

GAHC010140592023



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

Case No. : I.A.(CrI.)/573/2023

BIPIN KUMAR AND ANR.
S/O DHARMENDRA KUMAR
RESIDENT OF VILLAGE AND PS BAKTIARPUR, DIST PATNA, BIHAR

2: VIRA MAHATO
S/O LATE BASANTA MAHATO
VILLAGE GULAMAHIYA CHOK
PS MOJIPUR NADDI
DIST PATNA
BIHAR

VERSUS

THE STATE OF ASSAM,
REPRESENTED BY THE PP, ASSAM

Advocate for the Petitioner : M PATHAK

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

For Applicants : Mr. M. Pathak, Adv.

For respondent : Ms. S. Jahan, Addl. PP, Assam

Date of Hearing : 20.09.2023

Date of order : 26.09.2023

ORDER

(Mridul Kumar Kalita, J)

- 1.** Heard Mr. M. Pathak, learned counsel for the applicants. Also heard Ms. S. Jahan, 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 applicants, namely, *1. Bipin Kumar and 2. Vira Mahato*, who have preferred the connected appeal i.e. Criminal Appeal No. 171/2023 impugning the judgment and order dated 09.03.2023 passed by the learned Special Judge, Bongaigaon in Special (NAR) Case No. 23 (BGN) of 2022, whereby the present applicants were convicted under Section 20(b)(ii)(C) of the NDPS Act, 1985 and were sentenced to undergo rigorous imprisonment for 15(fifteen) years and to pay a fine of Rs.1,00,000/- each and in default of payment of fine to undergo simple imprisonment of 6(six) months. By filing the instant interlocutory application, the applicants have prayed for suspension of the sentence imposed on the applicants by the impugned judgments.
- 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, in as much 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, we are referring to bare minimum fact involved in this case, as hereunder: -

- (i)** That, on 13.02.2022, one Sanjib Choudhury, ASI of Police, lodged an FIR(First Information Report) before the Officer-in-Charge of

Bongaigaon GRPS, *inter alia*, alleging that on receipt of an information through reliable source that some cannabis peddler are bringing large quantity of Ganja in Coach No. B-01 of *Deoghar Weekly Express* Train bearing No. 15626 (*Agartala-Deogarh*), which was coming from Agartala Railway Station towards New Bongaigaon Junction, a search was conducted when the said train arrived at Bongaigaon junction at 1338 hours. During search operation three suspected passengers (including the present applicants) were apprehended with one blue colour trolley bag and plastic sacks, when they were noticed avoiding police team and trying to escape. On search, it was found that the apprehended persons were carrying suspected Ganja. The apprehended persons were de-boarded from the train and the recovered Ganja was seized and it was found that it weighed about 21 Kg.

- (ii)** On receipt of the said FIR, Bongaigaon GRPS Case No. 7/2022 was registered under Section 20(b)(ii)(C) of the NDPS Act, 1985 and investigation was initiated. Ultimately on completion of the investigation, charge-sheet was laid against the three accused persons (including the present applicants). Learned Special Judge framed charges against the accused persons (including the present applicants) under Section 20(b)(ii)(C)/29 of the NDPS Act, 1985. During trial seven prosecution witnesses were examined. The accused persons (including the present applicants), during their examination under Section 313 of the Code of Criminal Procedure, 1973, denied the allegations leveled against them by the prosecution witnesses. However, they did not adduced any evidence in their defence.

Ultimately, on completion of the trial, accused persons (including the present applicants) were convicted and sentenced in the manner as stated hereinbefore.

4. Mr. M. Pathak, learned counsel for the applicant has submitted that the present applicant are detained in jail since February 2020 and they have already completed more than 1/10th part of the sentence which was imposed on them. It was also submitted that the final disposal of the connected appeal may take a long time and there is a fair chance of the present applicants getting a judgment of acquittal in the appeal. It is also submitted by learned counsel for the applicant that though the applicants were convicted for possessing commercial quantity of Ganja, however, the learned Trial Court erred in not considering the fact that the prosecution side failed to prove the seizure of the said contraband beyond all reasonable doubt as all the three independent seizure witnesses, namely, PWs- 1, 2 and 3 have stated that they did not enter into the train and they cannot say how and from where inside the train, the seized contraband was found. It is also submitted that the seizure of the contraband in this case is in violation of the provisions contained in Section 100(5) of the Code of Criminal Procedure, 1973.

5. The learned counsel for the applicants has also submitted that from the evidence on record, it appears that the PW-4 who allegedly recovered the suspected ganja from the applicants was accompanied by six GRP personnel who were not examined as witnesses by prosecution. It is submitted that these GRP personnel could have been the best witnesses to prove the seizure and, therefore, for non-examination of these GRP Personnel, a presumption, as provided under illustration (g) of Section 114 of the Indian Evidence Act, may

be drawn against the prosecution side.

6. Learned counsel for the applicants has also submitted that the quantity of Ganja seized from the possession of each applicant was less than commercial quantity and learned Trial Court did not find any material to convict the applicants under Section 29 of the NDPS Act, 1985, and, therefore, the conviction of the applicants under Section 20(b)(ii)(C) of the NDPS Act 1985 is bad in law. Learned counsel for the applicants has submitted that the prosecution side has failed to prove the charges against the applicants beyond reasonable doubt, and therefore, they are entitled to get benefit of doubt and this is a fit case for suspension of sentence imposed on the applicants.

7. On the other hand, Ms. S. Jahan, 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 evidence available on record shows that the independent seizure witnesses have deposed that the GRP personnel boarded in the train and during search operation they recovered one trolley bag and plastic sacks containing ganja and also apprehended three persons including the present applicants during search operation. She has submitted that in the instant case the testimony of PW- 4, regarding recovery of seized ganja from the possession of present applicants has been corroborated by the independent witnesses, namely, PWs- 1, 2 and 3 and hence sentence imposed on the applicants should not be stayed during the pendency of the appeal.

8. 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.

9. We 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.

10. It is pertinent to mention herein that 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.”

11. 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.

12. 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.

13. In the above backdrop, if we consider the application for suspension of sentence by the present applicants, it appears that in the instant case the applicants are convicted and sentenced for offence involving possession of

commercial quantity of ganja. PW- 4 has deposed that on receipt of the information through reliable source and after being authorized, he boarded the train and conducted the search and found three persons including the present applicants possessing the seized ganja. For consideration of the plea taken by learned counsel for the applicants that the independent witnesses were not present at the time of seizure and that there is a violation of provision of Section 100 (5) 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, we are 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. We are 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 applicants may not be sustained, it may not be appropriate to suspend the sentence imposed on the applicants at this stage, more so, due to embargo of section 37 of the NDPS Act, 1985 which is applicable in this case.

14. 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 applicants, they shall be at liberty to make separate prayer for out of turn listing and expeditious hearing of the said appeal. With above observation this is

interlocutory application is hereby disposed of.

JUDGE

JUDGE

Comparing Assistant