

GAHC010258052023



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

Case No. : Bail Appln./4177/2023

SHIVNATH CHOUDHURY AND ANR
S/O- LT. BHUBANESWAR CHOUDHURY, VILL- BAIDHAVATI, POLICE
STATION- BADRESWAR, DIST.- HOOGLY, WEST BENGAL

2: BABAI GOSWAI
S/O- LT. SANKAR GOSWAI
VILL- SAURAPULI
POLICE STATION- FERI
DIST.- HOOGHLY
WEST BENGAL

VERSUS

THE STATE OF ASSAM
TO BE REPRESENTED BY THE PUBLIC PROSECUTOR

Advocate for the Petitioner : MR. M A CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 10.04.2024

1) Heard Mr. M. A. Choudhury, learned counsel for the petitioners. Also heard Ms. A. Begum, 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, Shivnath Choudhury and Babai Goswai, who are detained behind the bars since 05.01.2022 (for the last 826 days) in connection with Special (NDPS) Case No. 03/2022 corresponding to Bazaricherra P.S. Case No. 15/2022 under Section 20(b)(ii)(C)/29 of the NDPS Act, 1985, which is pending in the Court of learned Special Judge, Karimganj.

3) The gist of accusation in this case is that on 04.01.2022, one Nirranjan Das, SI of Police, lodged an FIR before the Officer-In-Charge of Bazaricherra Police Station, *inter-alia*, alleging that as per information received through reliable sources that one truck carrying some suspected Ganja, a naka checking was conducted at naka checking point of Churaibari Watch Post at National Highway No. 8 and a truck bearing registration No. WB 11D 6667 was intercepted and during search of the said truck, 31 packets containing 314 kg and 210 grams of ganja was found concealed in secret compartments.

4) The Petitioner No. 1, who is the driver of this said truck, and Petitioner No. 2, who is the helper in the said truck, were arrested and the recovered ganja was seized.

5) On the basis of the aforesaid FIR, Bazaricherra P.S. Case No. 15/2022 was registered and investigation was initiated.

6) After completion of the investigation, charge-sheet was laid against the present petitioners on 28.02.2022 and charges were framed against them on 26.02.2022.

7) Learned counsel for the petitioners has submitted that the petitioners are innocent, they are only the driver and helper (Khalasi), of the said truck and

were not knowing that the suspected ganja was loaded on the said truck.

8) It is also submitted that the petitioners were not responsible for loading the goods on the said truck and it was the employer of the petitioners as well as owner of the vehicle who might be knowing about the goods which were loaded on the said truck.

9) It is submitted by learned counsel for the petitioners that the petitioners, without knowing the goods which were carried by them, were moving towards Guwahati and it was only at the naka checking point, they came to know that ganja was found from the truck which they were driving.

10) Learned counsel for the petitioners has submitted that the petitioners are languishing behind the bars for more than 2 years, 3 months. However, the trial has not completed and out of 11 listed witnesses, only 6 have been examined and the last witness was examined on 01.01.2023 and since then no witness has been examined.

11) It is submitted by learned counsel for the petitioners that at this pace the culmination of trial would take a long time and the petitioners are entitled to get bail on the ground of prolonged incarceration only.

12) In support of his submission, learned counsel for the petitioners has cited the ruling of Apex Court of India in the case of ***Rabi Prakash Vs. State of Orissa*** reported in ***2023 Live Law (SC) 533***, as well as the case of ***Chitta Biswas @ Subhas Vs. The State of West Bengal*** (Criminal Appeal No. 245/2020, Order dated 07.02.2020), ***Nitesh Adhikari @ Bapan Vs. State of West Bengal*** (Order dated 01.08.2022 in SLP Criminal No. 5769/2022), ***Shariful Islam @ Sarif Vs. State of West Bengal*** (order dated 04.08.2022 in SLP Criminal No. 4173/2022), ***Karanail Singh vs The State Of Odisha*** Criminal Appeal No.2027 of 2022 arising out of SLP Criminal

No. 9067/2022 order dated 22.11.2022 and “**Anjan Nath Vs. The State of Assam** [Order dated 17.10.2023 passed in Special Leave to Appeal (Criminal) No. 9860/2023].

13) Learned counsel for the petitioners has submitted that in all the above cited cases the petitioners were granted bail due to prolonged incarceration of above one and a half years in each case, and hence, it is prayed that the petitioners may also be allowed to go on bail on the ground of prolonged incarceration.

14) On the other hand, Ms A. Begum, learned Additional Public Prosecutor has submitted that the contraband seized in connection with this case is of commercial quantity and hence, the embargo of Section 37 of the NDPS Act, 1985 is applicable to this case and on that ground she has opposed the grant of bail to the present petitioners.

15) It is also submitted by learned Additional Public Prosecutor that already 6 out of the 11 listed witnesses have been examined and only 5 witnesses remain to be examined which would be completed very soon. However, she also submits that the last witness was examined as per record on 01.11.2023.

16) I have considered the submissions made by learned counsel for both the sides and have perused the scanned copy of the case record of the trial court which is available on record.

17) It appears from the record that the petitioners are detained behind the bars since 05.01.2022, i.e. for more than 2 years and 3 months as on date. However, only 6 out of the 11 listed witnesses have been examined and the last witness to be examined was on 01.11.2023.

18) The 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 ground of undue delay in trial, cannot be said to be fettered by Section 37 of the NDPS Act, 1985”.

19) Similarly, the Apex Court of India has also observed in “***Rabi Prakash Vs. The State of Odisha***” (Supra) wherein, it 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.”

20) This Court is also of the considered opinion that while considering an application for bail involving commercial quantity of contraband, if the court comes to a finding that there has been undue delay in completion of the trial and that there has been prolonged incarceration of the petitioner during this time, he would be entitled to get bail in such case of prolonged incarceration as the fundamental right to life and personal liberty guaranteed under Article 21 of the Constitution of India would outweigh the fetters imposed under Section 37 of the NDPS Act, 1985.

21) It is also pertinent to mention herein that the 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***” (Supra), wherein the accused was detained behind the bars for one year and six months.

22) In “***Nitesh Adhikari Vs. State of West Bengal***” (Supra), the 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.

23) In the instant case also the trial is progressing very slow and the petitioners are incarcerated since last 2 years and 3 months and this court is of

considered opinion that under the facts and circumstances of this case the incarceration of the above-named petitioners is long enough and under such circumstances, the fundamental rights to life and personal liberty of the present petitioners guaranteed under Article 21 of the Constitution of India would outweigh the fetters imposed under Section 37 of the NDPS Act, 1985 and accordingly the petitioners are entitled to get bail in this case.

24) In view of above, the above-named petitioners are hereby directed to be released on bail on furnishing a bond of Rs. 50,000/- (Rupees Fifty Thousand only) each with two suitable sureties of like amount to the satisfaction of the learned Special Judge, Karimganj with the following conditions:-

- i. That the petitioners shall cooperate in the trial of Special (NDPS) Case No. 03/2022, which is pending in the Court of learned Special Judge, Karimganj;
- ii. That the petitioners shall regularly appear before the 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 person from disclosing such facts before the trial court in the trial pending against the present petitioner;
- 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 Court of the learned Special Judge, Karimganj;
- v. That the petitioners shall not leave the jurisdiction of the learned Trial Court without prior permission of the trial court and when such leave is

granted by the trial court, the petitioners shall submit their leave address and contact details during such leave before the trial court.

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

JUDGE

Comparing Assistant