

27.11.2020
Item No. 13
Sdas & PA
Allowed

C.R.M. 9314 of 2020
(via video conference)

In Re:- An application for bail under Section 439 of the Code of Criminal Procedure in connection with F. No. SI(VII) 81/2015 AIU dated 03.05.2015 under Sections 20(C)/23(C) of the NDPS Act and now numbered as N-71 of 2015.

And

In Re : Sanawar Ali petitioner

Mr. Debasis Kar
Mr. Arka Chakraborty
Mr. Husen Mustafi
Mr. Subhajit Chowhdur
.....for the petitioner

Mr. Y. J. Dastoor, learned ASG
Mr. Amajit De
....for the Union of India

Mr. K. K. Maiti
.... for the opposite party

An interesting question is raised in this bail application:- Whether restrictions imposed by Section 37 of the NDPS Act are over ridden by the operation of the directions given by the Hon'ble Apex Court in **Supreme Court Legal Aid Committee vs. Union of India (1994) 6 SCC 731** in the matter of grant of bail to undertrials in NDPS cases.

Admittedly, the petitioner is in custody for five years and six months and only two witnesses have been examined till date. Relying on the ratio laid down in **Supreme Court Legal Aid Committee** (supra) the petitioner pressed for bail.

Learned Additional Solicitor General argues that no law under Article 141 was declared in the aforesaid report. Only an

'one time direction' was issued. It is further contended that inordinate delay in trial may entitle the under trials to apply for bail only after compliance of requirements under Section 436A of the Code of Criminal Procedure and not otherwise.

Right of bail to an under-trial flows from Article 21 of the Constitution of India which frowns upon unnecessary and prolonged detention pending judicial adjudication of guilt. Nonetheless, discretion to grant bail to an accused is circumscribed by the "procedure established by law". NDPS Act was promulgated essentially for detection, investigation and prosecution of offences under Narcotic Psychotropic Act. In view of the grave nature of offences involving trafficking of narcotics in commercial quantities, the law engrafts strict restrictions under Section 37 of the Act on the Court's discretion to grant bail. Section 37 of the Act reads as follows:-

"37. Offences to be cognizable and non-bailable.-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b)no person accused of an offence punishable for offences under Section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless –

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

2. The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

As per the provision, if the prosecutor opposes the prayer for bail, an onerous duty is cast on the accused to satisfy the Court there are reasonable grounds to believe that he is not guilty of the alleged offence and shall not commit similar offence while on bail. The Apex Court has unequivocally held the expression “reasonable ground” must mean “prima facie ground”. [See ***State of Kerala vs. Rajesh. AIR 2020 SC 721 (Para 21)***]. Charge in this case involves possession of narcotic substances above commercial quantity. Hence, to obtain bail on merits, the petitioner would require to overcome the hurdle of satisfying the Court with regard to the twin requirements, as aforesaid. However, in the present case, the petitioner has sought bail not on merits but on the score of inordinate delay in trial which infracts his fundamental rights under Sections 14 and 21 of the Constitution of India. In rebuttal, it has been argued unless the petitioner has undergone half of the maximum sentence as envisaged under Section 436A of the Code of Criminal Procedure, no such right can be said to have fructified in his favour. That apart, contribution of the petitioner and other accused persons in the delay must also be taken into consideration. In this regard learned Additional Solicitor General drew our attention to the observation of the Apex Court in the cited decision holding deprivation of liberty by the accused persons who have suffered half of the maximum punishment provided for the offence can be held to be violative of Articles 14 and 21 of the Constitution.

We are unable to accept the contentions of the learned Additional Solicitor General for the following reasons.

