SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Revisional Jurisdiction]

PRESENT:

Mohammad Azam Khan, C.J.

Masood Ahmed Sheikh, J.

Criminal Revision No.10 of 2015

(Filed on 26.8.2015)

Altaf s/o hakim Ali, caste Sheikh r/o Ambor, at present confined in central Jail, Muzaffarabad.

.... PETITIONER

VERSUS

1. State through Advocate General of Azad Jammu & Kashmir, Muzaffarabad.
2. Police Station, Civil Secretariat, Tehsil and District, Muzaffarabad.

..... RESPONDENTS

(On revision from the order of the Shariat Court dated 25.7.2015 in Revision Petition No. 269 of 2015)

FOR THE PETITIONER: Mr. Sadaqat Hussain Raja Advocate.

FOR THE RESPONDENTS: Mr. Mansoor Pervaiz Khan, Advocate-General.

Date of hearing: 15.2.2016.

JUDGMENT:

Masood Ahmed Sheikh, J.— The captioned revision petition has been addressed against the order of the Shariat Court dated 25.7.2015, whereby, the revision petition No. 269 of 2015 filed by the petitioner, herein, has been dismissed.

2. The precise facts of the case are that the complainant lodged a written report at Model Police Station, Civil Secretariat, Muzaffarabad, to the effect that accused-person, Mushtaq Ahmed Mir son of Abdul Khaliq Mir, resident of Muhajir Camp, Muzaffarabad was arrested by Police Station Chanari, District Hattian Bala vide F.I.R. No. 8/2015 in the offences under sections 221-A, 121-A, 471/225, 467/468, 109, 419/420, APC, who disclosed during investigation that Altaf, son of Hakim Ali Sheikh, r/o Ambore Muhajir Camp has a huge quantity of Heroin in his custody. On this information, on 18.3.2015, after getting search warrant, complainant along with other police officials

under supervision of DSP/SDPO City at 4:30 p.m reached at the house of Altaf son of Hakim Ali Sheikh. On search of the store room of his house, they found a gray colored brief case containing heroin weighing 3-kg & 830-gm which was recovered by the police party. On this report F.I.R. No. 31/2015 under offences 3/4, the Prohibition (Enforcement of Hadd) Act, 1985, was registered at Model Police Station Civil Secretariat Muzaffarabad. The accused-petitioner was arrested by the police.

After having been arrested, the accused-petitioner moved bail application before the Additional Tehsil Court of Criminal Jurisdiction No.1, Muzaffarabad on 24.3.2015, which was rejected vide order dated 28.3.2015. The accused-petiotner moved second bail application on 18.5.2015, which also met the same fate vide order dated 18.6.2015. Then bail application was moved by the accused-petitioner before the District Court of Criminal Jurisdiction, Muzaffarabad, which was rejected vide order

dated 26.6.2015. Feeling aggrieved, the accused-petitioner filed a revision petition in the Shariat Court, which has been dismissed through the impugned order dated 25.7.2015, hence, the instant revision petition.

3. Mr. Sadaqat Hussain Raja, Advocate, the learned counsel for the petitioner has argued that the impugned judgment of the Shariat Court as well as that of the Courts below is against facts and the law. He maintained that the Shariat Court and the lower Courts while handing down the impugned judgments have not taken into consideration that prima-facie there was no case against the petitioner. The contents of the F.I.R. reflects that the real culprits have been substituted for the petitioner. The petitioner has not committed any offence alleged by the prosecution in the FIR. Recovery memo of the alleged heroine was not made in accordance with law, the provisions of section 103, Cr.P.C. have been violated in the alleged recovery. The learned counsel maintained that

the challan in the case has been submitted before the trial Court. The petitioner is no more required for further investigation. One cannot be left behind the bar for punishment without his conviction from a Court of competent jurisdiction.

4. Conversely, Mr. Mansoor Pervaiz Khan, the learned Advocate-General, has strongly defended the impugned judgment of the Shariat Court as well as that of the Courts below. He stated that the heroine weighing 3 kilo and 830 gram was recovered from the house of the petitioner during search. Out of which half of the heroine was sealed in parcel No.1 and sent for chemical examination. The laboratory has sent positive report that the parcel No.1 contains intoxicant material. He further maintained that the petitioner has been specifically nominated in the F.I.R. and the offence committed by him falls in the prohibitory clause, under which the petitioner may be punished for life imprisonment, therefore, he is not entitled for

concession of bail at this stage. He contended that no illegality in the impugned judgment has been pointed out, hence, the petiotner does not deserve for concession of bail.

