

GAHC010255412023



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

Case No. : Bail Appln./4154/2023

SHIAB UDDIN @ SIAB UDDIN AND ANR
S/O NUMAN ALI @ FAIYAZ ALI VILL. KARTIKTILLA P.S PATHARKANDI
DIST. KARIMGANJ ASSAM

2: JIBER HUSSAIN @ JUBER
S/O LT. MATAB UDDIN VILL. RAUTHGRAM P.O. KALIGAN P.S.
KARIMGANJ DIST. KARIMGANJ ASSA

VERSUS

THE STATE OF ASSAM
REP BY THE PP, ASSAM

Advocate for the Petitioner : MR. A M BARBHUIYA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

ORDER

Date : 13-02-2024

Heard Mr. A.M. Barbhuiya, learned counsel for the petitioners *Shiab Uddin @ Siab Uddin and Jiber Hussain @ Juber*.

2. Both the petitioners have filed this application under Section 439 of the Code of Criminal Procedure, 1973 as they are behind bars since 19.09.2021

(867 days) in connection with Special (NDPS) Case No. 90/2021 arising out of Ratabari Police Station Case No. 431/2021 registered under Sections 22(c)/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

3. It is submitted on behalf of the petitioners that they have been languishing in the jail for 867 days. 5 (Five) out of 10 (Ten) witnesses have been examined. The PWs have not supported the case, so they will be benefited as per Section 37 of the NDPS Act as there appears to be no possibility of conviction on conclusion of trial. It is submitted that the petitioners also deserve bail as their personal liberty has been curtailed and they are languishing in the jail for more than 2 (Two) years and only 5 (Five) out of 10 (Ten) witnesses have been examined. It submitted that the trial is unlikely to be concluded as 5 (Five) witnesses are yet to be examined and the trial is progressing at a snail's pace. The petitioners are willing to abide by any stringent conditions if imposed upon them in the event they are enlarged on bail.

4. The petitioners have also relied on the decision of Hon'ble the Supreme Court in *Rabi Prakash Vs. State of Odhisha reported in (2023) SCC OnLine SC 1109* wherein the petitioner Rabi Prakash was granted bail as the he was behind bars for more than three and a half years and as only one witness was examined, it was held by Hon'ble the Supreme Court that when the accused had spent more than three and a half years in the custody, the prolonged incarceration generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution.

5. The petitioner has also relied on the decision of Hon'ble the Supreme Court in *Sagar Tatyaram Gorkhe and another Vs. State of Maharashtra, Sachin Maruti Mali Alias Samar Shiva Vs. State of Maharastra reported in (2021) 3 SCC 725*. It is submitted on behalf of the petitioners that this Court including a

Coordinate Bench of this Court has granted bail to similarly circumstanced petitioner in the cases of Asab Uddin Vs. The State of Assam in Bail Appln. No. 1995/2023, Nasir Uddin Vs. The State of Assam in Bail Appln. No. 2661/2023, Md. Rashid Ahmed Vs. The State of Assam in Bail Appln. No. 1759/2023, Harish Mia @ Harij Miah Vs. The State of Assam in BA No. 2475/2023, Hussain Ahmed Khan Vs. The State of Assam in BA No. 3487/2023, Lutfur Rahman @ Tipu Vs. The State of Assam in Bail Appln. No. 2316/2023 and Mohbubur Rahman and Anr Vs. The State of Assam in Bail Appln. No. 2925/2023.

6. The petitioners have relied on the decision of the High Court of Delhi at New Delhi in Bail Appln. No. 1156/2023 in Case of Aabid Khan Vs. State of Govt. of NCT of Delhi wherein vide order dated 05.12.2023 it was held that

“18. As per nominal roll dated 10.05.2023, the applicant has been in judicial custody for 01 year 05 months and 28 days. The investigation in the present case is complete, the chargesheet stands filed and the trial is underway. No useful purpose will be served by keeping the applicant in judicial custody any further.”

7. Heard Mr. D.P. Gowami, learned Additional Public Prosecutor for the respondent State who has raised serious objection stating that 5 (Five) witnesses have already been examined. This case cannot be considered to be a case where personal liberty has been curtailed. The ratio of the decision of Hon'ble the Supreme Court in Rabi Prakash's case (supra) is not similar to this case. In this case, the petitioner who is behind bars for two and a half years is facing trial. The trial is proceeding at a regular pace. The trial is not proceeding at a snail's pace. The case of Sagar Tatyaram Gorkhe (supra) is not similar to this case. In the case of Sagar Tatyaram Gorkhe, 147 (One Hundred Forty Seven) witnesses have been enlisted and only 1 (One) witness has been

examined and the petitioners were behind bars for almost 4 (Four) years. This case cannot be considered to be a case where trial is unlikely to be concluded in the near future. The decision of *Mohit Agarwal Vs. Narcotics Control Bureau in Bail Appln. No. 2585/2020* has been altered by Hon'ble the Supreme Court.

8. In the decision of Hon'ble the Supreme Court in *Tarun Kumar Vs. Assistant Director Directorate of Enforcement in SLP (Crl.) No. 9431/2023*, it has been held and observed as extracted:

"19. It is axiomatic that the principle of parity is based on the guarantee of positive equality before law enshrined in Article 14 of the Constitution. However, if any illegality and irregularity has been committed in favour of any individual or a group of individuals, or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing similar wrong order. Article 14 is not meant to perpetuate the illegality or irregularity. If there has been a benefit or advantage conferred on one or a set of people by any authority or by the court, without legal basis or justification, other persons could not claim as a matter of right the benefit on the basis of such wrong decision."

9. I have considered the submissions at the bar with circumspection. In the case of *Mohd Muslim @ Hussain Vs. State (NCT of Delhi)* in Special Leave Petition (Criminal) No. 915/2023, the appellant was behind bars for more than seven years when he was granted bail. This case is not similar to the case of *Mohd Muslim @ Hussain* (supra). The facts and circumstances of this case is not similar to the facts and circumstance of the case decided by the Coordinate Bench of this Court as referred to by the learned counsel for the petitioners. It is also submitted by the learned Additional Public Prosecutor that PW4 has implicated the petitioners.

10. In the light of the decision of Hon'ble the Supreme Court in *Tarun Kumar's*

case (supra), petition with prayer for bail is rejected at this stage.

11. Send back the LCR.

In the above terms this Bail Application stands disposed of.

JUDGE

Comparing Assistant