

GAHC010225852023



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

Case No. : Crl.Pet./765/2023

MITHILESH KUMAR
S/O MUKUND KUMAR
S/O MUKUND CHAND SINGH
R/O VILL- ARJPUR
P.S.-CHOUSA
DIST- MADHEPURA
BIHAR

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY THE PUBLIC PROSECUTOR
ASSAM

2:NIRANJAN DAS
SI (UB)
CHURAIBARI WATCH POST
S/O LATE NILAKANTA DAS
CHENGKURI ROAD
UPENDRA DAM SARANI
SILCHAR-04

Advocate for : MR. A AHMED
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR

**BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA**

ORDER

Date : 07.12.2023

- 1)** Heard Mr. A. Ahmed, learned counsel for the petitioner. Also heard Mr. B. B. Gogoi, learned Additional Public Prosecutor for the State respondent.
- 2)** This application under Section 482 of the Code of Criminal Procedure, 1973 has been filed by the petitioner, namely, Mithilesh Kumar praying for quashing of the order dated 18.03.2023, passed in Special (NDPS) Case No.56/2022, whereby learned Special Judge, Karimganj had framed charges against the present petitioner and another accused, namely, Kamlesh Pancham Yadav under Sections 20(b)(ii)(C)/29 of the NDPS Act, 1985 read with Section 34 of the Indian Penal Code.
- 3)** The facts relevant for consideration of the instant criminal petition, in brief, are as follows:
 - i.** That on 08.04.2022, one Niranjana Das, S. I. of Police, had lodged an FIR before the Officer-in-Charge at Bazaricherra police station, *inter-alia*, alleging that on that day i.e. 08.04.2022 at about 9.15 PM, while the first informant and other police parties were conducting a naka checking in front of Churaibari Watch Post at National Highway 8, one night super bus of Sherowali tours & travels bearing registration No. AS 01 HC 6269 was intercepted and the naka checking party on getting suspicious searched each and every passenger of the said bus.
 - ii.** It is further alleged in the FIR that while searching the luggage of the passengers of the said bus, the first informant found one black

coloured trolley bag which belongs to one Kamlesh Pancham Yadav and on search of the said trolley bag, 14 numbers of packets containing about 15 Kgs of contraband suspected to be cannabis (Ganja) were found.

iii. It is further alleged in the FIR that during further search of the said bus, another black coloured backpack was found which belongs to the present petitioner (Mithilesh Kumar) from which, 7.8 kg of contraband suspected to be Ganja (cannabis) was found.

iv. On receipt of the said FIR, the Officer-in-Charge of Bazaricherra Police Station registered Bazaricherra P.S. Case No.64/2022 under Sections 20(b)(ii)(C)/29 of the NDPS Act, 1985 and initiated the investigation.

v. Ultimately, on completion of the investigation, charge-sheet was laid against two numbers of accused persons including the present petitioner under Sections 20(b)(ii)(C)/29 of the NDPS Act, 1985.

vi. In the meanwhile, the present petitioner was arrested on 08.04.2022 and since then, he has been detained behind the bars. After laying of the charge-sheet, the learned trial court framed charges under Section 20(b)(ii)(C)/29 of the NDPS Act, 1985 read with Section 34 of the Indian Penal Code against the present petitioner and the co-accused Kamlesh Pancham Yadav.

vii. When the said charges were read over and explained to the present petitioner, he pleaded not guilty and claimed to be tried. The said order of framing of charges under the aforesaid provision of law by the learned trial court is impugned in the instant criminal petition.

4) The learned counsel for the petitioner submitted that though only 8.7 kg of suspected Ganja was seized from the possession of the present petitioner, however, while laying the charge-sheet, the quantity of Ganja

which was seized from the possession of the co-accused namely, Kamlesh Pancham Yadav, who hails from Maharashtra and is not known to the present petitioner , was also taken into consideration for framing charges under section 20(b)(ii)(C)/29 of the NDPS Act against the petitioner.

5) Learned counsel for the petitioner has submitted that there is no material on record to show that there was any conspiracy between the present petitioner and the other co-accused namely, Kamlesh Pancham Yadav, who has been charge-sheeted along with the present petitioner in this case. It is further submitted by learned counsel for the petitioner that there is also no material on record to show that there was any connivance between the present petitioner and the co-accused namely, Kamlesh Pancham Yadav or that the petitioner abetted in any manner to carry the recovered quantity of contraband jointly with the co-accused.

6) Learned counsel for the petitioner submits that in absence of any materials or any evidence on record to suggest that there are elements to show that there was a criminal conspiracy within the meaning of section 29 of the NDPS Act,1985 between the present petitioner and the co-accused namely, Kamlesh Pancham Yadav to commit the alleged offence, the learned trial court erred in framing charges under section 20(b)(ii)(C)/29 of the NDPS Act, 1985.

7) Learned counsel for the petitioner further submits that, on the basis of materials available on record, at the very best, the charges against the present petitioner could only have been framed under section 20(b)(ii)(B) of the NDPS Act,1985 and he should have been tried separately in absence of any evidence regarding criminal conspiracy or connivance with the other co-accused.

