

(2015) 02 JH CK 0019
In the Jharkhand High Court
Case No : B.A. No. 140 of 2015

Dhiran Singh

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 20-02-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 306, 307, 439, 82

Evidence Act, 1872 — Section 25, 26, 30

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 16, 18, 20, 37, 45

Penal Code, 1860 (IPC) — Section 439

Citation : (2015) 02 JH CK 0019

Hon'ble Judges : Dhirubhai Naranbhai Patel, J.

Bench : Single Bench

Advocate : Arjun N. Deo, for the Appellant; Anand Kumar Pandey, APP and Ravi Prakash, Amicus Curiae, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Dhirubhai Naranbhai Patel, J.—This bail application has been preferred under Sections 439 of the Indian Penal Code in connection with Basistanagar P.S. Case No. 12 of 2011, corresponding to G.R. No. 248 of 2011, for the offence, registered under Sections 16, 18 and 20 of the Narcotics Drugs and Psychotropic Substance Act, 1985.

2. It appears that during search carried out by the police officer, huge quantity of opium i.e. 7000 gms. (7 Kg.), which is much more than the commercial quantity, was seized from the Bolero Jeep. Samples of the said substance was drawn and sent for the report of F.S.L. The F.S.L. Report has now been received by the Investigating Officer, who has also presented the same in the earlier Sessions Case before the Sessions Court and the said F.S.L. Report says that the substance, seized from the said Bolero Jeep was opium and the trial with respect to the accused, who were not absconding, was concluded and they have also been punished for 12 years rigorous imprisonment with a fine of Rs. 1,20,000/-.

Those accused have preferred Appeal before this Court and the same is pending.

3. The applicant in the present bail application was absconding and hence, his case was separated. It is numbered as N.D.P.S. Case No. 6-B of 2011 before the Sessions Judge-III, Chatra.

4. Learned counsel for the applicant has submitted that no offence has been committed by this applicant. This applicant was never caught red handed from the said Bolero Jeep, from where 7 Kg. opium was initially searched and seized and thereafter, seizure list was prepared. It is further submitted by the learned counsel for the applicant that the officer, who has carried out the search and seizure, is not an authorized officer under the Narcotics Drugs and Psychotropic Substance Act, 1985 (herein after referred to as "N.D.P.S. Act, 1985 for the sake of brevity) and, therefore, his action under Sections 49 and 50 of the N.D.P.S. Act, 1985 is illegal. It is further submitted by the learned counsel for the applicant that looking to the First Information Report, this applicant was not named nor he has been narrated as a driver and those accused, who were initially arrested at the spot, have also not given the name of this applicant. It is further submitted by the learned counsel for the applicant that the owner of the Bolero Jeep -Mithilesh Yadav has been granted bail and there is no value of the statement, made by one of the co-accused, as he can give any body's name.

5. These are the limited submissions made by the learned counsel for grant of bail to this applicant under Section 439 of the Code of Criminal Procedure.

6. Mr. Ravi Prakash, learned counsel, who has been appointed as Amicus Curiae by this Court along with the learned A.P.P., appearing for the State, has vehemently submitted that this applicant was an absconder. The date of First Information Report is 8th April, 2011. The offence has been registered because 7 Kg. Opium was seized from the Bolero Jeep. Two persons were caught red handed, at the spot. The driver has run away, as narrated in the First Information Report and this applicant is the driver of the said Bolero Jeep. F.S.L. Report is also in favour of the prosecution. Apart from the above, Mr. Ravi Prakash has further submitted that keeping in view Section 37 of the N.D.P.S. Act, 1985 and the fact that the statement made by the driver of the Bolero Jeep, who is one of the co-accused, is not hit by Section 25 and 26 of the Indian Evidence Act, 1872, because the officer, who has carried out investigation under the provisions of N.D.P.S. Act, 1985, is not a police personnel, and, thus, a statement of co-accused before Investigating Officer under N.D.P.S. Act, 1985 is a relevant evidence as per Section 53A of the N.D.P.S. Act, 1985, this applicant may not be enlarged on bail. It is further submitted by the learned counsel for the State that as this applicant was absconding and under Section 82 of the Code of Criminal Procedure necessary proclamation was also made by the order of the Court, his trial has been separated. Otherwise, the case of those accused, who were arrested, was already committed to the court of sessions and they have also been punished for a period of 12 years" rigorous imprisonment and a fine of Rs. 1,20,000/- has also been imposed by the competent trial court whereas the

