

GAHC010197742024



2024:GAU-AS:11676

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

Case No. : Bail Appln./2909/2024

ABU SALEH
SON OF NOOR UDDIN, RESIDENT OF VILL- MULLAGANJ (BATOIA), P.S.
NILAMBAZAR, DISTRICT- KARIMGANJ, ASSAM, PIN- 788710

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR. L R MAZUMDER, MR. A ISLAM

Advocate for the Respondent : PP, ASSAM,

BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA

ORDER

Date : 26.11.2024

Heard Mr. L. R. Mazumder, learned counsel for the petitioner. Also head Mr. R. J. Baruah, learned Additional Public Prosecutor for the State respondent.

2. This is an application under Section 483 of BNSS, 2023, praying for grant

of bail to the accused/petitioner, who has been arrested in connection with Karimganj P.S. Case No. 52/2023, under Section 379 IPC *read with* Section 22(C) of NDPS Act, 1985, corresponding to Special NDPS Case No. 05/2023, pending before the Court of learned Special Judge, Karimganj.

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

4. It is submitted by Mr. Mazumder, learned counsel for the petitioner, that the present accused/petitioner is behind the bar for last more than 1 (one) year 10 (ten) months in custody in connection with this case. However, he is innocent and no way connected in the alleged offence. More so, no recovery was made from his house and the seizure was made only from the house of one Moinuddin and not from the present petitioner. He further submitted that till date, only one witness has been examined by the prosecution out of 13 numbers of witnesses and hence, the probability of disposal of the case in near future cannot be expected. Accordingly, he submitted that considering the period of incarceration, the accused/petitioner may be allowed to go on bail.

5. Mr. Mazumder, learned counsel for the petitioner, further relied on following decisions in support of his case:

(i) **Rabi Prakash vs. The State of Odisha [2023 0 Supreme(SC) 707]**

(ii) **Abu Sufian Vs. The State of Assam [Bail Appln. No.**

1128/2023]

(iii) Kazi Alauddin Vs. The State of Assam [Bail Appln. No. 695/2024]

6. Mr. Baruah, learned Additional Public Prosecutor, submitted in this regard that the recovery was made from the house of the present accused/petitioner, who used to reside in the house of one Moinuddin, who is the landlord of the said house. He further submitted that the case is registered under commercial quantity considering the recovery of contraband from the possession of the accused/petitioner and thus, the rigor of Section 37 of NDPS Act will attract in this case. In this context, he also relied on a decision of Hon'ble Apex Court passed in **Union of India Vs. Ram Samujh & Anr. [(1999) 9 SCC 429]**, wherein the Hon'ble Supreme Court has held that "*to check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,*

- (i) there are reasonable grounds for believing that the accused is not guilty of such offence; and*
- (ii) that he is not likely to commit any offence while on bail"*

7. Accordingly, Mr. Baruah raised objection and submitted that it is not a fit case to allow the accused/petitioner to go on bail only considering the period of incarceration. More so, he submitted that one Prosecution Witness has already been examined by the prosecution and there are sufficient materials in the case

record incriminating the present accused/petitioner in the alleged offence.

8. 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.

9. As per the allegation, it is seen that initially the F.I.R. was registered against the present accused/petitioner in connection with theft of one ATM Card, which was subsequently recovered. However, during the investigation as well as recovery of the said stolen ATM, 59 grams of suspected Yaba Tablets was also recovered from the possession of the present accused/petitioner.

10. From the record, it also reveals that one Prosecution Witnesses has already been examined by the prosecution. However, from the statement made by the said witness, it is seen that he could not identify the accused person while adducing his evidence. However, he supported the prosecution case regarding the recovery of contrabands from a house which was intercepted by police during investigation.

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

12. 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.”

13. 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.

14. But, in the same time, it cannot be denied that the accused/petitioner is behind the bar for more than 1 (one) year 10 (ten) months from the date of his arrest and till then, the prosecution has been able to examine only 1 (one) witnesses out of 13 (thirteen) numbers of witnesses and it also cannot be denied that to examine the remaining witnesses, the prosecution may take a considerable period for completion of the trial.

12. In the case of **Rabi Prakash Vs. State of Orissa (supra)**, the Apex Court has observed 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.*” Again, in

the case of **Mohd Muslim @ Hussain Vs. State of (NCT of Delhi)**, it has been observed by the Apex court 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.

13. Further in the case of **Nitish Adhikari Vs. State of West Bengal (passed in SLP Criminal No. 5769/2022/2022)**, as relied by the learned counsel for the petitioner, as well as in **Md. Salman Hanif Shaikh Vs. State of Gujarat (passed in SLA Criminal No. 5530/2022)**, the Apex Court also expressed the same view and the petitioners of the said cases were released on bail on the ground of prolonged incarceration.

14. 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. The Charge-Sheet was also filed within the statutory period, but it is seen that in spite of filing of the Charge-Sheet in the year 2023, the prosecution could examine only 1 (one) witness out of 13 (thirteen) numbers of witnesses, though it a fact that the accused/petitioner is behind the bar for more than 1 (one) year 10 (ten) months.

15. 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 10 (ten) 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.

16. 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 Special Judge, Karimganj, the accused/petitioner, namely, Abu Saleh, be enlarged on bail, subject to the following conditions:

- (i) that the petitioner shall make himself available for interrogation by the Investigating Officer as and when required;
- (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; and
- (iii) that the petitioner shall not leave the jurisdiction of the learned Special Judge, Karimganj, without prior permission.

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

JUDGE

Comparing Assistant