

GAHC010114052023



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

Case No. : I.A.(Crl.)/512/2023

SURAJ KUMAR ROY
S/O KISANDEV ROY, R/O KUMARDUBI, KALYARI, P.S.- CHIRKUNDI, DIST.-
DHANBAD, JHARKHAND, PIN- 828202.

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY THE PUBLIC PROSECUTOR, ASSAM

2:SANJIB CHOUDHURY
S/O LATE SUNIL CHOUDHURY
VILL.- ABHAYAPURI
WARD NO. 3
P.S.- ABHAYAPURI
DIST.- BONGAIGAON
ASSAM

Advocate for the Petitioner : MR. S MITRA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MITALI THAKURIA

ORDER

05.10.2023

(M. Zothankhuma, J)

1. Heard Mr. S. Mitra, learned counsel for the applicant. Also heard Ms. N.

Das, learned Additional Public Prosecutor.

2. This is an application under Section 389 Cr.P.C. for suspension of the sentence and release of the applicant on bail.

3. The brief facts of the case is that the applicant/appellant along with two co-accused/appellants Bipin Kumar and Vira Mahato, have been arrested for possession of 21 kgs of ganja from the Bongaigaon Rail Station. The ganja had been recovered from one blue coloured trolley bag and one plastic sack. Consequent to the recovery of the ganja, Bongaigaon G.R.P.S. Case No.07.2022 under Section 20(b)(ii)(c) of the N.D.P.S. Act was registered. After charge-sheet was filed, the case was registered as Special (Nar) Case No.23(BGN)/2022 in the Court of the Special Judge, Bongaigaon. The applicant along with the co-accused were thereafter convicted under Section 20(b)(ii)(c)/29 of the NDPS Act and sentenced to undergo rigorous imprisonment for 15 (fifteen) years with a fine of Rs.1,00,000/-, in default, simple imprisonment for 6 (six) months.

4. The applicant counsel submits that the sentence imposed upon the applicant should be suspended, in view of the fact that there were no independent witnesses who had seen the search and recovery of ganja from the blue coloured trolley bag or the sack. He submits that the seizure witnesses not having seen the actual search and recovery of the contraband by the police, the provisions of Section 100(4)(5) Cr.P.C read with Section 51 of the NDPS Act have been violated and as such, the same vitiated the trial proceedings. Accordingly, the applicant would have to be acquitted of the charge due to non-compliance

with the mandatory provisions of law under the Cr.P.C and the NDPS Act, while conducting search and recovery of the contraband. He also submits that Section 50 of the NDPS Act was not complied with, as no Magistrate or Gazetted Officer, had been called at the time of search of the applicant and the two co-accused persons. He submits that Section 41(2) of the NDPS Act has been violated, as the Sub-Inspector who took down the information in writing with regard to the contraband drugs was not an empowered officer. He also submits that there being a time gap between the recovery of ganja at 1:30 p.m. and the seizure memo which was made on 4 p.m, the same gives rise to a suspicion that the case against the applicant is a fabricated case. He also submits that the prosecution failed to prove that the applicant was in conscious possession of the recovered drugs, inasmuch as, the blue coloured trolley bag did not belong to the applicant. He accordingly submits that the sentence should be suspended and the applicant should be allowed to go on bail.

5. Ms. N. Das, learned Additional Public Prosecutor, on the other hand submits that two co-accused/appellants i.e. Bipin Kumar and Vira Mahato had filed I.A.(Crl.) 573/2023 before this Court praying for suspension of sentence and bail under Section 389(1) Cr.P.C. However, this Court vide order dated 26.09.2023, dismissed the application of the co-appellants on the ground that it was inappropriate to suspend the sentence imposed on the co-appellants at this stage, more so due to the embargo of Section 37 of NDPS Act, 1985.

6. With regard to whether the absence of independent witnesses during the search and recovery of contraband was fatal to the case of the prosecution, various judgments have been produced by both sides. The judgment of the

Single Judge of this Court in the case of ***Thounaojam Punima Singh vs. Union of India & Another***, reported in ***2021 (1) GLT 790*** and the judgment of the Supreme Court in the case of ***Jagdish vs. State of M.P.***, reported in ***(2003) 9 SCC 159*** is to the effect that in the absence of independent witnesses at the time of search and recovery, it would not be safe to conclude that the prosecution had established the case of recovery of contraband drugs from the accused person. On the other hand, the judgment of the Supreme Court in the case of ***Ajmer Singh vs. State of Haryana***, reported in ***(2010) 3 SCC 746***, is to the effect that though it is normally expected that there should be independent evidence to support the case of the prosecution with regard to search and recovery of drugs, the same was not an inviolable rule. It further held that in the peculiar circumstances of that case, the Supreme Court was satisfied that it would be a travesty of justice, if the appellant was acquitted merely because no independent witness had been produced. It further held that it may not be possible to find witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts, which the Court considered in the circumstances of the case reasonable, the police officer was not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The Court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable, after taking due care and caution in evaluating their evidence.

7. In the case of ***Raveen Kumar vs. State of Himachal Pradesh*** (Criminal Appeal No.218788/2011), the Supreme Court has held as follows :

“19. It would be gainsaid that lack of independent witnesses are not fatal

to the prosecution case. However, such omissions cast an added duty on Courts to adopt a greater degree of care while scrutinising the testimonies of the police officers, which if found reliable can form the basis of a successful conviction."

The above being said, the facts in the case of ***Raveen Kumar (supra)*** appears to be one of chance recovery. Similarly in the case of ***Ajmer Singh (supra)***, the fact seems to indicate that it is also a case of chance recovery. On the other hand, the present case does not appear to be a case of chance recovery.

8. With regard to whether there was violation of Section 50 of the NDPS Act, we are of the view that the contraband having been recovered from the blue coloured trolley bag and one sack, the same does not come within the ambit of Section 50 of the NDPS Act. The applicability of Section 50 of the NDPS Act would only come into play when there is a search of a person and recovery of drugs is made from the body of the said person or the clothes he is wearing. It would not apply to cases where recovery is made from a bag being carried by any person or alleged to be belonging to any person.

9. The case of the prosecution being that the blue coloured trolley bag was held by the applicant and that the sack also belonged to the co-accused, the stand of the prosecution that the applicant was not the owner of the blue coloured trolley bag cannot be wished away.

10. On considering the other issues raised by the learned counsel for the applicant juxtaposed with the decision of this Court in rejecting a similar

application made by the co-appellants in I.A.(Crl.) 573/2023, we are of the view that the case of the applicant herein being similar to the case of the co-accused, the rejection of I.A.(Crl.) 512/2023 would also have to be considered while disposing of the present application. Without going deep into the evidence recorded by the learned Trial Court, we are of the view that prayer for suspension of sentence cannot be granted at this stage. Consequently, the application for bail is also rejected.

11. The observations made and the decision taken in this application will not be considered to be the final decision or observations made in this case, while hearing the appeal.

12. This application is accordingly disposed of.

JUDGE

JUDGE

Comparing Assistant