

GAHC010082752023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : AB/1452/2023

IKRAMUL ALI
S/O ABDUL MANNAF
R/O VILL- ROWMARI
P.S. SADAR
DIST. NAGAON,
ASSAM,
PIN-782125

VERSUS

THE STATE OF ASSAM
REP. BY THE PP,
GOVT. OF ASSAM

Advocate for the Petitioner : S AHMED

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

ORDER

Date : 25-05-2023

Heard Mr. S. Ahmed, learned counsel for the applicant and also heard Mr. B. Sarma, learned Addl. P.P., Assam, appearing for the State respondent.

2. Apprehending arrest in connection with Nagaon P.S. Case No.1092/2022,

under section 353 of the IPC, read with section 21(b)/29 of the NDPS Act, this application under section 438 Cr.P.C., is preferred by applicant, namely, Ikramul Ali, for grant of pre-arrest bail.

3. The said case has been registered on the basis of one FIR lodged by S.I. Abha Jyoti Rabha on 14.09.2022, to the effect that acting on a tip off, they have conducted search in the house of Ikramul Ali and recovered 21.05 gms. of suspected heroin and seized the same in presence of witnesses, and while they were conducting search in the house of Ikramul Ali, then one Ashadul Islam @ Saka, Sariful Islam, Jakir Hussain, Intu @ Andajul Ali, Ikramul Hussain, Madu Ali, Miss Nur Nehar, Sarufa Begum and Mastufa Ali and other associates obstructed the police party and helped the accused person to escape from the place of occurrence.

4. Mr. S. Ahmed, learned counsel for the learned counsel for the applicant submits that this is the second anticipatory bail application filed by the applicant and the earlier petition, being AB No. 3672/2022, was dismissed by this court after perusing the case diary, vide order dated 05.01.2023. Mr. Rahman further submits that the ground for filing this second application is the seized contraband substances were not recovered from the conscious possession of the applicant. It is the further submission of Mr. Rahman that the applicant is innocent and no way involved with the offence alleged in the FIR and the quantity of contraband substance recovered and seized is not commercial quantity and that he is ready to co-operate with the investigating agency and therefore it is contended to allow the petition. Mr. Rahman also referred to one case law of **Union of India vs. Shri Shiv Shanker Kesari**, in Case No. Appeal (Crl.) 1223/2007, in support of his submission.

5. On the other hand, Mr. B. Sarma, learned Addl. P.P., Assam, appearing for the

State respondent has produced the case diary before this court and submits that the IO has collected sufficient incriminating materials against the accused and contraband substance was recovered from the house of the applicant and the same was sent to the FSL, and the FSL report reveals that the same gave positive test for heroine. Mr. Sharma further submits that the complainant has found the applicant and one co-accused Nazim Ali in his house while selling drugs and then police apprehended co-accused Nazim Ali and the applicant fled away. Mr. Sharma further submits that the case is pending for arrest of the applicant who has been evading arrest and therefore, Mr. Sharma contended to dismiss the petition.

6. Having heard the submission of learned Advocates for both the sides, I have carefully gone through the petition and the documents placed on record and also perused the case diary with the assistance of learned Addl. P.P., Assam and also gone through the case law referred by Mr. S. Ahmed, learned counsel for the learned counsel for the applicant.

7. The materials collected so far in the case diary reveal that 21.05 gms of heroine was recovered from the house of applicant Ikramul Ali after search. It also appears from the materials collected in the case diary that having received the information about selling of contraband substance in the house of the applicant, while the informant - S.I. Abha Jyoti Rabha, with other staff, reached the house of the applicant, he found the applicant and one Nazim Ali selling drugs in his house and having seen the police party, the applicant fled away, but the informant had apprehended co-accused Nazim Ali. The seizure witnesses, examined by the I.O., also stated about the recovery of contraband substance from the house of the applicant.

8. Though this application is preferred on the ground that the contraband

substance was not recovered from the conscious possession of the applicant, yet, the submission so advanced by the learned counsel for the applicant left this Court unimpressed in view of the materials collected in the case diary.

9. I have carefully gone through the case law **Shiv Shankar Kesari (supra)** referred by the learned counsel for the applicant and I find that the same, in no way advance the case of the applicant. It is well settled in a catena of decisions of Hon'ble Supreme Court, especially in **Madan Lal vs. State of Himachal Pradesh**, reported in **(2003) 7 SCC 465**, - that whether there was conscious possession, has to be determined with reference to the factual backdrop.

10. [Section 21\(b\)](#) of the NDPS Act makes possession of manufactured drugs an offence. [Section 21](#) appears in chapter IV of the Act, which relates to offence for possession of such articles.

11. In the case of **Madan Lal (supra)**, it has been held by the Hon'ble Supreme Court that the expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry out different meanings in contextually different backgrounds.

12. In [Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors.](#), reported **1979 (4) SCC 274**, it has been held that it impossible to work out a completely logical and precise definition of 'possession' uniformly applicable to all situations in the context of all statutes. It is further held that the word 'conscious' means awareness about a particular fact, which is deliberate or intended.

13. In the case of [Gunwantlal v. the State of M.P.](#), reported in **1972 (2) SCC 194**, Hon'ble Supreme Court has held that possession in a given case need not be physical possession, but can be constructive, having power and control over the

article in case in question, while the person to whom physical possession is given holds it subject to that power or control. It is further held that once the possession is established, the person who claims that it was not a conscious possession, has to establish it, because how he came to be in possession is within his special knowledge. [Section 35](#) of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of [Section 54](#), where also presumption is available to be drawn from possession of illicit articles.

14. Bearing the aforesaid propositions of law in mind, while the factual scenario of the case in hand is examined, it has been noticed that the contraband substance appears to be recovered and from the conscious possession of the applicant. His presence in his house and fleeing seeing the police party and apprehension of the co-accused clearly negate the claim so made by the applicant. Another disturbing fact to be taken note of is that while the I.O. conducted search in the house of the applicant, some persons including the wife of the applicant attacked the police party, so as to resist the search and seizure. As discussed herein above the burden to prove that the contraband substance was not recovered from the conscious possession of the applicant is upon him. And such a question would arise when the prosecution side established the possession. And as such the plea could have been successfully taken only at the stage of trial not at this stage.

15. Under the aforesaid facts and circumstances, this Court is of the view that this is not a fit case and just ground to consider the anticipatory bail petition of the applicant. Accordingly, the petition stands dismissed.

16. Return the case diary forthwith. It is however, made clear that the observations, so made here in above, is made only for the purpose of disposal

of this petition, not on the merit of the case.

JUDGE

Comparing Assistant