



**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Criminal Miscellaneous II Bail Application No. 12906/2022

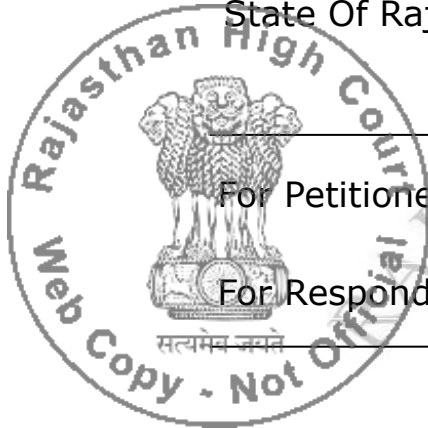
Suraj S/o Shri Ladu, R/o House Of Ajeet Singh, Idgah Road,
Kachchi Basti, Vaishali Nagar, Ajmer (At Present Confined In
Central Jail Ajmer).

-----Petitioner

Versus

State Of Rajasthan, Through Public Prosecutor.

-----Respondent



For Petitioner(s) : Mr. Anil Kumar Upman
Mr. Devanshu Sharma
For Respondent(s) : Mr. Mahendra Meena, PP

HON'BLE MR. JUSTICE FARJAND ALI

Order

27/08/2022

1. The instant bail application has been filed by the petitioner Suraj S/o Shri Ladu under Section 439 Cr.P.C against the order impugned passed by learned court below in connection with FIR No. 67/2016 registered at Police Station Nasirabad Sadar, District Ajmer for the offence(s) under Section 8/15 of the NDPS Act.

2. Learned counsel for the petitioner submits that a false case has been foisted against the petitioner. He has nothing to do with the alleged offences and no useful purpose would be served by keeping him behind the bars. The first bail application of the petitioner was dismissed by a co-ordinate bench of this Court vide order dated 09.12.2016 as the recovered contraband fell in the category of commercial quantity, however, the petitioner has been languishing in jail since 08.03.2016 and the trial is likely to take a



long time to conclude. It is submitted that Hon'ble the Supreme Court has preferred to enlarge the accused on bail in cases where though commercial quantity of alleged contraband was recovered but considering the premise that the petitioner had already suffered a long period of incarceration awaiting trial, the Apex Court chose to grant bail.

3. Per contra, learned Public Prosecutor opposes the bail application and submits that the alleged recovered contraband weighed way above the commercial quantity. The total weight of the alleged recovered contraband is 100 kgs which is above the commercial quantity demarcated for 'afeem dodapost', i.e. 50 kgs and thus, the embargo contained under Section 37 of the NDPS Act would be applicable in the present case.

4. Heard learned counsel for the parties. Perused the material available on record. The case of the prosecution is that the recovered contraband is above commercial quantity and thus, the embargo contained under Section 37 would be attracted whereas the submission of the learned counsel for the petitioner is that the bail plea may be granted owing to the long incarceration of the petitioner in the matter.

5. Indisputably, the accused-petitioner came to be arrested in this case on 08.03.2016 and he has been languishing in jail till date. He has spent more than six and a half years in jail pending trial. A considerable number of witnesses have been projected by the prosecution and culmination of the trial is not a seeming fate in the near future. A new lache has come up in this matter as one absconded accused named Mahipal Vishnoi was arrested on 25.05.2022. As he has joined the trial recently, thus, it can be



presumed that the trial will take further long time to reach a legitimate conclusion. The serious question to ponder upon in the matter is whether it would be just to make the petitioner suffer further incarceration, for no fault of his own as he is behind the bars, for the lackadaisical approach of the prosecution and their casualness and lack of promptness in moving the trial towards culmination. The right to speedy trial of the accused-petitioner has been infringed and the delay has not been occasioned on his account in the present matter.

6. This Court feels that the nature and gravity of offence and availability of material in support thereof are not the only factors to be taken into account while considering a bail application. The fact that trial is to be concluded within a reasonable period of time is imperative while considering grant of bail to an accused. It is settled principle of criminal jurisprudence that there is presumption of innocence at the pre-conviction stage and the objective for keeping a person in jail is to ensure his presence to face the trial and to receive the sentence that may be passed. This detention is not supposed to be punitive or preventive in nature. An accused is considered to be innocent until he or she or they are proven guilty in the court of law.

