

**IN THE COURT OF JUDICIAL MAGISTRATE 1ST CLASS
BONIYAR**

Bail Application

UT of Jammu and Kashmir Vs. Shams-ud-din Khan & Ors.

(APPLICANT: MOHD. ILYAS KHAN)

FIR No.: 61/2021

PS: Boniyar

U/S: 384, 341, 354, 419, 506, 34 IPC and 67(A) I.T. Act

16.08.2021

Present: Mr. Shahber Ayaz

Ld. APP, Shahzad Yattoo for the UT
Adv. Safina Kazmi for accused

ORDER

Arguments already heard. Today, case was fixed for orders.

Vide this order, the bail application under section 439 Cr.P.C. on behalf of accused M. Ilyas Khan, dated 04.08.2021 filed through counsel is disposed off.

I have heard both the sides and have gone through the record.

'Law of Bails' has to dovetail two conflicting demands, namely, the requirements of the society for being shielded from the hazards of being exposed to the mis-adventures of a person alleged to have committed a crime on one hand

and the fundamental canon of criminal jurisprudence viz, the presumption of innocence of an accused till he is found guilty, on the other. In a barbaric society you can hardly ask for bail; in a civilized society you can hardly refuse it" are more than an epigram, subject only to the tests or considerations laid down from time to time by the imprimatur of judicial decision.

The personal liberty is a priceless treasure for a human being. It is founded on the bed rock of constitutional right and accentuated further on human rights principle. The sanctity of liberty is the fulcrum of any civilized society. Deprivation of liberty of a person has enormous impact on his mind as well as body. Further article 21 Of the Constitution mandates that no person shall be deprived of his life or personal liberty except according to procedure established by law. *Further* India is a signatory to the International Covenant On Civil And Political Rights, 1966 and, therefore, Article 21 of the Constitution has to be understood in the light of the International Covenant On Civil And Political Rights, 1966. *Further* Presumption of innocence is a human right. Article 21 in view of its expansive meaning not only protects life and liberty, but also envisages a fair procedure. Liberty of a person should not ordinarily be interfered with unless there exist cogent grounds therefore. The fundamental principle of our system of justice is that a person should not be deprived of his liberty except for a distinct breach of law. If there is no substantial risk of the accused fleeing the course of justice, there is no reason why he should be imprisoned during the period of his trial. The basic rule is to release him on bail unless there are circumstances suggesting the possibility of his fleeing from justice or thwarting the course of justice. When bail is refused, it is a restriction on personal liberty of the individual guaranteed by Article 21 of the Constitution.

Further it has been laid down from the earliest time that the object of Bail is to secure the appearance of the accused person at his trial by reasonable amount of Bail. The object of Bail is neither punitive nor preventive. Deprivation of liberty must be considered a punishment unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after convictions, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earlier times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial, but in such case 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty under Article 21 of the Constitution upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. While considering an application for bail either under Section 437 or 439 CrPC, the court should keep in view the principle that grant of bail is the rule and committal to jail an exception. Refusal of bail is a restriction on personal liberty of the individual guaranteed by Article 21 of the Constitution. Seriousness of the offence not to be treated as the only consideration in refusing bail: Seriousness of the offence should not to be treated as the only ground for refusal of bail. **(Judgment of Sanjay Chandra Vs. Central Bureau of Investigation, AIR 2012 SC 830 relied).**

But, the liberty of an individual is not absolute. The Society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the societal order. A society expects responsibility and accountability from the member, and it desires that the citizens should obey the law, respecting it as a cherished social norm. Therefore, when an individual behaves in a disharmonious manner ushering in disorderly thing which the society disapproves, the legal consequences are bound to follow.

Further discretionary jurisdiction of courts u/s 437 and 439 CrPC should be exercised carefully and cautiously by balancing the rights of the accused and interests of the society. Court must indicate brief reasons for granting or refusing bail. Bail order passed by the court must be reasoned one but detailed reasons touching merits of the case, detailed examination of evidence and elaborate documentation of merits of case should not be done.

