

GAHC010002532021



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

**Case No. : Bail Appln./126/2021**

AHADUL HUSSAIN AND ANR.  
S/O LATE ABDUL SUKKUR, VILL. DEUBARI, P.S. PATHARKANDI, DIST.  
KARIMGANJ, ASSAM.

2: NOOR AHMED

S/O BURHAN UDDIN  
VILL. ERALIGOO (AHMEDPUR)  
P.S. PATHARKANDI  
DIST. KARIMGANJ  
ASSAM

VERSUS

THE STATE OF ASSAM  
TO BE REPRESENTED BY THE PP, ASSAM.

**Advocate for the Petitioner : MR H R A CHOUDHURY**

**Advocate for the Respondent : PP, ASSAM**

Linked Case : Bail Appln./498/2021

KABIR AHMED  
S/O LATE TAFAZZUL ALI  
VILL-TILLABARI  
P.S.-PATHARKANDI  
DIST-KARIMGANJ

ASSAM  
PIN-78824

VERSUS

THE STATE OF ASSAM  
REPRESENTED BY THE PUBLIC PROSECUTOR  
ASSAM

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Advocate for : MR. K N CHOUDHURY  
Advocate for : PP  
ASSAM appearing for THE STATE OF ASSAM

Linked Case : Bail Appln./139/2021

FARUK AHMED  
S/O LT. NEJAM UDDIN  
R/O VILL ATANAGAR  
(MOINA)  
PO KANAIBAZAR  
PS PATHARKANDI  
DIST. KARIMGANJ  
ASSAM

VERSUS

THE STATE OF ASSAM  
REP. BY PP  
ASSAM

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Advocate for : MR. N H BARBHUIYA  
Advocate for : PP  
ASSAM appearing for THE STATE OF ASSAM

Linked Case : Bail Appln./367/2021

IKBAL BAHAR @ IKBAL BAHAR KHONDAKAR  
S/O LATE ALA UDDIN @ ALA UDDIN KHONDAKAR

PRESENT ADD-VILL-HANIFABAD  
ASIMGANJ  
P.O.-KANAIBAZAR  
P.S.-PATHARKANDI  
DIST-KARIMGANJ  
ASSAM  
INDIA  
PIN-788724  
PERMANENT ADD- VILL-PURAN CHANDPUR  
P.O.-KANAIBAZAR  
P.S.-PATHARKANDI  
DIST-KARIMGANJ  
ASSAM  
INDIA  
PIN-788724

VERSUS

THE STATE OF ASSAM  
REPRESENTED BY THE PUBLIC PROSECUTOR  
ASSAM

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Advocate for : MR H R A CHOUDHURY  
Advocate for : PP  
ASSAM appearing for THE STATE OF ASSAM

Linked Case : Bail Appln./130/2021

RAHIM UDDIN  
S/O SAHAB UDDIN  
VILL. KABARIBOND  
P.S. PATHARKANDI  
DIST. KARIMGANJ  
ASSAM.

VERSUS

THE STATE OF ASSAM  
TO BE REPRESENTED BY THE PP  
ASSAM.

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Advocate for : MR H R A CHOUDHURY  
Advocate for : PP  
ASSAM appearing for THE STATE OF ASSAM

Linked Case : Bail Appln./361/2021

FORID UDDIN @ MD. FARID UDDIN  
S/O MD. NASIR ALI  
VILL-SOUTH KEWTI  
P.O.-ASHALKANDI  
P.S.-PATHARKANDI  
DIST-KARIMGANJ  
ASSAM  
INDIA  
PIN-788723

VERSUS

THE STATE OF ASSAM  
REPRESENTED BY THE PUBLIC PROSECUTOR  
ASSAM

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Advocate for : MR H R A CHOUDHURY  
Advocate for : PP  
ASSAM appearing for THE STATE OF ASSAM

Linked Case : Bail Appln./129/2021

SHAMIM UDDIN @ SHAMIM AHMED  
S/O FAIZUL HAQUE  
VILL. BAGAR SANGAN  
P.S. PATHARKANDI  
DIST. KARIMGANJ  
ASSAM.

