

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

Bail App No.237/2023 C/W
Bail App No. 240/2023

Reserved on 06.05.2024
Pronounced on 10.05.2024.

1 Abdul Rashid son of Mohd Iqbal Harga resident of village Kuthal
Tehsil Khara District Doda
2. Shafkat Hussain son of Abdul Qayoom Mir resident of Ghrat Nallah
Tehsil Khara District Doda

...Petitioners

Through: - Mr. I.H.Bhat Advocate.

Vs.

UT of Jammu and Kashmir through SHO, Police Station Gandoh

...Respondents

Through: - Mr. Adarsh Bhagat G.A.

Bail App No. 240/2023

1 Showkat Ali son of Kuthal Tehsil Khara District Doda
2. Akhter Hussain son of Shoket Ali Magre resident of Ghonari Tehsil
Khara Doda

Mr. I.H.Bhat Advocate.

vs.

UT of Jammu and Kashmir th. SHO P/S Gandoh.

Mr. Adarsh Bhagat G.A.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1 By this common order, the afore-titled two bail applications,
which arise from FIR No.35/2017 for offences under Sections 302,
307,458,436,511,201,120-B RPC and 7/25 Arms Act registered with
Police Station Gandoh, are proposed to be disposed of.

2 The petitioners, who are facing trial in respect of charges for offences under Sections 302, 307, 458, 436, 511, 201, 120-B RPC and 7/25 Arms Act before the Court of learned Additional Sessions Judge, Doda ('trial Court' for short), have moved this Court for grant of bail in terms of Section 439 of Cr.PC.

3 The first ground that has been urged by the petitioners is that they have been arrested in the year 2017 and since then, they have been in custody without there being any possibility of completion of trial in near future. It has been contended that only 24 prosecution witnesses have been examined by the prosecution before the trial Court, whereas in the challan, as many as 55 witnesses have been cited and that there is no immediate prospect of conclusion of the trial. Therefore, on the ground of long incarceration of the petitioners, they are entitled to grant of bail as the right to speedy trial has been recognized as a fundamental right which is being violated in the case of the petitioners.

4 The other ground that has been raised by the petitioners is that most of the material prosecution witnesses have been examined by the prosecution and that they have not supported the involvement of the petitioners in the alleged crime. It has been submitted that even if the remaining witnesses depose against the petitioners, still then, there are no chances of their conviction. Hence, even on merits, the petitioners are entitled to bail. It has also been contended that two other accused Bashir Ahmed and Altaf Hussain have been enlarged on bail by the trial Court and the role of the petitioners in the alleged crime is of a lesser degree

than the role of afore-named two co-accused, as such, the petitioners are entitled to bail even on merits.

5 I have heard learned counsel for the parties and I have also perused the record of the case including the trial Court record.

6 Before advertng to the grounds that have been urged by the petitioners for grant of bail, it would be apt to notice that the petitioners had initially applied for bail before the trial Court in the year 2019 and their bail application was dismissed by the said Court vide order dated 20.09.2019. Thereafter, they moved application for grant of bail before this Court and a Coordinate Bench of this Court vided order dated 04.08.2021 passed in Bail App No. 194/2020 declined the prayer of the petitioners. Thereafter, the petitioners again approached the trial Court on 23.07.2022 but their bail application was dismissed by the said Court in terms of order dated 19.07.2023. So, the present bail application is the fourth in series filed by the petitioners.

7 So far as the prosecution case is concerned, the same has been briefly stated by the trial Court in its order dated 19.07.2023 while rejecting the bail application of the petitioners. It would be apt to reproduce paras (5) and (6) of the said order wherein the facts have been narrated. The same read as under:

(5) An information was allegedly received by police post Kahara on 08.05.2017 at 2.50 a.m. from the reliable sources to the effect that some unknown militants/terrorists laced with illegal arms and ammunition attacked police picket, Tanta and targeted SPO Kiker Singh and SPO Mohd. Yunis with indiscriminate firing, as a consequence of which both were seriously injured and were lying in pool of blood

