

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

B.A. No. 151/2017

Date of order:-28.09.2017

Kishore Sharma

vs.

State.

Coram:

Hon'ble Mr. Justice Sanjay Kumar Gupta, Judge

Appearing counsel:

For the Petitioner/Appellant(s) : Mr. Jagpal Singh, Advocate.

For the Respondents(s) : Mr. L.K. Moza, AAG.

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

1. The instant bail application has been filed by the petitioner for grant of bail under sections 08/21/22 NDPS Act. The petitioner had earlier also moved the bail application before the learned Additional Sessions Judge, Kathua (*hereinafter referred to as, **the Trial Court***), but the same was rejected vide order dated 18th August, 2017 by the learned Trial Court without considering the grounds taken by the petitioner therein.
2. In this petition it is stated that the non-applicant has implicated the applicant in a false and frivolous criminal case under the aforesaid Sections. The Challan (Annexure-A) was presented in the case titled, "***State Vs. Kishore Sharma and ors.***" The same is pending before the Trial Court and the next date of hearing was fixed on 04th September, 2017. In the Challan, it has been alleged that 5.9 grams of Heroin was recovered from the applicant. It needs to mention that as per prosecution story, there were three accused and the bail has already been granted to the rest of the two accused. In the Challan, it has also been alleged that 5

grams of Heroin each was recovered from the rest of the two accused. The applicant was behind the bars for almost one and half month. Moreover, the Challan, which was already presented is pending before the Trial Court.

3. The petitioner had moved an application for bail before the Trial Court, but the same was rejected by the Trial Court vide its order (Annexure-B) dated 18th August, 2017. The Trial Court dismissed the bail application of the applicant/petitioner in a casual, cavalier, slipshod and mechanical manner. The Trial Court while dismissing the bail application of the applicant lost sight of the basic guidelines to be followed while deciding the bail application.
4. It is stated that the bare perusal of the Challan makes it amply clear that all the witnesses in the said criminal Challan are police witnesses, as the Investigating Agency has not associated any civil witness in the said Challan and, therefore, there is no question of intimidation of witnesses by the applicant. Moreover, rest of the two accused already stands granted bail, therefore, the Trial Court cannot dismiss the bail application of the applicant on the ground that if the bail is granted to the applicant, he would intimidate the prosecution witnesses. It needs to mention that since Challan stands presented and further custody of the applicant is not required by the non-applicant. It is pertinent to mention that in the Challan, it is alleged that 5.9 grams of Heroin is recovered from the applicant and the same is slightly more than smaller quantity and, therefore, the same falls under intermediate quantity. It is not applicable to the facts of the present case, as the contraband alleged to be recovered from the applicant is not a commercial quantity, but slightly more than smaller quantity, i.e., intermediate quantity. Therefore, applicant deserves to be granted bail by this Hon'ble Court. The applicant shall abide by all the terms and conditions, whichever are imposed by this

Hon'ble Court while enlarging the applicant on bail, i.e., the applicant would not jump over the bail and would appear before the Trial Court regularly.

5. Respondent has filed the objections stating therein that the bail application filed by the petitioner/accused for grant of bail in File No. 41/Cr. Mis. pending in the Court of learned Additional Sessions Judge, Kathua and pertaining to FIR No. 191/2017 of Police Station, Kathua under Sections 8/21/22 NDPS Act, is not maintainable. The Trial Court, before which the applicant had moved bail application has on very cogent and legal grounds rightly rejected the same vide order dated 18th August, 2017. There is no legal infirmity or lacuna in the Court order dated 18th August, 2017. The application is involved in a very heinous crime of dealing in narcotic drug of Heroin. 5.9 grams of Heroin has been recovered from the applicant, which resulted in the presentment of Challan after meticulous and painstaking investigation by the police concerned. It would be worthwhile to know that Heroin is an extremely potent drug and requires high degree of competence in dealing with such drugs. The drug is extremely costly and in fact, is the costliest intoxicant in the world. The recovered quantity of Heroin from the accused, i.e., 5.9 grams would be sufficient to result in intoxication of large number of people and, accordingly, is more than ample quantity to cause maximum damage to the society. Enlarging the applicant on bail would demoralize all the right thinking people, who are concerned on account of drug menace, that has permeated among the youth of the society. The drug use is eating into vitals of the society and requires to be dealt with stern and harsh measures. No good ground has been made out by the petitioner in support of his bail application and no new circumstance has arisen in the intervening period from the date, when his bail application was rejected