VERSUS

THE STATE OF ASSAM  
TO BE REPRESENTED BY PP

ASSAM.

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Advocate for : MR H R A CHOUDHURY  
Advocate for : PP  
ASSAM appearing for THE STATE OF ASSAM

Linked Case : Bail Appln./575/2021

JILLUL HOQUE  
S/O ABDUL JALIL  
VILL-KOLAKAURI  
P.O.-ERALIGOOOL  
P.S.-PATHARKANDI  
DIST-KARIMGANJ  
ASSAM  
PIN-78824

VERSUS

THE STATE OF ASSAM  
REPRESENTED BY THE PUBLIC PROSECUTOR  
ASSAM

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Advocate for : MR H R CHOUDHURY  
Advocate for : PP  
ASSAM appearing for THE STATE OF ASSAM

**BEFORE**  
**HONOURABLE MR. JUSTICE MANISH CHOUDHURY**

**ORDER**

**Date : 30-04-2021**

By these 8 (eight) nos. of applications filed under Section 439, Code of Criminal Procedure, 1973 (CrPC), 9 (nine) nos. of accused-petitioners have prayed for their release on bail as they are in custody in connection with

Badarpur Police Station Case no. 312/2020 (G.R. Case no. 2170/2020) registered for offences under Sections 21(c)/29 of the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985.

2. The accused-petitioners viz. (i) Ahadul Hussain and (ii) Noor Ahmed in Bail Appln. 126/2021 are in custody since 08.12.2020. The accused-petitioner viz. Rahim Uddin in Bail Appln. 130/2021 is in custody since 21.11.2020. The accused-petitioner viz. Faruk Ahmed in Bail Appln. 139/2021 is in custody since 12.11.2020. The accused-petitioner viz. Shamim Uddin @ Shamim Ahmed in Bail Appln. 129/2021 is in custody since 06.11.2020. The accused-petitioner viz. Forid Uddin @ Md. Farid Uddin in Bail Appln. 361/2021 is in custody since 21.11.2020. The accused-petitioner viz. Ikbah Bahar @ Ikbah Bahar Khondakar in Bail Appln. 367/2021 is in custody since 29.11.2020. The accused-petitioner viz. Kabir Ahmed in Bail Appln. 498/2021 is in custody since 11.02.2021. The accused-petitioner viz. Jillul Hoque in Bail Appln. 575/2021 is in custody since 14.11.2020.

3. As all these applications have arisen out of the same police case i.e. Badarpur Police Station Case no. 312/2020, the same are taken up together, as agreed to by the learned counsel for the parties.

4. Heard Mr. K.N. Choudhury, learned Senior Counsel for the accused-petitioner in Bail Appln. 498/2021 and Mr. H.R.A. Choudhury, learned Senior Counsel for the accused-petitioners in Bail Appln. 126/2021, Bail Appln. 129/2021, Bail Appln. 575/2021, Bail Appln. 130/2021, Bail Appln. 139/2021, Bail Appln. 361/2021 & Bail Appln. 367/2021. Also heard Mr. N.K. Kalita and Mr. T.K. Mishra, learned Additional Public Prosecutors for the State of Assam.

