

GAHC010293372023



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

Case No. : Bail Appln./68/2024

AINUL HOQUE
S/O- SIRAJ UDDIN, VILLAGE- DENGARBOND, P.O. SOLGOI, P.S.
BAZARICHERRA, DISTRICT- KARIMGANJ, ASSAM, PIN NO. 788726

VERSUS

THE STATE OF ASSAM
TO BE REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR H R A CHOUDHURY, J M SULAIMAN, MR. I U
CHOWDHURY, MR. R A CHOUDHURY

Advocate for the Respondent : PP, ASSAM,

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND
ORDER

13.08.2024

Heard Mr H R A Choudhury, learned Senior Counsel for the petitioner, Ainul Hoque, who has filed this application under Section 439 CrPC, with prayer for bail, as he is behind bars since 08.05.2023, in connection with Special NDPS Case No. 30/2023, arising out of Bazaricherra PS Case No. 81/2023, under Sections 22(C)/25/29 of the NDPS Act, 1985.

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 the FSL Report relating to the chemical examination of the seized articles in connection with this case was submitted after more than one month in violation of the Rule 14 of the Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022. This ground is sufficient to exonerate the petitioner and enlarge him on bail. Rule 14 reads as:-

“14. Expeditious Test- The chemical laboratory shall submit its report to the Court of Magistrate with a copy to the Investigating Officer within fifteen days from the date of receipt of the sample.

Provided that where quantitative analysis requires longer time, the results of the qualitative test shall be dispatched to the Court of Magistrate with a copy to Investigating Officer within the said time limit on the original copy of the Test Memo and in the next fifteen days the result of quantitative test shall also be indicated on the duplicate Test Memo and sent to the Court of Magistrate with a copy to the Investigating Officer.”

4. The embargo under Section 37 of the Act is thus negated by the lapse in submitting the FSL Report.

5. The learned Senior Counsel for the petitioner has also submitted that going by the merits of the case, the charge sheet has been erroneously submitted against the petitioner. The petitioner is a helper and he was not at all aware about any transportation of contraband.

6. It is further submitted that on 07.04.2023, the goods were seized and on

09.04.2023, the contraband was sent for chemical examination and the report was sent from the Directorate of Forensic Science, on 02.06.2023.

7. The learned Senior Counsel for the petitioner has relied on the decision of Hon'ble the Supreme Court in *Simarnjit Singh –Vs- State of Punjab*, wherein vide order dated 09/05/2023, in Criminal Appeal No. 1443 of 2023, it was observed that-

“8. In paragraphs 15 to 17 of the decision of this Court in Union of India v. Mohanlal & Another; reported in (2016) 3 SCC 379, it was held thus:

“15. It is manifest from Section 52-A(2)include (supra) that upon seizure of the contraband the same has to be forwarded either to the officerin-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has

to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with subsections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.”

10. Hence, the case of the prosecution is not free from suspicion and the same has not been established beyond a reasonable doubt. Accordingly, we set aside the impugned judgments insofar as the present appellant is concerned and quash his conviction and sentence.”

8. The petitioner has also relied on the decision of Hon’ble the Supreme Court in *Yusuf @ Asif –Vs- State*, wherein vide order dated 13.10.2023, in connection with Criminal appeal No. 3191 of 2023, it was observed that-

“15. In Mohanlal's case (supra), the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer in charge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of

the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.

16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.

17. Accordingly, we are of the opinion that the failure of the concerned authorities to lead primary evidence vitiates the conviction and as such in our opinion, the conviction of the appellant deserves to be set aside. The impugned judgment and order of the High Court as well as the trial court convicting the appellant and sentencing him to rigorous imprisonment of 10 years with fine of Rs.1 lakh and in default of payment of fine to undergo further imprisonment of one year is hereby set aside.”

9. The petitioner has also relied on the decision of Hon’ble the Supreme Court in *Sarija Banu @ Janarthani @ Janani & Another –Vs- State through Inspector of Police*; reported in (2004) 12 SCC 266, wherein it has been observed that-

“4. The appellants preferred bail application before the Sessions Court. The same was rejected and aggrieved by the same, they preferred bail application under [Section 439](#), Cr.P.C. before the High Court and the same was dismissed by the impugned order.

7. It is pertinent to note that in the bail application the appellants, it

was alleged, that there was serious violation of [Section 42](#) of the NDPS Act. In the impugned order nothing is stated about the alleged violation of [Section 42](#), and it is observed that it was not necessary to consider such violation at this stage. The compliance of [Section 42](#) is mandatory and that is a relevant fact which should have engaged attention of the Court while considering the bail application.”

10. The learned Additional Public Prosecutor, Mr B B Gogoi, has relied on the decision of the High Court of Judicature of Bombay at Goa, in *Johnson Richard –Vs- State of Goa*; reported in 2023 SCC OnLine Bom 1614, wherein it has been observed that-

“11. The preamble of the aforesaid Rules indicate that in exercise of the powers conferred by Section 76; read with Section 52-A; of the Narcotics Drugs and Psychotropic Substances Act, 1985, the Central Government makes the rules. The title of the Rules makes it clear that the Rules are relating to seizure, storage, sampling and disposal. Section 76 of NDPS Act provides that, subject to the other provisions of the Act, the Central Government may by notification in the official gazette, make rules for carrying out the purposes of the Act. The section also makes it clear that the Rules may provide for all or any of the matters referred to therein. The NDPS Rules, 2022 procedure regarding seizure and storage of seized material, designation of godowns, deposit in godowns, storage of seized material in godown, inspection of godown, application to Magistrate, samples to be drawn in the presence of the Magistrate, drawing the samples, quantity to be drawn for sampling, storage of samples, despatch of sample for testing, expeditious test, duplicate sample and remnants of samples, disposal, etc. Rule 14 relates to Expeditious Test. Assuming that the chemical

laboratory has not submitted its report within stipulated time as envisaged under Rule 14, the applicant would not be entitled for bail. Section 37 of the NDPS Act provides that no person accused of offence punishable for offences under section 19 or section 24 or section 27-A and also for offences involving commercial quantity shall be released on bail or on bond unless the Public Prosecutor is given opportunity to oppose the application for such release and where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. In view of the rigors implicit under Section 37 of the NDPS Act, the applicant is not entitled for bail.

