

# Abdul Mannan Ali vs The State Of Assam on 4 October, 2023

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GAHC010185972023

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

Case No. : Bail Appln./2932/2023

ABDUL MANNAN ALI  
S/O ABDUL MATLEB ALI  
R/O DOLOITOLA  
P.S. HAJO  
DIST. KAMRUP, ASSAM

VERSUS

THE STATE OF ASSAM  
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MS. R KALITA

Advocate for the Respondent : PP, ASSAM

BEFORE  
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

04.10.2023

1. Heard Ms. R. Kalita, learned counsel for the petitioner. Also heard Ms. S. Jahan, learned Additional Public Prosecutor representing the State of Assam.

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2. This application under Section 439 of the Code of Criminal Procedure, 1973 has been filed by the petitioner, namely, Abdul Mannan Ali, who has been detained behind the bars since 30.01.2023

(since last 248 days) in connection with NDPS Case No. 86/2023 corresponding to Jalukbari P.S. Case No. 56/2023 pending in the Court of learned Special Judge (NDPS), Kamrup (M), Guwahati.

3. It is pertinent to mention here that this is for the second time the present petitioner has approached this Court seeking bail. His earlier bail application was rejected by this Court by order dated 04.08.2023, in Bail Application No. 2069/2023 mainly on the ground that the case involves commercial quantity of contraband and therefore, the embargo of Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 comes into play in this case.

4. The gist of accusation against the present petitioner in this case is that on 31.01.2023, one Sri Pritam Das, SI of Police of Jalukbari Police outpost lodged an FIR before the Officer-in-Charge of Jalukbari Police Station, inter-alia, alleging that on 30.01.2023 at about 10.30 PM, while performing naka checking duty near Saraighat Bridge, the present petitioner was found coming in his motorcycle bearing Registration No. AS 25 V 2700 and when he was checked, 48 numbers of RTx-Care Premium (Codine Phosphate & Chlorpheniramine Maleate Syrup) and 200 numbers of Nitzacare-10 (Nitrazepam tablet IP), which were kept in a white colored plastic bag were found from his possession. It is also stated in the FIR that one another person/accomplice escaped from the naka checking place when the police party conducted the search of the said motorcycle. On receipt of the said FIR, Jalukbari P.S. Case No. 56/2023 under Section 21 (c) was registered and the present petitioner was Page No.# 3/9 apprehended. Ultimately, after completion of the investigation charge-sheet was laid against the present petitioner on 28.06.2023 and presently the case is pending before the Court of Additional Sessions Judge No. 2, Kamrup (Metro), Guwahati and the petitioner has been detained behind the bar since last 248 days.

5. Ms. R. Kalita, learned counsel for the petitioner has submitted that the petitioner has been detained behind the bars since last 248 days and under such circumstances, he is entitled to get bail solely on the ground of prolonged incarceration.

6. Learned counsel for the petitioner has also submitted that the quantity of contraband seized from the present petitioner namely, Nitrazepam as well as codeine phosphate is not of commercial quantity. Learned counsel for the petitioner has further submitted that as per FSL report of the seized contraband, it appears that one tablet of Nitzacare-10 weighed about 0.63 g. Hence the total weight of 200 numbers of Nitrazepam tablet would be only 126 g, which is less than 500 g i.e., the weight which is required for Nitrazepam to be considered as of commercial quantity. Learned counsel for the petitioner has also submitted that the total weight of 48 numbers of RTx-Care cough syrup containing codeine phosphate is about 4.8 litres. She has also submitted that the codeine is not a prohibited manufactured drug under the Narcotic Drugs and Psychotropic Substances Act, 1985.

