

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

Reserved on: 09.05.2022
Pronounced on: 21.05.2022

Bail App No.05/2022

RAYEES AHMAD DAR **... PETITIONER(S)**

Through: - Mr. Shuja-ul-Haq, Advocate.

Vs.

UNION TERRITORY OF J&K **...RESPONDENT(S)**

Through: - Mr. Usman Gani, GA.

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

JUDGMENT

1) The petitioner has invoked the jurisdiction of this Court under Section 439 of the Cr. P. C seeking bail in FIR No.50/2021 for offences under Section 8/21, 29 of NDPS Act registered with Police Station, Bijbehara.

2) As per the prosecution case, on 17.03.2021, Police Station, Bijbehara, received information that one person, namely, Sabzar Ahmad Dar has concealed some contraband substance in his residential house with a view to sell the same to the youth. On the basis of this information, FIR No.50 of 2021 was registered and investigation was set into motion. During investigation of the

case, residential house of accused Sabzar Ahmad Dar was searched and from there 2600 bottles of Welcyrex containing Codeine Phosphate came to be recovered and seized. The samples of the recovered contraband were sealed and sent to FSL, Srinagar, for chemical examination. On 04.11.2021, accused Sabzar Ahmad Dar came to be arrested. During his custodial interrogation, he disclosed that the said contraband drug was kept in his house by accused Zahid Ahmad Dar and Mudasir Ahmad Dar. Accused Zahid Ahmad Dar came to be arrested on 19.11.2021 and during his custodial interrogation, he made a disclosure statement that he along with Mudasir Ahmad Dar had concealed the contraband drugs in the residence of co-accused Sabzar Ahmad Dar. Accused Zahid Ahmad Dar made a further statement that the said contraband drugs were actually purchased by him from accused Rayees Ahmad Dar, the petitioner herein. The petitioner/accused Rayees Ahmad Dar was arrested on 20.11.2021. It appears that the petitioner herein had approached the Court of learned Principal Sessions Judge, Anantnag, for grant of bail but the application came to be dismissed by the said Court in terms of its order dated 01.02.2022.

3) It has been contended by the petitioner that he has no knowledge about the recovery of 2600 bottles Welcyrex (Codeine Phosphate) and nothing has been recovered from his possession. It has been further contended that there is no link between the recovery of contraband from co-accused and the petitioner. It is

also contended that confessional statement of the co-accused is not admissible in evidence and, as such, on the basis of a statement made by the co-accused, the petitioner cannot be implicated in the instant case. Finally, it has been submitted that the petitioner is ready to abide by any condition that may be imposed by this Court in case he is admitted to bail.

4) The bail application has been contested by the respondent by filing a reply thereto. In its reply, the respondent has contended that during investigation of the case, co-accused Sabzar Ahmad Dar was arrested and he disclosed that the seized contraband drugs were dumped in his house by other two accused, namely, Zahid Ahmad Dar and Mudasir Ahmad Dar. It has been further contended that accused Zahid Ahmad Dar disclosed that he along with petitioner are indulging in trade of illicit drugs and that they are selling the same to youth of the area at high rates. It is further averred that one of the accused, namely, Mudasir Ahmad Dar, is yet to be arrested.

5) I have heard learned counsel for the parties and perused the material on record including the Case Diary.

6) A perusal of the Case Diary reveals that 2600 bottles of Welcyrex (Codeine Phosphate) have been recovered by the Investigating Agency from the house of co-accused Sabzar Ahmad Dar. The quantity recovered is, admittedly, a commercial quantity. The Case Diary further reveals that role of the petitioner

in the alleged crime has surfaced when statement of co-accused Zahid Ahmad Dar was recorded who has stated that in March, 2021, he, along with co-accused Mudasir Ahmad Dar, purchased 50 boxes of contraband drugs from petitioner Rayees Ahmad Dar. He has further stated that a total of 6000 bottles (100 ml each) of Welcyrex were purchased @ Rs.150/ per bottle, whereafter these 6000 bottles of contraband drugs were kept in the house of co-accused Sabzar Ahmad Dar at two different places. He has further gone on to state that the petitioner Rayees Ahmad Dar is also involved in the illicit drug trade with him and the co-accused. He further stated that the petitioner Rayees Ahmad Dar has been paid an amount of Rs.9.00 lacs by them as cost of 6000 bottles whereas an amount of Rs.1.00 lac is still outstanding. Lastly, he has stated that the petitioner Rayees Ahmad Dar supplies the illicit drugs.

