

GAHC010245962023



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

Case No. : Bail Appln./3956/2023

JAMIR UDDIN
S/O NIMAR ALI, R/O VILL-KHAGALI, P.S. AND DIST-KARIMGANJ, ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR. L R MAZUMDER

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 03.04.2024

- 1.** Heard Mr. L. R. Mazumder, learned counsel for the petitioner.
Also heard Mr. R. J. Baruah, 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, *Jamir Uddin*, who has been detained behind the bars since 19.12.2022 (for last 471 days).
- 3.** The gist of accusation in this case is that on 19.12.2022 about

739 grams of heroin was seized from the possession of 4(four) accused persons including the present petitioner and on 19.12.2022, one Nilov Jyoti Nath, S.I. of Police had lodged an FIR to that affect before the Officer-In-Charge of Ramkrishna Nagar Police Station. On receipt of the said FIR, Ramkrishna Nagar P.S. Case No. 165/2022 was registered under Section 21(c)/25/29 of the Indian Penal Code, and investigation was initiated. Ultimately, on completion of the investigation, charge-sheet was laid against four numbers of accused persons, including the present petitioner on 30.04.2023 under Sections 21(c)/25/29 of the NDPS Act, 1985.

4. It is submitted by the learned counsel for the petitioner that the petitioner has been detained behind the bars for last 471 days and though the charge-sheet was laid on 30.04.2023, till now the charges are yet to be framed by the trial court.

5. It is also submitted that as one of the accused person named in the FIR is absconding and non-bailable warrant of arrest has been issued against him. Hence, there is no possibility of the initiation of trial in near future and, therefore, on the ground of prolonged incarceration the petitioner is entitled to get bail. In support of his submissions, learned counsel for the petitioner has cited the following rulings of the Apex court of India:

i. “Rabi Prakash Vs. The State of Odisha” reported in “2023 0 Supreme (SC) 702.

ii. “Nitish Adhikary @ Bapon Vs. The State of West Bengal” reported in CRM (NDPS) No. 442/2022, order dated 01.08.2022

iii. “Shariful Islam @ Sarif Vs. The State of West Bengal” reported in CRM (NDPS) Case No. 299/2022),

Order dated 04.08.2022.

6. The learned counsel for the petitioner has also submitted that in this case the prosecution side has not complied with the mandate of Section 52A of the NDPS Act, 1985 as from the order-sheet dated 20.12.2022, passed in Ramkrishna Nagar P.S. Case No. 165/2022, it appears that the samples of the seized contraband were not drawn in presence of the Judicial Magistrate.

7. The learned counsel for the petitioner has also submitted that the sample drawn of the seized contraband was kept in Police malkhana for about 4(four) months before sending the same for Forensic examination to the Forensic Laboratory, Guwahati, which is in violation of the procedure prescribed by law. On the aforesaid ground, the learned counsel for the petitioner has prayed for allowing the petitioner to go on bail.

8. On the other hand, learned Additional Public Prosecutor has vehemently opposed the grant of bail to the present petitioner on the ground that 739gms. of heroin was seized in this case, which is a commercial quantity of seized contraband and, therefore, the embargo of Section 37 of the NDPS Act, 1985 is applicable.

9. It is also submitted by the learned Additional Public Prosecutor that the court could not proceed with the trial as there are 4(four) accused persons and one of the accused person is yet to appear before the trial court.

10. I have considered the submissions made by the learned counsel for the parties as well as perused the material available on record.

11. It appears that total 739gms of heroin was seized in this case from the possession of the accused persons including the present petitioner and, hence, apparently the embargo of Section 39 is applicable in this case.

12. Regarding the submissions made by the learned counsel for the

petitioner that the provisions of Section 52A of the NDPS Act, 1985, was not complied with in this case as the sampling was not done in the presence of the Magistrate. However, on perusal of order dated 20.12.2022, it appears that the sampling was done in fact in the presence of the Magistrate and from each of the 11 boxes, 3 grams of suspected heroin was extracted as representative sample and was mixed homogeneously and thereafter marked and the total weight of the sample was 11 grams in each of the 3 samples, i.e., total 33gms of sample. Therefore, the submission of the learned counsel for the petitioner that the Section 52A of the NDPS Act, 1985, was not complied with and cannot be appreciated at this stage.

13. As regards submissions made by learned counsel about the delay in sending the samples to the Forensic Laboratory, the plea can only be taken or considered during the course of the trial. As regards the plea regarding the ground of prolonged incarceration, it appears that though prolonged incarceration is a valid ground for considering the prayer for bail even in a case where commercial quantity of contraband is involved. However, before invoking the said provision, the court has come to the conclusion that the incarceration is long enough so as to give the benefit of bail to the petitioner. However, in all the 3 cases cited by the learned counsel for the petitioner, the petitioners of those cases were incarcerated for much longer period than the present petitioner in this case.

14. In Nitish Adhikary's case (Supra), the petitioner was detained behind the bar for 1(one) year and 7(seven)months. In Shariful Islam's case (Supra), the petitioner was in custody for over 1(one) year and 6(six)months and in the case of Rabi Prakash, the petitioner was in custody for much longer period.

15. However, in the instant case, the petitioner has only completed 471days, i.e. about 1(one)year and 3(three)months only, therefore this court is of considered opinion that the incarceration of the present petitioner in this case is not long enough so as to override the embargo of section 37 of the NDPS Act, 1985.

16. However, considering the fact that even after 471days of detention, the charges are yet to be framed, the trial court is hereby directed to consider the option of splitting up the case of the petitioner and the accused persons who are appearing before the court from that of the accused person, who is yet to be apprehended and proceed with the trial as expeditiously as possible.

17. For above mentioned reasons, the prayer for bail of the present petitioner is rejected at this stage.

18. Let a copy of this order be furnished to the trial court. Registry shall do the same.

JUDGE

Comparing Assistant