

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

Reserved on: 31.03.2022
Pronounced on:06.04.2022

**CrI. R No.31/2021
CrIM No.1390/2021**

TUFAIL AHMAD CHOTA

... PETITIONER(S)

*Through: - Mr. M. S. Latief, Sr. Adv. With
Mr. Zahid Khan, Advocate.*

Vs.

STATE OF J&K

...RESPONDENT(S)

Through: - Mr. Sajad Ashraf, GA.

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

JUDGMENT

1) The petitioner, through the medium of instant petition, has challenged two orders passed by learned 1st Additional Sessions Judge, Srinagar, one dated 20.08.2021, whereby petitioner has been charged for the offences under Section 8/21, 22, 29, 27-A of NDPS Act and the other dated 10.09.2021, whereby bail granted to the petitioner has been cancelled.

2) The facts emerging from the challan are that on 08.10.2020, when the police personnel were on patrol duty near Islamia College, Srinagar, they intercepted a vehicle bearing No.UP14HT-5312 (I 10). The vehicle in question was being driven by accused Bilal Ahmad Sheikh. From his

personal search, police recovered 02 strips of Spasmoproxyvon Plus (each strip containing 24 capsules), currency notes of Rs.2090/, a Samsung S-A50 mobile phone and a scanned copy of driving license of the petitioner herein. The vehicle in question was also subjected to search and 23 strips of Spasmoproxyvon Plus containing 24 capsules each were recovered from underneath the driver's seat. The police registered FIR No.46/2020 for offences under Section 8/21, 22 and 29 of NDPS Act and started investigation of the case.

3) On 03.10.2020, the accused, namely, Bilal Ahmad Sheikh made a disclosure statement before the police that he had travelled to Delhi to meet one Ali Bhai whose address was given to him by the petitioner herein, in connection with procuring the drugs Tricare-SR, Spasmoproxyvon Plus and Tapal-75. During his questioning, the aforesaid accused also disclosed that he has brought these drugs from Delhi to Srinagar through a bus whereas he himself travelled to Srinagar by air. Out of these drugs, the aforesaid accused handed over 40 strips of Tricare-SR and 30 strips of Tapal-75 to the petitioner against a payment of Rs.32,000/.

4) On the basis of the disclosure made by accused Bilal Ahmad Sheikh, the police raided the house of petitioner and during search of his house, the police recovered 15 strips of Tapal-75 and 12 strips of Tricare-SR and the petitioner was also taken into custody. On the basis of disclosure made by accused Bilal Ahmad Sheikh, residence of another person, namely, Junaid Ahmad Shah was also raided on 11.10.2020 and from his residence, 96 capsules of Spasmoproxyvon Plus were

recovered. Accused Junaid Ahmad Shah was also taken into custody. Petitioner/accused also made a disclosure statement before the police during his questioning and it was found that the said accused has contributed an amount of Rs.27,000/ whereas co-accused Muneer Ahmad Kurpal contributed an amount of Rs.5000/ towards the cost of the drugs that they purchased from co-accused Bilal Ahmad Sheikh. These amounts were found to have been deposited by petitioner and aforementioned co-accused in the account of Bilal Ahmad Sheikh. It was found that the petitioner had purchased 40 strips of Tricare-SR and 30 strips of Tapal-75 from co-accused Bilal Ahmad Sheikh, whereas Mohammad Muneer had purchased 10 strips of Tapal-75 from co-accused. On the basis of the disclosure, the house of Mohammad Muneer Kurpal was also raided wherefrom 8 strips of Tricare-SR (80 tablets) were recovered and seized. The said accused was also taken into custody. Thus, in all four accused including the petitioner herein were arrested.

5) It is the case of the prosecution that all these four accused in a well-knit conspiracy were indulging in drug trafficking in Down Town area of Srinagar City by procuring these drugs from Delhi and other parts of the Country and selling the same at exorbitant rates to the youths. The call data record of the accused and their conduits in Delhi were collected by the investigating agency and the samples of the seized drugs were sent to FSL for their chemical examination. On 31.12.2020, Shakir Khan alias Ali Bhai was arrested from New Delhi, who, during his questioning, admitted his involvement in the conspiracy. It was found after investigation of the case that the petitioner and other co-accused used to

transfer the money to the account of accused Bilal Ahmad Sheikh, who, in turn, would transfer it to the account of accused Shakir Khan @ Ali Bhai. The said accused used to procure drugs from one Ajay Gupta through Vicky Bridhori by transferring the money in their accounts. The investigating agency collected the call data records as well as records pertaining to bank transactions, whereafter they found that the accused including the petitioner are part of a well-organized group which is involved in procuring, transporting and selling of narcotic drugs. Accordingly, the charge sheet was laid before the Court.

