

GAHC010257372023



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Bail Application No. 4327/2023

Gautam Rokshit @ Gautam Rakshit,
Aged about- 44 years,,
Son of Late Narayan Rokshit @ Narayan Rakshit,
R/o-Namghar Road, Ward No. 6,
Lankeswar Grant PS-Lanka,
District-Hojai, Assam,
PIN-782446.

.....Petitioner

-Versus-

The State of Assam,
Represented by the Public Prosecutor of Assam

.....Respondent.

Advocate for the Petitioner : Mr N K Murry.

Advocate for the respondent: Mr M P Goswami, APP, Assam.

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of Order : 06.02.2024

ORDER

Heard Mr N K Murry, learned counsel for the petitioner, Gautam Rokshit
@ Gautam Rakshit.

2. The petitioner has filed this application under Section 439 CrPC, with prayer for bail as he is behind bars since 03.03.2022, in connection with NDPS Case No. 27/2022, arising out of Diphu PS Case No. 17/2022, registered under Section 20 (C) of the NDPS Act (GR Case No. 40/2022).

3. The allegation against the petitioner is that on 03.03.2022, a tip off was received by the Investigating Team and a naka checking was held at Dhansiri near RPF Barrack Tiniali, when at about 10:25 am, two members of the team noticed three persons bargaining with an auto and they were carrying bags. These persons were confronted and search was done as per proper procedure and ganja was recovered from their possession. The petitioner is one of the three accused, who was apprehended, in connection with this case and forwarded to custody.

4. It is submitted on behalf of the petitioner that charge was framed on 24.05.2022 and out of 9 witnesses, only 5 witnesses have been examined. 4 witnesses are yet to be examined. It is unlikely that trial will be concluded soon. It is further submitted that the witnesses have exonerated the petitioner. The petitioner has prayed for bail on the ground of parity, as his co-accused has been granted bail.

5. It is further submitted that the petitioner was allegedly caught with 25.08 kgs of ganja, which is only a few kgs above intermediate quantity and cannot be *per se* considered to be a huge amount of commercial quantity. The petitioner is willing to abide by any stringent conditions, if imposed upon him.

6. It is also submitted that the evidence of PWs-1, 2 and 3, i.e., the evidence of seizure witnesses exonerates the petitioner, as several discrepancies could be elicited through the cross-examination of PW-1, who stated that the Police did not seize the weighing machine. PW-1 also did not see the Police searching the accused persons. Samples were not drawn from the recovered articles and so on and so forth.

7. It is further submitted that the cross-examination of PW-2 reveals that

he did not know from whom the ganja was recovered.

8. It is submitted that PW-5's deposition is contrary to the FIR, as it is clear that PW-5 was already present at the place of occurrence.

9. The learned counsel for the petitioner has relied on the decision of the High Court of Judicature of Punjab and Haryana, at Chandigarh, in ***Khushi Ram @ Happy –Vs- State of Punjab***, in connection with CRM-M-12940 of 2021, wherein vide order dated 03.10.2023, it has been observed that-

6. No doubt, the quantity of recovered contraband would fall in the 'commercial category' and the provisions of Section 37 of the NDPS Act would be attracted in the present case; however, it is also borne out from the record that the petitioner is in custody for the last more than 02 years and 11 months and only 7 witnesses have been examined so far. Even the prosecution could not bring on record any material, which would show that the trial has been delayed on account of any fault on the part of the present petitioner. Thus, the 'right to speedy trial' of the petitioner as enshrined in Article 21 of the Constitution of India is violated and the conditions as mentioned in Section 37 of the NDPS Act can be dispensed with at this stage for the limited purpose of grant of concession of bail.

10. The learned counsel for the petitioner has also relied on the decision of High Court of Judicature at Bombay in ***Shivraj Gorakh Satpute –Vs- The State of Maharashtra***; in connection with Bail Application No. 2865 of

