

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU
(through virtual mode)**

Reserved on: 26.11.2020
Pronounced on: 02.12.2020

Bail App No.152/2020
CrIM Nos.878, 1412 & 1413 of
2020

Pankaj Sharma

.....Petitioner(s)

Through :- Mr. K.S.Johal, Sr. Advocate with
Mr. Karman Singh Johal, Advocate

V/s

Union Territory of J&K and another

.....Respondent(s)

Through :- Mr. Aseem Sawhney, AAG

Coram: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1. Through the medium of instant petition the petitioner is seeking bail in FIR No.78/2020 for offences under Section 121 IPC and Section 3 of Enemy Agents Ordinance Svt. 2005.

2. It is the case of the petitioner that he has been arrested on 04.03.2020 at Police Nakka, Sabzi Mandi, Main Gate, Narwal, Jammu in the aforesaid FIR. It is further averred that after completion of the investigation of the case, challan has been filed before the Court of Principal Sessions Judge, Jammu on 02.06.2020. It is contended that a perusal of the challan reveals that a false, frivolous and vexatious case has been lodged against the petitioner and

the offences for which he has been booked are not made out from a plain reading of the challan.

3. It is further averred that the petitioner had moved an application for grant of bail before the learned trial Court but the same was rejected vide order dated 14.08.2020. According to the petitioner, the learned trial Court, while rejecting the bail application of the petitioner, has not appreciated the correct position of law and has not considered the facts and circumstances in right perspective. It is also averred that antecedents of petitioner are clean and he has been roped in a false case. Lastly, it has been averred that petitioner will abide by the conditions of bail, in case he is enlarged on bail.

4. The respondents have resisted the bail application of the petitioner by filing reply thereto. In the reply, the respondents have contended that the petitioner has committed a very heinous offence, which is against the society at large and as such, he does not deserve the concession of bail. It is further contended that petitioner cannot be granted bail both on facts as well as on law.

5. Giving details of the facts of the case, the respondents have submitted that on 04.03.2020, an information was received at Police Post, Narwal, Jammu that the petitioner is sending photographs of vital installations of Indian Territory to ISI of Pakistan through Facebook Messenger and in lieu thereof he is receiving money, thereby posing danger to the security, integrity and sovereignty of the Country. On the basis of this information, the subject FIR came to be registered and the petitioner was taken into custody.

6. During investigation of the case, it was disclosed by the petitioner that one of his neighbour introduced him to one Capt. Jyoti Sharma, whom he added as Facebook friend. The petitioner further disclosed that said Capt. Jyoti

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Sharma while chatting with him told him that she is on a peace mission at Sudan. Capt. Jyoti Sharma introduced the petitioner to her senior Maj. Amit Sharma, who offered a part time job of sending pictures of vital installations and developmental projects going on in India and in return thereof he was offered money. Accordingly, the petitioner sent pictures of Tarore Bridge at National Highway, AIIMS construction site and information with regard to the distance of said places from Jammu Airport and in lieu thereof he received a sum of Rs.6,000/- towards first installment in his bank account maintained with the State Bank of India. Thereafter, petitioner kept on sending pictures and in return he was getting money.

7. The petitioner is stated to have sent photographs of Samba City, Bari Brahmana, Ujh Bridge, Vijaypur Market, Bahi Nallah, Bari Brahmana Railway Station, Ghagwal Bridge, Pargwal Nallah and besides this prior to the Balakote strike, petitioner is stated to have sent photographs of trains boarded with army personnel at Railway Station, Bari Brahmana. During investigation, 14 suspicious bank transactions were detected, out of which three transactions could not be traced. It was also revealed that the petitioner got money into bank account of his illiterate mother, namely, Neelam Sharma and one of his close friends, namely, Ashwani Kumar. The money is stated to have been received by the petitioner and his relatives/friends from Dubai, Maharashtra etc. The Facebook IDs of Capt. Jyoti Sharma and Major Amit Sharma were found to be fake. Thus, according to the respondents, offences under Section 121 IPC and Section 3 of the Enemy Agents Ordinance are made out against the petitioner.

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8. I have heard learned counsel for the parties and perused the record of the case including record of the main challan that has been filed before the trial Court.

