

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Criminal Misc.-M No.31752 of 2021 (O&M)

Date of Decision: December 01, 2021

Ajay Kumar alias Kala

...Petitioner

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE MANOJ BAJAJ

Present: Mr.Dushyant Saharan, Advocate,
for the petitioner.

Mr.Bhupender Singh, DAG, Haryana.

Mr.R.A.Sheoran, Advocate,
for accused Pardeep.

MANOJ BAJAJ, J. (Oral)

Petitioner has filed this petition under Section 439 Cr.P.C. for grant of regular bail, pending trial in case FIR No.117 dated 25.02.2021, under Sections 20, 25, 27, 61 N.D.P.S.Act, 1985, Section 25 Arms Act, 1959, Section 307 IPC, 1860 and Section 420 IPC (added later on), registered at Police Station, Sadar Bhiwani, District Bhiwani, who is in custody since his formal arrest on 02.03.2021.

The above FIR was registered on the basis of information given by Inspector Shri Bhagwan and the relevant contents of the same are as under:-

“To, SHO PS Sadar Bhiwani. Today during intervening night

of 24/25.02.2021, I, Insp.Incharge CIA-2 Bhiwani along with EASI Sunder 374, HC Ramdia 82, EHC Narender 616 by riding Government vehicle bearing registration No.HR03-T-8710 which is driven by EHC Vikas 156 was present at Mundal Bus Stand in area of PP Mundal, PS Sadar Bhiwani for night patrolling and to stop criminal activities and in the meantime I received secret information from secret informer that narcotic substance is being brought in one Tempo Traveller No.HR61-C-8631 on Rohtak Hisar Road from Rohtak side. Believing this information to be true, notice u/s 42 NDPS was prepared and was sent to senior officers for information and at PP Mundal by the hand of EHC Narender 616. The contents of notice u/s 42 NDPS Act are as under:- Today during intervening night o 24/25.02.2021 I, Insp.alongwith EASI Sunder 374, HC Ramdia 82, EHC Narender 616 by riding Government Vehicle bearing registration No.HR03-T-8710 which is driven by EHC Vikas 156 was present at Mundal Bus Stand in area of PP Mundal, PS Sadar Bhiwani for night patrolling and to stop criminal activities and in the meantime, I received secret information from secret informer that narcotic substance is being brought in one Tempo Traveller No.HR61-C-8631 on Rohtak Hisar Road. At receipt of this information, notice u/s 42 NDPS is prepared and is being sent to senior officers for information and at PP Mundal by the hand of EHC Narender 616. I alongwith co-employees by riding Government vehicle and by taking along HC Rajpal 630 came at Rohtak Hisar Highway towards Village Bandaheri above Mundal Bridge and laid naka (barricading) and were checking incoming vehicles. In the meantime, one Tempo Traveller No.HR61-C-8631 was coming from Rohtak side at very high speed and on coming near naka (barricading) it was signaled to stop but the person sitting on driver seat suddenly tried to run his vehicle over police party with intention to kill and the person sitting behind driver seat fired firearm shot at police party, which missed police party and hit in standing nearby Government vehicle

No.HR03-T-8710. Whereupon, I gave information of this incident to co-employees by making phone call from my phone and asked them to pass message to Control Room Bhiwani for sending B.T. for laying naka (barricading) and thereafter, we gave retaliatory fire in self-defence and to stop the above mentioned vehicle, but the fire missed the tyre of moving vehicle and passed through rear windshield and hit in right arm of person sitting behind driver seat of Tempo Traveller. Driver was about to flee away and I with the help of co-employees apprehended the driver and inquired him about his name and address and he disclosed his name as Pardeep; son of Shamsher resident of Ladwa, District Hisar and the person sitting at back seat was apprehended and was inquired about his name and address and he disclosed his name as Ajay son of Ishwar resident of Khairi. As he was hit with bullet in his right arm, private vehicle was arranged and above mentioned Ajay alongwith HC Ramdia 82 was sent to Civil Hospital Bhiwani for medical treatment and the person sitting on driver seat above mentioned Pardeep was informed with notice u/s 50 NDPS Act.....”