At this stage, it can also be fruitful to note that requirements for bail u/s 437 and 439 are different. Section 437 Cr.P.C. severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. **(Sundeep Kumar Bafna Vs. State of Maharashtra, AIR 2014 SC 1745).**

Further at this stage it can be noted that interpreting the provisions of bail contained u/s 437 & 439 Cr.P.C., the Hon'ble Supreme Court in

its various judgments has laid down various considerations for grant or refusal of bail to an accused in a non-bailable offence like,

- i. *Whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;*
- ii. *Nature of accusation and evidence therefore,*
- iii. *Gravity of the offence and punishment which the conviction will entail,*
- iv. *Reasonable possibility of securing presence of the accused at trial and danger of his absconding or fleeing if released on bail,*
- v. *Character and behaviour of the accused,*
- vi. *Means, position and standing of the accused in the Society,*
- vii. *Likelihood of the offence being repeated,*
- viii. *Reasonable apprehension of the witnesses being tampered with,*
- ix. *Danger, of course, of justice being thwarted by grant of bail,*
- x. *Balance between the rights of the accused and the larger interest of the Society/ State,*
- xi. *Any other factor relevant and peculiar to the accused,*
- xii. *While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, but if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused.*

Furthermore, in the landmark judgment of **Gurucharan Singh and others Vs. State (AIR 1978 SC 179)**, it was held that:

“.....there is no hard and fast rule and no inflexible principle governing the exercise of such discretion by the courts. It was further held that there cannot be any inexorable formula in the matter of granting bail. It was further held that facts and circumstances of each case will govern the exercise of judicial discretion in granting or refusing bail. It was further held that such

question depends upon a variety of circumstances, cumulative effect of which must enter into the judicial verdict. Such judgment itself mentioned the nature and seriousness of nature, and circumstances in which offences are committed apart from character of evidence as some of the relevant factors in deciding whether to grant bail or not”.

Regarding the 'judicial discretion', **Cardozo** has remarked that:

the judge, even when he is free, is still not wholly free He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in social life.

Lord Mansfield has also observed in this regard as under:

Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular.

Further it may also be noted that it is also settled law that while disposing of bail applications u/s 437/439 Cr.P.C., courts should assign reasons while allowing or refusing an application for bail. But detailed reasons touching the merit of the matter should not be given which may prejudice the accused. What is necessary is that the order should not suffer from non-application of mind. At this stage a detailed examination of evidence and elaborate documentation of the merit of the case is not required to be undertaken. Though the court can make some reference to materials but it cannot make a detailed and in-depth analysis of the materials and record findings on their acceptability or otherwise which is essentially a matter of trial. Court is not required to

undertake meticulous examination of evidence while granting or refusing bail u/s 439 of the CrPC.

In the present case, accused has been booked in FIR No.: 61/2021, U/S: 384, 341, 354, 419, 506, 34 IPC and 67(A) I.T. Act by Police Station Boniyar. Police report reveals that: on 03/08/2021, Police Station Boniyar received inputs from some reliable source that at village Chehlan near Reservoir LJHP a person namely M. Ilyas Khan S/O M. Shafeeq Khan along with some other persons are secretly taking/making videos of the people particularly young couples who come to visit the Lower Jhelum on mobile phones and posing as Police/Army personals; beat these visitors, threat and harass them and demand/snatch valuables and cash from them and warn them that if they don't give these valuables/cash, they will initiate action against them. Phone numbers of these visiting couples are being taken and later, the videos of these couples are send to them and demand for money is made with the warnings that if they don't send the money, their videos will be made viral. As such these boys and girls are facing harassment and are under severe depression. As soon as the Police received the information, cognizance was taken and investigation was started. On 04/08/2021, the police nabbed the Accused No. 2 and 3 and seized their mobile phone, from where, many recorded audio clips, video clips and chats were obtained. Spot site plan was made and statements of witnesses were recorded. On the basis of these evidences, the charges against Accused No. 1 to 3 are established. Accused No. 2 and 3 have been arrested on spot and are in police custody on remand. During search and investigation, the mobile phones of accused have been seized as evidence. During investigation one girl namely xxxxxxxx xxxxxxxx R/O xxxxxxxx and a boy namely xxxxxxxxxxxxxxxxxxxxxx R/O xxxxxxxx have been presented before the court of JMIC Boniyar and their statements have been recorded under Section 164 Cr.P.C. It is revealed that Accused No. 1 and 2 have posed as Police/Army personals and were harassing the couples to the extent that these young couple were being locked up in their vehicles and forced to act as the accused