2022, wherein vide order dated 15.09.2023, it has been observed that-

9. In the instant case, it is not in dispute that the house of the Applicant was searched and Ganja was seized between sunset and sunrise without any warrant or authorization and that there was no compliance of Section 42 of the NDPS Act. It is sought to be projected that it was a chance seizure and hence, compliance with section 42 was not possible. In this regard, it is relevant to note that the accused no.1 – Vinod Rajaram Shinde, who was allegedly found in possession of two bags containing 22 kgs of Ganja was arrested on 01/07/2021. It is the case of the prosecution that on 02/07/2021, the accused no.1 had made a disclosure statement that he was willing to show the place and the person from whom he had purchased the contraband and that pursuant to the said disclosure statement, 10 kgs of Ganja was recovered from the house of accused no.2 – Samadhan Tawde at Nashik. The accused no.2 allegedly made a disclosure statement on 05/07/2021 that he had purchased the contraband from the Applicant herein, who was a resident of Sangamner, Ahmednagar and that he was willing to show his house. Pursuant to the said disclosure statement, the NCB team proceeded to the house of the Applicant at Ahmednagar and allegedly recovered 50 kgs of Ganja from his residence. The material on record reveals that the co-accused had disclosed the name of the Applicant as well as his address. Hence, prima facie it was not a case of chance recovery or seizure in the normal course of investigation but it was on the basis of specific information given by the co-accused. It is also pertinent to note that the said information was given at about 3.00 p.m. and the search and seizure was conducted after sunset. It is not the case of the prosecution that the empowered officer did not have sufficient time to obtain warrant or authorization without affording opportunity to the Applicant to escape or conceal the evidence. The concerned officer has not recorded reasons for such

belief in terms of proviso to Section 42(1) of the NDPS Act. Hence, prima facie the search and seizure, which is in contravention of the mandatory provisions of Section 42 of the NDPS Act prima facie makes the recovery doubtful.

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11. The above facts and circumstances raise a reasonable doubt about the involvement of the Applicant in the aforesaid crime. The Applicant, who is a young boy of 22 years of age, is in custody since last more than two years. The Applicant has no criminal antecedents. Considering the large pendency and the fact that the charge is not yet framed, it is evident that the trial is not likely to conclude within a reasonable time. The Apex Court has time and again observed that prolonged custody infringes the fundamental right under Article 21 of the Constitution of India and grant of bail on the ground of undue delay in trial is not fettered by Section 37 of the NDPS Act. Reliance is placed on the decision of Rabi Prakash Vs. The State of Odisha in Special Leave to Appeal (Crl.) No.4169 of 2023 wherein the Hon'ble Supreme 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." Reliance is also placed on Nitish Adhikary @ Bapan Vs. The State of West Bengal (Special Leave to Appeal (Crl.) No.5769 of 2022), Gopal Krishna Patra @ Gopalrusma Vs. Union of India (Criminal Appeal No.1169 of 2022) decided on 05/08/2022, and Sharifulislam @ Sarif Vs. The State of West Bengal (Special Leave to Appeal (Crl.) 4173 of 2022) decided on 04/08/2022.

11. Heard Mr M P Goswami, learned Additional Public Prosecutor for the

State of Assam.

12. The learned Additional Public Prosecutor has submitted that the majority of witnesses have already been examined. The evidence-in-chief of five witnesses incriminates the petitioner. The intricacies and the technicalities of the evidence cannot be considered at this stage. The decision of ***Khushi Ram @ Happy(supra)***, referred to by the petitioner, is not relevant to this case. The accused Shivraj Gorakh Satpute was behind bars for more than two years and he was a young lad of 22 years of age. Charges were not framed and it was held by the High Court of Judicature at Bombay that it was unlikely that the trial would conclude within a reasonable time, as charges were yet to be framed. In the instant case, however, trial has progressed and is almost to be concluded. The present petitioner is also not a young lad or a misguided youth. He is 44 years old.

13. I have considered the submissions at the Bar with circumspection.

14. It is true that the petitioner is behind bars for a considerable period of time. He was forwarded to custody on 03.03.2022. However, charges have already been framed and five witnesses have already been examined. It cannot be held to be a case where trial has been procrastinated to the extent

curtailing the fundamental right to personal liberty. This Court cannot be oblivious of the embargo under Section 37 of the NDPS Act. The evidence cannot be discussed at this stage when trial is about to be concluded. The other case referred to by the petitioner, i.e., ***Khushi Ram @ Happy's case (supra)*** is also not relevant to this case. The accused Khushi Ram @ Happy was granted bail as he was languishing in jail for 2 years 11 months. It has been held by Hon'ble the Supreme Court in ***Tarun Kumar -Vs- Assistant Director, Directorate of Enforcement;*** reported in **(2023) 4 Crimes (SC) 442**, that-

“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 or 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.”

15. 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.

However, the petitioner is at liberty to file a fresh petition for bail, if trial is procrastinated any further. The learned trial Court is directed to expedite the trial for speedy disposal of the case and make every endeavour to dispose of the case within 2 (two) months.

16. Bail Application stands disposed of.

JUDGE

Comparing Assistant