

GAHC010210462023



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

Case No. : Bail Appln./3332/2023

KHANGEMBAM MANGI SINGH AND ANR
S/O KHAMBENGAM NAGE SINGH
R/O CHINGTHAM
P.S. KHONGJOM
DIST. THOUBAL, MANIPUR

2: SHAGILSEM MANGLEMJAO SINGH
S/O SHAGOLSEM INNGOCHA SINGH
R/O SAPAM
P.S. KHONGJOM
DIST. THOUBAL
MANIPU

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR. Y S MANNAN

Advocate for the Respondent : PP, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA**

ORDER

Date : 10.01.2024

1. Heard Mr. Y. S. Mannan, learned counsel for the petitioners. Also heard Mr. D. Das and Mr. K. K. Parasar, learned Additional Public Prosecutor for the State respondent.

2. This application under section 439 of the Code of Criminal Procedure, 1973 has been filed by the petitioners, namely, 1. Khangembam Mangi Singh, and 2. Shagilsem Manglemjao Singh who have been detained behind the bars since 16.03.2022 (for last 1 year, 9 months and 23 days) in connection with NDPS Case No. 150/2022 pending before the Court of learned Additional Sessions Judge (FTC) No. 3, Kamrup (Metro).

3. The gist of accusation against the present petitioners, in this case, is that on 16.03.2022 one Sri Nabjeet Nath, S. I. of Police of Sonapur Police Station had lodged an FIR before the Officer-in-Charge of the Sonapur Police Station, *inter-alia*, alleging that on receipt of an information through reliable sources, a *naka* checking was conducted in front of Nazira Khat toll gate at National Highway No. 37. During the naka checking on 15.03.2022, a 6 wheeler Tata truck bearing registration No. MN 01 9937, which was coming from the side of Jagiroad towards Sonapur, was intercepted and was asked to stop and during search of the said truck following contrabands were recovered from gunny bags which were concealed inside the hidden chamber of the driver's cabin:

- i. 13 packets containing 1,30,000 Yaba tablets
- ii. 21 packet containing 2,10,000 Yaba tablets

- iii. 12 packets containing 1,20,000 Yaba tablets
 - iv. 12 packets of Methamphetamine approximately 1.04kg in each packet.
 - v. 2 packets of suspected heroin weighing about 750g in each packet.
- 4.** The total number of Yaba tablets seized were 4,60,000 and 12.48 kg of Methamphetamine, as well as 1.5 kg of heroin was seized in presence of the witnesses. Both the present petitioners who were inside the vehicle were arrested and Sonapur P. S. Case No.74/2022 was registered. Thereafter, on 16.06.2022, charge sheet was laid against both the present petitioners under section 22(c)/29 of the NDPS Act, 1985. On 23.12.2022, the trial court, i.e., the Court of Additional Sessions Judge (FTC) No. 3, Kamrup (M) framed charges against the present petitioners under Section 22(c)/29 of the NDPS Act, 1985, and thereafter the trial was commenced, however, only one PW has been examined till now.
- 5.** Learned counsel for the petitioners has submitted that though the petitioners are detained behind the bars since 16.03.2022 (*i.e., for last 1 year 9 months and 23 days*), however, till now only one out of seven prosecution witnesses has been examined.
- 6.** Learned counsel for the petitioners has also submitted that the charge sheet against the present petitioners was laid on 16.06.2022, however, the Investigating Officer has categorically stated in the charge sheet that the said charge sheet is a part charge sheet. Learned counsel for the petitioners has also submitted that the trial Court in its order dated 04.07.2022 has also categorically mentioned that the charge sheet submitted by the Investigating Officer is a part charge sheet and final charge sheet would be submitted after completion of the investigation. Learned counsel for the petitioners has submitted that since the charge sheet was only a part charge sheet, it implies

that the investigation was not completed when the charge sheet was laid, the petitioners are entitled to get default bail due to submission of charge sheet without completion of the investigation. Learned counsel for the petitioners has submitted that the Investigating Officer is yet to find any supplementary charge sheet or any final charge sheet, hence, the petitioners are entitled to get default bail under Section 167(2) of the Code of Criminal Procedure, 1973.

