

IN THE HIGH COURT OF JHARKHAND AT RANCHI

Cr. Appeal (DB) No. 426 of 2024

With

I.A. No. 12422 of 2024

Shish Mahmood @ Mahmood @ Manmood, aged about 42 years,
son of late Samsuddin Hak, resident of Village-Rargaon, P.O. + P.S.
Tamar, District-Ranchi.

... .. Appellant

Versus

The State of Jharkhand

... .. Respondent

**CORAM: HON'BLE MR. JUSTICE SUJIT NARAYAN PRASAD
HON'BLE MR. JUSTICE PRADEEP KUMAR SRIVASTAVA**

For the Appellant : Mr. Moktar Khan, Advocate
Mr. Raj Kishore Sahu, Advocate
For the Respondent : Mr. Satish Prasad, A.P.P.

C.A.V. on 27th February, 2025

Pronounced on 19/03/2025

Per Sujit Narayan Prasad, J.:

I.A. No. 12422 of 2024:

Prayer:

1. The instant interlocutory application has been filed on behalf of appellant for suspension of sentence against the judgment of conviction dated 23.02.2024 and order of sentence dated 28.02.2024 passed by the learned Additional Judicial Commissioner-II-cum-Special Judge, NDPS Act, Ranchi in NDPS Case No. 15 of 2020 (arising out of Tamar P.S. Case No.11 of 2020), whereby and whereunder, the appellant has been convicted under Section 18(b) of the NDPS Act and sentenced to undergo rigorous imprisonment for 15 years with a fine of Rs.1,50,000/- and in default of payment of fine, the appellant has further been directed to undergo simple imprisonment for one year.

Facts:

2. The prosecution story in brief which requires to be referred herein reads as under:

As per the case, on 15.03.2020 at about 12:20 p.m., Chandra Shekhar Azad, Officer in Charge Tamar P.S. was informed by the

SSP Ranchi about transportation of opium from Radgaon to Tata by Safari bearing no. WB-06-B-0616 and it was also informed that a team headed by Rural SP Ranchi was formed for conducting raid. Then after lodging a sanha, the officer-in-charge along with a police party proceeded for the spot and reached at Raidih More at about 01:50 p.m. The team of Rural SP Ranchi too reached there. The entire police team reached near Radgaon Madarasa at about 03:30 p.m. A vehicle bearing no. WB-06-B-0616 was seen going from Radgaon towards Tata which was chased and caught near a bridge before Tikar More, at NH-33. The driver tried to escape but was caught by the police team. He disclosed his name as Shish Mahmood. He was asked about search upon which he became ready for the search of his vehicle in presence of Magistrate. As it was a lonely place and no independent witness was there hence in presence of two members of police team named Uma Shankar Singh and Ratan Ravidas, following the due procedure, the SDPO Bundu Ajay Kumar, as Magistrate, searched the said vehicle, in which opium and two small electronic weighing machines, kept in a white colored bag, upon which "HARING ELEMENTS" was written, was found in the back seat of the vehicle. From the person of Shish Mahmood, a black colored Redmi mobile phone and cash of Rs.15000 were recovered. He failed to produce any paper regarding the said opium which was found 7.5 kg in weight. All the recovered articles were seized, a seizure list was prepared and Shish Mahmood was arrested. On the self statement of Chandra Shekhar Azad, Officer in Charge Tamar P.S., the FIR was lodged under Section 17/18 of NDPS Act against Shish Mahmood.

The appellant was produced before the court on 16.03.2020 and he was remanded to custody. After investigation chargesheet has been submitted against him under Section 17/18 of NDPS Act and cognizance has been taken on 12.06.2020.

During trial, the prosecution examined seven witnesses named in the charge sheet and later on, the charge has been amended and a

fresh charge has been framed under Section 17(c)/18(b) of NDPS Act.

After conclusion of the trial, the trial court observed that the prosecution has not been able to prove the charge levelled against the appellant under Section 17(c) NDPS Act but the charge under Section 18(b) has been found to be proved and hence, the learned trial court convicted the appellant under Section 18(b) and sentenced him to undergo rigorous imprisonment for 15 years along with fine of Rs.1,50,000/-.

Submission of the learned counsel for the appellant:

3. It has been contended on behalf of the appellant that the appellant is innocent and has falsely been implication in this case as he has committed no offence.
4. It has been contended by referring to paragraph no.1 of the testimony of P.W.-2 wherein he has deposed that the opium was recovered from the *dikki* of the car and not from the back seat as also he didn't remember the colour of the bag.
5. It has further been contended by referring to the testimony of P.W.-3 wherein he has deposed that the seizure list was prepared and on which, DSP has also signed but who has prepared the seizure list, he does not know and he has also deposed that he was neither a seizure witness nor he knows about the identify over the seized article.
6. It has further been contended by referring to the testimony of P.W.-4 who is also a member of the raiding party and has deposed that he does not know the identification mark on the seizure article. It has also been deposed that the seizure list was prepared by the P.W.-1, DSP whereas P.W.-1 has stated that he has not prepared the seizure list, as such, the seizure list itself has not been proved during trial as the person who has prepared the seizure list has not been examined nor any of the witnesses who have been examined have said that he has prepared the seizure list.

