HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

B. A. No. 82/2017

Date of Order: .12.2017

Rajesh Pandoh
Vs.
State and Another

Coram:

Hon'ble Mr Justice M. K. Hanjura, Judge

Appearance:

For petitioner(s): Mr Sunil Sethi, Sr. Advocate with Mr Vaibhav Gupta, Advocate

For respondent(s): Mr Sanveev Padha, GA

i/	Whether to be reported in Press/Media?	Yes/No
ii/	Whether to be reported in Digest/Journal?	Yes/No

1. Rajesh Pandoh-the applicant has filed this application under Section 497 Cr. P.C., for the grant of bail in his favour in case titled "***State of J&K v. Ankush Pandoh and Others***" arising out of FIR No. 101/209, of Police Station Udhampur, for the commission of offences punishable under Sections 302 read with 120-B and 109 RPC.
2. The facts as these emerge from the study of the file under consideration are that the deceased Parshotam Kumar alias Sanjay Jandial (hereinafter referred to as "deceased") and the applicant-accused were dealing as commission agents in the fruit and vegetable market, situate at Udhampur. There relations were not cordial. They had a business rivalry. A month before the alleged occurrence dated 02.05.2009, the applicant and his brother-in-law namely, Sudesh Verma are said to have concealed a vehicle loaded with kinnos, which the deceased had purchased and procured from Pathankote. On this, the deceased openly abused and thrashed both of them within the precincts of the fruit market. During this

incident, the accused-Ankush Pandoh, related to the applicant-accused as his nephew had also reached on the spot. The applicant–accused had at that moment divulged that the deceased will not permit him to carry on his business, and, therefore, some arrangements are required to be made to deal with him. On this the accused-Ankush Pandoh is said to have replied that if the applicant arranges for some money, he will take care of the rest.

3. The case of the prosecution further is that later Akush Pandoh in active connivance with his friends' Adil Shah-accused No. 2 and Rahil Chadel in furtherance of a common intention attacked the deceased on 02.05.2009 inside a shop known as "Kamal Enterprises" located at Chabutra Bazaar, Udhampur. Accused No. 1 is said to have inflicted injuries on his head with a sharp edged weapon called 'Khokhri' and accused No. 2 is stated to have fired on him with a country made shot-gun which hit his chest. Accused No. 3 is said to have exhorted the accused No. 1 and accused No. 2 from the area located outside the Shop. The deceased succumbed to his injuries on way to the hospital. After the occurrence, accused No. 4, the applicant provided Rs. 10,000/- to accused No. 2 and accused No. 3 at Jhajar Kotli through his servant Jagdish Khajuria and on the receipt thereof they fled away. The applicant-accused applied for bail before the Trial Court, which came to be rejected by order dated 31.12.2014, constraining the applicant to file an application for grant of bail before the High Court, on the grounds that he is innocent and a law abiding citizen. He has been falsely implicated in the case, he is facing incarceration since 2009 despite the fact that only three witnesses, namely, Sunil Khajuria, Raj Mathur and Jagdish Khajuria projected against the applicant, have not supported the prosecution story at all. The application came to be dismissed by an order dated 31.12.2015 of the High Court.

4. The applicant yet again filed an application for the grant of bail in his favour before the Court of the learned Principal Sessions Judge, Jammu holding the charge of the Court of the learned 2nd Additional Sessions Judge, Jammu, and

that application also met with the same fate. Dissatisfied with the order of the learned Principal Sessions Judge, Jammu, the applicant has moved the instant application for grant of bail in his favour, *primarily*, on the grounds that he has been in custody for the last eight years by now although nothing incriminating has surfaced as against him in the evidence recorded by the trial Court. The statements of the Sunil Khajuria, Raj Mathur and Jagdish Khajuria recorded by the trial Court have not supported the prosecution story. The only witness Jagdish Khajuria, who could have linked the applicant with the entire transaction after the alleged murder, has also not supported the prosecution version and has been declared hostile.

