



GAHC010265512023

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

Case No. : Bail Appln./4379/2023

KHAIMINLAL TOUTHANG
S/O- NGAMSEI TOUTHANG A RESIDENT OF MONNAPHAI, P.O., P.S. AND
DISTRICT- CHURACHANDPUR, MANIPUR

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : M THUMRA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI

Date of hearing : **20.12.2023**

Date of Judgment : **20.12.2023**

JUDGMENT & ORDER

Heard Shri Serto T. Kom, learned counsel for the petitioner, namely, Khaiminlal Touchang, who has filed this bail application under Section 439 of the



Cr.PC praying for bail in connection with Sonapur PS Case No. 585/2021 under 21(C)/24/29 of the NDPS Act.

2. The petitioner was arrested on 28.08.2021.
3. At the outset, it may be noted that the prayer for bail of this petitioner was rejected earlier vide order dated 18.04.2022 in Bail Appln./3706/2021.
4. Pursuant to earlier orders, the scanned copies of the case records have been transmitted to this Court.
5. Shri Kom, learned counsel for the petitioner makes the following submissions in support of his prayer for bail:
 - i. Till date, the petitioner is behind the bars for about 816 days and therefore, further custodial detention is not necessary. Though the trial has begun, only three numbers of PWs have been examined.
 - ii. Out of 6 arrested persons, 2 have been granted bail by this Court.
 - iii. There has been violation of the provisions of Section 52 A of NDPS Act, more specifically sub-section (4) thereof. It is contended that the inventory, photographs of the contraband, list of substance drawn and certified by the Magistrate would be treated as primary evidence and in this case, there is no fulfillment of the said requirement.
 - iv. There are no materials against the petitioner as he was merely a traveler in the Bolero vehicle.
 - v. There has been violation of Clause 1.13 of the Standing Order No. 1/88 which prescribes a time of 72 hours from the time of seizure for dispatching of sample to the laboratory.
 - vi. There is no *prima facie* case against the petitioner and therefore, he



should be given the benefit of Section 37 of the Act.

6. In support of his submissions, Shri Kom, learned counsel for the petitioner places reliance upon the following case decisions-

- i. Order dated 28.03.2023 of the Hon'ble Supreme Court in SLP(Crl.)/915/2023 [Mohd. Muslim @ Hussain Vs. State]***
- ii. Order dated 13.07.2023 of the Hon'ble Supreme Court in SLP (Crl.) No. 4169/2023 [Rabi Prakash Vs. State of Odisha].***
- iii. Judgment dated 13.10.2023 of the Hon'ble Supreme Court in Crl.Appeal./3191/2023 [Yusuf @ Asif Vs. State].***
- iv. Order dated 11.09.2023 of this Court in Bail Appln./2110/2023 [Lulun Kuki Vs. State of Assam].***

7. The case of ***Mohd. Muslim*** (supra) has been relied upon to explain the meaning of “not guilty” appearing in Section 37. The Hon’ble Supreme Court has explained that when all the evidence is not before the Court, it is only upon a *prima facie* determination and such determination can be on the basis of materials on record.

8. The case of ***Rabi Prakash*** (supra) has been relied upon to buttress the contention of long incarceration during the time of trial *vis-à-vis* the rights granted under Article 21 of the Constitution of India.

9. The case of **Yusuf** (supra) has been cited in support of the contention regarding the mandatory nature of the provisions of Section 52 A of the Act.

10. In the case of ***Lulun Kuki*** (supra), though bail has been granted, taking into account that the incumbent was in custody for a period of 744 days, it

appears that the said incumbent was also suffering from certain illness for which treatment was required.

11. *Per contra*, Shri KK Das, learned Addl. PP, Assam strenuously opposes the prayer for grant of bail of the petitioner. He submits that on 09.03.2022 the charge sheet has been submitted and the trial has begun. It is submitted that there are 9 numbers of PWs, out of which, 3 numbers of PWs have already been examined. It is further informed that the last date fixed for evidence was 14.12.2023. He accordingly submits that the trial is going on in a regular basis and there is no delay.

12. With regard to the requirement of *prima facie* case on the basis of the materials on record, the learned APP submits that the petitioner is a named accused who was arrested on the spot of the seizure from the vehicle (Bolero) in which he was travelling with few others. It is submitted that the contraband was concealed in the dashboard and the backlight of the vehicle in a planned manner. The report of the FSL also states that the contraband is Heroin with 78.85% purity. He further submits that amongst the witnesses examined, there is also a seizure witness who has deposed against the petitioner. The learned APP finally submits that in consideration of a bail application, this Court is not required to go into the merits of the allegations and the decision is to be rendered based on a *prima facie* determination from the materials on record.

13. The learned APP, Assam submits that apart from the fact that the rule of precedents will not have a strict application in criminal jurisprudence, the facts of the cases cited are distinguishable.

14. The rival contentions made on behalf of the parties have been duly considered and the scanned copies of the case records have been carefully

examined.

15. Before considering the submissions, this Court cannot lose sight of the fact that the bail sought for is in connection with the NDPS Act and the contraband involved is Heroin, the quantity of which has been ascertained as 1.324 kg with 78.85% purity.

