

GAHC010252162023



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

Case No. : Bail Appln./4073/2023

JAKIR HUSSAIN @ JABIR HUSSAIN AND ANR
S/O RAKMAT ALI
R/O VILL- DHOLGRAM
P.S. RATABARI, DIST. KARIMGANJ, ASSAM

2: ALI HUSSAIN
S/O SUKKUR ALI
R/O VILL- DHOLGRAM
P.S. RATABARI, DIST. KARIMGANJ, ASSAM

VERSUS

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

Advocate for the Petitioner : MR. M A CHOUDHURY

Advocate for the Respondent : PP, ASSAM

- B E F O R E -

HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

19.12.2023

1. Heard Mr. M.A. Choudhury, learned counsel for the petitioners. Also heard Mr. D. Das, learned Additional Public Prosecutor, Assam.

2. This application under Section 439 of the Code of Criminal Procedure, 1973 has been filed by the petitioners, namely, (1) Jakir Hussain @ Jabir Hussain and (2) Ali Hussain, who have been detained behind the bars since 28.01.2022 and 25.11.2021 respectively in connection with Special (NDPS) Case No.119/2021 pending before the Court of learned Special Judge, Karimganj which has arisen out of Patharkandi P.S. Case No.712/2021 registered under Sections 22(c)/29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to be NDPS Act, 1985).

3. The gist of accusation in this case is that on 24.11.2021, one P. Jatindra Singha, SI of Patharkandi Police Station lodged an FIR before the Officer-In-Charge of Patharkandi Police Station, *inter-alia*, alleging that on receipt of an information through reliable source that some prohibited drugs are concealed in the house of one Dilwar Hussain in the village of Janglatook (Moina) under Patharkandi Police Station, a search operation was conducted and 930 gram of "WY" tablets containing psychotropic substance 'methamphetamine' were seized therefrom.

4. The present petitioners were arrested from the place of seizure itself.

5. Mr. M.A. Choudhury, learned counsel for the petitioners has submitted that the petitioner No.1, namely, Jakir Hussain @ Jabir Hussain, has been detained behind the bars for last 690 days whereas the petitioner No.2, namely, Ali Hussain has been detained behind the bars for last 754 days. However, till now only 2(two) witnesses are examined and they also have been declared as hostile as their evidence does not support the prosecution case.

6. Learned counsel for the petitioners has further submitted that the petitioners are entitled to get bail in this case mainly on the ground of

prolonged incarceration as observed by Apex Court in the case of *Mohd. Muslim @ Hussain Vs. State (NCT of Delhi)*, reported in 2023 SCC OnLine SC 352 as well as in *Ravi Prakash Vs. State of Orrisa*, order dated 13.07.2023 passed in *Special Leave to Appeal (Crl.) No.4169/2023*. It is submitted by the learned counsel for the petitioners that the Apex Court has observed in the aforementioned cases that prolonged incarceration overrides the embargo of Section 37 of NDPS Act, 1985.

7. It is submitted by the learned counsel for the petitioners that both the petitioners are permanent residents of Karimganj District and they would face the trial and shall co-operate in their trial if they are allowed to go on bail.

8. On the other hand, Mr. D. Das, learned Additional Public Prosecutor, Assam has vehemently opposed the grant of bail to the present petitioners on the ground that the quantity of contraband seized in this case is of commercial quantity and therefore, the embargo of Section 37 of NDPS Act, 1985 is applicable here in this case. He has also submitted that though the incarceration of the present petitioners seems to be long, however, the prosecution side is not at fault in any manner as the trial got delayed as there was another co-accused, namely, Md. Dilwar Hussain, who was shown as an absconder in the charge-sheet and to split the case of said Dilwar Hussain from the case of the present petitioners, some time was required by the learned Trial Court. He has also submitted that the charges were framed on 01.06.2023 and thereafter, two witnesses have already been examined and therefore, there is likelihood that other witnesses shall also be examined soon. He accordingly opposes the grant of bail to the present petitioners.

9. I have considered the submissions made by the learned counsel for both the sides and have gone through the scanned copy of the case record of Special

(NDPS) Case No.119/2021 which is available before this Court.

10. Though this case involves commercial quantity of contrabands, however, considering the fact that the petitioners have been detained behind the bars for 690 days and 754 days respectively, the question before this Court is whether the prolonged incarceration of the petitioners in this case outweighs the embargo of Section 37 of NDPS Act, 1985. If this Court comes to a conclusion that the delay is long enough, so as to come to the finding that such a delay has outweighed the embargo of Section 37 of the NDPS Act, 1985 and the petitioners can no longer be detained behind the bars due to the Fundamental Right guaranteed to them under Article 21 of the Constitution of India, they may have to be released on bail in spite of the embargo of Section 37 of the NDPS Act, 1985.

11. It appears that though the prosecution was not entirely at fault for the delay caused in the trial of this case, however, it also appears that the petitioners are also not at fault for the delay of the trial as they have been detained behind the bars throughout the trial. The petitioners have a right to get a 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)*" (supra) 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 the 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 the petitioners, they 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.

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 and 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 petitioners have been detained behind the bars for last 690 and 754 days respectively and only 2(two) witnesses have been examined by the prosecution side and they have also turned hostile and only 7(seven) more witnesses are yet to be examined by the prosecution side, the trial is unlikely to complete soon.

17. Therefore, this Court is of the considered opinion that in the instant case

also, the long incarceration of the present petitioners has outweighed the embargo of Section 37 of the NDPS Act, 1985 and therefore, the above named petitioners are entitled to get bail in this case.

18. In view of above, the petitioners, namely, (1) Jakir Hussain @ Jabir Hussain and (2) Ali Hussain, are allowed to go on bail of Rs.50,000/- (Rupees Fifty thousand) each with two suitable sureties, one of whom should be a government employee and should be a resident of the State of Assam, of like amount, subject to the satisfaction of the learned Trial Court with the following conditions,

- i. That the petitioners shall cooperate in the trial of Special (NDPS) Case No.119/2021, which is pending in the Court of learned Special Judge, Karimganj;
- ii. That the petitioners shall regularly appear before learned Trial Court as and when so required by the learned Trial Court;
- iii. That the petitioners 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 petitioners shall provide their contact details including photocopies of their Aadhar Card, Driving License, PAN card, mobile number, and other contact details before the Officer-In-Charge of Patharkandi Police Station and before the Court of learned Special Judge, Karimganj;

v. That the petitioners 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 petitioners shall submit their leave address and contact details during such leave before the learned Trial Court as well as before the Officer-In-Charge of Patharkandi P.S Case No.712/2021.

vi. That the petitioners shall not commit any offence similar to the one for which they have been accused of, while they are on bail.

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

JUDGE

Comparing Assistant