by the learned Additional Sessions Judge, Kathua till he filed the present application.

6. I have considered the law on the subject and heard counsel for both sides.
7. From the perusal of order impugned, it reveals that 5.9 gm of heroin has been found from petitioner. Two more co accused was also with him and from than 5 gms of Heroin have been found from then each. They have been enlarged on bail by Magistrate since possession of 5gm Heroin comes under small quantity which is bail able. Learned Court of Additional Sessions Judge, Kathua where challan is pending has dismissed the bail of petitioner as offence under section 8/21/222 pertaining to possession of quantity in between carries punishment up to 10 years and fine up to 1 lakh.
8. Section 37 of the NDPS Act, reads as under:-

“[37. Offences to be cognizable and non-bail able;- (1) Notwithstanding anything contained in the code of Criminal Procedure, 1973(2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-

(i) the public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, 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.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail,].”

9. From the perusal of this Section, it is manifest that this section is applicable for **offences under section 19 or section 24 or section 27-A** only when commercial quantity of Narcotics Drug or Psychotropic Substance is found from the possession of accused. In term of section 37 of NDPS Act, no person shall be released on bail, who is found in possession of commercial quantity of Narcotic and Psychotropic substance unless the prosecution is given opportunity to oppose the bail application and Court finds that accused is not, prima facie, involved in the offense. These restrictions are in addition to restrictions imposed under section 497 Cr.P.C
10. In the present case, accused has been found in possession of 5.9 gm of Heroin; it's small quantity is 5 gm and commercial is 250 gm as per schedule of NDPS Act. The accused-petitioner has, thus, been found in possession of 5.9 gm of contraband; this quantity is in between commercial and small quantity. In this way rigor of section 37 of Act is not applicable. This quantity is 0.9gm above small quantity.
11. The general law of bail shall apply in present case. Every person is presumed to be innocent unless his guilt is proved beyond reasonable doubt. Section 497 Cr.P.C. empowers the Court to consider the bail. As per section 497 Cr.P.C., a person who has committed offence punishable with death or life imprisonment cannot be granted bail, if there appears that there are reasonable ground for believing that accused-applicant has committed such type of offence. In the present case accused -applicant has been found in possession of contraband, which is in between commercial quantity and small quantity, and punishment for this offence is upto 10 years and a fine of Rs. one lac. In this way rigor of Section 497 Cr.P.C is also not applicable.
12. Applicant is in custody since 8.7.2017 and trial is proceeding. He cannot be kept in custody as a matter of punishment. Further, he is not a habitual

offender as no previous criminal history of accused has been disclosed by police. Every person is presumed to be innocent until the accusation is proved against him/her. Bail is rule and its refusal has to be in exceptional circumstances. Prosecution has not been able to show any material warranting denial of such concession to the petitioner.

13. Petitioner is, thus, **admitted** to bail subject to furnishing of surety and personal bond in the amount of Rs.50,000/- each to the satisfaction of Court below on the following terms and conditions:-

- a) That he shall actively participate in trial.
- b) That he shall not leave territorial jurisdiction without taking prior permission of trial Court and shall refrain from intimidating prosecution witnesses.

14. Bail Application is **disposed of** accordingly.

(Sanjay Kumar Gupta)
Judge

Jammu

28.09.2017

Ram Krishan