

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPLICATION NO.1136 OF 2015
IN
CRIMINAL APPEAL NO.132 OF 2011**

Hayat Waris @ Bada Papa Baburajjab
Ansari .. Applicant

Versus

The State of Maharashtra .. Respondent

Mr. Ayaz Khan, Advocate for the applicant.

Mrs.M.R.Tidke, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.

DATED : 4th DECEMBER 2015

ORAL ORDER :-

1 The applicant/appellant has been convicted of an offence punishable under Section 20(b)(ii)(C) of the NDPS Act read with Section 8(c) thereof by the learned Judge of the Special Court for the trial of offences under the NDPS Act. The learned Judge has sentenced the applicant/appellant to suffer RI for 10(ten) years, and to pay a fine of Rs.1,00,000/- (Rupees One Lakh) in default to suffer RI for 6 months. The Appeal filed by the applicant/appellant challenging his conviction and the sentence imposed upon him has already been admitted. By the present

application, the applicant/appellant prays that during the pendency of the Appeal, the substantive sentences imposed upon him, be suspended and the applicant/appellant be released on bail.

2 I have heard Mr.Ayaz Khan, the learned counsel for the applicant/appellant. I have heard Mrs.M.R.Tidke, learned APP for the State. I have glanced through the relevant parts of the notes of evidence and the impugned judgment.

3 Mr. Khan submitted that the applicant/appellant has a good case on merits. He submitted that the applicant/appellant has already been in custody for a period of more than 6 ½ years, and has thus suffered more than half of the sentence imposed upon him. Mr.Khan submits that as the Appeal is not likely to be taken up for final hearing within a short time, the applicant/appellant be released on bail by suspending the substantive sentence imposed upon him.

4 The case of the prosecution, as put forth before the trial Court was as follows :-

That on 13th April 2009, secret information was received by API Mulla (PW 3) of the Anti Narcotics Cell, that one Hayat Waris (applicant/appellant) would be coming to sell *charas* at the Bombay Dyeing Showroom, Pandurang Vitthal Marg, Worli between 18.00 hrs to 18.30 hours. Pursuant to this information, a trap was laid, and when the applicant/appellant came to the said place, he was apprehended. 169 round balls of *charas* were found

with the applicant. The balls were tested and samples therefrom were drawn.

5 Mr.Khan submitted that the evidence adduced by the prosecution during the trial was discrepant. He submitted that there was a discrepancy as to the distance between the office of the Anti Narcotic Cell at Worli, and the spot where the applicant/appellant was allegedly apprehended. He pointed out that the First Informant Mulla (PW 3) has given this distance as about 4 – 5 kms, whereas PW 7 – Bhanudas Jadhav, who was also a member of the raiding party has given this distance as about 500 metres. According to Mr.Khan, the difference between the estimate of distance given by these two officers is significant, and therefore, it throws a doubt as to where exactly the applicant/appellant was found.

6 Mr.Khan also contended that the case of the prosecution was that the applicant/appellant was found in possession of 169 balls of *charas*, and that each ball was tested independently on the spot itself. The panchnama drawn in the course of investigation also indicates that each ball was tested separately and independently on the spot itself. Mr.Khan pointed out that PW 7 - Jadhav has stated that the testing of each ball took about 5 minutes. The evidence of PW 6 – Mukund Yadav, also a member of the raiding party shows that the testing of each ball took 5 ½ minutes for testing one ball. Based on this, Mr.Khan contended that the panchnama which is supposed to have been completed within three hours from the apprehension of the applicant/appellant, cannot be a true record of the happenings.

He submitted that going by the timings given by these two witnesses for testing one ball, it would take atleast 14 hours to complete the process of testing. In this context, Mr.Khan further pointed out that the panch witness PW 5 – Sarfaraz Shaikh has stated that he was on the spot where the applicant was apprehended (only) for about half an hour. Moreover, he further categorically stated that he was on the spot till 6.00 p.m., when the case of the prosecution is that the applicant/appellant was apprehended on the spot at about 6.30 p.m, and the panchnama went on till and concluded at 9.30 p.m.

7 Thus, according to Mr.Khan, the discrepancies with respect to the spot where the applicant/appellant was allegedly found, and the discrepancies in the timings during which the panchnama is said to have been made, together with the fact that it would not be possible to test each ball independently, within a short period of 3 hours, as claimed, create a doubt as to the place where the applicant/appellant was apprehended and as to whether the things had indeed happened as stated in the panchnama.

8 Mr.Khan also pointed out that the colour of the contraband seized, has been given differently by different prosecution witnesses. He pointed out that some of them have described the substance as 'blackish green' where some others have described it as 'brownish black'.

9 Mr.Khan submitted that in a number of cases in respect of the offences under the NDPS Act, Their Lordships of the

Supreme Court of India have granted bail on the ground of the convicts being detained in custody for a long period without the Appeals filed by them coming up for final hearing. He submitted that the applicant/appellant has got a good case on merits and considering the fact that inspite of the applicant/appellant being in custody for a period of more than 6 ½ years; and that in the ordinary course, the Appeal is not likely to be taken up for final hearing within a short time, the applicant/ appellant deserves to be released on bail.

10 I find that arguable points needing consideration have been raised. In these circumstances, and after considering all the relevant aspects of the matter, I am inclined to allow the application.

11 Application is allowed.

12 Pending the hearing and final disposal of the Appeal, the substantive sentence imposed upon the applicant/appellant shall stand suspended; and the applicant/appellant shall be rreleased on bail in the sum of Rs.1,00,000/- with one surety in like amount, or two sureties in the sum of Rs.50,000/- each, on the condition to report to the trial Court on First Monday of each calendar month, till the disposal of the Appeal.

13 Should the trial Court be closed on any given Monday on account of holiday, the applicant shall report to the trial Court on the next working day.

14 Should the applicant fail to report to the trial Court as stipulated above, the trial Court shall take such further action in the matter as it may deem fit and proper, by treating this order as if passed by the trial Court itself.

(ABHAY M. THIPSAY, J)

CERTIFICATE

***Certified to be true and correct copy of the original signed
Judgment/Order.***