

GAHC010069062023



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

Case No. : I.A.(Crl.)/498/2023

MONSER ALI
S/O LATE HASHEM ALI
R/O NO. 3
BAGHMARA CHAR
P.O.- BAGHMARA
P.S.- ALOPATI CHAR
DIST.- BARPETA
ASSAM.

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR
ASSAM

Advocate for : MR. A M BORA
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

For Applicant : Mr. A.M. Bora. Sr.Adv.
Mr. B. Bhagawati, Adv.

For respondent : Mr. R. J. Baruah, Addl. PP, Assam

Date of Hearing : 20.11.2023

Date of order : 21.11.2023

ORDER

(Mridul Kumar Kalita, J)

1. Heard Mr. A. M. Bora, learned Senior counsel assisted by Mr. B. Bhagawati, learned counsel for the applicants. Also heard Mr. R. J. Baruah, learned Additional Public Prosecutor for the State respondent.
2. This application under Section 389(1) of the Code of Criminal Procedure, 1973 has been filed by the applicant, namely, *Monser Ali* who has preferred the connected appeal i.e. Criminal Appeal No. 130/2023 impugning the judgment and order dated 01/03/2023 passed by the learned Special Judge, Goalpara in Special (NDPS) Case No. 14 of 2022, whereby the present applicant was convicted under Section 22(c) of the NDPS Act, 1985 and were sentenced to undergo rigorous imprisonment for 10(ten) years and to pay a fine of Rs.1,00,000/- and in default of payment of fine to undergo rigorous imprisonment of 3(three) years. By filing the instant interlocutory application, the applicants have prayed for suspension of the sentence imposed on the applicants by the impugned judgment.
3. At the stage of consideration of an application for suspension of sentence under Section 389 of the Code of Criminal Procedure, 1973, detail scrutiny of the evidence has to be avoided, inasmuch as, it may have an effect on the rights of the parties at the time of final consideration of the appeal. However, for considering the present application, I am referring to bare minimum facts involved in this case, as hereunder: -

- (i) That, on 29.3.2022, one Sri Nipu Moni Choudhury, SI of Police, lodged an FIR (First Information Report) before the Officer-in-Charge of Goalpara Police Station, *inter alia*, alleging that on 28.03.2022 at about 5.50 pm, during *naka* checking at Bhalukdubi near Goalpara Civil Hospital, one Maruti Alto car was intercepted and during search of the said car, three boxes of SPAS TRANCAN + Capsules (total 432 Nos. of capsules) were found concealed underneath the driver's seat. The present applicant was the driver of the said vehicle.
- (ii) On receipt of the said FIR, Goalpara Case No. 78/2022 was registered under Section 22(c) of the NDPS Act, 1985 and investigation was initiated. Ultimately, on completion of the investigation, the charge-sheet was laid against present applicant. Learned Special Judge, Goalpara framed charges against the applicant under Section 22(c) of the NDPS Act, 1985. During trial, eight prosecution witnesses were examined. The accused/applicant, during his examination under Section 313 of the Code of Criminal Procedure, 1973, denied the allegations leveled against him by the prosecution witnesses. He did not adduce any evidence in his defence. Ultimately, on completion of the trial, the present applicant was convicted and sentenced in the manner as stated hereinbefore.

4. Mr. A. M. Bora, learned senior counsel for the applicant has submitted that the evidence on record does not justify conviction of the present appellant/applicant under Section 22(c) of the NDPS Act, 1985. Learned senior counsel for the applicant has submitted that there has been a gross violation of not following the mandatory procedural requirement as mandated under Section 42 of the NDPS Act, 1985 by the PW-6, who first received the information

regarding the vehicle carrying drugs. It is submitted by the learned senior counsel for the applicant that the said information was neither reduced into writing nor a copy of the same was forwarded to the immediate official superior. Learned senior counsel for the applicant has submitted that the non-compliance of the mandatory requirement of Section 42 of the NDPS Act, 1985 is impermissible and same would vitiate the trial. Learned senior counsel has cited a ruling of Hon'ble Apex Court in "**Karnail Singh vs State of Haryana**" reported in "**(2009) 8 SCC 539**" in support of his submissions.

5. Learned senior counsel for the applicant has also submitted that the final disposal of the connected appeal may take a long time and there is a fair chance of the present applicant getting a judgment of acquittal in the appeal. It is further submitted by learned senior counsel for the applicant that the provision of Section 100 of the Code of Criminal Procedure, 1973 is also not followed properly and the seizure of the contraband was not made in presence of any independent witness. It is also submitted that the seizure and sealing of the contraband in this case has been done in violation of the provisions contained in the Code of Criminal Procedure, 1973.

6. On the other hand, R.J. Baruah, learned Additional Public Prosecutor has submitted that at the stage of consideration of the application under Section 389 of the Code of Criminal Procedure, 1973, Court may not delve deep into the evidence available on record and same may only be done at the time of the final hearing of the appeal. Learned Additional Public Prosecutor has further submitted that the search and seizure of the contraband in the instant case was made in the regular course of naka checking duty and PW-6 had no prior information regarding carrying of the contraband in the seized vehicle. To substantiate his submission learned Additional Public Prosecutor referred to the

cross-examination portion of the deposition of PW-6.

