

GAHC010269022023



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

Case No. : Bail Appln./4348/2023

LITON MIA
S/O ABUL HUSSAIN
R/O VILL- BOKSHANAAR
(MIDDLE), P.O. BOKSHANAGAR
P.S. KOLAMCHERA
DIST. SEPAHIJELA
STATE- TRIPURA, PIN-799102

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR. D M H R KHAN

Advocate for the Respondent : PP, ASSAM

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN
ORDER

22.02.2024.

Heard Mr. D.M.H.R. Khan, learned counsel for the accused. Also heard Mr. K.K. Das, learned Addl. P.P. for the State respondent.

2. This application, under Section 439 of the Code of Criminal Procedure, 1973, is preferred by accused, namely, Liton Mia, who has been languishing in jail since 20.03.2022, in connection with Special NDPS Case No.47/2022, under Sections 22(C)/25/29 of the NDPS Act, pending before the learned Special Judge, Karimganj, for grant of bail.
3. It is to be noted here that the aforementioned case has been registered on the basis of an FIR lodged by one WSI Marchilla D. Sangma of Karimganj P.S. on 19.03.2022.
4. The essence of allegations, made in the said complaint is that acting on tip off on 19.03.2022, at about 10.50 pm she along with other staff have intercepted one white coloured Baleno car having temporary registration number TR-01 BF (TC) 1042 and apprehended three persons namely (i) Sajan Ahmed Barbhuyan (ii) Rubel Ahmed Barbhuyan (iii) Liton Mia and Liton Mia was in the driver's seat. And during search they have recovered 50 blue coloured packets containing 10,000 YABA Tablets, which were being concealed under the driver's seat, and seized the same in presence of witnesses by preparing seizure list.
5. Mr. Khan, learned counsel for the accused, submits that the accused are behind the bar for last 675 days, as he was arrested on 20.03.2022. Mr. Khan further submits that the case has already been charge sheeted, and only two witnesses have been examined so far, out of 11 witnesses cited in the charge sheet. It is the further submission of Mr. Khan that the accused is innocent and the contraband substances were not recovered from the conscious possession of the accused and that he was driver of the vehicle and while he was proceeding to Tripura and on his way two persons boarded in his vehicle and the contraband substances belongs to them. Mr. Khan, referring to a decision of Hon'ble Supreme Court in **Rabi Prakash vs. The State of Odisha (Special Leave to Appeal (Crl.) No. 4169/2023, dated 13.07.2023)** further submits that though the quantity of contraband substances allegedly recovered from the car were of commercial quantity, yet, the conditional liberty available under Article 21 of the Constitution of India, must override the statutory embargo created under section 37 of the NDPS Act. Mr. Khan also submits that the accused is ready to face trial and will appear before the court on each and every date and therefore, it is contended to allow the petition.
6. On the other hand, Mr. R.J. Baruah, the learned Addl. P.P. submits that 10,000 YABA Tablets were recovered from the possession of the accused person while the same were being carried in the Baleno car, being driven by the present accused and the same are commercial quantity and the accused have failed to fulfill the twin requirements of section 37 of the NDPS Act, and that trial is going on and two

witnesses have already been examined. Mr. Baruah, further submits that the contraband substances were carried in the Baleno car having wrapped by yellow/brown plastic wrappers and concealing under the seat of the driver and as such it cannot be said that the same were not recovered from the conscious possession of the accused. Mr. Baruah, also submits that there is no considerable delay in trial and therefore, Mr. Baruah has contended to dismiss the petition.

7. Having heard the submissions of learned Advocates of both side, I have carefully gone through the petition and the documents placed on record and also perused the scanned copy of the case record, and also the Status Report, received from the learned Court below.

8. It also appears that the learned court below had framed charge against the accused persons on 26.08.2022, under section 22(C)/25/29 NDPS Act and since then the court below has examined two witnesses out of 11 witnesses cited in the charge sheet.

9. It is also not in dispute that the quantities of the contraband substances, so recovered from the possession of the accused persons are of commercial quantity, and as such the accused has to satisfy the twin conditions of Section 37 of the NDPS Act that there is no reasonable ground to believe that: the accused is not guilty of the offence and that he is not likely to commit any offence while on bail.

10. But, from the materials on record, specially from the scanned copy of the record received from the learned court below and also from the submission of learned counsel for the accused, this Court is unable to derive its satisfaction that there exists any reasonable ground for believing that the accused is not guilty of the offence and that he is not likely to commit any offence, while on bail.

11. Though the learned counsel for the accused submits that as the contraband substances were not recovered from the conscious possession of the accused and as there is delay in trial, he is languishing in jail hazoot for 675 days, and as such the conditional liberty available under Article 21 of the Constitution of India, must override the statutory embargo created under section 37 of the NDPS Act, yet such a submission left this court unimpressed in as much as the scanned copy of the record of learned court below never indicates that there is considerable delay in trial so as to contend that the right to speedy trial of the accused has been violated.

