

GAHC010222052023



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

Case No. : Bail Appln./3578/2023

ABUL KASHEM
S/O SRIMAT ALI
R/O VILL- SRIMANTAPUR
P.S. SONAMURA,
DIST. SEPHAIJALA, TRIPURA

VERSUS

THE STATE OF ASSAM
TO BE REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR. M A CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 29.01.2024

1) Heard Mr. A. Ahmed, learned counsel for the petitioner. Also heard Mr. B. B. Gogoi, learned Additional Public Prosecutor appearing for the State respondent.

2) This application under Section 439 of the Code of Criminal Procedure, 1973 has been filed by the petitioner, namely, Abul Kashem who has been detained behind the bars since 05.04.2023 (for the last 300 days) in connection with Bazaricherra P. S. Case No. 196/2022 under Section 20(b)(ii)(C)/25/29 of the NDPS Act, 1985 corresponding to Special (NDPS) Case No. 160/2022 pending before the Court of learned Special Judge, Karimganj under Section 20(b)(ii)(C)/25/29 of the NDPS Act, 1985.

3) The gist of accusation in this case is that on 11.11.2022 one Niranjana Das, S. I. of Police, lodged an FIR before the Officer-In-Charge of Bazaricherra Police Station, *inter-alia*, alleging that during routine Naka checking duty at Churaibari Watch Post at National Highway No. 8, one six wheeler goods carrier truck bearing registration number TR 01 B 1747 was intercepted and during the search of the said truck, 69 packets containing suspected Ganja (Cannabis) was recovered. The total weight of the recovered Ganja was 404 kgs. The driver and the helper of the said truck namely, Sujana Miah and Amdadul Haque were apprehended as they could not give any satisfactory explanation regarding the possession of the recovered contraband.

4) On receipt of the said FIR, Bazaricherra P. S. Case No. 196/2022 under Section 20(b)(ii)(C)/25/29 of the NDPS Act, 1985 was registered and investigation was initiated.

5) On 28.02.2023 a part charge-sheet was laid against the apprehended accused persons namely, Sujana Miah and Amdadul Haque under Section 20(b)(ii)(C)/25/29 of the NDPS Act, 1985 and thereafter, on 13.05.2023 a supplementary charge-sheet was laid against the present petitioner under Section 25/29 of the NDPS Act, 1985.

6) Mr. A. Ahmed, learned counsel for the petitioner has submitted that

though the court of learned Special Judge, Karimganj has framed charges under Section 20(b)(ii)(C)/25/29 of the NDPS Act, 1985 against the present petitioner along with other two charge-sheeted accused persons, however, there is no material on record to implicate the present petitioner under any of the provisions under which the charges were framed against him.

7) It is submitted by the learned counsel for the petitioner that the present petitioner is the owner of the seized truck and his truck was used by his driver and helper to transport poultry goods to Meghalaya and he had no knowledge that the said truck has been used for carrying the seized contraband.

8) It is also submitted by the learned counsel for the petitioner that he filed zimma application before the learned Sessions Judge, Karimganj who had directed the present petitioner to appear before the Investigating Officer for producing all the relevant documents before the Investigating Officer and on 05.04.2023 when the present petitioner appeared before the Investigating Officer along with documents, he was arrested in connection with this case and thereafter a supplementary charge-sheet was laid against him.

9) It is further submitted by learned counsel for the petitioner that neither the driver nor the helper of the seized truck has made any implications or any incriminating statement against the present petitioner.

10) It is also submitted by the learned counsel for the petitioner that in the supplementary charge-sheet which has been laid against the present petitioner, it is not clarified as to what incriminating material are available on the basis of which charge-sheet has been laid as it has only mentioned about one MVI report and the FSL report which in no way implicate the present petitioner in the present case.

11) Learned counsel for the petitioner has also submitted that to implicate

the present petitioner under Section 25 of the NDPS Act, 1985, it was incumbent upon the prosecution to show that the seized vehicle, of which the present petitioner is the owner, was used for carrying prohibited contraband with the knowledge of the present petitioner. However, there is nothing on record to show that the petitioner knew that his vehicle was used for carrying prohibited contraband.

12) Similarly, the learned counsel for the petitioner has also submitted that apart from the fact that the petitioner is the owner of the seized vehicle there is nothing on record to show that there was any abetment or any criminal conspiracy by the present petitioner with the other two co-accused so as to implicate him in this case. Hence, he has submitted that there are no materials on record to implicate the present petitioner under the provisions under which the charges are framed and therefore, there is reasonable ground to believe that he is not guilty of the offence under Section 20(b)(ii)(C)/25/29 of the NDPS Act, 1985.

13) It is also submitted by the learned counsel for the petitioner that in view of the above, the embargo of Section 37 is not applicable in this case.