The Apex Court while dealing with the issue of grant of bail on the score of inordinate delay in disposal of trials, had taken into consideration the statutory restrictions under Section 37 of the NDPS Act and held as follows :

“15. ...we are conscious of the statutory provisions finding place in Section 37 of the Act, prescribing the conditions which have to be satisfied before a person accused of an offence under the Act can be released. Indeed we have averted to this Section in the earlier part of the judgement. We have also kept in mind the interpretation placed on a similar provision in Section 20 of the TADA Act by the Constitution Bench in Kartar Singh vs. State of Punjab. Despite this provision we have directed as above mainly at the call of Article 21 as the right to speedy trial may even require in some cases quashing of a criminal proceeding altogether, as held by a constitution Bench of this Court, A.R.Antulay vs. R.S. Nayek, released on bail, which can be taken to be embedded in the right of speedy trial, may in some cases be the demand of Article 21. As we have not felt inclined to accept the extreme submission of quashing the proceedings and setting free the accused whose trials have been delayed beyond reasonable time for reasons already alluded to, we have felt that deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21.”

Aforesaid ratio clearly curves out a separate niche for grant of bail to under trials on the score of inordinate delay in contradistinction to bail on merits. Exercise of judicial discretion in this domain stands on a completely different footing from grant of bail on merits which is circumscribed by the restrictions envisaged under section 37 of the Act.

Observation of the Court with regard to the under trials suffering half of the maximum sentence (as referred to by learned ASG) has to be read in the light of the subsequent directives issued by the court in NDPS cases. After analysis of

the impact of inordinate and inexplicable delay on the fundamental rights of prisoners, the court explored the reliefs which may be made available to the incarcerated persons booked under NDPS Act:-

“The offences under the Act are grave and, therefore, we are not inclined to agree with the submission of the learned counsel for the petitioner that we should quash the prosecutions and set free the accused persons whose trials are delayed beyond reasonable time. Alternatively he contended that such accused likely to be further delayed should be released on bail on such terms as this Court considers appropriate to impose. This suggestion commends to us. We were told by the learned counsel for the State of Maharashtra that additional Special Courts have since been constituted by having regard to the large pendency of such cases in the State we are afraid this is not likely to make a significant dent in the huge pile of such cases. We, therefore, direct as under:-

(i)Where the undertrial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the Special Judge concerned with two sureties for like amount.

(ii)Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs 50,000 with two sureties for like amount.

(iii)Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has

been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.

(iv) Where an undertrial accused is charged for the commission of an offence punishable under Sections 31 and 31-A of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order”.

It is argued that such directions were intended to operate as an ‘one time measure’ in the State of Maharashtra. We, however, note that the directives were subsequently extended to the State of West Bengal and other States vide order dated 17th April, 1995 reported in **1995(4) SCC 695**. We are of the view that the aforesaid directives of the Apex Court in the matter of grant of bail due to inordinate delay are required to be taken into consideration and similar relief is to be extended to all undertrials who stand on the same footing. Liberty is an inalienable right of every individual guaranteed by our Constitution and cannot be whittled down by arbitrary categorisation. ‘Procedure established by law’ under Article 21 cannot be viewed in isolation from the principles of ‘equal justice’ or ‘equality before law’ enshrined under Article 14. To achieve such universal equality it is imperative that the directives laid down by the Court in the said report be extended to all undertrials who are similarly circumstanced and are suffering protracted detention throughout the length and breadth of the country. Selective approach to personal liberty is an anathema to our constitutional scheme. Hence, it is the duty of every Court including the High Courts when faced with the question of “bail or jail” to bear in mind the beholden principles

of parity and equal access to justice. Courts need to rise above petty technicalities to preserve and restore liberty to all similarly circumstanced persons. Failure to do so, would create privileged oases of liberty accessible to few and denial of freedom to most.

This concern is poignantly highlighted by the Apex Court in ***Arnab Manoranjan Goswami Vs The State of Maharashtra & Ors.*** in Criminal Appeal No. **742 of 2020**, wherein the Court held that the High Courts and the District Judiciaries are required to enforce the principle of 'bail and not jail' in practice and not leave the court of last resort to intervene at all times. The Court observed that the remedy of bail is "an expression of the humanness of the criminal justice system" and it cannot be applied in an inverted manner. If we do not extend the wholesome directives in ***Supreme Court Legal Aid Committee*** (Supra) to all under trials (in NDPS case) incarcerating in jail for more than five years, we would fail to discharge our constitutional duty to preserve personal liberty of citizens and apply the balm of humanness to those unfortunate undertrials who have failed to knock the door of the Apex Court.

