HIGH COURT OF JAMMU & KASHMIR
AT SRINAGAR
(Through Video Conference)

CrlA(AD) No. 10/2019
EMG-BA No. 07-A/2020

Reserved on : 20.05.2020
Pronounced on : 29.05.2020

Syed Saiqa **…Appellant**

Through:- Mr. A.H. Naik, Sr. Advocate with
Mr. Zia, Advocate.
(through video conference from his residence)

versus

Union Territory of J&K and Others **…Respondents**

Through:- Mr. Mir Sohail, AAG.
(through Whatsapp call from his residence)

Coram: **HON'BLE MR. JUSTICE DHIRAJ SINGH THAKUR, JUDGE**
HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

Sanjay Dhar-J

1. By the medium of this judgment, instant appeal filed by the appellant against the order dated 28th September 2019 passed by the learned Special Judge Designated under NIA Act, Srinagar whereby the bail application of the appellant Syed Saiqa, stands rejected, is proposed to be disposed of. During the pendency of the appeal, the appellant filed another application for grant of bail and pursuant to our directions dated 15.05.2020 the said application has been taken up for hearing along with the main appeal.

2. Before coming to the appeal and the bail application of the appellant, let us give the brief background of the facts leading to filing of the instant appeal and the bail application.

3. As per the charge-sheet that stands already filed before the learned trial Court on 12.10.2019, on 28.10.2018 Police Station, Pulwama received information from a reliable source that bullet ridden body of Sh. Imtiyaz Ahmad Mir, Sub-Inspector, Jammu and Kashmir Police was found at Village Wahibugh near Rohmi Nalla. On the basis of this report, FIR bearing No. 288/2018 was registered and the investigation of the case was started. During the course of investigation, the Police conducted the inspection of the site wherefrom the dead body was recovered, the dead body was seized, postmortem of the deceased was conducted, the dead body was handed over to legal heirs of the deceased, the vehicle of the deceased was recovered and seized and the statements of witnesses conversant with the facts of the case, were recorded under Section 161 of Cr.P.C. One Ansarul Haq S/o Bashir Ahmad Raina R/o Tikin, Batpora, who had been arrested by Special Cell Delhi, was called for questioning and upon his interrogation it was discovered that said Sh. Ansarul Haq along with Mst. Saiqa, the appellant herein, had hatched a conspiracy with the militants for eliminating Sub-Inspector Imtiyaz Ahmad Mir. During the course of investigation, call details of mobile cell phones of both the accused were collected and it was established that accused Ansarul Haq and Mst. Saiqa were in contact with the militants on the day of occurrence. Their mobile cell phones were seized and sent to FSL, Srinagar for retrieval of data. The vehicle belonging to Ansarul Haq was also seized and CCTV footage of some of the places visited by accused Saiqa on the day

of occurrence was also collected. After investigation of the case offences under Section 302 RPC read with Section 7/27 Arms Act, Sections 13 and18 UAPA and Section 120-B RPC were found established against accused Ansarul Haq and Saiqa, who were taken into custody on 22.11.2018 and 05.12.2018 respectively.

4. From a perusal of the trial Court record it is revealed that initially the appellant had moved Principal Sessions Judge, Pulwama for grant of bail. It is pertinent to mention here that at the relevant time, the Principal Sessions Judge, Pulwama was also exercising the powers of Special Judge Designated under NIA Act, and these powers were later on conferred upon Additional District and Sessions Judge (TADA/POTA) Srinagar in terms of SRO 149 dated 01.03.2019. Learned Principal Sessions Judge, Pulwama vide his order dated 27.02.2019 admitted the appellant to interim bail on medical grounds till 25.03.2019. Vide his order dated 25.03.2019, the learned Sessions Judge after taking note of SRO 149 dated 01.03.2019 transferred the bail application to Additional District and Sessions Judge (TADA/POTA) Srinagar for further proceedings.

5. Learned Special Judge Designated under NIA Act, Srinagar [Additional District & Sessions Judge (TADA/POTA), Srinagar], after hearing the parties, finally disposed of the bail application of the appellant vide impugned order dated 28.09.2019, whereby the bail application of the appellant was dismissed. Learned Special Judge while doing so considered the merits of the case and came to the conclusion that taking into consideration the nature and gravity of the offence, the larger interest of the

State coupled with security of the State, the accused is not entitled to concession of bail. The learned Special Judge also came to the conclusion that treatment for the ailment, with which the accused is suffering, can be given to her while being in custody and for that purpose it is not necessary to release her on bail. It is this order, which is under challenge before us.