7. In support of the submissions made by learned counsel for the petitioner, she has relied upon the following rulings of-

a) Order dated 25/5/23 in Bail Application No. 1232/2023 in "Malay Mukherjee & another vs State of Assam";

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- b) Order dated 9/9/21 in Bail Application No. 2006/21 in "Amit Pegu vs State of Assam";
- c) Order dated 22.12.2022 in Bail Application No. 3091/22 in "Aminur Rahman and another vs. State of Assam" ;
- d) Order dated 05.05.2021 in Bail Application No. 1023/21 in "Abdus Sahid Vs. State of Assam";
- e) Judgment of Delhi High Court dated 03.06.2021 and Bail Application No. 1177/21 in "Haresh Rawal Vs. Narcotics Control Bureau".
- f) "Mohd. Muslim @ Hussain Vs. State (NCT of Delhi)." Judgment dated 28/03/23 in SLP(Crl) 915/23
- g) "Rabi Prakash vs State of Odisha" reported in 2023 Live Law (SC) 533

8. Learned counsel for the petitioner has also submitted that as per Entry No. 35 of the Notification relating to Manufactured Narcotics Drug [Government of India Notification No. S.O.826(E) dated 14.11.1985 and S.O.40(E) dated 21.09.1993 and S.O. No. 1431(E) dated 21.06.2011] issued in exercise of powers conferred by Sub-Clause (b) of Clause (xi) of Section 2 of the NDPS Act, 1985, following has been provided:-

35. Methyl morphine (commonly known as 'Codeine') and morphine and their salts (including Dionine), all dilutions and preparations except those which are compounded with one or more other ingredients and containing not more than 100 milligrammes of the drug per dosage unit, and with a concentration of not more than 2.5% in undivided preparations and which have been established in Therapeutic practice.

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9. Learned counsel for the petitioner has submitted that though in the instant case the quantity of codine found in per bottle of seized cough syrup is 141.7 mg, however, same is not 2.5% of the undivided preparation of the seized cough syrup bottles and therefore, same does not fall within the definition of manufactured drug rather it is an essential manufactured drug which is used in therapeutic and medicinal use and is available in open market.

10. On the other hand, learned Additional Public Prosecutor has submitted that in the instant case, though the quantity of Nitrazepam tablet seized from the present petitioner does not fall within the commercial category as it is less than 500 g in weight. However, the quantity of cough syrup containing the codeine seized from the present petitioner is 4.8 liters as 48 numbers of bottles of cough syrup containing of 100 ml were seized from him and as it is more than the quantity prescribed for considering a contraband containing codine as commercial quantity, i.e. 1 kg. It is,

therefore, submitted that the quantity of cough syrup seized from the possession of the present petitioner which contains codeine is a commercial quantity and accordingly, the rigors of Section 37 of the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985 is applicable in this case. She has further submitted that as in the present case, the quantity of codeine found in the seized cough syrups is 141.7 milligrams per 100 ml bottle of cough syrup, and thus it is more than the prescribed proportion for 100 milligrams of codeine dose even to regard it as an essential narcotic drug under section 2(viia) of the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985. In support of her submission, learned Additional Public Prosecutor has cited following rulings-

a) "Govind Vallabh Prajapati vs State of Gujarat" reported in MANU/GJ/1052/2023 Page No.# 6/9

b) "Azhar Javid Rather vs UT of J&K" reported in MANU/JK/0274/2023

c) "Mohd Ahsan vs Customs" reported in 2022 0 Supreme(Del) 1905

d) "Hira Singh vs Union of India" reported in (2020)20 SCC 272

11. Learned Additional Public Prosecutor is also produced a Notification dated 02/06/2023 No. S.O.2404(E) issued by the Ministry of Health and Family Welfare, Government of India whereby the manufacture for sale, sale or distribution for human use of drug fixed dose combinations of Chlorpheniramine + Codeine Phosphate + Menthol Syrup has been banned with immediate effect.

12. I considered a rival submission made by learned counsel for both the sides and have gone so the scanned copy of the case record of the learned Trial Court as well as the rulings cited by both the sides.

13. In the instant case, admittedly the quantity of nitrazepam tablets found in possession of the petitioner is of intermediate quantity. However, he was found in possession of 48 numbers of 100ml bottles cough syrup containing codeine phosphate. As the total weight of said cough syrup containing codeine phosphate was found to be 4.8 liters which is more than 1 kg in weight and as such same is also of commercial quantity.

