

GAHC010145132024



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

Case No. : Bail Appln./2159/2024

FAYSOL AHMED @ RUBEL
S/O LATE BOSIR UDDIN, VILL- BAGARSANGON, P.S.-RATABARI, DIST-
KARIMGANJ, ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR H R CHOUDHURY, A S PRODHANI, S. TALUKDAR

Advocate for the Respondent : PP, ASSAM,

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 25.09.2024

- 1.** Heard Mr. H. R. Choudhury, learned counsel for the petitioner. Also heard Mr. B. Sarma, learned Additional Public Prosecutor for the State.
- 2.** This application under Section 483 of the BNSS, 2023 has been filed by the petitioner, namely, *Faysol Ahmed @ Rubel* who has been detained behind the bars since 27.02.2023 (for last 1 year, 6 months and 23 days) in connection with Special NDPS Case No. 19/2023 corresponding to Karimganj P.S. Case No.

166/2023 pending before the Court of learned Special Judge, Karimganj under Sections 21(c)/25/27(a) of the NDPS Act, 1985.

3. The gist of accusation in this case is that on 27.02.2023, one Suraj Dutta, SI of Police of Karimganj Police Station had lodged an FIR before the officer-in-charge of Karimganj Police Station, *inter alia*, alleging that on receipt of an information through reliable sources that large quantity of narcotic drugs are being concealed inside the house of one Azad Uddin by one drug peddler, namely, Faysol Ahmed (the present petitioner) at village, Bagarsangon, a search operation was conducted in the residence of Azad Uddin. During such operation, the petitioner was found inside the house of Azad Uddin and 161 grams of Yaba tablets containing methamphetamine were recovered from there.

4. On receipt of the said FIR, Karimganj Police Station Case No. 166/2023 was registered and investigation was initiated. It is also to be noted that the petitioner was apprehended from the house where the search was conducted. Ultimately on completion of the investigation, charge-sheet was laid against the present petitioner under Sections 21(c)/25/27(a) of the NDPS Act, 1985. The charge was framed against the present petitioner on 04.12.2023 under Sections 21(c)/25/27(a) of the NDPS Act, 1985.

5. The learned counsel for the petitioner has submitted that the contraband which has been seized in this case was recovered from the house of the brother of the petitioner, namely, Azad Uddin and it was not recovered from him.

6. The learned counsel for the petitioner has also submitted that in the instant case, the petitioner has been detained behind the bars for last more than one year six months and though the charge-sheet was laid on 16.08.2023 and charges were framed against the petitioner on 04.12.2023, but

till date, not even a single prosecution witness has been examined by the prosecution side.

7. The learned counsel for the petitioner has also submitted that as 161 grams of Yabba tablets containing methamphetamine were recovered in this case, hence apparently embargo of Section 37 appears to be applicable in this case. However, the Fundamental Right guaranteed to the petitioner under Article 21 of the Constitution of India overrides the fetters imposed by Section 37 of the NDPS Act in case of such prolonged incarceration.

8. Learned counsel for the petitioner has cited a ruling of the Apex Court in “**Rabi Prakash Vs. State of Orissa**” reported in **2023 live law (SC) 533**, wherein it has been observed by the Hon'ble Apex Court as follows;

“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)(ii) of the NDPS Act.”

9. The learned counsel for the petitioner has also cited the rulings of the Apex Court in (i) “**Shariful Islam @ Sarif Vs. State of West Bengal**” (order dated 04.08.2022 in SLP Criminal No. 4173/2022), (ii) “**Dheeraj Kumar Shukla Vs. State of Uttar Pradesh**” [order dated 25.10.2023 passed in Special Leave to Appeal (Criminal) No. 6690/2022], (iii) “**Anjan Nath V. The State Of Assam** [Order dated 17.10.2023 passed in Special Leave to Appeal (Criminal) No. 9860/2023], (iv) “**Nitesh Adhikari Vs. State of West Bengal**” (Order dated 04.05.2022 passed in SLP Criminal No. 5769/2022) and (v) “**Md. Salman Hanif Shaikh Vs. State of Gujarat**” (Order dated 22.08.2022 passed in SLA Criminal No. 5530/2022),

wherein the petitioners, who were facing trial for possessing a commercial quantity of contraband, in all the above mentioned cases, were allowed to go on bail by the Apex Court due to prolonged incarceration. Therefore, on the same principle, the learned counsel for the petitioner has also submitted that in the instant case also the petitioner, who has been languishing behind the bars for more than 1 year, 6 months and 23 days may be allowed to go on bail.

