

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

(Through Virtual Mode)
From Srinagar Wing

Bail App 167/2025

Reserved on: 19.11.2025
Pronounced on: 24.11.2025
Uploaded on: 24.11.2025

*Whether the operative part or full
judgment is pronounced: Full*

Mohd Ashraf Wagay

. . . Petitioner/appellant(s)

Through: Mr Koshal Parihar, Advocate
Vs.

UT of J&K through SHO P/S Gangyal

. . . Respondent(s)

Through: Mr Pawan Dev Singh, Dy. AG

CORAM:

HON'BLE MR. JUSTICE SANJAY PARIHAR, JUDGE

ORDER

1. The petitioner, through the medium of instant application, is craving for enlargement on bail in case FIR no. 76/2019 u/s 8/21/22/29 of NDPS Act, whereunder he is facing trial, because he was arrested on 26.7.2019 and has remained in custody ever since, except for a brief period when he was granted bail on medical grounds. It is submitted that during the currency of the bail application, out of 10 listed witnesses, 4 have been examined, all of them are material witnesses, and their testimony revealed no incriminating material against him.

2. It is submitted that the trial court has declined to release him on bail on flimsy grounds, whereas the petitioner has been able to carve out a strong *prima facie* case for his enlargement on bail. Since the material witnesses regarding the seizure of contraband stand recorded before the trial court, it can be reasonably believed that the petitioner has not committed the alleged offence. The petitioner, it is submitted, has been charged with an offence involving possession of a commercial quantity of contraband namely codeine phosphate (P-Coff-T), and a total of 1160 bottles, each containing 100 ml of manufactured drug, are alleged to have been seized by the respondent, and from the perusal of the statement of witnesses, the petitioner is found to be innocent, and given the material available, there is no likelihood of his conviction.
3. The respondents have chosen not to file any response; however, the ld. Deputy Advocate General argued that the petitioner has been found in possession of commercial quantity of contraband to which Sec. 37 of NDPS Act enacts a legal bar on granting bail; whereas the petitioner earlier had obtained bail on health grounds, and from the order of the trial court it is manifestly clear that the petitioner jumped the concession of bail thereby avoided the process of trial. It is further submitted that since the petitioner is himself responsible for protracting the trial, he cannot now claim that he is entitled to a speedy trial, and there is no fault on the part of the prosecution in delaying the trial. It is argued that there is a presumption against the

petitioner for having consciously possessed the commercial quantity of the narcotic substance, which possession has been reinforced from the testimony of the prosecution witnesses who have been examined so far and at the stage of grant or refusal of bail, the merits of the prosecution case are not to be touched. It is stated that what the petitioner is seeking is an appreciation of evidence at the stage of bail, which cannot be gone into, as that may prejudice the case of either of the parties.

4. In terms of the record of the trial court, it is discernible that it was on 26.7.2019 that a police party of P/S Gangyal headed by ASI Amir Hussain, who was on *Naka* duty at Kunjwani Jammu and was undertaking checking of vehicles for security reasons, a truck bearing no. JK22B1405 came from the Bari Brahmana side, and the said vehicle was signalled to stop. Still, the driver of the truck tried to flee by crossing the Naka point; however, with the efforts of the police, the truck was intercepted. The driver was apprehended, who disclosed his name as Mohd Iqbal, accused no. 1 in the challan, whereas the petitioner was found in the adjoining seat. Upon checking of the vehicle, one plastic bag containing intoxicant drug bottles “cough syrup codeine phosphate (P-Coff-T)” of 100 ml each was found underneath driver's seat and from the toolbox of the truck three more plastic bags containing similar manufactured drugs too were recovered, and in total 1160 bottles of narcotic substance of cough syrup codeine phosphate (P-Coff-T) were recovered. This led to the registration of FIR. It is also borne out from the record that

both the petitioners were charged sheeted on 17-10-2019 who denied the charges thus were put to trial and that the petitioner applied for short-term bail on account of surgery of his wife and was given concession of bail which was extended from time to time but since the petitioner failed to surrender before the court and jumped over the bail, as a result his bail was forfeited and contempt proceedings were drawn against SSP Shopian for not being able to bring the petitioner to justice, so with effect from 8.11.2021 till 3.7.2024 the petitioner is alleged to have absconded and subsequently surrendered to the custody and filed an application for bail before the trial court which was rejected in terms of order dated 30-05-2025, prompting him to file the instant bail application before this court.

