
(1998) 05 BOM CK 0010

In the Bombay High Court

Case No : Criminal Application No. 3135 of 1997

Smt. Shakuntala Bhagwat

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 06-05-1998

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 12, 15, 16, 17, 18

Citation : (1998) CriLJ 3773

Hon'ble Judges : M.B. Shah, C.J;A.Y. Sakhare, J

Bench : Division Bench

Advocate : G.S. Hegde, for the Appellant; J.S. Pawar, Adl. P.P., for the Respondent

Final Decision : Dismissed

Judgement

A.Y. Sakhare, J.—By an order dated 5th December, 1997, the learned Single Judge has made a reference to the Division Bench for deciding the following question :

Whether the provisions of Section 37(1)(b) of the Narcotic Drugs & Psychotropic Substances Act, 1985 would be applicable with regard to the grant of bail in respect of offence alleged to have been committed u/s 20(b)(i) of the Narcotic Drugs & Psychotropic Substances Act, 1985?

2. On 12th May, 1997 at about 8.15 p.m. the petitioner was arrested for being found in possession of 1.5 Kg. of Ganja. The petitioner is prosecuted for offence punishable u/s 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act for sake of brevity), in Crime Register No. 153 of 1997 registered by the police of Chatushringi Police Station, Pune. The petitioner's bail application came to be rejected by the Additional Sessions Judge, Pune by his order dated 18th August, 1997. Thereafter, the petitioner approached this Court for bail by way of present application. At the time of hearing of this application, the learned Single Judge noticed that there are

conflicting views of this Court about the applicability of Section 37(1)(b) of the Act in respect of bail provisions relating to offence alleged to have been committed u/s 20(b)(i) of the Act. Thus by an order dated 5th December, 1997, the learned Single Judge has made a reference to the Division Bench for deciding the question quoted above.

3. In unreported decisions of this Court in (1) Criminal Application No. 2075 of 1992 decided on 13th August 1992 and (2) Criminal Application No. 1453 of 1992 decided on 3-7-92 both by Mr. Justice Daud (as he then was), (3) Criminal Application No. 3049 of 1992 decided on 26-11-1992 by Mr. Justice 1. G. Shah (as he then was), (4) Criminal Application No. 575 of 1997 decided on 27th March, 1997 by Mr. Justice Datar and reported decisions of this Court in Ghanshyam alias Chotu son of Dagdu Waghmare v. State of Maharashtra, reported in 1997 (4) All MR 110 (Aurangabad Bench), it has been held that as offence u/s 20(b)(i) of the Act is not compulsorily punishable with imprisonment of five years" rigors of Section 37(1)(b) of the Act are not attracted. A contrary view has been expressed by the learned Single Judge of this Court in the case of Chhotu Vs. State of Maharashtra . The learned Single Judge has held that while considering the bail application of the accused charged for offence punishable u/s 20(b)(i) of the Act, provisions of Section 37(1)(b) of the Act will be attracted as the punishment of imprisonment provided u/s 20(b)(i) of the Act can be extended upto 5 years.

4. Our attention is invited to the Division Bench decision of Patna High Court in the case of Kamleshkumar v. State of Bihar, reported in 1994 (3) Crimes 671 and Single Judge decision of Karnataka High Court in the case of A.V. Dharmasingh and others Vs. The State of Karnataka, , wherein, it has been held that offence u/s 20(b)(i) of the Act is punishable with less than 5 years of imprisonment and, therefore, Section 37(1)(b) of the Act is not applicable, while considering bail application. The Division Bench of Madras High Court in the case of Sundaresan alias Meganathan alias Mega Vs. State, and Single Judge of Rajasthan High Court in the case of Gena Ram Vs. State of Rajasthan, have taken contrary view that for offence punishable u/s 20(b)(i) of the Act, Section 37(1)(b) of the Act will be attracted and bail applications must be decided keeping in mind the rigors of Section 37(1)(b) of the Act.