7. As per the fundamental rights granted to every citizen/person by the Constitution of India, the accused cannot be expected to languish in custody for an indefinite period if the trial is taking unreasonably long time to reach the stage of conclusion. An under trial prisoner, who is waiting for the trial to complete and reach a conclusion about his guilt for the alleged crime, is not only deprived of his right to a speedy trial but his other fundamental



rights like right to liberty, freedom of movement, freedom of practising a profession or carrying on any occupation, business or trade and freedom to dignity are also hampered.

8. Life without liberty is like a body without soul. Freedom is the open window through which pours the sunlight of the human spirit and human dignity. Personal liberty of the accused is sacrosanct and quintessential to the very spirit and structure of a civilisation. Jeremy Bentham, the great English jurist, postulated that the greatest happiness of the greatest number is the end of law. The concept of civil liberty is embedded in individualism. This simply means that the purpose of the state is to help every individual in reaching their highest development and evolving into the best personality, thereby reaching a point where law and state are not required by the society. Thus, when personal liberty of an individual is threatened, his development is in peril which is a matter of great concern. Sir William Blackstone has deftly observed on page 134 of the first volume of his book, **'Commentaries on the Laws of England'** that,

"Personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due process of law".

Justice cannot be presumed to have been administered merely on passing of a judgment of conviction and order of sentence or a judgment of acquittal; rather administration of justice shall be deemed to have been completed when the trial is concluded within **a reasonable period of time** and the accused



as well as the complainant/victim are not made to wait for years on end to know the result of the trial.

One of the founding fathers and the Third President of the United States of America, Thomas Jefferson, has rightly said that, "Rightful liberty is unobstructed action, according to our will, within limits drawn around us by the equal rights of others."

Though the victim/complainant party has the right to seek justice against an accused person but that does not mean that the right of the accused to a fair trial can get hampered. A fair trial is one which is concluded within a reasonable period of time.

It is not just a fundamental right but also a human right of every accused as incarceration for an indefinite period pending trial is in contravention of the universal rights that are imperative for us all sans any kind of discrimination. Justice P.N. Bhagwati has embodied the spirit of the afore-mentioned observation in ***Maneka Gandhi Vs. Union of India (UOI) and Ors.*** reported in AIR 1978 SC 597 in the following words:

"The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have raised to the status of distinct fundamental rights and given additional protection under Article 19."

No one is unaware of the fact that justice delayed is justice denied. On one hand, if a victim has to wait for years to see the perpetrator get his due and on the other hand, if the accused is innocent and it is so decided that he was not guilty for the crime as alleged by the prosecution, then there is no justifiable answer



that can put out the fire that has been burning in the minds of the parties since the very inception of the criminal proceedings.

9. A petition for issuance of a writ of habeas corpus was filed in ***Hussainara Khatoon & Ors. Vs. Home Secretary, State of Bihar, Govt. of Bihar, Patna*** reported in 1979 SCR (3) 169, praying for the release of a large number of men, women and children that were languishing in jails in Bihar for offences which if found guilty, were punishable by a sentence of not more than few months. Following the creative deliverance passed in the case of ***Maneka Gandhi (supra)*** which expanded the scope of interpretation under Article 21 of the Constitution of India, the right to a speedy trial was interpreted as being implied in the broad gamut of rights that are borne out of right to life and personal liberty enshrined under Article 21. Justice Bhagwati further expressed his anguish over the fact that the bail system of India works on the rusty assumption that monetary loss will deter an accused from fleeing from justice and thus, it operates harshly against the poor and indigent persons of the society. The burden of the period of detention falls on the innocent people who are the members of the family of the accused. **A set of guidelines were issued by the Apex Court in this case to ensure that the courts subordinate to each of the High Courts take lesser time to reach a legitimate conclusion in a trial and that there should be greater access to bail along with humane living standards for the under-trials.**

Subsequent to ***Hussainara Khatoon (supra)***, Hon'ble the Supreme Court held that the right to speedy trial is available at all the stages, be it the stage of investigation or inquiry, trial, appeal,



revision and even retrial, in **Abdul Rehman Antulay & Ors. Vs. R.S. Nayak & Ors.**, reported in AIR 1992 SC 1701. In addition to the above, it was also held that a time limit cannot be set for the conclusion of trial as there are many factors that impact the right to speedy trial and the facts and circumstances of each case need to be considered separately. An order for conclusion of trial within a fixed time is possible in specific cases where the circumstances and nature of offence demand it but a fixed time limit for all the trials cannot be imposed.

