

GAHC010018672024



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

Case No. : Bail Appln./319/2024

RAJU AHMED
S/O AHID MIAH, R/O VILL-THAKUR MURA (KHEDABARI), P.S.-
SONAMURA, DIST-SEPAHIJALA, TRIPURA, PIN-799102

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR SISHIR DUTTA

Advocate for the Respondent : PP, ASSAM

**BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI**

ORDER

27.02.2024

Heard Mr. S Dutta, learned senior counsel for the petitioner. Also heard Mr. BB Gogoi, learned Additional Public Prosecutor, Assam for the respondent State.

2. This is an application under Section 439 Cr.P.C. praying for bail to the petitioner, namely, Raju Ahmed, who was arrested on 17.11.2022 in connection with Bazaricherra Police Station Case No.198/2022 under Section 21(C), 25, 29 of the NDPS Act corresponding to GR Case No.2092/2022 and Special (NDPS) Case No.163/2022 pending before the Court of the learned Additional Sessions Judge, Karimganj.

3. The case of the prosecution is that on 16.11.2022 at about 9.A.M, Officer-in-Charge of Bazaricherra Police Station has received an information from I/C Rangamati AD Camp that during naka checking they apprehended one suspected person i.e. the petitioner who was the driver of a Bolero vehicle bearing registration No.TR01 J 3471 which was supposed to carry huge quantity of drugs, concealed in a secret chamber of the vehicle from Mizoram and transported to Agartala, in the State of Tripura via Assam. Accordingly, a G.D.Entry was recorded vide Bazaricherra P.S GDE No.267 dated 16.11.2022 and instructed one SI of police to make an enquiry in the matter and also sent a team to the spot. The search and seizure was accordingly made in the presence of the witnesses and on being searched, a total of 99 numbers of soap cases containing heroin packed with plastic packets were found inside the secret chamber of the said vehicle. Subsequently, the petitioner was arrested.

4. The learned counsel for the petitioner has submitted that there is a total violation of Section 42 of the NDPS Act, which is mandatory in nature. It is also submitted that as per prosecution the alleged secret information received by the prosecution was written down vide a General Diary Entry by the Officer in-Charge of the concerned police station which was subsequently intimated to the superior officer. But it is a settled position of law that a mere GD entry does not amount to a due compliance of Section 42(1) of the NDPS Act. According to the learned counsel for the petitioner the NDPS Act is a special legislation entailing several statutory restrictions

against the grant of relief. Hence, the obligation cast on the officers must strictly be construed as also the rights available to an accused under the Act which must also be given their due weightage. It is further submitted that non-compliance of Section 42 is not permissible in law. The report under Section 42(1) must be in terms of a clear recorded statement in writing by the authorized officer under Section 42(1) and must not be contained in a document which is closed from public view.

5. It is also the submission of the learned counsel for the petitioner that out of 10 witnesses, only one witness has been examined. The accused petitioner has been detained in custody for more than one year and during the period of one year, the trial court has failed to complete the trial.

6. It is further submitted that as there is violation of Section 42 of the NDPS Act, the accused petitioner cannot be convicted for the alleged offence carrying commercial quantity of heroin. The violation of Section 42 of the NDPS Act should be taken into consideration while considering bail application.

7. In support of his submissions, the learned senior counsel for the petitioner has placed reliance upon the following decisions:

- (i) CRM (NDPS)546/2023 (Abdul Rakib Vs. State of West Bengal);
- (ii) (2004) 12 SCC 266 (Sarija Banu Vs. State through Inspector of Police;
- (iii) (2011) 8 SCC 130 (Rajinder Singh Vs. State of Haryana);
- (iv) Bail Application No.4002/2021 (Sarah Vs. State of Kerala);
- (v) Bail Application No.568/2021 (Raju Bhablal Pawar and others Vs. State of Maharashtra);

- (vi) Bail Application No.2504/2023 (Alom Ali Vs. State of Assam);
- (vii) Bail Application No.3887/2023 (Anil Malakar Vs. State of Assam);
- (viii) CRM – M No.23220/2020 (Rakesh Kumar Singla Vs. Union of India).

8. On the other hand, the learned Additional Public Prosecutor submits that the accused petitioner is the driver of the vehicle wherein commercial quantity of heroin was concealed in soap cases which were kept inside the secret chamber of the offending vehicle. The learned Additional Public Prosecutor submits that so far only one witness has been examined in the aforesaid police case, but there was no delay in conducting the trial, as it appears that charge was framed only on 05.10.2023.

9. The learned Additional Public Prosecutor further submits that in exercising the discretion in favour of the accused petitioner in granting bail, the Court must on the basis of the records produced before it be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he has been charged and further he is not likely to commit any offence while on bail.

10. In support of his submission, the Additional Public Prosecutor has referred to the following decision:

- (i) SLP (Criminal)No.(s).8137/2022 (State by the Inspector of Police Vs. Ramu).

11. Regarding violation of Section 42 of the NDPS Act, the learned Additional Public Prosecutor has contended that the witnesses would prove the fact at the trial stage. On such ground, bail cannot be granted to the petitioner.

12. I have considered the submissions of the learned counsel for the parties. I have also perused the scanned copies of the record.

It appears from the LCR that the accused petitioner was apprehended along with the bolero vehicle bearing No.TR01 J 3471 on 17.11.2022 and a commercial quantity of heroin was recovered from the secret chamber of the said vehicle. The accused petitioner was the driver of the said vehicle. Though it is alleged that the petitioner had no knowledge regarding concealing of such substances in the secret chamber, but it has not been clarified in the statement of the witnesses, as to who had concealed such contraband in the secret chamber. It appears from the record that the accused was arrested on 17.11.2022 and charge-sheet was submitted on 29.03.2023 under Section 21(C)/25 of the NDPS Act.

13. The record further shows that supplementary charge-sheet has been submitted on 15.07.2023 against one absconder accused. After the execution of P & A to the absconder accused, the case against the present petitioner was split up and then the case was fixed on 05.10.2023 for consideration of charge and charge was framed accordingly. Thereafter, the case was fixed for evidence of the witnesses and one witness was examined on 03.02.2024. Apparently, there was no delay on the part of the prosecution to proceed with the trial.

14. Regarding violation of Section 42 of the Cr.P.C, it cannot be said at this stage as to whether there was any violation under Section 42(1) & (2) of the NDPS Act as the prosecution did not get the opportunity to produce and exhibit any document because of the fact that on receipt of the information regarding concealment of narcotic substances in the alleged vehicle only a GD entry was recorded.

15. In the case of *State of Kerala Vs. Rajesh* reported in (2020) 12 SCC 122, it was held by the Hon'ble Supreme Court which reads as follows:

“The scheme of Section 37 reveals that the exercise of power to grant bail is not

only subject to the limitations contained under Section 439 of the Cr.P.C, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose an application; and the second, is that the court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offences. If either of these two conditions is not satisfied, the ban for granting bail operates.

*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. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the Cr.P.C., or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for."*

16. Now coming to the judgment referred to by the learned counsel for the petitioner i.e Sarija Banu (supra) the aforesaid case had different facts.
17. In view of the above, as only one witness was examined so far in the case, it cannot be said at this stage that the prosecution has failed to prove its case against the present petitioner. Therefore, this Court is not inclined to grant bail to the petitioner at this stage.
18. However, the trial court is directed to proceed with the case and expedite the

trial.

19. Bail application, accordingly, stands disposed of.

JUDGE

Comparing Assistant