5. The First Information Report (FIR) was lodged by an Assistant Sub-Inspector of Police (ASI) attached to Badarpur Police Station on 04.11.2020. In the FIR, it has *inter-alia* been stated that based on a specific information received by the Officer In-Charge, Badarpur Police Station that one Maruti Suzuki Wagon R car bearing registration no. AS-10/E-1339 (white colour) was coming from Silchar side to Karimganj side with huge quantity of drugs, a General Diary Entry being G.D. Entry no. 67 dated 04.11.2020 was registered. Pursuant thereto, the Officer In-Charge, Badarpur Police Station deputed a team of police personnel for special *Naka* checking in front of Badarpur Police Station on National Highway 37 for checking of vehicles and interception of the said car particularly. Accordingly, the team took position at 10-47 a.m. on 04.11.2020. At around 11-00 a.m., the white colour Maruti Suzuki Wagon R car bearing registration no. AS-10/E-1339 was stopped at the *Naka* checking when it was found coming from Silchar side towards Karimganj side. The said car was found driven by one Sabbir Ahmed and when questioned, his replies were found unsatisfactory. The Officer In-Charge, Badarpur Police Station was informed and he arrived at the spot. The Officer In-Charge, Badarpur Police Station authorized one Sub-Inspector of Police to conduct search of the said car and accordingly, the car was searched in presence of 4 (four)nos. of witnesses, who were found present near the *Naka* checking spot. Upon thorough search of the said Maruti Suzuki Wagon R car, 32 (thirty two) nos. of plastic soap cases containing suspected *brown sugar* were found hidden in a modified box in the back of the car. The box was opened by the driver of the car, Sabbir Ahmed by taking out the right side rear wheel of the said car. The 32 (thirty two) nos. of plastic soap cases were inside two polythene packets – one of pink colour and the other one of yellow colour. The quantity of suspected *brown sugar* so found was weighed

on the spot and on weightment, the quantity of suspected *brown sugar* was found to be 1.330 Kg. Accordingly, the Sub-Inspector of Police seized the said 32 (thirty two) nos. of packets, found inside the two nos. of plastic bags of pink colour and yellow colour, and the Maruti Suzuki Wagon R car bearing registration no. AS-10/E-1339 along with its key. That apart, the registration certificate of the said car in the name of one Noor Ahmed and one mobile handset of Sabbir Ahmed were seized.

6. On receipt of the said FIR, the Officer In-Charge, Badarpur Police Station registered the same as Badarpur Police Station Case no. 312/2020 for offences under Sections 21(c)/29 of the NDPS Act.

7. Mr. K.N. Choudhury and Mr. H.R.A. Choudhury, learned Senior Counsel for the accused-petitioners have submitted that the accused-petitioners have been arrested merely on the basis of suspicion on the ground that the arrested accused person, Sabbir Ahmed in his statement, made in custody, had stated that some of these accused-petitioners were also involved in the alleged crime. It is their submission that apart from such implication made by the said arrested accused person, there are no other materials against the accused-petitioners to justify their arrest. It is further submitted that the FSL Report has not been placed before the Court despite strict direction of the Court. It has been submitted that another accused-petitioner, Walid Hussain @ Mona who was also arrested in connection with the case, has already been released on bail by a co-ordinate bench of this Court by an order dated 25.02.2021 passed in *Bail Appln. 2996/2020* [*Walid Hussain @ Mona vs. State of Assam*] after perusal of the materials in the case diary. They contend that the present accused-petitioners are also similarly situated with said Walid Hussain @ Mona and, as such, the

present accused-petitioners also be released on bail subject to suitable terms and conditions and the present accused-petitioners undertake to abide by any terms and conditions imposed and they would co-operate in the further investigation of the case. It has further been submitted that all the accused-petitioners have already been thoroughly interrogated in custody and nothing incriminatory have been found against them till date. As such, they have submitted, incarceration for any further period would be unjustified and unjust.

7.1. Learned Senior Counsel for the petitioners have referred to three orders passed by three co-ordinate benches of this Court in 3 (three) other bail applications involving commercial quantity of contraband substance viz. (i) order dated 19.06.2019 passed in *Bail Appln. 1464/2019 [Nurezzaman Islam @ Nurajjaman vs. State of Assam]*; (ii) order dated 18.09.2020 passed in *Bail Appln. 1483/2020 [Pranab Das vs. Union of India]*; and (iii) order dated 06.10.2020 passed in *Bail Appln. 1636/2020 [Ashik Ahmed Mondal @ Larju vs. State of Assam]*. Learned Senior Counsel for the petitioners have also referred to the decisions of the Hon'ble Supreme Court of India which have been referred to in the above-stated three orders while considering the matter of bail under the provisions of the NDPS Act involving commercial quantity of contraband substance.