6. The main grounds that have been urged for setting aside of the impugned order and for grant of bail to the appellant are that the learned Special Judge has rejected the bail application without any justifiable reason, that the bail of the appellant has been cancelled by the learned trial Court without following the principles governing the cancellation of bail and that the learned trial Judge has rejected the bail application by presuming the accused as guilty. The other limb of the argument of learned counsel for the appellant is that the medical condition of the appellant is such that she deserves the concession of bail and that the learned Special Judge has, without assigning any reason and without there being any change in the medical condition of the appellant, withdrawn the concession of bail in her favour. It is also contended that during the custody, the accused has developed a number of ailments in jail and it has become very difficult to manage her while being in custody as she needs continuous medical treatment outside the jail. It has further been contended by learned counsel for the appellant that the Government of Jammu and Kashmir vide order No. 100-Home of 2020 dated 02.04.2020 has issued guidelines for grant of special parole in favour of certain categories of prisoners which includes prisoners suffering from any illness. According to the learned counsel, the case of the appellant deserves to be examined in the light of the said guidelines. In the end, the appellant has

prayed that the instant appeal be allowed and the impugned order passed by the learned Special Judge be set aside and the appellant be released on bail.

7. The Respondent-State has filed objections, stating therein that the accused lady is involved actively in commission of gruesome murder of a young and promising police officer in conspiracy with other co-accused and that there is enough material on record which exhibits her complicity in the commission of the crime. It has been further contended that the accused is being regularly treated by the Doctors and there is no such emergency which calls for her release on bail on medical grounds. In the end, it has been contended that the appeal as well as bail application do not disclose any such ground much less a convincing one for enlarging the accused on bail.

8. We have heard learned counsel for the parties and perused the grounds of appeal, the bail application, the record of the trial Court and the impugned order.

9. There are two aspects of the instant matter. One is pertaining to the merits of the case and the other is pertaining to the health condition of the appellant/accused. So far as merits of the case are concerned, the learned Special Judge has, vide the impugned order, come to the conclusion that there are reasonable grounds to believe that the accused is prima facie involved in the commission of the offences which includes offence under Section 302 of RPC and other heinous offences under the provisions of Unlawful Activities Prevention Act, 1967. Para 13 of the impugned order is relevant in this regard and the same is reproduced herein below: -

> *"13. In the present case taking into consideration the nature and gravity of offence and the larger interests of the state and security of the state, the accused is not entitled to bail, as from the statements of the witnesses of the prosecution recorded during the course of investigation by the I.O under section 161 Cr.P.C there are reasonable grounds to believe the Prima facie involvement of the accused/applicant herein for the commission of aforesaid offences under ULA(P) Act 1967. Because if the accused is enlarged on bail, there are chances of tempering with the witnesses of the prosecution and no witness will come against him because of fear and influence of accused in the society. The embargo contained under section 43(D) proviso 5 is attracted in the present and the accused/applicant herein does not deserve the latitude of bail at this stage as the investigation is still under process."*

10. Before we proceed to return a finding on the legality of the impugned order and the observations of the learned trial Court as quoted above, it will be profitable to examine the legal position on the subject.

Section 437 of Cr.P.C. provides the procedure for grant of bail in case of non-bailable offences. Sub-section (1) of Section 437 Cr.P.C being relevant to the context is reproduced as under:

> *"(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but—*
>
> *(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;*
>
> *(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence:*

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court."

From a bare perusal of clause (i) of Sub-section (1) of Section 437 Cr.P.C. as quoted above, it becomes clear that a person cannot be released on bail if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. Besides this, Hon'ble Apex Court and various High Courts of the Country including this Court have, vide their various pronouncements, evolved certain legal principles that need to be taken into consideration at the time of grant or refusal of bail to an accused. The Hon'ble Supreme Court has in the case of **"National Investigation Agency vs. Zahoor Ahmad Shah Watali"** reported as ***(2019) 5 SCC 1***, restated the settled legal position and held that that the following matters are required to be considered for deciding an application for bail:-

"(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."

11. In the instant case the accused is alleged to be involved in not only offence under Section 302 RPC which carries punishment of death or imprisonment for life, but she is also alleged to have committed offences under Section 13 and 18 of the Unlawful Activities Prevention Act, 1967. Therefore, not only the provisions contained in clause (i) of the Sub-section (1) of Section 437 of Cr.P.C., but the provisions contained in Section 43D of the 1967 Act are also attracted to this case for the reason that Section 18 of the Act falls under chapter IV of the UAPA. Sub-section (5), (6) and (7) of Section 43D of the Act are relevant to the issue and the same read as under:

"43D. Modified application of certain provisions of the Code:-

(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

(7) Notwithstanding anything contained in sub-sections (5) and (6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorisedly or

illegally except in very exceptional circumstances and for reasons to be recorded in writing."

