

GAHC010164352023



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

Case No. : Bail Appln./2691/2023

MD. SAHABUDDIN KAZI @ MD SIHABUDDIN KAZI @ MD SHABUDDIN
S/O KAZI MOZAMIL HUSSAIN VIL. KAZIGRAM P.S BADARPUR DIST.,
KARIMGANJ ASSAM

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR. N N B CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY

ORDER

Date : 14-09-2023

Heard Mr. N.N.B. Choudhury, learned counsel for the accused-petitioner and Mr. K.K. Parasar, learned Additional Public Prosecutor for the State of Assam.

2. By this application under Section 439, Code of Criminal Procedure, 1973

[CrPC], the accused-petitioner viz. Md. Sahibuddin Kazi @ Md. Sihabuddin Kazi @ Md. Shabuddin has prayed for his release on bail in connection with NDPS Case no. 36/2021, arising out of Gorchuk Police Station Case no. 751/2020, registered for offences registered under Sections 21[c]/29 of the Narcotic Drugs and Psychotropic Substances [NDPS] Act, 1985, & G.R. Case no. 16181/2020, presently pending before the Court of learned Additional Sessions Judge no. 2, Kamrup [Metro], Guwahati [‘the Special Court’, for short].

3. The crime case, Gorchuk Police Station Case no. 751/2020 came to be registered on the basis of a First Information Report [FIR] lodged by one Mukutar Rahman, In-Charge, ISBT Police Out Post on 22.12.2020, pursuant to a General Diary Entry no. 427 dated 22.12.2020 registered at the ISBT Police Out Post. As per the FIR, the informant received a confidential input from the Crime Branch staff, Guwahati to the effect that illegal paddling/transportation of drugs was going on in the campus of the Inter-State Bus Terminus [ISBT] via buses coming from various States. On receipt of such information, the informant along with staff and the Officer In-Charge, Gorchuk Police Station, etc. conducted a search operation in the buses, coming from various destinations, parked within the ISBT complex. The informant had alleged that during such search operation, one suspected bus passenger viz. Md. Sahibuddin Kazi i.e. the accused-petitioner was found carrying a bag inside a bus bearing registration no. AS-10/C-6456, which came from Karimganj and was found parked at Bay no. 24 within the ISBT complex. When the accused-petitioner was searched, 30 nos. of soap cases of different colours were allegedly recovered from inside a bag. The 30 soap cases were found containing plastic packets/polythene with powdery substances, suspected to be drugs. As the bus driver also could not give any satisfactory reply, sufficient doubt was created and the bus driver was also

apprehended, apart from the accused-petitioner. The higher police official was called to the spot and the informant was issued a authority letter to seize and draw samples from the suspected contraband substances. A digital machine was brought to the place and the said 30 packets containing suspected contraband were weighed. On weighment, the total weight was found to be 400 grams. The packets and the bus were seized by preparing a seizure list. The informant had further stated that two sample packets [one original & one duplicate] of 5 [five] grams each were drawn at the place of occurrence in presence of witnesses and the apprehended persons viz. [i] the accused-petitioner, and [ii] Md. Suwail Ahmed [bud driver]. The two sample packets were sealed for forwarding it to the Forensic Science Laboratory [FSL] for chemical analysis.

4. On receipt of the said FIR, the Officer In-Charge, Gorchuk Police Station registered the same as Gorchuk Police Station Case no. 751/2020 under Sections 21[c]/29 of the NDPS Act on 22.10.2020. The accused-petitioner and Md. Suwail Ahmed after being apprehended, were produced before the Court of learned Chief Judicial Magistrate, Kamrup [M], Guwahati on 23.12.2020. On being so produced, the learned Court of Chief Judicial Magistrate, Kamrup [M], Guwahati remanded the two accused persons including the accused-petitioner, to judicial custody.

5. Thus, the accused-petitioner is in custody since 23.12.2020 and as on date, the accused-petitioner has spent more than 990 days in custody.

6. In the course of investigation, the results of chemical analysis in respect of the two samples were received from the Forensic Science Laboratory [FSL], Assam, Guwahati. As per the FSL Report, when the two sample packets were examined, they gave positive test for 'heroin'. In the course of investigation,

statements of a number of witnesses were recorded under Section 161, CrPC. The Investigating Officer [I.O.] of the case after completing the investigation, submitted a charge sheet under Section 173, CrPC being Charge Sheet No. 84/2021 dated 31.05.2021, finding a *prima facie* case under Section 21[c]/29 of the NDPS Act well established against both the accused persons.