7. Learned counsel for the petitioners has cited a ruling of the Apex Court in “***M. Raveendran vs directorate of revenue intelligence***” reported in **(2021) 2 SCC 485** wherein the Apex Court had observed as follows: -

17.7. Therefore, as mentioned supra, Section 167(2) is integrally linked to the constitutional commitment under Article 21 promising protection of life and personal liberty against unlawful and arbitrary detention, and must be interpreted in a manner which serves this purpose. In this regard we find it useful to refer to the decision of the three-Judge Bench of this Court in Rakesh Kumar Paul v. State of Assam [Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67: (2018) 1 SCC (Cri) 401], which laid down certain seminal principles as to the interpretation of Section 167(2) CrPC though the questions of law involved were somewhat different from the present case. The questions before the three-Judge Bench in Rakesh Kumar Paul [Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67 : (2018) 1 SCC (Cri) 401] were whether, firstly, the 90-day remand extension under Section 167(2)(a)(i) would be applicable in respect of offences where the maximum period of imprisonment was 10 years, though the minimum period was less than 10 years. Secondly, whether the application for bail filed by the accused could be construed as an application for default bail, even though the expiry of the statutory period under Section 167(2) had not been specifically pleaded as a ground for bail. The majority opinion held that the 90-day limit is only available in respect of offences where a minimum ten year' imprisonment period is stipulated, and that the oral arguments for default bail made by the counsel for the accused before the High Court would suffice in lieu of a written application. This was based on the reasoning that the court should not be too technical in matters of personal liberty. Madan B. Lokur, J. in his majority opinion, pertinently observed as follows: (SCC pp. 95-96 & 99, paras 29, 32 & 41)

“29. Notwithstanding this, the basic legislative intent of completing investigations within twenty-four hours and also within an otherwise time-bound period remains unchanged, even though that period has been extended over the years. This is an indication that in addition to giving adequate time to complete investigations, the legislature has also and always put a premium on personal liberty and has always felt that it would be unfair to an accused to remain in custody for a prolonged or indefinite period. It is for this reason and also to hold the investigating agency accountable that time-limits have been laid down by the legislature. ...

32. ... Such views and opinions over a prolonged period have prompted the legislature for more than a century to ensure expeditious conclusion of investigations so that an accused person is not unnecessarily deprived of his or her personal liberty by remaining in prolonged custody for an offence that he or she might not even have committed. In our opinion, the entire debate before us must also be looked at from the point of view of expeditious conclusion of investigations and from the angle of personal liberty and not from a purely dictionary or textual perspective as canvassed by the learned counsel for the State.

41. We take this view keeping in mind that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical. The history of the personal liberty jurisprudence of this Court and other constitutional courts includes petitions for a writ of habeas corpus and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the Court.”

Therefore, the courts cannot adopt a rigid or formalistic approach whilst considering any issue that touches upon the rights contained in Article 21.

8. Learned counsel for the petitioners has also submitted that the percentage of heroin found in the seized contraband is only 5.57%, whereas no charges are framed as regards the seized yaba tablets. Learned counsel for the petitioners further submits that considering the fact that the petitioners are detained behind the bars for last 663 days and the trial has not progressed as

only one prosecution witness has been examined till now, the petitioners are also entitled to get bail only on the ground of prolonged incarceration. Learned counsel for the petitioners has cited the 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 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.***"

9. On the other hand, learned Additional Public Prosecutor has submitted that in the instant case, the charge sheet was submitted after completion of the investigation as no investigation was pending against the present petitioners and nothing has been mentioned in that regard in the charge sheet. It is further submitted by the learned Additional Public Prosecutor that mere mentioning in the charge sheet that the same is a part charge sheet without anything on record to indicate that the investigation has remained incomplete would not make the charge sheet incomplete and merely due to erroneous mention in the charge sheet by the Investigating Officer as part charge sheet would not entitle the petitioners to get the benefit of default bail.

10. Learned Additional Public Prosecutor has also submitted that in the instant case, the contraband seized is of huge commercial quantity and hence, the embargo of Section 37 of the NDPS Act, 1985 comes into play, and therefore he has vehemently opposed the grant of bail to the present petitioners.

11. I have considered the submissions made by learned counsel for both the sides and have gone through the materials available on record, including the scanned copy of the case record of NDPS Case No. 150/2022 which was called

for in connection with this case.

12. In the instant case, it appears that charges were framed against the present petitioners by the Trial Court under Section 22(c)/29 of the NDPS Act, 1985, on 23.12.2022, however, though 1.5 kg of heroin was also seized from the present petitioners, no charge under Section 21(c) of the NDPS Act, 1985 was framed, which ought to have been framed in this case. It also appears that though it is alleged that the huge quantity of yaba tablets was seized from the petitioners, there is no forensic report as regards the yaba tablets and no charges were framed for the same against the petitioners.

