

Stanley Vs. State Through the Superintendent of Customs

Stanley Vs. State Through the Superintendent of Customs

SooperKanoon Citation : sooperkanoon.com/793665

Court : Chennai

Decided On : Jul-16-1996

Reported in : 1997CriLJ1217

Judge : N. Arumugham, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 389, 432, 433 and 439(1); Narcotic Drugs Psychotropic Substances Act - Sections 8, 21, 27, 32A, 33, 36B, 37 and 50

Appeal No. : Crl. Misc. Petn. No. 1212 of 1996

Appellant : Stanley

Respondent : State Through the Superintendent of Customs

Advocate for Def. : P. Rajamanickam, Spl. Police Prosecutor for Central Government of India

Advocate for Pet/Ap. : G.R. Edmund, Adv.

Judgement :

ORDER

1. Heard.

2. During the pendency of the appeal in C.A. No. 312 of 1996 before this Court challenging the correctness of the judgment of conviction rendered by the learned

Special District and Sessions Judge, Madurai, in C.C. No. 283 of 1993 dated 19-3-1996 finding the appellant guilty for the offences under Ss. 8(c) and 21 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'the Act') and sentencing him accordingly to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. 1,00,000/- and in default of the appellant to pay the fine to further undergo rigorous imprisonment for a period of three more years, the appellant-accused has filed this petition under S. 389 of the Code of Criminal Procedure seeking suspension of the sentence recorded against him by the trial Court.

3. On ordering notice to the respondent, a counter statement was filed on behalf of the respondent. Accordingly, I have heard the Bar for the respective parties in so far as the petition for the relief of suspension of sentence is concerned and dispose of the petition by the following order.

4. The matrix of the prosecution case is that on the midnight of 18-7-1990 on the southern seashore of Tuticorin, a country boat alleged to have been driven by the petitioner herein along with another identified by the customs officials, who chased the boat by giving warning signals by firing buck shots in the air and thus made the country boat to reach the seashore. But, in the meanwhile, another man who was found along with the petitioner, who later came to be known that he was Peter by name, the owner of the boat, had jumped into the sea and eluded away. On bringing the boat along with the petitioner, a search was made in the boat and two gunny bags were seized, which contained contraband of what is known as brown sugar, a narcotic drug and psychotropic substance, weighing about 33 kgs. The same was duly recovered by the customs officials and the petitioner was arrested. A voluntary confession has also been recorded by the customs officials, through which it came to know that the said contraband belongs to one Raghavan, a Srilankan national, who at that time was staying in Tuticorin town. On an open search made, either the said Raghavan or the said Peter was not available. After having investigated the case as per the procedure therefor, a final report against the accused-petitioner herein for having committed the offences under Ss. 8(c) and 21 of the Act, was filed before the learned Special District and Sessions Judge, Madurai. After full trial, the petitioner-accused was found guilty and

convicted and sentenced him as aforesaid. The judgment rendered by the trial Judge has now become the subject matter of the present appeal, in which the above application has been filed.

5. I have heard Mr. G. R. Edmund, learned counsel appearing on behalf of the appellant petitioner, who raised the following grounds for suspending the sentence awarded against the petitioner herein, pending disposal of the appeal :

(1) Throughout the trial before the trial Court, the petitioner was enlarged on bail and accordingly he was made available all through and therefore, the question of eluding away or not being himself before the Court of law; does not arise;

(2) While apprehending the accused along with the country boat and seizing the contraband, the mandatory provisions of S. 50 of the Act have not at all been followed by the customs authorities, which was in total derogation of the legal concept enunciated by the Apex Court as well as by this Court in very many case laws, which entitles the petitioner to seek suspension of sentence awarded;

(3) The prosecution has not explained as to why they had not raised their little finger about the owner of the boat by name Peter, who has allegedly jumped into the sea and eluded away and no steps were taken to apprehend him; the petitioner is only a servant engaged for rowing the boat and as long as nothing has been recovered from his person; it is not fair on the part of the trial Judge to award a rigorous punishment against him and for the said reasoning, the sentence awarded against him has to be suspended; and

