

GAHC010231372023



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

Case No. : Bail Appln./3685/2023

MD. ISHLAODDIN @ MD. ASLAUDDIN AND ANR
S/O MD. NAZIM UDDIN
VILL- LILONG TAIREN MAKHANG
P.S. LILONG
DIST. THOUBAL,, MANIPUR

2: ABBAS ALI
S/O MD. NASIM ALI
VILL- BAGHORGURI
PANITOL ROAD

P.S. SATGAON
DIST. KAMRUP (M)
ASSAM
PERMANENT ADDRESS- VILL- DHUMRI
P.O. DHAKKA
P.S. KHERAWA
DIST. MOTIHARI (BIHAR

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR. N N B CHOUDHURY

Advocate for the Respondent : PP, ASSAM

Linked Case : Bail Appln./3781/2023

MD. SAKIR AHMED AND ANR
S/O. ABDUL SATAR
R/O. SORAMAKHALAIKAI
P.S. TRENGBAND
DIST. THPUBAL
MANIPUR.

2: MD. ABOY
S/O. MD. THAMBAL
R/O. PHUNDREI
AWING LEIKAI
P.S. PHUNDREI
DIST. THOUBAL
MANIPUR.
VERSUS

THE STATE OF ASSAM
REPRESENTED BY PP
ASSAM.

Advocate for : MR. P K SAHARIA
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGMENT

Date : 09-01-2024

1. Heard Mr. N.N.B. Choudhury, learned counsel for the petitioners Md.

Ishlaoddin @ Md. Aslauddin and Abbas Ali.

2. The petitioners have filed this application under Section 439 of the Code of Criminal Procedure with prayer for bail as they are behind bars since 29.06.2022

in connection with *N.D.P.S. Case No. 334/2022* arising out of *Garchuk Police Station Case No. 201/2022* registered under *Sections 420/468* of the Indian Penal Code read with *Sections 22(c)/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985* (NDPS Act for short). The other petitioners in connection with Bail Appln. 3781/2023 are Md. Sakir Ahmed and Md. Aboy.

3. As the matters are related to the same cause of action, both the matters are taken up together.

4. Heard Mr. B.B. Gogoi, learned Additional Public Prosecutor for the respondent State of Assam.

5. It is submitted on behalf of the petitioners that no prima facie case to reject the bail application exists against the petitioners. The FIR was lodged on 29.06.2022 and the petitioners were forwarded to custody on 29.06.2022 and the petitioners are behind bars for 540 (Five Hundred Forty) days. Charge sheet was laid against the petitioners on 30.01.2022 and charge was framed on 10.06.2023. 9 (Nine) witnesses are enlisted in charge sheet and only 4 (four) witnesses have been examined. It is submitted that the evidence of the witnesses exonerates the petitioners and thereby the petitioners are entitled to bail.

6. The evidence of PW.2 absolves the petitioners as conscious possession has not been proved. The petitioners have thus prayed for bail as it is unlikely that this case will end in conviction and their incarceration would result in

infringement of their rights to personal liberty.

7. *Per contra* the learned Additional Public Prosecutor has raised serious objection stating that the last part of the cross examination of PW.3 does not at all exonerate the petitioners. The petitioners led the police to the recovery of the contraband. There is clinching evidence against the petitioners and they are not entitled to be admitted to bail. The offence alleged against the petitioners is grave in nature and the embargo under Section 37 of the NDPS Act as a fetter to their prayer for bail.

8. The petitioners have also relied on the law laid down by Hon'ble the Supreme Court *Satpal Sing-vs-State of Punjab, reported in (2018) 13 SCC 813* stating that the facts and circumstances of this case is similar to the case of Satpal Sing (*supra*) and this is a fit case for bail.