6) It is pertinent to mention here that during the investigation of the case, the petitioner had applied for grant of bail before the Court of learned 2nd Additional Sessions Judge, Srinagar. The said Court vide its order dated 28.12.2020, admitted the petitioner to bail by observing that the quantity of drugs recovered from the possession of the petitioner falls in the category of intermediate quantity. After grant of bail to the petitioner, the investigation was completed and the offence under Section 27-A of NDPS Act was added as the same was found established during the investigation of the case.

7) After the aforesaid development, the respondent-State made an application before the trial court i.e. Court of 1st Additional Sessions Judge, Srinagar, seeking cancellation of bail granted to the petitioner. The same has been allowed by the learned trial court vide its order dated 10.09.2021, which is under challenge by way of instant petition. In the meanwhile, the learned trial court vide its order dated 20.08.2021, framed charges against the accused including the petitioner for offences

under Section 8/21, 22, 29 and 27-A of NDPS Act. The said order is also under challenge before this Court.

8) It has been contended by the petitioner that there is no material on record of the challan laid against him that would show that he is involved in the alleged offences. It is further contended that the material on record only suggests seizure of intermediate quantity of psychotropic substance from the petitioner's residence and not his involvement in the illegal drug trafficking. The petitioner has also contended that it was not open to the learned trial court to withdraw the concession of bail to the petitioner, particularly when there was nothing on record to show that he had misused the concession granted to him

9) I have heard learned counsel for the parties and perused the record including the record of the trial court.

10) Before testing the merits of the arguments advanced by the learned Senior counsel appearing for the petitioner, it would be apt to test the merits of argument of learned Senior counsel on the question of charge.

11) It is settled law that at the time of framing of charge even a strong suspicion against an accused would justify framing of charge. The Court at this stage is not required to see whether the accused can be finally held guilty of the offence but it has to see whether there exist sufficient grounds for proceeding against the accused. The Court has to see whether, on the basis of material on record, ingredients constituting the alleged offences are, prima facie, made out. For this limited purpose, sifting of evidence is permissible but probative value of the material

brought on record by the prosecution cannot be gone into at this stage and there cannot be any roving enquiry into the pros and cons of the matter. The material cannot be weighed and evaluated in the manner in which the same is to be done at the conclusion of the trial. At the time of framing charge, the material produced by the prosecution along with the charge sheet is required to be evaluated for the limited purpose of ascertaining as to whether there is ground for presuming that the accused have committed the offences.

12) In the light of the foregoing position of law, let us now advert to the material on record that has been assembled by the investigating agency and placed before the trial court along with the charge sheet. The material on record suggests that upon raiding the premises of the petitioner, intermediate quantity of drugs containing psychotropic substance 'Tramadol' has been recovered from his possession. The material on record also suggests that the petitioner is deeply connected with co-accused including the kingpin, Bilal Ahmad Sheikh, who used to procure the drugs from Delhi against the payments made by the petitioner and other co-accused. On the basis of the disclosure made by Bilal Ahmad Sheikh, the main accused, drugs have been recovered from the possession of the petitioner and on the basis of the disclosure of petitioner, drugs have been recovered from the possession of co-accused, Mohammad Muneer Kurpal. So, there is definite material on record to show that the petitioner and co-accused were part of an organized gang and they entered into a well-knit conspiracy for procuring drugs containing psychotropic substances for illegal trafficking and sale.

13) It is not a case where the police have merely recovered intermediate quantity of drugs from the possession of petitioner but it is a case where the said recovery was made on the basis of a disclosure made by another accused who was in league with the petitioner. The recovery has also been made on the basis of disclosure made by the petitioner from another co-accused, which means that there was an organized gang of the accused who were indulging in illicit drug trafficking. There is also material on record in the shape of bank transactions to show that the petitioner and co-accused were financing the illicit traffic of drugs. Thus, there is sufficient ground for presuming that the petitioner was in possession of drugs containing psychotropic substances and was also a party of a criminal conspiracy to commit offences punishable under the NDPS Act. In these circumstances, the impugned order passed by the learned trial court whereby the petitioner has been charged for offences under Section 8/21/22/29/27-A of NDPS Act does not deserve to be interfered with.

14) That takes us to the legality and validity of the order passed by the learned trial court whereby the concession of bail granted to the petitioner has been withdrawn. As already noted, it has been contended by learned counsel for the petitioner that bail granted in favour of an accused can be withdrawn only if the accused has misused the concession of bail or he has violated the conditions subject to which the bail has been granted in his favour. According to the learned Senior counsel, in the instant case, there was absolutely no material on record to show that the petitioner had either misused the concession of bail or

violated any condition of bail and in these circumstances it was not open to the learned trial court to withdraw the concession of bail granted in favour of the petitioner.