7. After submission of the charge sheet, the case has been registered as NDPS Case no. 36/2021. The trial of the case has thereafter, proceeded before the Court of learned Additional Sessions Judge no. 2, Kamrup [M] [the Special Court]. In the Charge Sheet dated 31.05.2021, the Investigating Officer [I.O.] of the case had listed the names of 8 [eight] nos. of persons as prosecution witnesses [PWs]. After the charges were framed, the prosecution side, till date, has examined 7 [seven] nos. of PWs till date and they are : - [i] P.W.1 – Md. Rajib Ali, [ii] P.W.2 – Nipul Kr. Das, [iii] P.W.3 – Nurul Hussain Ali, [iv] P.W.4 – Smti. Shravanee Rajkhowa, [v] P.W.5 – Sri Niranjan Baruah, and [v] P.W.6 – Md. Mukuta Rahman.

8. The scanned copies of the case records of NDPS Case no. 36/2021 was requisitioned by an Order dated 04.08.2023 and the same have been received.

9. Both Mr. Choudhury, learned counsel for the petitioner and Mr. Parasar, learned Additional Public Prosecutor have referred to the depositions of the 7 [seven] prosecution witnesses [PWs] in the course of their submission.

10. P.W.1 – Md. Rajib Ali is a person who was at the ticket booking counter at the ISBT on the date of the alleged incident. As per his testimony, he was at the ticket booking counter during the evening hours on that day and came to know that some passengers were carrying drugs. He stated that the Police made

weighment of the drugs and called him and he on being asked, put his signature in the seizure list [Ext.P1]. In his cross-examination, he stated that he did not see himself as from whom and from where the seized contraband was recovered. P.W.2 - Nipul Kr. Das, a UB Constable at the ISBT Police Outpost was informed that there was drugs paddling at the ISBT and accordingly, he and two Sub-Inspectors of Police along with other police personnel, went to the ISBT platform and conducted a search inside a bus which came from Karimganj. On being searched, 30 nos. of soap cases were recovered from a person sitting inside the bus as a passenger. He further deposed that those soap cases contained powdery substances, suspected to be heroin. He has further stated that 400 grams of powdery substances were recovered from the possession of the said person. In his cross-examination, P.W.2 stated that he did not see the soap cases and the recovered drugs in the Court Room on the date of his testimony. P.W.3 - Nurul Hussain Ali, also a UB Constable at the ISBT Police Outpost deposed to the effect that on 22.12.2022, 30 nos. of soap cases containing 400 grams of powdery substances, suspected to be heroin, were recovered from a passenger of a bus, which came from Barak Valley, in his presence. He further deposed that the suspected contraband was seized in his presence. In his cross-examination, P.W.3 had stated that 3 [three] persons including the driver of the bus, were apprehended by Police on 22.12.2022. P.W.4 who is a Scientific Officer in the Drugs and Narcotic Division in the Directorate of Forensic Science, Assam deposed to the effect that he carried chemical analysis on the coloured powdery substances, 5 [five] grams each, contained in two closed polythene packets, which were forwarded to the FSL. On chemical examination of the powdery substances, it gave positive test for heroin and the percentage of heroin in each sample was found to be 82.37%.

P.W.5 - Sri Niranjan Baruah was the Officer In-Charge, Gorchuk Police Station and he was on duty on 22.12.2020. He stated that on receipt of the FIR from the informant, Mukutar Rahman, S.I., with the allegation that 30 nos. of packets containing suspected drugs from inside a bus had been recovered and seized, he registered the case. He stated that the recovered drugs were handed over to him and he took up the investigation. P.W.5 had also stated that he drew samples of the recovered drugs and sent the same for FSL examination. In his cross-examination, P.W.5 had denied that no inventory was prepared. But he had admitted that he did not submit any Report under Section 57 of the NDPS Act. While stating that only two samples were sent for chemical examination, P.W.5 as the Investigating Officer [I.O.], had admitted that no test memo was prepared in connection with the case. It was in his testimony that the samples were sent for chemical examination on 24.12.2020 and the same were received by the FSL on 28.12.2020 and he did not enquire as about the custody of the samples during the period from 24.12.2020 to 28.12.2020. P.W.6 - Md. Mukutar Rahman, who was the informant, had deposed that when on 22.12.2020, he carried out checking in one bus, he found a carton below the driver's seat and there were 30 nos. of soap cases inside the said carton. He further stated that those soap cases containing powdery substances, suspected to be heroin, inside a bus bearing registration no. AS-10/C-6456. As per his testimony, the driver of the bus and one more person were apprehended in connection with such recovery of substances, suspected to be heroin. On weighment, the total weight of the suspected contraband was found to be 400 grams. Accordingly, he lodged the FIR. In his cross-examination, P.W.6 had admitted that neither in the FIR lodged by him nor in the statement made by him before the I.O., he stated that the suspected heroin was recovered from below the driver's seat of the bus. In

