

GAHC010058352024



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

Case No. : Bail Appln./811/2024

JAGDHARI NISHAD @ JADHARI KEWAT
S/O LT. ROPAN NISHAD
R/O VILL-LEDAURA, P.O. GAHAJI
P.S. AHAROLA, DIST. AZAMGARH, UTTAR PRADESH, PIN-223221

VERSUS

THE STATE OF ASSAM
REP BY THE PP, ASSAM

Advocate for the Petitioner : MR SISHIR DUTTA

Advocate for the Respondent : PP, ASSAM

BEFORE

HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

24.06.2024

- 1.** Heard Mr. S. Dutta, learned counsel for the petitioner. Also heard Mr. B. B. Gogoi, learned Additional Public Prosecutor, Assam, appearing

for the State respondent.

2. This application under section 439 of the Code of Criminal Procedure, 1973, has been filed by the petitioner, Jagdhari Nishad @ Jadhari Kewat, who has been detained behind the bars since 30.08.2022, (for more than 1 year 9 months) in connection with Special NDPS Case No. 123/2022, corresponding to Bazaricherra P.S. Case No. 158/2022, under section 20(b)(ii)(C)/25/29 of the NDPS Act, 1985, which is pending before the Court of learned Additional Sessions Judge, Karimganj.

3. The gist of accusation in this case is that, on 30.08.2022, one Niranjan Das, SI of Police, had lodged an FIR before the Officer-In-Charge of Bazaricherra Police Station, *inter alia*, alleging that while conducting a daily naka checking duty at the naka check point of Churaibari Watchpost at National Highway No. 08 at about 8:25 PM, a TATA Goods Carrier Vehicle Truck bearing Registration No. AS-01FC-1894 was standing near Churaibari Watchpost naka checking point and it was found loaded with bundles of rubber. However, when on suspicion the said truck was searched; huge quantity of suspected ganja was found concealed under the rubber bundles.

4. The driver of the said vehicle could not be apprehended as he escaped before the search operation was initiated. On weighing of the recovered contraband suspected to be ganja (cannabis) which was found packed in 333 numbers of packets, it weighed 4728 kgs.

5. On receipt of the said FIR, Bazaricherra Police Station Case No. 158/2022 was registered and investigation was initiated.

6. During the course of investigation, it was found that the vehicle

bearing Registration No. AS-01FC-1894 was registered in the name of one Satiram Kewat of Fancy Bazar, Guwahati. It was also found that though the said truck was registered in the name of Satiram Kewat, it was operated by his brother Shri Jagdhari Nishad @ Jadhari Kewat (the present petitioner).

7. During the course of the investigation, it was also found that the truck which was seized at Churaibari in connection with this case was actually having Registration No. AS-01-GC-7349 of which Shri Satiram Kewat was the registered owner and the same was operated by the present petitioner.

8. It was also found during investigation that the truck from where the contraband was recovered was handed over to one Dilip Tiwari, who is suspected to be the driver of the truck from where the contraband was recovered.

9. Learned counsel for the petitioner has submitted that the petitioner is not involved in carrying of any contraband as alleged in the FIR.

10. It is also submitted by the learned counsel for the petitioner that the seized truck was not recovered from the possession of the present petitioner and he has been arrested merely on the basis of the statement of the co-accused.

11. The learned counsel for the petitioner has also submitted that though the petitioner has been detained behind the bars for more than last 1 year 9 months, however, till today only three out of ten listed witnesses have been examined and there is no hope of culmination of

the trial at the earliest. And hence, learned counsel for the petitioner has submitted that the petitioner is entitled to get bail on the ground of prolonged incarceration also.

12. 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."

13. On the other hand, Mr. B. B. Gogoi, learned Additional Public Prosecutor, has vehemently opposed the grant of bail to the present petitioner on the ground that the quantity of contraband seized in this case is huge quantity of 4,728 kgs of ganja and the same is commercial quantity and hence the embargo of Section 37 of the NDPS Act is applicable in this case.

14. I have considered the submissions made by learned counsel for both the sides and have perused the materials on record, including the scanned copy of the case record of the Special NDPS Case No. 123/2022 which was called for from the Trial Court.

15. It appears from record that the petitioner in this case was arrested long back and he has been detained behind the bars for more than last 1 year 9 months.

16. It also appears that the charge sheet in this case was laid on 20.02.2023 and the charges were framed on 11.12.2023. However, till

date only 3 of the 10 listed witnesses have been examined.

17. 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".
18. The Hon'ble Apex Court in "***Rabi Prakash Vs. State of Orissa***" (supra), 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."
19. 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.
20. 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 noncompliance 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.

21. 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.

22. 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.
23. 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.
24. 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.
25. 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.

26. 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.

27. In the instant case also, the present petitioner has been detained behind the bars for more than last 1 year 9 months and only 3 of the listed witnesses have been examined.

28. In view of the facts and circumstances of this case, as well as in light of the observations made by the Apex Court in the ruling cited herein above, wherein it has dealt with the question of long incarceration of the accused persons, who were found possessing commercial quantity of contraband, 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.

29. In view of the above, the petitioner, namely, Jagdhari Nishad @ Jadhari Kewat, 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, Karimganj with the following conditions:

- i.** That the petitioner shall cooperate in the trial of NDPS Case No. 123/2022, which is pending in the Court of learned Additional Sessions Judge, Karimganj;
- 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.

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

JUDGE

Comparing Assistant