12. Hence, I pass the following order:—

ORDER

(i) The criminal application (bail) No. 497 of 2023 (Filing) stands rejected.

(ii) The concerned CFSL authority is directed to submit the CFSL report expeditiously within a period of three months from today.

(iii) The application is disposed of. ———

11. The learned Additional Public Prosecutor, Mr B B Gogoi, has also relied on the decision of the High Court of Judicature of Karnataka at Bengaluru, in ***Mr Zakir Hussain –Vs- State by Intelligence Officer, NCB***; wherein vide order order dated 15.07.2022, in connection with Criminal Petition Nok. 2612 of 2022, it has been observed that-

“22. The learned counsel for the respondent has relied on a decision of a coordinate bench of this Court in the case of Emmanuel Michael Vs. Union of India passed in Criminal Petition No.3406/2021, disposed of

on 08.10.2021, wherein this Court has relied on a decision of the Hon'ble Apex Court in Paulswamy's case [(2000) 9 SCC 549] relating to matter regarding non-compliance with the formalities during the bail stage. Para 24 of the said order is extracted hereunder:

"24. It is relevant to refer to the decision of Paulswamy (supra), wherein, the Hon'ble Apex Court held that it would be too early to take into account and judge the matter regarding non compliance with the formalities during the bail stage, since recording of findings under Section 37 of the Act was a sine-qua-non for granting bail under the Act and held at para 6 as under:

6. In the light of Section 37 of the Act no accused can be released on bail when the application is opposed by the Public Prosecutor unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. It is unfortunate that matters which could be established only in offence regarding compliance with Sections 52 and 57 have been pre-judged by the learned Single Judge at the state of consideration for bail. The minimum which learned Single Judge should have taken into account was the factual presumption in law position that official acts have been regularly performed. Such resumption can be rebutted only during evidence and not merely saying that no document has been reduced before the learned Single Judge during bail stage regarding the compliance with the formalities mentioned in those two sections....."

emphasis supplied In so far as quantity of ganja seized, this Court has already considered in the earlier petition that the same is much more than the commercial quantity. Further, the accused has been found transporting ganja in his vehicle and at this stage, the material

collected is sufficient to show that he had real knowledge of the nature of substance concealed in the jute gunny bags beneath the load of coconuts. Hence, taking into consideration all the above, this Court is of the considered view that, a prima facie case is made out against the petitioner and it cannot be said at this stage that there are reasonable grounds for believing that the petitioner is not guilty of the offence alleged against him.

Hence, the following:

ORDER- Criminal Petition is dismissed.”

12. I have considered the submissions at the Bar with circumspection.
13. The FIR unfolds that on 07.04.2023, at about 06:30 pm, the Officer-In-Charge of Bazaricherra Police Station received a secret information that one public bus bearing Registration No. AS-10 AC-2730, approaching from Karimganj towards Rangamati, Bazaricherra was transporting suspected cough syrup and the bus was being driven by Rafiqur Rahman. The conductor was Jabrul Islam and the helper was Ainul Hoque. When the bus was halted by the investigating team, the petitioner and the other accused could not give any satisfactory reply about the suspected codeine phosphate syrup in the public bus. This information was forwarded to the superior officer by the investigating team and after receiving the authorization, the search and seizure was conducted and 4 cartons of cough syrup bottles were seized.
14. I have scrutinized the Trial Court Record.
15. Charge sheet has been laid against the petitioner. Charges have been framed on 08.11.2023. The Trial Court Record reveals that not a single witness has been examined

so far.

16. It is true that the petitioner is behind bars since 08.04.2023, but not a single witness has been examined so far.

17. The scrutiny of the Trial Court Record and the inventory reveals that it cannot be affirmed that the investigation was not conducted as per proper procedure. The inventory clearly reveals that seizure was made as per Section 52-A of the NDPS Act.

18. The scrutiny of the Trial Court Record reveals that, contrary to the allegations the procedure under Section 42 of the NDPS Act was followed, but at the same time, without evidence, it cannot be affirmed through the documents alone that the procedure under Section 52-A and Section 42 of the NDPS Act was properly followed. At this juncture, it cannot be held that the petitioner's precious Right to Personal Liberty has been infringed due to prolonged incarceration. At the same time, it cannot be ignored that there has been a delay in the trial, which is dragging on with leaden feet. The rigour under Section 37 of the NDPS Act comes into play.

19. Considering all aspects and in view of my foregoing discussions, at this juncture, the petitioner's prayer for bail is rejected. However, the learned trial Court is directed to expedite the trial for speedy disposal of the case and make every endeavour to record the evidence of the witnesses expeditiously, without delay.

20. Petition is rejected.

11. Bail Application stands disposed of.

12. Send back the Case Diary.

JUDGE

Comparing Assistant