16. In the case of **Chandrakeshwar Prasad Vs. State of Bihar**, reported in **(2016) 9 SCC 443** (popularly known as Md. Sahabuddin Case), the Hon'ble Supreme Court has laid down in clear terms that interest of the society is a relevant factor to be taken into account while considering the prayer for bail. For ready reference, the relevant paragraphs of the said case are extracted hereinbelow:

"10. This Court in Rajesh Ranjan Yadav @ Pappu Yadav v. CBI through its Director (2007) 1 SCC 70 balanced the fundamental right to individual liberty with the interest of the society in the following terms in paragraph 16 thereof:

"We are of the opinion that while it is true that Article 21 is of great importance because it enshrines the fundamental right to individual liberty, but at the same time a balance has to be struck between the right to individual liberty and the interest of society. No right can be absolute, and reasonable restrictions can be placed on them. While it is true that one of the considerations in deciding whether to grant bail to an accused or not is whether he has been in jail for a long time, the court has also to take into consideration other facts and circumstances, such as the

interest of the society."

17. This Court also takes into consideration the very object of the enactment, namely to curb the menace of drugs and its devastating effects on the society which has the propensity to destroy the generation as a whole. Therefore, any consideration of a prayer for bail in a NDPS case, that too for a commercial quantity has to be done without overlooking the aspect of interest of the society in general.

18. As regards the first ground urged in support of the prayer for bail, namely, long incarceration and reliance on the case of **Rabi Prakash** (supra) is concerned, this Court is of the opinion that such ground has to be weighed against the objective of the Act. In the case of **Rabi Prakash** (supra), the accused was in custody for a period of more than 3 ½ years and in the trial, only 1 out of 19 witnesses was examined. On the other hand, in the instant case, out of 9 PWs, 3 PWs have already been examined and the last date was fixed on 14.12.2023. Further, the period is also lesser.

19. With regard to the ground of availability of a *prima facie* case, the petitioner is a named accused who was arrested at the place of occurrence and was travelling in the vehicle (Bolero) along with few others. The seized contraband has been found to be Heroin, that too 1.324 kg with 78.85% purity which is a commercial quantity. The contraband was found concealed in the vehicle. This Court has further noted that the vehicle is not a large vehicle like a bus where there are many passengers but a Bolero where all the six passengers were travelling together. This Court has also noted that there is no denial of the fact of the presence of the petitioner in the vehicle and there is nothing in the petition or in the records regarding the purpose of the travel.

20. There is no dispute to the proposition that Section 52 A of the Act is mandatory in nature. However, perusal of the case records would show that certification was done by a Magistrate. In any case, such ground would be relevant only at the stage of the argument. Though Clause 1.13 on the Standing Order 1/88 has been cited, no materials have been shown regarding violation of the same.

21. With regard to the case laws cited, this Court has already noticed that in the case of **Lulun Kuki** (supra), there was an additional consideration of illness of the petitioner therein. The judgment passed in the case of **Yusuf** (supra) was in an appeal against an order of conviction and not in a bail petition.

22. In the case of **Mohd. Muslim (Supra)**, the Hon'ble Supreme Court has laid down the primary importance on the right to speedy trial and in this case, the appellant was found to be in custody for seven long years as an under trial. The Hon'ble Supreme Court had also taken into consideration the provisions of Section 436-A of the CrPC. Though a discussion has been made of Section 37 of the Act, the observation made appears to be only on one part of the said Section. Juxtaposed, in the case of **NCB Vs. Mohit Aggarwal** reported in **AIR 2022 SC 3444**, the other requirement that the accused person is unlikely to commit any offence while on bail has also been taken into consideration. Further, in this case the provisions of Section 436A of the CrPC is *prima facie* is not applicable *qua* the period in custody.

23. In the aforesaid case of **Mohit Aggarwal (Supra)**, the Hon'ble Supreme Court has interpreted Section 37 of the Act which has been inserted especially for the purpose of consideration of bail. It has been held that the expression "reasonable ground" appearing in Section 37(1)(b) would mean credible and

plausible grounds for the Court to believe that the accused person is not guilty for which supporting facts and circumstances must exist. The satisfaction regarding the accused person unlikely to commit any offence while on bail has also been highlighted.

24. The NDPS Act is a special Act with an inbuilt mechanism in the form of Section 37 relating to bail. For ready reference, Section 37 is extracted hereinbelow:

"37. Offences to be cognizable and non-bailable

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), -

(a) Every offence punishable under this Act shall be cognizable;

(b) No person accused of an offence under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless-

(i) The Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) 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.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail."

25. The said Act has introduced an additional restriction in the form of giving an opportunity to the Public Prosecutor and more importantly, the Court has to be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence **and** that he is not likely to commit any offence while on bail. Section 37 (2) makes it clear that the aforesaid limitations are in addition to the other limitations under the Cr.P.C or any other law for the time being in force, on grant of bail.

26. This Court also takes into account the case of ***Union of India Vs. Ajay Kumar Singh @ Pappu*** wherein the Hon'ble Supreme Court vide an order dated 28.03.2023 in CrI.App. No. 952/2023 interfered with an order passed by the Allahabad High Court whereby bail was granted. It was held that Section 37 of the Act was lost sight of. Further, in the case of ***Satpal Singh Vs. State of Punjab*** reported in **(2018) 13 SCC 813**, 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.

27. In view of the aforesaid facts and circumstances and also considering the fact that the offence is under the NDPS Act where, while granting bail, a number of other factors, namely, nature of the contraband, the quantity and the nature of accusation/involvement of the applicant are to be taken into consideration,



this Court is of the opinion that the petitioner is not entitled to the privilege of grant of bail. This Court also cannot ignore the objective and purpose of the enactment which is to curb the menace of drugs in the society.

28. Accordingly, the bail application stands rejected at this stage.

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

JUDGE

Comparing Assistant