HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CrlA(D)No.25/2022

Reserved on 26.05.2023
Pronounced on 20.07.2023

Zahoor Ahmad Wani.

….. Appellant/Petitioner(s)

Through: Ms. Asma Rashid, Advocate.

V/s

Union Territory of JK & Ors.

…..Respondent(s)

Through: Mr. Alla-u-din Ganie, AAG.

CORAM:

HON'BLE MR. JUSTICE ATUL SREEDHARAN, JUDGE
HON'BLE MR. JUSTICE MOHAN LAL, JUDGE

JUDGMENT

Atul Sreedharan, J.

Brief Facts:

1. The present appeal has been filed by the appellant for the grant of bail. The impugned order was passed in an application moved by him before the Court of the Ld. Special Judge.

2. The learned counsel for the appellant has argued that there has been a denial of speedy trial of the appellant. She further submits that out of five accused, four have already been granted default bail under Section 167(2) of Cr.PC.

3. Learned counsel for the appellant has taken us through the record of the proceedings/daily order sheets of the learned Trial Court from 07.07.2021 till 16.05.2023. The case was listed on twenty-eight occasions before the Trial Court after framing of charge and preparation of the trial programme. During this period, out of thirty-four prosecution witnesses only six witnesses have been examined till date. On all the occasions mentioned hereinabove, the prosecution was unable to produce witnesses, besides the six already mentioned hereinabove. On two occasions i.e. on 24.12.2021 and 22.11.2022 the

case was adjourned on account of non-availability of presiding officer for which the prosecution cannot be held liable.

4. Learned counsel for the UT on the other hand submits that the present case is not a run of the mill case and relates to an attempt to commit an act of terrorism against the State and therefore assumes seriousness. In order to buttress his arguments, he has referred to Section 24 of the Unlawful Activities Prevention Act, 1967(hereinafter referred to as The Act of 1967), which provides for witness protection. He further submits that due seriousness must be accorded to the special nature of the case before the Special Judge, and in view of the provisions of Section 44 of the Act of 1967, the argument of a delay in trial is not available to the appellant as the prosecution has to be given a sufficient leeway to produce its witnesses. He has also taken an objection with regard to the maintainability of the appeal itself in the light of the Section 21(4) of the Act of 2008 of the NIA Act and was submitting that Section 21(4) of the Act of 2008 does not provide for an appeal from an interlocutory order and as bail is an interlocutory order, this appeal is not maintainable.

5. Learned counsel appearing for the appellant has drawn attention of this court to Section 21(4) of the Act of 2008, which provides for an appeal from an order granting or rejecting the bail. Thus,the learned counsel appearing for the appellant submits that the argument of the learned counsel for the respondent as regards maintainability is misplaced and deserves to be rejected.

6. On merits, the Ld. Counsel for the UT has argued that in the course of investigation, four cartridges, one pistol, one magazine (as in a device in which cartridges are stored in a firearm) and a mobile phone was recovered from the appellant. It was also submitted that the appellant and co-accused persons were preparing for an Act of terrorism. However, when asked by this Court to place some prima facie evidence in order to satisfy the allegation that the appellant and the others were preparing for an act of terrorism, the learned counsel for the State was unable to place any prima facie material before us.

7. Heard learned counsels for the parties and perused the documents filed along with the appeal. The objection of maintainability raised by the Ld. Counsel for the UT is rejected in view of s. 21(4) of theAct of 2008.

8. It is relevant to mention here that the Ld. Counsel for the applicant has pressed for bail on the grounds of delay in trial. Therefore, this Court has to consider is if there has been delay in trial of the appellant which cannot be attributed to the conduct of the appellant, resulting in the violation of his right under article 21 of the Constitution.

9. Undisputedly, and as revealed by the Trial Court record, the case against the appellant was listed before the Ld. Trial Court on twenty-eight occasions between 07.07.21 and 16.05.23 after the framing of charge and out of thirty-four prosecution witnesses, only six have been examined in two years which reveals an extremely tardy progress of the trial. The Trial Court has never taken any serious measure to secure the presence of the prosecution witnesses and instead has mechanically been issuing summons repeatedly to the witnesses without recording in the order sheet the reasons for the absence of the witnesses on previous occasions. In fact, the approach of the Ld. Trial Court reveals a cavalier and routine attitude on its part. Never has the Ld. Trial Court resorted to coercive procedures to compel the attendance of the witnesses and neither has it ever sought reasons from the prosecution for their failure to produce their witnesses. During this period, the Trial Court record does not reveal that the appellant had in anyway been responsible for the delay. The delay has occasioned solely on account of the inability of the prosecution to produce its witnesses.

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10. The Hon'ble Supreme Court has repeatedly articulated the position of law that a speedy trial of an accused is an integral and inalienable right of an accused, the violation of which directly impinges the right of the accused under Article 21 of the Constitution. It has been held by the Supreme Court that the denial of speedy trial itself constitutes denial of justice and that, speedy trial, though specifically not laid

down as a fundamental right is inherent in the amplitude of Article 21[1].

11. More recently, a three-judge bench of the Hon'ble Supreme Court while dealing with an appeal by the Union of India in a case where the Hon'ble High Court of Kerala had granted bail on the grounds of delay in trial to an accused charged with offences under the Unlawful Activities (Prevention) Act, 1967 and notwithstanding the bar of s. 43-D(5) of the Act of 1967, held that the statutory bar in the Act of 1967 notwithstanding, the Constitutional courts is not precluded from granting bail on the grounds of delay in trial. They further held that the right to bail due delay in trial can be harmonised with the statutory bar to grant bail, where the Court in the initial stage of the trial can appreciate if on merits the accused is entitled to bail in the light of the allegations against him and conditions of exception, provided in a statutory bar to grant bail being fulfilled. However, even if the accused is not entitled to bail on merits and in view of the statutory bar to be released on bail pending trial, the same shall not be an impediment where bail on account of delay in the conclusion of trial is to be considered in the light of Article 21 of the Constitution[2].

