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Uday S. Jagtap

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

**INTERIM APPLICATION NO. 3365 OF 2022
IN
CRIMINAL APPEAL NO. 422 OF 2022**

1. Bai Sushila Lasar Chetiyar
Age – Adult, Indian Inhabitant,
Having address at Flat No.403,
Vasudev A Kailash Road, Setiya Nagar
Dist. Valsad, Gujrat

2. Bai Tehmina Mehboob Ghanchi
Age – Adult, Indian Inhabitant
Having address at Mullaward, Kara
Abrama, Tal. Jelapur, Dist. Navsari,
Gujrat
(Both at present are in Lajpore
Central Prison, Surat)

.. Applicants

Vs.

1. U.T. of Dadra & Nagar Haveli
Through S.H.O. Silvassa Police Station
C.R. No. 05/2008

2. The State of Maharashtra

.. Respondents

.....

Mr. Madhusudn Pareek for the applicants / appellants

Mr. Hiten Venegavkar a/w Mr. Bharat Mirchandani, standing
Counsel for respondent no.1 - Union Territory

Mr. A.R. Kapadnis, APP for the respondent – State

.....

CORAM : PRITHVIRAJ K. CHAVAN, J.

Reserved on : 21st JULY, 2023

Pronounced on : 27th JULY, 2023

ORDER :-

1. The Special Judge (NDPS) Act Dadara & Nagar Haveli, Silvassa by the impugned judgment and order dated 8th June, 2021 convicted applicant nos.1 and 2 of the offences punishable under Section 20(b)ii(c) r/w Section 8(a)(c) and Section 31 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (“NDPS Act”) by awarding sentence of 15 years rigorous imprisonment to the first applicant with fine of Rs.1,50,000/- and 10 years rigorous imprisonment to the second applicant with fine of Rs.1,00,000/- in default to suffer RI for six months.

2. An appeal is preferred wherein an application under Section 389 of the Cr.P.C. has been filed by the applicants for suspension of execution of substantive sentences, pending the appeal.

3. At the outset, this is the second conviction of the first applicant in light of the fact that the Special Court below has framed a point as to whether the prosecution proved that the first applicant was previously convicted under Section 20 of the NDPS Act by judgment in Special Case No.01 of 2015 by Valsad Court in Gujarat and by virtue of the said conviction, whether she is liable for enhanced punishment as per Section 31 of the NDPS Act.

4. Learned standing Counsel for respondent no.1 – Union Territory, and the learned Counsel for the applicants are *ad-idem* that there is no question of suspension of execution of the sentence awarded by the impugned judgment *qua* applicant no.1 in view of Section 32-A of the NDPS Act.

5. In view of the above, what is to be considered is as to whether the applicant no.2 can be said to be entitled for the relief claimed under Section 389 of the Cr.P.C.?

6. I heard Mr. Pareek, learned Counsel for the applicants. Learned Counsel has mainly emphasized the fact that the second applicant has already undergone substantive part of the sentence, in the sense, she had undergone more than half of the sentence awarded by the trial Court. Next point urged by the learned Counsel is that the Silvassa Police Station has received a secrete information on 7th January, 2018 that a lady by name Sushila Chetiyar (i.e. applicant no.1) was coming from Amli to Silvassa by an autorickshaw, who is in possession of *Ganja*. There was no information *qua* applicant no.2

7. It is case of the prosecution that when the Investigating

Agency intercepted autorickshaw No. GJ-15YY-6953 near Alpha Packaging Company, accused no.3 was found driving the autorickshaw and a juvenile-in-conflict with law was sitting next to him while the applicants were occupying rear seat.

8. Two bags with five packets each containing dry flowers like leaves (Ganja) were found in the said autorickshaw. The contraband weighed 21.044 kg. The Investigating Officer, as per usual procedure, collected the samples which were sent to the Forensic Science Laboratory for examination, after drawing a panchanama.

9. After filing charge-sheet, the Special Judge framed charges below **Exh.24** as per the aforesaid sections. As many as 11 witnesses were examined and after recording the statement of the applicants under Section 313 of the Cr.P.C., they are convicted and sentenced as above.

10. According to the learned Counsel for the applicants, there is non-compliance of mandatory provisions of Section 42 of the NDPS Act. The learned trial Court erred in concluding that Section 42 of the NDPS Act is not applicable. It is argued that the

learned Special Judge erred in concluding that Section 43 of the NDPS Act would be attracted in this case. It is further argued that there is non-compliance of Section 50 of the NDPS Act. It is submitted that at the time of drawing panchanama, there was no female pancha witness present in view of the fact that both applicants are females. Lastly, it is argued that the prosecution has failed to establish any nexus between the first applicant and the second applicant and, therefore, the judgment of the Special Court suffers from illegalities and, therefore, the applicant no.2 ought to have been acquitted.