7. Learned Additional Public Prosecutor has also submitted that all the procedure as prescribed under NDPS Act, 1985 were complied with in this case and the applicants failed to show that their case falls within the category of exceptional case so as to get the benefit of stay of sentence under Section 389 of the Code of Criminal Procedure, 1973.

8. By citing a ruling of Hon'ble Apex Court in "***Omprakash Sahni v. Jai Shankar Chaudhary***," reported in "**(2023) 6 SCC 123**", learned Additional Public Prosecutor has also submitted that the Appellate Court should not reappreciate the evidence at the stage of Section 389 Cr.P.C. and try to pick up a few lacunae or loopholes here or there in the case of the prosecution. Such would not be a correct approach.

9. I have also heard learned counsel for both the sides regarding applicability of Section 32A of the NDPS Act, 1985 in the instant case.

10. I have considered the rival submissions made by the learned counsel for the applicants as well as learned Additional Public Prosecutor and have perused the materials on record.

11. Section 32A of the NDPS Act, 1985 had imposed an absolute bar on suspension of any sentence awarded under NDPS Act, 1985 (other than under Section 27). However, Hon'ble Supreme Court of India in the case of "***Dadu @ Tulsidas v. State of Maharashtra***" reported in "**(2000) 8 SCC 437**" holding the provision under Section 32A of the NDPS Act, 1985 as unconstitutional to the extent it takes away the right of the Court to suspend the sentence of a convict under NDPS Act, 1985 has observed as follows: -

"(2) It is unconstitutional to the extent it takes away the right of the

court to suspend the sentence of a convict under the Act.

(3) Nevertheless, a sentence awarded under the Act can be suspended by the appellate court only and strictly subject to the conditions spelt out in Section 37 of the Act, as dealt with in this judgment.”

12. Thus, the law, as on date, is that in case of a sentence imposed under the provisions of NDPS Act, 1985, the High Courts are not denuded of the power to suspend the sentence under Section 389(2) of the Code of Criminal Procedure, 1973, however, a rider has been imposed that such power has to be exercised, subject to conditions mentioned in Section 37 of the NDPS Act, 1985.

Section 37 of the NDPS Act, 1985 provides as follows: -

“37. Offences to be cognizable and non-bailable.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.

13. Thus, it appears that though the Appellate Court, in a case where the sentence is imposed under any provisions of the NDPS Act, 1985, irrespective of Section 32A of the said Act, may, in exercise of powers under Section 389 of the

Code of Criminal Procedure, 1973 suspend the sentence, however, while exercising such a power, the Court is not only required to act within the parameter of law as contained in Section 389(1) of the Code of Criminal Procedure, 1973, but also to bear in mind that in case of an offence involving commercial quantity of contraband, suspension of sentence is not to be done, unless the Court has reasonable grounds to believe that the persons so convicted is not guilty of the offence and that they are not likely to commit any offence while on bail.

14. In the above backdrop, if we consider the application for suspension of sentence by the present applicant, it appears that in the instant case the applicant is convicted and sentenced for offence involving possession of commercial quantity of contraband. Though, learned Senior counsel for the appellant has submitted that the testimony of PW-1 shows that the informant (i.e., PW-6) had received an information over phone regarding carrying of drugs in the Maruti Alto Vehicle, however, the submission of learned Additional Public Prosecutor that the PW-6 in his testimony, during cross-examination has stated that he did not have any previous information that the drugs were being transported in the seized vehicle. For consideration of the rival plea taken by learned counsel for the both the sides whether the informant had previous information about carrying of drugs in the seized vehicles and whether there was a violation of provision of Section 42 of the Code of Criminal Procedure, 1973, a detailed scrutiny of the evidence available on record will be necessary which may only be done at the time of final hearing of the appeal after hearing learned counsel for both the sides. Considering the fact that the embargo of Section 37 of the NDPS Act, 1985 is applicable even while considering an application for suspension of sentence under section 389 of Code of Criminal

Procedure, 1973, where commercial quantity of seized contraband is involved, I am of the considered opinion that this is not the appropriate stage for re-appreciating the evidence and try to pick up lacuna in the case of the prosecution side. I am of the considered opinion that as this is not a case where something very apparent and glaring is found on the face of the record which may *prima facie* lead to the satisfaction that the conviction of the applicant may not be sustained, hence, in the considered opinion of this Court, it would not be appropriate to suspend the sentence imposed on the applicant at this stage, more so, due to embargo of Section 37 of the NDPS Act, 1985 which is applicable in this case.

15. For the reasons discussed above, this interlocutory application, for suspension of sentence of the applicants, fails and same is accordingly dismissed. However, considering the grounds taken in the connected appeal by the applicant, he shall be at liberty to make separate prayer for out of turn listing and expeditious hearing of the said appeal.

16. With above observation this is interlocutory application is hereby disposed of.

JUDGE

Comparing Assistant