation and possession of the contraband.
5. In its objections, the respondent submits that although no recovery has been effected from the personal possession of the petitioner, he was an active participant in the criminal conspiracy along with co-accused Mohd. Farooq and others. It is further contended that the petitioner, in his statement recorded under Section 67 of the NDPS Act, admitted his involvement in the alleged transaction. Since the recovery pertains to a commercial quantity of heroin, the rigours of Section 37 of the NDPS Act are attracted, disentitling the petitioner from the concession of bail.
6. Learned counsel for the petitioner, on the other hand, submits that the entire prosecution case against the petitioner is founded merely upon his

alleged association with the co-accused. It is argued that neither the complaint nor the charge-sheet contains any material in the nature of Call Detail Records, voice recordings or transcripts establishing that the petitioner had conscious possession of, or dominion over, the recovered contraband. It is further contended that no recovery whatsoever has been effected from the petitioner and that his mere presence in the company of the co-accused cannot, by itself, give rise to an inference of conscious possession or criminal conspiracy. Reliance has been placed upon the decision of the Hon'ble Supreme Court in *Tofan Singh v. State of Tamil Nadu*, 2021 Vol. I Crimes 208, to contend that the alleged confessional statement recorded under Section 67 of the NDPS Act is inadmissible in evidence.

7. Per contra, learned counsel appearing for the respondent submits that the offence involves commercial quantity of heroin and, therefore, the embargo contained in Section 37 of the NDPS Act squarely applies. It is argued that the petitioner was present at the place of occurrence, was acting in concert with the co-accused, and the investigation has disclosed sufficient material indicating his active participation in the conspiracy. It is further submitted that the analysis of the petitioner's Call Detail Records reveals frequent telephonic contact with co-accused Mohd. Farooq, including approximately twenty calls around the relevant period, thereby strengthening the prosecution case regarding criminal conspiracy and common intention.
8. Heard learned counsel for the parties and perused the record.
9. It is borne out from the digitized record that the complaint filed by the Narcotics Control Bureau (NCB) before the Court of the learned

Principal Sessions Judge, Rajouri, stands registered as Challan No. 08/2025, instituted on 09.09.2024, titled *UT of JKNCB v. Maqsood Ali & Ors.* The petitioner has been formally charged for the offences punishable under Sections 8/21/25/27/29 read with Section 60 of the NDPS Act. The trial has commenced, and one of the prosecution witnesses has already been examined.

10. The prosecution case, as emerging from the complaint, is that acting upon specific secret information, the NCB laid a naka at Rajpura and intercepted vehicle bearing registration No. JK02CS-0572 (Maruti Baleno), which was allegedly proceeding from Lam. Simultaneously, another vehicle bearing registration No. JK12C-1357 (Maruti Espresso) also reached the spot, whereupon its driver alighted and joined the occupants of the Baleno. Upon search, the NCB allegedly recovered 1.370 kilograms of heroin concealed in the dashboard of vehicle No. JK02CS-0572. At the relevant time, the Baleno was occupied by three persons, namely, Mushtaq Ahmed, Sharafat Ali and the present petitioner, all of whom have been arraigned as accused on the allegation that they were in conscious possession of the recovered contraband and had acted pursuant to a common intention and criminal conspiracy. However, the complaint does not disclose as to who was the owner or driver of the said vehicle.

11. The prosecution further relies upon the statements recorded under Section 67 of the NDPS Act, wherein the petitioner is alleged to have admitted that the recovered contraband belonged to all the accused and to have disclosed the involvement of certain other persons in the alleged narcotic transaction. According to the prosecution, the petitioner stated

that he had accompanied Mohd. Jaffar and Sharafat Ali at the instance of one Nissar and had agreed to transport the contraband for a consideration of ₹60,000/-. He is also stated to have named his brothers-in-law, namely, Farooq, Jaffar, Maqsood and Younis, as participants in the alleged transaction and further disclosed that upon noticing the NCB team, Farooq, Jaffar and Younis fled from the spot.

