

**HIGH COURT OF TRIPURA
AGARTALA
B.A. 13/2024**

1. Sri Bijoy Kr. Labor

son of Mohan Labor, aged 38 years, resident of village: Santapur,
P.O.Lahalial, Bihpuria, District- Lakhimpur, Assam.

2. Iddrish Ali

son of Joynal Abedin, aged 46 years, resident of Helapakhri, Baladmari,
Goalpara, Assam.

----Applicant(s)

Versus

The State of Tripura, represented by the Public Prosecutor (P.P.), Tripura

----Respondent(s)

For the Applicant (s) : Mr. Deba Sarmah, Advocate

For Respondent (s) : Mr. Raju Datta, P.P.

Date of hearing & delivery

of judgment & order : **12.04.2024**
& order

Whether fit for reporting : **Yes**

**HON'BLE MR. JUSTICE ARINDAM LODH
JUDGMENT & ORDER (ORAL)**

This is an application filed under Section 37 of the NDPS Act read with Section 439 Cr.P.C. for granting bail to the accused persons, namely, Bijoy Kumar Labor and Md. Iddrish Ali, who had been arrested on 22.01.2024 for allegedly committing offences punishable under Sections 8(c)/20(b)(ii) C/25/29/32 of the NDPS Act, 1985. The accused persons had been in custody for 60 days.

2. Shortly stated, the accused persons were driving a 10-wheeler container truck as driver and co-driver. The said container truck was originated from Udaipur, Gomati District, Tripura and was moving towards Assam. On the basis of a secret information, the vehicle was stopped at Churaibari Gate and was checked by the police personnel. There were many packets of various types of articles, and while checking 10 packets were found to be carrying contraband articles. The weight was taken and it was found that those packets were carrying 71.95 kgs. of dry ganjas (cannabis). On such recovery of contraband articles, police arrested both the accused

persons and seized those 10 packets containing dry ganjas. The accused persons had moved the jurisdictional Special Judge (NDPS) under Section 437 Cr.P.C. for releasing them on bail, but, such applications were refused. Thereafter, the accused persons had approached this court with the instant bail application.

3. With the aforesaid background of facts, I have heard Mr. Deba Sarmah, learned counsel for the accused persons and Mr. Raju Datta, learned PP appearing on behalf of the State-respondent.

4. At the very outset, Mr. Sarmah, learned counsel has canvassed that the accused persons are the drivers and it was not within their knowledge that out of several packets inside the containers, there were 10 packets containing contraband articles. According to the learned counsel for the accused persons, they were simply the drivers who were given the responsibility to drive the vehicle and carry the vehicle from Agartala to the place of its destination. Another fold of argument as advanced by Mr. Sarmah, learned counsel is that, though, it is true that the contraband articles were seized from the container truck which they were driving, but, those articles were not under their ‘conscious possession’. Mr. Sarmah, learned counsel has relied upon the decision of the Supreme Court rendered in *Union of India through Narcotics Control Bureau, Lucknow vs. Md. Nawaz Khan*, reported in (2021) 10 SCC 100 to establish the meaning of the expression “conscious possession”. Learned counsel appearing on behalf of the accused persons has emphasized that since the articles were not in conscious possession of the accused persons, they are entitled to be released on bail in consonance with the spirit of Section 37 of the NDPS Act.

5. On the other hand, Mr. Datta, learned PP appearing on behalf of respondent-State has strongly opposed the bail prayer made by the accused

persons. Mr. Datta, learned PP has submitted that since the contraband articles were found inside the container truck, it must be presumed that the drivers were in conscious possession of those seized articles as they were driving the vehicle. The second point of argument is that out of the said 10 packets containing contraband articles, only 5 packets were booked by a person to be delivered to the place of destination through a courier service company, namely, Delhivery Ltd. To say it otherwise, 5 packets were booked by the sender and another 5 packets were not booked by any person. Learned PP has also relied upon the judgment rendered in *Md. Nawaz Khan* (*supra*), particularly, paragraphs 28 and 30. Mr. Datta, learned PP has also placed into service a decision of the Supreme Court in *Union of India vs. Rattan Mallik alias Habul* reported in (2009) 2 SCC 624, paras 14 and 15.