9. The FIR unfolds that a tip off was received that on the night of 28.06.2022 that two persons were wandering in the Assam Meghalaya suburbs and they were in possession of a huge quantity of Drugs/Heroin, purported to be transported and sold and they were planning to deliver the contraband around different places like Borni, Roha, Panjabari and Boragaon Chariali area. The drug peddlers have already delivered the contraband at places like Borni, Roha and Panjabari and they were planning to deliver more contraband at Boragaon Chariali early in the morning between 06.00 to 07.00 AM. On receipt of the tip off, the Officer-In-Charge of Garchuk Police Station directed the informant to proceed to Boragaon Chariali on 29.06.2022 at around 05.30 AM for initiating

necessary action against the drug peddlers who were arriving from Panjabari side to Boragaon Chariali via Lokhra Chariali on a scooty without a number plate. The Garchuk Police Station G.D. Entry No. 699 dated 29.06.2022 was registered. The formalities were observed and at about 5.40 AM, search was conducted as per procedure at Boragaon area and Md. Ishlaoddin @ Aslaoddin and Md. Abbas Ali were apprehended. During investigation, Md. Ashaloddin confessed of preparing a fake identity card in the name of Manipur Police Department for the purpose of drug trafficking and also to dodge any investigation. The scooty without the number plate was seized.

10. It has surfaced that through the confession of the petitioners Ishlaoddin @ Ashaloddin and Abbas Ali who were interrogated that truck bearing registration No. MN-06-T-2136 was approaching from Imphal, Manipur with huge quantity of contraband, to be sold in different places under the Garchuk Police Station.

11. A naka checking (checking) was set up near the Nezone hoteal at Garchuk at around 1.30 PM. The informant noticed a Truck (Dumper) bearing registration No. MN-06-T-2136 approaching from Basistha side towards Gorchuk. The truck was driven with excessive speed but was however, identified by the petitioners Ishlaoddin @ Ashaloddin and Abbas Ali. The informant signaled the truck to halt, but the driver tried to escape and was speeding away on noticing the police party, but police team somehow managed to intercept the vehicle and two persons were found inside the vehicle. The persons who were apprehended are the petitioners Md. Aboy and Md. Sakir Ahmed. They also showed where the contraband was kept. The contraband was kept concealed in the loft of the driver's cabin of the vehicle. The contraband consisted of 73000 yaba tablets

and these were seized along with articles like mobile handset etc.

12. The learned counsel for the petitioners Md. Ishlaoddin @ Md. Aslauddin and Abbas Ali has argued strenuously that at best they can be booked for using a scooty without a number plate but the contraband was not found in their possession and there is no live link between Md. Ishlaoddin @ Md. Aslauddin and Abbas Ali with the other petitioners Md. Aboy and Sakir Ahmed relating to the transportation of 73000 yaba tablets which were not found in their possession but were found in the possession of the other petitioners Md. Aboy and Md. Sakir Ahmed.

13. The learned Additional Public Prosecutor has raised objection by submitting that it is not necessary to get into the details of the statements of the witnesses or the co-accused under Section 67 of the NDPS Act. The FIR clearly reveals that the entire team was operating as a gang of drug peddlers. All the petitioners were acting in coordination. The drugs transported from Manipur side have been distributed around the State of Assam and more contraband was about to be transported when the petitioners were caught red handed. The question of parity with another accused does not arise at all.

14. All the accused were working in tandem. This is not a case where the accused who were apprehended while they were approaching on the two wheeler can be released on bail whereas the other accused who were arriving in the truck/ tanker can be held to be responsible. It is also submitted that this is not a case where trial has been protracted by the prosecution or by the Court.

The accused were apprehended on 29.06.2022 and charge-sheet was laid on 26.12.2022. Charge was taken-up for consideration on 16.05.2023. The learned counsel for the petitioners have assiduously argued on the point of consideration of charge and stressed before the trial Court that the petitioners are entitled to be discharged. However, charge was framed on 10.06.2023 and thereafter this case proceeded for trial. 4 out of 9 witnesses have already been examined since 03.07.2023. This case was first fixed for evidence on 03.07.2023. Thereafter, trial was stalled on the point of transfer of this case to the Court of the Additional Sessions Judge No. 3 and again this case proceeded for evidence.

