

**CRIMINAL APPEAL NO.159/10**

**02.08.2011:**

Shri Sanjay Sharma, counsel for the appellants.

Shri Manoj Soni, counsel for the respondent/CBN.

Heard on I.A.No.4029/10 for suspension of the sentence.

Appellant No.1 stands convicted under Section 8/21 (c) whereas appellant No.2 stands convicted under Section 8/21 (c) read with section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity hereinafter referred to as 'the Act'). They have been ordered to undergo 10 years RI. A fine of Rs.1 lac each was also imposed with a default stipulation.

Learned trial Judge found them guilty of the offence on the chemical analysis report Ex. P/29 issued by the Assistant Chemical Examiner, Govt. Opium and Alkaloid Works, Neemuch. Relying on prosecution evidence, learned trial Judge found that besides 140

gms. of heroine powder, a mixture of heroine weighing 13.653 kg. in the liquid form is alleged to have been recovered from the residence of appellant No.1. On this basis, learned trial Judge calculated and held that more than commercial quantity of the contraband was recovered from appellant No.1, therefore, he was found guilty of the offence punishable under section 8/21 (c) of the Act. It is also pertinent to point out that no contraband article was recovered from the possession of appellant No.2. However, he has been held guilty of the offence punishable under Section 8/21 (c) of the Act because of the provisions contained in section 29 of the Act.

In support of the application for suspension of the custodial sentence, learned counsel submitted that trial Court erred in law in holding that commercial quantity was recovered from the residence of appellant No.1. He submitted that there is no evidence that the alleged residence is in

exclusive possession of appellant No.1 as there are other inmates residing in the house in question. He further submitted that the calculation done by the trial Court is erroneous. He also contended that the case of appellants would be governed by the law laid down by the Supreme Court in E. Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau (AIR 2008 SC 1720). In this connection, he pressed into service latest decision of the Supreme Court in the case of Harjit Singh Vs. State of Punjab reported in 2011 (2) EFR (5) equal to 2011 Cr.L.R (SC) 355. It was also contended that the appellants are in jail since 2004 and there is no possibility of hearing and disposing of this appeal at an early date. Lastly it is contended that assuming every thing against the appellants, still the quantity of contraband recovered is less than commercial quantity, therefore, they deserve to be released on bail by suspending their jail sentence.

On the other hand, Shri Soni appearing for the respondent opposed the application and submitted that the legislative intent is clear that the general principles of law governing bail are not applicable to the persons who are accused of an offence punishable under the provisions of the Act. He further submitted that trial Court committed no mistake in calculating the quantity which was more than commercial quantity seized and recovered from appellant No.1. He further submitted that it is besides the point that the appellants are in jail since 2004 or the appeal is not likely to be disposed of in near future. According to him, the case of the appellants squarely falls within section 37 of the Act and while deciding the bail application, the Court is mandated to be satisfied that there are reasonable grounds for believing appellant(s) are not guilty of such offence and that they are not likely to commit any offence while on bail. He submitted that no

such ground is available to appellants, therefore the application deserves to be rejected.

After careful consideration of the rival submissions, we are of the view that a case for suspension of the custodial sentence is made out in the facts and circumstances of the present case.

No doubt, section 37 puts an embargo on the general power to grant bail and as such it is an exception to the accepted norm "that the bail is rule, jail is an exception." A careful reading of section 37 would show that the negation of bail in limited cases is the rule and its grant is an exception. A negative approach is required when a person is an accused of the offence punishable under section 19, section 24, and section 27-A or offenses involving commercial quantity. The grant of bail in respect of these cases is an exception to the rule and is further subject to limitations that opportunity of hearing must

be given to the public prosecutor to oppose the bail application and the Court must record reasons to satisfy the requirements of sub clause (ii) of clause (b) of section 37 of the Act. It is true that provisions of section 37 would apply not only during trial but also post trial stage-Union of India vs. Ratan Mallik @ Habul (AIR 2009 SC (Supp) 1567). Their Lordships of the Supreme Court directed to consider the bail application in the light of the parameters of section 37 as explained in the said decision. Section 37 does not take away completely the judicial discretion while dealing with the bail application either during trial or post trial stage. As has been pointed out herein above, the Court has to be extra cautious while dealing with an application for bail if a person is accused of an offence punishable under section 19, 24, 27A or involving residuary clause relating to commercial quantity of the contraband article.

Now coming back to the case in hand, prima facie, we are satisfied that the law as laid down in E. Micheal Raj would be applicable and case does not fall within the clutches of Section 37 of the Act.

We are of the view that in the circumstances of the case, application for suspension of sentence and grant of bail should be allowed. We, therefore, allow the application in view of the law laid down by their Lordships of the Supreme Court in Sami Ullaha vs. Superintendent, Narcotic Central Bureau (2009 Cr.L.R (S.C) 30; Ratan Mallik @ Habul (supra) and Harjit Singh (supra) and direct the jail sentence passed against the appellants shall remain suspended during the pendency of the appeal provided that out of the fine amount, each appellant shall deposit Rs. 25,000/- within a period of one month from today, and shall also furnish personal bond of Rs.50,000/- with one surety each in the like amount to the satisfaction of the trial Court for their appearance

before the Registry of this Court on 21.11.2011 and on all such subsequent dates as may be fixed in this behalf by the Registry during the pendency of the appeal. I.A.No.4029/10 stands allowed and closed.

C.c on payment of usual charges.

(S.K.SETH)  
JUDGE

Hk/