(4) The alleged contraband is stated to have belonged to one Raghavan of Srilanka, against whom also the customs authorities have maintained the same inaction, which affects the whole prosecution case against the petitioner;

For all these reasonings and in factual aspects of the case, the learned counsel for the petitioner urged me to grant suspension of sentence pending disposal of the appeal. Reliance is also placed by Mr. G. R. Edmund, learned counsel for the petitioner on the decision of this Court in *Kantilal Jain v. Assistant Collector*, (1991) 1 MLW (Cri) 563, for the decision that during the pendency of the appeal, the

sentence awarded for the offences under the Act can also be suspended on identifying the proper grounds.

6. Mr. P. Rajamanickam, learned counsel appearing for the respondent would strenuously controvert everyone of the contentions of the petitioner by raising the following objections.

(1) The complacency of the petitioner with reference to his overt act of rowing the country boat on the midnight of 18-7-1990 was fully identified and consistently been pleaded by the respondent and he was further caught red handed with the boat containing the contraband of huge quantity of 33 kgs. of Brown Sugar and above all, a voluntary confession has been made by him and recorded by the respondent, which shows that the contraband belongs to one Raghavan, a Srilanka national, who at that time was sheltered in Tuticorin and the contraband was intended to transit to Srilanka and such a clear case was found accepted by the trial Court :

(2) The oral and documentary evidence adduced and the circumstances projected by the respondent before the trial Court and the findings given thereupon by the trial Court in the impugned judgment of conviction and sentence are primarily and prima facie evidence made available against the petitioner, and which would disentitle him to get the relief of suspension of sentence in the context of the rigor in built in Section 37(b) of the Act;

Reliance was placed on the legal ratio of the apex Court in Narcotics Control Bureau v. Kishan Lal, : 1991 CriLJ654 ; a decision of the learned single Judge of this Court in Jamal Shah S. A. v. Intelligence Officer, Directorate of Revenue Intelligence, Tiruchirappalli, as well as the case law held by Division Bench of this Court is Muruganandam v. State, (1995) 1 MLW (Cri) 278. Relying upon the said decisions, the learned counsel, thirdly, would contend that there was no adequate material placed before this Court to suspend the sentence rendered against the petitioner. Demonstrating his contentions upon the above three grounds, the learned counsel would contend that it is not a case in which the indulgence of this Court to use the discretionary powers as provided under Section 32A of the Act and Section 389 of the Code of Criminal Procedure, can be shown.

7. As against the factual aspects of the case as claimed by the Prosecution, the defence seems to be a limited one. It was claimed that the petitioner was rowing the country boat at the relevant time and date and excepting that said overt act, he did nothing. But, however, the prosecution claimed that the voluntary confession given by him roped not only himself but also the other person, who jumped into the sea. The learned trial Judge seems to have placed much reliance upon the confession given voluntarily by the accused-petitioner, though retracted and the evidence of the customs officials. Of course the correctness or propriety of the evidence can be canvassed during appeal and not at this stage. However, as was contended, the judgment of conviction rendered by the learned trial Judge appears to me, a prima facie evidence totally made available against the petitioner. To the limited extent of the presence of the petitioner during the commission of offence seems to have been prostrated before me while seeking the remedy of suspension of sentence in this petition. Such a fact amounts to a very material one to be taken into consideration for ordering suspension under Section 32-A of the Act, which deals with suspension, remission or commuting in any sentence awarded under the Act and which provides like this.

'Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force but subject to the provisions of Section 33, no sentence awarded under this Act (other than Section 27) shall be suspended or remitted or commuted.'

A mere glance of the above provision, though it seems that it does not empower the Court to grant suspension of sentence, it was not so and the same will be patent if a further probe is made therefor. It may be remembered that Sections 432 and 433 of the Code have been enacted as respects suspension, remission and commutation of sentence of persons convicted of an offence and under-going the incarceration. However, it curtailed the power of the Government, which seems to have been vested with such power to intervene in the middle by the provisions of Section 23-A with a non-obstante clause even in the beginning. As such, it is clear that there was no express exclusion of the power of the Court in the matter of suspension of sentence of offenders convicted of the offence under the Act and the same had been recognised and provided under Section 389 of the Code.

