

GAHC010252762022



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

Case No. : Bail Appln./3431/2022

SATYENDAR ROY
S/O RAM CHANDRA RAY
12 PTR SEEDING, SHALIMAR COAL DEPOT, HAORA (M. CORP.), HOWRA,
WEST BENGAL-711102

VERSUS

THE UNION OF INDIA
REP. BY THE NCB, GUWAHATI, ASSAM

Advocate for the Petitioner : MR. N ALAM R K

Advocate for the Respondent : SC, NCB

BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY

JUDGMENT

Date : 01-03-2023

Heard Mr. A. Rahman, learned counsel for the accused-petitioner and Ms. P. Das, learned counsel for the respondent Narcotics Control Bureau [NCB].

2. By this application under Section 439, Code of Criminal Procedure, 1973 ['CrPC' or 'the Code', for short], the accused-petitioner viz. Satyendar Ray has sought for his release on bail in connection with N.D.P.S. Case no. 36/2020, arising out of NCB Crime Case no. 18/2019, presently pending before the Court of learned Additional Sessions Judge No. 5, Kamrup [Metro], Guwahati ['the Special Court', for short], registered under Sections 8[c]/Section 20[b][ii][C] and Section 29 of the Narcotic Drugs and Psychotropic Substances [NDPS] Act, 1985. It may be mentioned that the petitioner's earlier bail application, B.A. no. 945/2021, was rejected by an order dated 24.06.2021.

3. The NCB Crime Case no. 18/2019 came to be registered in the following fact situations and the prosecution case, in brief, is as under :-

3.1. A specific information at about 15-00 hours on 07.12.2019 was received by the office of the Narcotics Control Bureau [NCB], Zonal Office, Guwahati to the effect that a huge quantity of **Ganja** was being transported in a truck bearing registration no. WB-11/D-7813 ['the subject-vehicle', for short] from Agartala to Guwahati by the accused-petitioner and the subject-vehicle would arrive at a place near M/s Health City Hospital, Khanapara, National Highway no. 37, Guwahati at about 05-00 hours on 08.12.2019. On receipt of the information, the same was brought to the notice of the higher authorities in the Narcotics Control Bureau [NCB], Zonal Office, Guwahati and an Office Order was issued, whereby, a team of NCB personnel was formed to take necessary action. The team of NCB had, thereafter, reached near M/s Health City Hospital, Khanapara, National Highway no. 37, Guwahati at around 02-50 hours p.m. on 08.12.2019. The presence of two independent witnesses was secured after getting consent from them to carry out the proposed search. When the NCB team along with the two independent witnesses waited near M/s Health City Hospital, Khanapara, National Highway no. 37, Guwahati, the subject-vehicle arrived at that place at around 03-45 hours on 08.12.2019. Thereafter, the NCB team intercepted the subject-vehicle and the team found one occupant as the driver i.e. the accused-petitioner inside the subject-vehicle. The subject-vehicle was searched by the NCB team in presence of the accused-petitioner and the two independent witnesses. When searched, it was found that there was a cavity inside the driver's cabin of the subject-vehicle sealed with steel sheets packed with nut bolts. When the said cavity was opened in presence of the accused-petitioner and the independent witnesses by the NCB team, 15 packets were found inside the cavity. On cutting open the packets, dried flowering tops believed to be **Ganja** were found. A small quantity of the dried flowering top was taken from each of the 15 packets and tested separately with the field drug detection kit and the tests gave positive result for **Ganja**. When weighed, the contraband [**Ganja**] found to be 199.450 Kgs in weight. Samples were drawn from those 15 packets. An inventory/search-cum-seizure memo and a panchnama of seized goods were prepared. The samples were handed over to the Godown In-Charge of the NCB

after obtaining receipts.

3.2. The accused-petitioner was arrested at about 16-00 hours on 08.12.2019. After arrest, the accused-petitioner was produced before the Court of learned Chief Judicial Magistrate, Kamrup [Metro], Guwahati on 09.12.2019 and on being so produced, he was remanded to custody on 09.12.2019. Since 09.12.2019, the accused-petitioner is in custody.