7) Excepting the aforesaid statement of accused Zahid Ahmad Dar, there is no other material on record of the Case Diary which shows the involvement of the petitioner in the alleged crime. Although the investigating agency has, during the investigation of the case, obtained the statement of bank accounts of the accused yet there is nothing in these statements which reflects any financial transaction between petitioner herein and the co-accused.

8) The question which falls for consideration is whether on the basis of a statement of a co-accused, the petitioner herein can be roped in the alleged crime. It is to be borne in mind that the

statement of co-accused Zahid Ahmad Dar which is the only link between petitioner and the alleged crime has been recorded in the presence of Executive Magistrate, 1st Class, Bijbehara, while the said accused was in police custody. The statement besides bearing signature of accused Zahid Ahmad Dar also bears the signature of various police officials as witnesses and the signature of Executive Magistrate, 1st Class, Bijbehara.

9) It has been contended that by learned counsel for the petitioner that a statement made by a person while in police custody in the presence of police officials, even if recorded in the presence of an Executive Magistrate, is not admissible in evidence whereas learned counsel appearing for the respondents submits that Section 26 of the Evidence Act carves out an exception to Section 25 of the said Act, inasmuch as it makes confession of an accused in police custody admissible in evidence if the same has been recorded in presence of a Magistrate. According to the learned counsel for the respondents, the expression 'Magistrate' appearing in Section 26 of the Evidence Act would include an Executive Magistrate as well.

10) Before going into the legal contentions raised by the learned counsel for the parties, it would be apt to notice the undisputed facts which have emerged from a perusal of the Case Diary. As already noted, there is no material on record against the petitioner except the confessional statement of co-accused Zahid Ahmad Dar

which has been recorded while he was in custody in presence of police officials and Executive Magistrate, 1st Class. Section 25 of the Evidence Act provides that no confession made to a police officer can be proved against a person accused of any offence, meaning thereby that confession made before a police official is inadmissible in evidence. Section 26 of the said Act carves out an exception to the provisions contained in Section 25 of the Act. It reads as under:

“26. Confession by accused while in custody of police not to be proved against him. — No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation. — In this section “Magistrate” does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure”

A bare perusal of the foresaid provision reveals that a confession made by a person while in custody of a police officer is admissible if it has been made in the immediate presence of a Magistrate.

11) Section 27 of the Evidence Act creates another exception to Section 25 of the Act and it reads as under:

“27. How much of information received from accused may be proved. — Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a

confession or not, as relates distinctly to the fact thereby discovered, may be proved. “

From a perusal of the aforesaid provision, it becomes clear that if a fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, as relates distinctly to the fact discovered, becomes admissible in evidence. Applicability of the provisions contained in Section 27 of the Evidence is ruled out in this case as nothing has been recovered from the possession of the petitioner pursuant to the statement made either by the petitioner or by co-accused Zahid Ahmad Dar. So we have to concentrate on the provisions contained in Section 26 of the Act.

12) Section 30 of the Evidence Act is also required to be taken into consideration while determining the issue at hand as we are dealing with a case which involves alleged confession of a co-accused. The said provision reads as under:

“30. Consideration of proved confession affecting person making it and others jointly under trial for same offence. — When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Explanation. —“Offence” as used in this section, includes the abetment of, or attempt to commit, the offence.”

The aforesaid provisions envisages that when more than one person are tried jointly for the same offence and the confession

made by one of such persons affecting himself and some other of such persons is sufficiently proved, the Court can take into consideration such confession against such other person as well as against the person who made such confession.

13) Before applying the provisions contained in Section 30 of the Evidence Act to instant case, it has to be seen whether co-accused has made a confession implicating himself and the petitioner herein. It has also to be seen whether such confession has been made in accordance with the provisions contained in Section 26 of the Act which provides that it has to be made in the immediate presence of a Magistrate. There is no dispute to the fact that co-accused Zahid Ahmad Dar has made confession implicating himself and the petitioner herein. The said confession is stated to have been made by him in presence of the Executive Magistrate. The determination of the issue whether a confession made in presence of an Executive Magistrate is admissible in evidence, therefore, revolves on the interpretation of the expression 'Magistrate' appearing in Section 26 of the Act.

