

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**INTERIM APPLICATION NO.1199 OF 2023
IN
CRIMINAL APPEAL NO.122 OF 2022**

Raju Rambhaw Kavde

...Applicant

Versus

The Intelligence Officer,
Narcotic Control Bureau, Mumbai and Another ...Respondents

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Mr. Advait Tamhankar i/by Mr. Shekhar S. Bhandary, Advocate for
the Applicant.

Mr. Shreeram Shirsat, Special P. P. with Adv. Anna Oommen and
Mr. Shekhar Mane, for Respondent No.1.

Mr. Y.M.Nakhwa, APP for the Respondent No.2 – State.

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CORAM	:	PRAKASH D. NAIK, J.
DATE	:	15th JUNE, 2023.

PER COURT:

1. This is an application for suspension of sentence and grant of bail during the pendency of Criminal Appeal No.122 of 2022.
2. Vide Judgment and Order dated 17.05.2019, the applicant (Original Accused No.1) is convicted for offence under Sections 20(b)(ii)(c) r/w Section 8(c) and Sections 29 & 30 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “NDPS Act”) and sentenced to suffer rigorous imprisonment

for Ten years and to pay fine of Rs.1,00,000/- and in default of payment of fine to suffer rigorous imprisonment for one year.

3. The prosecution case is that, on 08.01.2016 the accused Nos.1 to 4 were travelling in Toyota Qualis vehicle. They were intercepted. The accused Nos.1 to 4 were involved in procurement, possession and transportation of 36 Kgs. Charas.

4. Learned Advocate for the applicant submitted that, Section 42 of the NDPS Act is not complied. The warrant or authorization was not obtained by the Investigating Officer for such of vehicle as per the provisions of Section 41 of the NDPS Act. Hence, the search is not legal. The car was seized at 5.45 hours on 08.01.2016 which was before sunrise. The sunrise on 08.01.2016 was at 7.14 hours and therefore the car was seized between the sunset and sunrise. The prosecution has not produced any document showing that it was not a private vehicle. Whereas learned counsel for Respondent submitted that Section 42 is not applicable in the present case. The vehicle was in a moving condition. There is violation of the provisions of law.

5. The second submission advanced by learned Advocate for the applicant is that the applicant is in custody for a period of about Seven years and Six months. The appeal challenging the judgment

of conviction has been admitted by this Court. The appeal would not come up for hearing immediately. The sentence imposed by the trial Court is of Ten years. Substantial sentence has been undergone by the Applicant.

6. Learned Advocate for the Applicant has relied upon the following decisions :

- i. *Moosa Koya KP Vs State (NCT of Delhi)*¹.
- ii. Order dated 26.02.2022 passed by this Court in the case of *Kaluram Chaudhari Vs. Union of India and Anr.* in Interim Application No.815 of 2019.

7. Learned Advocate for Respondent No.1 submitted that the offence is of serious nature. The applicant has convicted for the offence under the NDPS Act and sentenced to suffer imprisonment for Ten years. 36 Kgs. Charas was recovered from the possession of the accused. Merely on the ground that the applicant is in custody for a period as stated above, the sentence may not be suspended.

8. The first submission with regards to non compliance of Section 42 will have to be appreciated while adjudicating the appeal at the stage of final hearing. However, the second submission deserves to be considered for suspending the sentence

¹ 2021 SCC Online Sc 3110

of imprisonment. It is not disputed that the applicant has undergone the period of Seven years and Six months. Substantive sentence of imprisonment imposed by the trial Court is of Ten years.

9. In the case of *Moosa Koya KP Vs State (NCT of Delhi)* (supra), the Appellant was convicted under Section 29 of the NDPS Act and sentenced to suffer imprisonment for Ten years and to pay fine of Rs.1,00,000/-. The Appeal against conviction was pending before the Delhi High Court. The application for suspension of sentence was rejected by the High Court. The Appellant had undergone sentence of about 8 years. While opposing the relief sought before the Apex Court, the prosecution had argued that the hearing of appeal may be expedited and prayer for suspension of sentence may not be considered having regard to seriousness of case. The apex Court observed that, the Court cannot be unmindful of the fact that the convict has undergone 8 years out of total sentence of 10 years. The Appeal is unlikely to be heard earlier. With the pendency of the work in the High Court, it may not be feasible to expedite the disposal of the appeal within short period. The apex Court suspended the sentence by setting aside the order of the High Court.

