

**HIGH COURT OF AZAD JAMMU & KASHMIR**

*Crim. Appeal No. 22 of 2022.*

*Date of Institution .. 26.01.2022.*

*Date of Decision .. 01.03.2022.*

Muhammad Waseem Mughal S/o Tasleem Mughal, R/o Upper Chatter, presently confined in Central Jail Rara, Muzaffarabad.

....Accused-Appellant

**Versus**

The State through Advocate General of Azad Jammu and Kashmir, Muzaffarabad.

.....Respondent

**CRIMINAL APPEAL**

***Before:- Justice Sardar Liaqat Hussain, J.  
Justice Syed Shahid Bahar, J.***

**PRESENT:**

Raja Shujat Ali Khan, Advocate for the Accused-Appellant.  
AAG, for the State.

**Judgment:**

*(Justice Syed Shahid Bahar, J).* The above titled appeal under Section 48 of Control of Narcotic Substances Act, 1997 (adopted in AJK in the year 2001) has been filed by the appellant-Muhammad Waseem Mughal by assailing the decision dated 19.01.2022 rendered by the learned Court of Sessions Judge Muzaffarabad empowered as Special Judge Anti-Narcotics, whereby the application for grant of post arrest bail in FIR No.89/2021, for offences under sections 324, APC, 15(2) of AJK AA 2016, and 9-C of CNSA, was turned down/rejected.

**Facts in brevity:-**

The complainant-Shaheed-ur-Rehman, ASI, registered an FIR bearing No.89/2021 under section 9-C of CNSA, 15(2) of AA/2016 and section 324 of APC on 20.09.2021 at Police Station Kahori Muzaffarabad and disclosed that as per information obtained from covert sources, the accused round about at 06:10 AM, was found in a suspected condition holding blue colour shopper, who targeted the police with pistol and intimidated them to do away with their lives, resultant of which on making search, police allegedly recovered 1220 grams contraband (چرس), 30-bore pistol with ammunition in presence of witnesses. Thereafter, in view of above stated alleged occurrence, the appellant herein, was taken into custody by the Investigating Agency and an application for grant of post arrest bail was moved by the appellant before the learned trial Court/ Court of Competent Jurisdiction Muzaffarabad, which was rejected vide decision dated 19.01.2022, hence, this appeal.

Arguments heard. Record perused.

**Submissions advanced by the learned counsel for Appellant:-**

Raja Shujat Ali Khan, the learned counsel vehemently contended on behalf of accused-appellant that the police has made out a concocted and frivolous case against the appellant by alleging self created story in order to drag the appellant into the matter. The learned counsel for the appellant staunchly argued that no such like occurrence had taken place at all, in fact accused/appellant was arrested from his home and he apprised the court in this regard that

the present witnesses of arrest have already submitted an affidavit in the trial Court. Furthermore the prosecution impleaded 12 witnesses and inserted the name of Chemical Examiner in the calendar of witnesses at serial No.12, whereas, in juxta-position the referred letter available with the challan was addressed to NIHS, Islamabad, while statement of P.W.12 has also not been recorded under section 161,Cr.P.C. He contended that challan of the case has already been submitted before the learned trial Court. The learned counsel for the appellant staunchly argued on behalf of accused-appellant that the appellant is behind the bars since 5/6 months. He further argued that the gravity of an offence per se is no ground for rejection of bail. He further added that at the bail stage only tentative assessment of the record is to be made as the entire occurrence portrayed by the Investigation Agency is fabricated, self created and false which was just meant for dragging the appellant in the case. He apprised the court that as per rule 4; sub-rule 2 of Control of Narcotic Substances (Government Analysts) Rules, 2001 the recovered material is liable to be sent for analysis to narcotic testing lab within 72 hours of recovery while in the case in hand, the alleged contraband had been sent for analysis after passing three days, hence, the matter falls within the ambit of further inquiry in view of Section 497(2), Cr.P.C. The learned counsel further argued that matter of recovery from the appellant seems dubious, as the statement of one P.W. Qaiser Kiani has not been recorded under section 161,Cr.P.C, in whose custody contraband was kept.

**Submission offered by the learned A.A.G:-**

On the other hand, the learned A.A.G appearing on behalf of State, tenaciously opposed the stance of the appellant and contended that the decision rendered by the court below is completely in accordance with law. He further contended that the appellant is not entitled to concession of bail, particularly, keeping in view the gravity of the offences leveled against him.

After hearing both the learned counsel for the parties we have gone through the record appended with the case, particularly the contents of the FIR.

There is no cavil with the proposition that the matter in hand pertains to the special law made by the Legislature for the purpose i.e. CNSA and the special law has always got an overriding effect over the general law. In the instant matter the accused is behind the bars since last 5/6 months. After perusal of the record, it reveals that Investigation Agency has terribly failed to adhere to the strict compliance of the provisions of CNSA Rules, which is definitely a major dent, particularly, sending of contraband for analysis after more than 3 days. In this regard rule 4 of CNSA Rules is reproduced:-

**4. Despatch of sample for test or analysts.---** (1) Reasonable quantity of samples from the narcotic drugs, psychotropic substances or the controlled substances seized, shall be drawn on the spot of recovery and despatched to the officer-incharge of nearest Federal Narcotic Testing Laboratory, depending upon the availability for test facilities, either by insured post or through special messenger duly authorized for the purpose.