7. It has further been contended by referring to the testimony of P.W.-5 wherein he has deposed that all the witnesses are police officials of Tamar Police Station and in paragraph-18 of his deposition, he has stated that the DSP has prepared the seizure list whereas the DSP has denied the said fact.
8. Learned counsel for the appellant, in view of the aforesaid, has submitted that it is very much evident that the person who has prepared the seizure list is not the witness and as such, the seizure list itself becomes suspicious, hence, no punishment can be awarded on suspicion.
9. It has also been contended that the investigating officer, during course of search and seizure, has not fulfilled the condition as enshrined under Section 50 of the NDPS Act.
10. It has also been contended that there is no criminal antecedent of the appellant whatsoever.
11. Learned counsel for the appellant, in the aforesaid premise, has submitted that it is a fit case where the instant interlocutory application deserves to be allowed so that the appellant be released on bail.

Submission of the learned Additional Public Prosecutor:

12. While on the other hand, learned APP appearing for the respondent-State, has vehemently opposed the prayer for suspension of sentence.
13. It has been contended that provision as provided under N.D.P.S Act has strictly been adhered to. Further, the learned Trial Court has found cogent evidence, based upon the statutory command and even on the basis of the principle laid down by the Hon'ble Supreme Court in the case of *Union of India Vs. Mohanlal and Anr.*, (2016) 3 SCC 379.
14. The learned APP has further submitted that all the prosecution witnesses and witness of seizure have substantiated the case and supported their versions and remained unshaken in their cross examination and there is no major contradiction in their testimony.

15. Learned APP, in the aforesaid premise, has submitted that it is not a fit case for suspension of sentence.

Analysis:

16. We have heard the learned counsel for the parties and gone across the finding recorded by the learned court in the impugned judgment as also the testimony of witnesses as available in the Lower Court Records along with other exhibits.

17. One of the main contention of the learned counsel for the appellant that the person who has prepared the seizure list is not the witness and as such, the seizure list itself becomes suspicious, hence, no punishment can be awarded on suspicion.

18. Further he has contended that the investigating officer, during course of search and seizure, has not fulfilled the condition as enshrined under Section 50 of the NDPS Act and there is inter-se contradiction among the testimonies of the prosecution witnesses.

19. On the other hand, learned APP has contended that provision as provided under N.D.P.S Act has strictly been adhered to and all the prosecution witnesses and witness of seizure have substantiated the case, as such there is no iota of doubt or suspicion in the prosecution story.

20. In the backdrop of the aforesaid contentions this Court is adverting to the factual aspects of the instant case.

21. It is evident from the FIR that on 15.03.2020, after receiving the secret information the police team of Tamar PS. caught a Safari vehicle, inside which the accused(applicant) was present and when the said vehicle was searched by SDPO Bundu then 7.5 kg opium and two small electronic weighing machines kept in a white colored bag, were found in the back seat of the vehicle, regarding which the applicant/accused failed to produce any valid paper. Further, a black colored Redmi mobile phone and cash of Rs. 15,000/- were recovered from the person of applicant/accused and accordingly the recovered articles were seized, a seizure list was prepared and the

accused was arrested. Consequently, on the self-statement of Chandra Shekher Azad, Officer in Charge Tamar P.S. the FIR has been lodged u/s 17/18 NDPS Act against the accused/applicant.

22. In the instant case informant has been examined as P.W.6 and in his testimony, he has fully supported the alleged involvement of the present applicant. The testimony of P.W.6 has been corroborated by P.W.1 who in his testimony has stated that after taking his consent regarding search, at first, he has his own search, in presence of two witnesses and thereafter searched the said vehicle in which 7.5 Kg opium along with other articles were recovered.
23. It is further evident from the impugned order that both the witnesses of seizure P.W.2 and P.W.4 have corroborated the cases and in their testimonies they have stated that their signatures made upon the seizure list were marked as Ext P-2/P.W.2 and Ext P-5/P.W.4 and in the said seizure 7.5 Kg opium was seized.
24. Thus, from the aforesaid discussion it is evident that prosecution case has been supported by the prosecution witnesses. Admittedly there are some contradictions is there but all the contradiction is appeared to be minor in nature and as such the credibility of prosecution case has not been eroded by these minor contradictons.
25. The learned counsel for the applicant has contended that the investigating officer, during course of search and seizure, has not fulfilled the condition as enshrined under Section 50 of the NDPS Act.
26. In order to verify the veracity of the said contention It would be better to refer herein the core of the section 50 of NDPS Act, which is as follows:

50. Conditions under which search of persons shall be conducted.—(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.

27. From perusal of the aforesaid Section, it is evident that when any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

