



GAHC010186072021

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

Case No. : Bail Appln./3150/2021

MAHESH RAY @ ROY
S/O LT. RAM DAYAL RAI
PRESENT ADDRESS- PALTAN BAZAR, K.C. SEN ROAD, PIN-781008, DIST.
KAMRUP (M), GUWAHATI, ASSAM
PERMANENT ADDRESS- VILL- GAUSPUR BARIARPUR, P.O.
CHAKSIKANPUR, P.S. RAJAPAKAR
DIST. BAISHALI, PIN-844115, BIHAR

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

2:UNION OF INDIA
REP. BY NARCOTICS CONTROL BUREA

Advocate for the Petitioner : MR. J I BORBHUIYA

Advocate for the Respondent : PP, ASSAM

B E F O R E

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Date of hearing : **29.04.2022**

Date of Judgment : **06.05.2022**

JUDGMENT & ORDER

Heard Shri JI Borbhuiya, learned counsel for the petitioner, namely, Mahesh Ray @ Roy, who has filed this application under Section 439 CrPC seeking regular bail in connection with NDPS Case No. 81/2019 arising out of NCB Crime No. 05/2019 registered under Sections 21(c) / 29 of NDPS Act, 1985. Also heard Shri SC Keyal, learned Standing Counsel, NCB.

2. The petitioner was arrested on 21.05.2019.
3. In terms of the order passed earlier, the scanned copy of the case records has been transmitted to this Court.
4. Shri Borbhuiya, the learned counsel for the petitioner makes the following submissions-
 - i. The petitioner was not named in the search cum seizure list dated 07.05.2019.
 - ii. No recovery whatsoever was made from the petitioner.
 - iii. The name of the petitioner was inserted as accused no. 3 only in the time of final complaint by the NCB.
 - iv. The petitioner has been arrested only on the basis of the statements made under Section 67 of the NDPS Act by co-accused.
5. Shri Borbhuiya, the learned counsel for the petitioner submits that the petitioner has been in custody for almost three years and therefore, there is no requirement of any further custodial detention.
6. In support his submissions, the learned counsel has placed reliance upon the case of ***Hira Singh and Anr. Vs. Union of India and Anr.*** reported in ***AIR 2020 SC 3255***.
7. On the other hand, Shri SC Keyal, the learned Standing Counsel, NCB submits that the petitioner is under a duty to make out a case for grant of bail based on the facts and circumstances and the concept of precedent in criminal cases except for a point of law may not be to that degree as in civil case. It is submitted that the case of ***Hira Singh (Supra)*** relied upon would rather come to the aid of the prosecution and in this connection paragraph 10 of the said Judgment has been pressed into service, the relevant part of which reads as

follows-

"10. In view of the above and for the reasons stated above, Reference is answered as under:

(I). The decision of this Court in the case of E. Micheal Raj (supra) taking the view that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight of the offending narcotic drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, is not a good law;

(II). In case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the "small or commercial quantity" of the Narcotic Drugs or Psychotropic Substances;

(III). Section 21 of the NDPS Act is not stand-alone provision and must be construed along with other provisions in the statute including provisions in the NDPS Act including Notification No.S.O.2942(E) dated 18.11.2009 and Notification S.O 1055(E) dated 19.10.2001;

(IV). Challenge to Notification dated 18.11.2009 adding "Note 4" to the Notification dated 19.10.2001, fails and it is observed and held that the same is not ultra vires to the Scheme and the relevant provisions of the NDPS Act. Consequently, writ petitions and Civil Appeal No. 5218/2017 challenging the aforesaid notification stand dismissed."

8. The learned Standing Counsel has submitted that records would reveal that co-accused Nirmal Kumar Sah has clearly implicated the present petitioner stating that the materials belonged to the petitioner and in this connection reference has also been made to bail application being BA No. 560/2022 filed by the said Nirmal Kumar Sah.

9. The learned Standing Counsel submits that the trial is at an early stage wherein only



one witness has been examined and releasing the petitioner on bail at this stage may jeopardize the proceeding. The further relevant consideration is that the quantity involved is a huge one falling within commercial quantity for which a strict approach needs to be adopted while considering the bail of an accused. He further submits that offence under this Act is organized one wherein a number of persons involved and seizure / recovery from each of them may not be there.

10. The submissions made by the rival parties have been carefully considered and the scanned copy of the case records perused. It appears that the thrust of the argument made on behalf of the petitioner in support of the prayer for bail is that the arrest and detention has been made solely on the basis of a statement of the co-accused. Further, no recovery, has been made from the petitioner and recovery has been made from two other persons.