7.2. Mr. H.R.A. Choudhury, learned Senior Counsel by referring to the documents annexed to the application, *Bail Appln. 361/2021*, has submitted that one of the police officers had taken a biased attitude in the investigation against the accused-petitioners therein because of previous enmity. He has submitted that one of the accused-petitioners herein viz. Ikbah Bahar had earlier filed a complaint case being C.R. no. 1486/2019 on 24.10.2019 against the said officer

where the accused-petitioner, in Bail Appln. 361/2021, Farid Uddin was listed as one of the witnesses. The accused-petitioner, Ikbah Bahar had to file another complaint case, C.R. no. 1092/2020 from jail against the said police officer. The two accused-petitioners viz. Ikbah Bahar and Farid Uddin had complained about their torture in custody by the said police officer who, according to the learned Senior Counsel, had unauthorisedly taken part in the investigation of the case in hand. To buttress his said submission, he has referred to an order dated 04.12.2020 passed by the learned Additional Sessions Judge (FTC), Karimganj in Special Case (NDPS) no. 37/2020.

7.3. It has been averred by the accused-petitioner in Bail Appln. 498/2021, Kabir Ahmed that based on an FIR dated 31.07.2018, Patharkandi Police Station Case no. 324/2018 was registered under Section 22(c), NDPS Act and in the said FIR, three persons were named as accused. By an application dated 10.08.2018, Section 29 of the NDPS Act was added in the said case and the name of the accused-petitioner, Kabir Ahmed was added as an accused. But when the charge sheet was submitted in the said case vide Charge Sheet no. 02/2019 dated 14.01.2019, his name was not included amongst the charge sheeted accused persons. Another police case, Patharkandi Police Station Case no. 59/2021 has been registered against the accused-petitioner, Kabir Ahmed under Sections 188/224/325/353/333/326/307, IPC accusing him of obstructing the police when they went to effect his arrest.

8. Learned Additional Public Prosecutors have submitted that the accused-petitioners have been arrested on the basis of the statement of the arrested accused person, Sri Sabbir Hussain who was arrested on 04.11.2020 after he was found in possession of commercial quantity of suspected *brown sugar*.

When the said accused person was interrogated in custody, he had implicated some of the present accused-petitioners to be involved with him in the alleged crime. After some of such accused persons were arrested they were interrogated and on the basis of leads received from such interrogations, the rest of the present accused-petitioners have been arrested. It has been contended that all of the arrested accused persons are suspected to be members of an organized gang which is involved in the business of drugs peddling in the district of Karimganj and in the neighbouring districts as well as in the neighbouring states for a long time. They have contended that the order dated 25.02.2021 in Bail Appln. 2996/2020 [Walid Hussain @ Mona vs. State of Assam] was passed without considering the mandatory prescription contained in Section 37 of the NDPS Act and, as such, the present accused-petitioners cannot be given the benefit of bail on the ground of parity. It has, however, been submitted that till date, except the statements extracted from the accused-petitioners during their custodial interrogations no other tangible materials have been recovered and seized from the possessions of any of the present accused-petitioners during the searches conducted at their premises or other places connecting them with the alleged crime of drugs peddling and the investigation is being carried out as on date. The detention of the accused-petitioners are necessary in order to continue the investigation in effective and unobstructive manner.

9. I have considered the submissions of the learned counsel for the parties and perused the materials available in the case diary, produced by the learned Additional Public Prosecutors for the State. I have also gone through the decisions on which the learned counsel for the parties have placed reliance in support of their respective submissions.

10. Section 21 of the NDPS Act has prescribed for punishment for contravention in relation to manufactured drugs and preparations. As per clause (c) of Section 21, where the contravention involves commercial quantity, whoever, in contravention of any provision of the NDPS Act or any rule or order made or condition of license granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable with rigorous imprisonment for a term which shall not be less than 10 (ten) years but which may extend to 20 (twenty) years and shall also be liable to fine which shall not be less than 1 (one) lakh rupees but which may extend to 2 (two) lakh rupees. Section 29 of the NDPS Act has prescribed for punishment for abetment and criminal conspiracy. It has *inter-alia* been laid down that whoever abets, or is a party to a criminal conspiracy to commit an offence punishable under Chapter IV of the NDPS Act which includes Section 21, shall, where such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in Section 116 of the Indian Penal Code, be punishable with the imprisonment provided for the offence.

