

GAHC010210492023



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

Case No. : I.A.(CrI.)/888/2023

BUNU SWARGIARY
S/O RAMESH SWARGIARY, R/O BAHADUR ADARSHAGAON, P.S.- MAZBAT,
DIST.- UDALGURI.

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY LD P.P., ASSAM.

2:AMIRUL ISLAM
S/O LT JAHIRUDDIN SARKAR
A.S.I OF MAZBAT P.S.
DIST.- UDALGURI

Advocate for the Petitioner : MR. A BHATTACHARYA

Advocate for the Respondent : PP, ASSAM

With Linked Case : I.A.(CrI.)/889/2023

SANJIT GOYARI
S/O LATE BIREN GOYARI
R/O BAHADUR ADARSHAGAON
P.S.- MAZBAT
DIST.- UDALGURI
ASSAM
PIN- 784507.

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

**BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY**

ORDER

Date : 13-06-2024

1. Heard Mr. A. Bhattacharjee learned counsel for the petitioner in I.A(Crl) No.888/2023 and Mr. D.K. Medhi learned counsel for the petitioner in I.A(Crl) No.889/2023. Also heard Mr. M.P. Goswami learned Additional PP, Assam.
2. I.A(Crl) 888/2023 is filed by petitioner namely, Sri. Bunu Swargiary and I.A(Crl)889/2023 is filed by petitioner namely, Sanjit Goyari.
3. The present applications are filed by the petitioners under section 389 Cr.P.C, 1973 for suspension of sentence and grant of bail to the petitioners who were convicted by judgment and order dated 25.07.2023, passed by the learned Special Judge, Udalguri convicting the petitioners in special NDPS Case No.7/2022 under section 20(b)(ii)(C) of NDPS Act and sentenced them to undergo Rigorous Imprisonment for a period of 10 years and was also imposed fine of Rs.1,00,000 and in default to undergo simple imprisonment for another six months.
4. According to the learned counsel for the petitioners, the

prosecution has failed to lay the foundation that the narcotics have been recovered from the possession of the accused persons. Referring to the deposition of PW-2 and PW-3 the independent seizure witnesses, the learned counsel for the petitioners submits that the possession has not at all been proved. It is also contended that the PW-2 & PW-3 clearly stated that they have not witnessed the recovery.

5. The learned counsel for the accused in I.A(CrI) No.888/2023 further contends that the police have allegedly recovered 1.180 kgs cannabis from the house of the petitioner and another quantity of 38.320 kg cannabis from the petitioner Sanjit Goyari and therefore the accused Bunu Swargiary could not have been convicted for 10 years inasmuch as, even if it is assumed that the recovery made is proved, then also the quantity recovery is an intermediate quantity of 1.180 kgs.
6. The learned counsel for the petitioner further contends that PW-4 the seizure witness even had deposed that the signatures were taken in the seizure memo in blank papers and they have not witnessed the seizure. In this regard the learned counsel for the petitioners relies on the decision of the Hon'ble Apex court in ***Sanjeet Kumar Singh @ Munna Kumar Singh Vs. State of Chattisgarh*** reported in ***2022 LiveLaw (SC) 724*** and ***Amarsingh Ramjibhai Barot Vs. State of Gujarat*** reported in ***(2005) 7 SCC 500***.
7. Per contra, Mr. Goswami, the learned counsel for the respondent State argues that the petitioners had already been convicted by a

competent court and thus a finding has already been arrived at by the learned trial judge at the conclusion of the trial. Therefore, this court while granting bail is to consider whether there is any reasonable ground of believing that the accused are not guilty of such offence and that they are not likely to commit any offence while on bail.

8. Mr. Goswami learned Addl. PP further submits that there is nothing apparent or gross on the face of the record, on the basis of which this court can arrive at a prima facie satisfaction that conviction may not be sustainable.
9. According to Mr. Goswami, on the materials relied on by the prosecution which has already been accepted by trial court, cannot lead to a prima facie satisfaction that there is a fair chances of acquittal. Mr. Goswami relies on the judgment of the Hon'ble Apex Court in the case of ***The State (GNCT of Delhi) Narcotics Control Bureau Vs. Lokesh Chadha*** reported in ***Criminal Appeal No.257/2021*** (arising out of ***SLP (Crl) No.670/2021***) and ***Omprakash Sahni Vs. Jai Shankar Chaudhary*** reported in ***2023 LiveLaw (SC) 389***.
10. Heard the learned counsel for the parties and perused the materials available on record including the judgment of the trial court.
11. From the FIR it is seen that the on 12.03.2022 complainant, one ASI Aminul Islam of Mazbat police station, lodged the FIR to the effect that on the basis of secret information, he along with staff of Mazbat PS conducted a search operation in the house of Bunu

