
Mushtaq Ahmad Peer Vs State Of Jammu & Kashmir And Others

IA No. 01 Of 2019, CrIM No. 379 Of 2019 In Criminal Appeals (CRA) No. 34 Of 2018

Court: Jammu & Kashmir High Court (Srinagar Bench)

Date of Decision: Oct. 15, 2019

Acts Referred:

Code Of Criminal Procedure, 1898 " Section 497D, 561A#Jammu And Kashmir State Ranbir Penal Code, 1989 " Section 71, 120B, 201, 406, 409, 420#Prevention of Corruption Act, 1988 " Section 5(1)(d), 5(2)#Code Of Criminal Procedure, 1973 " Section 35, 436A

Hon'ble Judges: Sanjeev Kumar, J

Bench: Single Bench

Advocate: M. M. Iqbal, Mohsin Qadri

Final Decision: Dismissed

Judgement

Sanjeev Kumar, J

1. This application, third in series, has been filed by the appellant seeking suspension of sentence and release on bail in case FIR No. 24/2013 for

offences under Sections 420, 406, 201 and 120-B RPC read with Section 5(1)(d) and 5(2) of the Prevention of Corruption Act. The first two

applications, which were filed by the appellant seeking same relief, have already been dismissed by this Court. This application, however, appears to

have been filed by the appellant on the ground that during investigation, trial and after conviction, he has remained in detention for more than three

years and six months and, therefore, is entitled to be released in terms of Section 497-D of the Code of Criminal procedure.

2. The first application seeking suspension of sentence and release on bail registered as IA No. 01/2018 was dismissed by this Court on 08.08.2018.

The relief claimed by the appellant was denied on merits. Not satisfied with the order dated 08.08.2018, the appellant filed another application styled

as protest petition in terms of Section 561-A Cr.P.C, seeking virtually the recall of earlier order of this Court dated 08.08.2018 and for suspension of

sentence and grant of bail in his favour. This application too was found to be without substance and was dismissed by this Court on 12.03.2019. The

instant application, however, has been filed by the appellant on the ground that during the pendency of the criminal appeal, in which the appellant has

challenged the judgment of conviction dated 25.04.2018 recorded by the Special Judge, Anticorruption, Kashmir, the detention of the appellant has

exceeded three years and six months and, therefore, he has become entitled to be released by the Court on his personal bond with or without sureties

in terms of Section 497-D Cr.P.C. The other ground urged in support of the relief claimed is that appellant is 70 years old and suffering from different

life threatening ailments like, diabetes, hypertension, heart disease like unstable angina.

3. The bail application has been resisted by the respondents, who have filed their objections and have taken the stand that having regard to the

seriousness of the allegations against the appellant and recording of order of conviction by the trial Court, the appellant is not entitled to the concession

prayed for in the application. The respondents have also denied that the appellant is entitled to the benefit of Section 497-D of the Code of Criminal

procedure. With regard to medical status of the appellant, the respondents have submitted that all necessary medical aid, as is required by the

appellant, is being provided to him in the Central Jail along with other inmates. The claim of the appellant that he suffers from life threatening deceases

is emphatically denied.

4. I have heard the learned counsel for the parties and perused the record.

5. During the course of the arguments the learned counsel for the appellant has not pressed for bail on health grounds, which, otherwise on close

scrutiny, has been found to be without any substance. The only question, debated before me is the applicability or otherwise of Section 497-D of the

Code of Criminal procedure, which provides for release of an under trial prisoner who, during the period of investigation, inquiry or trial under the

Code of Criminal Procedure or an offence under any law (not for an offence for which punishment of death has been specified as one of the

punishments under the law) has undergone detention for a period exceeding upto one half of the maximum period of imprisonment specified for that

offence under law.

6. Relying upon the aforesaid provision, the learned counsel for the appellant submits that incarceration of the appellant during the course of

investigation, trial and after conviction has exceeded three years and six months, which is more than one-half of the maximum period of punishment

specified for the offence which the appellant has been convicted for. He, therefore, submits that by operation of law, the appellant is entitled to be

released on bail on his personal bond with or without sureties, as may be directed by the Court.