Thereafter, the search of the vehicle was conducted and after completion of formalities, 320 kgs. 150 grams Ganja was recovered from it.

During the pendency of the petition, on 18.11.2021, an order dated 01.11.2021 (Annexure P-5) passed by the Additional Sessions Judge, Bhiwani granting bail to the co-accused, namely, Pardeep was placed on record by petitioner, to set up an additional ground of parity for bail, as the prosecution had set up a common case against both the accused persons. The order dated 01.11.2021 reveals that the trial court proceeded to grant regular bail to co-accused Pardeep on the ground that neither the applicant was arrested from the Tempo Traveller, nor the FSL report relating to alleged contraband has been received, therefore, the accused was held

entitled for concession of bail as not only he had clean antecedents, but the alleged supplier, namely, Singdi Nanaji @ Nani also did not name the said accused.

During the course of hearing, it was not disputed by the learned counsel for the petitioner as well as the learned State counsel that the co-accused, namely, Pardeep was indeed arrested on the spot after completion of formalities, who had also opted for search in the presence of a gazetted officer. Consequently, on 18.11.2021, this court *suo-motu* issued show cause notice under Section 439(2) Cr.P.C. to accused Pardeep for cancellation of his bail. In response, he has filed reply dated 26.11.2021 along with the FSL report dated 25.03.2021 (Annexure R-1).

Learned counsel for accused Pardeep has argued that the order dated 01.11.2021 granting bail to accused Pardeep has not been misused by the accused, therefore, the same does not deserve to be cancelled. He has further drawn the attention of the court to the FSL report (Annexure R-1) and argued that as per physical appearance, the contraband was greenish brown vegetative material having flowering/fruited tops and seeds etc., therefore, it would be debatable if the said recovered material would fall within the definition of Ganja contained in Section 2(iii)(b) N.D.P.S.Act. In support of his argument, he has relied upon the decisions of this court delivered in **CRM-M-43106-2018 (Sanjeev Kumar @ Sanju Versus State of Haryana)** and **CRM-M-13518-2021 (Irlasamrat Versus State of Haryana)**. He has further argued that the petitioner and the co-accused (driver) were not aware that the vehicle is containing the contraband as when they were in Andhra Pradesh, the vehicle was taken by one person as per directions of Raj Kumar, the alleged owner of the vehicle and on the

next day, the said vehicle was given to accused persons. Mr. Sheoran, learned counsel has argued that there is delay in lodging the FIR also and the accused was falsely implicated, therefore, the show cause notice dated 18.11.2021 may kindly be withdrawn.

Learned State counsel has argued that it is a clear and specific case of the prosecution that petitioner Ajay Kumar alias Kala and co-accused Pardeep were arrested in the above FIR after encounter and in the said occurrence, petitioner Ajay Kumar @ Kala had suffered gun shot injury. Learned State counsel argued that complainant Inspector Shri Bhagwan had received a secret information that narcotic substance would be brought in Tempo Traveller No.HR61-C-8631 and believing the information to be correct, the barricading was done by police party and upon seeing the vehicle, it was signaled to stop, but the driver of the said vehicle tried to run over the police officials, whereas his accomplice fired a gun shot, but no police official was injured, and in retaliatory fire by police, accused Ajay Kumar @ Kala suffered gun shot injury. According to him, the injured was immediately taken to Civil Hospital Bhiwani for medical treatment, who was later on referred to PGIMS Rohtak and after his discharge on 02.03.2021, he was arrested in this case.