desired for taking their videos. It was revealed that even cash of Rs.300/- was also snatched from this couple. After this event Shams-ud-din S/O A. Majeed, accused no. 1 is working with Army GDHC in 161-TA has misused his official uniform and ID card and went to Baramulla to harass the girl and threatened her that if she does not give her some illegal/ wrong favours, he will make her video viral. He further told the girl that he does not bother about Police or any law as they cannot do any harm to him. This resulted in the mental depression and harassment of the girl. The offences can easily be proved and established and it is clear that there are some more people involved in this unlawful activity as per the audio clips, video clips and chats available in seized mobile phones. This group of accused is looting, harassing and blackmailing innocent people mostly young couples who come to visit Lower Jhelum. As the crime is established and the case is fresh, the effected girls and boys are from various localities/areas and to record their statements, it will take some more time. It is also to be investigated whether these videos have been shared with some other groups or so. Vehicle of accused No.1 is to be seized and seizure memo to be made. Moreover, accused No.1 is evading arrest and has taken shelter in Army camp for which we have also written a letter to Army unit on 04/08/2021, but neither his presence is made nor the accused No. 1 is coming out of the camp. As such he is intentionally remaining absent and for his arrest, warrant is required.

Ld. APP has filed objections and has vehemently opposed therein the grant of bail in favour of accused person on the ground that the accused person is involved in very serious, heinous offences and offences against the society and women; as well as also, the investigation is still at an infancy stage and therefore the application filed by the accused be rejected to maintain the confidence of public in the rule of law and criminal Justice System. Heard the arguments and perused the record i.e., application, objections, police report and the CD File and scrutinized the catena of judgments on the subject. Ld. APP reiterated the same as mentioned in the objections during arguments

whereas the Ld. counsel of the alleged accused submitted that the alleged accused person has not committed any offence and have been involved in this case frivolously and falsely and the investigation in the case has been completed and the offences are not of serious nature as such accused be released on bail. Ld. counsel of the alleged accused also submitted that the accused is suffering from serious medical issues and bail be granted to the accused keeping in view, the medical condition of the accused. Ld. counsel of the alleged accused also submitted prescriptions and hospital reports in this regard, which are on record. In reply to this, Ld. APP submitted that the medical records of the accused placed by Ld. counsel of the alleged accused before this court are too old and dates back to the year 2013 and therefore, have no relevance and also, no medical record or prescription discloses accused having any medical issues as on date and also the medical examination of the accused being done from time to time while in custody also reveals that the accused is not having any medical issue.

Ld. APP moreso strongly opposed the bail with the argument that on the basis of evidence available at this point of time, more arrests are to follow and more severe offences are likely to be attracted in this case. On the other hand, Ld. counsel of the accused presented judgements like, *State of Maharashtra Vs. Sitaram Popat Vital, Prahlad Singh Bhati Vs. N.C.T. Delhi and Ors, State of Rajasthan Vs. Balchand alias Baliya, Hazarilal Vs. Rameshwar Prasad, Sumit Mehta Vs. State of N.C.T. of Delhi, Sheikh Ayub Vs. State of M.P., Ramathal and Others Vs. Inspector of Police and Another, and Arnab Goswami's Case*, which were also perused.

