

Salim Uddin vs The State Of Assam on 30 September, 2024

Author: Malasri Nandi

Bench: Malasri Nandi

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GAHC010132002024

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

Case No. : Bail Appln./2030/2024

SALIM UDDIN
S/O ABDUL SATTAR
VILL- SORA MAMANG
P.S.-KAKCHING
DIST- THOUBAL
MANIPUR

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR
ASSAM

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

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

Date : 30.09.2024 Heard Mr. N. J. Dutta, learned counsel for the petitioner. Also heard Mr. D.P. Goswami, learned Additional Public Prosecutor for the State.

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2. By this bail application filed under section 483 of the Bharatiya Nagarik Suraskha Sanhita, 2023, the accused petitioner namely, Salim Uddin, has prayed for bail in connection with Boko P.S. Case No. 272/2024 under Section 21(c)/29 of NDPS Act.

3. The FIR discloses that on 16/06/2024, an information was received by the police that a narcotic consignment is moving from Karanchi area of Manipur to Goalpara, Assam and the said consignment would be received at Guwahati by one of the FIR named accused who would be moving in one vehicle and escorted by the other. The number of one vehicle is AS-01-FQ- 3128 and the other is Maruti Dzire bearing number AS-01-FW-3878. Accordingly, the vehicle bearing No. AS-01-FQ-3128 (MG Hector) was intercepted before Boko Police Station. The vehicle was searched and one black shoulder bag was found with 30 soap boxes containing suspected heroine weighing 339 gm and thereafter, the contraband was seized. The escort car Maruti Dzire was driven by one Shahidul of Matia, Goalpara, who escaped leaving behind his Dzire vehicle which was also seized. The present petitioner along with two other co-accused travelling in the vehicle (MG Hector) were arrested. Subsequently, a case was registered vide Boko P.S. case no. 272/2024 u/s 21 (c)/ 29 of NDPS Act.

4. Learned counsel for the petitioner has argued that both the petitioner has been languishing in judicial custody since 17/06/2024. The petitioner is no way involved in the alleged offence. The allegations made against the petitioner are false, concocted and baseless. It is further submitted that investigation of the case is about to complete as such further Page No.# 3/10 detention of the petitioner may not be required for the purpose of investigation of the case.

5. It is also the submission of the learned counsel for the petitioner that from the order dated 18/06/2024, passed by the JMFC, Boko, it appears that I/O has prepared an inventory of the seized Psychotropic substance and accordingly the learned JMFC, Boko issued a certificate to that effect. From the said order dated 18/06/2024, it also appears that 30 nos. of plastic soap containers was weighed in three batches i.e., lot 1, lot 2 and lot 3 and the collected weight of the three lots is 336 gms. It also appears that samples were drawn from each of the lots and sent to the FSL for testing.

6. According to learned counsel for the petitioner, before drawing sample from the lot, there ought to have been a test conducted to come conclusively to the findings that all the thirty nos. of soap containers are identical in all respect. Otherwise what was required is to draw one sample in duplicate from each of the thirty containers which were not done in the instant case.

7. Learned counsel has further contended that Rule 10 (2) of 2022 provides that where after colour test by the drug identification kit, it is conclusively indicated that the packages/ containers are identical in all respect, then the packages/ containers may carefully be bunched in lot of not more than 10 packages or containers and for each of such lot of packages and containers, one sample in duplicate shall be drawn but in the instant case it was not done.

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8. Learned counsel further submits that there is a violation of section 52 (4) of the NDPS, Act and therefore, there is no discretion on the part of the investigating officer/ seizing officer to deviate from the procedure prescribed by the 2022 Rules. Hence, the petitioner may be enlarged on bail on the ground of violation of the provisions of NDPS, Act.

In support of his submission, learned counsel for the petitioner has placed reliance on the following cases -

- a. Majem Ali @ Majom Ali vs. State of Assam, in Criminal Appeal No. 125/2023.
- b. Pinak Shankar Basu vs. State of Assam & Anr., in Criminal Appeal(J) No. 84/2020.
- c. Altaf Hussain vs. State of Assam, in Bail Application No. 1048/2024.

9. Per contra, learned Additional Public Prosecutor submits that the sampling procedure was proper and no defect could be attributed to the procedure adopted by the investigating officer. The issue either the sampling procedure was in accordance with the standing orders or not is a matter of evidence to be appreciated at the time of trial and cannot be examined at this stage. It is further contended that the accused/ petitioner has to establish prejudice caused to them on account of the alleged non compliance with the appropriate procedure for sampling. Accordingly, the learned Additional Public Prosecutor has prayed for dismissal of the bail application at this stage of investigation.

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10. Having heard the learned counsel for the parties, it reveals that the learned counsel appearing for the petitioner seeks bail only on the ground of defect in sampling procedure adopted by the investigating officer at the time when the recovery and seizure was made in the present case. On perusal of case diary, it reveals that the alleged contraband are of commercial quantity and the FSL report gives positive test for heroine.

11. The procedure which comes into effect after arrest and seizure is contained in Section 52 and 57 of the NDPS Act. The Hon'ble Supreme Court, in State of Punjab v. Balbir Singh, (1994) 3 SCC 299 has held as under:

"24. Sections 52 and 57 come into operation after the arrest and seizure under the Act. Somewhat similar provisions are also there in the CrPC. If there is any violation of these provisions, then the Court has to examine the effect of the same. In that context while determining whether the provisions of the Act to be followed after the arrest or search are directory or mandatory, it will have to be kept in mind that the provisions of a statute creating public duties are generally speaking directory. The provisions of these two sections contain certain procedural instructions for strict compliance by the officers. But if there is no strict compliance of any of these instructions that by itself cannot render the acts done by these officers null and void

and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. But such violation by itself Page No.# 6/10 does not invalidate the trial or the conviction if otherwise there is sufficient material. Therefore it has to be shown that such noncompliance has caused prejudice and resulted in failure of justice. The officers, however, cannot totally ignore these provisions and if there is no proper explanation for non-compliance or where the officers totally ignore the provisions then that will definitely have an adverse effect on the prosecution case and the courts have to appreciate the evidence and the merits of the case bearing these aspects in view. However, a mere non-compliance or failure to strictly comply by itself will not vitiate the prosecution.