14) Learned counsel for the petitioner has also cited a ruling of Apex Court in case of "***Teesta Atul Setalvad Vs. State of Gujarat***", [order dated 19.07.2023 in SLP (Criminal Appeal No. 8503/2023)], wherein the Apex Court has observed that merely because of the fact that after filing of the FIR and after filing of the charge-sheet, the appellant neither challenged the same in a proceeding under Section 482 of the Code of Criminal Procedure, 1973 or under Article 226/32 of the Constitution of India, to hold that it is not permissible for the appellant to contend that a prima facie case is not made out would be a perverse finding.

15) Learned counsel for the petitioner has also submitted that in the instant case also merely because of the fact that the trial court has framed charges even in the absence of any material on record and the said framing of charges is not challenged in an appropriate proceeding, he is not precluded in this bail application, from taking a plea that no case has been made out against the petitioner.

16) On the other hand, Mr. B. B. Gogoi, learned Additional Public Prosecutor has submitted that since the vehicle in which the contraband was recovered belongs to the present petitioner and since the quantity of contraband seized is commercial quantity, the embargo of Section 37 would be applicable in this case and he opposed the grant of bail to the present petitioner.

17) I have considered the submissions made by learned counsel for both sides and have perused the materials available on record including the scanned copy of the case record of Special (NDPS) Case No. 160/2022 which was requisitioned from the Court of learned Special Judge, Karimganj.

18) In the instant case it appears that though, on 9th day of June 2023, charges were framed against three numbers of accused persons including the present petitioner under Section 20(b)(ii)(C)/25/29 of the NDPS Act, 1985, however, on perusal of the copy of the memorandum of charges, it appears that only accusation made against the present petitioner was that he was found in possession on 69 packets of suspected Ganja Cannabis weighing about 404 kg. There is no mention in the said memorandum of charges regarding present petitioner knowingly or anything allowing the seized vehicle to be used by the other co-accused or anything regarding criminal conspiracy or abetment to commit the offence punishable under Chapter IV of the NDPS Act, 1985, by the present petitioner.

19) It also appears that when the seizure of the seized contraband was made in this case, the present petitioner was not in the seized vehicle and only other two accused persons were found in the seized vehicle when the seizure was made. Therefore, the petitioner cannot be said to be in the conscious possession of the seized contraband. As regards narration the charge under Section 25 of the NDPS Act, 1985, there is no narration in the memorandum of charge regarding any offence under Section 25 of the NDPS Act, 1985, and there is no material on record to show that the vehicle bearing Registration No. TR 01B1747 was knowingly permitted to be used by the other two accused persons for commission of the offence punishable under NDPS Act, 1985. Hence, prima facie it appears that there is no material against the present petitioner under Section 25 of the NDPS Act, 1985.

20) Similarly, in addition to absence of any narration in the memorandum of charges against the present petitioner under Section 29 of the NDPS Act, 1985, there is no material on record to suggest that the present petitioner has entered into any criminal conspiracy or has abetted commission of any offence punishable under Chapter IV of the NDPS Act, 1985 with anyone as none of the witnesses her even the co-accused persons have implicated him for commission of the said offence.

21) In view of the above, this Court for the limited purpose of consideration of the instant bail application, is of the opinion that there are reasonable grounds for believing that the present petitioner is not guilty of the offence for which charges are framed against him in this case.

22) Further, there is also no material on record showing any criminal antecedent against the petitioner and therefore, there is nothing on record to suggest that he is likely to commit any offence if he is released on bail.

23) This Court is of the considered opinion that the embargo of Section 37 of the NDPS Act, 1985, is not applicable in the instant case for the reasons mentioned in foregoing paragraphs. It is hereby made clear that observations made hereinbefore are only for the purpose of considering the instant bail application and it shall have no bearing on the trial court for considering of any question which may come up before it.

24) In view of above, the above named petitioner is hereby allowed to go on bail of Rs. 50,000/- (Rupees Fifty Thousand only) with two sureties of like amount (one of whom should be a local resident, residing within the State of Assam) subject to the satisfaction of the learned Special Judge, Karimganj, Metro with the following conditions:

- i. That the petitioner shall cooperate in the trial of Special (NDPS) Case No. 160/2022, which is pending in the Court of learned Special Judge, Karimganj;
- ii. That the petitioner shall not directly or indirectly make any inducement, threat, or promise to any person who may be acquainted with the facts of the case, so as to dissuade such person from disclosing such facts before the trial court in the trial pending against him;
- iii. That the petitioner shall not leave the jurisdiction of the trial court without prior permission of the Trial Court and when such leave is granted by the Trial Court, the petitioner shall submit his leave address and contact details during such leave before the Trial Court.

25) With the above observation, this bail application is accordingly disposed of.

JUDGE

Comparing Assistant