

GAHC010228062023



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

Case No. : Bail Appln./3596/2023

JOHIRUL ISLAM @ JOHIRUL ESLAM
S/O LT. SOBUR UDDIN
R/O VILL- CHAGOLIA PT. I
P.S. GOLAKGANJ
DIST. DHUBRI, ASSAM

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR. M I HUSSAIN

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

ORDER

Date : 20-12-2023

Heard Mr. M.I. Hussain, learned counsel for the petitioner Johirul Islam @ Johirul Eslam.

2. The petitioner has filed this application under Section 439 of the Code of Criminal Procedure as he is languishing in jail since 09.02.2023 in connection

with Special Case No. 148/2023, arising out of Golakganj Police Station Case No. 105/2023 registered under Sections 22(c)/27 of the NDPS Act, 1985.

3. Also heard Mr. B.B. Gogoi, learned Additional Public Prosecutor for the State of Assam.

4. I have considered the submissions at the bar with circumspection. It is submitted on behalf of the petitioner that the petitioner is languishing in the jail for 316 (Three Hundred Sixteen) days. The charge sheet was filed on 02.05.2023. Out of 14 (fourteen) witnesses only 6 (six) witnesses have examined. No contraband was recovered from the petitioner

5. The petitioner has relied on the decision of Hon'ble the Supreme Court in *Ram Singh Vs. Central Bureau of Narcotics reported in (2011) 11 SCC 347*, wherein it has been held that:

“15. Now we proceed to consider the last question, i.e., whether the Appellant can be held guilty for being in possession or involved in selling the opium so as to attract the mischief of [Section 8/18](#) of the Act. In sum and substance the confession of the Appellant is that he was working in the hotel for the last two months and brought the opium from the house of the hotel-owner to the hotel, where it was being sold in tablets to the truck-drivers. In the confession Appellant has not stated or for that matter none of the witnesses have deposed that he was involved in selling the opium-tablets. Therefore, the Appellant cannot be held guilty for selling opium. Whether in the state of evidence Appellant can be held guilty for possessing the opium only on the ground that he brought the opium from the house of the owner to the hotel is another question which requires adjudication. It is trite that to hold a person guilty, possession has to be conscious. Control over the goods is one of the tests to ascertain conscious possession so also the title. Once an article is found in possession of an accused it could be presumed that he was in conscious possession. Possession is a polymorphous term which carries different meaning in different context and circumstances and, therefore, it is difficult to lay down a completely logical and precise definition uniformly applicable to all situations with reference to all the statutes. A servant of a hotel, in our opinion, cannot be said to be in possession of contraband belonging to his master unless it is proved that it was left in his custody over which he had absolute control. Applying the aforesaid principle when we consider the facts of the present case it is difficult to hold that opium was in possession of the Appellant. There is no evidence on record to suggest that the Appellant was in occupation of the room from where opium was recovered. Further the evidence clearly points out that title to the opium vested in the owners of the hotel. The confession given by the Appellant was only that he was servant of the owners of the hotel from where the opium was recovered. In the face of the state of evidence

it is difficult to hold that the Appellant was in conscious possession of the opium. Section 18 of the Act prescribes punishment for possession and that possession, in our opinion, has to be conscious. In the facts of the present case it is difficult to hold that the appellant was in possession of the opium and, therefore, his conviction and sentence cannot be sustained.

16. In the result, the appeals are allowed, impugned judgment of conviction and sentence is set aside. Appellant is on bail, his bail bonds are discharged.”

6. Relying on the decision of Ram Singh’s case, the petitioner has submitted that conscious position cannot be proved against the petitioner.

7. The learned Additional Public Prosecutor Mr. B.B. Gogoi has raised objection.

8. The FIR unfolds that on 07.02.2023 at about 10 P.M., the complainant received a secret information from reliable source that a huge quantity of contraband consisting yaba tablets was stored in the house of the present petitioner. Based on the information, investigating team went to the place of the occurrence and apprehended the accused Mofajjal Hoque and after spot interrogation it was learned that Moffajjal Hoque was addicted to drugs and he has stated that the present petitioner was selling yaba tablets and a huge quantity of yaba tablets was stored in the petitioner’s brother-in-laws house. The petitioner was then apprehended and the petitioner along with the investigation team proceeded to his brother-in-law’s house and yaba tablets which were concealed under the bed were recovered from the house of the present petitioner’s brother-in-law.

9. It is submitted that as the tablets were recovered from the petitioner’s house, conscious position cannot be attributed to the present petitioner.

10. I have perused the scanned copies of the LCR.

11. Charge sheet has been laid against the present petitioner. At this juncture the merits of the case relating to conscious position cannot be considered. This

Court is not seized of the matter like that of an appeal. The decision relied upon by the petitioner is not applicable to this case as the appellant Ram Singh was acquitted from offence under the NDPS Act at the stage of appeal and after considering the merits of the case.

12. In this case, trial has commenced and six witnesses out of fourteen witnesses have already been examined and charges were framed on 02.05.2023. This is not a case where the trial has been procrastinating. It appears to be a case where the trial has progressed at a regular pace. This is not a case where trial is dragging with a leaden feet.

13. It has to be borne that the charges have been laid against the petitioner in a case relating to offence under Section 22(c)/27 of the NDPS Act. The rigour of Section 37 of the NDPS Act, acts as an embargo. At this juncture it cannot be said that the fundamental right of the petitioner under Section 21 of the Constitution of India has been curtailed.

In view of my foregoing discussions, petition with prayer for bail is rejected at this stage.

JUDGE

Comparing Assistant