While interpreting the afore quoted provisions, the Hon'ble Supreme Court has, in Zahoor Ahmad Shah Watali's case (Supra), observed as under:-

"By virtue of the proviso to subsection (5), it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusation against the accused is prima facie true or otherwise. Our attention was invited to the decisions of this Court, which has had an occasion to deal with similar special provisions in TADA and MCOCA. The principle underlying those decisions may have some bearing while considering the prayer for bail in relation to offences under the 1967 Act as well. Notably, under the special enactments such as TADA, MCOCA and the Narcotic Drugs and Psychotropic Substances Act, 1985, the Court is required to record its opinion that there are reasonable grounds for believing that the accused is "not guilty" of the alleged offence. There is degree of difference between the satisfaction to be recorded by the Court that there are reasonable grounds for believing that the accused is "not guilty" of such offence and the satisfaction to be recorded for the purposes of the 1967 Act that there are reasonable grounds for believing that the accusation against such person is "prima facie" true. By its very nature, the expression "prima facie true" would mean that the materials/evidence collated by the Investigating Agency in reference to the accusation against the concerned accused in the first information report, must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows the complicity of such accused in the commission of the stated offence. It must be good and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted. In one sense, the degree of satisfaction is lighter when the Court has to opine that the accusation is "prima facie true", as compared to the opinion of accused "not guilty" of such offence as required under the other special enactments. In any case, the degree of satisfaction to be recorded by the Court for opining that there are reasonable grounds for believing that the accusation against the accused is prima facie true,is lighter than the degree of satisfaction to be recorded for considering a discharge application or framing of charges in relation to offences under the 1967 Act."

The Court further went on to explain the scope of discussion, that a Court is expected to undertake at this stage, in the following words:-

> *"A priori, the exercise to be undertaken by the Court at this stage - of giving reasons for grant or non-grant of bail - is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage. The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the stated offence or* otherwise.*"*

12. In view of the aforementioned position of law, the appellant/accused for making out a case for grant of bail on merits has to show that the material attached to the charge sheet do not make out reasonable grounds for believing that the accusation against her is prima facie true and that there do not appear reasonable grounds for believing that she has been guilty of an offence punishable with death or imprisonment for life, i.e., offence under Section 302 RPC.

13. In the above backdrop, let us analyse the charge-sheet, particularly the statements under Section 161 Cr.P.C., recorded by the Police during investigation of the case. From a perusal of the same, it appears that the accused/appellant was quite friendly with accused Ansarul Haq as well as with deceased Sub-Inspector Imtiyaz Ahmad. There is material on record to show that on the day of occurrence the accused/appellant met the deceased at Srinagar and this meeting was arranged by her at the instance of Ansarul Haq. The material in hand further goes on to show that she accompanied the deceased in a vehicle and led him to a place from where the deceased was shifted to another vehicle in which the militants were travelling, whereafter the accused/appellant was dropped by accused Ansarul Haq at Pulwama. It is

further revealed that in the same evening, the photographs of dead body of the deceased Sub-Inspector were sent by accused Ansarul Haq to the appellant/accused on her mobile phone. There is also material on record to show that the accused/appellant was in constant contact with accused Ansarul Haq while she was travelling with the deceased in his vehicle. All these circumstances which are supported by the material on record go on to show that the accused/appellant was deeply involved in the conspiracy to eliminate the deceased police officer.

14. After having analyzed the charge sheet and the documents attached thereto, we find ourselves in agreement with the findings and the conclusion secured by the learned Special Judge in the impugned order. In our opinion, taking into account the report made under Section 173 Cr.P.C. and the accompanying documents/ material, there are reasonable grounds to believe that the accusations made against the appellant are *prima facie* true and as such, the appellant has failed to make out a case for grant of bail in her favour.

15. The other contention raised by learned counsel for the appellant is that the health condition of the appellant/accused is such that she needs constant medical care, which is not possible in custody and as such she deserves to be released on bail on health grounds. While learned Principal Sessions Judge, Pulwama has in his order dated 27.02.2019, after taking note of the Medical Report dated 19.02.2019 of Senior Medical Officer, Central Jail, Srinagar, concluded that in order to provide medical treatment to the accused, it will be in the interest of justice to release her on interim bail, but

learned Special Judge, Srinagar vide the impugned order has concluded that treatment of the ailment with which the accused is suffering can be given to her in custody also and for that purpose it is not necessary to release her on bail.