in the aforesaid post. perpetrators, it was alleged subsequently fled from the spot taking advantage of dark. Finally, on this information FIR NO. 35 of 2017 for offences under sections 302 and 120-B of RPC and Section 7 /27 of Arms Act was registered and investigation began. Subsequently, on 09.05.17, injured SPO Mohd. Yunis succumbed to injuries in the hospital. Special investigating team was constituted under the command of Addl. SP Bhaderwah to investigate the case. During investigation, petitioner No.3 was arrested on 11.05.17 who is said to have made a disclosure statement following which one AK 47 Rifle with empty magazine was recovered; that on the alleged statement of petitioner No.3, the other three petitioners in application were rounded up; that on the disclosure statement of petitioner Akhter Hussain, two magazines with sixty rounds of AK-47 and one solar plate were recovered. investigation also revealed that petitioner Abdul Rashid joined LeT Militants Outfit in the year 2001 and in 2008 he allegedly surrendered before Army and joined and joined Territorial Army for some time from where he came in contact with Bashir and two other accused persons.. All of them, having criminal intention hatched a conspiracy to destabilize the sovereignty of India. It was also found that petitioner Abdul Rashid and Akhter Hussain were also involved in so many cases and were in contact with LeT militant Mohd Amin who was operating from Pakistan. Petitioners used to be instigated by aforesaid LeT militant whereas accused Bashir Ahmed, an employee Territorial Army was in contact with his close relative Altaf Hussain, Bashir Ahmed to arrange arms. Said Altaf Hussain, SPO on 03.01.17 obtained a Rifle along with ammunition from armory of police Line with criminal intention Instead of getting the Rifle issued in his name, got the same in the name of one Ghulam Nabi by playing fraud and took it to the house of accused Bashir Ahmed. The accused Bashir Ahmed hatched a criminal conspiracy with petitioner Abdul Rashid and asked him to get it changed with weapon from some banned militant outfit. Consequently, petitioner Abdul Rashid contacted militant Mohd. Amin (who is allegedly in Pakistan) and petitioner Shoket Ali and Akhter Hussain.

6.. On 22.04.17 petitioner Abdul Rashid got the gun from the house of accused Bashir Ahmed, petitioner Shoket Ali and taped it in solar plate with the help of petitioner Shoket

Ali and took it to Tanta. Thereafter petitioner Abdul Rashid contacted Shoket Hussain, a teacher in Madarsa near police picket Tanta and asked him to keep vigil on movements of police personnel deputed at aforesaid police picket and as given assurance that if he accomplishes the task, he would be adjusted in territorial army. Finally, in the intervening night of 7th/8th May 2017 petitioner Shoket Ali and Akhter Hussain as per already orchestrated plan attacked the police picket at 12.30 in the night in which petitioner Shoket Ali fired from his riffle, whereas petitioner Akhter Hussain gave a lit of fire to the stairs of pickets as a result of which SPOs Mohd Yunis and Kikker Singh were injured as aforesaid and subsequently Mohd Yunis died in Hospital. After Committing the offence, while petitioner Akhter Hussain was running away, his mobile phone fell down on the way and petitioner Shoket Ali who was in contact with petitioner Abdul Rashid asked Abdul Rashid to give a call on mobile of Akhter Hussain so that he could trace out fallen cell phone. Petitioner Abdul Rashid obliged and on his repeated rings, AKhter Hussain traced out his mobile and took it along with him from the spot. This is in brief is the prosecution story”

8 Now coming to the grounds urged by the petitioners for grant of bail, the first ground that has been urged is that there is a delay in completion of trial which is solely attributable to the prosecution and that the petitioners cannot be made to suffer because of the delay in progress of trial. In this regard, a perusal of the trial Court record shows that the charge-sheet upon its committal, was produced before the trial Court on 26.09.2017. On 22.12.2017 charges were framed against the petitioners and the prosecution was directed to lead evidence in support of its case. The record of the trial Court would reveal that till March 2020, about four prosecution witnesses were examined and on a couple of occasions, the statements of the witnesses present in the Court could not be recorded due to absence of counsel for the accused. After March 2020, Covid-19 pandemic intervened, as such, the proceedings in the

case could not be expedited. Even the accused could not be produced before the trial Court. The record further reveals that after the covid-19 pandemic was over, there has been good progress of trial and the prosecution has been able to produce its witnesses before the trial court regularly .However, at least on three occasions, the witnesses could not be examined due to absence of counsel for the accused.

9 From a perusal of the trial court record, it is clear that whatever delay has been caused in progress of the trial, the same has been caused due to intervention of covid-19 pandemic and the consequent restrictions in physical hearing of the cases. This is an eventuality beyond the control of everybody Therefore, the delay cannot be attributed either to the trial Court or to the prosecution. As already noted, after Covid-19 pandemic came to an end, the prosecution has been regularly producing the witnesses before the trial Court. Therefore, it cannot be stated that delay in progress of the trial has occasioned because of the prosecution. Even otherwise, the Supreme Court in the case of **Kalyan Chandra Sarkar vs. Rajesh Ranjan alias Pappu Yadav and another, (2004) 7 SCC 528** has held that in a case where gravity of offence alleged against an accused is severe, the bail cannot be granted only on ground of long incarceration.