5. As per the aims and objects of the Act, the Act was enacted to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property, derived from or used in illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the international conventions on Narcotic Drugs and Psychotropic Substances and for matters connected therewith. The Act was enacted as there was no sufficiently deterrent scheme of penalty before advent of the present Act. It was observed by the Law Commission that no minimum punishment was prescribed in the laws then applicable as a result of which drug traffickers were let off by the Courts with nominal punishment. It was also

observed that for a few years our country is increasingly facing the problem of traffic of drugs from some of our neighbouring countries and destined mainly to the western countries. Thus the Legislature when enacted the present Act intended to bring on statute an Act with stringent provisions to deal with and control the drug menace which was being felt over the years. By Act 2 of 1989 which came into effect with effect from 29th May, 1989, several amendments were made to the present Act. Possessing Ganja was made an offence punishable under the Act with effect from 29th May, 1989. Statement of Objects and Reasons dated 29th November, 1988 discloses that the Act provides deterrent punishment for drug trafficking offences. Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the Act, the need to amend the law to further strengthen it, has been felt. A sub-committee constituted for combating drug traffic and preventing drug abuse has also made number of recommendations for strengthening the existing law. In the light of the recommendations of the Cabinet Sub-Committee and the wording of the Act, an amendment was proposed which came to be incorporated by Act No. 2 of 1989 in the present Act. The amendment, inter alia, provided for the following things :-

- (i) to constitute a National Fund for Control of Drugs Abuse to meet the expenditure incurred in connection with the measures for combating illicit traffic and preventing drug abuse;
- (ii) to bring certain controlled substances which are used for manufacture of Narcotic Drugs and Psychotropic Substances under the ambit of Narcotic Drugs and Psychotropic Substances Act and to provide deterrent punishment for violation thereof;
- (iii) to provide that no sentence awarded under the Act shall be suspended, remitted or commuted;
- (iv) to provide for pre-trial disposal of seized drugs;
- (v) to provide death penalty on second conviction in respect of specified offences involving specified quantities of certain drugs;
- (vi) to provide for forfeiture of property and a detailed procedure relating to the same; and
- (vii) to provide that the offences shall be cognizable and non-bailable.

As per the Statement of Objects and Reasons dated 29th November, 1988, the Legislature intended to make provisions to make the offences punishable under the Act as cognizable and non-bailable.

6. Keeping in mind, the intention of the Legislature and the language used in Section 20(b)(i) and Section 37(1)(b) of the Act, we will have to find out whether while considering bail application of the accused charged with the offence

punishable u/s 20(b)(i) of the Act, Section 37(1)(b) of the Act is attracted or not. The rigors u/s 37(1)(b) of the Act are in addition to the conditions laid down under the Code of Criminal Procedure, 1973, for grant of bail.

7. To appreciate the submissions advanced before us, it will be useful to quote in verbatim Section 20 and 37 of the Act which read as under:-

Section 20 : Punishment for contravention in relation to cannabis plant and cannabis : Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder,-

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis,

shall be punishable,-

(i) where such contravention relates to ganja or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine which may extend to fifty thousand rupees;

(ii) where such contravention relates to cannabis other than ganja, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees and which may extend to two lakh rupees :

Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

Section 37 : Offences to be cognizable and non-bailable :- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1972 (2 of 1974),-

(a) every offence punishable under this Act shall be cognizable;

(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.

(2) The limitations on granting of bail specified in Clause (b) of Sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail.

8. As per Section 20(b)(i) of the Act, which is relevant for the present application, punishment prescribed as rigorous imprisonment for a term which

may be extended to 5 years and shall also be liable for a fine which may extend to Rs. 50,000/-. As per Section 37(1)(b) of the Act, the person accused of an offence punishable for a term of imprisonment of 5 years or more under the Act can be released on bail only if (i) Public Prosecutor has been given an opportunity to oppose the bail application and (ii) the Court is satisfied that (a) there are reasonable grounds for believing that the accused is not guilty of such offences and (b) that he is not likely to commit any offences while on bail.