12. The issue of possession has been dealt with by Hon'ble Supreme Court in the case of **Union of India through NCB, Lucknow vs. Nawaz Khan,**

reported in **(2021) 10 SCC 100**, as under :-

“25. We shall deal with each of these circumstances in turn. The respondent has been accused of an offence under Section 8 of the NDPS Act, which is punishable under Sections 21, 27-A, 29, 60(3) of the said Act. Section 8 of the Act prohibits a person from possessing any narcotic drug or psychotropic substance. The concept of possession recurs in Sections 20 to 22, which provide for punishment for offences under the Act. In *Madan Lal v. State of H.P.* (2003) 7 SCC 465 this Court held that:

“19. 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 are that all the accused persons were travelling 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.

20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

21. It is highlighted that unless the possession was coupled with the requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

22. 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 *Supt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja* (1979) 4 SCC 274 to work out a completely logical and precise definition of “possession” uniform[ly] applicable to all situations in the context of all statutes.

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

26. 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 the

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."

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.

13. In the case in hand, the contraband substances were carried in the Baleno car, having been wrapped by yellow/brown plastic wrappers and concealing under the seat of the driver. And admittedly, the present accused was the driver of the said Baleno car, and as such, applying the proposition of law, laid down in the case of **Nawaz Khan** (supra), it cannot be said that the same were not recovered from the conscious possession of the accused. Though the learned counsel for the accused submits that the contraband substances belongs to the co-accused persons, who had boarded in his vehicle of the present accused on the way, yet, the same left this court unimpressed, in view of the given facts and circumstances on the record.

14. I have carefully gone through the orders passed by this court in the Bail Applications, mentioned herein above and referred by Mr. Das and also by Mr. Keyal to press home their arguments. But, having gone through the same carefully this court is unable to read the same as precedent as no law is laid down in the said bail orders. A judicial decision is available as precedent only when it contains principle, which forms an authoritative element termed as *ratio decidendi*. The doctrine of precedent is a principle of following previous decisions of the Court within its well-defined limits, it significantly declares that cases must be decided in same way when the material facts are the same as it becomes '*ratio decidendi*'. But, in contradistinction to a binding precedent, some of the '*obiter dictum*' made by the Court in the judgment have persuasive value and they do not have any binding force. It is also to be noted here that the facts and circumstances of the case in hand is quite different from the facts and circumstances of the cases in which those bail orders were passed.

15. I have also gone through the decision of Hon'ble Supreme Court in **Ravi Prakash** (supra) so referred by Mr. Khan, the learned counsel for the accused and I find that the facts and circumstances of the case is quite different from the case in hand. In the said case Hon'ble Supreme Court has held that prolong incarceration, generally militate against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such situation, the conditional liberty must override the statutory embargo created under section 37(1) (b) (ii) of the NDPS Act. As in the case in hand there appears to be no considerable delay in trial so as to term the litigation protracted, this court is of the considered opinion that the proposition of law, laid down in the case of **Ravi Prakash** (supra) would not advance the case of the accused.

16. It is also to be mentioned here that in the case of **Union Of India vs. Ajay Kumar Singh @ Pappu**, Criminal Appeal No. 952 OF 2023 [Arising out of SLP (CRL.) No.2351 OF 2023], decided on 28 March, 2023, a bench of co-equal strength of Hon'ble Supreme Court, while setting aside the order of granting bail, by the Allahabad High Court, to the accused involving in commercial quantity of contraband substance, has held as under:-

“In view of the above provisions, it is implicit that no person accused of an offence involving trade in commercial quantity of narcotics is liable to be released on bail unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any offence while on bail.”

17. Same principle is echoed by another bench of co-equal strength of Hon'ble Supreme Court in the case of **NCB vs. Mohit Agarwal** (Criminal Appeal Nos. 1001-1002 of 2022, arising out of petitions for Special Leave to Appeal (Crl.) No. 6128-29 of 2021, decided on 19 July, 2022). It may be noted here that these decisions are earlier in point of time, and therefore, the same also cannot be ignored altogether in view of the Doctrine of binding precedent, as held by a five Judges bench of Hon'ble Supreme Court in - **National Insurance Company Ltd. vs. Pranay Sethi & Another** reported in (2017) 16 SCC 680.

18. In view of above, and also in view of the nature and gravity of the offence and the punishment prescribed for the same this Court is of the opinion that this is not a fit case to grant the privilege of bail, under Section 439 of the Cr.P.C., to the accused and therefore, the same stands dismissed.

19. However, the learned Court below is directed to expedite the trial and conclude the same at the

earliest possible time, without being influenced by any of the observations made by this court herein above. And if necessary, the learned court below shall take recourse to the provision of Section 309(1) of the Cr.P.C.

20. In terms of above, the bail application stands disposed of.

JUDGE

Comparing Assistant