

GAHC010186222023



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

Case No. : I.A.(Crl.)/758/2023

NILIKHANG WARY
S/O LATE UPEN WARY, VILL.- MADHAYAM RUNIKHATA UNDER
RUNIKHATA POLICE STATION IN THE DISTRICT OF CHIRANG, ASSAM,
PIN-

VERSUS

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

Advocate for the Petitioner : MR. U K NAIR

Advocate for the Respondent : PP, ASSAM

Linked Case : Crl.A./310/2023

NILIKHANG WARY
S/O LATE UPEN WARY

VILL.- MADHAYAM RUNIKHATA UNDER RUNIKHATA POLICE STATION IN
THE DISTRICT OF CHIRANG
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Advocate for : MR. U K NAIR
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM

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

ORDER

Date : 30.01.2024
(K.R. Surana, J)

Heard Mr. K.K. Mahanta, learned senior counsel, assisted by Mr. A. Boro, learned counsel for the appellant. Also heard Ms. S. Jahan, learned APP appearing for the State.

2. By filing this application under Section 389(2) Cr.P.C., the applicant has prayed for suspension of execution of sentence and stay of realization of fine and for releasing the applicant-appellant on bail pending disposal of the connected Criminal Appeal No. 310/2023.

3. The applicant was convicted of committing offence punishable under Section 22(c) of the NDPS Act, 1985 by judgment and order dated 25.07.2023 passed by the learned Special Judge, Chirang in Special NDPS Case No. 5/2021 and he was sentenced to undergo imprisonment for 10 (ten) years with fine of Rs.50,000/- (Rupees fifty thousand only) with default stipulation.

4. The learned senior counsel for the applicant has submitted that on 27.10.2020, when a raid was conducted by the police personnel in the pharmacy

of the applicant, the provisions of Section 50 of the NDPS Act read with Section 100 of the Cr.P.C was not followed. In the said context, it is submitted that firstly the raid was conducted between sunset and sunrise, but due safeguards were not resorted to for making a search after sunset. Moreover, it is submitted that before making a search, the police personnel did not procure attendance of 2 (two) respectable witnesses after putting them to notice that a search in respect of narcotic drugs and psychotropic substances was to be made by asking them whether they were willing to be witnesses to the search and that prior to enlisting them as witnesses, they were not issued any order or notice on writing to be a witness. Accordingly, it is submitted that the search and resultant seizure stands vitiated by non-compliance of the provision of Section 50 of the NDPS Act read with Section 100 Cr.P.C. It was further submitted that as the applicant was the owner of the pharmacy and since raid was conducted in his pharmacy, it would amount to search and seizure on the person of the applicant and therefore, it was mandatory to follow the procedure laid down under the provision of Section 50 of the NDPS Act read with Section 100 Cr.P.C.

5. It is submitted that the prosecution has heavily relied on the evidence of P.W.1, who is a seizure witness. It is submitted that the said P.W.1 was a chance witness, who has stated in his examination-in-chief that he saw a gathering in front of the pharmacy of the appellant-applicant and out of curiosity, he had gone there to see what has happened and saw police inside the pharmacy, who were collecting capsules on the table of the pharmacy and he saw those capsules and police requested him and two others persons to sit and wait for some time and thereafter, police took signature on a paper and packed the capsules in front of him.

6. Accordingly, it is submitted that he was merely a chance witness and

not a witness duly informed about the search and seizure to be conducted. It has also been submitted that the applicant was about 6 (six) months in jail during the trial and since his conviction vide the impugned judgment and order dated 25.07.2023, he is in judicial custody. Accordingly, it is submitted that there may not be a chance of early hearing for the connected appeal and therefore, the applicant be enlarged on bail.

7. Per contra, the learned APP has submitted that the Supreme Court of India in the case of *Ranjan Kumar Chadha Vs. State of Himachal Pradesh*, reported in (2023) 0 INSC 878 : (2023) 0 Supreme (SC) 1015 had relied on the decision of the larger Bench of the Supreme Court of India in case of *State of Himachal Pradesh Vs. Pawan Kumar*, (2004) 7 SCC 735, wherein it has been held that the term "person" under Section 50 of the NDPS Act would mean a natural person or not a living unit and not an artificial person i.e. a bag or a briefcase. Accordingly, it is submitted that a pharmacy premises cannot be read as an extension of physical body of a person so as to include the requirement of Section 50 of the NDPS Act to be complied with.

8. We take note of the decision of *Pawan Kumar (supra)* and the facts of the said case was that the search conducted was not only on the bag, but also of the person on the accused. However, the contraband was recovered only from the bag and not from the person of the accused therein. Nonetheless, since the recovery of the contraband was made from the bag and not from the accused person, the Supreme Court of India took the view that Section 50 of the NDPS Act would have no application. In the said decision of *Ranjan Kumar Chadha (supra)*, reference is made to the case of *State of Rajasthan Vs. Daulat Ram*, (2005) 7 SCC 36, where opium was recovered from a bag being carried on the accused person's head. Nonetheless, the Supreme Court of India, by relying

on the case of *Pawan Kumar (supra)* had held that the recovery made from the accused person's bag would not constitute personal search on the accused and thus it was held that it would not attract Section 50 of the NDPS Act. Several other cases are also cited in the said decision of *Ranjan Kumar Chadha (supra)*, which are not being referred herein.

9. Therefore, relying on the decision in the case of *Ranjan Kumar Chadha (supra)*, the Court is unable to accept that the rigours of Section 50 of the NDPS Act was required to be complied with for a search to be conducted on the pharmacy of the applicant and therefore, the said submission cannot be accepted.

10. Insofar as the plea of the value of evidence of P.W.1 is concerned, for the purpose of deciding an application under Section 389(2) Cr.P.C., the Court would not venture into appreciation of the evidence and try to find out if the evidence would lead to acquittal and then examine the prayer for bail or suspension of sentence. The said appreciation should be left while deciding the connected appeal.

11. One of the plea urged by the learned senior counsel for the applicant was that search and seizure was made after such set. We are unable to accept the plea because as per information available in the internet, on 27.10.2020, sunset in Assam was at 17:15 hours, with civil twilight ending at 17:36 hours. Therefore, *prima facie*, it cannot be accepted that on 5.00 pm, when search and seizure operation was conducted, sunset had occurred. Therefore, this plea also fails.

12. We would also like to refer to the decision of the Supreme Court of India in the case of *Satender Kumar Antil Vs. Central Bureau of Investigation &*

Anr., AIR 2022 SC 3386, where the observations of the Supreme Court India is as follows:-

“Where undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an under-trial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.”

13. Therefore, we find that as the applicant has not suffered incarceration of the period provided under Section 436A Cr.P.C., the ratio of the case of *Satender Kumar Antil (supra)* is squarely applicable and therefore, the applicant cannot be granted the benefit of suspension of execution of sentence and/or bail.

14. Accordingly, the prayer for bail is rejected at this stage.

JUDGE

JUDGE

Comparing Assistant