



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Criminal Misc Suspension Of Sentence Application (Appeal)
No. 1199/2022

IN

S.B. Criminal Appeal No. 311/2022

Shrawan Kumar

----Appellant

Versus

State Of Rajasthan, Through Pp

----Respondent

For Appellant(s) : Mr. Vijay Raj Bishnoi
For Respondent(s) : Mr. Gaurav Singh, PP

HON'BLE MR. JUSTICE FARJAND ALI

Order

21/04/2023

1. The instant application for suspension of sentence has been moved on behalf of the applicant in the matter of judgment dated 21.01.2022 passed by the learned Special Judge, NDPS Act cases, Jaisalmer in Sessions Case No.37/2020 whereby he was convicted and sentenced to suffer maximum imprisonment of 15 years under Sections 8/21 and 8/22 of NDPS Act.

2. Learned counsel for the appellant submits that appellant has falsely been implicated in this matter, he has nothing to do with the alleged offence. There is a major contradiction in the forwarding letter No. 825 (Ex. P-17) which was sent to FSL, Jodhpur and the FSL Report dated 31.12.2020 (Ex. P-21) wherein



the number of forwarding letter sent by SP, Jaisalmer is mentioned as 824 instead of 825. There are several flaws and latches in the case of the prosecution. The mandatory provision has not complied with stricto-sensu. Likewise, serious questions have been raised with regard to the compliance of Section 42 of the Act, which is mandatory in nature. Thus, there is a serious discrepancy which goes to the root of the case and casts a serious doubt in the story of the prosecution and veracity of the statement of the prosecution witness. As the hearing of the appeal will take long time to conclude, therefore, learned counsel for the appellants submits that the sentence awarded to the accused-appellants may be suspended.

3. Per contra, learned Public Prosecutor vehemently opposes the prayer made by learned counsel for the accused-appellants and submits that the matter pertains to recovery of 2.720 kilogram of TRICORE-SR tablets and the judgment of conviction passed by learned Court below does not warrant any interference. The impediment contained under Sections 32-A and 37 of NDPS, Act will be attracted in the factual situation of the present case.

4. Heard and perused the material available on record as well as gone through the statutory provisions applicable in the matter.

5. The prosecution has failed to prove the case beyond every shadow of reasonable doubt as it has not been proved that the information under Section 42(2) of NDPS Act was properly supplied to the superior officer. There is no evidence on record to corroborate the fact that the information under Section 42 of NDPS Act was received by the superior officer and no other



document has been produced to show the compliance of Section 42 of NDPS Act which is mandatory in nature.

6. The submission of the learned counsel for the accused-appellant regarding inconsistency in the record of the forwarding letter seems to be worth considering. A perusal of Exhibit P-17 which is the forwarding letter sent by the S.P., Jaisalmer to the FSL, Jodhpur reveals that the letter is numbered as 825 whereas if the FSL Report is looked at, the letter no. is recorded as 824. It is manifesting from the FIR as well as the impugned order passed by the trial judge that when the investigating agency apprehended the accused-appellant, they were on their way back after conducting a raid under NDPS Act at a shop nearby, thus, a safe inference can be drawn that there were two seizures conducted back to back by the same Police team on that particular day within a short time period one at Police Station Nachna pertaining to FIR No. 06/2020 and this one pertaining to Police Station Mohangarh of the same district. Moreover, it is further revealed from the FIR that there was yet another case wherein contraband was recovered by the police on the very same day, just before the two, afore-mentioned seizures were made, thus, there is strong possibility that there was a mix-up between the forwarding letters sent by S.P, Jaisalmer as well as in samples sent for FSL in the three cases, one of them concerning the accused-appellant of the instant case.

7. Another aspect that needs to be looked into is that a perusal of the cross-examination of PW-8, who was accompanying the team which was tracing the location of the suspected people who



sell illegal substances using their mobile numbers, reveals that this witness had already been intimidated by DTS In-charge that the accused-appellant and one Mr. Tilokaram who were the two people apprehended on 25.01.2020 sold illegal substances and that the investigating team went to PTM Chauraha to apprehend them. It baffles this Court as to how the investigating agency had time to relay the above-mentioned information to PW-08 but did not have time and foresight to comply with the mandate of Section 42 of the NDPS Act and inform the superior officer regarding the same. As per the mandate of law, if the officer has prior information regarding breach of the provisions of NDPS Act, he is under a legal obligation to note down the information and before proceeding to search and seizure he has to send a report to the superior officers.

