

S. No. 63
Regular list

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Bail App 64/2024 CrIM(981/2024)

ARSHID AHMAD GANIE

...Petitioner/Appellant(s)

Through: Ms. Nusrat Razak, Advocate.

Vs.

UNION TERRITORY OF JAMMU AND KASHMIR (HOME)

...Respondent(s)

Through: Mr. Hakim. Aman Ali, Dy. AG.

CORAM:

HON'BLE MR JUSTICE JAVED IQBAL WANI, JUDGE

ORDER
04.02.2025

(Oral):-

1. The petitioner herein has filed the instant petition for grant of bail as a second attempt before this court after having failed in his first attempt before the trial Court, which Court dismissed the said first bail application in terms of order dated 17th May 2024.
2. The facts emerging from the record would reveal that according to the prosecution version, on 24th January 2024 the In Charge of a Naka Party submitted a docket with the averments that he along with other police personal on duty at Tulkhun crossing, stopped a vehicle bearing Registration No. JK01K-1603 being boarded by the petitioner herein along with one Anayat Ali Dar and during the course of search, 10 bottles of 100 ml of Tripolidine Hydrochloride and Codeine Phosphate were recovered from their possession with 9 bottles recovered from the said Anayat Ali Dar and 10 bottles recovered from the petitioner herein, whereupon FIR No. 13/2024 under Section 8/21 and 29 of the NDPS Act, came to be registered against the petitioners and investigation commenced, and, during

the course of investigation, FSL report certified that the Codeine Phosphate and Tripolidine Hydrochloride were detected from the samples taken from the seized bottles and after the completion of the investigation, charge sheet came to be laid before the Court of Principle Sessions Judge (Special Judge Anantnag) against the petitioner and above named co-accused which Court subsequently charged the accused persons including the petitioner herein for commission of the offences covered in the FIR/charge sheet except offence under Section 29 of the Act.

3. The petitioner herein along with co-accused filed the aforesaid bail application before the trial Court, whereupon the trial Court in terms of order dated 17th May 2024 granted bail to the accused Anayat Ali Dar, however, declined the same to the petitioner herein, whereupon, the petitioner herein preferred the instant petition before this court.
4. The petitioner herein has in the instant petition sought bail, *inter alia* on the premise that the trial Court declined the bail to him on wrong premise, overlooking the judgments passed by the Apex Court insofar as the quantity of Psychotropic substance contained in the alleged recovered bottles is concerned and wrongly placed reliance on the applicability of Section 37 of the Act, in that, in terms of the judgments of the Apex Court, the quantity of the Narcotic and Psychotropic Substance contained in the alleged recovered bottles from the petitioner did not constitute the commercial quantity, but intermediate quantity, thus, not attracting the bar of Section 37 of the Act.
5. Objections to the petition have been filed by the respondents, wherein, the petition is being opposed on the premise that the petitioner is involved in a heinous offence, and that, *prima facie* he has been found to have committed the same during the course of investigation and that there are reasonable grounds for believing that the petitioner would jump over the concession of bail, if granted by this Court, and also that the petitioner may hamper with the prosecution evidence and witnesses which would vitiate the whole trial before the trial Court.
6. Insofar as plea of the applicability of Section 37 of the NDPS Act to the case in hand is concerned, the issue stands settled by a Coordinate Bench of this Court in case titled as **“Firdous Ahmad Payer vs State of J & K”** being BA No. 133/2018 decided on 17/10/2018, wherein, on same set of

allegations of recovery of 10 bottles of 100 ml of Codeine came to be considered and opined and observed as under:-

07. Looking at the merits of the application on hand, it needs must be said that in exercise of the powers conferred by clauses (viia) and (xxiia) of Section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and in supersession of Ministry of Finance, Department of Revenue notification 8.0. 527(E) dated 16th July, 1996, except in respect of things done or omitted to be done before such supersession, the Central Government specified the quantity mentioned in columns 5 and 6 of the Table, in relation to the narcotic drug or psychotropic substance mentioned in the corresponding entry in columns 2 to 4 of the said Table, as the small quantity and the commercial quantity, respectively, for the purposes of the said clauses of that section. Column 5 provides that a quantity upto 10 grams of Codeine falls within the parameters of small quantity and a quantity of 1 Kg of the same substance falls within the scales of the commercial quantity.

10. It is not disputed that the quantity of the contraband recovered from the possession of the accused does not fall within the parameters of commercial quantity, but it is an intermediary one. On the face of such an eventuality, the application of the applicant had to be considered under the provisions of Section 497 of the Cr. PC. It is only on the application of the rigor of Section 37 of the NDPS Act to a given case that bail can be withheld. In any case, which does not fall within the purview, scope and definition of Section 37 of the NDPS Act, grant of bail has to be considered on the agility and celerity of Section 497 of the Cr. PC. Therefore, a realistic view and a pragmatic approach has to be taken in such a case.

