

GAHC010157022023



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

Case No. : I.A.(Crl.)/644/2023

ABDUS SAMAD
S/O MD. SAHABUDDIN, VILL.- KWAKTA, P.S.- MOIRANG, DIST.-
BISHNUPUR, MANIPUR.

VERSUS

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

2:AMITAV SENSOWA
S/O LATE PRITAFULLA KR. SENSOWA
S.I. OF JAGIROAD POLICE STATION
DIST.- MORIGAON
ASSAM
PIN- 782410

Advocate for the Petitioner : MR. M KHAN

Advocate for the Respondent : PP, ASSAM

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA
ORDER**

27.02.2024

Heard Mr. M. Khan, learned counsel for the applicant. Also heard Mr. K. K. Parasar, learned Additional Public Prosecutor for the State respondent.

2. This is an application filed under Section 389 of the Code of Criminal Procedure, 1973, praying for suspension of sentence and releasing the accused/applicant on bail challenging the judgment and order dated 28.06.2023 passed by the learned Special Judge, Morigaon in NDPS Case No. 39/2022, [corresponding to G. R. Case No. 516/22], whereby, convicting the applicant to undergo R.I. for 10 years and to pay a fine of Rs. 1 lakh and in default another 1(one) year S.I. under Section 21(C) of NDPS Act.

3. Mr. Khan, learned counsel for the applicant has submitted that vide order dated 29.11.2023, the health Status Report of the applicant namely Abdus Samad was called for, from the District Jail, Morigaon, as he is suffering from severe illness and serious ailment which need immediate medical attendance. The health ground is also taken as an additional ground for seeking bail and for suspension of sentence imposed upon him. Accordingly, the Medical report has been receipt from the jail authority, wherein, it has been stated that immediate operation is required and which facility is not available in the jail premises and also the family members of the accused/applicant wants to take him outside for his treatment. Further, the learned counsel for the accused/applicant has submitted that they have taken the good grounds for appeal and there is every chance of succeeding the present connected criminal appeal and accordingly, he prays to suspend the conviction and allow the accused/applicant to remain on bail. He further submits that there is no chance of absconding, if the same is allowed.

4. He further submits that the judgment passed by the learned Trial Court also considered the fact that remnant of the sample could not be produced before the Court at the time of evidence except the FSL report. More so, the independent witnesses, i.e the PW-1 and PW-2 did not support the prosecution case and they were declared hostile who are the independent/seizure

witnesses of the prosecution. The entire conviction was based on evidence of PW-3 who is the informant of this case and PW-5 the IO. No further corroborating evidence could be produced by the prosecution during the trial of this case. More so, there are sufficient contradictions in the evidence of PW-3, which is not believable and on that count also accused/applicant is entitle for acquittal.

5. In support of his submission, Mr. Khan, learned counsel for the applicant relies on the decision passed by the Hon'ble Apex Court passed in ***Criminal Appeal No.1143/2019 [arising out SLP (Crl.) No.1273/2019]*** and he basically emphasize on paragraph Nos. 8 and 9 of the said judgment. He further relies on another decision passed in ***Criminal Appeal No.504/2020***, wherein, it has expressed the view that the prosecution has to establish a prima case beyond reasonable doubt and in that case only the burden of proof shall shift to the accused/applicant to prove his innocent.

6. Accordingly, it is submitted by the learned counsel for the applicant that sufficient ground has already been taken in the connected appeal and there is every probability of acquittal of the present applicant.

7. In this context, Mr. Parasar, learned Additional Public Prosecutor has submitted that the prosecution witness Nos. 1 and 2 may be declared as a hostile but on the evidence of PW-3 and PW-5 as well as PW-4 who is the FSL expert, the prosecution case is well established and hence, presumption under Section 35 of the NDPS Act can very well be taken and further, he submits that burden lies on the accused/applicant to prove his innocence. Accordingly, he raised objections and submitted that it is not a fit case, where the sentence imposed on the accused/applicant may be suspended by releasing him on bail.

8. After considering the submissions made by the learned counsels of both sides and without going into the entire merit of the case, I find that the health conditions of the accused/applicant is serious and as per the medical report of the Superintendent of Jail, he needs immediate operation for his appendicitis and which facility is not available in the jail and therefore he is providing some medicine and injection to the accused/applicant. Apart from the appendicitis, he is also suffering from Type-2 diabetes and urinary intact infection which may become

serious health issue, if the operation is not done immediately and further, there is probability of bursting of appendix also cannot be denied. Thus, I find it a fit case to allow the accused/applicant to go on interim bail by suspending the sentence imposed upon him for 2(two) months only considering his health and on humanitarian ground.

9. Accordingly, it is provided that on furnishing a bond of Rs. 50,000/- (Rupees fifty thousand) only with two surety of like amount to the satisfaction of the learned Special Judge, Morigaon, the accused/applicant, namely Abdus Samad, be enlarged on bail for two months, and on completion of 2(two) months he shall surrender before the learned Special Judge or may directly surrender before the concerned jail authority.

10. In terms of above, this interlocutory application stands disposed of.

JUDGE

Comparing Assistant