9. It has been vehemently contended by the learned Senior Counsel, appearing for the petitioner, that there is no material on record to even remotely suggest that the petitioner has committed an offence of waging war against the government or that he has committed any offence within the meaning of Section 3 of Enemy Agents Ordinance. According to the learned Senior Counsel, mere taking of photographs of some installations and sending it to some persons stationed at Sudan would not amount to either hobnobbing with enemy agents or waging war against the government of India. It has been contended that there is no material on record to show that the petitioner had any link with Pakistani ISI or that he had any knowledge of the links between ISI and the persons to whom he was sending the photographs. Learned Senior Counsel has also contended that even if, it is assumed that the photographs were being sent by the petitioner to the persons linked with ISI, still then no offence is made out against him because the kind of photographs, which the petitioner is alleged to have sent, are already available on the internet. In support of his contentions, learned Senior Counsel has referred to the judgments of the Supreme Court rendered in the cases of **2019(5) SCC 1** titled **National Investigating Agency v. Zahoor Ahmad Shsh Watali**, **(2005) 5 SCC 294** titled **Ranjitsing Brahmajeetsingh Shurma v. State of Maharashtra and another**, **(2003) 5 SCC 461** titled **Nazir Khan and others v. State of Delhi** and **(2007) 1 JKJ 226** titled **Maqbool Hussain and others v. State of J&K and others**.

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10. Learned counsel for the respondents, on the other hand, has argued that the petitioner has knowingly indulged in activities which are prejudicial to the security of the State, inasmuch as he has not only passed on the photographs of vital installations to the enemy of the nation but he has also passed on photographs of troops movement to the enemy. The learned counsel has submitted that in order to book a person for the offence of waging war against the Country, it is not necessary that such person should actually acquire or use arms and ammunition against the armed forces of the country. Learned AAG has submitted that having regard to the gravity of offences alleged to have been committed by the petitioner, he does not deserve the concession of bail.

11. Section 437 of the Code of Criminal Procedure governs the matters relating to bail in cases of non-bailable offences, whereas Section 439 Cr.P.C. provides powers to the High Court or the Sessions Court to grant bail. In Section 437 Cr.P.C., the Legislature has imposed certain qualifications and conditions on the grant of bail by a Court other than a High Court or Court of Session, however, under Section 439 Cr.P.C., the power of the High Court or the Sessions Court to grant bail is wider. While discussing the powers under Sections 437 and 439 Cr.P.C., the Supreme Court in the case of **Gurcharan Singh v. State (1978) 1 SCC 118**, has observed as under:-

"24. Section 439(1) Cr. P.C. of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1), Cr. P.C. against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be

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approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1) Cr. P.C. of the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1), Cr. P.C. of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out."

In Mahipal v. Rajesh Kumar (2020) 2 SCC 118, the Supreme

Court has, while discussing the principles for grant of bail, observed as under:-

"12. The determination of whether a case is fit for the grant of bail involves the balancing of numerous factors, among which the nature of the offence, the severity of the punishment and a prima facie view of the involvement of the accused are important. No straitjacket formula exists for courts to assess an application for the grant or rejection of bail. At the stage of assessing whether a case is fit for the grant of bail, the court is not required to enter into a detailed analysis of the evidence on record to establish beyond reasonable doubt the commission of the crime by the accused. That is a matter for trial. However, the Court is

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required to examine whether there is a prima facie or reasonable ground to believe that the accused had committed the offence and on a balance of the considerations involved, the continued custody of the accused subserves the purpose of the criminal justice system. Where bail has been granted by a lower court, an appellate court must be slow to interfere and ought to be guided by the principles set out for the exercise of the power to set aside bail.

"14. The provision for an accused to be released on bail touches upon the liberty of an individual. It is for this reason that this Court does not ordinarily interfere with an order of the High Court granting bail. However, where the discretion of the High Court to grant bail has been exercised without the due application of mind or in contravention of the directions of this Court, such an order granting bail is liable to be set aside. The Court is required to factor, amongst other things, a prima facie view that the accused had committed the offence, the nature and gravity of the offence and the likelihood of the accused obstructing the proceedings of the trial in any manner or evading the course of justice. The provision for being released on bail draws an appropriate balance between public interest in the administration of justice and the protection of individual liberty pending adjudication of the case. However, the grant of bail is to be secured within the bounds of the law and in compliance with the conditions laid down by this Court. It is for this reason that a court must balance numerous factors that guide the exercise of the discretionary power to grant bail on a case-by-case basis. Inherent in this determination is whether, on an analysis of the record, it appears that there is a prima facie or reasonable cause to believe that the accused had committed

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the crime. It is not relevant at this stage for the court to examine in detail the evidence on record to come to a conclusive finding."

