

GAHC010123132023



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

Case No. : Bail Appln./1995/2023

ASAB UDDIN
S/O LATE ABDUL JABBAR
VILL- JALALABAD
P.S. RATABARI
DIST. KARIMGANJ, ASSAM

VERSUS

THE STATE OF ASSAM
TO BE REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR H R A CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

02.08.2023

- 1.** Heard Mr. A. Ahmed, learned counsel for the petitioner. Also heard Mr. R. J. Baruah, learned Addl. P.P. representing the State of Assam.
- 2.** This application under Section 439 of the Code of Criminal

Procedure, 1973 has been preferred by the petitioner, namely, *Asab Uddin* who has been detained behind the bar since 10.08.2021 (720 days) in connection with Special Case No. 75/2021 corresponding to Ratabari P.S. case No. 344/2021 under Section 22(C) of the NDPS Act, 1985 pending before the Court of learned Special Judge, Karimganj.

3. The accusation in the instant case is that on 10.08.2021 one Sri N. Deka S.I. of Police of Ratabari P.S. lodged an FIR before the Officer-in-Charge of Ratabari Police Station, inter-alia, alleging that on 10.08.2021 at about 5-00 P.M. an information was received through reliable source that one Asab Uddin of village Jalalabad under Ratabari P.S. has kept concealed a large quantity of Narcotic Drugs (Yaba Tablets) in his fertilizer shop situated at Jalalabad Bazar. Accordingly, a search operation was conducted at the shop of the said Asab Uddin (present petitioner) at 5-55 P.M. and 48 numbers of small plastic packets each packets containing 200 suspected Yaba Tablets suspected to be contain methamphetamine weighing 907 gram were seized from the said shop.

4. On receipt of the said FIR, Ratabari P.S. Case No. 344/2021 was registered and the present petitioner was apprehended and investigation was initiated. Ultimately on completion of the investigation charge-sheet was laid against the present petitioner under Section 22(C) of the NDPS Act, 1985. The present petitioner faced the trial remaining in custody since the date of his arrest i.e. 10.08.2021. On 13th December, 2021 charge under Section 22(C) NDPS Act, 1985 was framed against the present petitioner and when the said charge was read over and explained to the present petitioner he pleaded not guilty to the said charge and claimed to be tried. Total 9 numbers of prosecution witnesses have been listed in the column No. 6 of the charge-sheet.

5. Learned counsel for the petitioner has submitted that till now 8 out of 9 prosecution witnesses have been examined and out of 8 prosecution witnesses examined by the prosecution side 7 of them have been declared hostile and they have stated nothing incriminating against the present petitioner. Only PW-4 who is the informant who lodged the FIR against the present petitioner had supported the prosecution case.

6. Learned counsel for the petitioner has submitted that the present petitioner has been detained behind the bar since last 31.07.2021 and the trial has not yet been completed. Hence, on the ground of delay in culmination of trial, the present petitioner is entitled to be enlarged on bail in this case.

7. The learned counsel for the petitioner has also submitted that though the instant case has been registered under Section 22(C) of the NDPS Act, 1985 for possession of commercial quantity of contraband by the petitioner, however, rigors of Section 37 of the NDPS Act, 1985 cannot abridge the right to life and personal liberty to which the petitioner is entitled to under Article 21 of the Constitution of India and in this regard learned counsel for the petitioner has cited a ruling of Hon'ble Supreme Court of India in "**Mohd Muslim @ Hussain Versus State (NCT of Delhi)**" reported in "**2023 SCC Online SC 352**" wherein the Hon'ble Supreme Court of India has observed as follows :-

"19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at

the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

20. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India V. Rattan Malik 19). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (Ref. Satender Kumar Antil Supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.

8. The learned counsel for the petitioner has also cited the ruling of Supreme Court of India in "***Rabi Prakash vs. The State of Odisha***" [Order dated 13.07.2023 passed in Special Leave to Appeal (Crl) No(s). 4169/2023] wherein the Hon'ble Supreme Court had observed that the prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act, 1985.