10. In the case of *Mayuresh Purohit Vs. Kaushik Manna and Anr.*² the accused was convicted under Section 29 read with Sections 8(c) and 20(b)(ii)(C) of the N.D.P.S. Act, and, sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/- by the trial Court. The convict preferred Appeal before the High Court. The application for suspension of sentence was not allowed. The convict had approached the Apex Court. While deciding the said Appeal, the Apex Court has observed that the Appeal before the High Court, though listed for hearing has not been heard till date and since a statement has made by the counsel for the respondents some time will be taken for hearing of appeal unless the same is expedited. The Court did not see any reason to expedite the hearing of Appeal before the High Court, as there are several similar and older matters in the cause list of particular Bench hearing the matter. The Court, however, took note of the fact that the accused has been in custody for over six years, the sentence imposed is one of ten years and considering the totality of the matter, directed that the convict be released on bail.

11. In the case of *Ramnik Singh Vs. Intelligence Officer D.R.I.* delivered in Criminal Appeal No.165 of 2013, dated 21.01.2013,

² 2018 ALL SCR (Cri.) 653.

the convict was tried for the offence under N.D.P.S. Act. He was convicted and sentenced to undergo imprisonment of ten years. The convict had served the sentence of five years and four months. It was observed that, since the Appeal is pending before the High Court and the possibility of the Appeal being taken up for hearing in near future is remote, the convict was entitled for suspension of sentence during pendency of Appeal. This Court vide order 9th December, 2021, granted bail to the appellant, who was convicted under Sections 8(c), 23(c), 25, 27A read with Sections 29 and 22(C) of the N.D.P.S. Act, on the ground that out of 12 years of the sentence of imprisonment awarded by the trial Court, the accused had undergone approximately 8 years in custody.

12. In the case of *Kaluram Chaudhary S/o Babulal Chaudhary Vs. Union of India and Anr.* (supra) this Court had considered the prayer for suspension of sentence wherein the convict had undergone the sentence of 6 years and 5 months and the maximum sentence imposed by the trial Court is of 10 years. While opposing the application for suspension of sentence, the prosecution had relied upon the decision of the apex Court in the Case of *Dadu Alias @ Tulsidas Vs. State of Maharashtra*³. This Court considered the decision in the Case of *Moosa Koya KP Vs State (NCT of Delhi)*

3 (2000) 8 SCC 467

(Supra) and several other decisions. It was observed that, in the case of *Dadu Alias @ Tulsidas Vs. State of Maharashtra*, (Supra) the apex Court was dealing with the issue relating to the constitutional validity of Section 32-A of the NDPS Act. As per Section 32-A, no sentence awarded under the Act shall be suspended, remitted or commuted. The apex Court held that the right of suspension of sentence cannot be taken away. However, in Paragraph 27, it was observed that Section 32-A is void insofar as it takes away the right of the Courts to suspend the sentence awarded to a convict under the Act. It was also observed that it would neither entitled such convicts to ask for suspension of sentence as a matter of right in all cases nor would it absolve the Courts of their legal obligations to exercise the power of suspension of sentence within the parameters prescribed under Section 37 of the NDPS Act. Considering the ratio laid down in the several decisions, the sentence of imprisonment was suspended.

13. In the light of the aforesaid observations, the case for suspensions of sentence imposed upon the applicant is made out. The applicant is in custody for substantial period of time. The applicant has undergone imprisonment of Seven years and Six months. The sentence imposed by the trial Court is of ten years. Hence, I pass the following order :

ORDER

- i. Interim Application No. 1199 of 2023 is allowed;
- ii. The substantive sentence of imprisonment imposed upon applicant vide Judgment and order dated 17th May, 2019 in N.D.P.S. Case No.1 of 2016 by Special Judge (NDPS), Palghar is suspended and the applicant is directed to be released on bail on executing PR. Bond in the sum of Rs.50,000/- with one or two sureties in the like amount;
- iii. The applicant shall not leave India without prior permission of this Court;
- iv. If the applicant has passport, he shall deposit the same before Trial Court. If he does not have passport and/or in the event his passport has been seized by the Investigating Agency, applicant is exempted from depositing passport. However, he shall file Affidavit in that regard before trial Court while executing bail bond.
- v. Applicant is permitted to furnish cash security in the sum of Rs.50,000/- in lieu of bail for a period of Six weeks.
- vi. Interim Application is disposed off accordingly.

(PRAKASH D. NAIK, J.)