12. With the aforesaid legal position in mind, let us now advert to the facts of the instant case. The petitioner/accused is alleged to have committed offences punishable under Section 121 IPC and Section 3 of Enemy Agents Ordinance. So far as Section 121 is concerned, the same is punishable with death or imprisonment for life together with fine. So far as offence under Section 3 of the Enemy Agents Ordinance is concerned, the same is punishable with death or rigorous imprisonment for life or with rigorous imprisonment for a term which may extend up to 10 years together with fine.

13. Before analyzing the material on record in order to reach a conclusion whether there exist reasonable grounds for believing that petitioner has committed the offences for which he has been booked, it has to be borne in mind that at the time of considering the bail application, in-depth analysis of the material on record has to be avoided. Having said so, it is the allegation of the prosecution that the petitioner was sending photographs of vital installations located in Jammu & Kashmir as also the photographs of troops movement, particularly, prior to the Balakote operation through his Facebook Messenger to two persons with fake Facebook IDs. There is material on record to suggest that petitioner, his mother and his friend- Ashwani Kumar were receiving money in their bank accounts in exchange of these photographs. The Investigating Agency has seized the bank statements during investigation of the case to substantiate this allegation. There is material on record to suggest that initially petitioner did not know that he was acting at the behest of ISI of Pakistan but

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later on he did come to know about it and inspite of this, he continued to send messages and photographs to his masters and kept on deleting the same to avoid detection. So, it cannot be said that petitioner was a naive and on account of his ignorance or innocence he was sending these pictures to the persons from whom he was getting payments.

14. A perusal of the charge-sheet along with documents appended thereto, including the bank statements and the statement of witnesses recorded under Section 161 Cr.P.C., *prima facie*, shows that the accusations made against the petitioner are true. At this stage, we cannot discard the material produced by the Investigating Agency before the trial Court.

15. The next question that falls for consideration is whether the act of petitioner falls within the definition of 'waging war' against the Country or within the mischief of Section 3 of Enemy Agents Ordinance.

16. Learned Senior Counsel appearing for the petitioner has relied upon the explanation of expression "waging war" given by the Supreme Court in the case of **Nazir Khan** (supra) to contend that unless there is insurrection or force accompanying with insurrection, a person cannot be stated to have waged war against the government.

17. In the instant case, the petitioner is alleged to have hobnobbed with ISI of Pakistan and passed on photographs of vital installations and troops movement to them. It is an open secret that the Country, particularly, Union Territory of J&K is facing onslaught of terrorist activities from the neighbouring country, which is orchestrated by ISI of Pakistan. Therefore, providing of vital information and photographs to the intelligence agency of an

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enemy country, to my mind, is nothing but waging war against the country and it also falls squarely within the definition of offence punishable under Section 3 of Enemy Agents Ordinance.

18. There is yet another aspect of the matter. A perusal of the charge-sheet shows that the investigation in the case is not complete and only part of the investigation has been completed in consequence whereof, the charge-sheet has been laid against the petitioner before the trial Court. It is clearly stated in the charge-sheet that co-accused in this case, who belong to Dubai, Abu Dhabi and Maharashtra are yet to be arrested and interrogated. The Investigating Agency has submitted that after their arrest and interrogation, supplementary charge-sheet will be produced before the Court. Therefore, if petitioner is granted bail, at this stage, it is definitely going to hamper further investigation of the case and in fact it may derail further investigation of the case.

19. The material on record shows that the petitioner has connection with agents living in Dubai and Abu Dhabi and as such, the possibility of his fleeing from the course of justice cannot be ruled out.

20. For all the foregoing reasons, I do not find the instant case fit one for grant of bail at this stage.

21. This petition is, accordingly, dismissed.

(SANJAY DHAR)
JUDGE

Jammu
02.12.2020
Vinod

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