14) Explanation to Section 26 of the Evidence Act provides that 'Magistrate' does not include the head of a village discharging magisterial functions in the Presidency of Saint George or elsewhere unless such headman is a Magistrate exercising the powers of the Magistrate under the Code of Criminal Procedure. Sub-Section (23) of Section 3 of the General Clauses Act defines the expression "Magistrate". It provides that Magistrate includes

every person exercising all or any of the powers of a Magistrate under Code of Criminal Procedure Code. Therefore, it becomes necessary to have a look at the relevant provisions contained in the Criminal Procedure Code.

15) Section 3 of the Cr. P. C bears reference to a Magistrate. It reads as under:

“3. Construction of references.—(1) In this Code,—

(a) any reference, without any qualifying words, to a Magistrate, shall be construed, unless the context otherwise requires,—

(i) in relation to an area outside a metropolitan area, as a reference to a Judicial Magistrate;

(ii) in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

(b) any reference to a Magistrate of the second class shall, in relation to an area outside a metropolitan area, be construed as a reference to a Judicial Magistrate of the second class, and, in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

(c) any reference to a Magistrate of the first class shall,—

(i) in relation to a metropolitan area, be construed as a reference to a Metropolitan Magistrate exercising jurisdiction in that area;

(ii) in relation to any other area, be construed as a reference to a Judicial Magistrate of the first class exercising jurisdiction in that area;

(d) any reference to the Chief Judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Chief Metropolitan Magistrate exercising jurisdiction in that area.

(2) In this Code, unless the context otherwise requires, any reference to the Court of a Judicial Magistrate

shall, in relation to a metropolitan area, be construed as a reference to the Court of the Metropolitan Magistrate for that area.

(3) Unless the context otherwise requires, any reference in any enactment passed before the commencement of this Code,—

- (a) to a Magistrate of the first class, shall be construed as a reference to a Judicial Magistrate of the first class;*
- (b) to a Magistrate of the second class or of the third class, shall be construed as a reference to a Judicial Magistrate of the second class;*
- (c) to a Presidency Magistrate or Chief Presidency Magistrate, shall be construed as a reference, respectively, to a Metropolitan Magistrate or the Chief Metropolitan Magistrate;*
- (d) to any area which is included in a Metropolitan area, as a reference to such metropolitan area, and any reference to a Magistrate of the first class or of the second class in relation to such area, shall be construed as a reference to the Metropolitan Magistrate exercising jurisdiction in such area.*

(4) Where, under any law, other than this Code, the function exercisable by a Magistrate relate to matters,—

- (a) which involve the appreciation or sifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or*
- (b) which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate.”*

16) A bare perusal of the aforesaid provision of the Code reveals that without qualifying words, reference to a Magistrate,

unless context otherwise requires, means reference to a Judicial Magistrate outside a metropolitan area or to a Metropolitan Magistrate in relation to a metropolitan area. Thus, unless it is specifically provided in any provisions of the Code that expression 'Magistrate' connotes anything contrary, the same has to be construed as Judicial Magistrate in an area outside metropolitan area. Sub-section (3) of Section 3 provides that in any enactment passed before the commencement of the Code, reference to 'Magistrate' of the first class in an area which is situated outside the metropolitan area has to be construed as reference to a Magistrate of first Class and it has to be construed as reference to a Metropolitan Magistrate in a metropolitan area.

17) Sub-section (4) of the aforesaid provision makes things more clear by providing that under any law other than the Cr. P. C, if functions exercisable by the Magistrate relate to matters which involve the appreciation or sifting of evidence or formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, the same shall be exercisable by a Judicial Magistrate whereas if the functions are administrative or executive in nature, such as granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, the same shall be exercisable by an Executive Magistrate.