12. Learned counsel for the petitioner, however, has contended that the prosecution cannot derive any advantage from the statement allegedly recorded under Section 67 of the NDPS Act in view of the authoritative pronouncement of the Hon'ble Supreme Court in *Tofan Singh v. State of Tamil Nadu*, wherein it has been conclusively held that officers empowered under Section 53 of the NDPS Act are police officers within the meaning of Section 25 of the Indian Evidence Act. Consequently, any confessional statement made before such officers is rendered inadmissible in evidence, and a statement recorded under Section 67 of the NDPS Act cannot be treated as a confession for the purpose of securing conviction.

13. The aforesaid legal position being no longer res integra, the alleged statement of the petitioner recorded under Section 67 of the NDPS Act cannot, at this stage, be relied upon as substantive evidence to establish either conscious possession or criminal conspiracy. Once the said statement is kept out of consideration, the material placed on record reveals that the contraband was not recovered from the personal possession of the petitioner. The sole allegation against him is that he was travelling in the vehicle from which the recovery was effected. Mere presence in the vehicle, in the absence of any independent

material demonstrating conscious possession, knowledge, or active participation, cannot, by itself, be construed as sufficient to attribute possession of the recovered contraband to the petitioner.

14. Much emphasis has been laid by the learned counsel for the respondent on the call detail records (CDRs), which reveal telephonic communication between the petitioner and, in particular, co-accused Mohd. Farooq. It is contended that approximately twenty calls were exchanged between them around the time of the alleged occurrence. However, the mere existence of such telephonic contacts, by itself, cannot be construed as constituting a strong prima facie circumstance sufficient to infer that the petitioner was in conscious possession of the contraband. Whether such evidence, either independently or in conjunction with other incriminating material, establishes the petitioner's culpability is a matter that necessarily falls within the domain of appreciation of evidence during the course of trial.

15. Learned counsel for the respondent has further submitted that the petitioner was one of the occupants of the vehicle from which the contraband was allegedly recovered and, therefore, it may be presumed that he shared a common intention with the co-accused in transporting the contraband. Such a submission, however, is required to be tested on the touchstone of the evidence brought on record and cannot, at this stage, be accepted as conclusive of the petitioner's conscious possession or complicity.

16. As noticed hereinabove, the objections filed by the respondent are conspicuously silent regarding the identity of the person who was driving the vehicle and, consequently, exercising effective physical

control over it at the relevant point of time. The alleged recovery was effected from the dashboard of the vehicle, which admittedly had three occupants. In these circumstances, it was incumbent upon the investigating agency to collect cogent material identifying the person who had exclusive or effective physical control over the place from where the contraband was recovered. In the absence of such material, the question of attributing conscious possession to the petitioner assumes significance and is a matter that would require adjudication upon appreciation of evidence during trial.

17. Learned counsel for the respondent has placed considerable reliance upon Sections 35 and 54 of the NDPS Act, contending that the statutory presumptions envisaged therein operate against the petitioner and that it is for the petitioner, during the course of trial, to rebut such presumptions. The scope and ambit of these provisions came up for authoritative consideration before the Hon'ble Supreme Court in Noor Aga v. State of Punjab & Anr., reported as (2008) 16 SCC 417, wherein the Court held as under:

“34. The Act contains draconian provisions. It must, however, be borne in mind that the Act was enacted having regard to the mandate contained in International Conventions on Narcotic Drugs and Psychotropic Substances. Only because the burden of proof certain circumstances is placed on the accused, the same, by itself, in our opinion, would not render the impugned provisions unconstitutional.

35. A right to be presumed innocent, subject to the establishment of certain foundational facts and burden of proof, to a certain extent, can be placed on an accused. It must be construed having regard to the other international conventions and having regard to the fact that it has been held to be constitutional. Thus, a statute may be constitutional but a prosecution thereunder may

not be held to be one. Indisputably, civil liberties and rights of citizens must be upheld.”

