

GAHC010037952024



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

Case No. : Bail Appln./538/2024

JAVAID IQBAL @ JAVID IQBAL
S/O MOHD. HUSSAIN
R/O VILLAGE NANDAN RAKI BAN PO NANDAN PS-DARHAL MALKAN
DIST RAJOURI JAMMU KASHMIR 185135

VERSUS

THE UNION OF INDIA
REPRESENTED BY THE STANDING COUNSEL, NARCOTIC CONTROL
BUREAU (NCB).

Advocate for the Petitioner : MR. M BISWAS

Advocate for the Respondent : SC, NCB

**BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA**

ORDER

Date : 17.05.2024

- 1)** Heard Mr. M. Biswas, 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, Javaid Iqbal @ Javid Iqbal, who

has been detained behind the bars since 25.07.2021 (*for last 2 years 9 months 23 days.*) in connection with NDPS Case No. 04/2022 corresponding to the NCB Crime No. 18/2021 under Sections 20(b)(ii)(C)/28/29/35 and 54 of the NDPS Act, 1985 pending in the Court of learned Session Judge, Amingaon.

3) The gist of the accusation in this case is that on 23.07.2021 at about 1000 hours, one Shri Kaushik Sarkar Kumar, Intelligence Officer, NCB Guwahati received an information from reliable sources that on 25.07.2021, two persons, namely, Javaid Iqbal (the present petitioner) and Sanjay Kumar Shah were coming from Tripura in a truck bearing registration No. JK 02 BG 6260 carrying a huge quantity of ganja. Accordingly, one NCB team conducted naka checking near Narayana Super Speciality Hospital at Amingaon on 24.07.2021 at about 10:45 p.m. and thereafter, on 25.07.2021, at about 3:30 a.m., the aforementioned truck was intercepted and two persons, including the present petitioner, were apprehended from the said truck. During the search of the said truck, total of 35 numbers of brown coloured packets were recovered, which are suspected to be Ganja. The total weight of the ganja packets recovered was 360.350 kg. Thereafter, the NCB had filed a complaint against the present petitioner and the co-accused persons, namely Sanjay Kumar Shah and Kajal Debnath.

4) The learned counsel for the petitioner has submitted that though in this case the charges under Section 20(b)(ii)(C)/29 of the NDPS Act, 1985 were framed against the present petitioner and the co-accused on 10.06.2022, however, even after lapse of more than 2 years 9 months, only 3 witnesses have been examined till now and there is no hope of culmination of the trial at the earliest, therefore, on the ground of prolonged incarceration, the petitioner is entitled to go on bail.

5) The learned counsel for the petitioner has also submitted that the petitioner was not in the conscious possession of the seized contraband as he was only the driver of the truck bearing Registration No. JK 02 BG 6260 and he was under impression that he was carrying a consignment of colgate in the said truck and he has no knowledge as to who loaded the seized contraband in the said truck.

6) The 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 prolong incarceration and inordinate delay in trial, the embargo of Section 37 of the NDPS Act, 1985 is lifted and it gives way to the right of the accused guaranteed under Article 21 of the Constitution of India.

7) The learned counsel for the petitioner has also submitted that though the present case is a case where commercial quantity of contraband is involved, however, as the detention of the petitioner is long enough, i.e., he has been detained behind the bars for last 2 years 9 months and 23 days, the prolonged incarceration of the present petitioner in this case would override the embargo of Section 37 of the NDPS Act, 1985.

8) The learned counsel for the petitioner has cited a ruling of the Apex Court in the case of "**Rabi Prakash Vs. State of Orissa**" reported in **2023 SCC Online SC 1109**, 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.*"

9) 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 commercial quantity of contraband). 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 2 years 9 months, may be allowed to go on bail.

10) The learned counsel for the petitioner has also submitted that the co-accused in this case namely, Sanjay Kumar Shah, who was similarly placed like that of the present petitioner has already been granted bail by this Court by Order dated 22.01.2024 passed in Bail Application No. 3881/2023.

11) On the other hand, Mr. S. C. Keyal, learned Standing Counsel, NCB has vehemently opposed the prayer for grant of bail to the present petitioner on the ground that there are sufficient incriminating materials against the present petitioner for possessing commercial quantity of *ganja* (360.350 kg) in this case, hence, he has submitted that the embargo of Section 37 of the NDPS Act, 1985 is applicable in the instant case, and therefore, the petitioner may not be allowed to go on bail.

12) The learned Standing Counsel, NCB has also submitted that what is

binding is not the conclusion arrived at by the higher Court, but the underlying principles, on the basis of which that conclusion has been reached. He has submitted that the rulings of the Apex Court cited by the learned counsel for the petitioner does not indicate any *ratio-decidendi* on the basis of which the petitioners in the said cases were allowed to go on bail.