5. We have heard the learned counsel for the parties and also gone through the record made available. The record shows that the officials of the police Station civil Secretariat, Muzaffarabad, after having obtained the search warrants, conducted search of the house of the accused-petitioner and recovered heroine weighing 3kg and 830gms from his store room on 18.3.2015. Out of which half of the heroine weighing 1kg 915gms was sealed in parcel No.1 and sent to the Forensic Science Laboratory, Lahore for chemical examination of the same vide memo dated 21.3.2015. The investigating agency, on completion of investigation, filed a challan of the case before the trial Court on 2.5.2015. The petiotner is being tried in the offence under sections 3 & 4 of the Prohibition (Enforcement of Hadd) Act, 1985. The

punishment under section 3 is 5 years imprisonment whereas, under section 4 of the aforesaid Act, the punishment is imprisonment for life. The record reveals that the petitioner earlier filed an application for concession of bail before the trial Court, which was dismissed and without any fresh ground, he filed second bail application, which was also dismissed vide order dated 18.6.2015. Against which the petitioner filed application before the District Criminal Court, which has also been dismissed vide order dated 26.6.2015. The offence in which the petitioner has been charged, falls in prohibitory clause. The petitioner, herein, could not point out any mala-fide or hostility towards the prosecution. The trial Court vide order dated 18.6.2015 dismissed the application of the petitioner on the ground that it was subsequent application, which contains no fresh ground as well as on the ground that as per report received from the chemical examiner, the material sent was declared as intoxicating substance. The

petitioner has been specifically nominated in the FIR and the allegation levelled against him could not be rebutted by him. Prima-facie, at this stage, the petitioner-accused is not entitled for concession of bail for above stated reasons. Moreover, the petitioner neither pointed out any enmity with the police nor any plausible reason could be extended by him through which it can be ascertained that he has been falsely implicated in the offence by the police. In the present case, the accused is charged in the offence under section 3 and 4 of the Prohibition (Enforcement of Hadd) Act, 1985, which reads as under:-

> 3. Prohibition of manufacture, etc. of intoxicants.- (1) Subject to the provisions of the sub-section (2) whoever-
> (a) imports, exports, transports, manufactures or processes any intoxicant; or
> (b) bottles any intoxicant; or
> (c) sells or serves any intoxicant; or
> (d) allows any of the acts aforesaid upon premises owned by him or in his immediate possession; shall be punishable with imprisonment of either description for a term which

may extend to five years and with whipping not exceeding thirty stripes, and shall also be liable to fine.

(2) Whoever---

(i) imports, exports, transports, manufactures or, traffics in opium or coca leaf opium or coca derivatives; or

(ii) finances the import, export, transport, manufacture, or trafficking of opium or coca leaf or opium or coca derivatives;

shall be punishable with imprisonment for life or with imprisonment which is not less than two years and whipping not exceeding thirty stripes, and shall also be liable to fine."

4. Owing or possessing intoxicant.- whoever owns, possesses or keeps in his custody any intoxicant shall be punished with imprisonment of either description for a term which may extent to two years, or with whipping not exceeding thirty stripes, and shall also be liable to fine.

Provided that nothing contained in this section shall apply to a non-Muslim foreigner or to a non-Muslim citizen of Pakistan or Azad Jammu & Kashmir who keeps in his custody at or about time of ceremony prescribed by his religion a reasonable quantity of intoxicating liquor for the purpose of using it as a part of such ceremony.

Provided further that, if the intoxicant in respect of which the

> offence is committed is heroine, cocaine, raw opium or coca leaf, and the quantity exceeds ten grams in the case of heroin or cocaine or one kilogram in the case of raw opium or coca leaf, the offender shall be punishable with imprisonment for life or with imprisonment which is not less then two years and with whipping not exceeding thirty stripes, and shall also be liable to fine."

A bare reading of the above, the punishment for offence under section 3 is five years and punishment for the offence under section 4 is imprisonment for life. The intent and scheme of the Legislature is quite clear about the quantum of the narcotics recovered and the punishment for the same. In the case in hand it is alleged against the petitioner that 3kg and 830gm heroine powder has been confiscated from the dwelling house of the petitioner-appellant, out of which 1kg and 915gm heroine was sent to the Forensic Science Laboratory. The Chemical Examiner's report is positive. In our opinion in such circumstances any guess work or speculative exercise cannot be undertaken by the Court at the bail stage to enlarge an

accused on bail in such crimes. Even otherwise, the quantum of the heroine sent to chemical examiner is 1kg 915gms, which also bring the offence into the ambit of section 4, according to which the punishment is imprisonment for life. The charge leveled against the appellant is heinous in nature which is also against the society at large and that is why the statute has provided the different sentence according to the quantum of substance seized from the accused. The appellant has failed to bring the matter in the ambit of further inquiry. As the deeper appreciation of evidence is not required at bail stage and the material available with the record prima-facie connects the accused with the alleged offence.

6. The concurrent findings recorded by the learned Judge in the Shariat Court and the Courts below cannot be disturbed at this stage as discretion exercised by the trial Court does not appear to be arbitrary or capricious. So far as the contention of the counsel for the

petitioner that the case of the petitioner is at par with the co-accused, is not correct, the case of the co-accused appears to be different. The prosecution challaned the co-accused under section 26 of the Prohibition (Enforcement of Hadd) Act, 1985, whereas the petitioner has been challaned under section 3 and 4 of the said Act. The petitioner could not make out any point for further inquiry before this Court. The order of the Shariat Court is quite in accordance with law, which needs no interference by this Court.

What has been discussed above, finding no force in this revision petition, it is hereby dismissed.

JUDGE CHIEF JUSTICE

Mirpur.
.3.2016.