18. The aforesaid decision lays down that the presumption of innocence, which is a cardinal principle of criminal jurisprudence, cannot be displaced merely because an accusation has been levelled against the accused alleging possession of contraband. Such presumption yields only upon the prosecution first establishing the foundational facts demonstrating that the accused was in conscious possession of, and exercised control and dominion over, the contraband recovered. It is only upon proof of such foundational facts that the statutory presumption under the provisions of the NDPS Act comes into operation, whereupon the burden shifts upon the accused to rebut the same by demonstrating that he was not in conscious possession of the seized contraband.
19. There can be no dispute that the NDPS Act has been enacted with the avowed object of curbing the menace of illicit trafficking in narcotic drugs and psychotropic substances and that, over the years, the Legislature has introduced several amendments rendering its provisions more stringent and prescribing severe punishments. At the same time, the rigours of the statute cannot absolve the prosecution of its obligation to establish the foundational facts necessary to attract the statutory presumptions. In the present case, save and except the statements purportedly recorded under Section 67 of the NDPS Act, the material collected during investigation does not prima facie disclose that the petitioner was exercising physical control or dominion over the contraband. The prosecution case, at its highest, only indicates that the

petitioner was travelling in the same vehicle along with the co-accused from which the contraband was recovered.

20. Ld. counsel for the respondent has laid considerable emphasis on the physical presence of the petitioner in the vehicle from which the contraband was recovered. However, mere presence in the vehicle, without more, cannot by itself give rise to an inference of conscious possession. Conscious possession necessarily postulates knowledge coupled with control over the contraband, both of which must be prima facie established by cogent material. Admittedly, the recovery was not effected from the person of the petitioner but from the dashboard of the vehicle. It is also not the case of the prosecution that the petitioner was either the driver or the registered owner of the vehicle. In such circumstances, the inference that the petitioner was in conscious or exclusive possession of the contraband cannot be readily drawn merely because he happened to be an occupant of the vehicle. At the stage of consideration of bail, the Court is not expected to undertake a meticulous examination of the evidence or record findings touching upon the merits of the prosecution case, as any such observation may prejudice the trial. Once the statements recorded under Section 67 of the NDPS Act are kept out of consideration, prima facie there appears to be no independent material connecting the petitioner with the conscious possession of the contraband so as to justify the conclusion that there are reasonable grounds for believing that he is guilty of the offence alleged.

21. It is also not the case of the prosecution that the petitioner is a habitual offender or has any criminal antecedents involving offences under the

NDPS Act or otherwise. The prosecution has been afforded full opportunity of hearing, and it is not in dispute that the trial has already commenced with the framing of charges. The contention advanced on behalf of the respondent that the very fact of framing of charges constitutes sufficient prima facie material to decline bail cannot be accepted. The framing of charge is only a tentative judicial determination based upon the material placed before the Court at that stage and does not foreclose the accused from seeking regular bail. The presumption of innocence continues to operate until the charge is established by legally admissible evidence. Equally, the rigours contained in Section 37 of the NDPS Act do not eclipse that presumption where the material produced by the prosecution itself does not prima facie furnish reasonable grounds for believing that the accusation of conscious and unauthorized possession of the contraband against the petitioner is true.

22. The petitioner has remained in judicial custody since 20.03.2024. The quantity of contraband allegedly recovered is 1.370 kilograms. Having regard to the period of incarceration already undergone by the petitioner, the stage of the trial, the absence of any criminal antecedents, and the nature of the material collected during investigation, particularly the lack of prima facie evidence demonstrating the petitioner's conscious possession of the contraband independent of the statements recorded under Section 67 of the NDPS Act, this Court is of the considered opinion that the twin conditions stipulated under Section 37 of the NDPS Act stand satisfied for the limited purpose of consideration of bail. Consequently, the petitioner has succeeded in making out a case

for being enlarged on bail, subject to appropriate conditions to secure his presence during trial.

23. For aforesaid reasons, this application is ***allowed***. Petitioner is directed to be released on bail, subject to the conditions as laid by the trial Court. Copy of the order shall be notified to the trial Court for further compliance.

(Sanjay Parihar)
Judge

JAMMU
03.07.2026
Asif Tantray