Thus in view of the aforesaid opinion of the coordinate Benches, this Court has no reason to differ there from in so far as the holding that the quantity of the drug is not commercial but intermediate.

7. Having held that the quantity of the drug allegedly recovered from the petitioner herein is of intermediate quantity, the next question for consideration of this Court would be as to whether the petitioner becomes entitled to the concession of bail at this stage by this Court. A reference in

this regard to the settled position of law would become imperative, hereunder to the observations and findings of the co-ordinate bench again in the case supra, wherein at Paras 8,9,11,12 and 13 following has been held.

08. The settled position of law, as evolved by the Supreme Court in a catena of judicial dictums on the subject governing the grant of bail, is that there is no strait jacket formula or settled rules for the use of discretion, but, at the time of deciding the question of 'bail or jail' in non-bailable offences, the Court has to utilize its judicial discretion, not only that, as per the settled law, the discretion to grant bail in cases of non-bailable offences has to be exercised according to rules and principles as laid down by the Code and various judicial decisions. In bail applications, generally, it has been laid down, from the earliest times, that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative, but the learned trial Court appears to have applied it in the reverse. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earliest times, it was appreciated that detention in custody, pending completion of trial, could be a cause of great hardship. From time to time, necessity demanded that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial, but, in such cases, 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which he has not been convicted or that, in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses, if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for

it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

09. The expression 'judicial discretion' has been very well explained by an eminent jurist Benjamin Cardozo. In the words of Benjamin Cardozo, "the Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system and subordinated to the primordial necessity of order in the social life. Wide enough, in all conscience, is the field of discretion that remains." Even so, it is useful to notice the tart terms of Lord Camden that "the discretion of a Judge is the law of tyrants. It is always known, it is different in different men; it is causal, and depends upon constitution, temper and passion. In the best, it is often times caprice, in the worst, it is every vice, folly and passion to which human nature is liable."

11. To categorize the materials in terms of quantity as small, medium and commercial is to allow escape routes for those to whom the rigor of section 37 of the NDPS Act does not apply. Had the intention of the Legislators been to treat those who are found to be in possession of the small and medium quantity of the drugs and Narcotic substances on par with those from whom commercial quantity of such substances is recovered, it could not have pierced and scaled it in different categories. The conflict between the human tendencies and the rules of society is an eternal one which cannot ever be solved or ended to the entire satisfaction of idealistic puritans. World of human society will always remain imperfect. It creates a false ethical self-importance on the part of the Courts who sit in judgment to decide or determine such cases not in accordance with the law, but by sentimental proverbs.

12 Testing the instant application from the above perspective, it requires to be recapitulated that the Pignor of Section 37 of the NDPS Act does not apply to the instant case. It also needs to be said that the case of the applicant does not fall within the parameters of the offences that are punishable with death or imprisonment of life. Therefore, there appears to be no reasonable ground for declining bail to the applicant. The maxim of the law of bails, which has its

application to the case on hand where the quantity of narcotics recovered from the applicant falls within the scales of an intermediary one, for which the punishment provided is upto 10 years and a fine of rupees one lac, is "bail and not jail". 13. Deprivation of liberty is tantamount to punishment. The principle that punishment begins after conviction and that every man is deemed to be innocent unless duly tried and duly found guilty, has its application to the facts of the instant case in all the fours. The object of the bail is to seek attendance and appearance of the accused at the trial by a reasonable amount of bail. Bail cannot be withheld as a means of punishment. Prison hell destroys the tender sentiments of a person. The applicant/applicant has been languishing in the jail for so many months by now. The applicant/ accused has to prepare for his defence which is of an essence in a criminal trial. The discretion has to be exercised on well based foundations of law and one cannot get swayed by sentiments. Temper and passion have no role to play in exercising the discretion for the grant of bail.

8. In view of aforesaid facts of the case, inasmuch as the position of law referred in the preceding paras, the petition deserves to be allowed and is accordingly allowed, as a consequence whereof, the petitioner herein is admitted to bail subject to following conditions.

- I. Furnishing of personal bond to the tune of Rs. 50,000/- with two sureties of the like amount to the satisfaction of the trial court.
- II. The petitioner shall appear before the trial court on every date of hearing unless exempted by the trial court.
- III. The petitioner shall not leave the territorial jurisdiction of this Court till the conclusion of the trial unless permitted by the trial court.
- IV. The petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the trial court or to any police officer or tamper with the evidence.

- V. That in the event, the prosecution collects any material during the period petitioner is on bail that he has influenced the witnesses or tried to intimidate them, the prosecution would be well within its right to move an application before the trial court for cancellation of his bail.

09. *Disposed of.*

(JAVED IQBAL WANI)

JUDGE

SRINAGAR

04.02.2025

Hilal Ahmad

