

GAHC010233332022



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

Case No. : Bail Appln./3075/2022

BAPPON GOSH @ BAPPAN GHOSH
S/O- SRI. GOPAL GHOSH, R/O- VILL- BHAGIYAPUR, P.S. DHORMANAGAR,
DIST.- NORTH TRIPURA

VERSUS

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

Advocate for the Petitioner : MR. B CHOWDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

ORDER

Date : 02-01-2023

Heard Mr. B. Chaudhury, learned counsel for the accused and also heard Ms. S.H. Borah, learned Additional Public Prosecutor for the State respondent.

2. This application under Section 439 Cr.P.C. is preferred by accused Bappon Gosh @ Bappon Ghosh, who has been languishing in jail hajot, in

connection with **Special Case No.108 of 2021**, arising out of **Patharkandi P.S. Case No. 670 of 2021**, under **Section 20(c)/29 of NDPS Act**, pending before the court of learned Special Judge, Karimganj, since 05.11.2021, for grant of bail.

3. The said case has been registered on the basis of an FIR lodged by S.I. Jatindra Singha of Patharkandi Police Station, on 05.11.2021, to the effect that on the same day, acting on a tip off, he had intercepted three vehicles, bearing registration No. (i) TR01 BC 0229(Alto 800) (ii) TR02 10315 (Alto Ix 3) (iii) TR05 A 0703, while the same were being parked near Hotel Hanuman and also apprehended five persons, namely Bidhan Paul, Anup Nag, Bapon Gosh, Krishan Devberma while they were loitering in front of the Hotel Hanuman suspiciously, and recovered 10 bundles of suspected Ganja from two vehicles, six bundles weighing 41.828 kg from vehicle No. TR01 BC 0229 (Alto 800), and 4 bundles, weighing 17.144 kg, from vehicle No. TR02 10315 (Alto Ix 3) and seized the same preparing seizure list in presence of witnesses.

4. Mr. B. Chaudhury, the learned counsel for the accused submits that the case has already been charge sheeted and the accused has been charged under Section 20(c)/29 of NDPS Act, along with other co-accused, and the accused pleaded not guilty to the charges. Mr. Chaudhury further submits that the accused has been languishing in jail hazoot since 05.11.2021, for last 410 days and that nothing has been recovered from his conscious possession and from his vehicle and that except the statement of the co-accused there is no material against the accused and that he is ready to face trial and that out of seven witnesses cited in the charge sheet, three have already been examined and they failed to reveal complicity of the accused with the offence charged and he is innocent and therefore, it is contended to allow the petition.

5. Per contra, Ms. S.H. Borah, learned Additional Public Prosecutor has vehemently opposed the petition and submits that there is material to show complicity of the accused with the offence alleged. Ms. Borah further submits that though nothing has been recovered from the possession of the accused, yet, there are materials to show that the consignment of seized Ganja was recovered from the joint conscious possession of the accused persons who were travelling together in three vehicles. Ms. Borah has referred following three case laws in support of her submission of conscious possession:-

- (i) Madanlal and Another vs. State of H.P.** reported in **(2003) 7 SCC 465;**
- (ii) Satpal Singh vs. State of Punjab,** reported in **(2018) 13 SCC 813,**
- (iii) Union of India vs. Ratan Malik** reported in **(2009) 2 SCC 624**
- (iv) Union of India (NCB) vs. Md. Nawaz Khan,** reported in **(2021) 10 SCC 100**

Ms. Borah further submits that the quantity of Ganja, recovered and seized, is of commercial quantity (58.972 kg), and the embargo under section 37 of the NDPS Act, will be applicable here and the accused has failed to satisfy the two requirements of the said section, and therefore, it is contended to dismiss this petition.

6. Having heard the submission of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record and also perused the scanned copy of the record received from the learned court below.

7. There is no dispute that the accused was arrested on 05.11.2021, and

since then he has been languishing in jail hajot for more than 410 days. But, Hon'ble Supreme Court, in the case of **NCB vs. Mohit Agarwal**, reported in **[2022] 0 Supreme (SC) 619**, has made it clear that the length of period of his custody or the fact that the charge sheet has been filed and the trial has commenced are by themselves are not consideration that can be treated as persuasive ground for granting relief to the accused under section 37 of the NDPS Act.

8. It is also not in dispute that (58.972 kg) of Ganja was recovered from two vehicles, bearing registration No. TR01 BC 0229 (Alto 800), and TR02 10315 (Alto Ix 3) of the co-accused. The present accused was in the vehicle No. TR05 A 0703 (Swift Dezire), and admittedly, nothing was recovered from his vehicle. Mr. B. Chaudhury, the learned counsel for the accused has rightly pointed this out during his argument. But, the learned Addl. P.P. has controverted the submission of Mr. Chaudhury. According to her, though nothing has been recovered from the vehicle of present accused, yet, all the accused have travelled together in three vehicles, and as such the present accused is also accountable for the recovery of Ganja in two other vehicles and that this is an organized crime.

9. The rival submissions of learned Advocates of both sides received due consideration of this court. Also, I have carefully gone into the case laws, referred by learned Addl. P.P. In the case of **Rattan Malik (supra)** Hon'ble Supreme Court in paragraph No. 16, has held that:-

“Merely because, according to the Ld. Judge, nothing was found from the possession of the respondent, it could not be said at this stage that the respondent was not guilty of the offences for which he had been charged and convicted. We find no substance in the argument of learned counsel for the respondent that the observation of the learned Judge to the effect that

"nothing has been found from his possession" by itself shows application of mind by the Ld. Judge tantamounting to "satisfaction" within the meaning of the said provision. It seems that the provisions of the **NDPS Act** and more particularly **Section 37** were not brought to the notice of the learned Judge."

