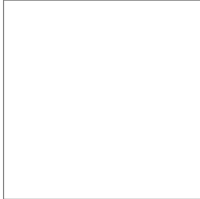


GAHC040009302023



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

Case No. : IA(Crl) 42/2023

Sangey Gombu
Age: 21
Occupation :
Address: Son of Sri Dorjee Gombu
Resident of Balukpong
Near Police Colony
PO/PS Balukpong
West Kameng District
Arunachal Pradesh. Mobile No. 7629828904

VERSUS

THE STATE OF AP
Age: 0
Occupation :
Address: Represented by its Public Prosecutor.

Advocate for : G Taloh
Advocate for : P P of AP appearing for THE STATE OF AP: Advocate appearing for respectively.

**BEFORE
HONBLE MRS. JUSTICE MITALI THAKURIA**

ORDER

Date : 08.08.2023

Heard Mr. G. Taloh, the learned counsel for the appellant and Mr. T. Ete, the learned Additional Public Prosecutor for the State respondent.

2. This is an application filed under 389 of the Cr.P.C for suspension of sentence and to release the appellant on bail during the pendency of the connected appeal which is filed against the judgment and order dated 15.06.2023, pronounced by the learned Special Judge, NDPS, Bomdila in NDPS Case No. 09/2019, convicting the appellant under Sections 21(a)/27(a)/27A, read with Section 29 of NDPS Act and sentencing him to rigorous imprisonment of 1 year with fine of Rs.10,000/- under Section 21(a) & 27(a) and rigorous imprisonment for 10 years with fine of Rs.1 lakhs for under Section 27A of NDPS Act.

3. It is submitted by the learned counsel for the appellant that there is every chance of succeeding in the connected appeal and the

learned Special Judge (NDPS), Bomdila had passed order without considering the fact that there is total non-compliance of Section 50 and 42 of the NDPS Act which are mandatory in nature. It is further submitted that from the evidence of vital witnesses i.e. PW-1, PW-4 and PW-6 and it is very much evident that the accused persons were not given any chance or to search their body in presence of any Gazetted Officer nor there was any compliance of Section 50(2) and 40(2) of the NDPS Act, which are mandatory in nature. From the evidence of the PW-4, who is an independent witness, it reveals that police not only searched in their scooty but the body of the accused persons were also searched but they were not provided with any opportunity to be searched in presence of Gazetted Officer or Executive Magistrate. More so, it is seen from the evidence of the I.O that vials which was alleged have been recovered from the present convict/appellant was never sent to FSL for examination to determined as to whether the contra-band which was alleged to have been recovered from the possession of the present appellant was narcotic or psychotropic substances to come under the NDPS Act.

4. It is further submitted by the learned counsel for the appellant that there is also total non-compliance of the Section 57 of NDPS

Act, which is mandatorily required be compliance with. Thus, it is submitted that there is every chance of succeeding in the present appeal as there is total non-compliance of Section 42 and Section 50(2) and also there is non-compliance of Section 57 of the NDPS Act, which are mandatorily required to be complied with. In this context the learned counsel for the appellant also relied on decision of Hon'ble Apex Court reported in **2013 2 SCC 212 Sukhdeb Singh Vs. State of Haryana** wherein para-22 and 23 of the said judgment it has been held that;

“22. There is patent illegality in the case of the prosecution and such illegality is incurable. This is a case of total non-compliance, thus the question of substantial compliance would not even arise for consideration of the Court in the present case. The twin purpose of the provisions of Section 42 which can broadly be stated are that : (a) it is a mandatory provision which ought to be construed and complied strictly; and (b) compliance of furnishing information to the superior officer should be forthwith or within a very short time thereafter and preferably post-recovery.

23. Once the contraband is recovered, then there are other provisions like Section 57 which the empowered officer is mandatorily required to comply with. That itself to some extent would minimize the purpose and effectiveness of Section 42 of the NDPS Act. It is to provide fairness in the process of recovery and investigation which is one of the basic

features of our criminal jurisprudence. It is a kind of prevention of false implication of innocent persons. The legislature in its wisdom had made the provisions of Section 42 of NDPS Act mandatory and not optional as stated by this Court in the case of Karnail Singh (supra)."

He has also relied on another decision of the Hon'ble Apex Court reported in **2006 8(Supreme)914 Dilip and Anr. Vs. State of MP.**

5. Further, it is submitted that during the entire trial, the accused was on bail and he never jumped over any condition of bail and hence, there is no chance of absconding if the accused is allowed to go on bail suspending the sentenced imposed on him.

6. In this context, the learned Additional Public Prosecutor, Mr. T. Ete submitted that from the statement of PWS, it is evident that there was no compliance of Section 50 and 42 of the NDPS Act. However, he submitted that while dealing with the petition Section 389 of the Cr.P.C, the Court is to see whether there is something which is very apparent or gross on the face of the record on basis of which there may be *prima facie* satisfaction that conviction may not be sustainable. In this context, the learned Additional Public Prosecutor also relied on a decision of Hon'ble Supreme Court

reported in **(2023) 6 SCC 123** in the case of **Omprakash Sahni Vs. Jai Shankar Chaudary and Another**, where in para-33 of said judgment reads as under;

“33. Bearing in mind the aforesaid principles of law, the endeavour on the part of the Court, therefore, should be to see as to whether the case presented by the prosecution and accepted by the Trial Court can be said to be a case in which, ultimately the convict stands for fair chances of acquittal. If the answer to the above said question is to be in the affirmative, as a necessary corollary, we shall have to say that, if ultimately the convict appears to be entitled to have an acquittal at the hands of this Court, he should not be kept behind the bars for a pretty long time till the conclusion of the appeal, which usually take very long for decision and disposal. However, while undertaking the exercise to ascertain whether the convict has fair chances of acquittal, what is to be looked into is something palpable. To put it in other words, something which is very apparent or gross on the face of the record, on the basis of which, the Court can arrive at a prima facie satisfaction that the conviction may not be sustainable. The Appellate Court should not reappreciate the evidence at the stage of Section 389 of the CrPC and try to pick up few lacunas or loopholes here or there in the case of the prosecution. Such would not be a correct approach.”

7. I have considered the submissions made by learned counsel for both the sides and also considering the evidences of the PWs

recorded in connection with this case, it is seen that there is basically non-compliance of Section 50 of the NDPS Act as well as *prima facie* it is seen that there is also non-compliance of Section 42(1) of the NDPS Act. At the same time, it is also seen from the evidence of I.O that he never prepared any inventory during the course of his investigation which otherwise also *prima facie* establish that there is non-compliance of 52A of NDPS Act as well. Further, it is seen that the accused/convict did not jump over the bail conditions while he was in bail during his entire trial.

8. So, considering all the circumstances of this case, I hereby find it justified to suspend the sentence passed by the learned Special Judge (NDPS) Bomdila dated 15.06.2023 till final disposal of the appeal. Accordingly, the Shri Tenzin Thardod Rijiju@James shall be allowed to go on bail on furnishing a bail bond of Rs. 20,000/- with a surety of like amount to the satisfaction of the learned Special Judge (NDPS) Bomdila under the following conditions;

- 1) The accused shall appear before the I.O as and when called for.
- 2) The accused shall not hamper and temper with the evidence in whatsoever manner.
- 3) The accused shall not leave the jurisdiction of

Special Judge (NDPS), Bomdila, without prior permission.

4) If any of the conditions is violated, this bail will stand cancelled.

With the above observation, the present I. A. stands disposed of.

JUDGE

Comparing Assistant