

(2007) 02 GUJ CK 0064

In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 1067 of 2007 in Criminal Appeal No. 2277 of 2004

Mohammed Iqbal Gulam Mohammed Shaikh

APPELLANT

Vs

The State of Gujarat and Another

RESPONDENT

Date of Decision : 06-02-2007

Acts Referred:

Constitution of India, 1950 — Article 21

Criminal Procedure Code, 1973 (CrPC) — Section 389

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 32A, 33, 37

Citation : (2007) 02 GUJ CK 0064

Hon'ble Judges : Bankim N. Mehta, J;A.L. Dave, J

Bench : Division Bench

Advocate : Rajesh M. Agrawal, No. 1, for the Appellant; None, for the Respondent

Judgement

A.L. Dave, J.—This is a successive application preferred by the applicant for suspension of sentence and his release on bail during pendency of the appeal. The earlier application preferred by the applicant bearing No. 12261/04 came to be rejected by order dated 6.5.2005 which runs as under:

This is an application filed u/s 389 of Cr.P.C. For suspension of the substantive sentence and to grant bail pending final disposal of the appeal. We have heard learned advocates for the parties. Mr. R.M. Agrawal learned advocate for the applicant, however, does not press this application. Hence, this application is rejected.

2. The applicant has since then preferred numerous applications for temporary bail which have been decided in accordance with law.

2.1. Now the applicant has preferred this application again on the ground that he is in jail since 22nd August, 2000, that his appeal is not yet listed for final hearing that there is likelihood of delay in disposal of the appeal, and that his fundamental right for expeditious justice under Article 21 of the Constitution of

India is thus violated. He may, therefore, be enlarged on bail as efflux of time is itself a change of circumstance. Learned advocate Mr. Agarwal has submitted that although Section 37 of N.D.P.S. Act would be applicable in the facts of the present case, that section does not lay down an absolute proposition of law that no person involved in offences of N.D.P.S. Act can be enlarged on bail. He submitted that Section 32A of the N.D.P.S. Act has also been held to be ultra-vires to Article 21 of the Constitution of India as far as it relates to power of Court to suspend sentence, and, therefore, that section also will not come in the way of the applicant asking for bail. Mr. Agarwal submitted that the application may, therefore, be allowed.

3. Learned APP Mr. Raval appears for opponent No. 1 on service of advance copy of the application. According to him when the applicant is convicted for an offence under the N.D.P.S. Act, the requirements of Section 37 of the N.D.P.S. Act cannot be said to have been satisfied and, therefore, the Court may not exercise discretion in favour of the applicant. The application may be rejected.

4. Before proceeding to deal with the merits of the application brief facts of the case may be narrated thus:

4.1. The applicant is convicted for having indulged in possession and/or trading of 6 kg and 6 gms. of charas when he was caught red handed while he was handing over a suit-case containing the contraband to another convict. He is sentenced to undergo R.I. for 12 years and to pay a fine of Rs. 1 lakh and, in default, to undergo further imprisonment for a period of three months.

5. Since this is a successive application the Court is not required to go into the examination of merits of the applicant's case for suspension of sentence. It was contended that the earlier application was not pressed and, therefore, was not decided on merits. However, if the order passed in that application quoted in earlier part of this order is seen, it is clear that the application was not pressed by the learned advocate for the applicant after hearing and upon the learned advocate not pressing the application the Bench rejected the application finally. We are, therefore, of the view that the contention that earlier application was not decided on merits and that, therefore, this application may be heard on merits cannot be accepted.

6. Considering the quantity of contraband (6 kg and 6 gms) with which the applicant is held to have been involved, there cannot be any doubt that Section 37 of N.D.P.S. Act would be applicable to the facts of the case. Section 37 of N.D.P.S. Act provides that no person accused of an offence punishable for offences u/s. 19, 24 or 27 A and also for offences involving commercial quantity shall be released on bail unless the Public Prosecutor is heard and the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail.

6.1. In the case on hand the applicant is convicted by a competent Criminal Court in respect of contraband being 6 kg and 6 gm, which would be a

commercial quantity and, therefore, we do not find any material before us to feel satisfied about existence of reasonable grounds for believing that the applicant is not guilty of such offence. Further, we do not have any other material to feel satisfied that the applicant is not likely to commit any offence while on bail. It was contended that there is no evidence that the applicant has, in past, committed such an offence or that he is involved with any such gang or racket, but absence of past conviction or non-involvement with such gang thus would not be good enough to satisfy judicial conscious of a Court that a man convicted of such offence would not commit such an offence if released on bail. In our opinion, therefore, Section 37 of the Act would be applicable to the present case with full force.

6.2. Resultantly the two requirements having not been satisfied the applicant cannot be released on bail by virtue of the provisions of Section 37.

7. Provisions contained in Section 32A of the N.D.P.S Act can also be profitably referred to. Section 32A of the Act provides that notwithstanding anything contained in Code of criminal procedure or any other law for the time being in force and subject to provisions of Section 33, no sentence awarded under the Act shall be suspended or remitted or commuted. It was contended by learned advocate for the applicant that Section 32A has been held to be partially ultra-virus to Article 21 of the Constitution of India. In this context decision of the Supreme Court in case of *Dadu @ Tulsidas Vs. State of Maharashtra*, may be referred to. The Apex Court came to the conclusion that Section 32A of the N.D.P.S. Act is violative of Article 21 of the Constitution of India to the extent it takes away the right of Court to suspend the sentence awarded under the Act. The rest of the provisions of said section has been upheld by the Apex Court.

7.1. In that very decision the Apex Court came to the conclusion that power of suspension of sentence must be exercised by Court of law within parameters of Section 37 of N.D.P.S. Act. Persons convicted under the Act is not entitled to seek suspension as a matter of right on the ground that provisions in Section 32A depriving Courts of suspending sentence has been held to be void. As discussed above neither of the twin requirements of Section 37 of N.D.P.S Act is satisfied and, therefore, discretion to grant bail cannot be exercised in favour of the applicant.

8. Now comes a question as to whether the applicant is entitled to suspension of sentence and bail on the ground that he is in jail since 22nd August, 2000 and there is likelihood of delay in disposal of the appeal.

8.1. The applicant is convicted for rigorous imprisonment for 12 years. He is involved in a serious offence affecting the society as a whole. There is no material to infer that the applicant would not involve himself in similar cases in future. The Court has to take into consideration while considering the question of the suspension of sentence the nature of accusation made against the accused, the manner in which the crime is alleged to have committed, the gravity of

offence and the desirability of releasing the accused on bail. (Vinay Kumar Vs. Narendra and Others, , Ramji Prasad Vs. Rattan Kumar Jaiswal and Another, : and Kishori Lal Vs. Rupa and Others,

8.2. The application has to fail on all the four counts if facts of the case are considered.

8.3. The applicant came to be convicted of the offence by judgment and order dated 11th June, 2003 and the appeal came to be preferred by him in the year 2004 after it was time barred by preferring a delay condonation application. It therefore, cannot be said that the delay is caused not because of any fault on the part of the applicant. That apart as desired by the Apex Court as many as six Benches are working on criminal side of hearing of the appeals for speedy disposals of the appeals. The applicant's plea that delay is likely to occur in disposal of his appeal which violates his right under Article 21 cannot be accepted, in the present factual situation considering the nature of accusation, the manner in which the offence is committed and desirability of the applicant's release on bail. The application, therefore, must fail and stands rejected.