

GAHC010282262023



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Bail Application No. 4568/2023

1. Raju Deori @ Babatu,
(Age 30 years),
S/o-Durga Deori,
R/o-Kinapathar,
P.S. & P.O.- Narayanpur,
District- Lakhimpur (Assam).

2. Deepak Srivastav @ Dipu,
(Age 41 years),
S/o Late Jogendra Sribastav,
R/o-Kachikata,
P.S. & P.O.- Bihpuria,
District-Lakhimpur (Assam)

.....Accused/Petitioners

-Versus-

The State of Assam,
Represented by the Public Prosecutor of Assam

.....Respondents.

Advocates for the Petitioners : Mr M Rahman

Advocate for the respondent : Mr B B Gogoi, APP, Assam.

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of Order : 30.01.2024

ORDER

Heard Mr M Rahman, learned counsel for the petitioners, 1) Raju Deori @ Babatu and 2) Deepak Srivastav @ Dipu.

2. The petitioners have filed this application under Section 439 CrPC, with prayer for bail, as they are behind bars since 06.10.2022, in connection with Special NDPS Case No. 03/2023, arising out of Laluk PS Case No. 195/2022, under Sections 20(b)(ii)(C)/29 of the Narcotic Drugs And Psychotropic Substances Act, 1985 (NDPS, for short).

3. Heard Mr B B Gogoi, learned Additional Public Prosecutor for the State

of Assam.

4. It is submitted on behalf of the petitioners that 15 witnesses out of 16 witnesses have already been examined and as per Section 37 of the NDPS Act, the petitioners are entitled to bail as not a single witness has implicated the petitioner. A Court witness has also been examined, but there is every possibility that the petitioner shall be acquitted in connection with this case. As they are behind bars for 427 days, their personal liberty has been curtailed. In case of acquittal, their incarceration for such a prolonged period will be unjustified.

5. The FIR unfolds that a reliable information was received by the investigating team that two persons were travelling in a car bearing Registration No. SK08P0727, a red-coloured Swift vehicle. The vehicle was proceeding towards Lakhimpur from Narayanpur. Ganja was being carried through the vehicle. A naka checking was held at Laluk Tiniali, at about 02:35 pm, on 06.10.2022 and the aforementioned vehicle was intercepted. On searching the vehicle, 37.776 kgs of ganja was recovered from the vehicle which was occupied by the petitioners. The petitioners were taken into custody and since then, they have been behind bars.

6. The learned counsel for the petitioners has relied on the decision of Hon'ble the Supreme Court in ***Hasubhai Kamabhai Thakor –Vs- The State of Gujarat***, wherein vide order dated 26.04.2023, in connection with Petition for Special Leave to Appeal (Crl.) No. 2523/2023, it has been observed that-

“3. The materials on record show that the petitioner has supplied Ganja seed for cultivation and as per the definition of Ganja in Section 2(iii)(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act), it is not a banned contraband. There are no specific allegation that the Ganja seeds were supplied by the petitioner to the other person with an intention to receive back the grown Ganja after cultivation.”

7. The learned counsel for the petitioners has also relied on the decision of the High Court of Judicature at Bombay in ***Kunal Dattu Kadu –Vs- Union of India***, in connection with AB No. 2173/2022, wherein, vide order dated 29.08.2022, it has been observed that-

16) The NDPS Act defined Ganja under Section 2(iii)(b) as under : ”

Ganja, that is the flowering of fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) by whatever, name they may be known or designated; and which means that if the seeds and leaves are accompanied by the tops then the same can be termed as ganja.”

From the reading of aforesaid description, it can be seen that Ganja is flowering or fruiting tops of the cannabis plant and when the flowering or fruiting tops are not accompanied, the seeds and leaves are to be excluded.

It is implied that if seeds and leaves are accompanied by tops by way of flowering or fruiting, it would amount to Ganja, but when the seeds and leaves are not accompanied by the tops, this will not be considered as Ganja, ultimately it would have to be ascertained whether the flowering or fruiting tops of the cannabis are accompanied by the seeds and leaves.”

8. It was held by Hon'ble the Supreme Court in ***Hasubhai Kamabhai Thakor's case (supra)*** that *at best it could be held that the petitioner was supplying ganja seeds for plantation and the petitioner was granted bail.* The ratio of the decision in ***Hasubhai's case (supra)*** is not applicable to this case. The merits of this case are not brought to the fore, at this juncture.

9. The High Court of Judicature at Bombay had also granted bail in ***Kunal Dattu Kadu's case (supra)***. It was also held in ***Kunal Dattu Kadu's case (supra)***, that *there was no reference of the flowering and fruiting of tops and leafy substance indicating that it is a mixture of green leafy substance and was a heterogeneous mixture of flowering and fruiting tops, bits of leaves, stem and stalks along with seeds of plant.* It was held that the actual ganja would weigh less than 43 kgs, which may not tantamount to

commercial quantity of ganja and thereafter, the petitioner Kunal Dattu Kadu, was granted bail.

10. The learned Additional Public Prosecutor has raised serious objection stating that the FSL Report clearly reveals that the articles seized from the possession of the petitioner were tested and the report was a 'positive' report of cannabis.

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

12. I have also considered the evidence of the witnesses, highlighted by the petitioner that PW-3 has mentioned in his cross-examination that the contraband item appeared to be dried leaves and stems. Fruits and flowers were missing. It was also projected by the learned counsel for the petitioner that PW-15 has also stated that the contraband seized from the petitioner were dried leaves and stems.

13. It is submitted that PW-3 was the Seizing Officer and PW-15 was the Investigating Officer.

14. At this juncture, this Court would abstain from dealing with the technicalities of the case. 15 witnesses have already been examined. This

case is at the fag end of the trial. The technicalities of the evidence would be better dealt with by the learned trial Court.

15. There appears to be no justified ground to grant bail to the petitioners, at this stage of trial.

16. Petition with prayer for bail is rejected at this stage.

17. However, learned trial Court is directed to conclude the trial within one month from today.

18. Bail Application stands disposed of.

JUDGE

Comparing Assistant