

(2020) 09 J&K CK 0033

In the Jammu And Kashmir High Court

Case No : Criminal Miscellaneous No. 58 Of 2019, Criminal Appeal No. 05 Of 2018

Mohammad Yousuf Ganaie

APPELLANT

Vs

State Of J&K And Others

RESPONDENT

Date of Decision : 16-09-2020

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 8, 20, 20(c), 37(1) (b)
Code Of Criminal Procedure, 1973 — Section 436(A), 497(D)

Citation : (2020) 09 J&K CK 0033

Hon'ble Judges : Ali Mohammad Magrey, J; Sanjay Dhar, J

Bench : Division Bench

Advocate : S. T. Hussain, T. M. Shamsi

Final Decision : Dismissed

Judgement

Sanjay Dhar, J

1) The appellant has moved this application for grant of interim bail for four months in his favour. In the application, it is contended that because of lockdown in Kashmir Valley, the family of the appellant-convict is suffering economically. It is averred that the appellant is the only bread earner of his family and he has to arrange finance for treatment of his wife and he has also to arrange betrothal of his daughter, who has now turned 30 years.

2) Apart from above contentions, the appellant has raised certain issues touching the merits of the main appeal.

3) We have heard learned counsel for the parties and perused the record of the case.

4) The brief factual background giving rise to the filing of criminal appeal, discernible from the record, is that on 31.01.2014, appellant/ accused, pursuant to reliable information, was subjected to personal search by the sleuths of NCB

and Police at Railway Station, Jammu, and 6.023 Kgs charas was recovered from his possession. After investigation of the case, offences under Section 8/20 of NDPS Act were established against the appellant/accused and a complaint in this regard was laid before the court below.

5) After trial of the case, the appellant has been convicted for offence under Section 8/20 NDPS Act in terms of impugned judgment dated 05.03.2018 and he has been sentenced to undergo rigorous imprisonment for 15 years and to pay fine of Rs.1.00/ lac.

6) During the pendency of the appeal, appellant had moved an application for grant of bail on an earlier occasion. The same has been dismissed vide order dated 03.08.2018. The instant application is the second one filed by the appellant for grant of bail.

7) It has been contended by the learned counsel for the appellant that his wife is unwell and he has to arrange finance for her treatment. It is also argued that the appellant has to arrange betrothal for his daughter.

8) The appellant has not placed on record anything, worth the name, to show that his wife is unwell. No medical record in this regard has been placed before us. Regarding betrothal of daughter of the appellant, the same cannot be a ground for grant of bail, particularly in a serious offence like the one under Section 8/20 of NDPS Act, for which appellant is undergoing sentence in terms of the impugned judgment passed by the trial court.

9) It has been contended by the learned counsel for the appellant that the appellant cannot, in any case, be sentenced to imprisonment for more than ten years by the trial court as there was no material regarding previous criminal record of the appellant before the trial court. On this basis, learned counsel for the appellant has contended that since the appellant has undergone more than half of the sentence which can ultimately be awarded in his favour, as such, he is entitled to grant of bail in terms of Section 497-D of the Code of Criminal Procedure which corresponds to Section 436A of Central Code of Criminal Procedure.

10) The benefit of Section 497-D of Cr. P. C can be claimed by a person who has undergone at least one half of maximum imprisonment specified for the offence. The provision reads as under:

"497-D. Maximum period for which an under trial prisoner can be detained:

Where a person has during the period of investigation, inquiry or trial under this Code or an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under the 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 in the 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 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 maximum period of imprisonment provided for said offence under the law.

Explanation:--In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded.

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 extending 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 v. Union of India & others*, reported in (2015) 13 SCC 605. Para 6 of the said judgment is relevant to the context and the same is reproduced as under:

"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." (emphasis supplied)

12) Relying upon the aforementioned 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 noting the provisions contained in Section 497-D of Cr. P. C 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) Applying the ratio laid down in the above referred cases to the facts of the instant case, it can safely be stated that the appellant/accused is not entitled to the benefit of Section 497-D of the Code of Criminal Procedure. This is so because the appellant/accused has been in custody for a period of only about six years and eight months whereas the offence under Section 20 of the NDPS Act, of which the appellant has been convicted, specifies maximum punishment of imprisonment of 20 years. Therefore, unless a person undergoes detention of ten years, the benefit of Section 497-D Cr. P.C cannot be extended to him. The appellant obviously does not fulfill this criteria. He has not even undergone detention for one half of the sentence of imprisonment actually awarded to him. The argument of the learned counsel is, therefore, without any merit.

14) It has been next contended by the learned counsel for the appellant that it is unlikely that the appeal of the appellant will be heard by this Court in near future because of the prevailing pandemic, therefore, the appellant deserves to be enlarged on bail.

15) It is true that the Supreme Court has in *Akhtari Bi (Smt) v. State of M.P.*, reported in (2001) 4 SCC 355, reiterated in *Hussain and another v. Union of India*, reported in (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. But even these principles are not applicable to the case at hand. The instant appeal has been filed before this Court in the month of April, 2018. The appeal is, therefore, less than five years old and it is not a case where the hearing of the appeal has been delayed for an unreasonably long period. Thus, no case for grant of bail is made out in favour of the appellant on this ground as well.

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 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 reported in (2009) 2 SCC 624.

17) While considering an application for grant of bail in an offence to which Section 37 (1)(b) of NDPS Act is attracted, as in the present case, it has to be shown by the applicant that there are reasonable grounds for believing that the applicant is not guilty of the offence and that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose of consideration of the prayer for bail.

18) Upon consideration of the impugned judgment as well as the evidence on record, it cannot be stated that the appellant/accused is not guilty of the offence of which he has been convicted. We may hasten to add here that our above observation is tentative in nature and are relevant only for the purpose of determination of this application.

19) For the foregoing reasons, we do not find any merit in this application. The same is dismissed. However, it is directed that the paper book of the appeal be prepared immediately and the main appeal be listed for final hearing on 4th of November, 2020.