

GAHC040000522023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Case No. : IA(Crl) 4/2023

1:Abu Salam
S/o Late Abul Hussain

Permanent Resident of Village Barujhar
PO Bechimari
PS Dolgaon
District Darrang
Assam.
Ph. No. 9854529749

VERSUS

1:THE STATE OF AP and Anr.
Represented through the Public Prosecutor.

2:Pyiloki Lotha
R/o Village Wakha

PO and PS Wakha
Nagaland
PIN 797111

Advocate for the Petitioner : L Norbu
Advocate for the Respondent : P P of AP

**BEFORE
HONBLE MRS. JUSTICE MITALI THAKURIA**

ORDER

Date : 02-03-2023

Heard Mr. T. Tsering, learned counsel for the applicant. Also heard Mr. J. Tsering, learned Public Prosecutor representing the State respondent.

2. This application is filed under Section 389 of the Code of Criminal Procedure, 1973, praying for suspension of the impugned judgment dated 20.12.2022 and conviction dated 05.01.2023, passed by the learned District & Sessions Judge, Bomdila, Arunachal Pradesh in Bomdila Special NDPS Case No.19/2021.

3. Mr. T. Tsering, learned counsel for the applicant has submitted that the said judgment & order dated 20.12.2022 and the Conviction order dated 05.01.2023 respectively was passed by the learned Special Judge, NDPS, Bomdila, in Special NDPS Case No. 19/2021 convicting the appellant under Section 20(b)(ii)(C) of the NDPS Act and thereby sentencing him to suffer rigorous imprisonment of 10 (ten) years and to pay a fine of 1,00,000/-(Rupees one lakh) only and in default of fine to undergo further simple imprisonment of 3(three) months in addition.

4. The learned counsel for the applicant has submitted that the PW-3, i.e. the IO, had never approached before concerned Magistrate for filing any requisition for collection of the samples from the alleged contraband substances

nor had prayed he prepared any inventory in respect of the alleged contraband substance and that of the alleged seized offending vehicle. He also had not taken any photographs of the alleged contraband substances at the time of seizure as well as at the time of destruction. He had not prepared any report of the alleged contraband substances before and after collection of samples which being mandatory provisions of Section 52A and also violated of the said Section.

5. Further, Mr. T. Tsering, learned counsel for the applicant has relied on the decision of the Hon'ble Gauhati High Court in the case of *Sri Dipak Kumar Singh vs. the State of Assam*, reported in 2018 4 GauLT 128 , wherein, "the appellant was acquitted considering the ground of non-compliance of Section 52 (A) NDPS Act". In the said judgment it is also observed that examination of independent witnesses is more necessary when there exists large number of discrepancies in the statement of official witnesses.

6. The learned counsel for the applicant has accordingly prayed for suspension of the impugned judgment dated 20.12.2022 and conviction dated 05.01.2023, passed by the learned Special Judge, NDPS, Bomdila, Arunachal Pradesh in Bomdila Special NDPS Case No.19/2021 till disposal of the Criminal Appeal No.Crl.A.02(AP)/2023 and also submitted that the accused/applicant shall abide by all the conditions, if any impose upon him.

7. In this context, Mr. J. Tsering, learned Public Prosecutor, has submitted that upon perusing the case record and also going through the fact of the deposition of PW-3, i.e. the IO, it is seen that there is non-compliance of Section

42 & 52 (A) of the NDPS Act and also the Malkhana register is not enclosed with CS as well as the report of the seized suspected contraband was not prepared.

8. Further, Mr. J. Tsering, learned Public Prosecutor has relied on the decision of the Hon'ble Apex Court reported in 2005(0) Supreme (SC) 333 in the case of *State of Rajasthan vs. Gurmail Singh*, where it has been observed that "there in absence of satisfactory evidence in regards to the seized contrabands goods and non submission of the Malkhana register against the accused/applicant is entitle to get the acquittal" and also relied upon the case of *Boota Singh vs. State of Haryana*, reported in 2021 0 Supreme (SC) 203, wherein, it has been held that "total non-compliance of Section 42 is impermissible Courts below fell in error in rejecting submissions advanced on behalf of appellants – Appellants acquitted of charge leveled against them".

9. After hearing the submissions of the learned Advocates of both sides, it is seen that there is every chance of succeeding in the appeal especially due to non-compliance of provision under Section 42 & 52 (A) of the NDPS Act. Further, considering the conduct of the accused/applicant and other facts of the case, I hereby allow the present application filed under Section 389 of the Code of Criminal Procedure, 1973, praying for suspension of the impugned judgment dated 20.12.2022 and conviction dated 05.01.2023, passed by the learned Special Judge, NDPS, Bomdila, Arunachal Pradesh in Bomdila Special NDPS Case No.19/2021. Accordingly, the judgment and order of Conviction dated 20.12.2022 and 05.01.2023 is hereby suspended and the accused/applicant is allowed to go on bail till disposal of the Criminal Appeal No.Crl.A.02(AP)/2023.

10. Accordingly, it is provided that on furnishing a bond of Rs. 20,000/- (Rupees twenty thousand) only with one surety of like amount to the satisfaction of the learned Special Judge, NDPS, Bomdila, the accused/applicant, namely, Shri Abu Salam, be enlarged on bail, subject to the following conditions:

- (i) that the applicant shall not leave the jurisdiction of the learned Special Judge, NDPS, Bomdila without prior permission.

11. In terms of above, this interlocutory application stands disposed of.

12. LCR be retained till disposal of the Criminal Appeal No.Crl.A.02(AP)/2023.

JUDGE

Comparing Assistant