5. It has also been stated that out of a list of 49 witnesses cited as witnesses to the prosecution case, only 04 witnesses remain to be examined, out of whom 03 are police officials and none of them is a witnesses to the crime the commission of which has been attributed to the applicant. It is also stated that the High Court in a Criminal revision bearing No. 81/2010 had directed the trial Court to wrap up the proceedings in the case within a period of four months, however, nothing has been done by the Court below in the process of the culmination of the trial so far except for seeking extensions.
6. It has also been contended that the learned Trial Court while dealing with the bail application of the applicant has observed that the prosecution has relied upon the evidence of the aforesaid three witnesses only against the applicant in the aforesaid challan and it has been observed by the learned Trial Court that Jagdish Khajuria has turned hostile, Sunil Khajuria did not support the prosecution story and even Raj Mathur has not said anything about the conspiracy hatched by the applicant and the accused-Ankush Pandoh to eliminate the deceased, but the learned Trial Court despite observing the above has rejected the bail application of the applicant vide order dated 31.12.2014.
7. It has been stated further that after the rejection of the two applications for admitting the applicant to bail-one by the Sessions Court and the other by the

High Court, he filed a third application for the grant of the same relief before the Court of learned 2nd Additional Sessions Judge, Jammu, seeking concession of bail on the ground that the statements of a majority of witnesses (39 out of 49) have been recorded and none of them have inculpated the applicant. However, the learned Trial Court considered the bail application of the applicant and by his order dated 01.04.2017, rejected the same on the ground that there is no change of circumstances.

8. The learned Trial Court without properly appreciating the arguments advanced in support of the bail application and the change in circumstances, i.e., recording of evidence of as many as 45 witnesses out 49 at the time of passing of order, rejected the bail application by returning erroneous findings that the trial is at the mid stage. The findings and observations of the learned Trial Court while rejecting the application of the applicant are not legally sustainable under the given and the peculiar circumstances of the case. The applicant without any legal and valid justification languishes in the jail.
9. In their objections the state has resisted and controverted the application of the applicant on the grounds, *inter alia*, that he has been rightly arrested in the case in accordance with the procedure established by law and is presently facing the trial. There is incriminating evidence against the applicant on record which connects him with the commission of the crime. He is not entitled to the concession of bail as per the statutory law and languishes in jail in accordance with the procedure established by law. Those who are unruly and wayward, having no respect for the law of the land and the rights of the other fellow human beings cannot seek indulgence of the Hon'ble Court for enforcement of their own rights, and, as such, the instant application does not merit consideration and needs outright rejection. It is further submitted that the liberty of the individuals is precious and is to be zealously guarded by the Courts, however, such a protection cannot be absolute in every situation. The interest of the society and liberty of the individual has to be balanced. The case on hand is

a fit one where the collective interest of the community outweighs the right of the personal liberty of the applicant and granting of the bail will impede not only the administration of justice but will also injure the public interest instead of serving it.

10. It has been stated further that the trial is in progress. The evidence of the prosecution by the learned trial Court cannot be appreciated in part only at this stage as the statements of some of the prosecution witnesses are yet to be recorded in the said case and they may improve their statement and support the prosecution. There is no reason in stating that the applicant has not committed the offence of which he is charged. Moreover there is every apprehension that he will tamper with the prosecution evidence in case he is granted bail. The delay in concluding the trial can only be attributed to the applicant and the other accused, and the same is reflected in the order of the learned trial Court dated 12.05.2015. One of the accused persons namely, Rahil Chandel, escaped from the police custody. There are inputs that the applicant and the absconder, Rahil Chandel, have planned to eliminate the brother of the deceased named, Roshan Jandial. The applicant has moved successive bail applications on the grounds identical to the ones raised in the earlier application.

11. Heard and considered.

12. The law is that bail in non bailable cases is not a matter of right. It is in the discretion of the Court. This discretion is not a wild horse. It has to be supported by reasons and the law governing the grant of the bails. The question of the grant of the bail cannot be put in a steel jacket formula. The Court has to take an overall view of the matter taking all relevant factors into consideration. The "Law of Bails" should balance between two conflicting demands viz shielding the society from misadventures of persons allegedly involved in crime and the presumption of the innocence of the accused till he is found guilty. The law also provides that where there is no perceptible change in the circumstances successive bail applications will not lie.