8. A learned single Judge of this Court in Jamal Shah's case observed thus :

'It is to be remembered that the materials available as against a person accused of an offence under this Act prior to and during the stage of trial can, in the eye of law, be construed as prima facie materials capable of proving the alleged commission of the offence during trial. After the stage of trial, such materials, get sanctified as evidence proving the commission of the offence by the offenders till their conviction and sentence are set aside on appeal. If such is the state of affairs, it cannot be stated that there are reasonable grounds, at the stage of consideration of suspension of sentence pending appeal, 'for coming to the conclusion that he is not guilty of the offence in respect of which he had been convicted and sentenced, leave alone the other ground that he is not likely to commit any offence while on such bail.'

9. One another decision, which has become more relevant at this stage to quote is the one delivered by a Division Bench of this Court in Murugan Andam's case (1995) 1 MLW (Cri) 278;

'A full Bench of the Kerala High Court had occasion to consider the scope of power of the High Court to enlarge on bail a person convicted for murder and sentenced to life pendent lite in Uthaman v. State of Kerala, , the following observations are very relevant :

'We find to warrant for any dogmatic approach that when once a person accused of an offence under Section 302 of the I.P.C. has been convicted and sentenced to life imprisonment, the appellate Court is not to enlarge the accused on bail pendente lite. To state the proposition in such categorical terms would be to self-impose a restriction on the exercise of power by the appellate Court under Section 389 read with Section 439(1) of the Criminal Procedure Code. That will be to read into the power of the High Court a limitation not warranted by the provisions of the Criminal Procedure Code May be in, considering the possibility of the 'accused jumping bail the question whether there is reasonable ground to believe that the accused had committed a serious crime is relevant. It is in that view that the High Court takes note of these circumstances under Section 439(1) of the Code. If either because the evidence is so meagre that the accused is not likely to take the

risk of jumping bail anticipating conviction in appeal or there are other reasons why on the facts of a case the Court could form the opinion that the accused would not jump bail if released, then bail may be granted unless it be that the Court may have reason to believe that the release of the accused may be of danger to others or to himself or he may cause self effacement. In determining whether there are reasonable grounds for believing that the accused has committed an offence punishable with death or life imprisonment the Court looks into materials then available to it, whether it be at the stage of investigation or at the stage of trial. Such would be the case even in the appeal. Merely because the appeal 'is against the conviction there should not be a presumption that the accused has committed the offence as that would be to foreclose on the plea of the accused that on the materials available, there is no justification to refuse bail.

'We are of the firm opinion that the legal position has been correctly spelt out by the Full Bench of the Kerala High Court, in the decision above referred to. Hence, we are not able to agree with the view taken by two learned single Judges of this Court in Velu Thevar's case 1992 MLW (Cri) 187 and Nagalingam's case 1993 MLW (Cri) 534, that after the stage of trial, material laid by the prosecution gets sanctified as evidence proving the commission of the offence by the offenders, till their conviction and sentence are set aside on appeal and in such state of affairs it cannot be stated that there are reasonable grounds at the stage of consideration of suspension of sentence pending appeal, for coming to conclusion that the person is not guilty of the offence in respect of which he had been convicted and sentenced, leave alone the other ground that he was not likely to commit any offence while on bail. We quite often come across cases where convictions are rested either on no evidence or on inadmissible evidence and similar such circumstances, and if it were to be held as a rigid rule, that though the power vests in the High Court to suspend the sentence and direct enlargement of bail of person convicted for offences punishable under the Act, but still it cannot do so, merely because it will have to be held that ex facie the judgment rendered by the trial judge raised a presumption that reasonable grounds existed for believing that the appellant was not guilty of such offence and he was not likely to commit any offence while on bail, it will certainly amount to self-imposing on restrictions not warranted by law. The past history of the appellant will of course be relevant on