7. Per contra, it is the argument on behalf of the respondents that Section 497-D of the Code of Criminal Procedure is not applicable to the case of the

appellant. The application of the appellant having been rejected by this Court twice, the appellant cannot be treated as an under trial prisoner,

for he is undergoing sentence post his conviction recorded by the trial Court after a full fledged trial. The status of under trial prisoner, as

claimed by the appellant, is denied by the respondents. It is also argued by the respondents that the trial Court while recording the conviction of the

appellant for offences under Sections 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, Section 409 RPC, Section 420 RPC read

with Section 120-B RPC has sentenced the appellant to undergo Rigorous Imprisonment of 5 years and fine of Rs. one crore (for offence under the

Prevention of Corruption Act), 3 years imprisonment for offence under Section 409 RPC, 7 years imprisonment for offence under Section 420 RPC

and 1 years imprisonment for offence under Section 120-B RPC. The trial Court has further provided that the sentences imposed on the appellant

would run consecutively, that is, one after the other, in terms of Section 35 of the Code of Criminal Procedure. The appellant has not even undergone

a fraction of the total imprisonment awarded by the trial Court and, therefore, he cannot claim the benefit of Section 497-D of the Code of Criminal

procedure, contends the learned counsel for the respondents.

8. I have given thoughtful consideration to the rival contentions.

9. Since the whole edifice of the argument of the learned counsel for the appellant is built on Section 497-D of the Code of Criminal procedure, which

came to be inserted by the Jammu and Kashmir Criminal Laws Amendment Act, 2013, as such, it would be appropriate to set out the provisions

thereof herein under:-

“497-D. Maximum period for which an under trial prisoner can be detained.- Where a person has during the period of investigation, inquiry or trial

under this Code or an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments

under the law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that

law, he shall be released by the Court on his personal bond with or without sureties.”

10. From bare reading of Section 497-D of the Code of Criminal procedure, it is clear that the Section has been enacted for the benefit of the

under trial prisoner who remains in detention during investigation, inquiry or trial for a period exceeding up to one-half of the maximum period

of punishment specified for that Section under law. A holistic reading of Section 497-D of the Code of Criminal procedure would clearly indicate that

this benefit is intended to be conferred only on the under trial prisoners and not on those who have been convicted in a trial and are undergoing

sentence. It is true that a criminal appeal is a continuation of a trial, but the person undergoing sentence, in my humble opinion, cannot be treated as an

under trial prisoner, more so, when the Court has not suspended the sentence or the conviction. It is, because of this reason, Section 497-D of

the Code of Criminal procedure has been couched in a language which speaks of an "under trial prisoner" having undergone detention for a

PERIOD EXCEEDING UP TO ONE- HALF OF THE MAXIMUM PERIOD OF IMPRISONMENT PRESCRIBED FOR THAT OFFENCE

UNDER LAW, and does not refer to a maximum period of imprisonment for which a convict has been sentenced. The learned counsel for the

appellant may be technically correct that an appeal is continuation of a trial, but that would not make the appellant an "under trial prisoner" for

the purposes of deriving benefit under Section 497-D of the Code of Criminal Procedure. That apart, in terms of Section 35 of the Code of Criminal

procedure, the Court in a case where a person is convicted at one trial for two or more offences, may sentence such person for such offences to the

several punishments prescribed therefor and such punishments when consisting of imprisonment, to commence one after the expiry of the other, in

such order as the Court may direct, unless the Court directs that such punishments shall run concurrently. Section 35, for facility of reference is also

reproduced hereunder:-

" 35. Sentence in cases of conviction of several offence at one trial:- When a person is convicted at one trial for two or more offences, the Court

may, subject to the provisions of Section 71 of the Ranbir Penal Code, sentence him, for such offences, to the several punishments prescribed therefor

which such Court is competent to inflict; such punishments, when consisting of imprisonment to commence one after the expiration of the other in

such order as the Court may direct, unless the Court directs that such punishments shall run concurrently."

11. Reading of Section 35 reproduced above makes it clear that it is the discretion of the Court convicting an accused at one trial of two or more

offences to provide that the sentences inflicted would run consecutively and not concurrently. As a matter of fact, if the Court does not provide that

the sentences awarded for different offences shall run concurrently, it shall be presumed and understood that the Court has directed that the

sentences would commence one after expiration of the other.