9. The learned counsel for the petitioner has also submitted that in

view of observations made by the Hon'ble Apex Court in "Mohd Muslim @ Hussain Versus State (NCT of Delhi) (Supra)", the court can look into the materials on record whenever the bail application is made to come to arrive at a primary satisfaction as to whether there are reasonable grounds for believing that the accused is not guilty of such offence and as to whether he is not likely to commit any such offence while on bail.

10. On the other hand, the learned Additional Public Prosecutor has submitted that though out of eight prosecution witnesses have already examined seven have become hostile and have not supported the prosecution's case, however, the trial is nearing its end as only the Investigating Officer is remaining to be examined. He has opposed the release of the present petitioner on bail on the ground that the quantity of contraband seized from the present petitioner is commercial quantity and hence the embargo of Section 37 of the NDPS Act, 1985 is applicable in the instant case and bail may not be granted to the present petitioner.

11. I have considered the submissions made by learned counsel for both sides and perused the materials available on record including the scanned copy of Special Case No. 75/2021 which was requisitioned from the Court of learned Special Judge, Karimganj in connection with the instant case.

12. Though, this case involves commercial quantity of methamphetamine weighing 907 gram and charge has been framed against the present petitioner under Section 22(C) of the NDPS Act, 1985 on 13.12.2021 and apparently the embargo of Section 37 of the NDPS Act, 1985 appears to be applicable in the instant case. However, the present petitioner is detained behind the bars since last 10.08.2021 (720 days i.e. 1 year 11 months 21 days) and the evidence on the prosecution witnesses is yet to complete. It also

appears that on 22.05.2023 summons were issued by the trial court to the last prosecution witness i.e. the Investigating Officer, however, the Investigating Officer remained absent on three consecutive dates thereafter the next date for examination of Investigating Officer is fixed on 24.08.2023. It is also pertinent to note that out of the eight prosecution witnesses, seven have become hostile and have not implicated the present petitioner. Considering the fact that Hon'ble Supreme Court of India has observed in "**Mohd Muslim @ Hussain Versus State (NCT of Delhi)**" (supra) that "**Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act**" and also considering the observations of Hon'ble Supreme Court of India in "**Rabi Prakash vs. The State of Odisha**" (supra) to the effect that "**prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act, 1985**", if this Court comes to a finding that there is an undue delay in completion in trial and there is prolonged incarceration of the petitioner, he would be entitled to get bail on the ground of prolonged incarceration only as in case of such prolonged incarceration the right to life and personal liberty under Article 21 of the Constitution of India, would outweigh the fetters imposed by Section 37 of the NDPS Act, 1985. Hon'ble Supreme Court of India in "**Shariful Islam @ Sarif -Vs- State of West Bengal**" [order dated 04.08.2022 in SLP (Crl.) No. 4173/2022] had granted bail to the accused on the ground of prolonged incarceration of 1 year 6 months. Similarly, in "**Nitesh Adhikari -Vs- State of West Bengal**" [order dated 04.05.2022 in SLP (Crl.) No. 5769/2022] Hon'ble Apex Court granted bail to the accused facing an

accusation under Section 21(C) of the NDPS Act, 1985 on the ground of prolonged incarceration of 1 year 7 months. As such, in the instant case, when out of eight of the prosecution witnesses already examined, seven of them have become hostile, and the Investigating Officer has not turned up on last three consecutive dates in spite of issuance to summons to him and the present petitioner is languishing behind the bar since 720 days i.e. 1 year 11 months 21 days, he is entitled to get bail only because of the fact that trial has not yet completed in spite of his prolonged incarceration.

13. In view of above, the petitioner, namely, *Asab Uddin* is hereby allowed to be released on bail of Rs.50,000/- (Rupees Fifty Thousand) only with two sureties of like amount to the satisfaction of learned Special Judge, Karimganj with following conditions:-

- (i) The petitioner shall cooperate in his trial in Special (NDPS) Case No. 75/2021 and shall appear before the learned trial court as and when so required by learned trial court;
- (ii) The petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him or her from disclosing such facts before the trial court,
- (iii) The petitioner shall refrain from committing any offence similar to one of which he is accused of, while on bail.

14. With the above observation, the instant bail application is disposed of.

JUDGE

Comparing Assistant