

GAHC010072302023



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

Case No. : I.A.(Crl.)/456/2023

NIJUT BORMOHOLIA
R/O BONDALJHARNI
P.S.- DHEKIAJULI
P.O.- NO. 2 PIRAKATA
DIST.- SONITPUR
ASSAM
PIN- 784110.

VERSUS

THE STATE OF ASSAM
REP. BY THE P.P.
ASSAM

Advocate for : MR D K MEDHI
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 18.04.2024

1) Heard Mr. D. K. Mehdi, learned counsel for the applicant. Also heard Mr. B. B. Gogoi, Learned Additional Public Prosecutor for the State of Assam.

2) This interlocutory application, under section 389 (1) of the Code of Criminal Procedure, 1973, has been filed by the applicant, Nijut Bormoholia, praying for suspension of sentence imposed on him by judgment and order dated 22-12-2022 by learned Special Judge, Udalguri in Special (N) Case No. 4/2020, whereby the present applicant was convicted under section 20(b)(ii)(C) of the NDPS Act, 1985 and was sentenced to undergo rigorous imprisonment for 10 years and also to pay a fine of Rs. 1 lakh only and in default of payment of fine to undergo further simple imprisonment for 6 months. The aforesaid judgment has been impugned by the present applicant by filing a connected criminal appeal which has been registered as Criminal Appeal No.192/2023.

3) At the stage of consideration of an application for suspension of sentence under section 389 of the Code of Criminal Procedure, 1973, a detailed scrutiny of 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 appeal.

4) However, for considering the present application, I am referring to bare minimum facts of the case, which are required only for adjudication of the instant Interlocutory Application, as hereunder:

i. One Rohit Kumar Chetri, S. I. of Police had lodged an FIR before the Officer-In-Charge of Majbat Police Station, *inter-alia* alleging that on 15.02.2022, the Officer-In-Charge of Majbat police station got secret information regarding transportation of ganja by two persons in a swift desired vehicle from Lalpani towards Majbat.

ii. Accordingly, a naka checking was organized at Bahipukhuri, line no. 12, Orang-Rupa Road and during naka checking, at about 11 am, one metallic grey colour swift desired vehicle bearing registration number AS12P3916 was intercepted and two persons

were found inside the said vehicle. After the said vehicle was searched, suspected ganja weighing about 30 kg was recovered from the said vehicle.

iii. Thereafter, during interrogation, the apprehended accused persons, led the police team to the residence of one Jayanta Doimari at Rowta and during the search of the said residence of Jayanta Doimari, some more suspected ganja was recovered from there. On weighing the recovered ganja, it was found to be 75 kg. Therefore, the total recovery made in this case was 105 kgs of suspected ganja.

iv. On receipt of the said FIR, Majbat P.S. Case No. 12/2020 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 3 accused persons including the present applicant under Section 20(b)(ii)(C) of the NDPS Act, 1985.

v. The present applicant faced the trial remaining in custody. During the trial, the prosecution side examined as many as seven prosecution witnesses to bring home the charges. The applicant and other accused persons were examined under Section 313 of the Code of Criminal Procedure, 1973, during which they denied the truthfulness of the testimony of prosecution witnesses and pleaded their innocence. However, the applicant did not adduce any evidence in defence.

vi. Ultimately, by the judgment which has been impugned in the connected appeal, the applicant was convicted and sentenced in

the manner as already described hereinbefore.

5) Learned counsel for the applicant has submitted that the applicant has been detained behind the bars for last more than four years since the date of his arrest on 15.02.2020.

6) It is also submitted by learned counsel for the applicant that the present applicant has a fair chance of getting a judgment of acquittal in the connected appeal as the trial court has failed to take into consideration the contradictions amongst the testimony of prosecution witnesses.

7) Learned counsel for the applicant has also submitted that the seized ganja was not exhibited or produced before the trial court during the trial. It is also submitted by learned counsel for the applicant that neither the seized ganja was exhibited nor the inventory which was prepared has been exhibited during the trial and under such circumstances the trial court has erred in coming to the finding of guilt of the present appellant.

8) It is also submitted by learned counsel for the applicant that in the instant case the sample of the seized contraband was not drawn in presence of a Judicial Magistrate and therefore, there has been a violation of the provisions of Section 52A of the NDPS Act, 1985.

9) On the other hand, Mr. B. B. Gogoi, learned Additional Public Prosecutor has submitted that at the stage of consideration of an application under Section 389 of the Code of Criminal Procedure 1973, Court may not delve deep into evidence available on record and same may only be done at the time of final hearing of the appeal.

10) Learned Additional Public Prosecutor has also submitted that the evidence available on record has clearly established that the contraband recovered in this case was seized from the possession of the present applicant

and the trial court has correctly arrived at the finding of guilt of the present applicant.

11) It is submitted by the learned Additional Public Prosecutor that no major error or anomaly appears to be there in the impugned judgment and therefore this is not a fit case where the operation of the sentence imposed on the applicant may be suspended during the pendency of the connected criminal appeal.

12) I have considered the rival submissions made by learned counsel for the applicant as well as learned Additional Public Prosecutor and also peruse the materials available 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 32 A 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."

13) 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.

14) 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 32 A 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.

15) In this backdrop, if we consider the prayer for suspension of sentence by the present applicant, it appears that in the instant case the present applicant has been convicted and sentenced for an offense involving possession of commercial quantity of ganja. The evidence on record shows that the commercial quantity of ganja was recovered from the vehicle in which the present applicant was traveling along with one another co-accused.

16) For consideration of the plea taken by learned counsel for the applicant that there are contradiction in the testimony of the prosecution witnesses and that the seized ganja or the inventory was not exhibited during the trial and the trial court has ignored these facts while coming to the finding of guilt of the present applicant, 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.

17) 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 the Code of Criminal Procedure, 1973, as in this case also the contraband seized is of commercial quantity, this Court is 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 prosecution side.

18) This Court is of considered opinion that this is not a case where something very apparent or glaring error is found on the face of the record which may *prima facie* lead to the satisfaction that the conviction of the appeal applicant may not be sustained, it is therefore not appropriate to suspend this sentence imposed on the applicant at this stage, more so, due to the embargo of section 37 of the NDPS Act, 1985 which is applicable in this case.

19) For the reasons discussed above this interlocutory application for suspension of sentence of the applicant is hereby dismissed.

20) However, considering the grounds taken by the applicant in the connected appeal, the applicant shall be at liberty to make a separate prayer for out-of-turn listing and expeditious hearing of the connected appeal.

JUDGE

Comparing Assistant