11. Available literature indicates that *brown sugar*, also called *smack*, is an adulterated form of *heroin*. *Brown sugar/smack* is usually made available in powder form and the substance is about 20% *heroin*. Mention of *heroin* is found in Entry no. 56 in the Table appended to the NDPS Act issued in terms of clauses (viia) and (xxiia) of Section 2 of the NDPS Act, specifying small quantity and commercial quantity in respect of the narcotic drugs and psychotropic substances mentioned therein. As per the said Entry no. 56, a quantity of *heroin* upto 5 grams falls under small quantity and a quantity above 250 grams is

termed as commercial quantity.

12. The case of the prosecution here is that when Sabbir Ahmed was apprehended on 04.11.2020, he was found in possession of suspected *brown sugai*, which on weighment, was found to be weighed 1.330 Kg. Evidently, the accusation made herein is in respect of commercial quantity of suspected *brown sugai*.

13. At this stage, it is apposite to refer to Section 37 of the NDPS Act. Section 37 of the NDPS Act, as substituted by Act 2 of 1989 with effect from 29.05.1989 with further amendment by Act 9 of 2001, reads as follows :

**"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 punishable for offences 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."

14. Section 37 of the NDPS Act starts with a non-obstante clause. Keeping the *non-obstante* clause in mind, a reading of sub-section (2) of Section 37 of the NDPS Act makes it clear that the power to grant bail to a person accused of

having committed an offence either under Section 19 or Section 24 or Section 27A and also offences involving commercial quantity under the NDPS Act is not only subject to the limitations imposed under Section 439, CrPC, but it is also subject to the restrictions placed by sub-clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other two conditions viz. (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. In other words, these limitations are in addition to those prescribed under the CrPC or any other law in force on the grant of bail. The operative part of Section 37, NDPS Act is in the negative form. Such stringent restrictions have been put on the discretion of the Court for considering application for release of a person accused of offences prescribed therein by the Legislature consciously in view of the seriousness of the offences. The conditions mentioned in Section 37 of the NDPS Act are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on reasonable grounds.

15. It is settled law vide *Narcotics Control Bureau vs. Kishan Lal and others*, (1991) 1 SCC 705 that the powers of this Court to grant bail under Section 439, CrPC are subject to the limitations contained in Section 37 of the NDPS Act and the restrictions placed on the powers of the Court under Section 37, NDPS Act are applicable to this Court also in the matter of granting bail. In *Satpal Singh vs. State of Punjab*, reported in (2018) 13 SCC 813, the restrictions placed on the discretion to be exercised by the Court while considering an application for bail, by way of Section 37, NDPS Act have been reiterated. It has been observed that before allowing a bail application, the Court must be satisfied that there are

reasonable grounds for believing that the person is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. Materials on record are to be seen and the antecedents of the accused is to be examined to enter such a satisfaction. The Court has held that these limitations are in addition to those prescribed under the CrPC or any other law in force on the grant of bail.

16. The expression reasonable grounds means something more than *prima facie* grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence [*Collector of Customs, New Delhi vs. Ahmadalieva Nodira*, [(2004) 3 SCC 579 and *State of Kerala etc. vs. Rajesh etc.*, AIR 2020 SC 721]. The Court while considering the application for bail with reference to Section 37 of the NDPS Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and to record its satisfaction about the existence of such grounds. Thus, recording of satisfaction on both the aspects, noted above, is *sine qua non* for granting of bail under the NDPS Act. Relying on those decisions, the said position is reiterated in *Pranab Das* (supra).