18) In the instant case, we are dealing with a situation where confessional statement of an accused is under consideration. The confessional statement of an accused recorded during investigation or inquiry or trial of a case exposes such person to punishment, penalty or detention in custody and has the effect of sending him to trial before the court. Therefore, unless the context otherwise suggests, the expression ‘Magistrate’ appearing in any law other than the Code of Criminal Procedure has to be construed as Judicial Magistrate. This view is further strengthened from the fact that the provisions contained in Section 164 of the Cr. P. C, which deals with the recording of confessions and statements, clearly provides that it is only a Metropolitan Magistrate or the Judicial Magistrate who is empowered to record the confession or statement made in the course of an investigation or even afterwards before the commencement of the inquiry or trial. The said provision reads as under:

“164. Recording of confessions and statements.—(1)

Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:

Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:—

“I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

*(Signed) A. B.
Magistrate.”*

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(5-A) (a) In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, subsection (1) or sub-section (2) of section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code (45 of 1860), the Judicial Magistrate shall record the statement of the person against whom

such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police:

Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement:

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be videographed.

(b) A statement recorded under clause (a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in section 137 of the Indian Evidence Act, 1872 (1 of 1872) such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried."

19) From a perusal of the aforesaid provision, it is clear that it is only a Judicial Magistrate of first class or a Metropolitan Magistrate who is empowered to record confessions. These confessions are to be recorded in the manner provided in the aforesaid provision. The said provision, inter alia, seeks to protect an accused from making a confession under duress, undue influence of police as also from being recorded under the influence, threat or promise from a person in authority. It takes into its embrace the right of an accused flowing from Article 20(3) of the Constitution of India as also Article 21 thereof. The

provision provides the safeguards for ensuring that confession of an accused is recorded without any coercion and pressure. Thus, the expression 'Magistrate' appearing in Section 26 of the Evidence Act refers only and only to a Judicial Magistrate of first class or a Metropolitan Magistrate. Any other interpretation, if given to the said expression, would defeat the aim and object of recording a confession of an accused in an atmosphere free of coercion, pressure or undue influence of the police/ investigating agency.

20) The question whether the expression appearing in Section 26 of the Evidence Act would mean a 'Judicial Magistrate' or an 'Executive Magistrate' came up for consideration before a Full Bench of the Gauhati High Court in the case of **Kartik Chakraborty and Ors. vs. State of Assam, (2018) 2 Gauhati Law Reports**. In the said case, the Full Bench of the Gauhati High Court was called upon to decide a reference arising out of the findings of the Division Bench of the same High Court in the case of **State of Assam v. Anupam Das, (2008) 1 GLR 681**. While dealing with the aforesaid reference, the Full Bench of the Gauhati High Court observed as under:

"31. We are afraid; we can accept such reasoning in the referral order. Paragraphs 28 and 29 of Anupam Das (supra) have been extracted above. A plain and simple reading of paragraph 28 would go to show that the previous Division Bench had observed that it would be a strange logic if a statement recorded by a Judicial Magistrate under Section 164 Cr.PC would not be admissible in evidence if the conditions stipulated therein are not complied with whereas a

statement made before an Executive Magistrate under Section 26 of the Evidence Act where there is no procedural safeguards as provided under Section 164 of the Code of Criminal Procedure, 1973, would be admissible in evidence. Following such analysis, conclusion was reached in paragraph 29 that the expression "Magistrate" appearing in Section 26 of the Evidence Act can only mean a Judicial Magistrate but not an Executive Magistrate. There is no confusion here. The exposition of the legal position in Anupam Das (supra) is clear and unequivocal. Therefore, the observation made in the referral order that there appears to be some confusion in paragraphs 28 and 29 of Anupam Das (supra), perhaps, was not justified. Reference to the Coroner's Act, 1871 whereunder Coroners appointed were deemed to be Magistrates within the meaning of Section 26 of the Evidence Act is misplaced for the same reason as alluded to herein above that when the Coroner's Act was enacted, there was no distinction between Judicial Magistrate and Executive Magistrate.

32. The view taken in Anupam Das (supra) was followed by another Division Bench of this Court in Ratan Singh Vs. State of Assam, 2012 (6) GLJ (NOC) 123, wherein it was held that in view of the provision prescribed by Section 3 of the Code of Criminal Procedure, 1973, a reference to a Magistrate unless the context otherwise requires, is to be construed as a reference to a Judicial Magistrate. It was further held that making of a confessional statement in the presence of an Extra-Assistant Commissioner cannot be treated as a statement made in the immediate presence of a Magistrate, while in police custody; it would be hit by Sections 25 and 26 of the Evidence Act and therefore, such statement cannot be used as legal evidence against the maker of the statement.

