

GAHC010142272023



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

Case No. : Bail Appln./2297/2023

MD. ISLAM UDDIN
S/O LATE ROIS ALI
R/O VILL- DEUBARI,
P.S. PATHERKANDI, IN THE DISTRICT OF KARIMGANJ, ASSAM

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : DR. P K GOSWAMI

Advocate for the Respondent : PP, ASSAM

BEFORE
THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the petitioner : Dr. P. K. Goswami. Advocate.
For the Respondents : Mr. M. P. Goswami, Addl P.P. Assam.
Date of Hearing : 21.11.2023
Date of Judgment & Order : 21.11.2023

JUDGEMENT & ORDER (ORAL)

1. Heard Dr. P. K. Goswami, learned counsel for the petitioner. Also heard Mr. M. P. Goswami, learned Additional Public Prosecutor for the State of Assam.
2. This is an application made under Section 439 Cr. P.C. seeking bail by the accused/petitioner, namely, **Md. Islam Uddin**, who has been in jail since 25.08.2021 in connection with Patherkandi PS Case No. 493/2021 being registered under Sections 22(C)/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.
3. The accused/petitioner is in jail since 25.08.2021, arrested in connection with Patherkandi PS Case No. 493/2021 being registered under Sections 22(C)/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Subsequently, after completion of the investigation, the Investigating Officer laid charge sheet being CS No. 475/2021 dated 31.12.2021 under Sections 22(C)/29 of the NDPS Act, 1985.

4. A case being Special (NDPS) Case No. 82/2021 was registered and trial is going on in the aforesaid case and in the meantime, as many as 6 (six) witnesses have been examined.
5. This Court by its order dated 27.07.2023, called for the scanned copy of the order sheet, charge framing form, FSL report, copy of depositions of witnesses so far examined from the learned trial Court below for consideration of the present bail application.
6. The learned counsel for the petitioner submits that from the deposition of the witnesses so far recorded, it is clear that there are reasonable ground believing that the petitioner is not guilty of the offence charged inasmuch as the witnesses so far examined clearly reveals that the foundational fact of conscious possession of the alleged narcotics of the petitioner has not yet been established though all the seizure witnesses have been examined.
7. Per contra, Mr. M. P. Goswami, learned Additional Public Prosecutor for the State of Assam submits that there are altogether 11 (eleven) witnesses only, already 6 (six) have been examined and therefore, this is not the stage to release the petitioner on bail and inasmuch as he has not able to satisfy the rigour of Section 37 of the NDPS Act, 1985.
8. It is the further contention of Mr. Goswami, learned Additional Public Prosecutor for the State of Assam that huge quantity of narcotic substances commercial in nature has been seized from the conscious possession of the petitioner.
9. This Court has given anxious consideration to the submissions

advanced by the learned counsel for the parties. Also perused the material available on record.

10. It is not in dispute that the alleged contraband seized are of commercial quantity and therefore, rigour of Section 37 of the NDPC, Act shall be applicable in the present case.
11. It is a settled proposition of law that burden of laying the foundational fact as regards conscious possession of the contraband is upon the prosecution and if no such foundational fact is laid, the same may destroy the entire foundation of such allegation in the given facts of the case inasmuch as conscious possession is sine qua non for conviction of a person under NDPS Act, 1985.
12. The prosecution to prove the foundational fact of conscious possession has in the meantime examined as many as 6 (six) witnesses who are projected as seizure witnesses. In the case in hand, PW-1, PW-2, PW-3, PW-4, PW-5 and PW-6 are of independent seizure witnesses. However, all 6 (six) witnesses have been declared as hostile witnesses for the reason that these witnesses has not supported the case of the prosecution and they being the seizure witnesses, witnessing seizure of the alleged contraband from the conscious possession of the petitioner as projected by the prosecution.
13. Accordingly, these witnesses have duly been cross-examined by the prosecution. During cross-examination also, the PW-1 took a stand that he put his signature in a blank paper, the PW-2, during his cross-examination stated that the police coerced him to put the signature in the seizure

memo, the PW-3, during cross-examination even stated that police did not recorded his statement, the PW-4 during cross-examination took a similar stand that police even did not record his statement, the PW-5, during cross-examination has stated that his house is at distance of 3 to 4 KM away from the village where the materials were seized and that he did not meet the police and PW-6, took a stand during his examination-in-chief that he knows nothing about the incident and his house is towards the north of the village from where the contraband has been seized.

14. While taking a decision on an application for bail, in a case of involving commercial contraband of articles, the crucial aspect to be looked into is the rigour under Section 37 of the NDPS Act, 1985, namely, satisfaction of the Court that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
15. From the aforesaid materials, prima facie, in the considered opinion of this Court, the petitioner has been able to show that there are reasonable grounds for believing that the petitioner is not guilty of such offence.
16. Law is equally well settled that the length of period of custody or fact that the charge sheet has been filed and trial has commenced are by themselves no consideration that can be treated as persuasive grounds for granting relief of bail weaving the rigour under Section 37 of the NDPS Act, 1985.
17. Taking note of the aforesaid settled principles of law, this Court is of the prima facie view that the prosecution has failed to lay the foundational

fact regarding conscious possession of the petitioner of the contraband in question.

18. Therefore, the aforesaid leads to a belief of this Court that there are reasonable grounds that the petitioner is not guilty of such offence. In the aforesaid background, to balance the stringent condition of the NDPS Act, 1985 and the right of the petitioner under Article 21 of the Constitution of India, in the considered opinion of this Court, the petitioner can be released on bail with stringent conditions to ensure that the petitioner does not commit any such similar offence while on bail.
19. Considering the aforesaid aspects, propositions of law and in the given facts and circumstances of the present case, this Court is of the considered opinion that by imposing stringent conditions, the attendance of the petitioner before the learned trial Court could be secured and he can be barred from hampering and tampering or influencing the witnesses.
20. In view of the peculiar facts and circumstances of the case, the petitioner namely **Md. Islam Uddin**, be released on bail on executing a bail bond of Rs. 2,00,000/- (Two lakhs) with two suitable solvent sureties of like amount to the satisfaction of the learned Additional Sessions Judge (FTC), Karimganj, Assam in connection with aforementioned case. The bail granted to the petitioner shall be subject to following conditions:-
 - (a) The petitioner shall not leave the territorial jurisdiction of learned Additional Sessions Judge (FTC), Karimganj, Assam, without prior written permission from him;

- (b) The petitioner shall not hamper and tamper with the evidence of the case;
- (c) The petitioner shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police office.
- (d) The petitioner shall surrender his passport, if any (if not already surrendered) before the Additional Sessions Judge (FTC), Karimganj, Assam.
- (e) The petitioner shall not try to contact any of the witness by any mode including telephone, social media etc.
- (f) The petitioner shall furnish the present residential address with proof to the Investigating Officer as well as to the learned trial Court below and shall not change the said residence without prior permission of the learned trial Court.
- (g) The petitioner shall appear before the I.O., on the 1st day of every week.
- (h) The petitioner shall appear before the learned trial Court below each and every date of appearance during trial.

In the aforesaid term, this bail petition is allowed.

JUDGE

Comparing Assistant