12. From the judgment of conviction impugned in the appeal, it is crystal clear that the trial Court has specifically provided that the different sentences

awarded to the appellant would run consecutively, i.e. one after the other, though the order in which such sentences would run, has not been

specifically mentioned.

13. Be that as it is, the maximum sentence awarded to the appellant is for offence under Section 420 RPC and it is 7 years. After expiry of this

sentence the sentence of 5 years, which has been awarded for offence under Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption

Act would start. This would be followed by 3 years imprisonment under Section 409 RPC and lastly the sentence of one year for offence under

Section 120-B RPC would commence. Since the sentences would run consecutively, i.e. one after the other, as such, the one-half of the maximum

period of sentence for the purposes of Section 497-D of the Code of Criminal procedure would come to 7 ½ years. As per own showing, the

appellant has only undergone 3 ½ years imprisonment, which does not represent half of the sentence which the appellant is supposed to undergo if

the judgment of conviction is upheld and attains finality.

14. The argument of the learned counsel appearing for the appellant that the expression used in Section 497-D of the Code of Criminal procedure,

“one-half of the maximum period of imprisonment specified for that offence under that law, signifies that if an under trial prisoner has undergone

half of the sentence specified for each offence, he would be entitled to benefit of release under Section 497-D of the Code of Criminal procedure, is

an argument in despair and is not borne out from plain reading of Section 497-D of the Code of Criminal procedure. The argument of the learned

counsel for the appellant would have been correct and acceptable, had it been a case of sentences running concurrently. The trial Court has exercised

its discretion in terms of Section 35 of the Code and has specifically provided that the sentences awarded to the appellant would run consecutively, i.e.

one after the other. That would make the total sentence of the appellant to 15 years and half of which would be 7 ½ years.

15. The learned counsel for the appellant has relied upon AIR 2001 SC 1528, Smt. Akhtari Bi vs. State of M.,P (2015) 13 SCC 605, Bhim Singh vs.

Union of India and others, 2017 (2) J.K.J 10 (SC), Hussain and another vs. Union of India. These judgments are primarily on two points; one that

criminal appeal is continuation of the trial and the other is that where an under trial prisoner has undergone one-half of the imprisonment prescribed for

the offence for which he has been tried, such person is entitled to the benefit of Section 436-A of the Central Code of Criminal Procedure which

Section corresponds to Section 497-D of the Jammu and Kashmir Code of Criminal procedure. While there is no quarrel with regard to the

propositions propounded by the learned counsel for the appellant, which are supported by the judgments of Hon'ble the Supreme Court supra, yet

the judgments are not per se applicable to the case on hand. None of the judgments cited by the learned counsel for the appellant have interpreted the

expression, “under trial prisoner” as used in Section 436-A of the Central Code of Criminal Procedure or Section 497-D of the Jammu and

Kashmir Code of Criminal Procedure.

16. As observed herein above, the expression “under trial prisoner” used in Section 497-D of the Code of Criminal procedure has to be

understood in the context of the provisions of the Section, which clearly speak of maximum period of imprisonment specified for offences and not the

maximum period of sentence inflicted by the competent Court. The expression “under trial prisoner”, as used in Section 497-D of the Code of

Criminal procedure is, therefore, required to be restricted to a person who is in detention during the period of investigation, inquiry or trial and not to a

person who is undergoing the sentence for having been convicted by a competent Court of law.

17. Assuming, though it is not correct position of law, that the appellant whose appeal against his conviction is pending, continues to be an under trial

prisoner, yet the benefit of Section 497-D of the Code of Criminal procedure cannot be extended to the appellant for the reason that he has not yet

undergone detention exceeding up to one-half of the total sentence inflicted on him. The appellant, as stated above, has been sentenced for

commission of different sentences for different durations and the sentences have been provided to run consecutively. That being the position, it is

beyond cavil of any doubt that the appellant is not eligible for the benefit of release on his personal bond with or without sureties, as envisaged under

Section 497-D of the Code of Criminal procedure.

In view of the foregoing discussion and the analysis, this application is found to be without any merit and is, accordingly, dismissed.