

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on: 28th February, 2025
Pronounced on: 19th March, 2025

CrlA (S) No. 3/2024
CrlM 179/2025

Mohammad Junaid Raina (Aged: 32 years) ...Appellant(s)
S/O Abdul Jabber Raina
R/O Kaloosa, Bandipora
Through his father,
Abdul Jabber Raina

Through: Mr. S. T. Hussain, Senior Advocate with
Ms. Nida Nazir, Advocate.

Vs.

1. Union Territory of J&K through Police ...Respondent(s)
Station Parimpora.
2. Superintendent Central Jail, Srinagar.

Through: Mr. Alla Ud Din Ganai, AAG with
Ms. Shaila Shameem, Assisting Counsel.

CORAM:

Hon'ble Mr. Justice Mohd. Yousuf Wani, Judge.

JUDGMENT

CrlM 179/2025; CrlM No. 238/2024 in CrlA (S) No. 3/2024:

Mr.S. T. Hussain, Senior Advocate with Ms. Nida Nazir, Advocate for applicant/appellant.
Mr. Alla Ud Din Ganai, Additional Advocate General with Ms. Shaila Shameem, Assisting Counsel for non-applicants/respondents.

01. The applicant/appellant, namely, Mohammad Junaid Raina S/o Abdul Jabber Raina R/o Kaloosa, Bandipora, came to be held guilty and convicted on the culmination of trial held by the court of learned 4th Additional Sessions Judge, Srinagar (Hereinafter referred to

as the learned “Trial Court” for short) on a police report/challan arising out of case FIR No. 113/2020 of Police Station, Parimpora, offence under Section 8/21 of Narcotic Drugs and Psychotropic Substances Act, 1985 (Hereinafter referred to as the “Act” for short) and sentenced to undergo the rigorous imprisonment for ten years and to pay fine of Rs. 1.00 lac, with the stipulation that in case of default to pay the fine, he shall undergo the rigorous imprisonment of one year more. The order of sentence also provides that period already undergone by the applicant/convict shall be setoff.

02. Aggrieved by the aforesaid judgement of conviction dated 12th February, 2024 and the order of sentence dated 15th February, 2024, the applicant/convict preferred an appeal before this Court by invoking the provisions of Section 374 of the Code of Criminal Procedure, 1973 (Hereinafter referred to as the “Code” for short) and alongside the appeal, he also filed an application bearing CrIM No. 238/2024 for suspension of sentence and his enlargement on bail.

03. Although the earlier application for suspension of sentence bearing CrIM No. 238/2024 having been filed by the applicant/convict under Section 389 of the Code, is still pending disposal along with the main appeal, yet another interim application bearing CrIM No. 179/2025 came to filed

on behalf of the convict for suspension of sentence and grant of bail to him.

04. I have heard the learned senior counsel for the applicant/convict Mr. S. T. Hussain, learned Senior Advocate and Mr. Alla Ud Din Ganai, learned Additional Advocate General for the non-applicants/ respondents in respect of the interim applications for suspension of sentence and considered their submissions.

05. Mr. S. T. Hussain, learned Senior Counsel for the applicant/convict *inter alia* submitted that the applicant/convict is innocent, having not committed the alleged offence, but was falsely implicated by the police concerned in the case, which fact of his innocence has been proved at the trial of the case. He further submitted that the mandatory provisions under the Act have been observed in breach, as the learned Trial Court did not appreciate the evidence adduced at the trial of the case by the prosecution as well as the law on the subject, in right perspective. He submitted that there was no justification at all for convicting the applicant/appellant, but the learned Trial Court while ignoring the fatal irregularities, discrepancies and illegalities, hurried to pass the orders of conviction and sentence. He submitted that requirements of law as regards the search, recovery, seizure and sampling was not complied with at all and the learned Trial Court proceeded to pass the

order of conviction on his personal philosophy, being influenced by the social sentiments vis-à-vis drug addiction. He further contended that the applicant/convict has been undergoing sentence and thus being under detention since last more than one year. As according to the learned counsel for the applicant/convict, the pendency of the appeal has become oppressive against the applicant/convict.

06. The second interim application bearing CrIM No. 179/2025 for suspension of sentence and enlargement of the applicant/ convict on bail, came to be field on behalf of the applicant/convict on 21st February, 2025, exclusively on humanitarian grounds.

07. It has been mentioned in the said application that the father of the applicant/convict is seriously ill, who has to undergo a serious liver surgery. It is submitted that the father of the applicant/convict is scheduled to get admitted in the hospital and there is no other male member in the family except the applicant/convict.

08. The learned senior counsel in support of his contentions placed reliance on the authoritative judgments cited as **“2017 V2 SCC Cr P 114; AIR 2017 SCW P.721; 2021 SAR Online (SC) 769; and CrLA (D) No. 48/2023 titled Syed Ishfaq Hussain Shah & Another vs Union Territory Th. Police Station Karnah”** decided by Division Bench of this Court on 12th September, 2024.