13. The main thrust of the arguments of the learned counsel for the applicant is that the three witnesses namely, Suhail Khajuria, Raj Mathur and Jagdish Khajura, who were material to connect the accused with the commission of the crime had implicated him in their statements made under Section 161 Cr. P.C., recorded by the Police. They have been examined by the Court and they have turned the prosecution case topsy- turvy. This aspect of the case has already been dealt with by a Coordinate Bench of this Court by order dated 31.12.2015, while dealing with the application of the applicant for the grant of bail in his favour in file No. 03/2015 connected with MP No. 01/2015 titled as "***Rajesh Pandoh v. State of J&K through Police Station, Udhampur***", the relevant excerpts of which are detailed below:

> *"10. Learned Trial Court, after considering the submissions made by the petitioner, declined to release the petitioner on bail for the reason that the trial was still in progress and some material witnesses are yet to be examined. Learned Trial Court opined that at this stage, it was not possible to comment that there was no reasonable round for believing that petitioner-accused had not committed offence of which he was charged. Almost on similar grounds and without there being any progress in the trial, instant applicant for bail has been filed. The grounds for claiming bail, which has been taken by the petitioner before the Trial Court have been reiterated. The great emphasis was laid on the statements of the prosecution witnesses, namely, Sunil Khajuria, Raj Mathur and Jagdish Khajurai, which was recorded during the course of trial. It was contended by learned counsel for the petitioner that aforesaid three witnesses which has deposed against the petitioner on the conspiracy angle involved the petitioner before the Police have not supported the prosecution case during their examination in the trial. It was further contended that despite lapse of more than two years and five months only 13 out of 49 witnesses have been examined by the Trial Court despite there being directions passed by this Court in Criminal Revision No. 81/2010 directing the learned Trial Court to wrap up the proceedings within a period of four months. The case of the petitioner is thus that he had been roped in the case by the aid of Section 120-B RPC, which was based upon the statements of the prosecution witnesses aforementioned.*

Learned counsel for the petitioner contends that since the aforesaid prosecution witnesses have not supported the prosecution witnesses have not supported the prosecution, as such, there is no evidence, which has come forth to connect the petitioner with conspiracy hatched by him with other accused to kill deceased Parshotam Kumar.

11. With a view to find out as to whether after dismissal of the application for bail filed by the petitioner before the learned Trial Court, there had been progress in the trial or not, learned counsel for the State was directed to apprise this Court about the status of the proceedings in the Trial Court. This was so directed by this Court on 28.10.2015. In compliance to the aforesaid order, status report has been filed by the State counsel indicating therein that out of 49 witnesses, 18 witnesses have since been examined, which included three witnesses, namely, Sunil Khajuria, Raj Mathur and Jagdish Khajuria who were the witnesses to the conspiracy pertaining to the petitioner and that there are some other material witnesses, which are yet to be examined in the said case, and in case their statements are recorded, there is every possibility that they might improve their statements and support the prosecution case .However, it was not clearly indicated in the report as to which are other material witnesses, which are yet to be examined, and what is the nature of deposition, likely to be made".

14. The applicant yet again moved an application before the Court of learned 2nd All. Sessions Court, Jammu, which was decided by an order dated 01.04.2017, in which the learned Sessions Judge came to the following conclusion:

"The accusation in the case is very serious as applicant alongwith other accused have committed murder of deceased with sharp edged weapon and gunshot injuries. The punishment for offence under Section 302 RPC is death or life imprisonment. Life imprisonment is rule and death sentence is an exception. The trial is at mid stage, because SSP is producing the prosecution witnesses. In case accused is enlarged on bail there is every apprehension that he will jump over the bail bond and will threaten the prosecution witnesses. The law is also clear that detailed appreciation of prosecution evidence cannot be considered at the time of bail. The long incarceration is no ground for grant of bail, because it is the accused who have

delayed the trial, because order dated 12.05.2015, would reveal that one of the accused Rahil Chandel was escaped from the custody. He has been proceeded U/S 12 Cr. P. C. on 27.07.2015. The Hon'ble High Court of Jammu and Kashmir has already dismissed the bail petition of petitioner Rajesh Pandoh on 31.12.2015. No substantial change in circumstances has been made put. At this stage, there appear reasonable ground for believing that accused has committed the offence U/S 302 RPC, hence, I do not find any ground for grant of bail in such heinous offences. This application is dismissed at this stage".

