

GAHC010250042023



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

Case No. : Bail Appln./4138/2023

SHEFUL HOQUE
SON OF- MONTAJ ALI, RESIDENT OF VILL- JAGODISHPUR PART-V, P.O.
JAGODISHPUR, P.S.- KATIGORAH, DISTRICT- CACHAR, ASSAM

-VERSUS-

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR. L R MAZUMDER

Advocate for the Respondent : PP, ASSAM

- B E F O R E -

HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

21.12.2023

- 1.** Heard Mr. L.R. Mazumder, learned counsel for the petitioner. Also heard Mr. P. Borthakur, learned Additional Public Prosecutor, Assam.
- 2.** This application under Section 439 of the Code of Criminal Procedure, 1973 has been filed by the petitioner, namely, Sheful Hoque, who has been detained behind the bars since 26.04.2021 (for last 2 years 8 months) in

connection with Special (NDPS) Case No.39/2021 corresponding to Karimganj P.S. Case No.412/2021 pending before the Court of learned Special Judge, Karimganj.

3. The accusation against the present petitioner is that on 26.04.2021, one Md. Nadeem, Assistant Commandar, Coy. Commandar, 'E' Coy, 7 BN. BSF had lodged an FIR before the Officer-In-Charge of Karimganj Police Station, *inter-alia*, alleging that on 26.04.2021, on the basis of an information received from reliable sources, the troops of 7 Battalion of BSF under the supervision of DC(G), SHQ, Silchar, carried a search operation and during search operation, a vehicle suspected to be carrying the apprehended drugs which was bearing Registration No.AS-11T-2367 was intercepted and during search operation, 1970 Nos. of YABA tablets containing methamphetamine were seized. The total weight of the seized tablets was 218.94 gram with packet and 201.16 gram without packet.

4. On receipt of the said FIR, Karimganj P.S. Case No.412/2021 was registered and an investigation was initiated. Later on, on completion of the investigation, charge-sheet was laid against 3(three) Nos. of accused persons where the present petitioner and another co-accused Joynul Hoque were shown as accused in custody and another co-accused, namely, Mokbul Hoque @ Mokbul Ali was shown as absconder in the charge-sheet.

5. It is submitted by the learned counsel for the petitioner that though the charges were framed on 14.03.2022, till now only one witness has been examined. It is also submitted that the said witness was examined on 31.03.2023 and thereafter, the prosecution has failed to produce any further evidence. It is submitted by the learned counsel for the petitioner that even the seizure witness who has been examined has not implicated the present

petitioner.

6. Learned counsel for the petitioner has submitted that the petitioner has been languishing behind the bars for more than 2 years and 8 months and solely on the ground of prolonged incarceration, he is entitled to get bail in this case as per the observations made by the Apex Court in "***Rabi Prakash Vs.***

State of Odisha" reported in ***2023 0 Supreme (SC) 707*** and ***Mohd Muslim @ Hussain Vs. State (NCT of Delhi)***" reported in "***2023 SCC Online***

SC 352". The Apex Court has observed in the aforesaid cases that 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 Cachar district and he will face the trial and co-operate in the trial if he is allowed to go on bail.

8. Learned counsel for the petitioner has submitted that on an earlier occasion, the co-accused, namely, Joinul Uddin @ Joynul Hoque had approached this Court by filing Bail Application No.2209/2023 which was rejected by Co-ordinate Bench of this Court by order dated 31.07.2023. However, an observation was made by a Co-ordinate Bench of this Court in the said order directing the learned Trial Court to examine all the material witnesses within a period of 3 months from the date of the said order and it was also observed that failing which the Court would consider the application for the bail of the present petitioner favourably.

9. On the other hand, learned Additional Public Prosecutor, Assam has vehemently opposed the grant of bail to the present petitioner on the ground that the huge 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 in this case.

10. I have considered the submissions made by both the sides and have perused the scanned copy of the case record which was called for in connection with this case.

11. Though the contraband seized in the present case is of commercial quantity, however, considering the fact that the petitioner has been detained behind the bars for 2 years and 8 months, the question before this Court is as to whether prolonged incarceration of the petitioner overrides the embargo of Section 37 of the NDPS Act, 1985. If this Court comes to the finding that the delay is long enough so as to come to a conclusion that the embargo of Section 37 of the NDPS Act, 1985 has been outweighed by the Fundamental Rights guaranteed to the present petitioner under Article 21 of the Constitution of India, he might have to be released on bail in spite of the embargo of Section 37 of the NDPS Act, 1985.

12. 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.

13. 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 Odisha*" (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 prolonged incarceration of petitioner, he would be entitled to get bail on the ground of prolonged incarceration only as in such case of prolonged 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.

14. 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.

15. 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.

16. 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.

17. In the instant case, the petitioner has been behind the bars since 26.04.2021 i.e. for last 2 years and 8 months and only one witness has been examined out of 8(eight) listed witnesses and the said prosecution witness has not supported the case of the prosecution. Under such facts and circumstances, this Court is of the considered opinion that in the instant case also the detention of the present petitioner is long enough and has outweighed the embargo of Section 37 of the NDPS Act, 1985 and therefore, the petitioner is entitled to get bail in the instant case.

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 of like amount to the satisfaction of the learned Trial Court with conditions that:-

- i. The petitioner shall cooperate in the trial of Special (NDPS) Case No.39/2021, which is pending in the Court of learned Special Judge, Karimganj;
- ii. The petitioner shall regularly appear before the Trial Court as and when so required by the Trial Court;
- iii. 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 Trial Court in the trial pending against the present petitioner;

iv. 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 Karimganj Police Station and before the Court of learned Special Judge, Karimganj;

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

vi. 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