33. This has also been the view of the Madras High Court and it finds its expression in several decisions. In Palanisamy alias Kunjupaiyan Vs. State, Criminal Appeal No.541/2005, decided on 22.03.2013, Madras High Court has held that the Evidence Act was enacted before the commencement of the Code of Criminal Procedure, 1973. In view of Section 3(3) of the Code of Criminal Procedure, 1973, the term "Magistrate" referred to in Section 26 of the Evidence Act does not refer to Executive Magistrate. Consequently, the expression "Magistrate" as appearing in Section 26 of the Evidence Act would

mean only a Judicial Magistrate. Therefore, confession recorded or videographed by police in the presence of Executive Magistrate would be hit by Sections 25 and 26 of the Evidence Act. Again, in the case of Kalam @ Abdul Kalam Vs. Inspector of Police, reported in MANU/TN/07588/2011, the Madras High Court examined the provisions of Section 26 of the Evidence Act vis-à-vis Section 3(3) of the Code of Criminal Procedure, 1973 and after observing that the Evidence Act was enacted before the commencement of the Code of Criminal Procedure, 1973, held that the term "Magistrate" as referred to in Section 26 of the Evidence Act will mean only a Judicial Magistrate.

34. Therefore, we have no hesitation in our mind in coming to the conclusion that the views expressed by the Division Bench in Anupam Das (supra) lays down the correct legal position and strictly speaking, the reference so made was really not necessary.

35. Beyond this, we would not like to say anything more.

36. Consequently, we hold that the decision in Anupam Das (supra) lays down the correct legal proposition and accordingly, we answer the reference by holding that the expression "Magistrate" appearing in Section 26 of the Evidence Act would mean only a Judicial Magistrate and not an Executive Magistrate."

21) Again, in Zwinglee Ariel vs. State of M. P., AIR 1954 SC

15, a somewhat similar issue came up for consideration before the Supreme Court. The Court, while considering the admissibility of statement regarding conduct of an accused, observed as under:

"13. Finally, the High Court relied on the statements alleged to have been made by the appellant when he was halted after leaving the Bedia Bungalow. Extracts from the evidence given by Pande, Joshi and Deo have been set out in para 18 of the High Court's judgment. The whole evidence of course was not quoted. It will be observed that the witness Pande tried to add a little embellishment to his statement by referring to the conduct of the accused, namely,

that he started trembling and showed signs of being frightened, presumably to make it admissible in evidence as conduct of the appellant under Section 8, Evidence Act.

The two Magistrates, however, did not refer to any such conduct. The conduct being thus out of the way, it is clear that the appellant's statements in reply are not admissible at all under Section 8, Evidence Act. If these alleged statements are to be regarded as confessions then they will be hit by Section 25, Evidence Act. For they were made to Pande, the Police Officer, who was there. If they are sought to be brought in under Section 26 as confessions made in the immediate presence of the Magistrates, then also they will not be admissible in evidence in that they were not recorded by the Magistrates in the manner prescribed by Section 164, Criminal P. C."

22) In State of Uttar Pradesh vs. Singhara Singh and Ors, AIR 1964 SC 358, a three Judge Bench of the Supreme Court considered this aspect of the matter. In the said case, the question before the Court was whether a confession recorded by a Magistrate of Second Class is admissible in evidence. The Court, while dealing with the aforesaid question, observed as under:

"15. Mr. Aggarwala then contended that Nazir Ahmed's case(1) was distinguishable. He said that all that the Judicial Committee decided in Nazir Ahmed's case was that if a Presidency Magistrate, a Magistrate of the first class or a Magistrate of the second class specially empowered in that behalf records a statement or confession under [s. 164](#) but the procedure laid down in it is not complied with, he cannot give oral evidence to prove the statement or confession. According to Mr. Aggarwala, it does not follow from that decision that a Magistrate of a class not mentioned in the section, for example a magistrate of the second class not specially empowered by the State Government cannot give oral evidence of a confession made to him which

he had purported to record under [s. 164](#) of the Code.

