

GAHC010010102024



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

Case No. : Bail Appln./190/2024

YAHIYA KHAN
S/O MAIPAK SHAH
R/O VILL- KIYAMGEI
P.O. LILONG
P.S. IRILBUNG
DIST. IMPHAL (EAST), MANIPUR
PIN-795003

VERSUS

THE UNION OF INDIA
REPRESENTED BY SC, NCB

Advocate for the Petitioner : MS. S K NARGIS

Advocate for the Respondent : SC, NCB

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 26.06.2024

1. Heard Mr. S. Nawaz, learned counsel for the petitioner. Also heard Mr. S. C. Keyal, learned Standing Counsel, Narcotic Control Bureau (NCB).

2. This application under Section 439 of the Code of Criminal Procedure, 1973 has been filed by the petitioner, namely Yahiya Khan, who has been detained behind the bars since 14.10.2020 (more than 3 years 8 months), in connection with NDPS Case No. 16/2021, arising out of NCB Crime No. 13/2020, under Section 22(C)/29 of the NDPS Act, 1985 pending before the Court of learned Additional Sessions Judge No. 2, Kamrup (M), Guwahati.

3. The case of the petitioner is that he has been detained in connection with NCB Crime No. 13/2020 on 14.10.2020, along with two other co-accused, namely Shakil Khan and Mithilesh Kumar, from near Rehman Hospital, 6 Mile, Guwahati, Assam, on acquisition of possessing 2.146 kg of methamphetamine tablet.

4. Later on, on the basis of a complaint filed by one Manoj Sauguna, Intelligence Officer, Narcotic Control Bureau, the NDPS Case No. 16/2021, was registered and the trial was commenced.

5. It is pertinent to mention herein that, out of 2.146 kg of methamphetamine tablets which were seized in this case, a total of 275 grams of methamphetamine in tablet form was recovered from the possession of co-accused Shakil Khan and a quantity of 839 grams of methamphetamine in tablet form was recovered from the co-accused Mithilesh Kumar, whereas the weight of the methamphetamine tablets which was recovered from the physical possession of the above-named petitioner, Md. Yahiya Khan, was 1.032 kg. Thus, even individually, the quantity of methamphetamine tablets which were recovered from the three accused persons was commercial quantity.

6. Learned counsel for the petitioner has submitted that in the NDPS Case

No.16/2020, which is pending before the Court of learned Additional Sessions Judge No.2, Kamrup (M), Guwahati, wherein the above-named petitioner is facing trial, the charges were framed against the present petitioner and two other co-accused under Section 8(C)/22(C)/29 of the NDPS Act 1985 on 10.03.2022.

7. Learned counsel for the petitioner has also submitted that though, total 12 numbers of witnesses have been listed in the complaint filed by the NCB, till now only 10 witnesses have been examined and the next date of the aforesaid case is fixed on 04.7.2024 for re-examination of PW-10 who has been recalled by the learned Trial Court on the prayer of NCB.

8. Learned counsel for the petitioner has also submitted that the co-accused in this case, namely, Shakil Khan had earlier preferred a bail application before this Court, which was registered as Bail Application No.994/2023 and the said bail application was disposed of by order dated 02.05.2023 by a Coordinate Bench of this Court, wherein, though the prayer for bail of co-accused Shakil Khan was rejected, the Court made an observation that the Trial Court shall plan a calendar of hearing suitably so as to ensure early disposal of the case, preferably within six months, failing which the Trial Court shall consider the release of the said accused on bail subject to certain conditions.

9. It is also submitted by learned counsel for the petitioner that when the Trial Court failed to culminate the trial as within six months of the date of the said order, the co-accused, Md. Shakil Khan, was granted bail by the Trial Court by its order dated 18.11.2023 with certain conditions.

10. It is also submitted by learned counsel for the petitioner that even after

seven months of the release of the co-accused on bail on the grounds of prolonged incarceration, the present petitioner, who is similarly situated to that of the accused who was already released on bail, is languishing behind the bars with uncertainty of early culmination of trial.

11. It is also submitted by learned counsel for the petitioner that as the above-mentioned petitioner has been languishing behind the bars for the last more than three years, eight months, and the trial has not yet culminated, he is entitled to bail on the grounds of prolonged incarceration only.