3.3. Samples of suspected contraband, 15 in nos., were sent to the Forensic Science Laboratory [FSL], Assam at Guwahati on 09.12.2019 for chemical analysis. The FSL Report of the chemical analysis in respect of the samples was received from the FSL on 29.05.2020. The FSL Report has indicated that the chemical analysis tests gave positive result for **Ganja/cannabis**.

3.4. The case, NCB Crime Case no. 18/2019 which was registered under Section 8[c] of the Narcotic Drugs and Psychotropic Substances [NDPS] Act, 1985 [‘the NDPS Act, 1985’, for short] is stated to be punishable under Sections 20[b][ii][C]/29 of the NDPS Act, 1985. After completion of investigation, the respondent NCB had submitted the Offence Report under Section 36A[1][d] of the NDPS Act, 1985 on 03.06.2020. After submission of the Offence Report, the case has been registered as N.D.P.S. Case no. 36/2020 before the Court of learned Special Judge, Kamrup [Metro], Guwahati. The Offence Report was submitted against three accused persons viz. [i] Sri Satyendar Ray i.e. the accused-petitioner; [ii] Sri Bipin Ray; and [iii] Sri Rupak Das. In the course of investigation, the other two accused persons were found absconding. The case is presently at the stage of production/consideration of charge.

4. Mr. Rahman, learned counsel for the accused-petitioner has submitted that the accused-petitioner is in custody since 09.12.2019. After submission of the Offence Report also as far back as on 03.06.2020, the other two absconding accused persons have not appeared in the ensuing trial till date. Projecting so, Mr. Rahman has submitted that the accused-petitioner was only a driver of the subject-vehicle wherefrom the contraband was allegedly recovered. As the accused-petitioner was only a driver, who had only carried the contraband purportedly at the instruction of the other two absconding accused-persons, without knowing

the actual contents of the packets, the prayer for release of the accused-petitioner on bail may be considered on the premises that the main two culprits of the crime are still at large and there is likelihood of a protracted trial. He has further submitted that considering the length of detention of the accused-petitioner, the Court should consider the aspect of bail vis-à-vis the personal liberty of the accused-petitioner.

4.1. The learned counsel appearing for the respondent NCB has extensively referred to the materials on record, to submit that there is no circumstance to hold that the accused-petitioner not guilty of the offences for which he has been charge-sheeted under the NDPS Act, 1985.

5. The scanned copies of case records of N.D.P.S. Case no. 36/2020, was called for, from the learned trial court and the same have been received.

6. I have duly considered the submissions of the learned counsel for the parties and have also perused the materials brought on record including that of N.D.P.S. Case no. 36/2020, the scanned copies of which were called for.

7. It is settled law that the powers of this Court to grant bail under Section 439, CrPC are subject to the limitations contained in Section 37 of the NDPS Act, 1985 and the restrictions placed on the powers of the Court under Section 37, NDPS Act, 1985 are applicable to this Court also in the matter of granting bail.

8. For ready reference, Section 37 of the NDPS Act is quoted hereunder :-

37. Offences to be cognizable and non-bailable. - [1] Notwithstanding anything contained in the Code of Criminal Procedure, 1973 [2 of 1974],--

[a] every offence punishable under this Act shall be cognizable;

[b] no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

[i] the Public Prosecutor has been given an opportunity to oppose the application for such release, and

[ii] where the Public Prosecutor opposes the application, the court is satisfied 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.

[2] The limitations on granting of bail specified in clause [b] of sub-section [1] are in addition to the limitations under the Code of Criminal Procedure, 1973 [2 of 1974] or any other law for the time being in force on granting of bail.