17. It is in the afore-mentioned context, the present bail applications are to be considered. Though after recovery and seizure of suspected *brown sugar* from the possession of Sabbir Ahmed 32 (thirty two) nos. of samples of 6 grams each were drawn from 32 nos. of packets and sent to the Forensic Science Laboratory

(FSL), Assam, Guwahati for its report on 05.11.2020, the FSL report on such samples has not been provided by the Directorate of Forensic Science, Assam till the date of hearing of these bail applications. It may be noted that on 08.03.2021, an order was made with a direction to the Director, FSL, Assam to forward the FSL report on the samples of the seized substance so as to enable the Investigating Officer (I.O.) to complete the investigation at the earliest and to enable the Court to decide these bail applications without further delay. But despite the said direction, no FSL report has been produced before this Court on behalf of the State.

18. In view of submissions made by the learned counsel for the accused-petitioners that the bail applications in the absence of the FSL report, may be considered on merits by proceeding on the assumption that the seized quantity is commercial quantity of *brown sugar qua* the involvement or otherwise of the present accused-petitioners in the offence alleged in terms of Sections 21(c)/29 of the NDPS Act, these bail applications are taken up for consideration, by proceeding on the said basis and by perusal of the materials collected during the course of investigation carried out so far, as available in the case diary placed before this Court.

19. The co-ordinate benches in *Nurezzaman Islam @ Nurajjaman* (supra) and in *Ashik Ahmed Mondal @ Larju* (supra) had taken note of the provisions of Section 21(4), contained in the Maharashtra Control of Organised Crime Act (MCOCA), 1999, a provision [*pari materia*] to Section 37 of the NDPS Act, and the decision of three-judges bench of the Hon'ble Supreme Court of India in *Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra and another*, reported in (2005) 5 SCC 294. For ready reference, Section 21(4) of the MCOCA,

1999 is quoted hereunder :

“21(4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless -

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

(b) 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.”

20. While considering the restrictive nature of the provision contained in Section 21(4) of MCOCA, 1999 *vis-à-vis* the right of personal liberty of an individual, the Hon’ble Supreme Court of India in *Ranjitsing Brahmajeetsing Sharma* (supra) has observed that the question as to whether a person is involved in the commission of organized crime or abetment thereof must be judged objectively. It has further observed as under :

“38. We are furthermore of the opinion that the restrictions on the power of the Court to grant bail should not be pushed too far. If the Court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the Court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. If such an expansive meaning is given, even likelihood of commission of an offence under Section 279 of the Indian Penal Code may debar the Court from releasing the accused on bail. A statute, it is trite, should not be interpreted in such a manner as would lead to absurdity. What would further be necessary on the part of the Court is to see the culpability of the accused and his involvement in the commission of an organised crime either directly or indirectly. The Court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea. Every little omission

or commission, negligence or dereliction may not lead to a possibility of his having culpability in the matter which is not the sine qua non for attracting the provisions of MCOCA. A person in a given situation may not do that which he ought to have done. The Court may in a situation of this nature keep in mind the broad principles of law that some acts of omission and commission on the part of a public servant may attract disciplinary proceedings but may not attract a penal provision.

44. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, thereof, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.

46. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of Section 21 of the Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial could, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby."

21. In *Nurezzaman Islam @ Nurajjaman* (supra), neither narcotic drugs and psychotropic substances nor any objectionable documents were recovered from the house of the accused-petitioner therein. No material was collected during the investigation to indicate that the said accused-petitioner was running any business in drugs or had employed the other accused persons to transmit the drugs. The entire case therein was hinged and was based around the statement of the co-accused without any other positive evidence. In *Ashik Ahmed Mondal @ Larju* (supra), pursuant to a secret information, three accused persons were intercepted when they were going in a vehicle. On being searched, contraband substance involving commercial quantity were seized from their possessions. The accused-petitioner therein was arrested by the Narcotics Control Bureau (NCB) on the basis of a statement of one of the afore-stated three arrested accused persons, made purportedly under Section 67 of the NDPS Act, that he would sell a part of the contraband substance to the accused-petitioner therein. No contraband substance was seized from the possession of the said accused-petitioner and no other material was brought on record to connect the said accused-petitioner with the recovery of contraband or the offence involved in the said case. Having considered the above fact situations, the co-ordinate benches arrived at opinions that there were no reasonable grounds to believe that the two accused-petitioners in *Nurezzaman Islam @ Nurajjaman* (supra) and *Ashik Ahmed Mondal @ Larju* (supra) may ultimately be held liable for the offences of those cases for which they were made accused.