10. In the case of **Madanlal** (supra) Hon'ble Supreme Court has held that:-

19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record is that all the accused persons were traveling in a vehicle and as noted by the Trial Court they were known to each other and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

20. **Section 20(b)** makes possession of contraband articles an offence. **Section 20** appears in chapter IV of the Act which relates to offence for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

21. It is highlighted that unless the possession was coupled with requisite mental element, i.e. conscious possession and not mere custody without awareness of the nature of such possession, **Section 20** is not attracted.

22. The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in **Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors.** (AIR 1980 SC 52), to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

23. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

24. As noted in **Gunwantlal v. The State of M.P.** (AIR 1972 SC 1756) 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 whom physical possession is given holds it subject to that power or control.

25. The word 'possession' means the legal right to possession (See **Health v. Drown** (1972) (2) All ER 561 (HL)). In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See **Sullivan v. Earl of Caithness** (1976 (1) All ER 844 (QBD)).

26. Once 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.

27. In the factual scenario of the present case not only possession but conscious possession has been established. It has not been shown by the accused-appellants that the possession was not conscious in the logical background of **Sections 35** and **54** of the Act.

28. In fact the evidence clearly establishes that they knew about transportation of charas, and each had a role in the transportation and possession with conscious knowledge of what they are doing. The accused-appellant Manjit Singh does not stand on a different footing merely because he was a driver of the vehicle. The logic applicable to other accused-appellants also applies to Manjit Singh.

29. Therefore, the presumption available by application of logic flowing from **Sections 35** and **54** of the Act clearly applies to the facts of the present case. The judgments of the Trial Court and the High Court suffer from no infirmity to warrant interference. The appeals deserve dismissal, which we direct."

11. In the case of **Union of India through Narcotic Control Bureau, Lucknow vs. Md. Nawas Khan** reported in **[2021]0 Supreme (SC) 508**, Hon'ble Supreme Court has held that:-

"25. In line with the decision of this Court in Rattan Mallik (supra), we are of the view that a finding of the absence of possession of the contraband on the person of the respondent by the High Court in the impugned order does not absolve it of the level of scrutiny required under **Section 37(1)(b)(ii) of the NDPS Act."**

12. Bearing these principles in mind, while the facts and circumstances on the record are examined, this court is unable to record concurrence with the submission of learned counsel for the accused that absence of possession of contraband substance will absolve present accused from the of the level of scrutiny, required under section 37(1)(b)(ii) of NDPS Act, as held by Hon'ble Supreme Court in the case of **Ratan Mallik** (supra). Instead, I find sufficient force in the submission of learned Addl. P.P. in this regard, and I record concurrence with the same.

13. There is also no dispute that the consignment of Ganja, so recovered and seized from the possession of the co-accused is of commercial quantity. And as such the embargo under section 37 of the NDPS Act will be applicable herein this case. Though Mr. Chaudhury, the learned counsel for the accused, referring to the evidence of the three prosecution witnesses, examined till date, submitted that the same are not at all sufficient to show complicity of the accused with the offence charged, yet, the same left this court unimpressed. This court cannot evaluate the evidence/materials on record to find out the guilt of the accused. In the case of **Mohit Agarwal** (supra) Hon'ble Supreme Court has explained the same in paragraph No. 15 as under:-

“15. We may clarify that at the stage of examining an application for bail in the context of the Section 37 of the Act, the Court is not required to record a finding that the accused person is not guilty. The Court is also not expected to weigh the evidence for arriving at a finding as to whether the accused has committed an offence under the NDPS Act or not. The entire exercise that the Court is expected to undertake at this stage is for the limited purpose of releasing him on bail. Thus, the focus is on the availability of reasonable grounds for believing that the accused is not guilty of the offences that he has been charged with and he is unlikely to commit an offence under the Act while on bail.”

14. While keeping the aforesaid principles in mind, an exercise is carried out, to find out the availability of reasonable ground for believing that the accused is not guilty of the offences that he has been charged with, by examining the materials/evidence on the record of the learned court below, for the limited purpose of releasing him on bail, and to ascertain that he is unlikely to commit an offence under the Act while on bail, this Court is unable to derive its satisfaction that there exist any reasonable ground to show that the accused is not guilty of the offence and that he is unlikely to commit such offence while

on bail. Apart from statement of co-accused and his own statement, there is recovery and seizure of (58.972 kg) of Ganja from two vehicles, bearing registration No. TR01 BC 0229 (Alto 800), and TR02 10315 (Alto Ix 3) of the co-accused, and other facts and circumstances on the record clearly indicates complicity of the present accused with the offence charged. Under the above factual scenario, this court is left unimpressed by the submission of Mr. B. Chaudhury, the learned counsel for the accused that the accused is innocent.

15. In view of the above, and also in view of the embargo under Section 37 of the NDPS Act, this Court is of the considered view that it is not a fit case where the privilege of bail can be extended to the accused. It well settled by Hon'ble Supreme Court in the case of **Mohit Agarwal** (supra), that liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

16. Accordingly, the instant petition stands dismissed. However, the learned court below is directed to expedite the trial and complete the same at the earliest possible time, without being influenced by any of the observation made herein above, as the same is made only for the purpose of disposing of this bail application, not on merit of the case, and if necessary, recourse has to be taken to the provision of section 309(1) Cr.P.C.

JUDGE

Comparing Assistant