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25....(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is noncompliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case."

12. In *Shailender v. State NCT of Delhi*, vide bail application no. 3508/2021, bail to the applicant therein was denied by holding that the procedural lapse has to be determined during the course of the trial and not in a proceeding for grant of bail.

13. In *Bipin Bihari Lenka v. Narcotics Control Bureau*, 2022 SCC Page No.# 7/10 OnLine Del 1160, rejected the bail application and observed that alleged prejudice caused to the applicant on account of non-compliance of sampling procedure would have to be established during the course of trial. It was held as under:

"23. Similarly, in *Basant Rai v. State* [*Basant Rai v. State*, 2012 SCC OnLine Del 3319], under somewhat similar circumstances accused was found carrying polythene bag containing eight smaller polythene bags having brown colour substance and IO took small pieces of charas from each packet, mixed the same and drew two sample parcels which were sent to FSL for analysis.

24. Further, it may be observed that in *Ahmed Hassan Muhammed v. Customs [Supdt. and Remembrancer of Legal Affairs v. Anil Kumar Bhunja]*, (1979) 4 SCC 274: 1979 SCC (Cri) 1038: AIR 1980 SC 52], the case related to import of certain consignment in which the contraband was recovered and as such apart from the benefit on account of sampling, the contentions had been made that the involvement was alleged on the basis of conspiracy and no incriminating material was recovered from the person of the petitioner- accused therein.

25. Observations of the learned trial court in order dated 6-8-2021 while dismissing the application on the point of sampling may be noticed:

"As the recovery was from the truck which he was driving therefore, there is definite presumption under Sections 35 and 54 of the NDPS Page No.# 8/10 Act against this accused at this stage, which could be rebutted during trial [Madan Lal v. State of H.P., (2003) 7 SCC 465] [Mohan Lal v. State of Rajasthan, (2015) 6 SCC 222]. The substance from each packet was tested individually and was found positive for ganja thereafter, all the 106 packets were divided into 13 lots and total 26 samples were drawn after mixing of the substance homogeneously and this procedure was found as due compliance as per mandate of judgment Sumit Tomar v. State of Punjab, reported in (2013) 1 SCC

395. Furthermore Delhi High Court in a recent judgment titled Santinu Simone v. Deptt. of Customs [Santinu Simone v. Deptt. of Customs, 2020 SCC OnLine Del 2128] held that the prosecution had failed to establish that the content of each packet was separately tested however in present case prima facie the each packet were separately tested. Furthermore, any infirmity in the procedure which do not go into the root of the matter cannot be appreciated at this stage."

14. The Hon'ble Supreme Court in Supdt., Narcotics Control Bureau, Chennai v. R. Paulsamy, (2000) 9 SCC 549 held as under:

"6. In the light of Section 37 of the Act no accused can be released on bail when the application is opposed by the Public Prosecutor unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. It is unfortunate that matters which could be established only in offence regarding compliance with Sections 52 and 57 have been prejudged by the Page No.# 9/10 learned Single Judge at the stage of consideration for bail. The minimum which learned Single Judge should have taken into account was the factual presumption in law position that official acts have been regularly performed. Such presumption can be rebutted only during evidence and not merely saying that no document has been produced before the learned Single Judge during bail stage regarding the compliance with the formalities mentioned in those two sections.

7. We may also observe that learned Single Judge has not recorded a finding in terms of Section 37 of the Act which is sine qua non for granting bail to an accused involved in the offence under the Act. "

15. In view of the above, this Court is of the opinion that the procedure adopted with respect to contraband in the present case cannot be said to be defective in nature at this stage. The petitioner will get ample opportunity to prove that the said recovery was defective and samples drawn were not the true representatives of the samples recovered, during the course of trial before learned Special

Judge. It is pertinent to note that, the said standing orders cannot be exhaustive enough to cover all factual scenarios at the time of seizure of the contraband. Various factors like nature of contraband seized, the volume/quantity of the seizure, place of seizure, time of seizure, etc. will be relevant to determine any non-compliance thereof and effect of such noncompliance.

16. Hon'ble Supreme Court in Balbir Singh (supra) observed that the Investigating Officer is bound by the procedural instructions and has to follow the same, and in case of non-compliance thereof, and if no proper Page No.# 10/10 explanation is forthcoming, then the same would have adverse impact on the prosecution's case. It was further noted in the said judgment that the Courts would appreciate the evidence and merits of the case keeping these aspects in view.

17. In the opinion of this Court, whether the samples drawn would be a true representative sample of the contraband recovered, can be answered by the chemical analyst, who analyses the sample and gives his/her opinion. Learned Special Judge during the course of the trial will have the advantage of the testimony of the chemical analyst as well as the production of contraband seized in the Court. Therefore, it is premature at this stage to say that the samples drawn are not true representative samples of the contraband seized. In the present case, at the time of examination of case property, the learned Special Judge can satisfy himself with regard to the correctness of the procedure followed.

18. In view of the aforesaid position and circumstances, the present bail application is rejected and disposed of accordingly.

19. Return the Case Diary.

JUDGE Comparing Assistant