10 That takes us to the contention of the petitioners as regards grant of bail on merits. In this regard, it is to be noted that the consistent view of the Supreme Court as well as of this Court, is that the matters to be considered in a bail application for grant of bail are as follows:

1. Whether there is a, prima facie, reasonable ground to believe that the accused had committed the offence;
2. Nature and gravity of the charge;
3. Severity of punishment in the event of conviction;
4. Danger of accused absconding or fleeing, if released on bail;
5. Character, behavior, means, position and standing of the accused;
6. Likelihood of the offence being repeated;
7. Reasonable apprehension of the witnesses being tampered with;
8. Danger of course of justice being thwarted by grant of bail;

11 So far as the instant case is concerned, the petitioners are facing the charge of murder which is punishable with death sentence or imprisonment for life. The Supreme Court in the case of **Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav and another, (2004) 7 SCC 528**, while laying down the guidelines for grant or refusal of bail in serious offences like murder, has observed as under:

"11. The law in regard to grant or refusal of bail is very well settled. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are,

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;

(b) Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

*(c) Prima facie satisfaction of the Court in support of the charge; (See **Ram Govind Upadhyay Vs. Sudarshan Singh and others** and **Puran Vs. Rambilas and another**.)*

12. In regard to cases where earlier bail applications have been rejected there is a further onus on the court to consider the subsequent application for grant of bail by noticing the grounds on which earlier bail applications have been rejected and after such consideration if the court is of the opinion that bail has to be granted then the said court will have to give specific reasons why in spite of such earlier rejection the subsequent application for bail should be granted.(See [Ram Govind Upadhyay, supra](#))”

12 In the aforesaid judgment, the Supreme Court has also observed that the conditions [laid down in](#) Section 437(1)(i) of Cr. P. C are sine qua non for granting bail even under Section 439 of the Code, meaning thereby that in a case where a person is alleged to be involved in an offence punishable with death sentence or imprisonment for life, he cannot be released on bail if there appear reasonable grounds for believing that he has been guilty of such an offence. So the petitioners in the instant case, in order to succeed in making out a case for grant of bail in their favour on merits, have to satisfy this Court that on the basis of the evidence led by the prosecution and the evidence that is proposed to be led by the prosecution, there is absence of reasonable grounds for believing that they have committed the offence.

13 Learned counsel for the petitioners has taken this Court through the statements of prosecution witnesses recorded before the trial court so far. According to the learned counsel ,all the material witnesses examined by the prosecution have contradicted the prosecution case on its vital aspects. While PW Attah Mohd who is a witness to disclosure statement of petitioner Showkat Ali has turned hostile, the other witnesses relating to disclosure and seizure have also not supported the prosecution case. Therefore, the petitioners are entitled to grant of bail. It

has also been contended that co-accused in the case have already been enlarged on bail and, as such, the petitioners deserve to be admitted to bail.

14 The statements of the prosecution witnesses which have been referred to by the learned counsel for the petitioners reveal that, prima facie, they have supported the prosecution case, particularly in their examination-in-chief. There may be some contradictions and inconsistencies in their statements made during cross-examination, but it is not open to this Court to minutely examine and analyze their statements at the time of deciding the bail application of the petitioners. It is not a case where these witnesses have turned hostile or they have stated something which is completely contrary to what the prosecution has alleged in the charge-sheet. A meticulous or detailed examination of the statements of the prosecution witnesses may or may not bring out inconsistencies and contradictions on vital aspects of the case, but this is not the stage for this Court to undertake such an exercise as the same would amount to prejudging merits of the case. In addition to this, the statements of most of the material witnesses relating to circumstances on which the prosecution has based its case, are yet to be recorded. The statements of these material witnesses recorded during investigation of the case, prima facie, show the involvement of the petitioners in the commission of alleged crime. Therefore, there is absolutely no scope for this Court to enlarge the petitioners on bail, on merits.

15 So far as the contention of the petitioners that co-accused have been granted bail by the trial court and, as such, they are also

entitled to bail on the ground of parity is concerned, this Court while deciding the earlier bail application of the petitioners has rejected the said contention of the petitioners. This aspect of the matter has been specifically dealt with by this Court in its order dated 08.04.2021 passed in Bail App No. 194/2020 and it has been held that the case of the other two accused, who were released on bail by the trial Court is quite dissimilar looking to the role played by them in the alleged crime. Therefore, there is no scope for this Court to take a different view in the present bail applications.

16 In view of the foregoing discussion, I do not find any merit in these petitions. The same are, accordingly, dismissed, leaving it open to the petitioners to apply afresh after change of circumstances.

(Sanjay Dhar)
Judge

JAMMU
10.05.2024
“Sanjeev ”

Whether order is reportable: Yes