

GAHC010128272024



2024:GAU-AS:12272

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

Case No. : Bail Appln./1922/2024

AFZAL HUSSAIN
S/O ISLAM UDDIN, VILL- SENIPATAN, P.O.-BHANGA BAZAR, P.S.-
BADARPUR, DIST- KARIMGANJ, ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR H R A CHOUDHURY, MR. I U CHOWDHURY, J M
SULAIMAN, MR. R A CHOUDHURY

Advocate for the Respondent : PP, ASSAM,

BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA

ORDER

Date : 04.12.2024

Heard Mr. H. R. A. Choudhury, learned Senior Counsel assisted by Mr. I. U. Choudhury, learned counsel for the petitioner. Also heard Mr. R. J. Baruah, learned Additional Public Prosecutor for the State respondent.

2. This is an application under Section 439 of the Code of Criminal Procedure, 1973 praying for grant of bail to the accused/petitioner, who has been arrested in connection with Special (NDPS) Case No. 22/2023, arising out of Badarpur P.S. Case No. 71/2023, under Section 21(C)/29 of NDPS Act, 1985.

3. Scanned copy of the case record has already been received. Perused the same. Heard both sides.

4. It is submitted by Mr. Choudhury, learned Senior Counsel for the petitioner, that the present accused/petitioner is innocent and he is not involved in the alleged offence. He along with co-accused person was apprehended by police on the allegation of recovery of 284 grams of contrabands (brown sugar) from their possessions. The commercial quantity of contraband is of 250 grams and the recovery of the contraband was joint recovery and thus, the recovery from the present petitioner does not come under the commercial quantity. He further submitted that the accused got arrested in connection with this case on 05.03.2023 and since then, he is in judicial custody. The charge-sheet of the case was filed on 30.06.2023 and the charge was accordingly framed on 16.11.2023 and since then, the case is fixed for evidence. However, till date, no witness could be examined by the prosecution. The accused is behind the bar for more than 1 (one) year and 9 (nine) months. He further submitted that though the case is fixed for evidence after framing of the charge on 16.11.2023, but the attendance of the prosecution witness could not be procured by the learned Trial Court below and out of 10 (ten) numbers of witnesses, no witness could be examined till date. In this context, he also filed the status of the case

wherefrom it is seen that no witness could be examined on the last date fixed, i.e. on 04.10.2024, and the next date for evidence is fixed on 06.12.2024.

5. In support of his submission, Mr. Choudhury, learned Senior Counsel for the petitioner, further relied on the following decisions of the Hon'ble Supreme Court:

- (i) **Rabi Prakash Vs. State of Odisha [2023 0 Supreme(SC) 707]**
- (ii) **Hussainara Khatoon & Ors. Vs. Home Secretary, State of Bihar, Pata [(1980) 1 SCC 98]**
- (iii) **Mohd Muslim @ Hussain Vs. State (NCT of Delhi) [2023 0 Supreme(SC) 289]**
- (iv) **Nitish Adhikary @ Bapan Vs. The State of West Bengal [2022 SCC OnLine SC 2068]**

8. Citing the above referred decisions, it is submitted by Mr. Choudhury, learned Senior Counsel for the petitioner, that the present accused/petitioner may be granted with the privilege of bail considering his long period of incarceration. Further he submitted that the present accused/petitioner is a permanent resident of his addressed locality and there is no chance of absconding and he will produce the genuine bailor and will appear before the learned Trial Court below on each and every date to be fixed by the Court.

9. Mr. Baruah, learned Additional Public Prosecutor, submitted in this regard that from the F.I.R., it is seen that the information was received from reliable source that 2 (two) persons were coming with the contraband concealing in their jackets and accordingly they got arrested and on search, 284 grams of contrabands, suspected to be brown sugar, was recovered from their possession and it is seen that only one seizure list was prepared wherein 284 grams of contrabands was seized from the possession of the 2 (two) accused persons. However, he submitted that there is no mention that both the accused persons were coming separately or two separate seizure list was made by the Investigating Officer during the investigation of this case. He further submitted that the case is also registered under Section 29 of the NDPS Act considering the involvement of both the accused persons in the alleged offence. More so, from the order sheets, it is seen that the learned Trial Court below took all endeavors to procure the attendance of the witnesses. However, due to some reasons, the witness could not be examined by the learned Special Judge. More so, considering the entire materials on record, it also cannot be held that there was any violation of Article 21 of the Constitution of India in the present case. Accordingly, the learned Additional Public Prosecutor raised objection and submitted that it is not at all a fit case to grant bail to the present accused/petitioner.

10. After hearing the submissions made by the learned counsels for both sides, I have perused the scanned copy of the case record and the annexures filed along with the petition.

11. As per the allegation, information was received from reliable source that large quantity of contraband suspected to be narcotics drugs was being transporting by 2 (two) persons from Kankalash to Senipatan area via paddy field by concealing inside their jacket and on the basis of the said information, the informant/SI Shri Pranab Mili, Incharge Malua PICIP of Badarpur Police Station, along with other Police Officials, arrived at the place of occurrence. During search, 284 grams of suspected of Brown Sugar was recovered from the possession of the accused persons concealed inside their jackets and accordingly, the police team seized the contrabands and arrested the accused persons. However, it is the case of the petitioner that he was arrested by the police only on suspicion and the contrabands were not recovered from his conscious possession. More so, it is the case of the petitioner that the alleged recovery of contraband from the present petitioner does not come under the commercial quantity as the commercial quantity of contraband is of 250 grams.

