

GAHC010192402023



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

Case No. : Bail Appln./3157/2023

MD MAJNU SHEK
S/OMD. SATTER SEKH
R/O VILL-KALMATI, P.S. DINHATA
DIST. COOCH BIHAR (W.B.)

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MS. S K NARGIS

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 15.12.2023

- 1)** Heard Ms. S. K. Nargis, learned counsel for the petitioner. Also heard Mr. P. S. Lahkar, learned Additional Public Prosecutor for the State respondent.
- 2)** This application under Section 439 of the Code of Criminal Procedure, 1973 has been filed by the petitioner, namely, Md. Majnu Shek, who has been

detained behind the bars since 10.05.2019 (for last 1679 days i.e. 4 years 7 months 10 days) in connection with NDPS Case No. 66/2019 arising out of GRPS Case No. 77/2019 under Section 22 (c) of the NDPS Act, 1985.

3) The gist of accusation in this case is that on 10.05.2019 one Badri Prasad Baruwati had lodged an FIR before the Officer-in-Charge of Guwahati Govt. Railway Police Station, *inter-alia*, that on the said day at about 7.00 am one passenger i.e. the present petitioner was found in seat no. 27 in Coach No. B/13 of the train no. 20503 DN. Rajdhani Express and when the said train was standing at platform No. 1 of the Guwahati Railway Station a search operation was conducted and 39 small black polythene packets containing 200 R and MY Tablet (containing Methamphetamine) were found from a bag from the possession of present petitioner. In total 7800 pieces of Tablet were found 39 black colored polythene packets.

4) On receipt of the said FIR, GRPS Case No. 77/2019 was registered under Section 22 (c) of the NDPS Act, 1985 and investigation was initiated. On the same date i.e., 10.05.2019 the present petitioner was arrested in the said case.

5) After completion of the investigation charge-sheet was laid against the present petitioner, on 31.08.2019, under Section 22 (c) of the NDPS Act, 1985. Thereafter, on 23.10.2019 charge under Section 22(c) of the NDPS Act, 1985 was framed against the present petitioner for possessing the commercial quantity of R and MY tablet containing Methamphetamine. The petitioner pleaded not guilty to the said charges and claimed to be tried.

6) Learned counsel for the petitioner has submitted that though the petitioner has been detained behind the bars since last 4 years 7 months, however, the trial is yet to be concluded. It is further submitted by learned

counsel for the petitioner that out of total 9 listed witnesses though 7 witnesses have been examined, however, last witness was examined on 15th June 2023 and since then no further witness has been examined. It is also submitted by learned counsel for the petitioner that in spite of the fact that all the witnesses listed in the chargesheet are the government officials, still the prosecution side has failed to bring all the witnesses in the last 4 years 7 months and during this period the present petitioner has been languishing behind the bars.

7) Learned counsel for the petitioner has also submitted that earlier also the petitioner had approached this Court by filing a Bail Application under Section 439 which was rejected by this Court by order dated 07.11.2022 passed in B.A. No. 2467/2022, however, while rejecting the application, Coordinate Bench of this Court has observed that keeping in mind the personal liberty guaranteed by Article 21 of the Constitution of India, the Trial Court was directed to make all endeavors to dispose of the case within a reasonable period of time, if required by resorting to Section 309(1) of the Code of Criminal Procedure, 1973.

8) Learned counsel for the petitioner has submitted that though more than one year has been passed since the said direction which was issued by the Coordinate Bench of this Court, however till now, the trial has not yet been completed and the petitioner has been languishing behind the bars.

9) Learned counsel for the petitioner has cited ruling of the Apex Court in ***“Thana Singh Vs Central Bureau of Narcotics”*** reported in ***(2013) 2 SCC 590***, wherein the Apex Court emphasised in conducting day to day trial in all pending cases.

10) Learned counsel for the petitioner has cited ruling of the Apex Court in ***Hussain & Anr. Vs. Union of India*** reported in ***(2017) 5 SCC 702***, wherein the Apex Court had observed that in Sessions cases the trial should normally be concluded within a period of two years.

11) Learned counsel for the petitioner has submitted that though the present case is a case under NDPS Act, 1985 however the detention of the petitioner for more than 4 years 7 months is long enough to override the embargo of Section 37 of the NDPS Act, 1985. In support of the said submission, the learned counsel for the petitioner has also cited the ruling of the Hon'ble Apex Court in ***Tapas Mondal Vs. The State of West Bengal & Ors*** [Order dated 14.09.2023 in Special leave appeal (Criminal) No. 8464/2023], wherein the petitioner was granted bail for incarceration of almost two years in spite of the fact that he was charged under the offence for possessing commercial quantity of contraband.

12) Similarly, learned counsel for the petitioner has also cited a ruling of Hon'ble Apex Court in ***Man Mandal and Another Vs. The State of West Bengal & Ors*** [Order dated 14.09.2023 in Special leave appeal (Criminal) No. 8656/2023], wherein also the petitioner was granted bail on the ground that almost two years the trial was not completed and though the petitioner was charged for an offence under section 21 (c) of the NDPS Act, 1985.

13) Learned counsel for the petitioner has submitted that though the embargo of Section 37 of the NDPS Act, 1985 is mandatory in nature however, in view of the observations made by the Supreme Court in a number of cases, in case of inordinate delay in trial, the embargo is lifted and it gives way to the right of the accused under Article 21 of the Constitution of India.

14) Learned counsel for the petitioner has also submitted that though the

petitioner is a resident of West Bengal, he shall regularly face remaining part of the trial if he is allowed to go on bail.

