

GAHC010246552022



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

Case No. : I.A.(CrI.)/776/2022

BANAMALI SARKAR
S/O LATE PULEN CH. SARKAR, R/O JELKAJHAR, PATGIRI, P.S. AND DIST.-
BONGAIGAON.

VERSUS

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

2:KULENDRA KR. HAJURI
S/O UMESH CH. HAJURI

S.I OF BONGAIGAON POLICE STATION
PIN- 783380
ASSAM

Advocate for the Petitioner : MS M DAS

Advocate for the Respondent : PP, ASSAM

Linked Case : CrI.A./326/2022

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Advocate for : MS M DAS
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR.

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

ORDER

Date : 08.02.2024

(M.K. Kalita, J)

- 1.** Heard Mr. M Biswas, learned counsel for the applicant. Also heard Ms. S. Jahan, learned Additional Public Prosecutor for the State of Assam.
- 2.** This interlocutory application has been registered on filing of an application under Section 389 of the Code of Criminal Procedure, 1973 by the applicant, namely, Shri Banamali Sarkar praying for suspension of sentence and grant of bail to the applicant during the pendency of Criminal Appeal No. 326/2022.
- 3.** The said appeal has been preferred by the present applicant impugning the judgment dated 30.09.2022 passed by learned Special Judge, Bongaigaon in

Special (NAR) Case No. 46(BGN)/2021 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 12 years and to pay a fine of Rs.1,00,000/- and in default of payment of fine to undergo simple imprisonment of 6(six) months.

4. The facts relevant for consideration of the instant application, in brief, are as follows:

(i) On 22.05.2021, one Shri Kulendra Kumar Hujuri who, is SI of police received an information through secret sources that one Shri Banamali Sarkar (the present applicant) has kept ganja concealed in his house and has been selling the same illegally at Jelkajhar Patgiri para.

(ii) On receipt of the said information a general diary Entry No. 685 dated 21.05.2021 was made by the Officer-in-Charge of Bongaigaon police station and after being authorized by Deputy Superintendent of Police (headquarter) a police party headed by the informant Kulendra Kumar Hujuri who proceeded to the place of occurrence in a departmental Tata Sumo vehicle. Before reaching the house of the present applicant the police party took two independent witnesses along with them namely Shri Bijay Ray and Shri Pradeep Barman.

(iii) When they reached the house of the present applicant, his wife namely Gayatri Sarkar was present there and she allowed the police party to conduct search in her house and during search operation one yellow color cement bag containing suspected ganja and nine number of polythene banks bags containing suspected ganja were recovered from the house of the present applicant. The total weight of the

recovered ganja was found to be 25.563 kilograms. The applicant was not available in his house at the time of the search operation, however his wife who was there at the house could not give any satisfactory explanation regarding recovery of suspected ganja from their house.

(iv) On the basis of the said FIR, the Officer-in-Charge of Bongaigaon police station registered the Bongaigaon P.S. Case No. 451/2021 under Section 20(C) of the NDPS Act, 1985 and entrusted SI Dalim Das to investigate the case. After completion of the investigation the charge sheet was laid against the present applicant under Section 20(C) of the NDPS Act, 1985.

(v) The applicant Banamali Sarkar faced the trial remaining in custody and charge under Section 20(C) of the NDPS Act, 1985 was framed against the applicant and when same were read over and explained to him he pleaded not guilty to the said charges and claimed to be tried.

(vi) The prosecution side, during trial, examined 10 prosecution witnesses to bring home the charge against the present applicant. During his examination under Section 313 of the Code of Criminal Procedure, 1973, the applicant had denied the truthfulness of the evidence of the prosecution witnesses and pleaded his innocence. The applicant did not adduce any evidence in his defence. Ultimately, by the judgment which has been impugned in the connected criminal appeal, the applicant was convicted and sentenced in the manner as already described hereinbefore.

5. Mr. M. Biswas, learned counsel for the applicant has submitted that the

learned trial court has erroneously appreciated the evidence of prosecution witnesses and has overlooked the mandatory provisions of NDPS Act, 1985 and hence, it is submitted that during pendency of the connected criminal appeal, the execution of the sentence imposed on the present applicant may be suspended and he may be allowed to go on bail.

6. Learned counsel for the applicant has made three main arguments praying for suspension of the sentence of the present applicant. Firstly, he has submitted that the forensic laboratory report relied on by the prosecution side and exhibited in the present case does not relate to the samples of contraband which was seized in this case as the facsimile of samples of the seized contraband as well as samples examined by the forensic laboratory are different.

7. Learned counsel for the applicant has pointed out that the PW-6, who is an office staff of the establishment of Chief Judicial Magistrate, Bongaigaon and who prepared the sample has deposed that the samples packets were marked as A1, B1, and C1 and sealed with the facsimile seal of "CJM BNG", however, the PW-9 who is the Scientific Officer, Drug and Narcotic Division, Forensic Laboratory, Assam, Kahilipara has deposed that the parcel consisted of 3 exhibit enclosed in a seal envelope cover and the facsimile of the seal was found to be "SUPDT OF POLICE BNG". Hence, the learned counsel for the applicant has submitted that as the facsimile of the seal at the time of sampling of the contraband and the facsimile of the seal found by the forensic Laboratory are different, the prosecution side has not been able to prove that the report of the FSL pertains to the seized contraband only.

8. Learned counsel for the applicant has also submitted that the custody of the contraband and the samples were not proved properly by the prosecution

side. It is submitted that there was a delay of more than 57 hours in sending the samples of the seized contraband to the Forensic Laboratory and nothing was brought on record to show that the samples/contraband were kept in safe custody during this period as neither the Malkhana-in-charge nor the Malkhana Register was exhibited.