8. In ***Vijaysinh Chandubha Jadeja Vs. State of Gujarat*** reported in AIR 2011 SC 77, the Hon'ble Apex court indicated that the failure to comply with the provisions of NDPS Act would render the recovery of illicit articles ineffective and vitiate the conviction.

The relevant part of the judgment is as follows:-

“Under Section 42 of the NDPS Act, the empowered officer can enter, search, seize and arrest even without warrant or authorisation, if he has reason to believe from his personal knowledge or information taken down in writing, that an offence under Chapter IV of the said Act has been committed. Under proviso to Sub-section (1), if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between





sunset and sunrise after recording the grounds of his belief and send the same to his immediate official superior in terms of Sub-section (2) of the Section.

'22. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under Sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision."

9. It is a very interesting and bizarre situation in this case that neither the samples of contraband nor the original articles seized by the police were produced before the trial court during examination of seizing officer. The Malkhana register has not been tendered into evidence and the inventory was not prepared which is mandatorily to be prepared by a magistrate as per the settled legal position under section 52-A of NDPS Act. The mandate of



preparation of inventory by Judicial Magistrate has been stipulated with a view to verify the fact of alleged recovery including appearance, quantity and weight of the recovered contraband.

10. Likewise, if the Police Officer has information regarding illegal transportation of any contraband and he is required to take immediate steps then it is incumbent upon him to write down the information in writing, send a copy of the same to the superior officer forthwith and mention all these things in daily rojnaamcha diary. It is an admitted position that the information was not relayed to the superior officers and the other requisites were also not fulfilled. It is trite law that the provision of Section 42 of the NDPS Act is required to be applied mandatorily as propounded in the case of **Vijaysinh Chandubha Jadeja (supra)**. The NDPS Act is called a draconian law because of its stringent provision of punishment and that is why the mandatory provisions are required to be complied with stricto sensu, failure of which vitiates the recovery.

11. It is admitted position that copies of Rojnamcha were not transmitted to the superior officers which were required to be done as per the statutory mandate. For the purpose of hearing this application for suspension of sentence tentatively, it can be considered that the compliance of Section 42 of NDPS Act was not made in letter and spirit, through final adjudication shall be done at the time of hearing of the appeal.



12. In light of the judgments cited above, the provision contained in Section 42 of the NDPS Act, this Court is of the view that the non-compliance of mandatory provisions of the NDPS Act has to be dealt with a strict hand and it is imperative upon the courts to be cautious while adjudicating such matters where seizure is concerned under the NDPS Act as no accused should be able to walk scot-free for want of proper implementation and following of the procedure established by law.

13. This Court is cognizant of the provisions contained in Section 32-A and Section 37 of the NDPS Act but considering the submissions made by learned counsel for the accused-appellants regarding non-compliance of statutory procedure and keeping in mind the fact of subjection of accused to long period of incarceration pending appeal, this court is of the opinion that it is a fit case for suspending the sentence awarded to the accused appellants.

14. Accordingly, the application for suspension of sentence filed under Section 389 Cr.P.C. is allowed and it is ordered that the sentence passed by the learned Special Judge, NDPS Act cases, Jaisalmer in Sessions Case No.37/2020 against the appellant-applicant- **Shrawan Kumar S/o Sh. Bhanwara Ram**, shall remain suspended till final disposal of the aforesaid appeal and he shall be released on bail provided he executes a personal bond in the sum of Rs.50,000/-with two sureties of Rs.25,000/- each to the satisfaction of the learned trial Judge for his appearance in this court on 30.05.2023 and whenever ordered to do so till the disposal of the appeal on the conditions indicated below:-



1. That he will appear before the trial Court in the month of January of every year till the appeal is decided.

2. That if the applicant changes the place of residence, he will give in writing his changed address to the trial Court as well as to the counsel in the High Court.

3. Similarly, if the sureties change their address(s), they will give in writing their changed address to the trial Court.

15. The learned trial Court shall keep the record of attendance of the accused-applicant in a separate file. Such file be registered as Criminal Misc. Case related to original case in which the accused-applicant was tried and convicted. A copy of this order shall also be placed in that file for ready reference. Criminal Misc. file shall not be taken into account for statistical purpose relating to pendency and disposal of cases in the trial court. In case, the said accused-applicant does not appear before the trial court, the learned trial Judge shall report the matter to the High Court for cancellation of bail.

(FARJAND ALI),J

2-Ashutosh/-