case of this applicant was separated and was given a new number bearing N.D.P.S. Case No. 6-B of 2011, which is pending before the learned Sessions Judge-III, Chatra. It is further submitted by the learned counsel for the State that the evidences of the prosecution are ready and the prosecution will present its witnesses one by one, as and when the learned trial court is taking up the matter or a suitable direction may be given to the trial court to conclude the trial within a stipulated time, but, this applicant may not be enlarged on bail, otherwise he will not be available for trial or he may tamper with the evidences and witnesses.

7. Having heard learned counsel for both the sides and looking to the facts and circumstances of the case, I see no reason to enlarge this applicant on bail, mainly for the following facts and reasons:

(i) The date of First Information Report is 8 t h April, 2011. From the Bolero Jeep 7000 gms. (7 Kgs.) opium was searched and seized. Sample of the substance was drawn and sent to Forensic Science Laboratory for its report. Now the report has been obtained by the Investigating Officer and the substance, which was searched and seized, was found to be a narcotics substance, as the provisions of N.D.P.S. Act, 1985.

(ii) Looking to the evidences, collected by the Investigating Officer, it appears that two persons were arrested on the spot from the Bolero Jeep, whereas, the driver of the said Jeep ran away and the applicant is the driver, who has surrendered before the learned trial court on 3 rd January, 2014.

(iii) Thus, this applicant was absconding for fairly a long time i.e. from the year 2011 to 2014. Under Section 82 of the Code of Criminal Procedure necessary actions were initiated by the learned trial court and this applicant has been declared absconder under the provisions of the Code of Criminal Procedure.

(iv) The name of this applicant has been given by one Mithilesh Yadav, who is owner of the said Bolero Jeep from which 7000 gms. Opium was seized. Statement of this Mithilesh Yadav is a relevant evidence under Section 53A of the N.D.P.S. Act, 1985 and it is not hit by Section 25 and 26 of the Indian Evidence Act, 1872.

(v) Looking to the provisions of Section 37 of the N.D.P.S. Act, 1985, F.S.L. Report, the statements of the witnesses, recorded during the investigation and also looking to the fact that this applicant was absconding for fairly a long time, if he is enlarged on bail, there are all chances that he may not be available for trial and he may tamper with the evidences. As this applicant was absconding, for this applicant the trial was separated and was given a new number bearing N.D.P.S. Case No. 6-B of 2011, which is pending before the learned Sessions Judge-III, Chatra.

(vi) Learned counsel for the applicant has submitted that the police officer, who has carried out search and seizure, was not authorized and, therefore, his action

under Sections 45, 50 and 51 of the N.D.P.S. Act, 1985 is illegal, null and void.

This contention has got no merits, mainly for the reason that when any vehicle is searched and seized abruptly, there is no need of any procedure to be followed. It may happen that when the police is checking any vehicle for any reason whatsoever, there may not be any contra-banned article, but, during the search, if there is any prohibited or contra-banned substance in the said vehicle, the police has got all power, jurisdiction and authority to seize the said prohibited substance. Moreover, there is no violation of Section 50 of the N.D.P.S. Act, 1985, in view of the fact that even from the physical custody of this applicant the narcotics substance was not found. The applicant was the driver, who ran away and his name was given by the owner of the vehicle (co-accused), which is relevant as per Section 53A of the N.D.P.S. Act, 1985. Even otherwise also, since the trial being N.D.P.S. Case No. 6-B of 2011 is pending before the learned Sessions Judge-III, Chatra, I am not inclined to give further details of this argument, but, suffice it to say that at this stage this cannot be a ground for enlarging this applicant on bail.