In support of his submission, learned counsel for the petitioner has relied upon the judgement of High Court of Bombay in ***Sagar Nana Borkar Vs. State of***

Maharashtra (Criminal Bail application No. 3636/2022), wherein it was observed as follows:

“7. The, police have recovered contraband of totalling 10.319 kg from the possession of the Applicant and contraband totalling 11.24 kg from the possession of the co-accused. It is alleged that, both applicant and co-accused were travelling together and contraband recovered from their possession was commercial quantity. In my view, though applicant and co-accused found together but, they were carrying the contraband individually. The recovery of the contraband from the possession of the Applicant and co-accused should be considered separately and as observed by this Court in case of Smt.Rashida Iqbal Khan V/s. State of Maharashtra, has taken a same view. Applicant is behind bar more than 1 year and 9 months. Investigation is completed and charge-sheet has been filed.”

8) Learned counsel for the petitioner also relied upon another ruling of High Court of Bombay in ***“Smt. Rashida Iqbal Khan Vs. State of Maharashtra “*** in ***criminal application no. 2177/2006.***

9) Learned counsel for the petitioner has also submitted that in absence of any evidence on record to suggest that there was any abetment and/or criminal conspiracy between the present petitioner and the other co-accused namely, Kamlesh Pancham Yadav within the meaning of Section 29 of the NDPS Act, 1985, the learned trial Court had erred in framing charges against the present petitioner under section 20(b)(ii)(C)/29 of the NDPS Act read with Section 34 of the Indian Penal Code.

10) He has also relied upon the ruling of Hon'ble Apex Court in ***“Amarsingh***

Ramjibhai Barot vs. State of Gujarat” reported in ***(2005) 7 SCC 550*** wherein it was observed as follows :-

8. In our view, however, there was no warrant for this conclusion at all as there is no evidence to suggest that there was any such abetment and/or criminal conspiracy within the meaning of Section 29 of the NDPS Act. The appellant and Danabhai Virabhai Rabari were found together, but individually carrying the recovered substances. Hence, it was not possible for the High Court to take the view that Section 29 was attracted.”

11) On the other hand, learned Additional Public Prosecutor has submitted that as both the petitioner and the co-accused were travelling in the same bus where the contraband was seized, though the contraband was found in separate bags, there is sufficient materials to come to the conclusion that there is conspiracy/abetment to commit the offence involving commercial quantity by the present petitioner and the co-accused in this case. However, he also submits that the Investigating Officer has made separate seizure lists of recoveries made from the present petitioner and the co-accused and apart from the fact that the recovery of the said contraband was made from the same bus, no other material is there to suggest that there was any connivance or conspiracy between them.

12) On perusal of the seizure list (*in M. R. No. 43/2022*) which is annexed as Annexure No. 2 along with the present criminal petition, it appears that total 8.7 kg of Ganja was seized from the possession of the present petitioner. It also appears that the remaining quantity of 15 kg of suspected ganja was seized from the possession of the other co-accused namely Kamlesh Pancham Yadav who was the co-passenger of the said bus. However, the seizure was made after about 40 minutes of the seizure made from the present petitioner.

13) It is apparent that the quantity of Ganja which is seized from the present petitioner is less than the commercial quantity of 20 kg. This Court is of the considered opinion that merely because the present petitioner was travelling in the same bus in which the co-accused was also found to carry some ganja in his possession, Section 29 of the NDPS Act could not have been applied as the recoveries made from both the present petitioner as well as the co-accused were separate recoveries and there is no material on record to suggest that there is any connivance or abetment of conspiracy between them except the fact that they were travelling in the same bus.

14) The material on record suggest that the present petitioner was carrying the contraband, which was seized from him, individually. No evidence could be collected during the investigation to link the contraband seized from him with the contraband seized from the co-accused Kamlesh Pancham Yadav. As only 8.7 kg of suspected Ganja was recovered from the present petitioner, and as apart from the fact that the present petitioner was travelling in the same bus in which another accused was travelling, there is no other material on record to show that there was any connivance or conspiracy between both the accused persons named in the charge-sheet, this Court is of the considered opinion that there is no ground for presuming that the petitioner has committed the offence under Sections 20(b)(ii)(C)/29 of the NDPS Act read with Section 34 of the Indian Penal Code.

15) Hence, this Court is of the considered opinion that the learned trial court has erred in framing charges against the present petitioner under Sections 20(b)(ii)(C)/29 of the NDPS Act, 1985 read with Section 34 of the Indian Penal Code and accordingly, the said charge is hereby set aside.

16) The learned trial court is hereby directed to reconsider the charges

afresh after giving the opportunity of being heard to the petitioner as well as the prosecution side, as early as possible, and thereafter proceed with the trial of Special (NDPS) Case No.56/2022.

17) Let a copy of this order be also furnished to the learned trial court for compliance.

18) With this observation, this criminal petition is hereby disposed of.

JUDGE

Comparing Assistant