13) The learned Standing Counsel, NCB has also submitted that in case of an heinous offence like that of offences under the NDPS Act, 1985, the object of enacting NDPS Act, 1985 as well as legislative mandate of the said Act should be strictly followed and no accused should be released on bail unless mandatory conditions provided under Section 37 of the NDPS Act, 1985 are fulfilled. To substantiate his submission, the learned Standing Counsel, NCB has cited a ruling of the Supreme Court of India in the case of “***Union of India Vs. Ram Samujh***”, reported in **(1999) 9 SCC 429**. The learned Standing Counsel, NCB has also cited a ruling of the Apex Court in the case of “***State By (NCB) Bangalore Vs. Pallulabid Ahmed Arimutta***” reported in **(2022) 12 SCC 633**.

14) The learned Standing Counsel, NCB has also submitted that a person accused of offences, which are non-bailable is liable to be detained in custody during pendency of the trial unless he is enlarged on bail in accordance with law and such a detention cannot be questioned as being violative of Article 21 of the Constitution of India, since the same is authorised by law. In support of his submission, the learned Standing Counsel, NCB has cited a ruling of the Apex Court in the case of “***Kalyan Chandra Sarkar, Etc. Vs. Rajesh Ranjan @ Pappu Yadav***” reported in **(2005) 2 SCC 42**.

15) The learned Standing Counsel, NCB has also submitted that in a criminal trial it is not possible to lay down a fixed period for conclusion of trial as the conclusion of criminal trial depends on many factors like nature of offence, the

number of accused, the number of witnesses, the workload in the particular court, the means of communication and several other circumstances which are to be kept in mind and if the delay is not for any wrong on the prosecution side the accused should not get benefit of any such systemic delay. The learned Standing Counsel, NCB has cited a ruling of the Apex Court in the case of "**High Court Bar Association, Allahabad Vs. The State Of Uttar Pradesh**" reported in **2024 Legal Eagle (SC) 198**, to buttress his submission.

16) The learned Standing Counsel, NCB has also submitted that in the case of **Satender Kumar Antil Vs. CBI reported in 2022 (10) SCC 51**, the Apex Court has observed that Section 436 A of the Code of Criminal Procedure, 1973, which relates to the maximum period for which an under trial prisoner can be detained behind the bars, is also applicable to offences under NDPS Act, 1985. It is submitted by the learned Standing Counsel, NCB that as Section 436 A of the Code of Criminal Procedure, 1973, provides that if an under trial prisoner had undergone detention for a period extending up to one half of the maximum period of imprisonment specified for that offence under that law he shall be released by the Court on his personal bond with or without surety, hence, for an offence under NDPS Act, 1985 an under trial prisoner may be detained behind the bars till he completes one half of the maximum period of imprisonment specified for that offence. It is submitted by the learned Standing Counsel, NCB that unless the under trial prisoner completes the said period, he may not be released on bail merely on the ground of prolonged incarceration as embargo of Section 37 of the NDPS Act, 1985 would be applicable in such case.

17) Apart from the above cited rulings, the learned Standing Counsel, NCB has also cited following ruling in support of his submission:

- i. **Hira Singh and Another Vs. Union of India and**

Another reported in 2020 (20) SCC 272.

- ii. ***Narcotics Control Bureau v. Kishan Lal*** reported in **(1991)1 SCC 705.**
- iii. ***Gurwinder Singh Vs. State of Punjab,*** reported in **2024 0 Supreme (SC) 104.**
- iv. ***Narcotics Control Bureau Vs. Mohit Aggarwal,*** reported in **2022 0 Supreme (SC) 619.**
- v. ***Union of India Vs. Ajay Kumar Singh @ Pappu,*** reported in **2023 0 Supreme (SC) 285.**
- vi. ***State of Bihar & Anr. Vs. Amit Kumar @ Bacha Rai,*** reported in **2017 (13) SCC 751.**
- vii. ***MattuLal v. Radhe Lal,*** reported in **AIR 1974 SC 1596.**
- viii. ***National Insurance Company Limited Vs. Pranay Sethi*** reported in **2017 16 SCC 680.**
- ix. ***Secundrabad Club Vs. CIT*** reported in **2023 0 Supreme (SC) 765.**

18) 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. 04/2022.

19) In the case of ***Hussain Ara Khatoon (Supra)*** the Apex Court has observed that the procedure prescribed by law for depriving a person of his personal liberty cannot be regarded as reasonable, fair or just unless that procedure ensures a speedy trial for determination of guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as reasonable, fair or just and it would fall foul of Article 21 of the Constitution of India.