(vii) Learned counsel for the applicant has also submitted that the statement of Mithilesh Yadav- co-accused or accomplice has got no value in the eyes of law. He can give any body's name and that any body can be innocent also.

This attractive argument is also not accepted by this Court, mainly for the reason that as per Section 53A of the N.D.P.S. Act, 1985 the statement of the co-accused is a relevant evidence. Section 53A of the N.D.P.S. Act, 1985 reads as under:

"53A. Relevancy of statements under certain circumstances.-

(1) A statement made and signed by a person before any officer empowered under section 53 for the investigation of offences, during the course of any inquiry or proceedings by such officer, shall be relevant for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,-

(a) when the person who made the statement is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceedings under this Act or the rules or orders made thereunder, other than a proceeding before a court, as they apply in relation to a proceeding before a court."

(Emphasis supplied)

There is one more reason not to accept this argument, canvassed by the learned counsel for the applicant that for any accused the Investigating Officer can apply through the A.P.P. for making him approver under Sections 306 and 307 of the Code of Criminal Procedure and once that co-accused is declared as an approver, the statement made by this co-accused will be very very relevant evidence in the court of law. For ready reference, Sections 306 and 307 of the Code of Criminal Procedure are being reproduced hereunder:

"306. Tender of pardon to accomplice. - (1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) This section applies to-

(a) any offence triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952);

(b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under sub-section (1) shall record-

(a) his reasons for so doing;

(b) whether the tender was or was not accepted by the person to whom it was made,

and shall, on application made by the accused, furnish him with a copy of such record free of cost.

(4) Every person accepting a tender of pardon made under sub-section (1)-

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any,

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has accepted a tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case.-

(a) commit it for trial-

(i) to the Court of Session if the offence is triable exclusively by the Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;

(ii) to a Court of Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952), if the offence is triable exclusively by that Court;

(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.

307. Power to direct tender of pardon. - At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person."

(Emphasis supplied)

(viii) It is not known what stand will be taken by the Investigating Officer and the A.P.P. when the trial will commence, but, suffice it to say that especially under the provisions of N.D.P.S. Act, 1985 even though the statement is made by co-accused before the Investigating Officer, it is a relevant evidence. As per Section 30 of the Indian Evidence Act, 1872 also, the statement made by one of the co-accused cannot be simply brushed aside, at this stage. Section 30 of the Indian Evidence Act, 1872 reads as under:

"30. Consideration of proved confession affecting person making it and others jointly under trial for same offence. -When more person than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

(Emphasis supplied)

If this Section is read with Section 53A of the N.D.P.S. Act, 1985, then the statement, which is a confessional statement of co-accused- Mithilesh Yadav is highly relevant, during the trial before the learned trial court and hence, the argument canvassed by the learned counsel for the applicant that the statement of Mithilesh Yadav, who is accomplice, has got no value in the eyes of law, is devoid of any merit.

8. As a cumulative effect of the aforesaid facts and reasons and the provisions of N.D.P.S. Act, 1985, especially Sections 37 and 53A thereof to be read with Section 30 of the Indian Evidence Act, 1872 and also keeping in mind the fact that this applicant was absconding from 2011 to 2014 and also looking to the fact that he has actively participated, prima facie, in committing the offence, as alleged by the prosecution, and also looking to the gravity of offence and the quantum of punishment, I am not inclined to enlarge this applicant, namely,

Dhiran Singh, on bail. Thus, there being no substance, this bail application is hereby dismissed.

9. Registrar General of this Court will send a copy of this order through Fax to:

- (a) Secretary, Department of Home, Govt. of Jharkhand, Ranchi;
- (b) Director General of Police, Jharkhand, Ranchi;
- (c) Director, Judicial Academy, State of Jharkhand, Ranchi (for educational purpose;
- (d) Deputy Inspector General-cum-Principal, Police Training Center, Hazaribagh (for educational purpose); and
- (e) Superintendent of Police of all the district within the State of Jharkhand to percolate this order into sub-ordinate vertical hierarchy.