We are conscious that delay may also be caused by an accused and it is nobody's case that such a litigant can derive benefit out of his own wrong. However, the principle of apportionment of responsibility in the matter of delay in trial must be counteracted in the backdrop of the constitutional duty of the State to ensure effective and speedy prosecution. The Constitution assures every individual the precious right of personal liberty and when it is forfeited by the State to ensure

administration of criminal justice a heavy corresponding duty is cast on it to ensure speedy conclusion of trial minimizing under trial detention. Directives in **Supreme Court Legal Aid Committee** (Supra) are to be viewed from such perspective. These directions cannot be whittled down or restricted by the operation of Section 436 A Cr.P.C. The said provision is an expression of similar anxiety of the legislature to minimize under trial detention. The directives of the Apex Court relating to bail and section 436A operate in the same field and are supplementary to one another. To read one in derogative of the other would amount to restricting the right of under-trials to bail in the face of inordinate delay in trials and would frustrate the very spirit of the aforesaid law.

In this backdrop, we have gone through the records of the case and we do not find any special feature relating to contributory role of the petitioner in the inordinate delay in trial. Absence of forensic laboratories, under staffing in those laboratories, inadequate number of prosecutors and frequent transfer of official witnesses cause chronic delay in trial of narcotic cases. Adverting to such issues, the Apex Court in **Thana Singh Vs. Central Bureau of Narcotics, (2013) 2 SCC 590** issued various directions to ensure speedy trial. **Thana Singh (Supra)** quoted with approval the directives **Supreme Court Legal Aid Committee (Supra)**. In spite of such directions, there is little progress in the ground and the bleak picture of delay persist to haunt under trials.

In light of the aforesaid discussion, we are of the view that the directives in ***Supreme Court Legal Aid Committee*** (Supra) applies with full force to the facts of this case and the petitioner ought to be released on bail on the score of inordinate delay in trial infracting his fundamental rights under Articles 14 and 21 of the Constitution.

Accordingly, we direct that the petitioner shall be released on bail upon furnishing a bond of Rs. 2,00,000/- with ten sureties of Rs. 20,000/- each, one of whom must be local, to the satisfaction of the learned Judge, Special Court under NDPS Act, North 24 Pargans, subject to the conditions that petitioner shall appear before the trial court on every date of hearing until further orders and shall not intimidate the witnesses and/or tamper with evidence in any manner whatsoever and on further condition that the petitioner, while on bail, shall remain within the jurisdiction of Gardenreach Police Station until further orders except for the purpose of investigation and/or for attending Court proceedings and shall report to the Officer-in-Charge of the concerned police station and Mr. Kalyan Das, Superintendent, Customs, AIU, Legal Section, Customs House, 15/1, Strand Road, Kolkata- 700 001, once in a week until further orders.

In the event the petitioner fails to appear before the trial court without justifiable cause, the trial court shall be at liberty to cancel his bail in accordance with law without further reference to this Court.

Under-trial detention in India is a chronic malady in the administration of criminal justice. 25th Edition of the Prison Statistics in India as per NCRB Report, 2019 shows that 69.5 per cent of prisoners in Indian jail are undertrials.

Under such circumstances and to ensure that equal justice is extended to all under trials who are incarcerated in jail for five years and more in NDPS cases, we direct the learned ASG as well as the learned Public Prosecutor, High Court, Calcutta to submit reports enumerating cases under NDPS Act where accused persons are in detention for five years or more.

Similar report shall be filed by the Registrar General of this Court also.

Copy of this order be forwarded to Registrar General and Public Prosecutor for due compliance.

Let this matter appear on 15th January, 2021.

(Suvra Ghosh, J.)

(Joymalya Bagchi, J.)