5. Ld. counsel for the petitioner while reiterating the grounds urged for grant of bail, laid stress that there is seizure of 1160 bottles of manufactured drug, but as per the forensic report only two bottles of said manufactured drug have been sent for expert examination, so even if we take the two bottles as containing the narcotic drug, the fact that neither the batch no. of the manufactured drug nor there being any evidence that the remaining bottles were also part of the same consignment, it cannot be said that section 37 of the NDPS Act can be invited. Relying upon the judgment of a coordinate bench passed in the case titled “**Kamran Gull vs. UT of J&K (Bail App 120/2024)**” it was urged that there is no opinion of a forensic expert regarding the other bottles and there are reasonable grounds

for believing that the petitioner is not guilty, thus entitled to bail. Further relying upon **2023 SCC Online SC 352**, it is urged that since the petitioner had already spent more than three years in custody, his prolonged incarceration entitles him to be released on bail.

6. On the other hand, the respondents have placed reliance on **NCB v. Kashif, Criminal Appeal no. 5544 of 2024(SC)** to bring home the point that while considering the bail application, the court must bear in mind the provisions of Sec. 37 of the NDPS Act, which are mandatory in nature and that the recording of finding as mandated in section 37 is a *sine quo non* for grant of bail. Merely because there have been some procedural lapses regarding compliance with section 52A or its delayed compliance, that would be a mere procedural irregularity which would neither entitle the petitioner to be released on bail nor would it vitiate the trial on that ground alone.
7. I have given thoughtful consideration to the submissions made at the bar and perused the record.
8. The jurisdiction to grant bail must be exercised on the touchstone of well-settled principles and with due regard to the nature and gravity of the accusations. In the present case, the petitioner was found travelling in the vehicle from which 1160 bottles of manufactured drugs were recovered. He is the real brother of the co-accused, and at the time of recovery, he was present inside the vehicle.

According to the prosecution, one bag was recovered from beneath the driver's seat and three bags from the toolbox, all of which contained the contraband. The forensic report confirms that the seized bottles contain codeine phosphate, a narcotic substance whose possession is prohibited under Section 8 of the NDPS Act unless duly permitted. Being a manufactured drug, its possession and movement are regulated under the Drugs and Cosmetics Act. The petitioner has offered no plausible explanation as to how the consignment came to be present in the vehicle. Section 37 of the NDPS Act mandates that before bail can be granted in cases involving commercial quantity, the accused must satisfy the "twin conditions", that there are reasonable grounds for believing that he is not guilty of the alleged offences and that he is not likely to commit any offence while on bail. In *State of M.P. v. Kajad*, (2001) 7 SCC 673, the Supreme Court held that "negation of bail is the rule and its grant an exception" in cases punishable with five years or more. The Court further held that a liberal approach to bail under the NDPS Act is impermissible.

9. Against this backdrop, the present case clearly attracts the rigour of Section 37, as the recovered contraband indisputably pertains to a commercial quantity. The petitioner argues that only two bottles from the total of 1160 were taken as samples for forensic analysis. Though it is correct that the sampling and forensic reports indicate that only two bottles of 100 ml each were examined, and that the seizure memo does not mention batch or lot numbers, this omission

alone cannot entitle the petitioner to bail. In *Kamran Gull v. UT of J&K*, the coordinate Bench held that in the absence of batch numbers, a sample cannot automatically be treated as representative of the entire lot. However, the facts of that case are distinct, as the recovered bottles there pertained to no identifiable batch. Here, once the lot number is recorded in the re-sealing order, the omission in the seizure memo does not prima facie establish that the samples were not from the same batch. Further, as held in *NCB v. Kashif, Criminal Appeal No. 5544 of 2024 (decided on 20.12.2024-SC)*, procedural irregularities in search and seizure, by themselves, do not render the entire evidence inadmissible, particularly when the NDPS Act must be interpreted strictly, keeping in view the grave societal impact of narcotics offences.