Learned State counsel has further argued that large quantity of Ganja weighing more than 320 kgs. was recovered from the said vehicle which is commercial in nature and driver Pardeep was also arrested on the spot. Learned State counsel, on instructions from ASI Ramesh Kumar, Investigating Officer, has stated that the FSL report relating to the recovered contraband was filed before the trial court on 03.06.2021, i.e., before the order dated 01.11.2021 and as per said report, the recovered material is

After hearing the learned counsel for accused Pardeep and the learned State counsel, this court finds that the argument that the recovered contraband does not fall within the ambit of N.D.P.S.Act,1985 is misplaced, because as per FSL report, the sample tested was identified as 'Ganja' and its definition as contained in Section 2 (iii)(b) N.D.P.S.Act reads as under:-

XXXX XXX XXX

XXX XXX XXX

A reading of above shows that seeds and leaves in the absence of fruiting tops may not fall within the definition of Ganja, but where the seeds or leaves are accompanied by tops, the said material would not be excluded from the definition of Ganja. The physical appearance of the material as contained in the FSL report (Annexure R-1) describes it as ***“greenish brown vegetative material having flowering/fruiting tops and seeds etc.”***. Thus, the judgments relied upon by the learned counsel may not be helpful to the case of the petitioner as in those cases, the recovered material was without the tops, and even otherwise, in those cases this court while granting bail to accused had observed that it would be debatable, if, the recovered material would fall within the definition of Ganja or not and the issue was left open to be decided in trial.

Apart from it, the stand of Mr. Sheoran, learned counsel for the accused that co-accused Singdi Nanaji @ Nani (supplier) did not name accused Pardeep in his statement does not seem to be correct as the said accused was not found at home in District Visakhapatnam and his wife disclosed that Singdi Nanaji @ Nani is confined in District Jail Visakhapatnam, Andhra Pradesh in FIR No.168/21 dated 14.04.2021, under Section 20(b)(i), 20(b)(ii)(C), read with Section 8(c) N.D.P.S. Act, Police Station Chodavaram and this fact is contained in the reply filed by police in response to the bail application filed by accused Ajay Kumar @ Kala before the trial court. Moreover, according to prosecution, both accused were arrested at the spot, when the recovery of contraband was effected, and the defence that they had no knowledge of this contraband would again be a matter of trial, so it would not be appropriate for this court to make any comment on this issue at this juncture.

The other argument raised by learned counsel for accused Pardeep that as the concession of bail has not been misused by him, therefore, the order dated 01.11.2021 does not deserve to be cancelled is also without any merit, as the jurisdiction under Section 439(2) Cr.P.C can be exercised in case the order granting bail to the accused is perverse. The reference in this regard can be made to **Brij Nandan Jaiswal Vs. Munna @ Munna Jaiswal, 2009 (1) SCC 678**, wherein it has been held that the order of bail can be questioned on merit as well and the relevant observations contained in Para 7 read as under:-

“7. It is now a settled law that complainant can always question the order granting bail if the said order is not validly passed. It is not as if once a bail is granted by any court, the only way is to get it cancelled on account of its misused. The

bail order can be tested on merits also. In our opinion, therefore, the complainant could question the merits of the order granting bail. However, we find from the order that no reasons were given by the learned Judge while granting the bail and it seems to have been granted almost mechanically without considering the pros and cons of the matter.”

The above view was further reiterated by the Hon'ble Supreme Court in **Padmakar Tukaram Bhavnagare Vs. State of Maharashtra (2012) 13 SCC 720** and the relevant observations are extracted below:-

“..... It is true that this Court has held that generally speaking the grounds for cancellation of bail broadly are interference or attempt to interfere with the due course of justice or abuse of the concession granted to the accused in any manner. This Court has clarified that these instances are illustrative and bail can be cancelled where the order of bail is perverse because it is passed ignoring evidence on record or taking into consideration irrelevant material. Such vulnerable bail order must be quashed in the interest of justice. (See: Dolat Ram v. State of Haryana, 1995 (1) SCC 349 & Dinesh M.N. (S.P.) v. State of Gujarat, 2008 (3) R.C.R. (Criminal) 868: 2008 (4) R.A.J. 596: 2008 (5) SCC 66.”

As a result of the above discussion, this court is of the opinion that the order dated 01.11.2021 has been passed by the Additional Sessions Judge, Bhiwani in an arbitrary manner by twisting the facts in order to extend the benefit of regular bail to accused Pardeep. The observation that accused Pardeep was not arrested from the Tempo Traveller gives an impression that he was not present at the spot, whereas as per prosecution, the driver had tried to escape in a violent manner in order to avoid arrest and seizure of contraband.