the course of his testimony, the seized suspected heroin was not shown to him. P.W.6 had further admitted that he did not prepare any Report as per the provisions of Section 57 of the NDPS Act and did not prepare any inventory as per Section 52A of the NDPS Act. P.W.7 was also a ticketing clerk at the ticket cancellation counter at the ISBT. P.W.7 had deposed only to the effect that noticing a gathering of people, he came out and could come to know that some bags containing drugs were seized from inside a bus. In cross-examination, he deposed that he did not personally know wherefrom and from whom the seized contraband was recovered.

11. On going through the scanned copies of the case record, I find force in the submission of Mr. Choudhury, learned counsel for the accused-petitioner that despite the accused-petitioner being present in the Court Room on each of the dates of recording the testimonies of the prosecution witnesses [PWs], none of the prosecution witnesses [PWs] had identified the accused-petitioner as the person from whom the suspected contraband was recovered.

12. By drawing attention to the materials in the case record, Mr. Choudhury, learned counsel for the accused-petitioner has submitted that there is nothing on the case record, wherefrom it can be inferred that the procedure required to be adhered to as per Section 52A of the NDPS Act was followed in the case in hand. Has placed reliance in the decision of the Hon'ble Supreme Court of India in Union of India vs. Mohanlal and another, reported in [2016] 3 SCC 379, wherein it has been observed that it is manifested in the provision contained in Section 52A that upon seizure of the contraband the same has to be forwarded either to the Officer In-Charge of the nearest police station or to the Officer empowered under Section 53, who shall prepare an inventory as stipulated in

the said provision and make an application to the Magistrate for purposes of [a] certifying the correctness of the inventory, [b] certifying photographs of such drugs or substances taken before the Magistrate as true, and [c] to draw representative samples in the presence of the Magistrate for certifying the correctness of the list of samples so drawn. It has been held that it has obligated under Sub-section [3] of Section 52[A] for the Magistrate to allow the application at the earliest. The provisions therein has implied that no sooner the seizure is effected and the contraband forwarded to the Officer In-Charge of the Police Station or the Officer empowered, the Officer concerned is duty-bound in law to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. It has been further held that the question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. In Criminal Appeal no. 451 of 2011 [Bothilal vs. Intelligence Officer Narcotics Control Bureau], decided on 26.04.2023, placed by Mr. Choudhury, it has been held that the act of drawing samples from all the packets at the time of seizure is not in conformity with what is held by the Court in the case of Mohanlal [supra] and the same creates a serious doubt about the prosecution's case that the substance recovered was contraband.

13. There is another aspect which has been urged by the learned counsel for the accused-petitioner. It has emerged from the materials available in the case record that the accused-petitioner is in custody since 23.12.2020, which means

the accused-petitioner is in incarceration for a period of more than 990 days.

14. In Special Leave to Appeal [Crl.] no. 4169/2023 [Rabi Prakash vs. The State of Odisha], decided on 13.07.2023, the Hon'ble Supreme Court of India, with regard to the twin conditions contained in Section 37 of the NDPS Act, has observed that the first condition stands complied with when the Public Prosecutor is heard. It has further observed that so far as the second condition i.e. formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at beyond a stage when the accused person had already spent more than three and a half years in custody. Observing so, it has been held that the prolonged incarceration generally, militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37[1][b][ii] of the NDPS Act. In Petition for Special leave to Appeal [Crl.] no. 3961/2022 [Abdul Majeed Lone vs. Union Territory of Jammu and Kashmir], decided on 01.08.2022, the Hon'ble Supreme Court of India finding the period of incarceration of the accused person therein for a period of over two years and five months since 01.03.2020, directed the release of the accused person on bail, subject to such terms and conditions which the concerned trial Court shall deem fit and find appropriate to impose upon him. In Criminal Appeal no. 1169/2022 [Gopal Krishna Patra @ Golaprusma vs. Union of India], decided on 25.01.2022, the accused person was in custody since 18.06.2020 and was facing charges for the offences punishable under Sections 8/20/27-AA/28 read with Section 29 of the NDPS Act. Observing that a case for bail is made out due to the length of custody undergone by the accused therein, the accused was allowed to be released on bail, subject to imposition of such conditions as the