12. How much delay triggers the right of the accused to be enlarged on bail depends on the facts and circumstances of each case and there can be no indelible proposition of law on that count. However, conditions that may be factored by the Trial Court while assessing delay in trial and whether there is an accrual of a right to bail on the grounds of delay in trial are **(A)** the period of incarceration of the accused from the date of arrest till the filing of the chargesheet, **(B)** the delay in examining the witnesses for the prosecution, **(C)** the expeditious conduct or the lack of it on the part of the prosecution to produce its witnesses, **(D)** the conduct of the Court and its anxiety or its absence, in resorting to coercive measures to secure the presence of witnesses where the witnesses abstain despite service of process on them and,**(E)** whether the conduct of the accused reveals that he is responsible for the delay in trial.

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[1]**Hussainara Khatoon and others (I) Vs. Home Secretary, State of Bihar –(1980) 1 SCC 81 – para 5**
[2]**Union of India Vs. K.A. Najeeb – (2021) 3 SCC 713 – para 17**

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13. In the present case,the delay in trial can solely attributed to the prosecution. The approach of the Ld. Trial Court added to the delay as it did not take any steps to expedite the stage of evidence. Under the circumstances, we are of the opinion that there has been a violation of the appellant's right under Article 21 of the Constitution on account of the delay in trial. **Resultantly, we direct that the appellant be enlarged on bail subject to a personal bond of rupees fifty thousand and one surety in the like amount. In addition to this, the appellant shall not make any attempt to influence the witnesses of the case, directly or indirectly, and shall attend the proceedings before the Ld. Trial Court regularly personally, unless so exempted by the Ld. Trial Court and his presence is recorded through his counsel.**

14. We further deem it appropriate to issue certain guidelines to the Trial Courts in the State to expedite the cases before them, with specific reference to the stage of prosecution evidence. The same are an enumerated below.

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(A) After framing of charges against the accused, summons be issued to the eyewitnesses or, if it is a case where there are no eyewitnesses, then to those witnesses who are most material to prove the case of the prosecution,

(B) If summons is returned unserved for whatever reason, instead of wasting further time by resorting to the same process time and again, the next summons must be served through the office of the Superintendent of Police. If those summonses are also not served, the report of the police must reflect the reason why they have not been served,

(C) If the reasons given by the police in the report returning the summons unserved, reflect that the witnesses are unreachable/untraceable and that service cannot be effected on them on account of their non-availability, then the trial court must skip those witnesses and proceed to the next set of witnesses by issuing summons to them. The Trial Court must realise that the case of the prosecution is actually the case of the

Union Territory through the police, against the accused persons. It is the duty of the police to produce their witnesses before the trial Court. By skipping a set of witnesses, the court is not closing their evidence but merely keeping them in abeyance, to be recorded as and when they are found by the police or appear on their own before the Trial Court at any stage before the conclusion of the trial. In such a case, skipping of such witnesses would necessarily need the consent of Counsel for the defence and if opposed by the defence Counsel, for whatever strategic reasons the defence may have, then the court may issue fresh summons to the same set of witnesses. However, in such a situation, the delay in conduct of trial would then be on account of the conduct of the defence for which accused cannot claim violation of the right to a speedy trial at a later point of time,

(D) If material witnesses cannot be secured without delay, the court must explore the possibility of examining formal witnesses and expert witnesses if any and conclude the same. Thereafter, notwithstanding the fact that there remain witnesses for the prosecution who have not been examined on account of the inability of the police to produce them for reasons reflected in the report of the police, the court must close the evidence of the prosecution and proceed to the next stage of the case. However, if any of the prosecution witnesses appears at a subsequent stage, before passing of the judgment by the trial Court, the court shall be free to exercise its jurisdiction under section 311 Cr.P.C. and record their statements in the interest of justice after considering objections of the defence, if any,

(E) The police on its part, must secure the mobile number and E-mails ids of all witnesses, if they possess the same. This must be retained by them in the inner case diary to be used for transmitting the summons or messaging the witness regarding their date and time of appearance before the Trial Court to testify. The police must take care that the aforementioned details are NOT disclosed in the charge-sheet in order to ensure

that the access of the accused to the witnesses is minimised to the greatest extent possible,

(F) The Trial Court must also resort to the option of delivering summons through SMS and E-mail in addition to the conventional process, wherever possible. The purpose of the endeavour must be to secure the presence of the witnesses in the shortest possible time to complete the trial. The Courts must bear in mind that as long as the trial is in progress, presumption is always of innocence and not of guilt.

(G) It shall not be open to the police to put forward reasons of law-and-order work or any other of their functions as excuses for not complying with the order of the Trial Court to secure the presence of their witness. Such non-compliance on the part of the police may constitute contempt or the Trial Court's order, and the Trial Court shall be at liberty to initiate such proceedings against the police if it is not satisfied with the reply of the police for not complying with the order passed by it.

(Mohan Lal)
Judge

(Atul Sreedharan)
Judge

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<u>SRINAGAR:</u>
20.07.2023
"Shaista"

Whether approved for reporting? Yes/No