15. It is submitted by the learned Addl. PP that it is apparent that trial was proceeding at a regular pace and trial was not protracted by the prosecution or by the trial Court. The learned Addl. PP has prayed to dismiss the petition as the rigours of section 37 of the NDPS Act is an embargo and does not entitle the petitioners to bail.

16. I have given my thoughtful consideration to the submissions at the bar.

17. The petitioners have relied on the decision of Hon'ble the Supreme Court in *Bharat Chaudhary Vs. Union of India and Raja Chandrasekharan Vs. The Intelligence Officer, Directorate of Revenue Intelligence* dated 13.12.2021 wherein it has been held and observed that that:

“11. In the absence of any psychotropic substance found in the conscious possession of A-4, we are of the opinion that mere reliance on the statement made by

A-1 to A-3 under Section 67 of the NDPS Act is too tenuous a ground to sustain the impugned order dated 15th July, 2021. This is all the more so when such a reliance runs contrary to the ruling in Tofan Singh (supra). The impugned order qua A-4 is, accordingly, quashed and set aside and the order dated 2nd November, 2020 passed by the learned Special Judge, EC & NDPS Cases, is restored. As for Raja Chandrasekharan [A-1], since the charge sheet has already been filed and by now the said accused has remained in custody for over a period of two years, it is deemed appropriate to release him on bail, subject to the satisfaction of the trial Court."

18. The ratio of the decision of Bharat Chaudhary's case is not applicable to this case. The bail order of Bharat Choudhury and Raja Chandrasekharan was cancelled and they brought an appeal against the cancellation of the bail order. Moreover, reliance was placed on the statement of co-accused under Section 67 of the NDPS Act. In this instant case, the evidences of witnesses have already been recorded. 4 (Four) out of the 9 (Nine) witnesses have already been examined. The petitioners are not behind bars for 2 (two) years unlike Bharat Choudhury's case. Within one and a half year, trial has commenced and four witnesses out of nine witnesses have already been examined. This case cannot be said to be a case of procrastination or protraction of trial. It appears that the trial is proceeding at a regular pace. The merits of the evidence cannot be brought to the fore as this case is under trial.

19. The submissions of the learned counsel for the petitioners that the statement of witnesses under Section 67 of the NDPS Act cannot be considered. The petitioners are charged under Section 22(c)/29 of the NDPS Act for possession and transportation of 73,000 yaba tablets and thus embargo under Section 37 of the NDPS Act comes into play.

20. It is further submitted on behalf of the petitioners that in a similarly placed situation, the accused namely Md. Mehbub Alam was granted bail vide order dated 24.06.2022 in Bail Application No. 985/2022 in connection with Basistha Police Station Case No. 41/2022 under Sections 22(c)/24/29 of the NDPS Act, corresponding to NDPS Case No. 96/2022. It was observed by a Co-Ordinate Bench of this Court that the materials on record clearly shows that no contraband was recovered or seized from the possession of Mehbub Alom who is one of the co-accused in that case and it was not likely that the accused while on bail would commit any offence.

21. The ratio of Mehbub Alam's case is not remotely relevant to this case. Without describing the role of the petitioners, it is held that the question of parity does not arise at all.

22. The ratio of *Satpal Singh's* case (*supra*) is also not similar to this case. Satpal Singh and the co-accused were directed to surrender before the learned trial Court. It was also observed that they were free to apply for regular bail which may be considered by the Court as per the merits of the case. The facts and circumstances of this case and the merits of this case are not brought to the fore at this juncture as this case is under trial.

23. In view of my foregoing discussions, it is held that this is not a case where the trial has been protracted or procrastinated by the Court or by the prosecution. It is true that the petitioners are behind bars for 540 days.

However, at this juncture it cannot be held that the petitioner's right to liberty guaranteed by Article 21 of the Constitution of India has been curtailed due to procrastination of trial. This Court cannot be oblivious of the embargo u/s 37 of the NDPS Act. The petitioners are booked under a grave offence. At this stage it cannot be held that the trial would not entail conviction.

24. Prayer for bail is rejected at this juncture.

25. The trial Court is directed to expedite the trial for speedy disposal of the case.

JUDGE

Comparing Assistant