

GAHC010231622022



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

Case No. : Bail Appln./3116/2022

NITISH KUMAR @ NITESH KUMAR AND ANR
S/O- LT. MAHESH RAY, R/O- VILL- TARIYANI, P.O. BISHAMBHARPUR, P.S.
SHEOHAR, DIST.- SHEOHAR, BIHAR

2: SUJIT KUMAR
S/O- SRI NABA KUMAR RAY
R/O- SHEOPUR
P.S. MATIHARI
DIST.- MOTIHAR

VERSUS

THE STATE OF ASSAM
REP. BY P.P., ASSAM

Advocate for the Petitioner : MR. N N B CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 16.02.2023

Heard Mr. N.N.B. Choudhury, learned counsel for the petitioners.
Also heard Mr. M.P. Goswami, the learned Addl. Public Prosecutor for the State.

2. The petitioners, namely, Nitish Kumar @ Nitesh Kumar and Sujit Kumar, who were arrested on 21.07.2022 in connection with Guwahati GRPS Case No. 102/2022, under sections 17(c)/29 of the NDPS Act, 1985 are seeking regular bail under section 439 IPC.

3. The learned counsel for the petitioners has submitted that the petitioners are in custody for last 224 days and there is no chance of an early trial. It is further submitted that as per the seizure list dated 21.07.2022, suspected opium weighing about 1 kg. each was allegedly recovered from the petitioners. However, by clubbing the said seizure with separate seizure made from two other persons, the prosecution is making an attempt to convert the case from intermediate quantity to commercial quantity.

4. In support of his submissions for bail, the learned counsel for the petitioners has placed reliance on the following cases, viz., (i) *M. Ravindran v. Directorate of Revenue Intelligence*, 2020 SCC OnLine SC 867, (ii) *Hitendra Vishnu Thakur v. State of Maharashtra*, (1994) 4 SCC 602, and (iii) *Vijaysinh Chandubha Jadeja v. State of Gujarat*, (2011) 1 SCC 609.

5. The learned Addl. P.P. has opposed the prayer for bail.

6. The scanned copy of the case record and case diary, which was called for from the learned trial Court has been perused. At the outset, it may be stated that there are sufficient incriminating materials in the charge-sheet against the petitioners of being intercepted while travelling in train with two other co-passengers and total suspected opium weighing 10 kg. was recovered from them, out of which the petitioners were found in possession of 1 kg. suspected contraband each i.e. 2 kg. contraband was recovered from them. It

may be mentioned that 2.5 kg. is the notified commercial quantity in respect of opium.

7. The scanned copy of the order-sheet reveals that charge-sheet was submitted on 22.12.2022, which is 153rd day from the date of remand and therefore, in the considered opinion of the Court, the petitioners would not be entitled to bail as the four passengers were travelling in one group and were travelling from same station to same destination. The records reveal that the FSL report indicates that the seized sample was opium. Thus, merely because the quantity of contraband has been split-up amongst the four passengers, including the petitioners, it is not an acceptable submission that the petitioners were not carrying commercial quantity of contraband. In terms of the provision of Sub-Section (4) of Section 36A of the NDPS Act, 1985, the time for completing investigation is 180 days. The said provision is quoted below:-

“36A. Offences triable by Special Courts.- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

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(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days."

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days."

8. Coming to the cases cited by the learned counsel for the petitioners is concerned, at this stage of consideration of bail, the Court ought not to conduct a mini trial by examining the evidence that has been presented

along with the charge-sheet to find out if it is a case of acquittal, but such an exercise is to be left for the trial Court.

9. The said cases cited by the learned counsel for the petitioners has received due consideration. In the said context, the Court finds that 2.5 kg. of opium is the notified commercial quantity. Therefore, with the recovery of 10 kg. of opium from the petitioners and their other two co-passengers travelling together from same place and for the same destination, they were found transporting 4 (four) times more than the minimum notified commercial quantity of opium. In cases registered for dealing and transporting commercial quantity of opium, the Court is to record its satisfaction as required under Section 37 of the said Act. Thus, as commercial quantity of opium was seized from the conscious possession of the petitioners and two other co-passengers, they are *prima facie* shown by the I.O. to be a part of the same conspiracy. The petitioners are both residents of Bihar and therefore, in light of the punishment prescribed, the Court is unable to record its satisfaction that if granted bail, the petitioners would appear and cooperate with the trial. The Court also finds no material in the case diary to suggest that the petitioners are not guilty of the offence. Moreover, as the petitioners were transporting contraband drugs by splitting the quantity amongst them, the Court is unable to record its satisfaction that if released on bail, the petitioners would not commit similar offence again.

10. It would also be relevant to quote the provision of Section 436A Cr.P.C., which is as follows:-

“436A. Maximum period for which an under trial prisoner can be detained.- Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the

punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation.—In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded."

11. It would also be appropriate to refer to the decision of the Supreme Court of India in the case of *Satender Kumar Antil v. Central Bureau of Investigation*, AIR 2022 SC 3386, wherein it is provided that "*Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.*"

12. In the present case, the petitioners are charged of committing offence punishable under Sections 17(c) of the NDPS Act, 1985, where the punishment is not less than 10 years but which may extend to 20 years and with fine which may extend to Rupees One lakh. The petitioners are also charged of committing offence punishable under Section 29 of the NDPS Act, 1985, for which punishment same as one prescribed in concerned section, which would be punishment is not less than 10 years but which may extend to 20 years and with fine which may extend to Rupees One lakh. Therefore,

following the ratio laid down in the case of *Satender Kumar Antil (supra)*, as well as the provision of Section 436A Cr.P.C., the petitioners having been incarcerated for a period of 224 days, have not become entitled to be released on bail.

13. This application for bail is rejected.

14. Nothing contained in this order shall prejudice any side during trial.

15. The Registry shall not issue any certified/uncertified copy of any part of the scanned copy of the record received from the learned trial Court.

JUDGE

Comparing Assistant