09. *Per contra*, Mr. Alla Ud Din Ganai, learned Additional Advocate General submitted that the applications for suspension of sentence moved by the applicant/convict are not having any merit and thus deserve to be outrightly rejected. He submitted that the applicant/appellant has been convicted through a detailed and exhaustive judgment dated 12th February, 2024, passed by the learned Trial Court while culminating the trial in an NDPS case bearing FIR No. 113/2020 and the learned Trial Court has fully appreciated the evidence adduced at the trial by the prosecution in the light of the governing legal principles.

10. Learned Additional Advocate General contended that the applicant/appellant was convicted on a heinous charge under the Act as a big consignment of manufactured drug containing tramadol as a psychotropic substance in mixture was recovered from his possession when on 23rd June, 2020, he was nabbed by a naka party near Shalteng, when he was coming from Bemina towards Shalteng in a vehicle bearing Registration No. UP16AY/5846. He submitted that ten boxes of sposmo proxyvon-plus capsules, each box containing six strips of 24 capsules each, were recovered from his vehicle, regarding which he could not tender any justification.

11. He further submitted that in addition to the aforesaid boxes, one strip of the same drug was recovered while searching his pocket. He contended that search, seizure and sampling of the recovered manufactured drug was proved at the trial in accordance with law.

12. The learned Additional Advocate General further contended that the recovered drug falls within the commercial quantity, as it is now well settled that if a narcotic drug or psychotropic substance is recovered in the form of mixture, having other neutral or non-psychotropic substances with it in mixture, the entire quantity is to be taken into consideration for the purpose of computation of the drug, being commercial or non-commercial.

13. The learned Additional Advocate General also pleaded that the case of the applicant/convict is hit by the provisions of Section 37 of the Act and, as such, pending disposal and subject to the outcome of the main appeal, the sentence cannot be suspended and the applicant/convict admitted to bail, as the same is likely to cause great miscarriage of justice. He further pleaded that the reply/objections having already been filed in response to the main appeal, be also considered as objections to the interim applications seeking suspension of sentence.

14. I have perused the instant applications, seeking suspension of sentence and enlargement of the applicant/convict on bail. I have also accorded my thoughtful consideration to the rival arguments advanced on both sides. The main appeal as well as the record of the learned Trial Court has also been perused.

15. Keeping in view the aforementioned perusal and consideration in the light of the law on the subject as interpreted by the Hon'ble Apex Court and various other High Courts of the Country including this Court, I am of the considered opinion that it may meet the ends of justice in case the order of sentence dated 15th February, 2024 is suspended and the applicant/convict admitted to bail, subject to some reasonable terms and conditions. The main appeal is still pending disposal since last more than one year and the final arguments in same are yet to be heard, which are likely to take some more time.

16. Now there are two interim applications before this Court for suspension of sentence and grant of bail, one having been filed with the main appeal on 28th February, 2024 on merits and the second one being filed on 21st February, 2025 exclusively on humanitarian grounds.

17. The recent application filed on humanitarian grounds reveals that father of the applicant/convict,

namely, Abdul Jabar Raina is seriously ill, who has to undergo a serious liver surgery at AIIMS, New Delhi. The said application also reveals that ailing father of the applicant/convict has no other person to look after him at hospital and thereafter at Home. The application is supported with the copies of the medical records of the father of the applicant/convict.

18. This Court is convinced to allow the prayer of the applicant/convict on both counts. Without touching the merits of the case, this Court is of the opinion that *prima facie* ground is made for suspension of order of sentence and enlargement of the applicant/convict on bail, subject to some reasonable conditions.

19. Secondly, the grounds pleaded in the recent application which are exclusively humanitarian in nature supplement the view of this Court.

20. Court can under some compelling medical or humanitarian circumstances consider the release of a convict, notwithstanding the merits of the case and any statutory bar.

21. Admittedly there is bar under Section 37 of the Act for grant of bail to a person involved/ convicted in the commission of the offences under the Act in relation to commercial quantity, but in the opinion of the Court as

hereinabove mentioned, ground appears to be made out for suspension of sentence and grant of bail to the applicant/convict.