the second contingency envisaged by Section 37(b). The guidelines provided under Section 37(b) of the Act will have to be imported into Section 36-B of the Act, though it does not form part of the latter section, keeping in 'view the object of the Act. The factual constituent in every case, will be the guiding factor for suspension of sentence and grant of bail pending appeal. A rigid formula cannot be adopted that in no case a person convicted of an offence under the Act can have his sentence suspended and consequently released on bail irrespective of facts, on presumptions that there will be no reasonable grounds to believe that he was not guilty of such offence, more so, when the presumption is rebuttable. It is not as though grant of bail is totally barred under the Act at any stage, but all that the Court will have to look into will be the limitations on granting of bail in the back ground of the object of the Act. Even the Code of Criminal Procedure imposes fairly similar reasonable restrictions. The decisions of learned single Judges of this Court which enunciate a principle contra shall stand overruled.'

The Bench has further observed.

'Our answer to the question posed is that the High Court has power to suspend the sentence awarded in conviction for offences punishable under the Act, with imprisonment for five years or more in exercise of its powers under Section 389 of the Code of Criminal Procedure, but such suspension will depend upon the fact situation placed for Court's scrutiny. The consequential power directing enlargement on bail on suspension, is of course a logical corollary. Section 32-A of the Act will not be applicable to the High Court and the powers of suspension conferred on the High Court under the Code of Criminal Procedure stand preserved in view of the provisions enshrined in Section 36B of the Act. We have already stated out reasons and they require no reiteration.'

'For factual consideration, on suspension of sentence and enlargement of the petitioner on bail, this matter will go back to the learned single Judge'.

The oft quoted legal ratios enunciated in the above case laws would clearly reveal that this Court has got enough power to suspend the sentence awarded for any of the offences committed under the Act, but subject to the condition that upon the materials made available and the facts of the given case, one is able to prove that

the suspension of the sentence has become imperative and that the discretionary power vested with the Court is expected to be indulged in his favour. I would like to say further in the light of the above decisions that the power to suspend the sentence and enlarge the petitioner on bail is always available with this Court under the relevant provisions of the Code and it should be exercised with care and caution on the consideration and scrutiny of established factual and materials placed before this Court. While importing such ratio to the facts of the instant case, it is seen that except the fact that the petitioner was enlarged on bail throughout the trial of the case, nothing more was made available before me to enlarge him on bail by suspending the sentence. As was observed, the materials placed by the prosecution against the petitioner as referred to by the learned trial Judge is still alive and surviving to prove the case against the petitioner. No argument was advanced as to what are the implications or materials for suspending the sentence. A cursory reading of Section 389 of the Code of Criminal Procedure reveals that it does not provide an automatic right for the person convicted of an offence to get the sentence suspended in the context of the rigor of Section 37 of the Act. In the absence of any contention made even on factual aspects, I am not inclined to accede with the request made by the petitioner to suspend the sentence at this stage, for the very reasoning that no adequate materials or ground has been projected before me. In the light of the prima facie evidence of the judgment made against him and for the factual aspects, I am not inclined to grant suspension. The contention that the mandatory provisions of Section 50 of the Act have not been complied with while search or recovery of the country boat was made, which amounts to violation of the mandatory provisions of law, cannot be considered at this stage for the reason that it can be looked into at the time of hearing of appeal. For the purpose of this petition, I simply say that the contraband has been recovered from two gunny bags kept in the country boat, which was rowed by the petitioner. It is enough for me to stop with the said reference on facts. For all the reasonings as above and the ratios held, I am persuaded not to accept any of the contentions raised on behalf of the petitioner, but, however, to endorse my view with the objections raised by Mr. P. Rajamanickam, learned counsel for the respondent.

10. In the result, the petition fails and accordingly, it is dismissed. However, under the circumstances, if the Registry is able to get the case papers ready, it is directed that the hearing of the appeal may be advanced by putting the case in the list as early as possible.

11. Petition dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com