15) *Per contra*, learned counsel for the respondent-State has argued that at the time when bail was granted to the petitioner, the offence under Section 27-A of NDPS Act was not incorporated and it is only after investigation of case was complete that the aforesaid offence was found established against the petitioner and other co-accused. Thus, according to the learned counsel for the respondent, the learned trial court was well within its jurisdiction to cancel the bail granted to the petitioner.

16) Sections 437 and 439 of the Code of Criminal Procedure govern the principles for grant of bail in non-bailable offences. Sub-section (5) of Section 437 provides that any Court which has released any person on bail may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody. Similarly, sub-section (2) of Section 439 provides that a High Court or Court of Session may direct that any who has been released on bail be arrested and commit him to custody. These two provisions make it clear that a Court which has granted bail to an accused has jurisdiction and power to withdraw the said concession. Of course, this power has to be exercised in accordance with the settled principles of law and not in an arbitrary manner.

17) The Supreme Court in the case of **Pradeep Ram vs. State of Jharkhand and another**, AIR 2019 SC 3193, had an occasion to deal with the question as to whether an accused who is bailed out in a criminal

case in which new offences have been added can be remanded back to custody after cancelling his bail. The Supreme Court, after noticing that there are divergent views of various High Courts of the Country on the issue, has settled the controversy and laid down the following principles:

“29. In view of the foregoing discussions, we arrive at following conclusions in respect of a circumstance where after grant of bail to an accused, further cognizable and non-bailable offences are added:-

(i) The accused can surrender and apply for bail for newly added cognizable and non-bailable offences. In event of refusal of bail, the accused can certainly be arrested.

(ii) The investigating agency can seek order from the court under Section 437(5) or 439(2) of Cr.P.C. for arrest of the accused and his custody.

(iii) The Court, in exercise of power under Section 437(5) or 439(2) of Cr.P.C., can direct for taking into custody the accused who has already been granted bail after cancellation of his bail. The Court in exercise of power under Section 437(5) as well as Section 439(2) can direct the person who has already been granted bail to be arrested and commit him to custody on addition of graver and non-cognizable offences which may not be necessary always with order of cancelling of earlier bail.

(iv) In a case where an accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the accused, but for arresting the accused on such addition of offence or offences it need to obtain an order to arrest the accused from the Court which had granted the bail.

18) From the foregoing principles laid down by the Supreme Court, it is clear that in a criminal case when a graver offence is added, the accused who is on bail has an option of surrendering before the Court and apply for bail for newly added offence or even the investigating agency, on addition of a graver offence, has an option to proceed to arrest the accused but before doing so, it need to obtain an order of arrest against the accused from the Court that had granted the bail. It is also

deducible from the aforesaid principles that the Court in exercise of its powers under Section 437(5) and 439(2) of the Cr. P. C has the jurisdiction to direct the person already granted bail to be arrested on addition of a graver offence after cancellation of his bail.

19) Now adverting to the facts of the present case, the petitioner, who was on bail, has been charged for a graver offence under Section 27-A of the NDPS Act and he has also been found to be a part of a larger criminal conspiracy as a consequence whereof he has been charged under Section 29 of the NDPS Act. As has been rightly pointed out by the learned trial court, when we take the total quantity of the mixture of drugs that have been recovered from all the accused who are part of the larger conspiracy, the quantity of psychotropic substance recovered falls within the category of commercial quantity. Thus, the rigor of Section 37 of the NDPS Act to grant of bail gets attracted to the case of the petitioner. Apart from this, with the addition of Section 27-A of NDPS Act, the rigor of Section 37 to grant of bail to petitioner gets attracted.

20) With the coming into play of provisions of Section 37 of the NDPS Act, the petitioner, in order to succeed in an application for grant of bail, has to satisfy the Court that there are reasonable grounds for believing that he is not guilty of such offence. In the instant case, as already noted, there is sufficient material on record to, prima facie, suggest that the petitioner has committed the offence under Section 27-A of the NDPS Act and that he is part of a conspiracy whereby commercial quantity of psychotropic substance has been recovered from the possession of the

accused. Therefore, the petitioner has been unable to carve out a case for grant of bail in his favour.

21) The learned trial court, while cancelling bail of the petitioner, directed him to surrender before the SHO concerned or in the alternative to arrest him and send him to judicial custody, which cannot be termed to be either illegal or improper. The jurisdiction exercised by the learned trial court under Section 439(2) of the Cr. P. C, in the instant case, is based on well-recognized principles of law and the same cannot be interfered with in exercise of revisional jurisdiction of this Court.

22) For the foregoing reasons, I do not find any merit in this petition. The same is, accordingly, dismissed.

23) A copy of this order be sent to the learned trial court for information.

(SANJAY DHAR)
JUDGE

Srinagar,
06.04.2022
“Bhat Altaf, PS”

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No