9. It is submitted by learned counsel for the applicant that the seized contraband was produced before learned Chief Judicial Magistrate on 22.05.2021 and it was received by the Forensic Laboratory on 24.05.2021 and during the intervening period, the samples were in custody of one Girish Chander Roy (ABC 319) from 23.05.2021 till 24.05.2021, however, said Girish Chander Roy has not been examined. Learned counsel for the applicant has, therefore, submitted that the prosecution side has failed to prove the chain of custody of the seized contraband/sample and hence, the applicant is entitled to get benefit of the same.

10. The third point which was raised by the learned counsel for the applicant was to the effect that the independent seizure witnesses have showed their ignorance about the place from where the ganja was seized as they have stated during their cross-examination that they have not seen from where the police had recovered the seized ganja and therefore, it is submitted that the prosecution case suffered a serious dent due to lack of support by the independent witnesses.

11. On the other hand, Ms. S. Jahan learned Additional Public Prosecutor has submitted that in the instant case all the procedure as prescribed under NDPS Act, 1985 were followed in this case and the applicant has failed to show that his case falls within the category of exceptional case so as to get the benefit of suspension of sentence under Section 389 of the Code of Criminal

Procedure, 1973 during the pendency of the connected appeal.

12. As regards the difference in the facsimile over the samples of contraband, it is submitted by learned Additional Public Prosecutor that facsimile seal of "CJM BNG" was put on the sample packets which were marked A1, B1 and C1 at the time of sampling before the learned Judicial Magistrate, Bongaigaon, whereas the facsimile seal of "SUPTD OF POLICE BNG" was found on the sealed envelope of the parcel in which 3 exhibits were enclosed in separate sealed envelopes and therefore, it is submitted that there is no discrepancy in the facsimile of seals referred to by PW-6 and PW-9 in their depositions.

13. Learned Additional Public Prosecutor has submitted that the benefit of suspension of sentence in a case involving commercial quantity of contraband may be given only in exceptional cases where some glaring error in the impugned judgment may be shown, however, in the instant case the applicant is unable to show that his case falls within the exceptional category and therefore, she has opposed the prayer for suspension of the sentence under section 389 of the Code of Criminal Procedure, 1973 and grant of bail to the applicant during the pendency of the connected criminal appeal i.e., Criminal Appeal No. 326/2022.

14. We have considered the rival submissions made by the learned counsel for the applicant as well as learned Additional Public Prosecutor and have perused the materials on record.

15. 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 cases under Section 27 of the Act). However, the 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 32A 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.”

16. 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. Section 37 of the NDPS Act, 1985 provides as follows: -

“37. Offences to be cognizable and non-bailable

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the

Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.

17. In the above backdrop, if we consider the application for suspension of the sentence by the present applicant, it appears that in the instant case the applicant was convicted and sentenced for the offense involving possession of commercial quantity of ganja (25.563 kg). Hence, the embargo of Section 37 of the NDPS Act, 1985 is applicable to instant case also.

18. As regards the submission of learned counsel for the applicant that the FSL report of the samples which was exhibited during the trial does not pertain to the contraband which was seized in this case as the facsimile seal of the samples which were sent to the Forensic Laboratory as well as facsimile seal of the samples received by the Forensic Laboratory were different, it appears that the facsimile seal of "CJM BNG" to which PW-6 was referring to in his testimony was in respect of the samples which were marked as A1, B1 and C1, whereas the facsimile seal of "SUPTD OF POLICE BNG" to which the PW-9 is referring to in his testimony appears to be in respect of the envelope of the parcel in which three samples were sent to the Forensic Laboratory, therefore, at this stage without detail scrutiny of the evidence on record, it cannot be said that the FSL report relied upon and exhibited in the present case does not pertain to the samples of the contraband which were seized in this case. Hence, this submission, in our considered opinion, does not appear to be sufficient to justify the suspension of the sentence imposed on the applicant and allowing the present applicant to go on bail on that ground only.

19. As regards the submission regarding lack of sufficient evidence to prove that chain of custody of the seized contraband was properly maintained, we are of the considered opinion that the detailed scrutiny of the evidence available on record will be necessary for consideration of the said submission of learned

counsel for the applicant, which may only be done at the time of final hearing of the appeal after hearing learned counsel for both sides.

20. Considering the fact that the embargo of Section 37 of the NDPS Act, 1985 is applicable even while considering an application under Section 389 of the Code of Criminal Procedure, 1973 for suspension of sentence if the seized contraband is of commercial quantity, we are of the considered opinion that this is not the appropriate stage for detail scrutiny of the evidence on record, and try to pick up the lacuna in the case of prosecution side here and there. We are also of the considered opinion that at this stage of consideration of an application for suspension of sentence under Section 389 of the Code of Criminal Procedure, 1973, detailed scrutiny of the evidence available on record 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 the appeal.

21. We are of the considered opinion that that instant case does not fall within the category of cases where something very glaring and apparent is found on the face of record, which may prima facie lead to the satisfaction that the conviction of the applicant may not be sustained, therefore, we are of the considered opinion that it may not be appropriate to suspend the sentence imposed on the applicant at this stage, more so as the embargo of Section 37 of the NDPS Act, 1985 is also applicable to this case at this stage.

22. For the reasons stated above, this Interlocutory Application for suspension of sentence of the applicant is accordingly dismissed.

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

24. With the above observation, this Interlocutory Application is hereby disposed of.

JUDGE

JUDGE

Comparing Assistant