

GAHC010031422024



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

Case No. : Bail Appln./445/2024

MD. SABBIR AHMED @ SABIR AHMED
S/O- LATE JALAL AHMED, R/O- VILL. CHAPARMUKH TOWN, P.O.
CHAPARMUKH, P.S. RAHA, DIST. NAGAON ,ASSAM, PIN- 782425

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE P.P., ASSAM

Advocate for the Petitioner : MR. N K MURRY

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 03.04.2024

- 1.** Heard Mr. N. K. Murry, learned counsel for the petitioner. Also heard Mr. K. K. Das, learned Additional Public Prosecutor for the State.
- 2.** This application under Section 439 of the Code of Criminal Procedure, 1973 has been filed by the petitioner, namely, *Md. Sabbir Ahmed @ Sabir Ahmed* who has been detained behind the bars since 10.01.2023 in connection

with NDPS Case No. 41/2023 corresponding to Khatkhati P.S. Case No. 2/2023 under Section 21(c) of the NDPS Act, 1985 which is pending before the Court of learned Special Judge, NDPS, Karbi Anglong, Diphu.

3. The gist of accusation in this case is that on 10.01.2023, one Rajib Borah, S.I. of Police of Khatkhati Police Station had lodged an FIR before the Officer-in-charge of Khatkhati Police Station, *inter alia*, alleging that on receipt of information through reliable sources that huge quantity of narcotic substances are being transported through Khatkhati, a naka checking was conducted near Khatkhati, Janak Phukuri Tiniali and at about 12.20 PM on 10.01.2023, one Chevrolet car bearing Registration No. AS-01-AA-3848 was intercepted. On checking, it was found that the said car was being driven by the present petitioner Sabbir Ahmed and on search of the said car some white carry bag inside a carton box in the dikki of the said car was recovered from where suspected heroin weighing about 363.17 grams were recovered. The said contraband was seized by the seizing officer, and Khatkhati P.S. Case No. 2/2023 under section 21(c) of the NDPS Act, 1985 was registered. Ultimately on completion of the investigation, charge-sheet was laid against the present petitioner under section 21(c)/29 of the NDPS Act. One co-accused Md. Salman Khan @ Sahil was also named in the charge-sheet as accused No. 2.

4. Learned counsel for the petitioner has submitted that the petitioner has been detained behind the bars for last one year two months and twenty four days i.e., 449 days. However, the trial has not proceeded expeditiously. Though the charges were framed on 12.09.2023, however, till now the prosecution side has not examined any witness. It is also submitted by the learned counsel for the petitioner that on the last 15 occasions the prosecution side has been unable to adduce evidence of any prosecution witness. Therefore, on the

ground of undue delay in completion of the trial as well as on the ground of prolonged incarceration, the learned counsel for the petitioner has prayed for allowing the petitioner to go on bail.

5. In support of his submission, learned counsel for the petitioner has cited a ruling of the Apex Court of India in the case of “**Rabi Prakash Vs. The State of Odisha**” reported in “**2023 LiveLaw(SC) 533**” wherein it was observed by the Apex Court 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.

6. The learned counsel for the petitioner has also cited another ruling of the Apex Court in the case of “**Md. Muslim @ Hussain Vs. State (NCT of Delhi)**” reported in “**2023 LiveLaw (SC) 260**” wherein also the Apex Court had granted the bail to the petitioner on the ground of prolonged incarceration in spite of the fact that the said petitioner was facing a charge for possessing commercial quantity of contraband.

7. The learned counsel for the petitioner has also cited a ruling of the High Court of Punjab in the case of “**Khusi Ram @ Happy Vs. State of Punjab**” reported in CRM-M-12940 of 2021 order dated 03.10.2023 as well as another ruling of the High Court of Bombay in the case of “**Shivraj Gorakh Satpute Vs. State of Maharashtra**” (Bail Application No. 2865 of 2022) order dated 15th September, 2023 in support of submissions made by him.

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 contraband (heroin) which was found from the conscious possession of the

present petitioner is of commercial quantity weighing about 363.17 grams and, therefore, the embargo of Section 37 comes into play. He has also submitted that there is clear evidence on record against the present petitioner.

9. It is also submitted by the learned Additional Public Prosecutor that the facts of the case cited by the learned counsel for the petitioner are distinguishable from the facts of the present case as in the case of “**Md. Muslim @ Hussain Vs. State (NCT of Delhi)**” (supra) there were total 30 numbers of witnesses and the court failed to proceed with the case in spite of direction for expeditious hearing, however, in the instant case there are only six witnesses which are yet to be examined.

10. Similarly, learned counsel for the petitioner has also submitted that in the case of “**Md. Muslim**” (supra), the petitioner was in custody for over seven years four months whereas in the case of “**Rabi Prakash**” (supra) the petitioner was in custody for more than three and a half years. However, in the instant case the petitioner is in custody for a much lesser period of time and, therefore, the incarceration undergone by the present petitioner may not be acquitted with that of the cases of “**Md. Muslim**” (supra) and “**Rabi Prakash**” (supra). He has submitted that instead a direction may be given to the trial court for expeditious hearing of the matter.

11. I have considered the submissions made by the learned counsel for both the sides and have perused the scanned copy of the case record of NDPS Case No. 41/2023 which was called for in connection with this case.

12. It is apparent from the record that the contraband recovered from the possession of the present petitioner weighed 363.17 grams and the same was found to be heroin, hence, the weight of seized contraband is of commercial

quantity and, therefore, the embargo of Section 37 of the NDPS Act is applicable in this case.

13. Though, the observation of the Apex Court of India in the case of “***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 is relevant and is also applicable in appropriate cases where the court comes to a finding that the incarceration of the petitioner is long enough so as to come to the conclusion that the embargo under Section 37 is outweighed by such incarceration. However, in the cases cited by the learned counsel for the petitioners that the period of incarceration undergone by the petitioners of those cases is much longer than the present petitioners. The present petitioners has been detailed behind the bars for only one year, two month and twenty five days, however, the petitioners is not able to show any authority to convince this court that the said period can be regarded as long enough to outweigh the embargo of Section 37 of the NDPS Act, 1985.

14. In this case, the quantity of contraband i.e., heroin is 363.17 grams and though the petitioners are entitled to have an expeditious trial, however, this court is of considered opinion that under the facts and circumstances of this case the period of incarceration already undergone by the petitioners does not appear to be long enough to outweigh the embargo of Section 37 of the NDPS Act, 1985.

15. The trial court is hereby directed to expedite the trial and make all endeavors to dispose of the NDPS Case No. 41/2023 within a period of six

months from the date of this order.

16. With the above observation, this bail application is disposed of.

JUDGE

Comparing Assistant