10. On the other hand, learned Additional Public Prosecutor has vehemently opposed the grant of bail to the present petitioner on the ground that on last two occasions, the witnesses for prosecution side remained present before the Court. However, they could not be examined only because of the fact that the Presiding Officer was on leave on that day.

11. The learned Additional Public Prosecutor has also submitted that there are sufficient incriminating materials against the present petitioner in this case and as the contraband involved in this case is of commercial quantity, hence, the embargo of Section 37 of the NDPS Act, 1985 is applicable in this case. He, therefore, submits that the petitioner should not be allowed to go on bail.

12. The learned Additional Public Prosecutor also submits that in such a case involving commercial quantity of contraband, the length of detention may not be the sole ground for releasing an accused on bail. In support of his submissions, the learned Additional Public Prosecutor has cited the ruling of the Apex Court in the case of “**Narcotics Control Bureau Versus Mohit Aggarwal**” reported in “**2022 LiveLaw (SC) 613**” wherein it was observed by the Apex Court as follows: -

“18. In our opinion the narrow parameters of bail available under Section 37 of the Act, have not been satisfied in the facts of the instant case. At this stage, it is not safe to conclude that the respondent has

successfully demonstrated that there are reasonable grounds to believe that he is not guilty of the offence alleged against him, for him to have been admitted to bail. The length of the period of his custody or the fact that the charge-sheet has been filed and the trial has commenced are by themselves not considerations that can be treated as persuasive grounds for granting relief to the respondent under Section 37 of the NDPS Act”.

13. I have considered the submissions made by the learned counsel for both the sides and have perused the materials available on record, including the scanned copy of the case record of Special NDPS Case No. 19/2023, which was requisitioned in connection with the instant bail application.

14. In the case of ***Hussainara Khatoon and Ors. Vs. Home Secretary, State of Bihar*** reported in ***(1980) 1 SCC 81***, the Apex Court has observed that the procedure prescribed by law for depriving a person of his personal liberty cannot be regarded as reasonable, fair or just unless that procedure ensures a speedy trial for determination of guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as reasonable, fair or just and it would fall foul of Article 21 of the Constitution of India.

15. Though, Section 37 of the NDPS Act, 1985 provides for stringent provision for grant of bail, however, Section 36 (1) of the NDPS Act, 1985 also mandates the Government to constitute as many special courts as necessary for the purpose of providing speedy trial of offences under the NDPS Act, 1985. If speedy trial is not provided to an incarcerated accused, it will certainly have a negative impact on the rigours of Section 37 of the NDPS Act, 1985.

16. The 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”.

17. In the case of ***Narcotic Control Bureau Vs. Mohit Aggarwal*** (supra), the facts of the case are distinguishable as in the said case, the respondent was granted bail by the High Court on the ground that no incriminating materials were found against him. However, on an appeal by NCB, the Apex Court cancelled the bail on the ground that there are incriminating materials against the petitioner on record and High Court was wrong in holding that no incriminating materials are available. The bail in that case was not granted on the ground of prolonged incarceration and as such the question of prolonged incarceration was not considered by the Apex Court while cancelling the bail.

18. Whereas, the Hon'ble Apex Court in “***Rabi Prakash Vs. State of Orissa***” reported in ***2023 SCC Online SC 1109***, wherein it has been observed by the Hon'ble Apex Court 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)(ii) of the NDPS Act.”

19. This Court is of the considered opinion that for whatsoever reasons, if inordinate delay has been caused and if it is not due to any fault of the petitioner, then to keep him under incarceration for a long period on one hand, and to continue to cause delay in culmination of the trial on the other hand would certainly be infringing his fundamental rights guaranteed under Article 21 of the Constitution of India and under such circumstances, the petitioner would be entitled to get bail.

