

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CJ Court

Reserved on:26.08.2021
Pronounced on:02.09.2021

CrlA(D) No.10/2021

PEERZADA MOHAMMAD WASEEM ... APPELLANT(S)

Through: Mr. N. A. Ronga, Advocate with
Mr. Umar Nazir Ronga, Advocate.

Vs.

UNION TERRITORY OF J&K ...RESPONDENT(S)

Through: Mr. B. A. Dar, Sr. AAG.

CORAM: HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

(JUDGMENT)

Sanjay Dhar, 'J'

1) Through the medium of instant appeal under Section 21(3) of the National Investigation Agency Act (hereinafter referred to as the NIA Act), appellant has challenged the order dated 12.05.2021 passed by learned Additional Sessions Judge, TADA/POTA (Special Judge Designated under NIA Act), Srinagar, whereby bail application of the appellant has been dismissed.

2) The facts giving rise to the filing of the instant appeal are that on 22.06.2017, while the holy festival of Shabe Qadar was being observed in Jamia Masjid, Nowhatta, the appellant and the co-accused raised inflammatory slogans against the Government of India and they caught

hold of deceased Mohammad Ayoub Pandit Dy. S. P. of 3rd Battalion Security, who had been deployed in the area to supervise the manpower for access control at Jamia Masjid on the occasion of Shabe Qadar. The deceased was beaten up, dragged and lynched to death by the mob, of which the appellant was a part. His pistol was also snatched and the dead body was dragged and left at Batagali Nowhatta. Police registered FIR No.51/2017 for offences under Section 302, 148, 149, 392, 341 RPC read with 13 of Unlawful Activities (Prevention) Act and investigation of the case was set into motion. After conducting investigation of the case, the challan was presented before the trial court against 20 accused. Out of these, 17 accused were arrested and produced before the trial court at the time of presentation of challan whereas one accused Sajad Ahmad Gilkar was killed in an encounter prior to presentation of the challan. Two more accused including appellant herein absconded and they could not be produced before the Court at the time of presentation of the challan.

3) In terms of order dated 12.12.2017, the learned trial court framed charges for the offences mentioned in the charge sheet against 17 accused who had been produced before it at the time of presentation of the challan. During pendency of the trial, the appellant was also arrested and produced before the trial court. Charges against him for offences under Section 302, 148, 392, 341 RPC read with Section 13 ULA(P) Act were framed by the trial court in terms of its order dated 16.05.2019. The appellant/accused pleaded not guilty and trial against him also commenced.

4) It appears that after recording of statements of some of the prosecution witnesses, the appellant/accused moved an application before the trial court for grant of bail on the ground that material prosecution witnesses to the extent of his case have turned hostile and, as such, he deserves to be enlarged on bail. The bail application came to be dismissed by the learned trial court vide its order dated 16.09.2020. The appellant preferred an appeal against the said order before this Court which was registered as CrIA(D) No.17/2020. Vide order dated 26.02.2021 passed by this Court, the order of learned trial court was set aside and the appellant was given liberty to move a fresh application before the trial court.

5) It appears that the appellant moved another application before the trial court on similar grounds as were projected by him in his earlier bail application and the same has been rejected by the learned trial court vide the impugned order dated 12.05.2021.

6) The primary ground on which the instant appeal has been filed by the appellant is that the witnesses who have deposed about his involvement during investigation of the case, have been examined by the trial court but they have turned hostile and that they have not supported case of the prosecution. It has been urged that even if the remaining prosecution witnesses support the prosecution case and make their statements in line with the statements made by these witnesses during the investigation of the case, still then appellant cannot be convicted. On these grounds, it is contended that the appellant/accused deserves to be enlarged on bail.

7) We have heard learned counsel for the parties and perused record of the case including the trial court record.

8) It has been contended by learned counsel for the appellant that the appellant was not named in the FIR but he has been falsely implicated later on and a supplementary challan against him was filed by the Investigating Officer. According to the learned counsel, the material witnesses cited in the supplementary challan who have deposed about the involvement of the appellant during investigation of the case have already been examined and they have turned hostile. The further submission of the learned counsel is that the appellant has made an application under Section 272 of the J&K Cr. P. C before the trial court stating therein that the appellant/accused admits whole of the remaining prosecution evidence but in spite of that, the learned trial court, has, without determining the *prima facie* involvement or otherwise of the appellant/accused on the basis of the evidence already led by the prosecution and the remaining evidence which has been recorded during investigation of the case, rejected the bail application.