16. As per Medical Report dated 19.02.2019 of the Senior Medical Officer, Central Jail, Srinagar, the accused/appellant has symptoms of aggressiveness and agitative behaviour and she has aggressive signs and symptoms which include self-harm, aggressive outburst, tries to strangulate herself, bleeding through eyes. It appears that thereafter the accused/appellant has been subjected to medical examination by the Medical Board and the Board has, vide its certificate dated 26.04.2019 opined that the patient has cluster B traits, low stress tolerance and emotional constriction.

17. There is no material on record to show that the accused/appellant is suffering from such an ailment which cannot be treated and managed in the Police Hospital. In fact, the respondents have categorically stated in their objections that the accused is being regularly treated by the Doctor and in case of any emergency, the health of the accused can be better taken care of by the jail authorities, rather than at the native place of the accused, keeping in view the prevailing situation in the country. It appears that the accused/appellant is being provided necessary medical attention and treatment by the jail authorities and as and when any emergency arises she can be given medical treatment at SKIMS or any other Government hospital.

18. After scanning the record, we have come across a very interesting feature regarding the ailment of the accused/appellant. As per the

record, the appellant/accused was arrested on 05.12.2018 and thereafter released on interim bail on 27.02.2019. Pursuant to the impugned order dated 28.09.2019, the appellant/accused was again taken into custody. Thus, between 27.02.2019 to 28.09.2019, the appellant/accused was on interim bail. The medical record placed on record by the appellant pertains to the period when she was in custody, but there is no medical record pertaining to the period when she was on interim bail. From this it may be inferred that the appellant perhaps does not need any medical treatment when she is out of jail, but feels the need for the same as soon as she is sent to custody. This raises a question mark regarding the seriousness of the ailment of the appellant/accused.

19. When the State (as in the present case) is ready to provide all the necessary treatment which the accused needs by keeping her in custody, the Court cannot allow the accused to go on bail on the ground of her sickness, particularly when there is nothing on record to show that there is any imminent danger to the life of the accused/appellant or that she cannot be given the requisite treatment while in custody. Therefore, learned trial Court has rightly declined the prayer of the appellant/accused for grant of bail on health grounds.

20. It has been vehemently argued by learned counsel for the appellant that by the impugned order learned Special Judge has cancelled the bail of appellant/accused without following the principles laid down for cancellation of bail. This argument of the learned counsel is misconceived for the reason that it is not a case where concession of bail granted to the

appellant/accused by the learned Principal Sessions Judge, Pulwama was cancelled by the learned Special Judge, Srinagar, but it is a case where the interim bail extended in favour of the appellant/accused was withdrawn at the time of final disposal of the bail application by the successor Court. In the instant case the Principal Sessions Judge, Pulwama had admitted the appellant/accused to interim bail pending the disposal of the bail application.

21. Ordinarily, bail application after its presentation, is listed after a few days, so that the Court gets an opportunity to look into the case diary and other material and till then, if the applicant is not admitted to interim bail, he has to remain in custody. The Court in such cases may exercise its discretionary powers to grant interim bail pending the regular bail application is heard and decided. This is what has been done by the Court of Principal Sessions Judge, Pulwama and thereafter, the successor Court, i.e., the Court of Special Designated Judge, Srinagar has decided the bail application after hearing the parties and after going through the material on record. So, it is not a case of cancellation of bail, but it is a case where regular bail application was finally decided by the Court vide the impugned order and it found that the concession of interim bail deserves to be withdrawn on merits. The principles governing cancellation of bail, therefore, do not apply to the instant case.

22. Finally, it has been contended by learned counsel for the appellant/accused that the case of accused/appellant deserves to be examined by the Government in the light of SRO 149 dated 01.03.2019. A perusal of the said SRO reveals that it covers the cases of convicts and not of under trials.

Accused/appellant being an under trial, as such, a direction to the Government to consider her case in the light of the said SRO cannot be issued.

23. In view of the preceding analysis, there appears to be no merit and substance in the appeal as well as in the application for grant of bail. The same are accordingly dismissed.

24. The appellant/accused is, however, at liberty to approach the trial Court for grant of bail upon change of circumstances like examination of material witnesses. The respondents are directed to ensure that necessary medical care and treatment is given to the appellant/accused

25. Registry to send a copy of this order to the learned trial Court for information.

(SANJAY DHAR) (DHIRAJ SINGH THAKUR)
JUDGE JUDGE

Srinagar
29.05.2020
PawanAngotra

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