

GAHC010218522023



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

Case No. : Bail Appln./3486/2023

BURHAN UDDIN
S/O- SHAB UDDIN, R/O- VILL- AYLABARI (CHALEPUR), POLICE STATION-
KARIMGANJ, DIST.- KARIMGANJ, ASSAM

VERSUS

THE STATE OF ASSAM
TO BE REPRESENTED BY THE PUBLIC PROSECUTOR

Advocate for the Petitioner : MR. M A CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

15.12.2023

- 1.** Heard Mr. A. Ahmed, learned counsel for the petitioner. Also heard Mr. D. Das, learned Additional Public Prosecutor representing the State of Assam.
- 2.** This application under section 439 of the Code of Criminal Procedure, 1973 has been filed by the petitioner, namely, Burhan Uddin, who has been

detained behind the bars since 17.11.2021 (for last 758 days), i.e. 2 years 28 days in connection with Special (NDPS) Case No. 116/2021.

3. The gist of accusation in this case is that on 17.11.2021, one Ratan Das, Inspector of Police had lodged an FIR before the Officer-in-Charge of Ratabari Police Station, *inter-alia*, alleging that on receipt of secret information that a vehicle bearing Registration No. KA-01-AF-4349 was carrying prohibited substance, a search team was constituted and a Naka Checking was organized, and during the Naka Checking, the said vehicle was intercepted and during search of the said vehicle total 10.485 kg of yaba tablets contained in plastic packets was found therefrom and the driver of the said vehicle, i.e. the present petitioner was arrested on the said date. On receipt of the said FIR, Ratabari P.S Case No. 551/2021 was registered and investigation was initiated and ultimately on completion of investigation, charge-sheet was laid against the present petitioner under Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as NDPS Act, 1985).

Thereafter, on 30th December, 2021, the petitioner faced the trial before the Court of learned Special Judge, Karimganj and the charges were framed against the petitioner on 06.04.2022. However, the trial progressed at a very slow pace. In the meanwhile, the petitioner approached this Court praying for bail in the month of September, 2022. However, by order dated 30.09.2022 passed in Bail Appln. No. 2238/2022, the prayer of the petitioner was rejected by a co-ordinate bench of this Court and directions were given to the learned Trial Court to make all endeavours to complete the trial as early as possible.

4. Learned counsel for the petitioner has submitted that in spite of the lapse of more than one year from the date when the said direction was given by a co-ordinate bench of this Court, the trial has not progressed much and only

3(three) witnesses have been examined out of total 11(eleven) listed prosecution witnesses.

5. It is also submitted by the learned counsel for the petitioner that all the three prosecution witnesses, who are the seizure witnesses, have become hostile and have not supported the prosecution's case.

6. It is further submitted by the learned counsel for the petitioner that the petitioner is entitled to get bail mainly on the ground of prolonged incarceration as per the observations of Hon'ble Apex Court in "***Mohd Muslim @ Hussain Vs. State***" (***NCT of Delhi***) reported in ***2023 SCC Online SC 352*** as well as in "***Rabi Prakash Vs. The State of Odisha***" order dated 13.07.2023 passed in Special Leave to Appeal (Crl.) No. 4169/2023. The Apex Court has observed in the aforementioned cases that the prolonged incarceration overrides the embargo of Section 37 of the NDPS Act, 1985.

7. Learned counsel for the petitioner has also submitted that the petitioner is a permanent resident of Karimganj district and he would face the trial if he is allowed to go on bail.

8. On the other hand, learned Additional Public Prosecutor has vehemently opposed the grant of bail to the present petitioner on the ground that the quantity of contraband seized in this case is of commercial quantity and therefore, the embargo of Section 37 of the NDPS Act, 1985 is applicable here in this case. He has also submitted that though this Court directed for an expeditious disposal of the case way back in the month of June, 2023, however, the period during which the petitioner has been incarcerated was also intervened by Covid-19 which has affected the work of the Court and thereby affecting the progress of the trial.

9. I have considered the submissions made by learned counsel for both

the sides and has perused the scanned copy of the case record, which is available on record.

10. Though this case involves commercial quantity of contraband, however, considering the fact that the petitioner has been detained behind the bars for more than last 2 years, the question before this Court is that whether prolonged incarceration of the petitioner overrides the embargo of Section 37 of the NDPS Act, 1985. If this Court comes to a finding that if the delay is long enough, so as to come to the finding that the embargo of Section 37 of the NDPS Act have been outweighed by the Fundamental Right, guaranteed to the present petitioner under Article 21 of the Constitution of India he way have to be released on bail in spite of the embargo of Section 37 of the NDPS Act, 1985.

11. It also appears that the delay in the trial in this case is not due to the fault of the present petitioner, as he has been detained behind the bars throughout his trial. The petitioner has a right to get speedy trial under Article 21 of the Constitution of India

12. 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" and also considering the observation of Hon'ble Supreme Court of India in "***Rabi Prakash Vs. State of Orissa***" (supra), wherein Hon'ble Apex Court has observed that "***prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution of India 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*** ", this Court is of considered opinion that if this Court comes to a

finding that there is undue delay in completion of trial and that there is prolong incarceration of petitioner, he would be entitled to get bail on the ground of prolong incarceration only as in such case of prolong incarceration, the right to life and personal liberty under Article 21 of the Constitution of India would outweigh the fetters imposed under Section 37 of the NDPS Act, 1985.

13. It is also pertinent to mention herein that the Hon'ble Supreme Court of India had granted bail to the 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.

14. 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.

15. 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.

16. In the instant case, the petitioner has been detained behind the bars since last 17.11.2021 and only 3(three) witnesses have been examined by the prosecution side and they have also turned hostile and only 8(eight) prosecution witnesses are yet to be examined by the prosecution side.

17. Under such facts and circumstances of this case and on the basis of the observation made by the Apex Court in aforementioned ruling, this Court is of the considered opinion that in the instant case also long incarceration of the

present petitioner has outweighed the embargo Section 37 of the NDPS Act, 1985 and the petitioner is entitled to get bail in the NDPS Case No. 116/2021.

18. In view of above, the above named petitioner is hereby allowed to go on bail of Rs. 1,00,000/- (Rupees One Lakhs) with two suitable sureties, one of whom should be a government employee and should be resident of the State of Assam, of like amount to the satisfaction of the learned Trial Court with conditions that:-

- i.** That the petitioner shall cooperate in the trial of NDPS Case No. 116/2021, which is pending in the Court of learned Special Judge, Karimganj;
- ii.** That the petitioner shall regularly 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 Ratabari Police Station and before the Court of learned Special Judge, Karimganj;
- 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 Ratabari P.S Case No.551/2021

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.

19. With the above observations, this bail application is hereby disposed of.

JUDGE

Comparing Assistant