9. Thus, as per Section 37(1)(b) of the Act if the accused is charged for offences punishable for a term of 5 years or more in addition to the conditions laid down in the Code of Criminal Procedure, 1973, the aforesaid conditions will have to be complied with. The words used in Section 37(1)(b) are for a term of imprisonment of 5 years or more, while, in Section 20(b)(i) of the Act the words used are with rigorous imprisonment of a term which may extend to 5 years. By carefully considering the provisions of Sections 20 and 37 of the Act, it is clear that the punishment provided for contravention in relation to the cannabis plant and cannabis (as per Section 20), can extend to 5 years which means punishment up to 5 years can be imposed. Further, this would be clear if the following Sections are read in the context of other Sections which provide for punishments :-

First category

1. (a) Section 15 provides for punishment for contravention in relation to poppy straw; Section 16 provides for punishment for contravention in relation to coca plant and coca leaves;

(b) Section 17 provides for punishment for contravention in relation to prepared opium;

(c) Section 18 provides for punishment for contravention in relation to opium poppy and opium;

(d) Section 19 provides for punishment for embezzlement of opium by cultivator;

(e) Section 20 provides for punishment for contravention in relation to cannabis other than ganja;

(f) Section 22 provides for punishment for contravention in relation to psychotropic substances;

(g) Section 21 provides for punishment for contravention in relation to manufactured drugs and preparations;

(h) Section 23 provides for punishment for illegal import into India, export from India, or transshipment of narcotic drug and psychotropic substances;

(i) Section 24 provides for punishment for external dealings in narcotic drugs and psychotropic substances in contravention of Section 12;

(j) Section 25 provides for punishment for allowing premises etc., to be used for

commission of an offence;

(k) Section 25-A provides for punishment for contravention of orders made u/s 9-A.

(1) Section 27-A provides for punishment for financing illicit traffic and harbouring offenders.

For all the above offences, the punishment provided for is rigorous imprisonment for a term which shall not be less than ten years which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees.

Second category

II. Section 20(i) quoted above, provides for punishment for contravention in relation to cannabis plant and cannabis. Where such contravention relates to ganja or the cultivation of cannabis plant, the punishment provided is rigorous imprisonment for a term which may extend to five years and shall also be liable to fine which may extend to fifty thousand rupees.

The punishment provided is imprisonment for a term which may extend to six months or with fine or with both.

Third category

III. Section 25-A provides for punishment for contravention of orders made u/s 9-A and the offence is punishable with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees.

Fourth category

IV. Section 26 provides for punishment for certain acts by licensee or his servants and the offence is punishable with rigorous imprisonment for a term which may extend to three years or with fine or with both.

V. Section 32 provides for punishment for offence for which no punishment is provided for contravention of any provision of this Act or any rule or order made, or any condition of any licence, permit or authorisation issued.

Sixth category

VI. Section 27 provides for punishment for illegal possession in small quantity for personal consumption of any narcotic drug or psychotropic substance or consumption of such drug or substance. Punishment is provided in Clauses (a) and (b) as quoted below :-

(a) Where the narcotic drug or psychotropic substance possessed or consumed is cocaine, morphine, diacety-morphine or any other narcotic drug or any psychotropic substance as may be specified in this behalf by the Central

Government, by notification in the Official Gazette, with imprisonment for a term which may extend to one year or with fine or with both; and

(b) Where the narcotic drug or psychotropic substance possessed or consumed is other than those specified in or under Clause (a), with imprisonment for a term which may extend to six months or with fine or with both.

Considering the aforesaid phraseology used in different Sections, it is clear that wherever the Legislature wanted to use the words "and" and "or", it has used the said words specifically. In the first group of matters, the word "and" is used and in the second group of matters the word "or" is used. So it would be difficult to hold that the word "or" in Section 37(1)(b) of the Act should read as "and".