10. Thus, reliance on the *Kamran Gull case “supra”* does not assist the petitioner, the factual matrix being distinguishable. The petitioner next contends that the trial has been pending since 2019 and, given its slow pace, there is little prospect of its early conclusion, thereby violating his right to a speedy trial. Reliance is placed on *Umar Riyaz v. Union Territory of J&K, Bail Application No. 167/2024*, where prolonged incarceration was considered a ground for bail. However, in *Umar Riyaz*, the accused had been unable to surrender due to the Covid-19 lockdown and belonged to the economically weaker section, which impacted his livelihood; such factors are absent here.

11. The petitioner also relies on *Mohd. Muslim @ Hussain v. State (NCT of Delhi)*, 2023 SCC On Line SC 352, and on *Supreme Court Legal Aid Committee v. Union of India*, (1994) 6 SCC 731.

In those cases, the Supreme Court emphasized that unduly prolonged incarceration without likelihood of early conclusion of trial violates Article 21, and that continued detention beyond half of the maximum prescribed sentence would be impermissible. Subsequent decisions, including *K.A. Najeeb* (2021) 3 SCC 713, and *Vijay Madanlal Choudhary v. Union of India*, 2022 6 SCR 382, have reiterated that constitutional courts retain the power to grant bail where fundamental rights stand compromised, notwithstanding statutory restrictions, provided the accused has undergone substantial incarceration and bears no responsibility for the delay. More recently, *Satender Kumar Antil v. CBI* 2022-10-SCC 51, reaffirmed that Section 436-A CrPC applies even to special statutes in the absence of contrary provisions, and that systemic delays must be factored in.

12. However, while the right to speedy trial is an essential facet of Article 21, the legislative embargo under Section 37 of the NDPS Act must also be respected unless the conditions for lifting the embargo are demonstrably satisfied. Furthermore, while the court acknowledges that stringent offences demand quicker adjudication, systemic factors such as trial court workload, number of witnesses, and proliferation of narcotics cases cannot be ignored. The Special Judge, NDPS, Jammu (the trial court herein) is presently burdened

with around 2000 cases, more than 700 of which are over five years old. In recognition of such realities, Section 436-A CrPC and its counterpart in the BNSS Sec. 479, provide relief where an under-trial has undergone one-half or one-third of the prescribed sentence, as the case may be.

13. Examining the petitioner's case in this legal framework, it emerges that after his arrest on 26.07.2019 and filing of the charge-sheet on 17.10.2019, he was granted interim bail. Still, from 08.11.2021 to 03.07.2024, he absconded during this period, necessitating coercive measures and compelling the trial court to declare him an absconder. He surrendered only on 03.07.2024. His conduct, therefore, directly caused a delay in the trial and infringed upon the co-accused's right to timely adjudication. Thus, unlike *Umar Riyaz (supra)*, the delay here is attributable entirely to the petitioner, disentitling him from claiming parity. Nor has his plea of false implication been dispelled from the evidence so far recorded in the trial.
14. Given that he faces accusations of an offence of possession involving a commercial quantity, punishable with a minimum of 10 years and up to 20 years of sentence, bail cannot be granted unless he has undergone at least one-half of the potential sentence or establishes a strong prima facie case of false implication or lack of conscious possession. The petitioner satisfies neither requirement. His prolonged abscondence not only impeded the trial but also reflects a propensity to evade judicial process. Unlike in *Mohd.*

Muslim, supra, where the accused had spent over seven years in custody with a sluggish trial, the petitioner's incarceration attributable to the State is limited, and the delay is self-created.

15. In view of the above discussion, the petitioner has failed to make out a case for the grant of bail, and his bail application is accordingly **rejected**. Disposed of as such, and a copy of the order be notified to the trial court.

(Sanjay Parihar)
Judge

SRINAGAR
24.11.2025

N Ahmad

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