11. *Prima facie*, it appears from the records that initially, the petitioner was not named and from the complaint one would come to learn that it is only on the basis of the statements by co-accused that the petitioner has been arrested.

12. The offence involved in this case is one under the NDPS Act and the quantity involved is a commercial quantity. The contraband involved is also chemical manufacture drugs (1000 nos. of bottles of Phensedyle Cough Syrup).

13. This Court finds force in the submission of the learned Standing Counsel, NCB that offences under the NDPS Act are part of an organized crime wherein difference roles are played by different accused persons. Therefore, recovery or seizure cannot be held to be a *sine qua non* for the arrest / detention or even for conviction if there are other convincing and corroborating materials. Therefore, this Court is unable to accept the plea that since no recovery was made from the petitioner, his involvement can be ruled out.

14. This Court is also unable to accept the plea made on behalf of the petitioner regarding the quantity which according to the petitioner is between small and commercial quantity *inasmuch as* it is cleared from the search cum seizure list as well as the Panchnama Report that the recovery of a commercial quantity contained in five cartoons having 1000 nos. of bottles of the contraband.

15. What is left now is the issue of the arrest being based on the statement of the co-accused. At this stage, it is to be kept in mind that it is only the question of grant of bail which is the subject matter of the petition and this Court is not required to go to the aspect as to whether conviction on the sole testimony of a co-accused is sustainable.

16. To resolve the aforesaid issue, one may gainfully refer to the relevant provision of law, namely, Section 133 of the Indian Evidence Act, which reads as follows-

"133. Accomplice.

An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

17. Since, the aforesaid aspect finds mention by way of an illustration, to come to a correct finding the same is also required to be consideration which is extracted hereinbelow-

"14. Court may presume existence of certain facts.

The court may presume the existence of any fact which it things likely to have happened regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume-

(a) ...

(b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars."

18. A conjoint reading of the aforesaid provisions would lead to a conclusion that though a statement of an accomplice can be relied upon for the purpose of conviction of a co-accused, such statement is necessarily required to be corroborated with other relevant materials.

19. The above provision of law and the discussion made are in the context of coming to a finding of conviction which is at a much later stage. However, in the instant case, that stage has not even come and the trial is at a very initial stage. Further, this Court is of the view that

if an arrest and detention is not permissible on the basis of a statement of a co-accused, no investigation would be possible leading to a situation of anarchy and lawlessness.

20. Further, this Court is of the view that it is a settled position of law that in a case involving the NDPS Act, though the length of detention may be a relevant factor, the same shall not be the sole factor for determining a bail application and various other factors are taken into consideration like the quantity of the contraband, nature of the substance, nature of involvement etc. In the present case, the contraband is a commercial quantity and the substance is chemically manufactured drug. Moreover, Section 37 of the NDPS Act lays down that before granting a bail, the relevant factors are that the Court should come to a satisfaction that *prima facie* the petitioner is not guilty of the offence and also the petitioner has to satisfy the Court that in case bail is granted, he is not likely to commit further offence. The aforesaid two factors do not seem to be fulfilled in the present case.

21. At this stage, it would be gainful to refer the following decisions of the Hon'ble Supreme Court.

- i. ***Satpal Singh Vs. State of Punjab*** reported in **(2018) 13 SCC 813** and
- ii. ***Union of India (NCB) Vs. Md. Nawaz Khan*** reported in **(2021) 10 SCC 100**.

22. In the case of ***Satpal Singh (Supra)***, the Hon'ble Supreme Court reiterated that the rigors of granting bail under the NDPS Act should be strictly followed and the conditions laid down under Section 37 of the Act are to be mandatorily followed.

23. In the case of ***Md. Nawaz Khan (Supra)***, the Hon'ble Supreme Court by referring to various earlier judgments had laid down that a finding of absence of possession of contraband on the person does not necessarily absolve it of the level of scrutiny required under Section 37(1)(b)(ii) of the NDPS Act.

24. In that view of the matter and also taking into consideration the very object of the enactment, namely to curb the menace of drugs and its ill effects on the society which has the propensity to destroy the generation as a whole, this Court is of the opinion that no case for grant of bail is made out at this stage. Accordingly, the same stands rejected.



25. It is however clarified that the observation made are tentative in nature and shall not cause prejudice to either of the parties in the trial.

JUDGE

Comparing Assistant