13. Further, it is true that the charge sheet can be laid only after completion of the investigation and failure to lay the charge sheet within the statutorily stipulated period after completion of the investigation would entitle the accused persons to get statutory bail under Section 167(2) of the Code of Criminal Procedure, 1973, however, in the instant case we have to see as to whether the charge sheet was laid against the present petitioners after completion of the investigation or without the same. Though the Investigating Officer, in the instant case, has mentioned in the charge sheet that the same is a part charge sheet and one of the ways to ascertain as to whether the investigation has been completed before laying the charge sheet is to consider the explicit language used by the Investigating Officer in the charge sheet, however, the same is not the only factor to be considered for finding out the fact as to whether the charge sheet was laid after completion of the investigation or not. In the instant case, it has been categorically mentioned in the charge sheet that sufficient materials are found against the present petitioners for possessing commercial quantity of contraband but there is no mention as to whether any investigation is pending against the present petitioners, there is also no prayer for conducting

any further investigation. In the instant case, rather, it has been categorically mentioned in the charge sheet that there are sufficient materials against the present petitioners for possessing commercial quantity of contraband. As in the instant case, materials available on record shows that the investigation as regards the allegation against the present petitioners for possessing commercial quantity of contraband has been completed and apart from the fact that the Investigating Officer has mentioned in the charge sheet as a part charge sheet, there is nothing to indicate that the investigation regarding the accusation against the present petitioners for possessing commercial quantity of contraband is not complete before laying the charge sheet against them, hence this court , in the facts and circumstances of this case, fails to persuade itself with the submissions made by learned counsel for the petitioners that they are entitled to get default bail. This Court is of the considered opinion that under the facts and circumstances of this case, the petitioners are not entitled to get default bail in this case.

14. Though in the considered opinion of this Court the petitioners are not entitled to default bail, however, the petitioners have been behind the bars for last 663 days and therefore, the question before this Court is as to whether the incarceration of the petitioners is long enough so as to override the embargo of Section 37 of the NDPS Act, 1985. If this Court comes to a finding that the delay is long enough that the embargo of Section 37 of the NDPS Act, 1985, is outweighed by the fundamental right to life and personal liberty guaranteed to the present petitioners under Article 21 of the Constitution of India, they may have to be released on bail inspite of the embargo of Section 37 of the NDPS Act, 1985.

15. It also appears that though the petitioners are detained behind the bars

for 1 year 9 months and 23 days (663 days), only one witness has been examined till now and since 03.02.2023 the NDPS Case No. 150/2022 was listed for evidence of prosecution witnesses for 11 times on 11 occasions. However, not even a single witness could be examined on the last 11 dates. It appears that the delay in trial in this case cannot be attributed to the present petitioners as they are detained behind the bars throughout their trial.

16. The petitioners have a right to get speedy trial under Article 21 of the Constitution of India.

17. 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" 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 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 petitioner, he would be entitled to get bail on the ground of prolonged incarceration only as in such case of prolong incarceration, the fundamental 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.

18. 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.

19. 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 seven months.

20. 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.

21. In the instant case also, the petitioners are detained behind the bars since 16.03.2022 (for last 663 days) and only one prosecution witness has been examined till now. There is a likelihood that culmination of the trial would take time and under the facts and circumstances of the present case, this Court is of the considered opinion that the long incarceration of the petitioners for more than 1 year 9 months in this case has outweighed the embargo of Section 37 of the NDPS Act, 1985, hence the petitioners are entitled to get bail in this case.

22. In view of above, the above named petitioners are hereby allowed to go on bail of Rs. 1,00,000/- (Rupees One Lakh) only with two suitable sureties, one of whom should be a government employee and should be resident of the State of Assam, of like amount to the satisfaction of the Trial Court with following conditions:-

- i. That the petitioners shall cooperate in the trial of NDPS Case No. 150/2022, which is pending in the Court of learned Additional Sessions Judge (FTC) No. 3, Kamrup (Metro);

- ii. That the petitioners shall regularly appear before the learned Trial Court as and when so required by the 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 persons from disclosing such facts before the Trial Court in the NDPS Case No. 150/2022 pending against the present petitioners;
- 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 Trial Court;
- v. That the petitioners 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 petitioners shall submit his leave address and contact details during such leave period before the Trial Court;
- 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.

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

JUDGE

Comparing Assistant