

(1996) 05 OHC CK 0012

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 864 of 1996

N. Nageswar Rao

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 10-05-1996

Acts Referred:

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

Citation : (1997) CriLJ 6 : (1996) 2 OLR 211

Hon'ble Judges : P.K. Misra, J

Bench : Single Bench

Advocate : Ashok Kumar Mohapatra, K.N. Parida, M. Mishra, B.P. Satpathy, S.C. Choudhury, A.K. Mishra and A. Tripathy, for the Appellant; A.B. Misra, Standing Counsel (Central), for the Respondent

Judgement

P.K. Misra, J.—Robert Bruce had become successful after several attempts. The petitioner possibly being inspired by Robert Bruce has filed this petition for bail after similar applications had been rejected on several occasions in the High Court. Last such order was passed on 23-2-1994. The present petition has been filed even before the ink has dried on the earlier order.

2. The petitioner is facing trial before the 2nd Addl. Sessions Judge, Cuttack in 2 (c) C. C. No. 335 of 1994 alongwith co-accused Dhoina Das. Charge has been framed u/s 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act") Some witnesses have been examined.

The petitioner has been charged u/s 20(b)(i) of the NDPS Act which is punishable with imprisonment for a term which may extend to five years. Learned counsel for the petitioner submits that since the offence is punishable for a term of imprisonment which may extend to five years, the embargo u/s 37(1)(b) of the NDPS Act, is inapplicable. Section 37(1)(b) of the NDPS Act, reads as follows:

37(1) xx xx xx (a) xx xx xx (b) No person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on

bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the public prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

It is the submission of the learned counsel for the petitioner that the embargo u/s 37 of the NDPS Act is applicable where a person is accused of having committed an offence punishable for a term of imprisonment of five years or more. According to his submission since an offence u/s 20(b)(i) of the NDPS Act is punishable for a term which may extend to five years. Section 37 of the Act should not stand as a hurdle in the matter of consideration of bail. He submits that NDPS Act being a penal statute and Section 37 being a restrictive provisions, should be interpreted strictly. He submits that. more often than not the usual punishment imposed in an offence u/s 20(b)(i) of the Act is less than five years and as such it would be unjust to keep such accused persons who are charged with offences punishable for a term which may extend to five years, under indefinite custody. He has relied upon a decision of the Karnataka High Court reported in 1993 CriL LJ 94, A. V. Dharmasingh and Ors. v. The State of Karnataka, which has been subsequently followed by a Division Bench of Patna High Court reported in 1994 (3) Crimes 671 Kamalesh Kumar and Ors. v. State of Bihar. It is further brought to my notice that while interpreting Section 167(2) proviso of the Code of Criminal Procedure it has been held by Orissa High Court in a decision reported in (1993) 6 OCR 714 Bijay Kumar raout v. State of Orissa, that the expression to the effect offence punishable with imprisonment for a term not less than ten years" cannot be equated with the expression "offence punishable with imprisonment for a period up to ten years. "He submits that the expression "...offence punishable for a term of imprisonment of five years or more" means an offence where the minimum sentence is five years or mere and should not be equated with offences where the punishment may extend to a term of five years. The aforesaid submissions of the learned counsel for the petitioner though attractive on the face of it cannot be considered, in view of the direct decision of Oriss High Court arising under the NDPS Act reported in 1992 Crimes 79, Rajendra Panda and Anr. v. State of Orissa which is binding on me in the said decision it has been held that bar u/s 37 is also applicable to an offence punishable with imprisonment for a term which may extend to five years.

In view of the aforesaid, I proceed on the footing that the bar u/s 37 is applicable. As required u/s 37(1)(b)(ii), the Court is to consider whether there is reasonable ground for believing that the accused is not guilty of such offence and secondly, the accused is not likely to commit any offence while on bail.