12. It is also submitted by learned counsel for the petitioner has that the principle of releasing the accused on bail even in cases involving commercial quantity of contraband mainly on the grounds of prolonged incarceration has been recognized by the Apex Court in the case of “*Rabi Prakesh 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.”

13. Learned counsel for the petitioner has submitted that though the embargo of Section 37 of the NDPS Act, 1985 is mandatory in nature, however, in view of the observations made by the Supreme Court in a number of cases, in case of inordinate delay in trial, the embargo is lifted and it gives weigh to the fundamental right of the accused which is guaranteed under Article 21 of the Constitution of India.

14. The learned counsel for the petitioner has also cited the rulings of the

Apex Court in (i) “***Shariful Islam @ Sarif Vs. State of West Bengal***” (order dated 04.08.2022 in SLP Criminal No. 4173/2022), (ii) “***Dheeraj Kumar Shukla Vs. State of Uttar Pradesh***” [order dated 25.10.2023 passed in Special Leave to Appeal (Criminal) No. 6690/2022], (iii) “***Anjan Nath V. The State Of Assam*** [Order dated 17.10.2023 passed in Special Leave to Appeal (Criminal) No. 9860/2023], (iv) “***Nitesh Adhikari Vs. State of West Bengal***” (Order dated 04.05.2022 passed in SLP Criminal No. 5769/2022) and (v) “***Md. Salman Hanif Shaikh Vs. State of Gujarat***” (Order dated 22.08.2022 passed in SLA Criminal No. 5530/2022), wherein the petitioners (who were facing trial for possessing a commercial quantity of contraband) were granted bail by the Apex Court. However, due to the prolonged incarceration in all the above mentioned cases, the petitioners were allowed to go on bail. Therefore, on the same principle, the learned counsel for the petitioner has also submitted that in the instant case also the petitioner, who has been languishing behind the bars for more than 3 years 8 months may be allowed to go on bail.

15. On the other hand, Mr. S. C. Keyal, learned Standing Counsel, NCB has vehemently opposed the grant of bail to the present petitioner on the grounds that there are sufficient incriminating material against the present petitioner for possessing a commercial quantity of methamphetamine tablets in this case, and hence the embargo of Section 37 of the NDPS Act, 1985 is applicable in the instant case, and therefore, he may not be allowed to go on bail.

16. Learned Standing Counsel, NCB has also submitted that though the Apex Court has observed that the prolonged incarceration may be one of the grounds for releasing the accused on bail however it has not laid down in anywhere as to how long incarceration would be long enough to override the embargo of

Section 37 of the NDPS Act, 1985.

17. It is submitted by learned Standing Counsel, NCB that as now it is well accepted that the provision of Section 436A of the Code of Criminal Procedure, 1973 is also applicable in NDPS cases, hence, until the accused has completed half of the period of the maximum sentence prescribed for the offence for which the accused undergoing incarceration has been charged with, his period of detention may not be considered as long enough to override the embargo of Section 37 of the NDPS Act, 1985.

18. The learned Standing Counsel, NCB relying on the judgment of the Supreme Court of India in the case of State by NCB, ***Bengluru vs Pallulabid Ahamad Arimutta and others*** reported in ***(2022) 2 Scale 14*** had submitted that the petitioner would not get the benefit of the co-accused Shakil Khan having been released on bail as he does not stand on the same footing as that of the said accused, namely, Shakil Khan. As the quantity of contraband seized from the possession of the present petitioner is much higher than that of the co-accused Shakil Khan who has been released on bail.

19. Learned Standing Counsel, NCB has also submitted that in a case involving heinous offences, the Constitutional Courts should refrain from fixing a time bound schedule for disposal of case and it may issue such direction for time bound disposal in the exception circumstances only and to buttress his submission he has cited a ruling of the Apex Court in the case of ***High Court Bar Association, Allahabad Vs. State of UP and other*** reported in ***2024 SCC online SC 207.***

20. To impress upon this Court that on the ground of prolonged incarceration only the petitioner may not be granted bail in a case where

commercial quantity of contraband is involved, learned Standing Counsel, NCB has also cited ruling of Coordinate Bench of this Court in the case of

- i.** Aminul Islam Vs. Union of India (Order dated 06.05.2022 in Bail Application No. 2816/2020)
- ii.** Khamin Lal Vs. State of Assam (Order dated 20.12.2023 in Bail Application No. 4379/2023)
- iii.** Ravinder Ray Vs. Union of India (Order dated 10.06.2024 in Bail Application No. 1240/2024)

21. I have considered the submissions made by learned counsel for both sides and have perused the materials on record, including the scanned copy of the case record of NDPS Case No. 16/2021, which was called for in connection with this case.

