

GAHC010234022023



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

Case No. : Bail Appln./3775/2023

MOHAMMAD FARAZ
S/O NOOR MOHAMMAD
VILL- MOH QURESHIYAN UJHARI
TEHSIL -HASANPUR, P.S. SEHET NANGLI
DIST. AMROHA UP- PIN-244242

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

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

ORDER

07.06.2024

Heard Mr A Ahmed, learned counsel for the petitioner, Mohammad Faraz, who has filed this application under Section 439 CrPC, with prayer for prayer for bail as he is behind bars since 07.07.2020, in connection with Special (NDPS) Case No. 100 of 2022, arising out of Bazaricherra PS Case No. 125/2022, under Sections 22(c)/25/29 of the

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS, for short).

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

3. It is submitted on behalf of the petitioner that 4 out of 10 witnesses have been examined. The petitioner was a driver of the vehicle which belongs to A R Azad Roadways. The company or the owner of the vehicle is responsible for transporting the contraband. The petitioner was not aware that the contraband was being transported in his vehicle.

4. The learned counsel for the petitioner has relied on the decision of Hon'ble the Supreme Court in *Mohan Lal –vs- State of Rajasthan*; reported in 2015 AIR SCW 3043, wherein it has been observed that-

“16. From the aforesaid exposition of law it is quite vivid that the term "possession" for the purpose of Section 18 of the NDPS Act could mean physical possession with animus, custody or dominion over the prohibited substance with animus or even exercise of dominion and control as a result of concealment. The animus and the mental intent which is the primary and significant element to show and establish possession. Further, personal knowledge as to the existence of the "chattel" i.e. the illegal substance at a particular location or site, at a relevant time and the intention based upon the knowledge, would constitute the unique relationship and manifest possession. In such a situation, presence and existence of possession could be justified, for the intention is to exercise right over the substance or the chattel and to act as the owner to the exclusion of others. In the case at hand, the appellant, we hold, had the requisite degree of control when, even if the said narcotic substance was

not within his physical control at that moment. To give an example, a person can conceal prohibited narcotic substance in a property and move out thereafter. The said person because of necessary animus would be in possession of the said substance even if he is not, at the moment, in physical control. The situation cannot be viewed differently when a person conceals and hides the prohibited narcotic substance in a public space. In the second category of cases, the person would be in possession because he has the necessary animus and the intention to retain control and dominion. As the factual matrix would exposit, the accused-appellant was in possession of the prohibited or contraband substance which was an offence when the NDPS Act came into force. Hence, he remained in possession of the prohibited substance and as such offence under Section 18 of the NDPS Act is made out. The possessory right would continue unless there is something to show that he had been divested of it. On the contrary, as we find, he led to discovery of the substance which was within his special knowledge, and, therefore, there can be no scintilla of doubt that he was in possession of the contraband article when the NDPS Act came into force. To clarify the situation, we may give an example. A person had stored 100 bags of opium prior to the NDPS Act coming into force and after coming into force, the recovery of the possessed article takes place. Certainly, on the date of recovery, he is in possession of the contraband article and possession itself is an offence. In such a situation, the accused-appellant cannot take the plea that he had committed an offence under Section 9 of the Opium Act and not under Section 18 of the NDPS Act.”

5. It is submitted that in the instant case, the present petitioner was not in conscious possession of the contraband. The contraband is manufactured drugs and it is plausible that the drugs were not illegally transported and there is every possibility that the petitioner was not aware that the articles inside the packets were contraband.

6. The learned Additional Public Prosecutor has submitted that this case is at the stage of trial. 4 witnesses have already been examined. The rigours of Section 37 of the NDPS Act acts as an embargo against the bail prayer. Investigation has been concluded and charge sheet has been submitted, as a *prima facie* case has been found against the petitioner.

7. I have considered the submissions at the Bar with circumspection.

8. I have also scrutinized the Trial Court Record as well as the statements of the witnesses and the statement of the accused.

9. The FIR unfolds that a routine checking was held at checkpoint of Churaibari Watch Post of NH-08. At around 07:50 am, a red/white coloured 10 wheeler container body truck of A R Azad Roadways, bearing Registration No. RJ-09GD 3391, was proceeding towards Tripura. The truck was coming from Uttar Pradesh. The Police team stopped the truck which was driven by the petitioner and he was accompanied by a helper, namely, Samir Ahmed. The Police team found that the truck was loaded with different kinds of cartons and packets. After thorough checking and after opening some of the packets, 26 packets containing 8300 bottles of Codein Phosphate Eskuf Syrup manufactured by Laborte Pharmaceuticals India Limited, were found. The driver and the helper of the vehicle failed to produce receipts or challan of the cough syrup

and immediately, the superior officers were informed about the cough syrup. After following proper procedure of law, the contraband was seized. After this incident, another information was received from reliable sources about another container body truck being loaded with suspected contraband proceeding from Guwahati towards Tripura and a naka checking was held. At 06:45 pm, one white coloured 6 wheeler container body truck, bearing Registration No. TR -01AK 1721 arrived at the naka check point. This truck was thoroughly searched and 20 cartons containing 3200 bottles of cough syrup were recovered from the truck. The bottles were concealed under the automobile items.

10. The learned counsel for the petitioner has submitted that the driver, i.e., the present petitioner is innocent. He was not at all aware that the truck company or the owner of the truck has loaded contraband in his truck. The petitioner deserves bail as the statements of the witnesses do not implicate that the driver was in conscious possession of the contraband.

11. In the case of ***Mohan Lal (supra)***, the case was decided finally after meticulous scrutiny of the evidence. However, in the instant case, there is a *prima facie* case that the petitioner was transporting the 'chattel', i.e., the contraband, without proper documents. At this stage, it can only be presumed that any truck driver will always carry the documents or the challans required

for transportation of the articles loaded in his truck for verification at different checkpoints. At this stage, it cannot be conclusively decided with the evidence adduced so far that the petitioner was not in possession with animus as he had no knowledge about the contraband inside his truck.

12. It is true that investigation is dragging on with laden feet, but the double pronged conditions restrict the bail of the petitioner.

13. Considering all aspects and in view of my foregoing discussions, petition with prayer for bail is rejected, at this stage. However, the petitioner is at liberty to apply for bail at a later stage, if trial is procrastinated by the trial Court or by the prosecution.

JUDGE

Comparing Assistant