

GAHC010247632023



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

Case No. : Bail Appln./3961/2023

NIL KAMAL BISWAS @ NEEL KAMAL BISWAS AND ANR
S/O LATE GUNALAL BISWAS @ BONOLAL BISWAS, R/O VILL-SOUTH
GARAMARI, P.O.-GARAMARI, P.S.-GAURIPUR, DIST-DHUBRI, ASSAM

2: RAHUL BISWAS
S/O NIL RATAN BISWAS
R/O VILL-SOUTH GARAMARI
P.O.-GARAMARI, P.S.-GAURIPUR
DIST-DHUBRI, ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR. M A I HUSSAIN

Advocate for the Respondent : PP, ASSAM

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN

ORDER

07.03.2024

Heard Mr. A. Chamuah, learned counsel for the accused and also heard Mr. B. Sarma, learned Additional Public Prosecutor, Assam, appearing for the State respondent.

2. This application under Section 439 Cr.P.C. is preferred by two accused, namely, Nil Kamal Biswas @ Neel Kamal Biswas and Rahul Biswas, who have been languishing in jail hazot since 10.09.2023, in connection with NDPS Case No.254/2023, arising out of Gauripur P.S. Case No.126/2023, under Section 20(c) of the NDPS Act.

3. It is to be noted here that the aforementioned case has been registered on the basis of an FIR lodged by S.I. Kapil Ch. Das of Gauripur Police Station, on 22.02.2023. The essence of allegation made in the aforesaid FIR is that on that day, at about 6:00 p.m., ASI Saha Alom Azad, Traffic In-Charge of Gauripur Traffic Branch, received one secret information over phone that in a white coloured Bolero vehicle, bearing Registration No.AS-12R-7288, suspected Ganja was being carried from Asharikandi to Gauripur. On being entrusted, the informant along with staff proceeded to the village and having seen the police party, the driver and the boarded persons left the Bolero vehicle, bearing Registration No.AS-12R-7288 on the PWD road of Charjugipara. Thereafter, in presence of witnesses search was conducted and found 14 nos. of packets suspected to be cannabis weighing 82.724 kg and seized the same in presence of witnesses.

4. Mr. Chamuah, learned counsel for the accused submits that the present accused persons are not named in the FIR and they were arrested on 10.09.2023 solely on the basis of statement of co-accused, namely, Azibur Rahman Mollah, who was the driver of the Bolero vehicle and except the statement of the co-accused, no other materials are there against the present accused persons. Mr. Chamuah further submits that it is now well-settled by a catena of decisions of Hon'ble Supreme Court, specially in the case of **Tofan Singh Vs. State of Tamil Nadu**, reported in **(2021) 4 SCC 1**, where it has been held that the statement of co-accused is not at all admissible in evidence and that the investigation of the case has already been completed and the I.O. had laid charge-sheet before the learned Court below and the learned Court below had also framed charge against the accused persons under Section 20(c) of the NDPS Act. Mr. Chamuah further submits that out of 12 witnesses cited in the charge-sheet, 3

witnesses have already been examined and none of the witnesses, examined so far, have implicated the present accused with the offence alleged and the remaining witnesses also, who are yet to be examined, are seizure witnesses and in their statement recorded under Section 161 Cr.P.C. have not implicated the present accused persons and that the accused persons are behind the bar for last 107 days, as they were arrested and forwarded to jail hazot on 10.09.2023 and that they will appear before the learned Court below on each and every date and therefore, it is contended to allow this petition.

5. On the other hand, Mr. B. Sarma, learned Additional Public Prosecutor, Assam, also submits that investigation of the case has already been completed and charge-sheet has been submitted before the learned Court below and the learned Court below has framed charge against the accused persons under Section 20(c) of the NDPS Act and out of 12 cited witnesses, 3 witnesses have already been examined and the case is pending for further evidence.

6. To a pointed query of this Court, Mr. Sarma fairly submits that except the statement of the co-accused, no other materials are there against the present accused persons. However, Mr. Sarma submits that the quantity of contraband substance allegedly recovered from the co-accused persons are of commercial quantity and as such the accused persons have to satisfy the requirement of Section 37 of the NDPS Act.

7. Having heard the submission of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record and also perused the scanned copy of the record of the learned Court below.

8. It is not in dispute that after investigation of the case the I.O. has laid charge-sheet before the learned Court below against the present accused persons along with some other co-accused and the learned Court below has framed charge against the accused persons under Section 20(c) of the NDPS Act and examined 3 witnesses, out

of 12 witnesses cited in the charge-sheet and having gone through the statement of the 3 witnesses, which are placed on record by the learned counsel for the accused persons, I find sufficient force in his submission that they have not supported the charges.

9. I have also gone through the documents placed on record and also perused the scanned copy of the record of the learned Court below and I find that except the statement of the co-accused i.e. the driver of the vehicle, no other materials are available on the record. It is now well-settled in the case of Tofan Singh (supra) that the statement of the accused, recorded under Section 67 of the NDPS Act is not admissible in evidence.

10. In view of the settled position of law and also in view of the absence of material to show the complicity of the accused persons, this Court is of the view that the embargo under Section 37 of the NDPS Act would not be applicable in the case of the present accused. Therefore, in view of the discussion made herein above, this Court is inclined to allow this petition. It is provided that on furnishing a bond of Rs.50,000/- each, with one surety of the like amount to the satisfaction of the learned Special Judge (NDPS Act), Dhubri, the accused persons, namely, Nil Kamal Biswas @ Neel Kamal Biswas and Rahul Biswas, be enlarged on bail.

11. It is to be noted here that the observation herein above is made only for the limited purpose of disposing of this bail application.

12. In terms of above, this bail application stands disposed of.

Sd/- Robin Phukan
JUDGE

Comparing Assistant