9. Section 37 of the NDPS Act, 1985 starts with a non-obstante clause. Keeping the non-obstante clause in mind, a reading of sub-section [2] of Section 37 of the NDPS Act, 1985 makes it clear that the power to grant bail to a person accused of having committed an offence either under Section 19 or Section 24 or Section 27A and also offences involving commercial quantity under the NDPS Act, 1985 is not only subject to the limitations imposed under Section 439, CrPC, it is also subject to the restrictions placed by sub-clause [b] of sub-section [1] of Section 37 of the NDPS Act, 1985. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other two conditions viz. [i] the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and [ii] that he is not likely to commit any offence while on bail, have to be satisfied. In other words, these limitations are in addition to those prescribed under the Code or any other law in force on the grant of bail. The operative part of Section 37, NDPS Act, 1985 is in the negative form. Such stringent restrictions have been put on the discretion of the Court for considering application for release of a person accused of offences prescribed therein by the Legislature consciously in view of the seriousness of the offences. The conditions mentioned in Section 37 of the NDPS Act, 1985 are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on 'reasonable grounds'.

10. In **Satpal Singh vs. State of Punjab**, reported in [2018] 13 SCC 813, the restrictions placed on the discretion to be exercised by the Court while considering an application for bail, in the

context of Section 37, NDPS Act, 1985 have been reiterated. It has been observed that before allowing a bail application, the Court must be satisfied that there are reasonable grounds for believing that the person is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. Materials on record are to be seen and the antecedents of the accused is to be examined to enter such a satisfaction. The Court has held that these limitations are in addition to those prescribed under the Code or any other law in force on the grant of bail.

11. The expression 'reasonable grounds' means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence [**Collector of Customs, New Delhi vs. Ahmadalieva Nodira**, [2004] 3 SCC 579 and **State of Kerala, etc. vs. Rajesh etc.**, [2020] 12 SCC 122]. The Court while considering the application for bail with reference to Section 37 of the NDPS Act, 1985 is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and to record its satisfaction about the existence of such grounds. Thus, recording of satisfaction on both the aspects, quoted above, is *sine qua non* for granting of bail under the NDPS Act.

12. In **Criminal Appeal nos. 1001-1002/2022 [Narcotics Control Bureau vs. Mohit Aggarwal]**, decided on 19.07.2022, the Hon'ble Supreme Court of India after considering the decisions in **Ahmadalieva Nodira** [supra] and **Rajesh** [supra], has summed up the legal position regarding the expression 'reasonable grounds' in the following words :-

“To sum up, the expression 'reasonable grounds' used in clause [b] of sub-section [1] of Section 37 would mean credible, plausible and grounds for the Court to believe that the accused person is not guilty of the alleged offence. For arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Dove-tailed with

the aforesaid satisfaction is an additional consideration that the accused person is unlikely to commit any offence while on bail.”

13. The Hon'ble Supreme Court in **Mohit Aggarwal** [supra] has also clarified about the manner of consideration of an application for bail. In the context of Section 37 of the NDPS Act, 1985, it has been clarified therein to the effect that at the stage of examining an application for bail involving commercial quantity of a contraband, the Court is not required to record a finding that the accused person is not guilty. At the time of such consideration, 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, 1985 or not. The entire exercise that the Court is expected to undertake at the stage is for the limited purpose of releasing the accused-petitioner 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 NDPS Act, 1985 while on bail.

14. Mention of **Ganja** is found in Entry no. 55 of the Table appended to the NDPS Act, 1985 in terms of sub-clause vii[a] and xxiii[a] of Section 2 of the NDPS Act, 1985. As per Entry no. 55, a quantity of **Ganja** weighing 20 Kgs or more falls under commercial quantity. In the case in hand, the chemical analysis gave positive tests for **Ganja** and the quantity of **Ganja** seized is 199.450 Kgs. Viewed in relation to the total quantity of **Ganja** seized in the case in hand, it is **prima facie** evident that the quantity of the contraband [**Ganja**] seized is commercial quantity.