3. The latter question can be answered only in a hypothetical manner, as no Court can predicate if an accused if released on bail is not likely to commit any

offence while on bail, ordinarily though the Courts come to a conclusion that the accused is not likely to commit an offence in future, keeping in view the past conduct of the accused. If there is no allegation of involvement in any previous offence, it can be reasonably assumed that the accused person is not likely to commit an offence in future while on bail. It is said that every saint has a past and every sinner has a future. So far as the NDPS, Act, is concerned, it can be assumed that an alleged sinner (the accused) if he does not have a past can be said to have a future. Judged against the aforesaid assumption, it appears that in the present case there is no definite allegation that the petitioner was involved in any particular crime in the past, though it is suspected that he indulges in trafficking of illicit drugs. For the purpose of this case, I, therefore, proceed on the assumption that the petitioner if released on bail is not likely to commit an offence in future in the absence of any definite material about his past involvement.

4. Now the most important question relating to the other requirements as envisaged in Section 37(1)(b)(ii) is whether it can be said that there is reasonable ground for believing that the petitioner is not guilty of the alleged offence.

Learned counsel for the petitioner submits that only material against the petitioner is the Confessional statement of the co-accused Dhoina Das which had been recorded by the investigating agency. The aforesaid confessional statement having been recorded before the Inspector of Central Excise and Customs, is admissible as it does not come within the purview of Section 25 of the Indian Evidence Act. It has been held in the case of Raj Kumar Karwal Vs. Union of India and others, that the officers of other Departments who are authorised to search, seize and investigate under the NDPS Act are not Police Officers and confession made before them is admissible. Therefore, there can be no doubt that the confession of co-accused Dhoina Das is admissible. The question is whether such confession of a co-accused can be said to be sufficient even at the stage of consideration of bail to justify further incarceration of the petitioner in custody. Confession of a co-accused is relevant u/s 30 of the Evidence Act, However law is well-settled that such confession of co-accused cannot be considered as substantive material to implicate the co-accused person in the trial and it can be considered as lending assurance to the other materials on record. In other words, a conviction cannot be based solely on the confession of accused. If other materials are on record to sustain a conviction, the confession of a co-accused can be considered as material tending assurance to such other materials.

5. If the aforesaid confession of the co-accused would have been the only material against the present petitioner, I would have been tempted to accept the contention of the learned counsel for this Petitioner. However, on perusal of the statement recorded during the investigation find that one Rabindra Kumar Behera has made statements implicating the present petitioner. Initially, the aforesaid Rabindra Kumar Behera was considered to be one of the suspects, but

since no material was unearthed against him, he was not made an accused. It is submitted by the learned counsel for the petitioner that the aforesaid Rabindra Kumar Behera has subsequently sworn an affidavit disclaiming his earlier statements recorded by the investigating agency. It is further submitted by him that the aforesaid Rabindra Kumar Behera has not been shown as a witness in the Prosecution Report. My attention has been drawn to the statement of PW 2 as contained in paragraph-18 of the deposition, where it has been stated that in the P. R. Rabindra Kumar Behera has not been shown as a witness. It is submitted that in view of the affidavit of Rabindra Kumar Behera and the fact that he has not been cited as a witness in the Prosecution Report, it is very unlikely that the said Rabindra Kumar Behera will be examined as a witness and at any rate such evidence cannot be accepted.

6. It would be hazardous on my part to conjecture at this stage as to whether the prosecution is likely to examine the said Rabindra Kumar Behera as a witness and as to what would be the effect of his subsequent affidavit if he is in fact, examined as a witness. Any observation on this aspect of this juncture is likely to prejudice the prosecution and the defence and I desist from doing so. Suffice it to say that having regard to the materials on record. I am not in a position to come to a prima facie conclusion to the effect that there is reasonable ground for believing that the petitioner is not guilty of the alleged offence. In view of the aforesaid conclusion and in view of the embargo as contained in Section 37(1)(b) (ii), I reject the application of the petitioner albeit reluctantly.

The petitioner is in custody for about one and half years; the trial has already commenced and some of the witnesses have been examined. The ratio of the decision reported in (1995) 8 OCR1 (SC) (Supreme Court Legal Aid Committee representing Under-trial Prisoners v. Union of India and Ors.) is not applicable. It is hoped and expected that the trial shall be concluded expeditiously, preferably within a period of three months. It is made clear that the trial Court should not be influenced by any observations made in this order regarding the factual aspects of the case.

Subject to the aforesaid observations, the Criminal Misc. Case is dismissed.