

(2024) 06 J&K CK 0007

In the Jammu And Kashmir High Court

Case No : Criminal Appeal (D) No. 31 Of 2023, Criminal Miscellaneous Case No. 2096 Of 2023

Saddam Hussain

APPELLANT

Vs

Union Territory Of J&K And Others

RESPONDENT

Date of Decision : 03-06-2024

Acts Referred:

National Investigation Agency Act, 2008 — Section 22
Unlawful Activities (Prevention) Act, 1967 — Section 13, 18, 19, 20, 23, 27, 38, 39, 43D(5)
Arms Act, 1959 — Section 3, 7, 25, 27
Code Of Criminal Procedure, 1973 — Section 164

Citation : (2024) 06 J&K CK 0007

Hon'ble Judges : Atul Sreedharan, J;Puneet Gupta, J

Bench : Division Bench

Advocate : Sanchit Verma, Monika Kohli

Final Decision : Allowed

Judgement

Atul Sreedharan, J

1. The present appeal has been filed by the appellant whose application for bail was dismissed vide order dated 30.10.2023 by the Court of learned Additional District and Sessions Judge (Fast Track Court) Doda [Special Judge Designated under Section 22 of the NIA Act].

2. Briefly, the case of the appellant is that he was charged by the police of Police Station Dachhan in FIR No. 01/2020 for commission of offences under Sections 13/18/19/20/23/38/39 of the Unlawful Activities (Prevention) Act and 3/25, 7/25, 7/27 of the Arms Act. The undisputed fact of this case is that the appellant was initially absconding from the trial. Learned counsel for the appellant submits that the appellant was away in Himachal Pradesh and the case was registered during the Covid period and that is why he never came to know about the case pending against him. It is also undisputed that when the appellant came to know

about the case pending against him, he appeared before the learned Court below and surrendered and was taken into custody. Also, admittedly the only evidence against him is the testimony of PW-6 Waris Rasool. In all there are 22 witnesses in this case out of which 14 witnesses have been examined by the prosecution as on the date on which the impugned order was passed. Learned counsel for the appellant submits that Waris Rasool has been examined as PW-6 before the learned trial Court. He has been declared hostile and cross examined by the prosecution. He has stated nothing incriminating against the appellant.

3. Under the circumstances, learned counsel for the appellant submits that the prima facie case which may have existed against the appellant till the time PW-6 Waris Rasool was examined as witness before the trial Court came to be dislodged after he turned hostile.

4. In opposition, the prosecution has argued that the application for bail before the trial Court was not maintainable as the charge had already been framed against the appellant. The second limb of the argument is that a prima facie case against the appellant stands established by the prosecution. Thirdly, it is argued before this Court that Waris Rasool during his cross-examination has not denied the involvement of the appellant and lastly, his illness which was urinary infection is being treated in jail and that the illness of his daughter was a condition that could have been looked-after by the wife of the appellant.

5. The facts relating to the appellant are laid down in paragraph 17 of the impugned order. The learned Trial Court has condensed the charges against the appellant by recording that he is an Over Ground Worker for Hizbul Mujahideen and was providing hideouts and safe harbors for the terrorists and also gave them logistic support and was continuously attending meetings of Hizbul Mujahideen and supplying requisite information to the terrorists and that he was also involved in the collection of funds for the terrorists while providing weapons to the terrorists and also giving them intelligence support to facilitate the attacks. There are multiple accused persons in this case. On 05.01.2020, two of the accused persons were taken into custody and on 06.01.2020, three other accused persons were taken into custody. On 13.01.2020, two accused persons were taken into custody on the basis of suspicion and on 07.02.2020, one more accused person was apprehended. At the stage of framing of charge, two persons were discharged by the learned Court below vide order dated 02.06.2021.

6. The specific charge recorded by the trial Court, as reflected in paragraph 18 of the impugned order, where the trial Court says that the appellant worked as an underground worker for Hizbul Mujahideen to facilitate the terrorists in accomplishing acts of terrorism and also provided all kinds of logistic support to them.

7. Learned senior AAG appearing on behalf of the prosecution submits that the allegations against the appellant are grave and falls under the category of

offences under the UA(P)A Act to which the bar of the proviso to sub section 5 of section 43-D of the UA(P)A applies. As regards the witness PW-6 Waris Rasool, who has turned hostile, the learned Sr. AAG has referred to paragraph 21 of the learned trial Court's order from which it appears that the learned trial Court has appreciated the evidence/deposition of Waris Rasool in such a manner and held that even though Waris Rasool has turned hostile before the learned trial Court, he has supported the prosecution's case in the 164 CrPC statement made before the Magistrate wherein he has given incriminating statements against the appellant herein of having been associated with the terrorists. However, in his deposition before the trial Court he completely omits the incriminating part of the 164 statement made before the Magistrate on account of which he was declared hostile by the prosecution in cross examination. In cross examination PW-6 Waris Rasool admits that he knows the appellant and that the appellant was a Moulvi of Mosque from whom the witness used to learn the Quran and Urdu and that the incriminating material stated by him before the Magistrate under Section 164 was made by him under pressure of the police as they had taken him into custody and threatened him that they will implicate him in the case if he does not state against the appellant herein.

8. Under the circumstances, it appears that the learned Court below has relied upon the 164 statement of the witness Waris Rasool over the statement given by the said witness in his deposition before the trial Court.

9. This Court is of the opinion that the learned Court below committed a cardinal error in relying upon the 164 statement recorded by the police in the course of the investigation by producing him before the Magistrate as that is a statement which was un-tested by cross examination by the appellant herein and therefore, cannot be evidence against the appellant. Undoubtedly, the statement made by Waris Rasool under Section 164 CrPC was prima facie evidence against the appellant till such time that Waris Rasool was examined as a prosecution witness before the Trial Court. Once the said witness had turned hostile and had not supported the case of the prosecution and has also explained why he had made the incriminating statement against the appellant under section 164 CrPC which was on account of pressure by the police and alleged unlawful detention by the police, the prima facie evidence against the appellant stood dislodged. There is no other evidence which could have been taken into account else the learned Court below would have referred to the same.

10. The learned Sr. AAG has referred to the statement under section 27 of the co-accused which involves the appellant herein. However, the same again will not come in the category of prima facie evidence unless and until the maker of the statement was made an approver and examined as a witness on behalf of the prosecution. That is not the case here.

11. Looking at the facts and circumstances of the case and what has been argued and considered by this Court hereinabove, the appeal is allowed. The appellant is admitted to bail subject to furnishing of Rs.50,000/- as personal

bond and two solvent sureties of the like amount to the satisfaction of the Registrar Judicial of this Court. Additionally, the appellant shall appear before the SHO Police Station, Dachhan once in ten days to register his presence which shall continue till the end of the trial.