15. In **Md. Sahabuddin and another vs. State of Assam**, reported in [2012] 13 SCC 491, the two appellants were driver and cleaner of a truck which was intercepted and wherein upon search, large number of cartons of cough syrups were found concealed along with household articles. For transporting such huge quantity of pharmaceutical products, the driver of the truck could not produce any valid documents. In view of the conduct of the appellants in having huge quantity of cough syrup without valid documents, it was held that when the appellants were not in a position to explain as to whom supply was meant either for distribution or for any licensed dealer dealing with pharmaceutical products and in the absence of any valid explanation for effecting the transportation of such huge quantity of

cough syrups which contained narcotic substance of Codeine Phosphate beyond the prescribed limit, the application for bail cannot be considered.

16. The concepts of 'possession' and 'conscious possession' have come to be deliberated in **Mohan Lal vs. State of Rajasthan**, reported in [2015] 6 SCC 222. It has been observed therein that whether there was conscious possession has to be determined with reference to the factual backdrop. The expression 'possession' is a polymorphous term which assumes different colours in different contexts and it may carry different meanings in contextually different backgrounds. It is, therefore, impossible to work out a completely logical and precise definition of 'possession' uniformly applicable to all situations in the context of all statutes. Ordinarily, the word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended. Possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the possession to whom physical possession is given holds it subject to that power or control. 'Possession' is meant to be the legal right to possess. Thus, the decision has observed that the term 'possession' would mean physical possession with animus; custody over the prohibited substances with animus; exercise of dominion and control as a result of concealment; or personal knowledge as to the existence of the contraband and the intention based on this knowledge.

17. On perusal of the case records, it is found that the accused-petitioner was the only occupant in the subject-vehicle when the same was intercepted and he was driving the same. The contraband [**Ganja**] weighing 199.450 Kgs were recovered from a special cavity made inside the driver's cabin of the subject-vehicle. The materials in the case record **prima facie** indicate compliance of procedure prescribed in Section 42, Section 52[a] and Section 57 of the NDPS Act, 1985. Section 54 of the NDPS Act, 1985 raises presumption of illicit articles. Section 54 has **inter alia** laid down that in trials under the NDPS Act, 1985, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under the NDPS Act, 1985 in respect of any narcotic drug or psychotropic substance or controlled substance for the possession of which he fails to account satisfactorily. The afore-said provision in Section 54 of the NDPS Act, 1985 creates a legal fiction and presumes

the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Section 35 of the NDPS Act, 1985 contains the statutory provision which has given recognition to culpable mental state.

18. The matter of possession is *inter alia* to be considered in the fact situation obtaining in the particular case. The fact of possession in the case in hand is to be considered in the background facts that [a] the accused-petitioner was the only occupant in the capacity of the driver of the subject-vehicle [truck], [b] there was a special cavity built over the driver's cabin of the subject-vehicle [truck] sealed with steel sheets packed with nut bolts; [c] on search, 15 [fifteen] packets were found inside the cavity and on cutting open the packets, dried flowering tops believed to **Ganja** were found and on chemical analysis, the Forensic Science Laboratory [FSL] had affirmed the seized contraband substances to be **Ganja**; and [d] the quantity of contraband [**Ganja**] found in the cavity built inside the subject-vehicle is of commercial quantity. When the afore-mentioned circumstances are considered in the context of Section 37 of the NDPS Act, 1985, this Court is not persuaded to reach a view that the accused-petitioner was not in possession of the commercial quantity of contraband [**Ganja**] and there are no reasonable grounds for believing that the accused-petitioner is not guilty of the offences under Section 8[c] r/w Section 20[b][ii][C] and Section 29 of the NDPS Act, 1985.

19. Whether the contraband substances [**Ganja**] which is a commercial quantity, was kept inside the special cavity made inside the subject-vehicle, driven only by the accused-petitioner, was with his conscious knowledge or otherwise will be determined in the course of the trial on the evidence to be led by the parties. It is noted that the trial is yet to reach the stage where evidence will be adduced. Once possession is held to be established, the person who claims that it was not a conscious possession has to establish it, because now he came to be in possession is within his special knowledge.