9) The contention of learned counsel for the appellant that the appellant was impleaded as an accused at the time of filing of supplementary challan and he was not an accused in the original challan is factually incorrect. In the first charge sheet itself filed by the Investigating Agency before the trial court, the name of appellant is shown in Column No.2 indicating therein that the said accused has not been arrested. In fact, after the presentation of the challan, the learned trial court has, vide its order dated 16.10.2017, issued general warrants of arrest against two accused including the

appellant herein after recording satisfaction that there are no immediate prospects of his arrest. So, it is not a case where appellant/accused has been implicated in the case after presentation of the charge sheet but it is a case where involvement of the appellant/accused is based upon the evidence collected by the investigating agency which forms part of the first challan itself.

10) The record further shows that the contention of the learned counsel for the appellant that he has moved an application before the learned trial court in terms of Section 272 of J&K Cr. P. C, wherein he has admitted the remaining part of the evidence which the prosecution proposes to lead in support of its case, is also factually incorrect. We could not lay our hands on any such application on the trial court record nor there is any interim order of the trial court evidencing the said fact.

11) That takes us to the merits of the contention of the appellant that material witnesses who have deposed about the involvement of the appellant having turned hostile, as such, no amount of evidence that may be led by the prosecution in support of its case would lead to his conviction. In this regard, a perusal of the trial court record shows that protected witnesses Mark E, F and K, who, during investigation of the case, have in their statements recorded under Section 164 of Cr. P.C, deposed about the involvement of appellant in the occurrence being part of the unlawful assembly, have turned hostile when their statements were recorded before the Court. All these three witnesses have admitted having made statements under Section 164 Cr. P. C before the Magistrate in which they have

implicated the appellant/accused. Protected witnesses Mark F and K have stated that they made these statements under pressure from police whereas protected witness Mark E has stated that he does not recollect what was stated by him. These three witnesses have been cross-examined by the prosecution as well as by the defence. The question arises as to whether at the time of considering the bail application, it is open to this Court to give a finding even on *prima facie* basis with regard to reliability and evidentiary value of the statements of these witnesses.

12) At the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merit of the case cannot be undertaken. What is the effect of statements of hostile witnesses would be a moot point to be decided during the course of trial of the main case and cannot be decided during bail proceedings. The mere fact that material witnesses have turned hostile, in our opinion, by itself is not sufficient to grant bail because of the simple reason that this Court cannot imagine what would happen till the disposal of the case. If the Court were to accept or to rely upon the evidence of the prosecution recorded by the trial court, it would amount to appreciation of evidence on record which is impermissible in these proceedings. Till the completion of evidence and the trial, appreciation of evidence at the time of granting or rejecting bail, this Court cannot step into the shoes of the trial court for the purposes of appreciating the material on record.

13) What would be the effect of prosecution evidence led so far, is an issue which cannot be determined by this Court and the same has to be

determined by the learned trial court at the conclusion of trial. Even the Investigating Officer, who is a star witness in the case, is yet to be examined and without examining him, this Court cannot even frame a *prima facie* opinion as to the merits of the prosecution case. It is a settled law that conviction of an accused can be based even on the statements of hostile witnesses and the Investigating Officer provided the same inspire confidence. This question can be determined only by the trial court and not by this Court in these proceedings.

14) Learned counsel for the appellant has contended that the appellant has been in custody for quite some time now and in the face of the fact that material witnesses have turned hostile, it may work harshly against the appellant if he is kept in custody till the remaining evidence of the prosecution is recorded, particularly when there are no chances of his conviction.

15) A perusal of the trial court record shows that it is only in May, 2019, that charges have been framed against the appellant/accused and until that date, he was absconding. Due to COVID-19 pandemic, the normal work of trial courts got seriously hampered and in spite of this, a large number of witnesses have already been examined by the prosecution in the case. Therefore, it cannot be stated that there has been any delay in trial of the case.

16) Apart from the above, we also need to take into account the gravity of the offence and the circumstances in which the offence has been committed by the accused including the appellant herein. It is a case where

a young police officer has been lynched to death by a mob of miscreants of which the appellant is alleged to be a part, thereby putting the humanity in general and spirit of Kashmiriyat in particular to shame. Bail in such heinous and serious offences cannot be granted as a matter of course.

17) For the foregoing reasons, we do not find any merit in this appeal and the same is, accordingly, dismissed.

(SANJAY DHAR)
JUDGE

(PANKAJ MITHAL)
CHIEF JUSTICE

Srinagar
02.09.2021
"Bhat Altaf, PS"

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

