

(2023) 05 J&K CK 0027

In the Jammu And Kashmir High Court

Case No : Criminal Miscellaneous Case No. 154 Of 2020 In Criminal Appeal No. 3 Of 2020

Aaqib Ahmed Mir

APPELLANT

Vs

UT Of Jammu And Kashmir

RESPONDENT

Date of Decision : 15-05-2023

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 8, 20, 20(c), 29
Code Of Criminal Procedure, 1973 — Section 436A
Code Of Criminal Procedure, 1989 — Section 497D
Code Of Criminal Procedure, 1973 — Section 436A

Citation : (2023) 05 J&K CK 0027

Hon'ble Judges : Sanjay Dhar, J;Rajesh Sekhri, J

Bench : Division Bench

Advocate : Sunil Sethi, Mohit Vaid

Final Decision : Dismissed

Judgement

Sanjay Dhar, J

CrIM No. 154/2020:

1 The applicant/appellant has moved this application for suspension of sentence and grant of bail in his favour.

2 Although while seeking bail by virtue of the aforesaid application, the applicant/appellant has contended that there is no legal evidence against him to connect him to the alleged crime, yet, during the course of hearing, the learned Senior Counsel, appearing for the applicant/appellant, has confined his arguments to grant of bail on the ground of long incarceration of the applicant/appellant.

3 It has been contended by the learned Senior Counsel appearing for the applicant/appellant that the applicant/appellant has been in custody, in the instant case, for the last about 07 years, while as, he has been sentenced to imprisonment of 12 years by virtue of the impugned judgment/order of

conviction/sentence. It has been submitted that the applicant/appellant has served more than half of the sentence imposed against him and, as such, he is entitled to grant of bail. In support of his contentions, learned Senior Counsel has relied upon the ratio laid down by the Supreme Court in the case of Supreme Court Legal Aid Committee representing Undertrial Prisoners vs. Union of India, (1994) 6 SCC 731 as also the ratio laid down by the Delhi High Court in the case of Anil Kumar alias Nillu vs. State, (Bail App No. 1724/2021, decided on 21.03.2022).

4 Learned AAG appearing on behalf of the respondent-State has contested the bail application on the ground that the ratio laid down by the Supreme Court in the judgments referred to and relied upon by the learned Senior Counsel is not applicable to the present case because the applicant/appellant is not an undertrial as he has been convicted by the trial Court. He has further submitted that, once the finding of conviction is recorded against an undertrial, the presumption of innocence attached to him during trial of the case comes to an end. It has been also contended that the law provides that, in order to entitle an undertrial to grant of bail, it has to be shown that he/she has been in custody for more than one half of the sentence specified for the offence and not the actual sentence imposed upon him/her.

5 We have heard learned counsel appearing for the parties and perused the record of the case.

6 A brief factual background giving rise to filing of the instant criminal appeal as is discernible from the record is that on 29.08.2016 at about 1.30 am, the police, while performing Naka duties at Bamyal Morh within the jurisdiction of Police Post, Jagti spotted a car bearing registration No.JK12A-8481 and an Auto rickshaw bearing registration No.JK02BL-9321. Bharat Bhushan was identified as driver of the Auto-rickshaw, whereas, the applicant/appellant herein was identified as driver of the Car. The person accompanying the applicant/appellant herein was identified as Ghulam Nabi Bhat. Two polythene packets containing charas like substance were recovered from the possession of aforesaid persons and 5 packets containing charas like substance were found inside the car. The total quantity of charas was found to be 2 kgs and 70 gms. Thus, according to the prosecution case, commercial quantity of contraband charas was recovered from possession of the accused including the applicant/appellant herein. FIR No. 175/2016 for offences under Sections 8/20/29 of NDPS Act was registered with Police Station, Nagrota and the investigation was set into motion. After investigation of the case, the aforesaid offences were found established against the accused including the appellant herein and the charge sheet was laid before the trial Court. After trial of the case, the appellant herein along with co-accused have been convicted for offence under section 20 (c) of the NDPS Act in terms of the impugned judgment dated 31.12.2019 and they have been sentenced to undergo rigorous imprisonment for a period of 12 years and to pay a fine of Rs.1.00 lac each in terms of order of sentence dated 01.01.2020.

7 The first contention, that has been raised by the learned Senior Counsel appearing for the applicant/appellant is that the applicant/appellant has been in custody during trial of the case and during pendency of the appeal for the last 07 years and, as such, he has served more than half of the sentence imposed upon him. On this ground, it is urged that the appellant is entitled to grant of bail in terms of the ratio laid down by the Supreme in the case of Supreme Court Legal Aid Committee's case (supra).

8 A perusal of the aforesaid judgment referred to and relied upon by the learned Senior Counsel for the applicant/appellant shows that the ratio laid down in the said case applies only to the undertrials and not to the convicts. It was a case where the Supreme Court was dealing with a situation that had arisen on account of delay in trial that had occurred due to coming into effect of Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1988. It is in those circumstances that the Supreme Court provided guidelines for grant of bail to the undertrial accused whose trial was delayed. One of the directions extended by the Supreme Court vide the aforesaid judgment was that where the undertrial accused is charged with an offence under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial has to be released on bail if he has been in jail for not less than 5 years. It is on the strength of this direction that the applicant/appellant has based its case for grant of bail.

9 So far as the grant of bail to an undertrial is concerned, the parameters that are to be applied are different to the parameters that are to be applied in the case of convicts. Once a person is convicted of an offence, the presumption of innocence attached to him during the trial does not come into play. The ratio laid down in Supreme Court Legal Aid Committee's case (supra) is applicable to the undertrial prisoners and not to the convicts.