After meticulously analysing, appreciating and scrutinizing the law on the matter it is quite clear that the basic rule is bail and not the jail and the accused person shall be deemed innocent until proved guilty and the object of bail is to secure the appearance of the accused at the trial and the object of bail is neither punitive nor preventive but at the same time the bail cannot be granted as a matter of routine in all

cases especially in those cases where public interest and public property is involved .There are cases like the present one where exception to the basic rule needs to be invoked to send signal to the potential offenders of such type of crimes which involves public interest and the principles for the consideration of bail has been laid down by the Hon'ble Supreme Court in case titled:

“Kalyan Chandra Sarkar Vs. Rajesh Ranjan alias Pappu Yadav and others” AIR 2005 SC 921. It is held as under:

“It is trite law that Personal Liberty cannot be taken away except in accordance with the procedure established by law. Personal Liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of Personal Liberty by procedure established by law. Under the Criminal Laws of this Country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorized by law. But even persons accused of non-bailable offences are entitled for bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so”.

In Ram Govind Upadhyay Vs. Sudarshan Singh (2002) 3 SCC 598, it has been clearly laid down by the Hon'ble Apex Court of the Country that:

“the grant of bail though involves exercise of discretionary power of the Court, such exercise of discretion has to be made in a judicious manner and not as a matter of course. The heinous

nature of crimes warrants more caution as there is a greater chance of rejection of bail though, however, dependent on the factual matrix of the matter.”

The Apex Court in “**The State Vs. Capt. Jagjit Singh**”, AIR 1962 S C 253, has held that:

“Court while granting bail in a non-bailable offence should take into account the various considerations, such as nature and seriousness of the evidence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public and the state, similarly other consideration which arise when the court is asked for bail in a non-bailable offence. It is further held that if the offence is of a kind in which bail should not be granted considering its seriousness the court should refuse the bail”.

The Hon’ble High Court of Jammu and Kashmir in “**Nagar Singh Vs. State of J&K**” 2014(II) S.L.J (HC) 619, has observed that:

“...while considering the bail application, what is required to be seen is prima facie involvement of a particular accused connecting him with the commission of alleged offence and its gravity or seriousness-chances of tampering with evidence can also be a valid ground for rejecting or accepting the bail application-courts to ensure that there should be no hindrance in free, fair & just trial”. In Para No.15 of the Judgement, it has been observed that the principles which generally govern the grant of bail are relatable to following things: -

- *The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;*

- *Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant;*
- *Prima facie satisfaction of the court in support of the charge.*

Further, what has been observed in this regard at Paragraph 18 of the said Judgement may be notice as under:

“...It is well settled that the matters to be considered in application for bail are

- 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, behaviour, means, position and standing of the accused;*
- vi) likelihood of the offence being repeated; vii) reasonable apprehension of the witnesses being tampered with; and*
- vii) danger, of course, of justice being thwarted by grant of bail”.*

In “Haji Mohammad Jaffer & Anr. Vs. State of J&K” 2014(I) S.L.J (HC)361, it has been held that:

“...Grant or refusal of bail in non bailable offences is discretion of the court but this discretionary jurisdiction is to be exercised with great care and not casually and in cavalier manner. Order passed by the bail court must expressly indicate reasons for granting or refusing bail. A reference to facts and evidence proposed/recorded is inevitable but care must be taken to safeguard against prejudicing the case at the time of trial. It must be paramount in the mind of a judge dealing with the bail application, particularly

where an accused is alleged to have committed serious offences, that he is discharging the solemn duty of balancing the sanctity of individual liberty enshrined under the constitution on one hand and interest of the society loath against crime on the other”.