20. In this regard the observations made by the Apex Court in the case of ***Satender Kumar Antil Vs. CBI and Anr.*** reported in (2021) 10 SCC 773 are relevant, same is quoted here in below:

“49. Sub-section (1) mandates courts to continue the proceedings on a day-to-day basis till the completion of the evidence. Therefore, once a trial starts, it should reach the logical end. Various directions have been issued by this Court not to give unnecessary adjournments resulting in the witnesses being won over. However, the noncompliance of Section 309 continues with gay abandon. Perhaps courts alone cannot be faulted as there are multiple reasons that lead to such adjournments. Though the section makes adjournments and that too not for a longer time period as an exception, they become the norm. We are touching upon this provision only to show that any delay on the part of the court or the prosecution would certainly violate Article 21. This is more so when the accused person is under incarceration. This provision must be applied inuring to the benefit of the accused while considering the application for bail. Whatever may be the nature of the offence, a prolonged trial, appeal or a revision against an accused or a convict under custody or incarceration, would be violative of Article 21. While the courts will have to endeavour to complete at least the recording of the evidence of the private witnesses, as indicated by this Court on quite a few occasions they shall make sure that the accused does not suffer for the delay occasioned due to no fault of his own.

21. In view of the observation made by the Apex Court, this Court is of the

considered opinion that if, under the facts and circumstances of a case, this Court comes to the finding that there is an undue delay in the completion of the trial, and that the incarceration of the petitioner is long enough, he would be entitled to get bail on the ground of such prolonged incarceration, as in such a case of prolonged incarceration, the right to life and personal liberty guaranteed to the petitioner under Article 21 of the Constitution of India would outweigh the fetter imposed under Section 37 of the NDPS Act, 1985.

22. It is also pertinent to mention herein that the Hon'ble Supreme Court of India had granted bail to an 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***”(supra), wherein the accused was detained behind bars for one year and six months.

23. In “***Nitesh Adhikari Vs. State of West Bengal***”(supra), 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.

24. Similarly in “***Md. Salman Hanif Shaikh Vs. State of Gujarat***”(supra), the petitioner was granted bail by the Apex Court on the ground of prolonged incarceration of two years.

25. In “***Chitta Biswas Alias Subha Vs. The State Of West Bengal***”(Order dated 07.02.2020 passed in SLP Criminal No. 8823/2019), the Apex Court granted bail to the petitioner, who was facing a trial for possessing a commercial quantity of contraband on the ground of prolonged incarceration of 1 year 6 months.

26. It appears on perusal of the rulings cited by learned counsel for the petitioner that in all the cases cited by the petitioner, though commercial quantity of contraband was involved and apparently the embargo of Section 37

of the NDPS Act, 1985 would have been applicable in those cases, however, only because of the fact of the prolonged incarceration of the petitioners, the Apex Court allowed the petitioners to go on bail.

27. In the instant case also, the petitioner has been detained behind the bars for more than one year six months and not even a single prosecution witness has been examined till date. Hence, under the facts and circumstances of this case as well as considering the observations made by the Apex Court in the rulings cited hereinabove, wherein it has dealt with the question of long incarceration of similarly situated petitioners who were before the Apex Court, this Court is of considered opinion that in the instant case also due to the long incarceration of the present petitioner, the Fundamental Right guaranteed to the petitioner under Article 21 of the constitution of India outweighs the embargo of Section 37 of the NDPS act 1985 and the petitioner, therefore, is entitled to get bail on the ground of prolonged incarceration.

28. In view of the above, the petitioner, namely, Faysol Ahmed @ Rubel is allowed to go on bail of Rs. 1,00,000/- (Rupees One Lakh only) with two sureties of like amount (one of whom should be a government servant and residing within the State of Assam) subject to the satisfaction of the learned Special Judge, Karimganj with the following conditions:

- i. That the petitioner shall cooperate in the trial of Special NDPS Case No. 19/2023, which is pending in the Court of learned Special Judge, Karimganj;
- ii. That the petitioner shall appear before the Trial Court as and when so required by the 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 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 Trial Court;

v. That the petitioner shall not leave the jurisdiction of the 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; and

vi. That the petitioner shall not commit any similar offence while on bail.

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

JUDGE

Comparing Assistant