

Cr.A. No.538/2015

13.01.2017

Shri A.S. Saraswat, learned counsel for the appellant.

Shri Himanshu Joshi, learned Public Prosecutor for the respondent/State.

Heard on **I.A.No.181/2017**- an application under Section 389 of the Code of Criminal Procedure for suspension of custodial sentence of appellant Jagdish s/o Rameshwar Patidar.

1) The appeal has been preferred against the judgment dated 26.03.2015 passed by Additional Special Judge, NDPS Act in Special S.T. No.03/2012, whereby the appellant has been convicted for offence under Section 8/18 (B) of NDPS Act (hereinafter referred to as the Act of 1985) and sentenced to undergo ten years R.I. with fine of Rs.1,00,000/- and in default of payment of fine one year R.I.

2) As per prosecution story on 07.12.2011 at about 07:40 PM police received a secret information that co-accused Vinod and appellant Jagdish were coming from village Daloda side on a bike bearing registration No. MP 14-MB-8993. They were carrying opium in a bag hanging on the handle of motorcycle. On the information Shri U.S. Bhadoria the then A.S.I. of P.S. Afjalpur apprehended the applicant and co-accused Vinod and sized 3.390 kilogram opium from the possession of co-accused Vinod and arrested the appellant and co-accused Vinod.

3) Learned counsel for the appellant submits that the

appellant is in custody since 07.12.2011 and suffered almost half of the custodial sentence as awarded by the trial Court and hearing of the appeal is likely to take time. Learned counsel for the appellant further submitted that opium was found in a bag hanging on a bike, which was being driven by co-accused Vinod and seized from his possession and he is the owner of the said bike. No contraband was seized from the possession of the appellant. The appellant has no idea as to what was being carried by co-accused Vinod on his bike. He was just a pillion rider and has falsely been implicated in the matter. Hence, counsel prayed for grant of suspension of jail sentence.

4) Learned counsel for the State opposed the application stating that appellant was apprehended carrying 3.45 kg. opium on the bike. The appellant and co-accused Vinod both were involved in the crime. He further submits that since the matter involves commercial quantity and hence, provisions of Section 37 of the Narcotic Drugs & Psychotropic Substances Act, 1985 are attracted and at this stage, it cannot be said that the appellant is not guilty of the said offence nor at this stage, it is necessary to weigh the evidence meticulously to arrive at a positive finding as to whether or not accused committed the said offence under the provisions of the Act of 1985 and prayed for dismissal of the application.

5) In this regard, learned counsel for the appellant placed

reliance in the Apex Court judgment passed in **Mansingh vs. Union of India reported in (2006) 1 SCC (Cri.) 279**, He has also drawn attention to the decision dated 21.01.2013 of the Apex Court in the case of **Ramnik Singh v. Intelligence Officer, Directorate of Revenue Intelligence in Criminal Appeal No.165/2013** wherein the Hon'ble Apex Court considering the fact that the appellant has completed more than five years jail sentence out of ten years rigorous imprisonment awarded by the learned Special Judge, allowed the application for suspension of jail sentence of the appellant.

6) But Hon'ble Supreme Court may grant release on bail or suspension of sentence without getting itself satisfied with requirements of S.37, if that is necessary for doing complete justice, such an authority, however, is not available to the High Court or trial Court as the case may be. The order passed above in the said case is a reflection of the Authority exercised by the Supreme Court under Article 142 of Constitution of India, is not having a binding effect or in other words, an authority of precedent for the High Court or the other Courts subordinate. The judgment passed in the case of **Dadu @ Tulsidas V/s State of Maharashtra AIR 2000 SC 3203 and Union of India vs. Rattan Mallik @ Habul**, reported in (2009) 2 SCC 624 and **Ratan Kumar Vishwas vs. State of UP** reported in (2009)1 SCC 482 are laying down law, hence, are having binding effect and

those are required to be adhered in their true spirit. Thus, it is to be followed by the courts while dealing with the applications submitted by the accused of the offences referred in S.37 for grant of bail or for suspension of sentence. As held by Three judge bench of Rajasthan High Court in **Daulat Singh alias Gatu vs. State of Rajasthan reported in 2014 Cri.L.J. 2860 (Raj. HC)**.

7) Apex Court in the case of **Dadu @ Tulsidas V/s State of Maharashtra reported in AIR 2000 SC 3203** – held that 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. Namely (i) there is reasonable ground that the accused is not guilty of the offence for which he was convicted. (ii) he is not likely to committed any offence during the period of suspension of sentence are satisfied . The Hon'ble apex Court in the case of **Ratan Kumar Vishwas vs. State of UP** reported in (2009)1 SCC 482 held that suspension of sentence and grant of bail- a person/accused of offence under the act should not be released on bail, during trial unless mandatory condition provided under Section 37 of Act. There are reasonable ground for holding that the accused is not guilty of a such offence and that he is not likely to commit any offence while on bail are satisfied.

8) The Hon'ble apex Court in the matter of **Union of India vs.**

Rattan Mallik @ Habul, reported in (2009) 2 SCC 624 held that 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." It is plain from a bare reading of the non obstante clause in the Section and subsection (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds". The expression 'reasonable grounds' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief

contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

9) **Thus**, it is clear that in the case of NDPS Act suspension of sentence cannot be suspended only on the ground of delay for granting suspension of sentence the provision of u/S.37 of NDPS Act should be considered.

10) Although learned counsel for the appellant also submitted that opium was found in a bag hanging on the bike, which was being driven by co-accused Vinod and was seized from his possession and he is the owner of the said bike, no contraband was seized from the possession of the appellant. The appellant has no idea as to what co-accused Vinod was carrying on his bike. He was just a pillion rider.

11) While learned counsel for the State submitted that appellant was apprehended carrying 3.45 kg. opium on the bike. The appellant and co-accused Vinod both were involved in the crime. Hence, in the light of provisions of Section 37 of Narcotic Drugs & Psychotropic Substances Act, 1985 appellant is not entitled for bail.

12) Although, it appears that opium weighing 3.45 kg was

seized from the possession of co-accused Vinod. But from the statement of prosecution witnesses and documentary evidence produced by the prosecution, it also appears that Police apprehended co-accused Vinod and appellant Jagdish, on the information of informant that they were coming from village Daloda side on a bike bearing registration No. MP 14-MB-8993 carrying opium in a bag hanging on the handle of motorcycle. Applicant and co-accused Vinod, knew each other and residing in the same village. The learned trial Court in para 31-32 of the impugned judgment appreciated the fact and observing that the applicant also had knowledge that the co-accused Vinod carrying opium in his bag. So looking to the provisions of Section 37 of Act, it is not appropriate to suspend the sentence of the accused Accordingly, the application is **dismissed**.

(RAJEEV KUMAR DUBEY)
JUDGE