15. In case titled "***Narayan Ghosh @ Nanu v. State of Orrisa***", in Criminal Appeal No. 251 of 2008 (Arising out of SLP (Criminal No. 6875 of 2007), decided on 04.02.2008, the Supreme Court had the occasion to deal with a petition almost identical to the present one and it held as under:

9. It is an admitted position that the appellants Sankar Adeya and Narayan Ghosh are the residents of Banagaon District which is a border District. Therefore, it cannot be said that the apprehension expressed by the learned counsel for the Prosecution is totally unfounded. Learned counsel, however, insisted that we should consider the material and more particularly the evidence regarding the conspiracy. We do not think that it would be proper for us to discuss the evidence threadbare as any expression of ours would undoubtedly affect the trial. It was admitted during the debate that some witnesses who were the witnesses for conspiracy were examined and had to be declared hostile. If that is so, that is all the more reason for us not to release the appellants when the trial is at a precarious stage.

10. Much debate was devoted about the non admissibility of the confessions of the co-accused which were likely to be relied upon by the prosecution. Reference was made to the reported judgments more particularly of Jayendra Saraswathi Swamigal v. State of Tamil Nadu [(2005) 3 SCC 13]. It was urged, relying on that decision, that there was no reasonable ground to believe that two or more persons in this case had conspired together to commit an offence and if there was no prima facie evidence of the existence of conspiracy, then there was no question of any

evidence of the acts and statements made by any of the accused in furtherance of the common object being admissible at all. Learned counsel strenuously argued that there was no prima facie evidence to show that the two appellants were party to the conspiracy and had conspired together between themselves or with any other accused persons. It was pointed out from the reported decision that it was only when the conspiracy was being hatched, whatever was said could become admissible. Our attention was invited to the following observations:

> *"The words of Section 10 are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The words 'common intention' signify a common intention existing at the time when the thing was said, one or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention to the conspirators to which the statement can have reference."*

There is no dispute about the principles stated in the ruling, however, we do not think that it would be proper for us to discuss at this juncture about prima facie finding. In our opinion it would be for the trial court to consider and appreciate the evidence which comes before it in support of the plea of conspiracy and to arrive at the correct finding. We will not, at this stage, comment upon the nature of the evidence one way or the other. In that view of the matter we do not think that the High Court was in error in refusing the bail to the appellants.

16. In the case titled "***Ved Prakash @ Kalu (JC) v. State through the Nct (Delhi)***" reported in (2007) 1LR 2 Delhi 176 some of the questions raised herein this application have been answered in the following manner:

> *"10. After having considered the arguments advanced by the counsel for the parties and the decisions referred to by them, I am of the view that there is no difficulty with the principles which have been laid down in the decisions which have been referred to by Mr Hariharan. However, those principles would be more applicable at the stage of a judgment being passed by the trial Court upon an appreciation of the entire evidence on record. At present I am concerned with an application for bail. In a recent decision the Supreme Court in the case of State of U.P. v. Amarmani Tripathi made it clear that the matters to be considered in an application for bail are: (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behavior, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail.*
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> *11. "……. Taking a prima facie view of these factors as also taking note of the fact that the trial is towards its end, I do not think that it would be appropriate to grant bail to the petitioner at this stage. This application for bail is rejected with the hope that the trial would be concluded at an early date. It is made clear that nothing expressed in this order shall be taken into consideration by the trial Court while delivering its judgment on the case".*

17. Applying the ratio of the law laid down above to the application on hand, the evidence of the prosecution can be analyzed at the outcome of the trial and doing so is within the domain and power of the trial court. This principal of law has been evolved in Narayan Ghosh @ Nantu's case, referred to herein before in which the Court held that we cannot discuss the evidence threadbare as any expression of ours would undoubtedly affect the trial, although, it was admitted during the debate that some of the witnesses who are witnesses for conspiracy were examined and declared to be hostile. The Supreme Court further held that

if that is so, that is all the more reason for us not the release the applicants when the trial is at a precarious stage. In Ved Prakah @ Kalu's case cited above, it has been laid down that since the trial is towards its end, it will not be appropriate to grant the bail to the applicant.