22. Reverting back to the facts of the case in hand, it is found from the materials in the case diary that after Sabbir Hussain was apprehended with the suspected contraband substance on 04.11.2020, he was taken into custody and was interrogated. During his interrogation, Sabbir Hussain mentioned the names

of Jillul Hoque, Ahad Hussain, Noor Ahmed, Shamim Uddin @ Shamim Ahmed, Abdus Sahid, Abdul Kahar, Faruk Ahmed amongst others, to be persons who were involved with him in the alleged activities of drugs peddling. Sabbir Ahmed stated that the suspected *brown sugar* were to be distributed to Shamim Uddin @ Shamim Ahmed, Abdus Sahid, Abdul Kahar and Faruk Ahmed, who were waiting at Karimganj to receive the consignment of suspected *brown sugar*. After arrest of Shamim Ahmed @ Shamim Uddin, he was interrogated and during such interrogation, he mentioned that Sabbir Ahmed, Jillul Hoque, Rahim Uddin @ Javed, Farin Uddin, Iqbal Bahar, Kabir Ahmed, Ahad Hussain, Noor Ahmed, etc. were his associates in the business of drugs and some of them had invested lots of money in the business. Some of the other accused-petitioners during their interrogations, have stated the names of the other accused-petitioners to be their associates in the alleged business of drugs peddling.

23. After the arrest of the accused-petitioners, a number of raids and searches were made in the house premises of these accused-petitioners or in places stated to have been based on information elicited from these accused-petitioners. On going through the materials, it is found that the materials and articles so far seized in this connection are Indian currency notes, a number of vehicles, mobile handsets, bank account passbooks, bank cheque books, ATM cards, PAN cards, etc. No narcotic drugs or psychotropic substance has been found and recovered during such numerous raids and searches made so far during the course of investigation. Though CDR of the mobile phone numbers of the arrested accused persons have been analysed, no remark as regards establishing any link of the present accused-petitioners with Sabbir Ahmed or with the seized consignment of suspected *brown sugar* has been made. Thus, save and except the statements of Sabbir Ahmed and some of these accused-

petitioners recorded during their custodial interrogations, no other tangible and positive materials have been collected so as to establish a link or connection with either Sabbir Ahmed or with the transportation of suspected *brown sugai*, weighing 1.330 Kg, recovered from the Maruti Suzuki Wagon R car bearing registration no. AS-10/E-1339 (white colour) on 04.11.2020.

24. The Court is conscious of the fact that the clandestine business in narcotic drugs and psychotropic substances is usually carried out in an organized and secretive manner and it is difficult to collect all the positive evidence within a short period of time. The offences under the NDPS Act are serious in nature as it affects the whole society and it is in that view of the matter, provisions have been incorporated therein for period of custody of a person accused of certain offences under the Act, longer than the period provided in the CrPC. The purpose of interrogation of a person suspected of such offences is to elicit useful informations and materials so as to give the opportunity to the investigating authority to direct its investigation in the right directions in a meaningful manner. It is also to be noted that the investigation of the case in hand is being carried out since 04.11.2020 and a substantial period of time has elapsed in the meantime. But till date, except as mentioned above, no other positive materials have been collected or unearthed so as to link or connect the present accused-petitioners with the activities related to prohibited drugs. The available materials as on date are in the form of inculpatory statements of the arrested accused persons including the present accused-petitioners, which have been recorded during their custody. Apart from the above and other than the accused-petitioner, Kabir Ahmed, nothing has been brought to the notice of this Court that any of these accused-petitioners has been found involved in connection with drugs business or was/is an accused in or arrested in

connection with a case under the NDPS Act at any point of time. In one case, he was not charge-sheeted and the other one is not in respect of any offence under the NDPS Act. In view of such fact situation obtaining, no exception can be taken as regards criminal antecedents of the accused-petitioners so as to arrive at a finding that if released on bail, he would commit any offence under the NDPS Act.