10 After the aforesaid judgment of the Supreme Court, Section 436-A has been incorporated in the Code of Criminal Procedure to give a statutory recognition to the right of undertrial prisoners to bail in case they have undergone custody for more than one half of the maximum imprisonment specified for the offence. The aforesaid provision has been inserted vide Act No. 25 of 2005 w.e.f 23.06.2006 and the same reads as under:

"436-A. Maximum period for which an undertrial prisoner can be detained-

Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties;

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a

period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties;

Provided further that no such person shall in any case be detained during the period of investigation inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law"

11 It is clear from the afore-quoted provision that a person becomes entitled to grant of bail if he has undergone detention for a period exceeding up to one-half of the maximum period of imprisonment specified for that offence and not the actual sentence of imprisonment awarded for the offence. We are supported in our aforesaid view by the judgment of the Supreme Court in *Bhim Singh vs Union of India*, (2015) 13 SCC 605. Para 6 of the said judgment is relevant to the context and the same is reproduced as under:

"6. We, accordingly, direct that jurisdictional Magistrate/Chief Judicial Magistrate/ Sessions Judge shall hold one sitting in a week in each jail/prison for two months commencing from 1st October, 2014 for the purposes of effective implementation of 436A of the Code of Criminal Procedure. In its sittings in jail, the above judicial officers shall identify the under-trial prisoners who have completed half period of the maximum period or maximum period of imprisonment provided for the said offence under the law and after complying with the procedure prescribed under Section 436A pass an appropriate order in jail itself for release of such under-trial prisoners who fulfill the requirement of Section 436A for their release immediately. Such jurisdictional Magistrate/Chief Judicial Magistrate/ Sessions Judge shall submit the report of each of such sitting to the Registrar General of the High Court and at the end of two months, the Registrar General of each High Court shall submit the report to the Secretary General of this Court without any delay. To facilitate the compliance of the above order, we direct the Jail Superintendent of each jail/prison to provide all necessary facilities for holding the court sitting by the above judicial officers. A copy of this order shall be sent to the Registrar General of each High Court, who in turn will communicate the copy of the order to all Sessions Judges within his State for necessary compliance."

12 Relying upon the aforesaid judgment of the Supreme Court, this Court in the case of *Nazir Ahmad and Anr. v. State of J&K & Ors*, reported in 2018(1) JKJ 399 (HC), after noticing the provisions contained in Section 497-D of J&K Cr. P. C (which is in pari materia with Section 436-A of the Central Code) and the punishment specified under Section 20 of the NDPS Act for an offence under Section 8 of that Act, observed as under:

"6. From the perusal of the above provisions of law, what comes to the fruition is that where a person has undergone detention for a period extended to one half of the maximum period of imprisonment specified for that offence under that law the accused shall be released on bail with or without sureties. The thrust under this provision of law is on the words "maximum period of punishment specified

for the offences under that law" and not the punishment that has been awarded by a Court after considering the facts and circumstances of that case. The punishment provided for an offence under Section 8 of the NPDS Act, is provided in Section 20 (c) of the Act. It provides that whoever in contravention of the provisions of this Act, or any rule or Order made or condition of license granted there under possesses etc., any cannabis plant and cannabis which involves commercial quantity shall be punished with rigorous imprisonment for a term which shall not be less than 10 years but which may extend to 20 years and shall also be liable to fine which shall not be less than Rs. 1.00 lac but which may extend to Rs. 2.00 lacs."

13 Coming to the facts of the instant case, the applicant/appellant has been convicted of an offence under section 20 (c) which carries maximum punishment of 20 years of imprisonment. Admittedly, the appellant has spent less than 10 years in custody, as such, he is not entitled to benefit under Section 436-A of the Cr.P.C, nor can he claim benefit of the ratio laid down by the Supreme Court in Supreme Court Legal Aid Committee's case (supra) because the applicant/appellant is not an undertrial, but a convict.

14 Another ground for grant of bail that has been urged is that there is no any immediate chance of hearing of the appeal filed by the appellant, therefore, he deserves to be enlarged on bail.

15 The Supreme Court has, in the case of Akhtari Bi v. State of M.P, reported in (2001) 4 SCC 355, reiterated in Hussain and another v. Union of India, (2017) 5 SCC 702, held that if appeals are not disposed of within a period of five years for no fault of the convicts, such convicts should be released on bail. Even these requirements are not satisfied in the instant case. The instant appeal has been filed in the year 2020 and it is about 3 years old. The appeal has already been admitted to hearing and record of the trial Court has also been received. A special Bench for hearing the criminal appeals has been constituted and there is every likelihood that this appeal will be heard in immediate future. In fact, during the course of hearing of the bail application, it was made clear by the Bench to the leaned counsel for the parties that the appeal would be taken up for hearing at the earliest.

16 Even otherwise, the factors like, period of detention undergone by the applicant and chances of his appeal being heard within a reasonable period of time, may be relevant for grant of bail in matters arising out of conviction under the Penal Code etc but these factors are not sufficient to satisfy the mandatory requirements as stipulated in Clause (b) of sub-Section (1) of Section 37 of NDPS Act. I am supported in my aforesaid view by the judgment of the Supreme Court in Union Of India vs Rattan Mallik @ Habul, (2009) 2 SCC 624.

17 For the foregoing reasons, we do not find any merit in this application. The same is, accordingly, dismissed.

18 However, it is directed that the main appeal alongwith appeal filed by the

appellant Bharat Bhushan bearing CrI A(D) No. 02/2020 be listed for final hearing on 30.05.2023. The appeal filed by the third accused, namely Ghulam Nabi Bhat which is stated to have been transferred to Srinagar wing of the High Court and has been assigned CrI A(D) No. 05/2023, is also directed to be heard along with the aforesaid two appeals through video conferencing on 30.05.2023 subject to orders from Hon'ble the Chief Justice.