

R. Veeraiyan Vs. Intelligence Officer, Narcotics Control Bureau, South Zone, Chennai

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Court : Karnataka

Decided On : Jul-04-2001

Reported in : 2001(77)ECC315; ILR2001KAR5462

Judge : Mohamed Anwar, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 4(3), 37, 37(1), 50; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 389

Appeal No. : Criminal Appeal No. 633 of 2001

Appellant : R. Veeraiyan

Respondent : intelligence Officer, Narcotics Control Bureau, South Zone, Chennai

Advocate for Def. : Sri Urval N. Ramanand, Central Government Special Public Prosecutor

Advocate for Pet/Ap. : Sri Hasmath Pasha, Adv.

Disposition : Application rejected

Judgement :

ORDER

The Court

1. Heard the arguments of learned Counsels for both parties on I.A. I, filed for appellant under Section 389 of the Cr. P.C. praying to suspend the impugned sentences against appellant and release him on bail on such terms and conditions as the Court thinks fit.

2. By the impugned judgment of conviction, the appellant herein, who was accused 3 (in Spl. Case No. 25 of 1997) before the learned trial Sessions Judge has been convicted for the offence punishable under Section 21 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) ('NDPS Act' in short), and he was sentenced to suffer Rigorous Imprisonment for ten years and pay a fine of Rs. 1,00,000/- in default to suffer Rigorous Imprisonment for one year.

3. The respondent-prosecuting agency has filed its objection statement opposing LA. I on the ground that in view of the mandate of law contained in Section 37(1)(b)(ii) of the NDPS Act, the applicant-appellant is not entitled to be released on bail.

4. Mr. Hashmath Pasha, learned Counsel for appellant, argued that if the judgment of conviction of the Court below is apparently found to be suffering from material legal infirmities which are sure to result in reversal of the judgment, then, it obviously follows that there do not exist reasonable grounds for believing that accused is guilty of the offence of which he is convicted, and, as such he would be entitled to bailpending final disposal of this appeal. Certain so-called material infirmities highlighted by Mr. Hashmath Pasha are that the person who gave credible information to C.W. 1-Superintendent of Narcotic Control Bureau, and C.W. 1 as well are not examined at the trial; that the informant of the subsequent information, which was reduced into writing by Ex. P. 2 was also not examined; that C.W. 1 who apprehended the appellant-accused and was stated to have searched and seized the contraband from his possession under Ex. P. 3-Seizure Mahazar in presence of P.W. 1 and other panch witnesses viz., C.Ws. 4 and 5 did not step into the witness-box to prove the said facts, nor the said panchas C.Ws. 4 and 5 were examined by the prosecution and that P.W. 1 alone who was examined to speak to those facts was an incompetent witness inasmuch as she was not an authorised officer under the Act to carry out apprehension, search and

seizure of the accused; that non-examination of C.W. 1 who was the author of the information at Exs. P. 1 and P. 2 is fatal to the prosecution and apart from the above infirmities the mandatory requirements of law in Sections 42 and 50 of the Act are also not complied with. Besides, it was also contended by Mr. Hashmath Pasha that the officials of the Department of Narcotic Control Bureau, to which C.W. 1 and P.W. 1 were attached and which was created by notification issued under Section 4(3) of the NDPS Act, were not empowered to apprehend, arrest, search or seize any material from possession of the offender or for that matter to prosecute him for any offence under the Act.

5. The impugned judgment discloses that on consideration of the prosecution evidence on merit, the learned trial Sessions Judge reached his affirmative conclusions that this appellant-accused was found in possession of heroin and was therefore guilty of the offence punishable under Section 21 of the Act. The punishment prescribed for the offence by Section 21 is the Rigorous Imprisonment for a term which shall not be less than ten years but which may extend to twenty years and which shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. The proviso to Section 21 further states that for reasons to be recorded in the judgment, the Trial Court may impose a fine exceeding two lakh rupees.

6. The relevant provision dealing with bail to accused under the NDPS Act is Section 37 thereof. The material portion of Section 37 is extracted below:

'37. Offences to be cognizable and non-bailable.--(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

(a).....

(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).....

(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'.

Sub-clause (ii) of Section 37(1)(b) of the Act places a serious restriction on the Court's power to grant bail to a person who is accused of an offence under the Act, which is punishable for a term of imprisonment exceeding 5 years. It enjoins that the grant of bail to such an accused could be considered only if 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. Mr. Hashmath Pasha, in his attempt to satisfy the Court that the appellant cannot be held guilty of such offence, canvassed the aforesaid points assailing the legality of the impugned judgment of conviction. He proposed to place reliance on a recent decision of Supreme Court in *Dadu alias Tulsidas v State of Maharashtra*, where at paragraph 26 of its judgment, Supreme Court said:

'26. Under the circumstances the writ petitions are disposed of by holding that (1) Section 32A does not in any way affect the powers of the authorities to grant parole; (2) It is unconstitutional to the extent it takes away the right of the Court to suspend the sentence of a convict under the Act; (3) Nevertheless, a sentence awarded under the Act can be suspended by the Appellate Court only and strictly subject to the conditions spelt out in Section 37 of the Act as dealt with in this judgment'.

7. I find the above authority not helpful to the applicant-appellant's case for the purpose of disposal of his application for bail by suspending the impugned sentences against him, particularly, in view of the law restated therein by Supreme Court that a sentence awarded under the NDPS Act can be suspended by the Appellate Court only and strictly subject to the conditions spelt out in Section 37 of the Act.

8. At this initial stage of the appeal proceeding, the appellant having been convicted of the said offence by the Trial Court after his full length trial and on

appreciation of the prosecution evidence on record, it has to be presumed for the purpose of Section 37(1)(b)(ii) that he is prima facie guilty of the said offence. The aforesaid point highlighted by Mr. Hashmath Pasha, assailing the legality of the impugned judgment of conviction, may possibly hold good at the time of final hearing and decision of the appeal on merits. But, certainly, they are of little avail to appellant as regards his plea of bail in appeal against his conviction is concerned.

9. Hence, I.A. I is rejected.

10. The matter may be listed during second week of September 2001 for final hearing.

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