

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPLICATION NO.4 OF 2015**

**MOHD.RASHID MOHD.RAFIQ KHAN )...APPLICANT**

**V/s.**

**THE STATE OF MAHARASHTRA )...RESPONDENT**

Mr.Ayaz Khan i/b. Mr.Dilip Mishra, Advocate for the Applicant.

Mrs.S.V.Gajare, APP for the Respondent - State.

**CORAM : ABHAY M. THIPSAY, J.**

**DATE : 2<sup>nd</sup> FEBRUARY, 2015.**

**P.C. :**

1           The appeal filed by the applicant challenging his conviction for an offence punishable under Section 21 of Narcotic Drugs and Psychotropic Substances Act (N.D.P.S. Act) read with Section 8(c) thereof, as recorded by the learned Special Judge under the N.D.P.S. Act, has been admitted. The learned trial

Judge has sentenced the applicant to suffer Rigorous Imprisonment for 10 years, and fine of Rs.1 Lac, in default, to suffer Simple Imprisonment for Six months. By the present application, the applicant prays that the sentence imposed upon him by the trial court be suspended, and that, he be released on bail, pending the hearing and final disposal of the appeal.

2           The applicant had, previously also, applied for the suspension of the sentence imposed upon him, but as there appeared a possibility of the appeal itself being heard expeditiously, the said application was withdrawn by the applicant (Criminal Application No.1621 of 2011 in Criminal Appeal No.1552 of 2011, withdrawn on 17<sup>th</sup> July, 2012). However, the appeal could not be taken up for final hearing, thereafter. The applicant, then, once again applied for suspension of the sentence imposed upon him, which application was rejected by this court, by the order dated 25<sup>th</sup> April, 2014, (Criminal Application No.231 of 2014 in Criminal Appeal No.1552 of 2011) (Coram : Smt.Mridula Bhatkar, J.). However, while rejecting the said

application, this court granted liberty to the applicant to move this court again, after undergoing half of the sentence i.e. 5 years. It is pursuant to the liberty granted by the said order, that the present application has been made.

3           The applicant was apprehended on 22<sup>nd</sup> December, 2009, and has remained in custody ever since then. Thus, it is not in dispute that the applicant has already undergone more than half of the sentence imposed upon him.

4           I have heard Mr.Ayaz Khan, the learned counsel for the applicant, who submits that, apart from the fact that the applicant has already undergone more than half the sentence, as imposed upon him by the trial court, the applicant has also a good case on merits. Mr.Khan canvassed basically three points. According to him, there was a clear non-compliance with the provisions of Section 42 of the N.D.P.S. Act, and that, this non-compliance ought to be held as fatal, in the light of the law laid down by the Apex court. He also submitted that the evidence with respect to the

compliance with the provisions of Section 50 of N.D.P.S. Act was not satisfactory, in as much as, the same has not been supported by the panch witnesses. Lastly, he submitted that the applicant was, allegedly, found in possession of a powder weighing 110 gms., which is said to be 'Cocaine' but the report of the Chemical Analyzer shows that the powder contained only 6.03% of the 'Cocaine.'

5           I have considered primarily the aspect of the alleged non-compliance with Section 42 of the N.D.P.S. Act. I have gone through the relevant part of the impugned judgment, where this aspect of the matter has been dealt with, by the learned trial Judge. The learned trial Judge, while observing that the information was received by PW3 H.C.Jawale, and that, though he could have recorded it, it was not so recorded by him. The learned Judge observed that as per the prosecution evidence, PW3 H.C.Jawale had disclosed the information to A.P.I. Mane, who had reduced the same into writing. The learned Judge, however, was of the view that, since the raid was conducted in a public place,

the provisions of Section 42 were not applicable. Mr.Khan submits that, this view of the learned Judge is contrary to law and places reliance on certain decisions of the Supreme Court of India.

6           Arguable points needing serious consideration have been raised. The applicant / appellant has also undergone more than half of the substantive sentence imposed upon him. In the ordinary course, the appeal is not likely to be taken up and heard finally within a short time. Considering all the relevant aspects of the matter, I am inclined to allow the application.

7           The application is allowed.

8           Pending the hearing and final disposal of the appeal, the substantive sentence imposed upon the applicant / appellant shall stand suspended, and the applicant shall be released on bail in the sum of Rs.1,00,000/-, with one surety in like amount, or two sureties in the sum of Rs.50,000/- each, on the condition that the applicant shall report to the trial court on the first and third

Monday of every calendar month, till the disposal of the appeal. Should the trial court be closed on any given Monday, on account of a holiday, the applicant shall report to the trial court on the next working day.

9 Any default on the part of the applicant / appellant in reporting to the trial court, shall forthwith be brought to the notice of this court by it, for further appropriate action.

10 The application is disposed of in the aforesaid terms.

**(ABHAY M. THIPSAY, J.)**