(2) Samples may be despatched for analysis under the cover of a Test Memorandum specified in Form-I at the earliest, *but not later than seventy-two hours of the seizure. The envelope should be sealed and marked "Secret drug sample/ test memorandum"*

After brooding over Rule 4 of CNSA Rules, 2001 in a scrupulous manner it becomes crystal clear that the recovered contraband needs to be sent to the nearest narcotic testing laboratory by the Investigating Agency within 3 days from recovery of the same whereas in the case in hand this mandatory requirement has not been complied with by the Investigating Agency. Furthermore, the statements of the material witnesses i.e. P.W.1 and 11 have not been recorded in support of the recovery articles. It is also settled principle of law that bail is not a license of acquittal or exonerance but simply a change of custody and in case of bail the place of custody is only substituted and the court after satisfying itself the custody, changes the custody from police and give it to the hands of sureties.

It is a beaten track whereupon certain principles regarding acceptance and refusal of bail, that too structuring or governing the matter have stood laid down by the superior courts. Be that as it may, in our estimation, the appellant has successfully made out his case under Section 497 (2) of Cr.P.C. for further inquiry, particularly, when the mandatory provisions of the special law have not been adhered to by the Investigating Agency, therefore, presumption of recovered contraband at present goes against the prosecution for the purpose of bail. Furthermore,

heinousness of offences is per se no ground for rejection of bail. There are plethora of judgments of the Hon'ble Supreme Court of AJK as well as from Pakistan Jurisdiction, both the vertical and horizontal precedents on the subject that after tentative assessment of the record as a general principle of criminal justice, if any dent is appearing in the case of prosecution, same is always to be resolved in favour of accused and burden of proving the allegation leveled against the petitioner is solely on the shoulders of the prosecution. Although matter in hand pertains to the offences falling under the ambit of special law i.e. CNSA and Rules wherein arrow of presumption of illicit recovered articles as per section 29 CNSA to some extent has been fixed against the accuse but it needs to be taken into consideration only when the investigation agency has stricto sensu given adherence to the codal modalities and mandatory provisions of special law which in our estimation so far is lacking in the case in hand, gross lapses and loopholes are oozing from the available record on part of the investigation agency. Therefore, in our estimation, the appellant has made out the case for grant of bail.

Though any sole fact itself is not sufficient to shatter the prosecution's case but all the above noted discrepancies found in the case of the prosecution bring the case of the appellant within the ambit of further inquiry as per contemplation of Section 497(2) Cr.P.C. It is worthwhile to mention that mere leveling of an offence is not sufficient to keep the accused behind the bars. The basic rule of law is bail and not jail, as laid down by the Apex Court of

Pakistan in PLD 1995 SC 334. Furthermore, ex-facie the bar contained in section 51(1) for the purpose of post arrest bail keeping in view the case brought by the prosecution seems not to be attracted or nor does it place any hindrance to grant post arrest bail as at bail stage we have to follow the available record tentatively. The Honorable Apex Court of Pakistan in the case of Muhammad Sarfraz Ansari V/S state and others reported as PLD 2021 SC 738 (vertical precedent) held that that at bail stage the court cannot make deeper examination and appreciation of the evidence collected during investigation or to conduct anything in the nature of a preliminary trial to determine the accused's guilt or innocence. Likewise the learned Peshawar High Court in the case of Hayatullah V/s Lal Badshah reported as PLD 2009 Peshawar 28 (Horizontal precedent) held that deeper appreciation of evidence and drawing conclusions therefrom is not warranted.

Without entering into the merits of the case, bird's eye view of the prosecution's case transpires leads the case towards even minimum punishment after completion of the trial under Section 9-C of CNSA. All the circumstances and facts narrated above seems tilting as per scales of justice in favour of bail rather than jail. In this regard, we would like to refer the dicta of Supreme Court which laid down in Jamal Din's case reported as 2012 SCMR 573 as well as other cases reported as 2018 P.Cr.L.J 590 and 2013 SC 270.

For what has been narrated above, we, therefore are inclined to allow the appeal in hand and consequently, appellant shall be released forthwith on bail if he furnishes bail bond in sum of Rs.200,000/-(two lac) as well as personal bond in the like amount to the satisfaction of the trial Court, if he is not required in any other case or offence.

At this juncture as we have found and observed non-adherence of provisions of the special law i.e. CNSA and its Rules by the investigation agency, therefore, we deem it proper to direct the Inspector General of Police Azad Jammu and Kashmir to do needful in this regard by taking necessary measures in order to make sure the strict compliance of codal law i.e. CNSA and its rules by the Investigation Agency. Copy of the instant judgment shall be transmitted to the worthy Inspector General of Police AJ&K for compliance of the same.

Muzaffarabad,  
01.03.2022.

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JUDGE

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JUDGE

To be reported

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