Further, the first category of Sections provides for punishment which shall not be less than 10 years and also for fine. Second category of Section 20(1) provides for punishment which may extend upto 5 years. Third category provides for punishment which may extend upto 10 years and also fine. The fourth category provides for punishment which may extend to three years. The fifth category of Section 32 provides for punishment which may extent to six months or with fine or with both and lastly the sixth category of Section 27 provides for punishment for possession of small quantity for personal consumption of any drug where the punishment provided is one year or upto six months. These Sections are bifurcated by the Legislature considering gravity of offences determined by it. Therefore, it would not be open to the Court to say that a particular offence is not of serious nature or that possession of ganja should not be viewed seriously.

Further, for offences punishable u/s 31(a) the Legislature has also provided death penalty. Thus considering the various provisions of the Act, it is clear that the Act has made provisions of imposing minimum and maximum sentences for various offences. Section 37(1)(b) of the Act, clearly indicates that it has categorised the offences in two categories, (i) offences for which punishment of 5 years imprisonment or more has been provided for and (ii) for offences for which sentence of 5 year imprisonment cannot be given. Considering the intent of Legislature and language used in the Act, it is clear that for the purposes of bail applications under such offences for which punishment can be imposed for 5 years or more, provisions of Section 37(1)(b) of the Act will be attracted. In other words, if the offence is punishable with imprisonment which may extend to five years then provision of Section 37(1)(b) of the Act will be applicable and bail application will have to be considered keeping in mind restrictions imposed u/s 37(1)(b) of the Act.

9. It was submitted on behalf of the Applicant that the provisions of Section 37(1)(b) of the Act should be read down to mean that the punishment awarded is 5 years and more. It is submitted that the provisions of 5 years or more should be read as 5 years and more. As per the learned Counsel if the word "AND" is a conjunctive, then both the requirements are required to be satisfied. He further submitted that the provisions of Section 37 must be held to cover a case which is

punishable with imprisonment for five years and more and not upto five years only. It is not possible to accept this submission. There is no reason to read down Section 37(1)(b) of the Act, as contended by the learned Counsel, in view of its clear language coupled with Legislative intent. Section 37(1)(b) of the Act is applicable to offences which are punishable with imprisonment for a term of 5 years or more. Thus where the punishment provided for an offence can extend to imprisonment of 5 years, Section 37(1)(b) of the Act will be attracted.

10. By Act No. 2 of 1989 possessing Ganja was made an offence punishable under the Act with effect from 29th May 1989. By the same Act, Section 37 of the Act is substituted which is in the present form. Thus possessing of Ganja is treated as serious offence by Legislature. The Legislature has created a clear distinction for covering the cases u/s 37(1)(b) of the Act. The limitation or the expression used in Section 37(1)(b) of the Act is "for a term of imprisonment of 5 years or more". Thus offences for which punishment can be extended upto 5 years are covered by the provisions of Section 37(1)(b) of the Act.

11. The learned single Judge of this Court in case of *S.K. Chhotu v. State of Maharashtra* (cited supra) in paras 7 and 8 has observed as under :-

(7) If we look at the language of Section 37(1)(b) of the Act, it is clear that it intends to classify and bring into existence two categories, the first category being the offences in which the punishment for five years of imprisonment and more can be given and the other category being all the other offences in which the sentence of five years imprisonment cannot be given. The limitation of five years, therefore, appears to be deliberate. The plain meaning of the language would, therefore, be that all such offences in which a punishment of five years or more can be granted are covered under the language of Section 37(1)(b) and such other offences in which such punishment cannot be granted would not be so covered and such offences would be covered by the ordinary and general provisions of Criminal Procedure Code regarding the bail.

(8) Even at the cost of repetition, it could be said that Section 37 uses the words "five years or more" as a dissecting line between the two categories. All the offences in which a punishment of five years or more could be given are the offences which would be so covered u/s 37(1)(b) and all the others would be left out from the operation of that Section. The two categories are clear, distinct, intelligible and admit of no doubt or confusion. The argument that there were intended to be four categories, therefore, will have to be rejected.