Swargiary, and recovered suspected cannabis (ganja) of 1.180 kgs. According to the FIR, after interrogation, Bunu Swargiary led the police party to the house of accused Sanjit Goyari of village Bahadur Adharsh Gaon. After conducting house search of Sanjit Goyari, the police recovered 2 numbers of plastic bags and another polythene bag containing 38.320 kgs of suspected cannabis, which was kept concealed in his house.

12. After completion of the investigation charge sheet was filed and after conclusion of the trial, the learned special judge, Udalguri convicted the petitioner.
13. According to the prosecution, more particularly, the PW-1 informant, the seizure list was prepared in presence of seizure witnesses at the spot and seizure list were exhibited as P-3 and P-4. Such seizure lists were proved through PW-2 and PW-3, PW-4 and PW-5.
14. The PW-2 is the wife of the accused Sanjit Goyari. She was declared hostile as she did not support the case of the prosecution for obvious reasons. The defence cross examined her and during her cross examination she stated that nothing has been shown by the police to her. The other seizure witness PW-3 also did not support the case of the prosecution. She even said that she did not know whether ganja was recovered from the house of Sanjit Goyari.
15. Another seizure witness Habasi Swargiary also did not support the prosecution case as regards recovery from the accused persons. Other witnesses PW-5, who is projected to be seizure

witness of seizure of cannabis from the possession of Bunu Goyari also did not support the case of the prosecution.

16. It is a condition precedent that even in NDPS cases, where the presumption is against the accused person, the foundational fact of recovery/conscious possession of the accused persons is to be laid by the prosecution.
17. In the considered opinion of this court, once such foundational fact is laid, then only the accused is to explain how he came into such possession. Once possession is proved under section 54 of the NDPS Act, the accused is presumed to be guilty of the offence in view of such presumption.
18. It is true that it is not always necessary that evidence of police witnesses had to be corroborated by the independent witnesses and independent witnesses turning hostile need not necessarily result in acquittal of the accused. However, court cannot completely disregard the lack of corroboration of the testimony of police witnesses by the independent witnesses.
19. In the case in hand, none of the independent witnesses supported the recovery, though one of the police officer PW-7 has supported the recovery, though he was not projected by the prosecution as a seizure witness. However, his testimony is not supported by any of the independent witnesses. Even if we ignore the testimony of the hostile witnesses i.e, the wife of one of the accused the other independent witness did not support the case of the prosecution as regards recovery of cannabis from the possession of these two petitioners.

20. In view of the aforesaid, though the case presented by prosecution has been accepted by trial court, in the considered opinion of this court there is fair chances of acquittal of the convicts. Therefore, even without detailed examination of the witnesses, or any other material, prima facie, on the face of the evidence of independent witnesses, the recovery of the cannabis from the possession of the petitioner has itself become doubtful. Therefore, there is reasonable ground of believing that there is a fair chance that the accused is likely to be acquitted.
21. In the aforesaid backdrop, this court is of the view that the petitioners have been able to make out a case for grant of bail under section 389 Cr.P.C.
22. Another aspect of the matter whether there is any likelihood of the petitioners committing any further similar offence. This court is of the view that such anxiety of the prosecution can be redressed, if stringent conditions are imposed while granting bail.
23. Accordingly, in view of the peculiar facts and circumstances of the case, the petitioners namely **1. Bunu Swargiary & 2. Sanjit Goyari**, be released on bail on executing a bail bond of Rs. 1,00,000/- (One lakh) each with two suitable local government solvent sureties of like amount to the satisfaction of the learned Special Judge, Udalguri, in connection with aforementioned case. The bail granted to the petitioners shall be subject to following conditions:-
- (a) The petitioners shall not leave the territorial jurisdiction of learned Special Judge, Udalguri, without prior written

permission from him;

(b) The petitioners shall furnish the present residential address with proof to the learned trial Court below and shall not change the said residence without prior permission of the learned trial Court.

(c) The petitioners shall appear before the learned trial Court below on each and every date of appearance during trial.

(d) The petitioners shall not involve themselves in similar nature of offence(s).

24. In the aforesaid terms, these I.A's are allowed.

JUDGE

Comparing Assistant