

GAHC010088542021



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

Case No. : Bail Appln./1163/2021

MD. BATU ALAM
S/O. MD NUR AMIN, VILL. SONARIGAON, P.S. DHING, DIST. NAGAON,
ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MR T THAKURIA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI

ORDER

Date : 29-06-2021

Heard Shri YS Mannan, learned counsel for the applicant, namely, Md. Batu Alom, who has filed this bail application under Section 439 of the CrPC praying for bail in connection with Dhing PS Case No.505(N)/2020 under Sections 17(b)/18(c)/ 20(b) (ii) (C)/21(C)21(C)/25/27A/29(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985.

2. Pursuant to the orders of this Court dated 01.06.2021 and 16.06.2021, the scanned copies of the

LCR have been received. Thereafter, vide order dated 25.06.2021, this Court had granted time to the learned Addl. Public Prosecutor, Assam to enable him to go through the Case Records.

3. Shri Mannan, learned counsel for the applicant submits that till today, the applicant has completed 199 days in custody and he was arrested merely on suspension as he was physically present in the house of the prime accused-Habil Ali during the search and seizure. It is further submitted that nothing has been recovered from the possession of the applicant and even during the investigation, the police remand was sought only for Habil Ali. The learned counsel has further submitted that though this Court vide the earlier order dated 11.05.2021 had rejected the bail of the applicant, the said rejection was primarily on the ground that the investigation was already over and the charge sheet was filed and accordingly, the petitioner was given liberty to file a fresh bail petition before the learned trial court which was to be considered on the merit of the case.

4. Shri Mannan has submitted that the subsequent order dated 18.05.2021 passed by the learned trial court has simply rejected the bail on the ground of filing of charge sheet without entering into the merit. Therefore, it is prayed that the prayer for bail is liable to be considered on merits.

5. Vehemently objecting to such prayer, Shri D Das, learned Addl. Public Prosecutor, Assam has submitted that the order of rejection dated 18.05.2021 is not merely on the ground of filing of the charge sheet. It is submitted that a bare reading of the order dated 18.05.2021 would reveal that the prayer of the applicant has been considered on merits and the learned trial court had come to a categorical conclusion of presence of a *prima facie* case and therefore, grant of bail was not possible. The learned Court had also referred to the embargo embodied in Section 37 of the NDPS Act.

6. On merits, the learned Addl. Public Prosecutor has submitted that admittedly the narcotics / contraband which have been seized is of a huge quantity. The cash recovered is also huge and examination of the bank accounts revealed transaction of crores of rupees. Further, the FIR clearly states the name of the applicant.

7. Shri Das has further submitted that though the personal liberty of the applicant is a relevant factor, the same has to be balanced with the larger interest of the society. In this regard, the learned

Addl. Public Prosecutor has referred to the case of ***Chandrakeshwar Prasad Vs. State of Bihar***, reported in **(2016) 9 SCC 443 (Md. Shahabuddin case)**, wherein the Supreme Court, while interfering with the order of the Hon'ble Patna High Court in granting bail to the accused-Md. Shahabuddin, had observed that no right can be absolute and reasonable restrictions can be placed on them and the duration as an under trial prisoner has to be examined from the point of view of the interest of the society. It is submitted that when the case of a Member of Parliament can be treated to that extent, the case of the present applicant would be fully justified by rejection of his prayer for bail. Lastly, it is submitted that when the huge amount of money involved, there is every possibility of misuse of the liberty and therefore, it is fit case wherein the applicant should not be granted bail.

8. In his reply, Shri Mannan, learned counsel for the applicant, submits that the petitioner being arrested only on suspicion and no incriminating materials being found against him, he should be given the privilege of grant of bail.

9. I have duly considered the rival submissions of the learned counsel for both the parties. I have also carefully examined the scanned copies of case records.

10. 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."

11. 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.

12. In the instant case, it has been urged on behalf of the applicant that he is not connected and was only a Mason. However, in the trial court, it was submitted that the applicant was a driver. The aforesaid submission has to be examined from the point of view of the nature of the contraband seized. The record reveals that 2076 grams of heroin, 101.48 grams of cannabis, 977 gram of liquid opium and a huge quantity of cash of Rs. 10,70,690/- have been recovered along with 3 vehicles, 2 weighing machines and accounts book. The bank accounts of Habil Ali and his wife reveal transaction of crores of rupees.

13. The object and intent of Section 37 of the NDPS Act make it clear that there has to be a *prima facie* satisfaction that the accused not being guilty and that he is not likely to commit any offence while on bail. It reveals that there are two conditions and both the conditions are required to be fulfilled as expression used is 'and' not 'or'. Considering the nature of the seizure made and the huge amount of cash along with the bank transactions, this Court is of the opinion that enlarging the applicant on bail would be against the interest of society. In the case of *Shahabuddin* (*supra*), 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."

11. In Ash Mohammad v. Shiv Raj Singh @ Lalla Babu and another (2012) 9 SCC 446, this Court in the same vein had observed that though the period of custody is a relevant factor, the same has to be weighed simultaneously with the totality of the circumstances and the criminal antecedents. That these are to be weighed in the scale of collective cry and desire and that societal concern has to be kept in view in juxtaposition to individual liberty, was underlined.

12. In the instant case, having regard to the recorded allegations against the respondent-accused and the overall factual scenario, we are of the view, having regard in particular to the present stage of the case in which the impugned order has been passed, that the High Court was not justified in granting bail on the considerations recorded. Qua the assertion that the respondent-accused was in judicial custody on the date on which the incident of murder in the earlier case had occurred, the judgment and order of the trial court convicting him has recorded the version of the brother of the deceased therein, that he had seen the respondent-accused participating in the offence. We refrain from elaborating further on this aspect as the said judgment and order of the trial court is presently sub judice in an appeal before the High Court.

13. On a careful perusal of the records of the case and considering all the aspects of the matter in question and having regard to the proved charges in the concerned cases, and the charges pending adjudication against the respondent-accused and further balancing the considerations of individual liberty and societal interest as well as the prescriptions and the perception of law regarding bail, it appears to us that the High Court has erred in granting bail to the respondent-accused without taking into consideration the overall facts otherwise having a bearing on the exercise of its discretion on the issue.

14. Judged on the entire conspectus of the attendant facts and circumstances and considering the stage of the present case before the trial court where charge-sheet has already been submitted, together with pending proceedings against the respondent-accused as on date, and his recorded antecedents in the various decisions of this Court, we are thus unable to sustain the impugned order of the High Court granting bail to him.

15. In view of the above, the order passed by the High Court granting bail to the respondent-accused is set aside and the State is directed to take all consequential steps, inter alia, for taking him to custody forthwith."

14. Presence of the applicant at the site where the contraband as well as other incriminating materials, including huge amount of cash were seized has to be properly explained and that burden

does not appear to be fully discharged in the instant case that the applicant did not know about the consignment. The corollary question which would also arise is that can the prime accused Habil Ali alone do the entire business? The presence of three vehicles at the place of seizure is also a relevant factor which appears to be consistent with the version of the prosecution.

15. Under the aforesaid facts and circumstances, this Court is of the view that no case for grant of bail has been made out and accordingly, the present bail application is rejected. It is however, made clear that the observations made above are all tentative in nature and the findings are on *prima facie* satisfaction of this Court and none of the observation and the findings are to be taken into consideration at the time of trial so as to avoid causing of any prejudice to either of the parties.

16. The bail application stands disposed of.

JUDGE

Comparing Assistant