20. Since prolonged period of the accused-petitioners' custody has been urged as a prime factor to be considered for his release on bail, it is appropriate to refer to few of the decisions of the Hon'ble Supreme Court of India rendered on the aspect of period of custody. If an

accused person is found guilty of the offence under Section 20(b)(ii)(C) of the NDPS Act, 1985, such an accused person is liable to rigorous imprisonment for a term which shall not be less than 10 [ten] years but which may extend to 20 [twenty] years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees.

In **Gobarbhai Naranbhai Singala vs. State of Gujarat**; [2008] 3 SCC 775, it is observed that the period of incarceration by itself would not entitle the accused to be enlarged on bail. It has been observed in **Ash Mohammad vs. Shiv Raj Singh @ Lalla Babu and another**; [2012] 9 SCC 446, that though the period of custody is a relevant factor, the same has to be weighed simultaneously with the totality of the circumstances and the criminal antecedents and these factors are to be weighed in the scale of collective cry and desire and societal concern has to be kept in view in juxtaposition to individual liberty. In **Brijmani Devi vs. Pappu Kumar**; [2022] 4 SCC 497, the Hon'ble Supreme Court of India has observed that liberty of an individual is an invaluable right but at the same time while considering an application for bail, the Courts cannot lose sight of the serious nature of accusations against an accused and the facts that have a bearing in the case, particularly when the accusations may not be false, frivolous or vexatious in nature but are supported by adequate materials brought on record so as to enable a Court to arrive at a prima facie satisfaction. It has been observed in **Panchanan Mishra vs. Digambar Mishra**; [2005] 3 SCC 143, that once a person is released on bail in criminal cases where the punishment is quite stringent and deterrent, the accused in order to get away from the clutches of the same indulged in various activities like tampering with the prosecution witnesses, threatening the witnesses and also create problems of law and order situation. The prime consideration is to protect a free and fair trial and to ensure that justice is done. This may happen only if the witnesses are able to depose without fear, freely and truthfully.

21. The instant application is considered on the basis of the materials available in the case records of N.D.P.S. Case no. 36/2020 and having gone through the materials, this Court has not found any good and sufficient ground to persuade itself to hold that there are reasonable grounds to reach a finding that the accused-petitioner is not guilty of the offences for which the Offence Report has been submitted. At the cost of repetition, it is mentioned that in an application for bail involving contraband of commercial quantity which brings in the limitations

prescribed in Section 37 of the NDPS Act, 1985, it is not the period of detention but the merits *qua* the twin conditions laid down in Section 37 of the NDPS Act, 1985 which are required to be considered. It has also been held by the three-judges Bench of the Hon'ble Supreme Court of India in **Mohit Aggarwal** [supra] that the length of the period of custody of the accused person or the fact that the charge-sheet has been filed and the trial has commenced are by themselves not considerations that can be treated as persuasive grounds for granting relief to an accused person under Section 37 of the NDPS Act, 1985.

22. In view of the above discussion, this Court finds that the application is bereft of merits. Consequently, the same is dismissed.

23. From the case records, it has emerged that while the accused-petitioner is in custody since 09.12.2019 and the Offence Report was submitted on 03.06.2020 with the other two accused persons shown as absconders, the learned Special Court had observed in its order dated 16.09.2020 that the prosecution had failed to comply with the direction of the learned Special Court regarding the prospect of apprehending the remaining two absconding accused persons to decide about splitting up of the case or otherwise. It is expected that the learned Special Court would consider the said aspect considering the fact that the accused-petitioner is in custody for more than 4 [four] years till date with the prosecution side not able to apprise the learned Special Court about the prospect of apprehending the remaining two absconding accused persons while proceeding with the trial of N.D.P.S. Case no. 36/2020.

24. It is, also, made clear that the observations made above are only in respect of consideration of the present 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