trial Court deems appropriate to impose. In Petition[s] for Special Leave to Appeal [Crl.] no. 5769/2022 [Nitish Adhikary @ Bapan vs. The State of West Bengal], decided on 01.08.2022, the petitioner sought release on bail wherein he was *inter alia* facing charges under Section 21[c] of the NDPS Act and had undergone custody for a period of 1 [one] year and 7 [seven] months as on 09.06.2022. The said accused person was allowed to go on bail subject to him furnishing bail bonds to the satisfaction of the trial Court. In Criminal Appeal no. 245/2020 [Chitta Biswas Alias Subhas vs. The State of West Bengal], decided on 07.02.2022, the accused person was undergoing custody for offences punishable under Section 21-C of the NDPS Act. The accused who was arrested on 21.07.2018, was allowed to be released on bail, subject to furnishing bail bond in the sum of Rs. 2,00,000/- with two like sureties to the satisfaction of the learned trial Court and the learned trial Court was allowed to impose such other conditions as it deemed appropriate to ensure the presence and participation of the accused in the pending trial. It appears from all the aforesaid decisions, the Hon'ble Supreme Court of India without expressing any opinion on the merits or demerits of the case, has allowed the prayers for bail of the concerned accused persons who were facing charges for allegedly committing offences under the NDPS Act on consideration of their prolonged incarceration. In addition, different coordinate benches of this Court have also followed the same line of reasoning to grant bail to accused persons arrested under the provisions of the NDPS Act on the ground of prolonged pre-trial incarceration. In this regard, reference can be made to an Order dated 10.04.2023 passed in Bail Application no. 513/2023 and Order dated 19.07.2022 passed in Bail Application no. 1063/2022. Having examined the case of the present accused-petitioner *qua* the aforesaid decisions, this Court is of the

considered view that the accused-petitioner has been able to make out a case for his release on bail in view of the fundamental right guaranteed under Article 21 of the Constitution of India, despite the rigours contained in Section 37 of the NPDS Act.

15. The other accused person viz. Md. Suwail Ahmed who was arrested along with the present accused-petitioner on 23.12.2020 and produced before the learned Court of Chief Judicial Magistrate, Kamrup [M], Guwahati also on 23.12.2020, has since been released on bail as far back as on 18.01.2021. It is noticed that while most of the prosecution witnesses [PWs] were cross-examined on behalf of the accused-petitioner, the cross-examination on behalf of the other accused person was found reserved on behalf of co-accused, Md. Suwail Ahmed in respect of few of the PWs. While on the same set of materials/evidence, the co-accused, Md. Suwail Ahmed has been released and this Court is of the considered view that on the ground of parity and having regard to the precious fundamental right under Article 21 of the Constitution of India, the present accused-petitioner can also be released on bail, subject to appropriate terms and conditions.

16. For the above stated reasons, it is provided that the accused-petitioner namely, Md. Sahibuddin Kazi @ Md. Sihabuddin Kazi @ Md. Shabuddin is to be released on bail of Rs. 1,00,000/- [Rupees One Lakh] with two sureties of like amount to the satisfaction of the learned Additional Sessions Judge no. 2, Kamrup [Metro], Guwahati, subject to the following conditions –

[i] That the accused-petitioner shall regularly appear before the learned trial Court on all dates to be fixed from time to time till the case is disposed off; and

[ii] That out of the two sureties, one must be a government servant subject to verification of the relevant documents, if deemed necessary and after such verification, the learned Court below shall return the original documents retaining legible scanned copy thereof on record for future reference.

17. It is, however, made clear that the observations made above are only in respect of consideration of the accused-petitioner's prayer for bail and none of the observations made in this order shall have any bearing on the trial of the accused-petitioner.

JUDGE

Comparing Assistant