

GAHC010282602023



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

Case No. : I.A.(CrI.)/120/2024

RAJESH SARKAR
S/O-LATE SUBAL SARKAR
RESIDENT OF VILL-SOKOLANI PATHAR GAON
P.S.-PULIBOR
DISTRICT-JORHAT
ASSAM

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY P.P.
ASSAM

2:FIRDUSH AHMED
S.I.
S/O-MD. MOSTAK HUSSAIN
PULIBOR POLICE STATION
DISTRICT-JORHAT
ASSAM (INFORMANT)

Advocate for : MR. B HALDAR
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR.

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA**

ORDER

Date : 29.05.2024

Heard Mr. B. Haldar, learned Legal Aid Counsel for the applicant. Also heard Ms. S. Jahan, learned Additional Public Prosecutor for the State respondent.

2. This is an application under Section 389 of the Code of Criminal Procedure, 1973 for suspending the impugned judgment and order of sentence dated 25.07.2023, passed by the learned Special Judge, Jorhat in Special (NDPS) Case No. 60/2021 and releasing the applicant on bail.

3. It is submitted by Mr. B. Haldar, learned Legal Aid Counsel for the applicant, that there is major contradiction in the evidences of the prosecution witnesses which may be sufficient for acquittal of the present accused/appellant. He further stressed on non-compliance of Section 42(2) of the NDPS Act which is a mandatory provision. Further he submitted that the learned Court below also reflected in the judgment that there was not the total compliance of Section 42(2) of the NDPS Act, however convicted the accused/appellant considering the judgment passed by the Apex Court passed in **Karnail Singh Vs. State of Haryana**, reported in **(2009) 8 SCC 539**, wherein it has been held *inter alia* that in case of non-compliance of Section 42 of Act, the trial may not be necessarily be vitiated if the accused is not prejudiced.

4. The learned Legal Aid Counsel for the applicant further emphasized on the deposition of the P.W.-5, i.e. the Seizing Officer, who stated in his cross-evidence that the information was received at 12.00 noon and they visited the place of occurrence for doing necessary formalities at 3.20 p.m., though the place of occurrence is only 14 kilometers away from the Pulibar Police Station. Thus, the police or the investigating officer had sufficient time for seeking authorization under the proviso of Section 42 of the NDPS Act. Accordingly, he submitted that on that count itself, the accused/appellant is entitled for acquittal.

5. Mr. Haldar further submitted that in the case of **Karnail Singh (supra)**, the Apex Court in paragraph No. 35 of the said judgment has held that "*not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act.*"

6. He further relied on another decision of Division Bench of Apex Court passed in case of **State of Rajasthan Vs. Chhagan Lal [Criminal Appeal No. 592/2005]** and further emphasized on paragraph No. 6 of the judgment, which read as under:

"6. According to the prosecution, the respondent threw the bag in the well. The suspected contraband was, therefore, tried to be concealed in a well. The possibility of its destruction was imminent. In fact, the evidence on record indicates that water entered in the bag and got mixed up with the opium. The opium was liquefied. This was indeed, an emergent situation. The well had to be searched with the help of an

independent witness, which was done. In such an emergent situation, if the officer had reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence (which, in this case, would have resulted in destruction of evidence), as per proviso to [Section 42\(1\)](#) of the NDPS Act, he could have conducted the search of the well after recording grounds of his belief. [Section 42\(2\)](#) requires that grounds of belief so recorded have to be communicated to the immediate superior official within seventy-two hours. In this case, there is nothing to establish that the officer had followed this procedure. There is nothing to establish that he recorded grounds of his belief and communicated them to his immediate superior. As observed by the Constitution Bench in [Karnail Singh](#) (supra), total non-compliance of requirements of sub-sections (1) and (2) of [Section 42](#) is impermissible. However, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of [Section 42](#). Since in this case, there is total non-compliance of [Section 42](#) of the NDPS Act, the High Court has rightly set aside the conviction of the respondent. The impugned order calls for no interference from this end. The appeal is, thus, dismissed."

7. Further he submitted that the accused is behind the bar for more than 3 (three) years and the disposal of the appeal will take further more time and hence, considering this aspect of the case also, the accused/appellant may be released on bail by suspending the sentence imposed on him and in that regard, he also relied on the decision of the Apex court reported in **(2023) 6 SCC 123 [Omprakash Sahni Vs. Jai Shankar Chaudhary & Anr.]**.

8. In this context, Ms. S. Jahan, learned Additional Public Prosecutor, has submitted that from the evidence of P.Ws.-5 & 6, it is seen that the information was received at about 3.30 p.m. and thereafter they rushed to the place of occurrence. However, she submitted that in the cross-examination of P.W.-5, he stated that the information was received at about 12.00 noon. Further she submitted that there is no any evidence that the report was not submitted to the higher authority within 72 hours as required under Section 42(2) NDPS Act. She further submitted that it cannot be said to be total non-compliance of the Section 42 of the NDPS Act as it reveals from the record that though the authorization was not obtained from the higher authority, but the Officer-In-

Charge of the concerned police station was accompanied by the Seizing Officer to the spot and thus, the entire seizure was done in presence of the Officer-In-Charge. More so, the P.W.-5 specifically deposed in his evidence that due to urgency, the proper authorization could not be obtained from the higher authority. Accordingly, she submitted that in presence of the Officer-In-Charge in the police team, the authorization is not required and he is supposed to be an authorized officer to give permission for seizure. However, she submitted that there may be some contradiction in the evidence of the prosecution witnesses, but that will be the subject to be looked into at the time of final hearing of the matter and accordingly, she raised objection and submitted that it is not at all a fit case wherein the accused/appellant can be allowed to be released on bail by suspending the sentence under Section 389 Cr.P.C.

9. After hearing the submissions made by the learned counsels for both sides, I have also perused the case record and the evidences recorded by the learned Court below.

10. It is seen that the seizure and the other witnesses have supported the case of the prosecution. However, there may be some sort of contradiction amongst the prosecution witnesses which may be considered at the time of final hearing of criminal appeal. The learned Special Judge observed in the judgment that there was not total non-compliance of the Section 42 NDPS Act and considering the judgment of the Apex Court passed in **Karnail Singh (supra)** convicted the accused/appellant observing that the non-compliance of Section 42 of the NDPS Act, the trial may not necessarily be vitiated if the accused is not prejudiced. More so, the issue raised in regards to the submission of report

to the higher or superior authority within 72 hours of the seizure of the contraband, it is seen from the evidence of the P.W.-5 that as the matter was urgent, the authorization could not be obtained in writing from the higher/superior authority and in the same time, the Officer-In-Charge of the police station also accompanied the seizing team to the place of occurrence. It also cannot be stated that the police officer had sufficient time to record in writing or to obtain the authorization from any higher authority before initiation of the proceeding.

11. The Apex Court in the case of **Karnail Singh (supra)** has held in paragraph No. 35 (c) (d) that *"total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42."*

12. In view of the entire discussion made above and also considering all other aspects of the case, viz-a-viz the nature of allegation and the period of sentence, I do not find it a fit case to allow the accused/appellant to release on bail by suspending the sentence and accordingly, the same stands rejected.

13. However, it is seen that the record has already been received and the case is ready for hearing and hence, an endeavour shall be made to dispose of the

appeal on the next date of listing.

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

JUDGE

Comparing Assistant