28. Further as per Sub-Section 5 of Section 50 When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973.

29. The Hon'ble Apex Court in the case of ***State of Haryana v. Rajbir Singh, (2006) 9 SCC 208*** while interpreting the Section 50 of Act 1985 has categorically held that if the search is conducted of a bag, briefcase or any such article or container which is being carried by the accused is not a search of the person, therefore, Section 50 would

not apply in such a case. The relevant paragraph of the aforesaid judgment is being quoted as under:

2. A three-Judge Bench of this Court in which one of us (Justice G.P. Mathur) was a party in State of H.P. v. Pawan Kumar [(2005) 4 SCC 350 : 2005 SCC (Cri) 943] had held that if the search is conducted of a bag, briefcase or any such article or container which is being carried by the accused is not a search of the person, therefore, Section 50 would not apply in such a case. The High Court has not considered the evidence on record. This being the position of the law, we set aside the order of the High Court and remand the case back to the High Court to decide the case afresh in accordance with law, after the appreciation of the evidence on record.

30. In the backdrop of the aforesaid stipulation as enshrined under section 50 of Act 1985, and the settled position of law, this Court is again reverting to the fact of the case.
31. Here in the instant case, it is the established case of prosecution that the opium was recovered from the vehicle which the applicant/accused was driving at the time of recovery and no other person was there along with him.
32. So far as the mandatory requirement that the person to be searched under this Act is required to be told about his right before he is searched, is concerned, almost all the witnesses have claimed in single tone that prior to search, the accused was told about his right and after taking his consent, the search was made by the SDPO Bundu, a Gazatted Officer, empowered u/s 42 of the Act.
33. Thus, the application of section 50 and 52 is strictly adhered herein and further since the said opium has been recovered from the backside of the vehicle which was kept in the bag and as such as per the settled law as settled by the Hon'ble Apex Court that if the search is conducted of a bag, briefcase or any such article or container which is being carried by the accused is not a search of the person.
34. So far as the points raised by the learned that both the witnesses of alleged seizure are police men and not independent ones although the alleged place of occurrence is a busy public place, hence the alleged seizure itself comes under shadow of doubt.

35. In this regard, admittedly both the witnesses of the seizure are the members of raiding team and though it was a public place even then no independent person has been made as the witness of said seizure. However, it is trite that non-joining of public witnesses itself cannot become a ground for acquittal if the case of prosecution is otherwise reliable. The evidence of official witnesses, made before the Court on oath cannot be disbelieved merely due to their official status.
36. The Hon'ble Apex Court in ***Girja Prasad v. State of M.P [(2007) 7 SCC 625]***, has held that the presumption that every person acts honestly applies as much in favour of a Police Official as any other person. No infirmity attaches to the testimony of Police Officials merely because they belong to Police Force. There is no rule of law which lays down that no conviction can be recorded on the testimony of Police Officials even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. But, if the Court is convinced that what was stated by a witness has a ring of truth, conviction can be based on such evidence.
37. Further at this juncture it needs to refer herein that the court considering an application for suspension of sentence and grant of bail, is to consider only the prima facie merits of the case. Further it is settled position of law that there is difference between grant of bail in case of pre-trial arrest and suspension of sentence, post-conviction. In the earlier case, there may be presumption of innocence, however, in case of post-conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise and the principle of bail being the rule and jail an exception is not attracted, if there is conviction upon trial.
38. Reference in this regard may be made to be the Judgment rendered by the Hon'ble Apex Court in the case of ***Preet Pal Singh vs. State of U.P., (2020) 8 SCC 645*** wherein at paragraph 35 of the said judgment it has been held as under:

"35. There is a difference between grant of bail under Section 439 CrPC in case of pre-trial arrest and suspension of sentence under Section 389 CrPC and grant of bail, post conviction. In the earlier case, there may be presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the courts may be liberal, depending on the facts and circumstances of the case, on the principle that bail is the rule and jail is an exception, as held by this Court in Dataram Singh v. State of U.P. [Dataram Singh v. State of U.P., (2018) 3 SCC 22 : (2018) 1 SCC (Cri) 675] However, in case of post-conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception attracted, once there is conviction upon trial. Rather, the court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong compelling reasons for grant of bail, notwithstanding an order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in Section 389(1) CrPC."

39. This court, in the light of the materials available against the applicant/appellant and taking into consideration the testimonies of P.W.-1, P.W.-2, P.W.-4 and P.W.-6 is of the considered view that it is not a fit case where sentence is to be suspended.

40. Accordingly, the instant interlocutory application stands dismissed.

41. It is made clear that any observation made hereinabove will not prejudice the case of the parties on merit since the appeal is lying pending for its consideration.

(Sujit Narayan Prasad, J.)

I agree,

(Pradeep Kumar Srivastava, J.)

(Pradeep Kumar Srivastava, J.)

Saurabh/-
A.F.R.