

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

(Through Video Conference)

Reserved on : 13.07.2020

Pronounced on: 25.08.2020

Bail App. No. 48/2020

CrIM No. 377/2020

Liaqat Hussain and others

.....Applicant(s)

Through :- Mr. Mohd Yaseer Choudhary, Advocate
Petitioner No. 1
Mr. Syed Aaqib Mujtaba, Advocate and
Mr. Ashfaq Mir, Advocate for
Petitioner Nos. 2 and 3
(on Video Conference from residence)

V/s

Union Territory of J&K

.....Respondent(s)

Through :- Mr. Aseem Sawhney, Advocate
(on Video Conference from residence)

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE
(through Video Conference from High Court, Jammu)

Judgment

1. The instant bail application has been filed by the applicants after their application for grant of bail was rejected by the learned Additional Sessions Judge, Jammu on 12.03.2020 (hereinafter referred to as "the trial court").

2. The instant application has been filed on the ground that the applicants are innocent persons and have been falsely implicated in FIR bearing No. 201/2019 under Sections 8/21 and 29 Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the NDPS Act) registered with Police Station,

Bakshi Nagar, Jammu. The applicants have further stated that the alleged contraband that has been recovered from the applicants is 40, 35 and 27 grams of heroin respectively. The said contraband, even if taken as a whole, does not fall within the category of commercial quantity and rather the same falls within category of the intermediate quantity. The applicants have further stated that they have been in custody ever since their arrest on 03.12.2019 and the charges have been framed on 27.01.2020. It is also stated that the rigor of Section 37 of the Act does not apply in the case in hand.

3. The respondent-Union Territory has filed the objections and preliminary objections have been raised by the respondent that the present application is not maintainable for the reasons that to maintain a subsequent/successive bail application, change of circumstance is required. However, in the instant application, there is no change of circumstance rather the applicants are trying their luck before this Court. It is further stated that the applicants do not deserve to be enlarged on bail as they are drug peddlers.

4. Learned counsels for the applicants argued that the applicants have been in custody for more than eight months and that too virtually without trial because the proceedings in the case are not being conducted because of restrictions imposed due to COVID-19 pandemic and no witness has been examined by the trial court till date. It is further submitted that FIR (supra) is the only FIR against the applicants and the prosecution has not brought any fact before this Court that the applicants are involved in any similar type of offences earlier also.

5. *Per contra*, Mr. Aseem Sawhney, learned AAG submits that the successive/subsequent bail application is filed without change of circumstance,

as such, is not maintainable and the applicants being the drug peddlers are not entitled to bail.

6. Heard and considered.

7. As per the prosecution, the applicants were arrested on 03.12.2019 at Naka Point near Pawan Ice Cream, Bakshi Nagar, Jammu. On that day, the applicants were stopped and during checking, 27 grams of heroin was found from applicant No. 3, 40 grams from applicant No. 2 and 35 grams from applicant No. 1 as such FIR bearing No. 201/2019 (supra) stands registered against the applicants under Sections 8/21/22/29 of the NDPS Act. It is evident that the applicants were arrested on 03.12.2019 and as on date, they have been in custody for more than eight months. It is undisputed that the applicants were charge-sheeted for commission of offences mentioned above on 27.01.2020 and till date not even a single witness has been examined by the prosecution due to restrictions imposed in view of COVID-19 pandemic.

8. The main objection that has been raised by the respondent is that the successive bail application without change of circumstance is not maintainable in view of the judgment of the Apex Court rendered in **Kalyan Chandra Sarkar v. Rajesh Ranjan, (2005) 2 SCC 42**. The Relevant portion of the judgment is reproduced as under:

“18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are

non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled to bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. **In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing require that such persons be released on bail, in spite of his earlier applications being rejected, the courts can do so.**

- 19.** The principles of res judicata and such analogous principles although are not applicable in a criminal proceeding, still the courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. **The findings of a higher court or a coordinate Bench must receive serious consideration at the hands of the court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event, the courts must give due weight to the grounds which weighed with the former or higher court in rejecting the bail**

application. Ordinarily, the issues which had been canvassed earlier would not be permitted to be re-agitated on the same grounds, as the same would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting.

