

GAHC010011292024



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

Case No. : Bail Appln./188/2024

MD. SONISH KHAN
S/O LT. ABDUR RAHMAN
VILL- YAIRIPOK, P.S. YAIRIPOK
DIST. EAST IMPHAL, MANIPUR-795149

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR. N SHARMA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

27.02.2024

Heard Mr. N Sharma, learned 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, Md. Sonish Khan, who was arrested on 27.02.2022 in connection with Special (NDPS) Case No.112 (N)/2022 arising out of Samaguri Police Station Case No.74/2022 under Sections 22(c) of NDPS Act.

3. One Lal Babu Gowala SI of Samaguri Police Station upon getting a secret information that some youths are coming from Imphal (Manipur) towards Guwahati by carrying a huge quantity of narcotics drug and psychotropic substances in a vehicle bearing No.AS01 EQ 5878, he conducted naka checking at NH 37 Rangagora with staff. During the said naka checking, the aforesaid vehicle was intercepted and apprehended two youths i.e. Arish Khan and the present petitioner, Sonish Khan. After thorough search of the vehicle, some contraband i.e. 10 numbers of bundles wrapped with cello tape kept concealed under the vehicle and each bundle consisted of 10 numbers of blue colour plastic pouch containing total 200 numbers yaba tablets in each plastic pouch i.e. 500 plastic pouch x 200 tablets i.e. 1 lac yaba tablets were recovered from the said vehicle and accordingly both the persons were arrested on 27.02.2022 by Samaguri police in connection with the aforementioned police station case which was registered under Section 22(c) of the NDPS Act. Thereupon after completion of the investigation, charge sheet was submitted against the petitioner.

4. It is submitted by the learned counsel for the petitioner that no contraband articles had been recovered from the conscious possession of the petitioner and he has been implicated in the case merely on suspicion. Moreover, no inventory has been prepared by the seizing officer at the time of seizure which is in gross violation of Section 52 of the NDPS Act. Hence, as there is non-compliance of the provisions of Section 52 of the NDPS Act, which is mandatory in nature, it is obvious indication of the fact that there is no chance of conviction of the accused petitioner.

5. It is also submitted that mandatory provision of submission of detailed report of search and seizure under Section 57 of the NDPS Act has also not been complied with

in this case. As such, there is little chance of conviction of the petitioner in this case. It is further submitted that the accused has been detained in custody since 27.02.2022 and out of 14 witnesses, only five witnesses have been examined so far. Hence further detention of the accused petitioner is totally unjustified and uncalled for.

6. According to the learned counsel for the petitioner, the alleged case relates to search and seizure of a private vehicle. However, it appears that the same has been done without complying with the mandatory provisions of Section 42 of the NDPS Act, as because no authority letter has been obtained or produced in the case which is required in order to conduct the alleged search and seizure.

7. The learned counsel for the petitioner has also pointed out that the progress of the trial is very slow. Within a span of two years, only five witnesses have been examined out of total fifteen witnesses. It is evident that there is no possibility of conclusion of the trial in near future. Hence, under such uncertainty, the accused petitioner deserves to be released on bail.

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

- (i) (2004) 12 SCC 266 (Sarija Banu Vs. State through Inspector of Police;
- (ii) (2011) 8 SCC 130 (Rajinder Singh Vs. State of Haryana);
- (iii) Bail Application No.2754/2023 (Deepak Chauhan Vs. State of Assam).

8. On the other hand, the learned Additional Public Prosecutor submits that the accused petitioner was travelling in a swift desire vehicle from which commercial quantity of yaba tablets were recovered.

9. The learned Additional Public Prosecutor further submits that in exercising 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. B 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.

13. Whether the investigator has complied with the mandatory provisions of Section 42 or 52 A or 57 of the NDPS Act, is a question of fact to be adjudicated during the stage of trial. However, before this Court treats compliances as illegal, the prosecution needs an opportunity to prove that they had complied with the mandatory provisions as per law. Such a stage would come only during the trial. In this case, admittedly out of fifteen witnesses, only five witnesses were examined.

14. It is to be seen whether the authorized officer has violated the mandatory requirement, as a question of fact, has to be proved during trial. In *Pooran Mal Vs. Director of Inspection* reported in (1974) 1 SCC 345 it was held that "*the power of search and seizure is in any system of jurisprudence, an overriding power of the State for the protection of social security and that power is necessarily regulated by law. A search by itself is not a restriction on the right to hold and enjoy property, though seizure is a temporary restriction to the right of possession and enjoyment of the property seized. However the seizure will be only temporary and limited for the purpose of the investigation. The evidence Act permits the relevancy as the only test*

of admissibility of evidence. The evidence obtained under an illegal search and seizure does not exclude relevant evidence on that ground. It is wrong to invoke the spirit of constitution to exclude such evidence....."

15. It would thus be settled law that every deviation from the details of the procedure prescribed for search does not necessarily lead to the conclusion that search by the police renders the recovery of the articles pursuant to the illegal search, irrelevant evidence nor the discovery of the fact inadmissible at the trial. Weight to be attached to such evidence depends on facts and circumstances in each case. The Court is required to scan the evidence with care and to act upon it when it is proved and the court would hold that the evidence would be relied upon.

16. The stand that the accused is in jail hajat for last two years is also not a legal ground to overcome the rigors of Section 37 of the NDPS Act at this stage. The grounds taken in the bail application do not shift the burden placed by the legislature on the accused under Section 37 of the NDPS Act. A perusal of the bail application and the documents attached *prima facie* points towards the petitioner's involvement and does not make out a case for granting bail.

17. Any observation made hereinabove is neither an expression of opinion on the merit of the case, nor shall the trial court advert to these observations. Accordingly, the bail application is rejected. However, considering the petitioner's right to speedy trial coupled with the pre-trial incarceration, this Court directs the trial court to make all endeavours to conclude the trial as early as possible by fixing a day to day hearing of the matter.

18. It is clarified that the observation of speeding up of the trial is subject to the condition that neither the petitioner shall seek an adjournment, nor try any other tactics to delay the trial.

19. Bail application, accordingly, stands disposed of.

JUDGE

Comparing Assistant