14. As regards the question as to whether codeine is prohibited manufactured drug under Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985 it appears that as per Entry No. 35 of the Notification relating to Manufactured Narcotics Drug [Government of India Notification No. S.O.826(E) dated 14.11.1985 and S.O.40(E) dated 21.09.1993 and S.O. No. 1431(E) dated 21.06.2011] issued in exercise of powers conferred by Sub-Clause (b) of Clause

(xi) of Section 2 of the NDPS Act, 1985, Methyl morphine (commonly known as 'Codeine') and morphine and their salts (including Dionine), all dilutions and Page No.# 7/9 preparations except those which are compounded with one or more other ingredients and containing not more than 100mg of the drug per dosage unit, and with a concentration of not more than 2.5% in undivided preparations and which have been established in therapeutic practice were declared to be manufactured drug under section 2(xi)(b) the NDPS Act, 1985.

15. What is exempted from the purview of above notification is any combination which is less than 100mg of the drug per dosage unit, and with a concentration of not more than 2.5% in undivided preparations. However, in the instant case, the FSL report shows that the quantity of Codeine phosphate found per 100 ml of the bottle of cough syrup was 141.7 mg which is more than the permissible limits. Furthermore, any fixed dose combination for being considered as 'Essential Narcotic Drug' under Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985 the content of codeine in the said combination must not be more than 100 mg per dosage unit, however in the instant case the content of Codeine phosphate found per 100 ml of the bottle of cough syrup was 141.7 mg, hence this is contraband (Cough syrups) in the instant case may not be regarded as an essential narcotic drug.

16. Thus, the submission of learned counsel for the petitioner that Codeine seized in the instant case is not a narcotic drug is not found to be acceptable. As the quantity of seized Codeine, in the instant case, is found to be of commercial nature, the embargo of Section 37 of the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985 comes into play and as on the basis of materials available on record at this stage, it may not be possible to hold at this stage, that there are reasonable grounds for believing that the present petitioner is not guilty of offence charge against him and that he is not likely to commit any offence while on bail.

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17. Learned counsel for the petitioner has also submitted that the petitioner has infact given lift to one another person, who identified himself as a student of National Law University and it was the said person, who was carrying a bag in which police later on found the seized contraband. However, at this stage when the trial is pending before the learned Trial Court, it is for the learned Trial Court to consider the plea raised by the learned counsel for the petitioner after considering the evidence of the prosecution side. However, at this stage as there are materials against the present petitioner, the embargo of Section 37 is applicable in this instant case.

18. As regards rulings cited by learned counsel for the petitioner, it appears that the same are of no help to the petitioner at this stage as in the case of Abdus Sahid (supra) and Aminur Rahman (supra), the petitioners in those cases were granted bail on completion of statutory period of detention on failure of the Investigating Authority to lay the charge-sheet within the due time which is not the case in the instant case. Similarly, in case of Haresh Rawal (supra), the accused was found in possession of small quantity of contraband which is also not the case in the instant case. In Amit Pegu (supra) also the basic allegation was of consumption of narcotic drug by the petitioner which is also not the case in the instant case and as regards Malay Mukherjee (supra) is concerned the Court found the documents seized by the accused to be valid documents as regards the seized contraband which is also not the case in the instant case.

19. As regards submission of learned counsel for the petitioner, the petitioner is entitled to get bail due to prolonged incarceration, it appears that in case of Mohd. Muslim @ Hussain (supra) and in case of Rabi Prakash (supra) the petitioners in those cases were detained for much longer period than the Page No.# 9/9 present petitioner before they were enlarged on bail on the ground of

prolong incarnation. It is also seen that in some of the cases where the petitioners have been detained behind the bars for more than 1 year 6 months, they were granted bail by the Hon'ble Apex Court on the ground that prolong incarnation militates against the most precious fundamental right guaranteed under Article 21 and it overrides the statutory embargo created under Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985. However, in the instant case as the charge-sheet has been laid only on 28.06.2023 and presently the NDPS Case No. 86/2023 is pending at evidence stage. Under the facts and circumstances of the present case, the period of detentions suffered by the present petitioner does not appear to be long enough to override the embargo imposed under Section 37 of the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985.

20. Hence, the prayer for bail is rejected at this stage.

21. However, considering the plea taken by learned counsel for the petitioner, in the instant bail application, the learned Trial Court is hereby directed to take all measures to dispose of the NDPS Case No. 86/2023 as expeditiously as possible.

22. With above observations, this bail application is disposed of.

23. Let a copy of this order be sent to the learned Trial Court for compliance.

JUDGE Comparing Assistant