In, **Neeru Yadav Vs. State of U.P. & Anr Criminal Appeal No. 1272 OF 2015 (SLP(Crl) No. 1596 OF 2015)**, the Hon’ble Supreme Court held and observed that:

*“... We will be failing in our duty if we do not take note of the concept of liberty and its curtailment by law. It is an established fact that a crime though committed against an individual, in all cases it does not retain an individual character. It, on occasions and in certain offences, accentuates and causes harm to the society. The victim may be an individual, but in the ultimate eventuate, it is the society which is the victim. A crime, as is understood, creates a dent in the law-and-order situation. In a civilized society, a crime disturbs orderliness. It affects the peaceful life of the society. An individual can enjoy his liberty which is definitely of paramount value but he cannot be a law unto himself. He cannot cause harm to others. He cannot be a nuisance to the collective. He cannot be a terror to the society; and that is why **Edmund Burke, the great English thinker**, almost two centuries and a decade back eloquently spoke thus: -*

“... Men are qualified for civil liberty, in exact proportion to their disposition to put moral chains upon their own appetites; in proportion as their love to justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the counsel of the wise and good, in preference to the flattery of knaves. Society cannot exist unless a controlling power upon will and appetite be placed somewhere and the less of it there is within, the more there must be without. It is ordained

in the eternal constitution of things that men of intemperate minds cannot be free”.

In this case the accused person is involved in a serious offence involving society, morality and Right to Personal Liberty, rather Right to Privacy as laid down by Hon'ble Supreme Court in **Kharak Singh Vs. State of U.P.** The offences alleged against the accused person also show an unhealthy effect upon the society and personal liberty of individuals. The law expects the judiciary to be alert while admitting this kind of accused person to be at large and, therefore, the emphasis is on exercise of discretion judiciously and not in a whimsical manner. No doubt the power to grant bail to an accused, who is accused of commission of an offence, which is non-bailable and is not punishable with Death or Imprisonment for life, is in the discretion of the Court but such discretion must be exercised judicially. The basic rule broadly put is bail and not jail, but where there are factors which justify refusal, the Court should refuse the bail. For granting or refusing bail, various circumstances have to be kept in view, such as, whether there is or is not a reasonable ground for believing that the accused/applicant has committed non- bailable offence. If the Court on the alleged facts reasonably feels that the accused may not have committed any non-bailable offence, it should grant the bail, but where prima facie it feels that the accused has committed the non-bailable offence, then it should proceed to see as to whether there are circumstances suggestive of his fleeing from justice or repeating the offence or intimidating the witnesses, gatherable from the nature and gravity of the offence, severity and degree of punishment prescribed for the alleged offence is such, where the possibility of accused fleeing from justice or thwarting the course of justice or intimidating the witnesses etc, can be inferred, the bail should not be granted. Keeping in view what has been stated supra and since the investigation of the case is still underway and has not yet been completed, trial in this case is yet to start, charges are yet to be framed, the case is at its infancy, the nature of offence is serious and sensitive involving public justice and possibility of intimidating

witnesses and again indulging in such or other related criminal activities affecting the public.

In the facts and circumstances of the case, I am of the considered opinion that this is a fit case for invoking exception to the general rule. The personal liberty guaranteed to the accused is undoubtedly a valuable right of the accused person guaranteed under Article 21 of the Constitution but same can be refused in accordance with the procedure established under law. The right of liberty of an individual needs to be balanced against the interests of whole society and the interests of society is to be preferred over the individual interest.

Thus, keeping in mind, the discussion as made above, in my view, it would be improper and premature to admit the applicant/accused person to bail at this stage in view of the nature of the alleged offences. Therefore, for the aforesaid reasons, this Court is not inclined to grant the concession of bail at this stage. Hence the application is rejected. Application is disposed off. Be consigned to records after due compilation.

**Announced
16/08/2021**

**Shahber Ayaz
(U.I.D. No. JK-00261)
Judicial Magistrate 1ST class
Boniya**