6. Before I deal with the merits of the instant bail application and the submissions advanced by learned counsel appearing for the parties, I deem it necessary to find out the meaning of the expression “conscious possession” as dealt by the Supreme Court in *Md. Nawaz Khan* (*supra*).

7. In the case of *Madan lal vs. State of H.P.*, reported in (2003) 7 SCC 465, the Hon’ble Supreme Court at para 20 has observed that “*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.*”

Again, at para 23 of the case *supra*, the Supreme Court has defined the expression ‘possession’. It was observed thus [SCC.p.472 para 22],

“23. 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”.

Paragraphs 24, 25, 26 and 27 of the case *supra*, are also relevant to the context of the case, which read as under:

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

25. 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.

26. 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).

27. 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”.

Again the Supreme Court in *Md. Nawaz Khan (supra)*, at para 26, has defined the expression “conscious possession”, which reads as under:

“26. What amounts to “conscious possession” was also considered in *Dharampal Singh v. State of Punjab* [(2010) 9 SCC 608] , where it was held that the knowledge of possession of contraband has to be gleaned from the facts and circumstances of a case. The standard of conscious possession would be different in case of a public transport vehicle with several persons as opposed to a private vehicle with a few persons known to one another. In *Mohan Lal v. State of Rajasthan* [(2015) 6 SCC 222] , this Court also observed that the term “possession” could 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”.

8. If I recapitulate the facts in short, I find in the case in hand, there were several packets of different articles inside the 10-wheeler container truck. One courier company, namely, Delhivery Ltd., had booked 5 packets of contraband articles. While checking the container truck, another 5 packets were found carrying dry ganjas where the shipper's or sender's name was not disclosed.

9. Here Mr. Datta, learned PP has mostly harped upon to convince this court that those 5 un-booked packets were within the knowledge of the

accused persons and both the accused persons being the driver and co-driver of the vehicle were aware of the fact that the container truck which they were driving was carrying contraband articles, and thus they were in conscious possession. To fortify this submission, learned PP has relied upon the observation of the Supreme Court rendered in paragraphs 28 and 30 of *Md. Nawaz Khan* (*supra*), which reads thus: [SCC.p.113 para 28, 29,30]

“28. As regards the finding of the High Court regarding absence of recovery of the contraband from the possession of the respondent, we note that in *Union of India v. Rattan Mallik* [(2009) 2 SCC 624], a two-judge Bench of this Court cancelled the bail of an accused and reversed the finding of the High Court, which had held that as the contraband (heroin) was recovered from a specially made cavity above the cabin of a truck, no contraband was found in the ‘possession’ of the accused. The Court observed that merely making a finding on the possession of the contraband did not fulfil the parameters of Section 37(1)(b) and there was non-application of mind by the High Court.

29. ***

30. With regard to the statement under Section 67 of the NDPS Act, the High Court has placed abundant reliance on the inclusion of Mohd. Arif Khan’s name in place of the respondent’s name in the endorsement of translation on the statement of the respondent. In *Tofan Singh* [(2021) 4 SCC 1], a three judge Bench of this Court held that a statement under Section 67 of the NDPS Act is inadmissible. The ASG submitted that independent of the statement, there are valid reasons to deny bail on the basis of the material which has emerged at this stage”.

10. Having perused the aforesaid observation, it comes to light that the Hon’ble Supreme Court in *Md. Nawaz Khan* (*supra*), having taken into consideration of the fact that the contraband articles (herion) were found within the cavity of the cabin of the driver held that the drivers of the vehicle were in *conscious possession* and cancelled the bail of the accused persons.

11. If I re-appreciate the meaning of the expression “conscious possession” as enumerated in the preceding paragraphs, particularly, the observation of the Supreme Court in paragraph 26 in the case of *Md. Nawaz Khan* (*supra*), I find in the instant case that the Shipper’s name of those 5 packets is BIGSHIPTECHNO LOGIE B2BC having invoice No. 0341. In the delivery voucher, the recipient’s name was written as ‘Sanjoy Kumar Bhagat’. At this juncture, learned PP has submitted that the payment against the said shipment was made by one Sanjit Kumar Das through online. The commodity described is ‘Handicrafts’ having weight of 104.0 kgs. Out of

those 10 packets, in 5 packets contraband articles were found inside some bamboo buckets.