12. It is a fact that the present accused/petitioner was arrested in connection with this case on 05.03.2023 with the allegation of recovery of commercial quantity of contraband from his possession and since then, the accused/petitioner is in custody. After his arrest and on completion of investigation, police find *prima facie* materials against him and accordingly filed the Charge-Sheet against him.

13. Thus, it is seen that the case is of commercial quantity and hence, the rigor of Section 37 NDPS Act will follow.

14. For ready reference, Section 37 NDPS Act is extracted hereinbelow:

"37. Offences to be cognizable and non-bailable.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973

(b) No person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

15. Thus, as per Section 37 (1) (b) of NDPS Act, the bail can only be granted, if there is no reasonable ground for believing that accused is not guilty of such offence and that he is not likely to commit any offence while on bail. But, from the materials available in the case record, there cannot be any reasons to believe that the accused/petitioner is not guilty of such offence or he is not likely to commit any offence while on bail.

16. But, in the same time, it cannot be denied that the accused/petitioner is behind the bar for more than 1 (one) year and 9 (nine) months from the date of his arrest and till then, the prosecution could not examine any witnesses and it also cannot be denied that to examine the witnesses, the prosecution may take a considerable period for completion of the trial.

17. In the case of **Rabi Prakash (supra)**, as relied by the learned counsel for the petitioner, the Apex Court has granted bail to the accused with a view 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)9ii) of the NDPS Act.”

18. In the case of **Chitta Biswas @ Subash Vs. the State of West Bengal [Criminal Appeal No (s) 245 of 2020 (Decided on 07.02.2022)]** also, the bail was granted by the Apex Court considering the long period of incarceration and also considering the fact that out of 10 (ten) numbers of witnesses, only 4 (four) witnesses were examined by the prosecution.

19. Again, in the case of **Nitish Adhikary @ Bapan (supra)**, considering the period of detention of 1 year 7 months, the bail was granted considering that the prosecution could examine only one witness and also considering that the case is at the preliminary stage of trial.

20. Further, in the case of **Shariful Islam @ Sharif Vs. The State of West Bengal [SLP(CrI) 4173/2022 (Decided on 04.08.2022)]** also, the Apex Court had considered the period of incarceration, i.e. 1 year 6 months, and the bail was granted.

21. The Apex Court in the case of **Mohammed Salman Hanif Shaikh Vs. The State of Gujrat [SLP(CrI) No. 5530/2022 (Decided on 22.08.2022)]** also granted bail to the accused without expressing any views on the merits of the case and only taking into consideration the period of custody.

22. In the case of **Karnail Singh Vs. The State of Odisha [Criminal Appeal No. 2027/2022, arising out of SLP(CrI) No. 9067/2022**

(Decided on 22.11.2022)]as well as in **Dheeraj Kumar Shukla (supra)** also, the Apex Court also expressed the same view and granted bail to the accused considering the period of incarceration.

23. Same view has been expressed by the Apex Court in the case of **Anjan Nath Vs. the State of Assam [SLP (CRL) No. 9860/2023 (Decided on 17.10.2023)]**, as relied by the learned counsel for the petitioner.

24. In the instant case, it is seen that there are some materials available in the Case Diary and on the basis of which, the Investigating Officer has also filed the Charge-Sheet against the present accused/petitioner showing his involvement in the alleged offence. But it is also seen that in spite of filing of the Charge-Sheet in the year 2023, the prosecution could not examine a single witness, though it a fact that the accused/petitioner is behind the bar for more than 1 (one) year and 9 (nine) months.

25. In view of above and also considering the observation made by the Apex Court in the various judgments, as discussed above, and further considering the other facts and circumstances of this case, this Court is of the opinion that the period of long incarceration undergone by the accused/petitioner for more than 1 (one) year and 9 (nine) months may be considered as a ground for bail with the conditional liberty considering the fundamental right guaranteed under Article 21 of the Constitution and, therefore, I am inclined to grant bail to the present accused/petitioner.

26. Accordingly, it is provided that on furnishing a bond of Rs. 50,000/-

(Rupees twenty thousand) only with 2 (two) sureties of like amount, one surety has to be a government servant, to the satisfaction of the learned Sessions Judge, Karimganj, the accused/petitioner, namely, Afzal Hussain, be enlarged on bail, subject to the following conditions:

- (i) that the petitioner shall appear before the Court of learned Sessions Judge, Karimganj, on each and every date to be fixed by the Court;
- (ii) that the petitioner shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;
- (iii) That the petitioner shall submit his Aadhar Card and PAN Card before the learned Sessions Judge, Karimganj; and
- (iv) that the petitioner shall not leave the jurisdiction of the learned Sessions Judge, Karimganj, without prior permission.

27. In terms of above, this bail application stands disposed of.

JUDGE

Comparing Assistant