

GAHC010291602023



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

Case No. : AB/4313/2023

ABDUL KALAM LASKAR
S/O. MONIR UDDIN LASKAR, VILL- KACHUDARAM, PT(IV), P.S- SONAI,
DIST. CACHAR, ASSAM.

VERSUS

THE STATE OF ASSAM
REPRESENTED BY PP, ASSAM

Advocate for the Petitioner : MR H R A CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN

ORDER

18.03.2024

Heard Mr. H.R.A. Choudhury, learned Senior counsel, assisted by Mr. F.A. Laskar, learned counsel for the applicant. Also heard Mr. R.J. Baruah, learned Additional Public Prosecutor, Assam, appearing for the State respondent.

2. Apprehending arrest in connection with Sonai P.S. Case No.32/2023, under

Sections 21(c)/22(c)/23/25/27A/29 of the NDPS Act, this application under Section 438 Cr.P.C. has been preferred by the applicant, namely, Abdul Kalam Laskar, for grant of pre-arrest bail.

3. It is to be noted here that the aforementioned case has been registered on the basis of an FIR lodged by SI Mahatmya Manash Handique, O/C of Sonai P.S. on 01.03.2023. The essence of allegation made in the FIR dated 01.03.2023, is that acting on a tip off, the informant along with other staff, conducted search in the house of one Nazrul Hoque Laskar and recovered suspected Yaba tablets in the sofa where he was sitting and also found one Aklas Uddin Laskar with him sitting in the said sofa and Nazrul Hoque Laskar accepted that he got Yaba tablets with him and both of them were going to have a deal in respect of the said drugs. Thereafter, he conducted search in the house of Nazrul Hoque Laskar and recovered 17 numbers of small black coloured plastic packets with grapes printed in white colour, containing 200 numbers of dark orange coloured small tablets in the packets, of total 3400 numbers of tablets, and seized the same in presence of witnesses, and during interrogation, Nazrul Hoque Laskar and Aklas Uddin Laskar disclosed that they used to work with a drug dealer, namely, Abdul Kalam Laskar of Kachudram Pt. IV. Thereafter, they proceeded to the house of Abdul Kalam Laskar of Kachudram Pt. IV and found the main gate of the house locked and they were informed by the local VDPs that Abdul Kalam Laskar's wife and his brothers' wives, before sometime, had thrown a suspected plastic sack in the bushes of the backside of his house and thereafter, they conducted search in the bushes of the backside of the house and found a plastic sack and having opened the same, they found 152 numbers of soap box like plastic containers with suspected heroine, weighing 2.036 kg, and also found 11 numbers of transparent plastic packets of identical shape containing white coloured powdery substances suspected to be heroin, weighing 598 grams, and thereafter, seized the same in presence of witnesses.

4. Mr. Choudhury, learned Senior counsel for the applicant submits that after completion of investigation, the case has already been charge-sheeted by the I.O. and

now the case is pending before the learned Court below and the learned Court below has issued process to the applicant, and that nothing has been recovered from the conscious possession of the applicant, and that the applicant is ready to cooperate with the investigating agency and he will appear before the learned Court below on each and every date, and therefore, it is contended to allow the application.

5. On the other hand, Mr. R.J. Baruah, learned Addl. Public Prosecutor submits that a large quantity of heroin, weighing 2.036 kg and also 598 grams were allegedly recovered from the bushes behind the house of the applicant and that the applicant is a veteran criminal, and as per the statement of the co-accused, they have collected the drugs from the present applicant, and therefore, Mr. Baruah has opposed the application.

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

7. It appears from the scanned copy of the record and the materials placed on record that the applicant has already been charge-sheeted after completion of investigation and the learned Court below has issued summon to the applicant. Further, it appears that on the basis of the statement of co-accused, search was conducted in the house premises of the applicant and a huge quantity of contraband substances suspected to be heroin, weighing 2.036 kg and also 598 grams were recovered from the bushes behind the house of the applicant and the seized contraband were thrown by the wife of the present applicant.

8. But, that does not mean that the seized contraband were not in his conscious possession. The issue of possession has been dealt with by Hon'ble Supreme Court in the case of **Union of India v. Mohd. Nawaz Khan, (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 *MadanLal v. State of H.P.* [*MadanLal v. State of H.P.*, (2003) 7 SCC 465 : 2003 SCC (Cri) 1664] this Court held that : (SCC p. 472, paras 19-23 & 26)

"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* [*Supt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja*, (1979) 4 SCC 274 :

1979 SCC (Cri) 1038] 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* [*Dharampal Singh v. State of Punjab*, (2010) 9 SCC 608 : (2010) 3 SCC (Cri) 1431] , 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* [*Mohan Lal v. State of Rajasthan*, (2015) 6 SCC 222 : (2015) 3 SCC (Cri) 881] , 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.”

9. Keeping these governing principles in mind, the issue has to be decided only after taking evidence of the prosecution side, which has not yet been started before the learned court below.

10. Even for the sake of argument it is accepted that the contraband substances were not recovered from the conscious possession of the present accused, yet, the same does not absolve it of level of scrutiny required under section 37(1)(b)(ii) of NDPS Act, as held by Hon'ble Supreme Court in **Union of India through NCB, Lucknow vs. Nawaz Khan** reported in **(2021) 10 SCC 100**, as the quantity of contraband substance recovered from the cow shed of the house premises of the accused is of commercial quantity, and as such, the embargo under Section 37 of the NDPS Act will definitely come into play.

11. 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.

12. 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, 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."

13. Same principle is echoed by 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.

14. 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 pre-arrest bail under Section 438 of the Cr.P.C. to the accused and therefore, the same stands dismissed. The applicant shall surrender before the learned court below forthwith.

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

Sd/- Robin Phukan
JUDGE

Comparing Assistant