20) Though, Section 37 of the NDPS Act, 1985 provides for stringent

provision for grant of bail, however, Section 36 (1) of the NDPS Act, 1985 also mandates the Government to constitute as many special courts as necessary for the purpose of providing speedy trial of offences under the NDPS Act, 1985. If speedy trial is not provided to an incarcerated accused, it will certainly have a negative impact on the rigours of Section 37 of the NDPS Act, 1985.

21) Hon'ble 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".

22) The Hon'ble Apex Court in "***Rabi Prakash Vs. State of Orissa***" reported in ***2023 SCC Online SC 1109***, wherein it has been observed by the Hon'ble 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."

23) In view of the aforementioned observations of the Apex Court, the submissions made by the learned Standing Counsel, NCB to the effect that as because Section 436 A of the Code of Criminal Procedure, 1973 is applicable to offence under the NDPS Act, 1985, therefore, the accused may not be released on bail unless he has completed one half of the maximum period of imprisonment specified for that offence, does not appear to be a reasonable argument.

24) It appears from the record that since the date of arrest, i.e. 25.07.2021, the petitioner has been detained behind the bars and though the charges were framed on 10.06.2022, however, till now, only 3 prosecution witnesses have been examined and the trial has not yet been completed in spite of the fact that

the petitioner has been detained behind the bars for the last 2 years 9 months and 23 days.

25) This Court is of the considered opinion that for whatsoever reasons, if inordinate delay has been caused and if it is not due to any fault of the petitioner, then to keep him under incarceration for a long period on one hand, and to continue to cause delay in culmination of the trial on the other hand would certainly be infringing his fundamental rights guaranteed under Article 21 of the Constitution of India and under such circumstances, the petitioner would be entitled to get bail.

26) In this regard the observations made by the Apex Court in the case of *Satender Kumar Antil (Supra)* are relevant, same is quoted here in below:

49. Sub-section (1) mandates courts to continue the proceedings on a day-to-day basis till the completion of the evidence. Therefore, once a trial starts, it should reach the logical end. Various directions have been issued by this Court not to give unnecessary adjournments resulting in the witnesses being won over. However, the non-compliance of Section 309 continues with gay abandon. Perhaps courts alone cannot be faulted as there are multiple reasons that lead to such adjournments. Though the section makes adjournments and that too not for a longer time period as an exception, they become the norm. We are touching upon this provision only to show that any delay on the part of the court or the prosecution would certainly violate Article 21. This is more so when the accused person is under incarceration. This provision must be applied inuring to the benefit of the accused while considering the application for bail. Whatever may be the nature of the offence, a prolonged trial, appeal or a revision against an accused or a convict under custody or incarceration, would be violative of Article 21. While the courts will have to endeavour to complete at least the recording of the evidence of the private witnesses, as indicated by this Court on quite a few occasions,

they shall make sure that the accused does not suffer for the delay occasioned due to no fault of his own.

27) In view of the observation made by the Apex Court, this Court is of the considered opinion that if, 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 Article 21 of the Constitution of India would outweigh the fetter imposed under Section 37 of the NDPS Act, 1985.

28) It is also pertinent to mention herein that the Hon'ble Supreme Court of India had granted bail to an 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***" (Order dated 04.08.2022 passed in SLP Criminal No. 4173/2022), wherein the accused was detained behind bars for one year and six months.

29) In "***Nitesh Adhikari Vs. State of West Bengal***" (Order dated 04.05.2022 passed in SLP Criminal No. 5769/2022), Hon'ble 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.

30) Similarly in "***Md. Salman Hanif Shaikh Vs. State of Gujarat***" (Order dated 22.08.2022 passed in SLA Criminal No. 5530/2022), the petitioner was granted bail by the Apex Court on the ground of prolonged incarceration of two years.

31) 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.

32) It appears on perusal of the rulings cited by learned counsel for the petitioner that in all the cases cited by the petitioner, though commercial quantity of contraband was involved and apparently the embargo of Section 37 of the NDPS Act, 1985 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.

33) In the instant case also, the present petitioner has been detained behind the bars for last 2 years 9 months and 23 days and the trial is yet to culminate and in view of the facts and circumstances of this case as well as considering 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 facts and circumstances are such that 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.

34) In view of the above, the petitioner, namely, Javaid Iqbal @ Javid Iqbal 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 Session Judge, Kamrup, Amingaon with the following conditions:

- i.** That the petitioner shall cooperate in the trial of NDPS Case No. 04/2022, which is pending in the Court of learned Session Judge, Kamrup, Amingaon;
- 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, Driving License, PAN card, mobile number, and 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.

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

JUDGE

Comparing Assistant