16. It is true that the Judicial Committee did not have to with a case like the present one where a magistrate 'of the second class not specially empowered had purported -to record a confession under s. 164. The principle applied in that decision would however equally prevent such a magistrate from giving oral evidence of the confession. When a statute confers a power on certain judicial officers, that power can obviously be exercised only by those officers. No other officer can exercise that power, for it has not been given to him. Now the power has been conferred by s. 164 on certain magistrates of higher classes. Obviously, it was not intended to confer the power on magistrates of lower classes. If, therefore, a proper construction of s. 164, as we have held, is that a magistrate of a higher class is prevented from giving oral evidence of a confession made to him because thereby the safeguards created for the benefit of an accused person by s. 164 would be rendered nugatory, it would be an unnatural construction of the section to hold that these safeguards were not thought necessary and could be ignored, where the confession had been made to a magistrate of a lower class and that such a magistrate was, therefore, free to give oral evidence of the confession made to him. We cannot put an interpretation on s. 164 which produces the anomaly that while it is not possible for higher class magistrates to practically abrogate the safeguards created in s. 164 for the benefit of an accused person it is open to a lower class magistrate to do so. We, therefore, think that the decision in Nazir Ahmed's case(1) also covers the case in hand and that on the principles there applied, here too oral evidence given by Mr. Dixit of the confession made to him must be held inadmissible."

23) From the foregoing enunciation of law on the subject, there is no room for doubt to construe that the expression 'Magistrate' appearing in Section 26 of the Evidence Act refers only to a Judicial Magistrate of first class or a Metropolitan Magistrate and

no other class of Magistrates. Giving it any other construction would defeat the provisions contained in Section 164 of the Cr. P. C., which provides for safeguards for ensuring recording of confessions of the accused in a free and fair environment.

24) Having held that the confession recorded before a Magistrate other than a Judicial Magistrate/Metropolitan Magistrate is not admissible in evidence, it becomes clear that the statement of the co-accused Zahid Ahmad Dar recorded in the presence of Executive Magistrate while he was in police custody and in presence of police officials, is clearly inadmissible in evidence. There is no other material on record of the Case Diary to connect the petitioner with the alleged crime. Even though the quantity of contraband drugs recovered by the investigating agency from the co-accused falls under the category of commercial quantity, yet, prima facie, there is no admissible evidence on record to connect the petitioner to the recovery of the aforesaid quantity of contraband drug or to suggest that he is a party to the conspiracy.

25) Section 37 of the NDPS Act is not a complete bar to the grant of bail in a case where the recovery of contraband drug falls under the parameters of commercial quantity. It only provides that bail in such cases cannot be granted unless the prosecutor has been given an opportunity to oppose the application and the Court is satisfied that there are reasonable grounds for believing that he

is not guilty of such offence and that he is not likely to commit any offence while on bail.

26) In the instant case, as already noted, prima facie, there appears to be no material on record of the Case Diary that can be converted into legal evidence to connect the petitioner with the alleged crime. The respondents have not placed on record anything to show that the petitioner, if enlarged on bail, would commit similar offences. Thus, the petitioner has been able to carve out a case for grant of bail in his favour.

27) For the foregoing reasons, the application is allowed and the petitioner is admitted to bail subject to the following conditions:

- (i) *That he shall furnish personal bond in the amount of Rs.1.00 lac (rupees on lac) with one surety of the like amount to the satisfaction of the Investigating Officer;*
- (ii) *That he shall appear before the Investigating Officer, as and when required.*
- (iii) *That he shall not leave the territorial limits of Union Territory of J&K without prior permission of the Investigating Officer;*
- (iv) *That he shall not tamper with the prosecution evidence;*
- (v) *That he shall not indulge in similar activities as are subject matter of the instant case;*

28) It is made clear that if during investigation of the case any material which is admissible in evidence is assembled by the investigating agency implicating the petitioner in the alleged crime, the investigating agency shall be free to approach this

Court for cancellation/revocation of the bail granted in favour of the petitioner.

29) The bail application shall stand **disposed** of.

30) The Case Diary be returned to the learned counsel for the respondent.

(SANJAYDHAR)
JUDGE

Srinagar,
21.05.2022
“Bhat Altaf, PS”

Whether the order is speaking:
Whether the order is reportable:

Yes/No
Yes/No

