

Harbans Kour Vs. the State

Harbans Kour Vs. the State

SooperKanoon Citation : sooperkanoon.com/899755

Court : Jammu and Kashmir

Decided On : Sep-13-1993

Reported in : 1994CriLJ328

Judge : B.A. Khan, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8, 17, 36C, 37 and 37(1); ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Section 497

Appeal No. : Bail Appln. No. 88 of 1993

Appellant : Harbans Kour

Respondent : The State

Advocate for Def. : R.C. Gandhi, A.A.G.

Advocate for Pet/Ap. : G.A. Tak and V.R. Wazir, Advs.

Disposition : Application rejected

Judgement :

ORDER

B.A. Khan, J.

1. Are women to be accorded special consideration in matters of grant of bail, is the interesting question posed in this bail application.

2. Petitioner, Harbans Kour was arrested on July 9, 1993 on a charge of trading in opium. She was booked Under Section 17 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) following seizure of 3 K.Gs of opium from her room and is standing trial before the Id Sessions Judge, Jammu. Her bail application has been rejected by the trial court and she has now come up to this Court for her release.

3. Petitioner's case is more based on gender and revolves round the ambit and scope of Section 36-C of the Act. Her counsel, Mr. Tak builds his castle round this provision and contends that as Section 36-C makes provisions of Cr. P.C. (including those related to Bail and Bail Bonds) applicable to proceedings under the Act, Section 497, Cr. P.C. becomes automatically applicable and since proviso to this section permits release of women even in offences punishable with death and life imprisonment, it follows as a necessary corollary that women constitute an exception and deserve special consideration in case of offences under the N.D.P.S. Act also. He goes a step further and urges that Section 37 of the Act which contains stringent conditions for grant of bail is not applicable to women and in their case Section 497, Cr. P.C. alone is the guiding factor.

4. The argument appears both attractive and imaginative, if not fanciful, on a superficial view but comes out weak in substance on a closer scrutiny. It would be advantageous at this stage to extract the relevant provisions to underline its fallacy:

36C. Application of Code to proceedings before a Special Court -- Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.'

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

(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 or any other law for the time being in force on granting of bail.

Section 497, Cr. P.C.:

When bail may be taken in case of non-bailable offence.-- (1) When any person accused of (or suspected of the commission of) any' non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

A plain reading of the provisions shows that Section 36-C applies provisions of Cr. P.C. including Bail provisions to proceedings before the Special Judge. It, however, begins with a saving clause and the words 'save as otherwise provided in this Act', saves the other provisions of the Act. Section 37 provides for the offences to be cognizable and for regulation of grant of bail. It prohibits release on bail in offences carrying a punishment of five years or more unless the court is satisfied that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail a tall order indeed. Section 497, Cr. P.C. also places a similar restriction in case of offences punishable with death or life

imprisonment, but its proviso makes an exception in case of woman, sick, infirm and persons below 16 years of age.

5. The moot question that falls for consideration is whether the exception provided for women in proviso to Section 497, Cr. P.C. can be imported and read into Section 37 of the N.D.P.S. Act on the strength of Section 36-C. If it can be so read, the women will have to be given a special consideration, the rigours of Section 37 notwithstanding.

6. In my view, that is not and cannot be the scheme and spirit of the Act and that is so for the simple reason that Section 36-C saves other provisions of the Act including Section 37 even when applying provisions of Cr. P.C. to the proceedings under the Act and once it leaves Section 37 intact, the conditions contained therein come into play in full force circumscribing the court's power to grant bail and the leeway allowed by provision to Section 497, Cr. P.C. is sealed.

7. It is a different matter whether Section 37 is attracted to the women at all. That aspect will be dealt with a little later. But assuming that it makes no distinction on the basis of sex, it holds the field and commands an overriding effect over provisions of Section 497, Cr. P.C. Consequently, the Court is not to be guided by the provisions of Section 497, Cr. P.C. but by Section 37 of the Act and if the latter provision places fetter on its power to grant bail, it cannot turn to and invoke proviso to Section 497, Cr. P.C. for any concession or relaxation. That cannot be the intent or purpose of Section 36-C or for that matter Section 37. Any contrary view would give a place of pride to provisions of Section 497, Cr. P.C. and render limitations contained in Section 37 redundant and meaningless.

8. Mr. Tak's second contention regarding non-application of Section 37 to women is also fallacious. He clings to and draws support from the words used in Sub-clause (b)(ii) of Section 37(1) which reads as follows :--

Section 37(1)(b)(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.

Mr. Tak cashes on the words 'he is not guilty', and 'he is not likely'. According to him if the Legislature had intended to cover women accused also, it would have used the word 'She' along with 'He' and omission to do so excludes women from the purview of Section 37. It goes without saying that the provision is ill-drafted, but when read in its totality, it leaves no room for doubt that it applies to all the accused irrespective of their sex. It is significant to note that controlling Clause (b) of Section 37(1) starts with the words, 'no person accused of an offence...' and the 'person' surely includes both men and women. The later omission to use word 'she' in Sub-clause (ii) can at best be treated as a 'Draftsman's devil' and should not be allowed to defeat the intent and purpose of the provision which on plain reading mandates refusal to grant bail to any person accused of an offence punishable with five years imprisonment or more unless the conditions laid down therein are satisfied. Any other interpretation would place women in a special class of accused irrespective of the gravity of the offence alleged against them and that too on the basis of their sex which could not have been the intention of the Legislature. Therefore, on this reasoning, I find it difficult to accept the contention and feel no hesitation in holding that Section 37 of the Act applies as much to the women as to the men so long as they are accused of an offence under the N.D.P.S. Act.

9. No other ground was urged before me for grant of bail. Even so, I summoned the record of the trial court to explore the possibility of petitioner's release on bail. I find from the record that she stands charged under Section 8/17 of the N.D.P.S. Act by order dated August 5, 1993 and the case is slated for prosecution evidence. There is nothing before me at this stage to form a prima facie belief whether she is not guilty of the offence or whether she is not likely to commit any offence while on bail. Therefore, it is difficult to allow this application for the present. This shall not, however, prevent her from moving the trial court or this Court again and in that case her bail application shall receive due consideration keeping in regard the material before the court and uninfluenced by rejection of her earlier bail applications.

10. This application is accordingly rejected. Record be returned to the trial court forthwith.

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