20. The decisions given by a superior forum, undoubtedly, are binding on the subordinate fora on the same issue even in bail matters unless of course, there is a material change in the fact situation calling for a different view being taken. Therefore, even though there is room for filing a subsequent bail application in cases where earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which an accused who has been denied bail earlier, can move a subsequent application. Therefore, we are not in agreement with the argument of learned counsel for the accused that in view of the guarantee conferred on a person under Article 21 of the Constitution, it is open to the aggrieved person to make successive bail applications even on a ground already rejected by the courts earlier, including the Apex Court of the country.”

9. In **Jagmohan Bahl v. State (NCT of Delhi)**, reported in **(2014) 16 SCC 501**, the Apex Court has held:

“15. In the instant case, when the Sixth Additional Sessions Judge had declined to grant the bail application, the next Fourth Additional Sessions Judge should have been well advised to place the matter before the same Judge. However, it is the duty of the prosecution to bring it to the notice of the Judge concerned that such an application was rejected earlier by a different Judge and he was available. In the entire adjudicatory process, the whole system has to be involved. The matter would be different if a Judge has demitted the office or has been transferred. Similarly, in the trial court, the matter would stand on a different footing, if the presiding officer has been superannuated or transferred. The fundamental concept is, if the Judge is available, the matter should be heard by him. That will sustain the faith of the people in the system and nobody would pave the path of forum-shopping, which is decryable in law.”

10. From the law laid down by the Apex Court in above judgments it is clear that the findings of the Court or higher court while rejecting the earlier bail application are to be considered when the bail application is filed subsequently either before the same court/ court of coordinate jurisdiction or before the subordinate court. Further but for the situations as contemplated in **Jagmohan Bahl v. State (NCT of Delhi) (supra)**, as a rule, the successive bail application is required to be heard by the same judge. Once the higher Court rejects the bail application, then the fresh bail application cannot be entertained by the subordinate court unless there is change of circumstance/situation. Even before the same Court, the successive bail applications cannot be entertained on

same facts when the earlier bail application has been rejected. The principle of bar in entertaining successive bail application without change of circumstance shall apply in those cases where the subsequent bail application is filed before the same court or the court of co-ordinate jurisdiction. Thus if the bail application is rejected by the Court, the accused is well within his right to approach the higher court on similar facts for grant of bail but not vice-a-versa. In **Diwan Singh vs. State of J&K and another, reported in 2010(3) JKJ 367** it was held that once an anticipatory bail application is rejected by the Sessions Court on the same cause of action, fresh application before high court can be filed.

11. Thus the contention of the Respondent with regard to non-maintainability of the instant bail application is rejected and the present bail application is held to be maintainable.

12. Since the quantity of recovered contraband is an intermediate quantity, the rigors of Section 37 of the NDPS Act shall not apply in the instant case. The applicants have been in custody for the last more than eight months and that too virtually without trial due to non-examination of the witnesses because of COVID-19 restrictions. No doubt the gravity of the offence is the relevant factor for deciding the bail application but the period of detention is also a relevant factor. In the instant case, challan stands already filed and the charges already framed, the presence of the applicants is required only during trial. The conclusion of the trial may take some time as there is no possibility of the conclusion of trial in near future so the applicants cannot be kept in custody for long time as a matter of punishment.

13. For all what has been discussed above, this application is allowed.

The applicants are enlarged on bail on the following conditions:

- (i) subject to furnishing of recognizance bond by surety to the tune of Rs. 50,000/- along with personal recognizance bond of the like amount to the satisfaction of the Trial Court.
- (ii) they shall furnish an undertaking that they shall regularly attend the proceedings before the trial court.
- (iii) they shall not leave the territorial jurisdiction of the Union Territory without the permission of the learned trial court.
- (iv) they shall not contact with any of the prosecution witnesses during the trial.

14. Disposed of accordingly.



(RAJNESH OSWAL)
JUDGE

Jammu:
25.08.2020
Rakesh

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