25. One of the accused persons of Badarpur Police Station Case no. 312/2020, Walid Hussain @ Mona has already been released by a co-ordinate bench of this Court by order dated 25.02.2021 passed in Bail Appln. 2996/2020 on the ground that the materials in the case diary did not have any material to suggest the involvement of the said accused person in the case. On perusal of the materials in the case diary, it is found that the said accused person was arrested on the basis of similar accusations as like the present accused-petitioners.

26. Section 25 of the Evidence Act is specific to the effect that no confession made to a police officer shall be proved as against a person accused of any offence. The NDPS Act does not contain any provision which overrides Section 25 of the Evidence Act. The Hon'ble Supreme Court of India in Criminal Appeal no. 152/2013 [*Tofan Singh vs. State of Tamil Nadu*], decided on 29.10.2020, has observed that to arrive at the conclusion that a confessional statement made before an officer designated under Section 42 or Section 53 can be the basis to convict a person under the NDPS Act, without any *non obstante* clause doing away with Section 25 of the Evidence Act, and without any safeguards, would be a direct infringement of the Constitutional guarantees contained in Articles 14, 20(3) and 21 of the Constitution of India. In the said decision, it has been amply made clear, by the majority view, that any confessional statement made

to police officers would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

27. In view of the afore-stated position of law and the discussion made above, this Court is satisfied that there are reasonable grounds to believe that these accused-petitioners may ultimately be acquitted of the offences under Sections 22(c)/29 of the NDPS Act. There are no cogent materials to indicate that in the event of enlargement on bail, the accused-petitioners shall commit any offence under the NDPS Act. Any further incarceration of the accused-petitioners in anticipation of positive evidence does not appear to be justified. The investigation of the case is still on. In such view of the matter, it calls for imposition of appropriate conditions.

28. Accordingly, the accused-petitioners are allowed to be enlarged on bail on furnishing a bail bond of Rs. 50,000/- each with two local sureties of Rs. 50,000/- each to the satisfaction of the learned Special Judge, Karimganj, Assam, subject to the following conditions :

- [1] The accused-petitioners shall furnish their local addresses and mobile numbers along with proof before the learned Special Judge, Karimganj, Assam;
- [2] The accused-petitioners shall not leave the territorial jurisdiction of the learned Special Judge, Karimganj, Assam without prior permission from the said Court;
- [3] The accused-petitioners shall cooperate with the Investigating Officer of the case and shall attend before him on the first day of every month and as and when their presence are required by the

Investigating Officer of the case till the submission of the charge sheet or final report, as the case may be, in Badarpur Police Station Case No. 312/2020;

- [4] The accused-petitioners shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;
- [5] The accused-petitioners shall not obstruct or hamper the police investigation and not to play mischief with the evidence collected or yet to be collected by the police;
- [6] The accused-petitioners shall maintain law and order and they shall not commit an offence similar to the offence of which they are accused, or of the commission of which they are suspected;
- [7] In the event of breach of any of the conditions, the Special Judge, Karimganj, Assam shall be at liberty to cancel their bail without any reference to this Court.

29. It is, however, made clear that the observations made above are only in respect of consideration of the present accused-petitioners' prayers for bail and none of the observations made in this order shall have any bearing on the trial of the accused-petitioners, in the event they are charge sheeted in the case.

30. Before parting with the applications in hand, this Court finds it appropriate to observe that in one of the bail applications, Bail Appln. 361/2021, interrogation charts of remand of four of the accused in connection with the case are found annexed. On query, it has been submitted that certified copies of

the same have been furnished when applied for. As such interrogation charts are part of investigation, meant only to be kept in the case diary, this Court records its disapproval to such practice of providing certified copies of interrogations charts.

31. The applications stand disposed of in the aforesaid terms.

Return the case diary.

**JUDGE**

**Comparing Assistant**