22. It appears from the record that the petitioner was arrested on 14.10.2020, and as on date the petitioner has completed more than 3 years 8 months of detention behind the bars and the next date of the case before Trial Court is fixed for re-examination of PW-10 on 04.07.2024 and two more listed witnesses are there who are yet to be examined in this case.

23. It also appears from record that one of the co-accused namely Shakil khan has already granted bail by the Trial Court about 7 month ago on the ground of prolonged incarceration though he was arrested on the same date as that of the present petitioner. In any view of the matter, the fact remains that even after more than three years and eight month the incarceration of the above named petitioner the trial has not yet culminated.

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

25. In case of “*Rabi Prakesh Vs. State of Orissa*” reported in **2023 live law (SC) 533**, 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.”

26. It appears on perusal of the rulings cited by learned counsel for the petitioner that in all the said cases, though commercial quantity of contraband was involved and apparently the embargo of Section 37 would have been applicable in those cases, however, only because of the fact of the prolonged incarceration of the petitioners, the Apex Court allowed the petitioners to go on bail.

27. In light of the observation made by the Apex Court, this Court is of the considered opinion that under the facts and circumstances of a case, this Court comes to the finding that there is an undue delay in the completion of the trial, and that the incarceration of the petitioner is long enough, he would be entitled to get bail on the ground of such prolonged incarceration, as in such a case of prolonged incarceration, the right to life and personal liberty guaranteed to the petitioner under Section Article 21 of the Constitution of India would outweigh the fetters imposed under Section 37 of the NDPS Act, 1985.

28. In “*Nitesh Adhikari Vs. State of West Bengal*” (Order dated 04.05.2022 passed in SLP Criminal No. 5769/2022), 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.

29. In “*Chitta Biswas Alias Subha Vs. The State Of West Bengal*” (Order dated 07.02.2020 passed in SLP Criminal No. 8823/2019), the Apex Court granted bail to the petitioner, who was facing a trial for possessing a commercial quantity of contraband on the ground of prolonged incarceration of 1 year 6 month.

30. In the instant case also, the present petitioner has been detained behind the bars for last more than 3 years 8 months and the trial is yet to culminate. In view of the facts and circumstances of this case as well as in the light of the observations made by the Apex Court in the rulings cited hereinabove, wherein, it has dealt with the question of long incarceration of similarly situated petitioners who were before the Apex Court, this Court is of the considered opinion that in the instant case also, the long incarceration of the present petitioner outweighs the embargo of Section 37 of the NDPS, Act 1985 and the petitioner is, therefore, entitled to get bail on the ground of prolonged incarceration only.

31. In view of the above, the petitioner, namely, Mr Yahiya Khan is allowed to go on bail of Rs. 1,00,000/- (Rupees One Lakh only) with two sureties of like amount (one of whom should be a government servant and residing within the State of Assam) subject to the satisfaction of the learned Additional Sessions Judge No.2, Kamrup (M), Guwahati with the following conditions:

- i.** That the petitioner shall cooperate in the trial of Special

(NDPS) Case No.16/2021, which is pending in the Court of learned Additional Sessions Judge No.2, Kamrup (M), Guwahati;

ii. That the petitioner shall appear before the Trial Court as and when so required by the Trial Court;

iii. That the petitioner 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 petitioner shall provide his contact details including photocopies of his Aadhar Card or Driving License or PAN card, and mobile number as well as other contact details before the Trial Court;

v. That the petitioner 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 petitioner shall submit his leave address and contact details during such leave before the Trial Court; and

vi. That the petitioner shall not commit any similar offence while on bail.

32. With the above observation, this bail application is accordingly disposed of.

33. Let a copy of this order be furnished by the Registry of this Court.

JUDGE

Comparing Assistant