18. Testing the instant case from another perspective, it is stated, at first, that a Coordinate Bench of this Court has already dealt with the main plank of the arguments of the learned counsel for the applicant as projected by him in the instant application, i.e. since the witnesses qua the applicant have already been examined and they have not supported the prosecution case, therefore, he has a right to be admitted to bail. Respect for the view taken by a Coordinate Bench is an essential element of judicial discipline. A Judge might have a difference of opinion with another Judge, but that does not give him or her any right to ignore the contrary view. In the event of a difference of opinion, the procedure sanctified by time must be adhered to so that there is demonstrated respect for the Rule of Law. This is what has been held by the Apex Court in its order dated 11.12.2017, rendered in the case of "***Ran Vijay Singh and Others v. State of U.P. and Others***" in Civil Appeal Nos. 367, 355, 354, 356-357, 358 and 366 of 2017.

19. Looking at the instant application from another parameter, i.e. in light of order of the learned District Judge, Jammu, buttressed with the application of the applicant filed before this Court it emerges that at the time of filing of the application before the learned District Judge, 39 out of a list of 49 witnesses had been examined and during the pendency of the application before the learned Sessions Judge, the number of witnesses examined swelled up to 45, meaning thereby that there is not any apparent change in the facts and the circumstances under which the grant of bail was considered and rejected by the learned Sessions Judge, Jammu.

20. Applying the above attributes and the guidelines to the instant case, the law laid down in case titled "***State of Tamil Nadu v. S. A. Raja***" in Criminal Appeal No.

1470 of 2005 (Arising out of SLP (Criminal) No. 3366 of 2005), decided on 26.10.2005, assumes significance and it reads as under:

> *"9. When a learned Single Judge of the same Court had denied bail to the respondent for certain reasons and that order was unsuccessfully challenged before the appellate forum, without there being any major change of circumstances, another fresh application should not have been dealt with within a short span of time unless there were valid grounds giving rise to a tenable case for bail. Of course, the principles of res judicata are not applicable to bail applications, but the repeated filing of the bail applications without there being any change of circumstances would lead to bad precedents.*

21. Viewed in the above context, the application of the applicant is devoid of merit. It merits rejection and, is accordingly, rejected with the direction to the trial Court to complete the proceedings without any unnecessary delay within a period of six weeks on day today basis avoiding unnecessary adjournments.

22. Before parting, it needs must be said in an apparent digression that various circulars have been passed by the High Court of Jammu and Kashmir for the speedy disposal of the cases involving under trial prisoners and others. These appear to have been violated with impunity. One gets dismayed to seek such a State of affairs. The Circular dated 30.05.2013 directed all the Principal and Additional District Judges to decide and dispose of all the cases of under trials where the charge sheets/ challans have been field on or before 31.12.2010 by 31.12.2013. There are other circulars also governing the filed. The learned trial Judges dealing with this case have not complied with the terms of these circulars. These have been followed in breach. This reflects a sad and sordid state of affairs. The High Court has to evolve some mechanism to keep itself abressed of the work done by each judicial officers in light of the circulars on the subject. Without exerting the checks, balances and the control, these circulars will remain mere pieces of papers. The work of each Judicial Officer is required to be monitored by the High Court and the trial Judges should be asked

to spell out the reasons in not following these circulars both in vigor and rigor. Right to speedy trial is a fundamental right available to the accused. The fate of an accused cannot be kept hanging like that of a "Trishunka" on the absolute discretion of the trial judge. The cases relating to the under trial prisoners have to be treated and categorized as a priority sector litigation.

23. The record of the case shall be sent back to the learned trial Court forthwith.

(M. K. Hanjura)
Judge

Jammu
.12.2017
"Manzoor"