22. In its opinion this Court is fortified with the judgment of the High Court of Karnataka delivered in **“Syed Abdul Ala vs Narcotic Control Bureau, South, 2003 Cri.L.J 999(Kar) decided on 17 December, 2002”** to the effect that the High Court under Section 439 of the Code of Criminal Procedure 1973 corresponding to Section 483 of Bhartiya Nagarik Suraksha Sanhita, 2023 (BNSS), is not powerless to consider the grant of bail on humanitarian grounds notwithstanding the restrictions imposed by Section 37 of the NDPS Act. It has been held in the case concerned that provisions of Section 37 of the NDPS Act apply where bail is to be considered on merits. It was agitated before the Court in the said case that power to grant bail is basically derived from the Code of Criminal Procedure and not from the NDPS Act and the later only qualifies the power of the court vested under the code. It was held that provisions of Section 37 of NDPS Act do not clamp or cap powers of the High Court to grant bail under section 439 of the Code in its entirety. The relevant paras 9 & 10 of the judgment *supra* are reproduced as under :-

“9). The provisions of Section 37 of the NDPS Act makes a drastic departure from the conventional cannons of burden of proof of prima facie case against the accused on

the prosecution even at the stage of bail. In respect of the offences under the NDPS Act, the onus is on the accused to prove the innocence/non-complicity in order to secure bail. The restrictions in Section 37 relates to prima-facie material regarding the guilt of the accused. The powers of High Court to grant bail under Section 439 are quite wide and discretionary. Notwithstanding a prima facie case of guilt, under exceptional circumstances, the High Court in its discretion can grant bail. The embargo placed under Section 37 of the NDPS Act operates only when the Court is considering the bail application on merits. Thus, the provisions of Section 37 does not clamp or cap the powers of High Court to grant bail under Section 439 in its entirety. In other words Section 37 operates only as partial eclipse on the powers of the High Court. While deciding the application on merits with reference to prima-facie material of guilt then only the provisions of Section 37 operate and they have to be read with the provisions of Section 439 of the Cr. P.C. When the bail is to be granted on other extenuating circumstances or humanitarian ground like the medical ground, the powers of the High Court under Section 439 are not curtailed. The provisions of Section 37 does not act as a blanket ban on the powers of the High Court under Section 439 of the Cr. P.C.

10). On careful reading of the decisions of the Supreme Court in *Kishan Lal's case, supra*, I find that there is no ratio laid down to the effect declaring that Section 37 of the NDPS Act, operates as a total blanket ban on the powers of High Court under Section 439 of the Cr. P.C. In the present case, the accused is seeking bail on medical grounds and the Court is considering the case of the petitioner de hors, prima facie material of guilt placed by the prosecution. On humanitarian considerations, the powers of High Court under Section 439 of the Cr. P.C., to grant bail is not eroded or affected by the provisions of Section 37 of the NDPS Act.”

23. This Court has also in case “**Jasvinder Singh Vs State of J&K B.A No: 156/2019**” decided on “**12.04.2021**” granted bail on humanitarian grounds to an

accused, who was suffering from diabetes, which had substantially affected his eyesight as per the medical records brought to the notice of this Court. This Court in the said also held that Section 37 of the Act only prescribes the limitations on the release of a person on bail. That the powers to grant bail stand vested with the High Court under Section 439 of the Code of Criminal Procedure. That Section 37 of the NDPS Act, comes into play only when bail of a person/accused of an offence involving commercial quantity of a contraband is being considered on merits and the limitations contained therein would not apply when bail is to be granted on humanitarian grounds like medical ground. In such cases the powers of the High Court U/s 439 of the Cr.P.C are not curtailed. Thus the provisions contained under Section 37 of the NDPS Act do not act as a blanket ban on the powers of the High Court U/s 439 of the Cr.P.C.

24. For the foregoing reasons, the interim applications seeking suspension of sentence and grant of bail, are allowed and further operation of the order of sentence dated 15th February, 2024 is placed under suspension. The applicant/appellant pending disposal and subject to the outcome of the main appeal, is admitted to bail, provided he furnishes surety and personal bonds to the tune of Rs.50,000/- each, for assuring the fulfilment of the following conditions:

- (i) *The applicant/appellant shall not repeat the commission of crime;*
- (ii) *The applicant/appellant shall remain punctual at the proceedings of the main appeal;*
- (iii) *The applicant/appellant shall not leave the limits of the Kashmir Division of the Union Territory of Jammu and Kashmir without permission of the SHO of his local police Station.*

25. In case the requisite surety bond is furnished to the satisfaction of the learned Registrar Judicial of this Court and attested by him, a formal release order shall be issued, directing the release of the applicant/appellant from his custody in this matter, subject to his furnishing of the personal bond to the satisfaction of the Superintendent Jail concerned.

26. Both the applications i.e. CrIM No. 179/2025 and CrIM No. 238/2024 are accordingly ***disposed of***.

27. List this main appeal (CrIA (S) No. 3/2024) for final hearing on 27th March, 2025.

(MOHD. YOUSUF WANI)
JUDGE

SRINAGAR:
19.03.2025
"HAMID"

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| ❖ Whether the Judgement is Reportable? | Yes |
| ❖ Whether the Judgment is Speaking? | Yes |