Strangely, the FSL report was filed on 03.06.2021 before the trial court, but it was not referred to at all by the Presiding Officer, who

extended the bail with the observation that the report is yet to be filed. It may be noticed here that the regular bail petition filed by Ajay Kumar @ Kala was dismissed on 14.07.2021 and at that stage, the gravity and seriousness of the offence was noticed by the trial court in respect of both the accused, and the argument that the accused is having clean antecedents was held to be of no consequence. The observations made in Para 5 of the order dated 14.07.2021, read as under:-

“5. It cannot be disputed by the applicant, that in the night of 24/25.02.2021, he had suffered a bullet injury in his arm, because he was hospitalised by police, on same day (i.e. 25.02.2021). On 02.03.2021, only when the applicant recovered from the injury, that he was arrested. So, the applicant also cannot take benefit of delay in his arrest. In fact the applicant was in custody of police, from the time of occurrence itself. It is alarming feature of present case a contraband (Ganja) in such huge quantity as above 300 kg was recovered from the vehicle being travelled in by the applicant and his co-accused. This reflects the magnitude of commercialization of drug peddling by the applicant and his co-accused. In order to save their product and themselves from been apprehended by police, the applicant or his co-accused even fired on the police party, from a fire-arm. This fact aggravates the gravity of offence committed by the accused. Single act of such severe magnitude debars the applicant from taking benefit of clean antecedents. In the totality of above circumstances, the applicant is not held entitled for the concession of bail. The facts of present case are quite distinguishable from those of the various citations produced by learned counsel for the applicant. So, the applicant cannot be advanced benefit of bail on the basis of citations produced by his learned counsel. Ultimately, application in hand is dismissed.”

Subsequently, the same Presiding Officer without any material change in circumstances, vide order dated 01.11.2021 allowed the regular bail application of accused Pardeep by making the following observations:-

“4. It is own version of police, that the applicant was not arrested from the Tempo Traveller vehicle, from which alleged contraband was recovered. It is admitted by Learned Public Prosecutor, that FSL report has not been received till date. By this time, custody period of applicant has enlengthened to approximately 08 months. It is also a fact on record, that alleged supplier of the contraband, viz. Singdi Nanaji @ Nani has not named present applicant to be connected with receipt/procurement of the contraband. Any adverse antecedent has also not been reported against present applicant. In given circumstances, without adverting on merits of the case, paying regarding to length of custody undertaken by applicant and him bearing clean antecedents, the applicant Pardeep is held entitled for concession of bail, at this juncture. So, application in hand is allowed. The applicant is admitted to bail on furnishing of personal & single surety bonds in the sum of Rs. 50,000/- each. Requisite bonds furnished. Surety bond is accepted and attested. However, personal bond is accepted, but be sent to jail authorities for attestation purpose.”

A reading of the above two orders dated 14.07.2021 and 01.11.2021 makes it absolutely clear that the Presiding Officer extended the concession of regular bail to accused Pardeep by deliberately ignoring the material on record, and exercised the discretion in favour of accused by violating the sound judicial principles and this amounts to grave misconduct on his part. *Prima-facie*, it appears that the order dated 01.11.2021 has been passed for extraneous considerations and warrants exercise of jurisdiction under Section 439 (2) Cr.P.C., and further the disciplinary action against the

Presiding Officer also deserves to be initiated.

Resultantly, the regular bail granted to accused Pardeep by the trial court vide order dated 01.11.2021 in the subject FIR is cancelled and he is directed to surrender forthwith before the trial court. It is made clear that nothing observed herein shall be construed as an expression of opinion on the merits of the case.

Let a copy of this order be sent to Registrar General of this Court for placing it before Hon'ble the Chief Justice for further orders on administrative side.

At this stage, learned counsel appearing for petitioner Ajay Kumar @ Kala does not press his prayer for regular bail and wishes to withdraw the same.

The prayer is accepted.

Ordered accordingly.

December 01, 2021
ramesh

(MANOJ BAJAJ)
JUDGE

Whether speaking/reasoned
Whether Reportable:

Yes/No
Yes/No