15) On the other hand, learned Additional Public Prosecutor has vehemently opposed the grant of bail to the present petitioner on the ground that as the quantity of contraband seized in that case is of commercial nature and due to the embargo of Section 37 of the NDPS Act, 1985, the petitioner may not be released on bail.

16) He has also submitted that though the period of 4 years and 7 months seems to be a long period however, the said period was intervened by Covid 19 due to which the Court functioning was affected and it has caused the delay in disposal of the trial.

17) He has also submitted that though this Court directed the learned Trial Court to conduct day to day trial taking recourse to Section 309(1) of the Code of Criminal Procedure, 1973, however, there is no material on record to show that the said order was communicated to the learned Trial Court.

18) I have considered the submissions made by learned counsel for both sides as well as I have perused the scanned copy of the case record of NDPS Case No. 66/2019.

19) It appears in this case that since date of arrest on 10.05.2019 the petitioner has been detained behind the bars. Though, the charges were framed on 23.10.2019 and though the witnesses listed in the charge-sheet are all official witnesses and only 9 in numbers however, the trial has not been completed, in spite of the fact that the petitioner has been behind the bars of last 4 years 7 months. It also appears that the delay in disposal of the trial may not be attributed to any fault on the part of the present petitioner as he was detained throughout the trial from the date of his arrest.

20) Hon'ble Supreme Court of India in "***Mohd Muslim @ Hussain Vs. State (NCT of Delhi)***" reported in "***2023 SCC Online SC 352***" has observed that "*grant of bail on the ground of undue delay in trial cannot be said to be fettered by Section 37 of the NDPS Act, 1985*".

21) The Hon'ble Apex Court in ***Rabi Prakesh Vs. State of Orissa*** reported in ***2023 live law (SC) 533***, wherein it has been observed by the Hon'ble Apex Court 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.***"

22) In view of the above observations made by Hon'ble Apex Court, this Court is of considered opinion that if under the facts and circumstances of the case, this Court comes to a finding that there is undue delay in completion of trial and that the incarceration of petitioner, is long enough, he would be entitled to get bail on the ground of such prolong incarceration as in such case of prolong incarceration, the right to life and personal liberty guaranteed under Article 21 of the Constitution of India would outweigh the fetters imposed under Section 37 of the NDPS Act, 1985.

23) It is also pertinent to mention herein that the Hon'ble Supreme Court of India had granted bail to an accused facing charges for possession of commercial quantity of contraband only on the ground of prolonged incarceration in "***Shariful Islam @ Sarif Vs. State of West Bengal***" (order dated 04.08.2022 in SLP Criminal No. 4173/2022), wherein the accused was detained behind bars for one year and six months.

24) In "***Nitesh Adhikari Vs. State of West Bengal***" (Order dated 04.05.2022 in SLP Criminal No. 5769/2022), Hon'ble Apex Court granted bail to the accused facing accusation under Section 21(c) of the NDPS Act, 1985 on the ground of

incarceration of one year seven months.

25) Similarly in "*Md. Salman Hanif Shaikh Vs. State of Gujarat*" (Order dated 22.08.2022 in SLA Criminal No. 5530/2022), the petitioner was granted bail, by the Apex Court, on the ground of prolonged incarceration of two years.

26) In the instant case not only the fact that the present petitioner has been detained behind the bars since last 4 years 7 months is relevant but also the fact that this Court about one year ago in Bail Application no. 2467/2022 by order dated 07.12.2022 directed the learned Court to make an endeavour to dispose of the case within a reasonable time, by resorting to Section 309(1) of the Code of Criminal Procedure, 1973, is also relevant as in spite of said direction, the petitioner has been languishing behind the bars even after lapse of more than one year after passing of the said order.

27) In view of the above circumstances as well as the considering the observations made by Hon'ble Apex Court in the aforementioned cases, where it has dealt with the of question of long incarceration of similarly situated petitioners who were before the Apex Court, this Court is of considered opinion that in the instant case also the facts and circumstances are such that the long incarceration of the present petitioner outweighs the embargo of Section 37 of the NDPS, Act 1985 and the petitioner is entitled to get bail on the ground of prolong incarceration.

28) In view of the above, the petitioner, namely, Md. Majnu Sekh is allowed to go on bail of Rs. 50,000/- (Rupees Fifty Thousand only) with two sureties of like amount (one of whom should be a government servant and residing within the State of Assam) subject to the satisfaction of the learned Special Judge, Kamrup, Metro with the following conditions:

- i. That the petitioner shall cooperate in the trial of NDPS

Case No. 66/2019, which is pending in the Court of learned Special Judge, Kamrup, Metro.

ii. That the petitioner shall appear before learned Trial Court as and when so required by the learned Trial Court

iii. That the petitioner shall not directly or indirectly make any inducement, threat, or promise to any person who may be acquainted with the facts of the case, so as to dissuade such person from disclosing such facts before the learned Trial Court in the Trial pending against the present petitioner.

iv. That the petitioner shall provide his contact details including photocopies of his Aadhar Card, Driving License, PAN card, mobile number, and other contact details before the Officer-in-Charge of GRPS, Guwahati and before the Court of learned Special Judge, Kamrup, Metro.

v. That the petitioner shall not leave the jurisdiction of the learned Trial Court without prior permission of the learned Trial Court and when such leave is granted by the learned Trial Court, the petitioner shall submit his leave address and contact details during such leave before the learned Trial Court as well as before the Officer-In-Charge of GRPS, Guwahati.

vi. That the petitioner shall not commit any offence similar to the one for which he has been accused of, while he is on bail.

With the above observation, this bail application is accordingly disposed of.
Let a copy of this order be furnished by the Registry of this Court.

JUDGE

Comparing Assistant