11. On the other hand, learned standing Counsel for respondent no.1 has invited my attention to Section 43 of the NDPS Act by contending that the trial Court has rightly observed that since the contraband was seized from an autorickshaw which was in transit and, therefore, provisions of Section 43 would be attracted and not Section 42 of the NDPS Act. Section 43(a) of the NDPS Act reads thus :-

“43. Power of seizure and arrest in public place – Any officer of any of the department mentioned in section 42 may –

(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled

substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, alongwith such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act.”

12. Section 42 contemplates the powers of entry, search, seizure and arrest without warrant or authorization by an Officer, who is authorized to enter into and search any such building, conveyance or place. *Prima facie*, it seems that the Court below had correctly observed as regards the seizure of the contraband, while it was in transit in an autorickshaw.

13. In so far as Section 50 of the NDPS Act is concerned, according to the learned standing Counsel for respondent no.1, since it was seized from an autorickshaw, there was no reason or occasion to search person of the applicants by taking them to the nearest Gazetted Officer or there is no question of even a female pancha for effecting the search of person of the applicants as contemplated in Sub-section (4) of Section 50 of the NDPS Act. The

learned Counsel for respondent no.1 argued that Section 42 of the NDPS Act contemplates search of a private place. He argued that PW-6, a lady Police Inspector Smt. Tandel was present at the time of recording the panchanama. He drew my attention to the explanation to Section 43 which states that expression “public place” includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to the public. Admittedly, an autorickshaw is a public conveyance and, therefore, seizure has rightly been made in view of Section 43 of the NDPS Act.

14. Ever since her arrest by the Silvassa Police Station on 7th January, 2018, the applicant no.2 is incarcerated. Till the matter is heard, she has already undergone more than 6 years of sentence out of total imprisonment of 10 years. Secondly, the prosecution, *prima facie* has not shown nexus between the first applicant and the second applicant and there was nothing to indicate that the first applicant was accompanied by the second applicant. Merely because there is no suggestion given to the prosecution witnesses by the defence in the trial, does not *ipso facto* mean that there was nexus between the first and the second applicant.

15. The appeal is of the year 2022. The appeal is unlikely to be heard early in view of the pendency of the older appeals. In all probability, the entire sentence would have been undergone by the time the appeal is heard.

16. In the aforesaid circumstances, particularly in view of the fact that the applicant no.2 had undergone more than 6 years of sentence out of the total sentence awarded by the trial Court, in my view, this is a fit and proper case where the execution of the sentence needs to be suspended till the appeal is heard finally. These are the strong compelling reasons for suspension of execution of sentence *qua* the applicant no.2 and her release on bail.

17. The Hon'ble Supreme Court in case of **Mossa Koya K.P. Vs. State (NCT of Delhi)**¹ has held in para 12, which reads thus :-

“12. We appreciate the submission of the Additional Solicitor General that offences under the NDPS Act are of a serious nature and the case is at the post conviction stage. Yet the Court cannot be unmindful of the fact that the appellant has undergone 8 years out of the total sentence of 10 years. The appeal is unlikely to be heard early. In all probability, the entire sentence would have been undergone by the time the appeal is heard. The decisions on the basis of which the High Court of Delhi

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had declined to grant suspension of sentence, are, at the highest, a broad guideline and cannot be placed on the same pedestal as a statutory interdict. With the pendency of the work in the High Court, it may not be feasible to expedite the disposal of the appeal within a short period.”

18. Having considered the aforesaid facts and circumstances of the case, without expressing any opinion on merits / demerits of the case, I do not see any reason not to suspend the execution of the sentence, pending the appeal and to release the applicant on bail.

19. In view of the above observations, the following order is expedient :-

ORDER

(i) Pending the appeal, execution of the sentence is suspended on the applicant no.2 executing a P.R. bond in the sum of Rs.15,000/- with two sureties in the like amount to the satisfaction of the Registrar Judicial of this Court.

(ii) The applicant no.2 shall attend the Silvassa Police Station on first day of each month between 10.00 a.m. to 12.00 noon.

(iii) If the applicant no.2 commits two consecutive defaults

in attending the police station, the prosecution will be at liberty to pray for cancellation of her bail.

(iv) The applicant no.2 shall surrender her passport, if any, in the Registry of this Court at the time of furnishing bail.

(v) The applicant no.2 shall furnish her permanent residential address as well as mobile number to the concerned police station.

(vi) The application is disposed of in the aforesaid terms.

(PRITHVIRAJ K. CHAVAN, J.)