12. Learned counsel for the petitioner has tried to clarify this booking system. According to him, in one cartoon there may be several packets. In this case also in one cartoon, 2 packets were found. There were 5 cartoons and each cartoon was carrying 2 packets and altogether there were 10 packets, but, those packets were found in 2 cartoons and out of 10 packets, 5 packets were carrying dry ganjas.

13. However, without entering into the merits of those submission, it has come to light, according to learned PP, that out of 10 packets carrying contraband articles, 5 packets were being booked by BIGSHIPTECHNOLOGIE B2BC and payment was made by one Sanjit Kumar Das through UPI and the recipient was Sanjay Kumar Bhagat.

14. Now, the question to be determined is whether the accused persons were aware of the fact that those 10 packets were carrying contraband articles which were loaded inside the said 10-wheeler container truck.

15. From the facts enumerated here-in-above, I find that vehicle was a big 10-wheeler container truck and inside that vehicle several cartoons/packets were booked by the Senders. Out of those several packets, during checking, 10 packets were found carrying contraband articles and the shipper's name was mentioned against 5 (five) packets.

16. In the given facts and circumstances, in my opinion, I find sufficient reason to believe at this stage that the accused persons were not at all aware of the fact that out of those several packets, 10 packets were carrying contraband articles because the records as of now speak that they had/have no control over the types of articles being carried through that container truck. A driver has no role to select or identify the articles. Record reveals

that the drivers had ever any role to verify or select the articles to be carried in that container truck. Whatever the articles were booked in the truck/container, it is the responsibility of the drivers to simply carry and delivery the booked articles inside the container to the place of destination. Had it been the case that those packets were found in a cavity or in a place inside the cabin, then, there might be a presumption that the drivers were consciously carrying those contraband articles, and thus, they were in “conscious possession” of those articles.

17. At this juncture, I may profitably rely upon the observation of the Hon’ble Supreme Court at paragraph 14 of the case of *Rattan Mallick* (*supra*), which reads as under: [SCC.pp. 628,629 para 14]

“14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of ‘not guilty’. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail”.

18. On plain perusal of the above observation of the Supreme Court, I may hold that this is not the stage for this court to arrive at a finding that the accused persons “are guilty” of committing the offences. At this stage, this court has only to see as to whether there are reasonable grounds for believing *prima facie* that the accused persons are “not guilty” of the offence for which they had been arrested.

19. As I said earlier that considering the fact that those 10 packets carrying contraband articles were found alongwith other several packets/cartons booked by some courier company, according to me, there is reasonable ground to believe that the drivers might not aware of the fact that some packets inside the container truck were having contraband articles, and in this circumstance, at this stage, the accused persons may not be held

guilty of committing offence, they are charged with. Furthermore, it is also not demonstrated that the accused/applicants had any power or control over those seized contraband articles. It is the not case here that the accused persons being the drivers had played any role in booking those materials. Vide Order dated 08.04.2024, this court requested the learned PP to take instructions as to the aspect whether the accused/applicants loaded those contraband articles from a place other than their place of origin.

Learned PP has also informed that the person who made online payment for those packets carrying contraband articles (dry ganjas) has been arrested in the meantime.

20. For the reasons stated and discussed here-in-above, on both points of law and facts, I am inclined to release the accused persons on bail.

21. Accordingly, the accused persons shall be released on bail on furnishing bail bond of Rs. 50,000/- each with one surety each of the like amount to the satisfaction of the jurisdictional Special Judge (NDPS), Dharmanagar, North Tripura. However, both the accused persons shall comply with the following conditions:

- (i) Both the sureties shall be the residents of the State of Tripura;
- (ii) Both the accused persons shall report to the Churaibari PS once in every 2 months. Again the accused person, namely, Bijoy Kumar Labor shall appear before the Officer-in-Charge of Bihpuria PS once in a month, and the accused Md. Iddrish Ali shall report to the Officer-in-Charge of Goalpara PS, Assam, once in 2 months;
- (iii) Further, during the course of trial, the accused persons shall appear before the court of learned Special Judge (NDPS), Dharmanagar, North Tripura on each and every date. It is further made clear that during the calendar fixed for trial, the accused persons shall not leave the jurisdiction of learned Special Judge (NDPS), Dharmanagar, North Tripura;

22. The instant bail application stands allowed with the aforesaid terms and thus disposed.

JUDGE

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