Same view has been taken by the Division Bench of Madras High Court in case of *Sundaresan v. State of Tamil Nadu* (cited supra) in para 25 has observed as under (at page 3362; of Cri L.I) :-

(25) We are unable to agree with the learned counsel for the petitioner that the offence alleged against the petitioner u/s 20(b) of the NDPS Act does not come within the purview of Section 37(b) of the NDPS Act. The word "punishable" is found in both the Sections, namely, Section 20(b) and also Section 37(b) of the

NDPS Act. As per Section 20(b) of the NDPS Act, the punishment is for a term of five years or more that means that the punishment can be for a term of five years also or more. Therefore, we are of the opinion that there is no distinction with regard to applicability of Section 37(b) of the NDPS Act for the offence punishable u/s 20(b) of the NDPS Act.

Similarly the learned single Judge of Rajasthan High Court in case of Gena Ram v. State of Rajasthan (cited supra) in paras 8 and 11 has observed as under (at page 673) :-

(8) A plain reading of Section 37 makes it abundantly clear that a person even if accused of an offence punishable for a term of five years or more under the Act may be released on bail, if the public prosecutor has been given opportunity to oppose such bail application and the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of an offence punishable for term of imprisonment of five years or more and that he is not likely to commit any offence while on bail. This Section does not speak that the offence levelled against such accused must be punishable for a minimum term of five years. Thus, there is not at all any occasion or necessity to imply that this Section applies for an offence punishable for a minimum term of imprisonment of five years.

(11) Moreover there is no offence under this Act which fetches or carries punishment for a minimum term of imprisonment of five years. Therefore, the expression "five years or more" under this Act appearing in Section 37(1)(b) of the Act cannot be interpreted to mean that the offence should be punishable with minimum of five years or more.

12. Considering the aforesaid judgments and the provisions of the Act it is not possible to agree with the contrary views expressed by the learned single Judge's of this Court in Ghanshyam @ Chotu S/o Dagdu Waghmare v. State of Maharashtra, reported in 1997 (4) All MR 110 and unreported decisions of this Court in Criminal Application Nos. 3049 of 1992, Criminal Application No. 2075 of 1992 and Criminal Application No. 1453 of 1992. We, hereby, approve the law laid down by the learned single Judge of this Court in the case of Chhotu Vs. State of Maharashtra . For the reasons stated above, with respect, it is difficult to agree with the reasons given by the Division Bench of Patna High Court, in the case of Kamleshkumar v. State of Bihar and by the learned single Judge of Karnataka High Court in the case of A.V. Dharamsingh v. State of Karnataka (cited supra). As far as other Courts are concerned, we are in agreement with the law laid down by the Division Bench of Madras High Court in the case of Sundaresan v. State of Tamil Nadu and the single Judge of Rajasthan High Court in the case of Gena Ram v. State of Rajasthan (cited supra).

13. We answer the following question referred to the Division Bench in the affirmative.

Question : Whether the provisions of Section 37(1)(b) of the NDPS Act would be

applicable with regard to the grant of bail in respect of offence alleged to have been committed u/s 20(b)(i) of the NDPS Act.

Answer : In the affirmative.

14. Turning to the merits of the case, as the prosecution launched against the petitioner is u/s 20(b)(i) of the Act, provisions of Section 37(1)(b) of the Act will be applicable. The applicant will have to satisfy two tests viz., the applicant is not guilty of such an offence and (ii) that she is not likely to commit any offence while on bail.

15. Prima facie, we are of the opinion that the applicant will not be entitled for bail as there is sufficient material on record to indicate that she is guilty of an offence punishable u/s 20(b)(i) of the Act. Once we come to the conclusion that prima facie the applicant is guilty of offence u/s 20(b)(i) of the Act, then the applicant will not be entitled for bail. Other submission advanced on behalf of the applicant that she has three children and that the family will suffer is not relevant for consideration of the bail application when the offence alleged is under the Act.

16. The applicant's bail application is rejected. Criminal Application No. 3135 of 1997 to stand disposed of accordingly.