In the case of **Sanjay Chandra v. CBI**, reported in AIR 2012 SC 830, Hon'ble the Supreme Court had observed that as the investigation is complete and charge sheet has already been filed by the investigating agency, there remains no necessity to keep the accused in custody for further investigation. Being cognizant of the fact that the alleged offences were such that if proved, they could cause imperilling of the Indian economy, still Hon'ble the Supreme Court upheld the right of an under-trial prisoner to be released on bail. In S.B. Criminal Miscellaneous IV Bail Application No.14677/2021 titled as **Banwari Meena v. State of Rajasthan**, this Court has passed an elaborate order in similar context holding that it is a well-established canon of criminal law that there is presumption of innocence at the pre-conviction stage and the objective for keeping a person in jail is to ensure his presence to face trial and to receive the sentence that may be passed. This detention is not supposed to be punitive or preventive in nature. In another case titled **Savanta v. State of Rajasthan** (S.B. Criminal Miscellaneous VII Bail Application No.



3701/2022), this Court has held that over-incarceration of under-trial prisoners, beyond reasonable period of time, is violative of their fundamental right to a fair and speedy trial. Any trial that is deemed fair should conclude in a reasonable period of time.

Courts should not lose sight of the fact that pre-conviction detention has some punitive implications and the purpose of detention before conviction is to secure their presence at the trial and ensure their personal attendance in cases where necessity dictates their arrest and jail is the exception not the rule.

The Hon'ble Supreme Court has recently passed a judgment in Criminal Appeal No(s). 1525 of 2021 titled as **Ashim @ Asim Kumar Haranath Bhattacharya @ Asim Harinath Bhattacharya @ Aseem Kumar Bhattacharya v. National Investigation Agency** vide order dated 01.12.2021 wherein looking to the aspect that the fundamental right of the undertrial prisoner to have a timely trial was getting violated due to long and indefinite period of incarceration, the trial court was directed to grant the benefit of post-arrest bail in favour of the appellant.

In **Union of India (UOI) Vs. K.A. Najeeb**, reported in AIR 2021 SC 712, Hon'ble the Supreme Court upheld the order of the High Court of Kerala granting bail to an accused and observed that had it been a case at the threshold, the Hon'ble Court would not have paid heed to the respondent's prayer but looking to the length of time that the accused has already spent in jail and the likelihood of the trial taking still more time to conclude, they agreed that the High Court was not left with any other option but



to release the accused on bail. The relevant portion of the judgment is reproduced as below:

“An attempt has been made to strike a balance between the Appellant's right to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the Respondent's rights guaranteed under Part III of our Constitution have been well protected.”

In another recent case of **Satender Kumar Antil Vs. Central Bureau of Investigation & Ors.**, reported in AIR 2022 SC 3386, Hon'ble the Supreme Court took cognizance of the fact that the jails of the country are over-flowing with prisoners and that arrest, being a draconian measure that curtails the liberty of the arrested individual, should be used sparingly. It was also observed that accused can be considered for enlargement on bail on the basis of unreasonable delay being one of the grounds. The Apex Court classified offences into four broad categories and prescribed guidelines with respect to following statutory law as well as precedents laid down by the Apex Court with regard to Sections 41 & 41A, 87 & 88, 167, 170, 309(1) among others, with the expectation that it would help in unclogging the prisons and result in reduction of pendency of bail applications.

The inmates who have spent years on end to see what has been decided in their case have probably resigned to their ill fate and become used to the confines of the four walls of the prison. It reminds this Court of the reference made to Dr. Manette's predicament in the Charles Dickens' novel '**A Tale of Two Cities**' by Hon'ble the Supreme Court in **State of Kerala Vs. Raneef**, reported in AIR 2011 SC 340 while dismissing the appeal filed against grant of bail to the accused who was a doctor and had



already spent 66 days in custody. In the book, Dr. Manette had spent such a long time of eighteen years as an inmate that he forgot his name, profession and other details about his life that existed prior to him becoming a prisoner at La Bastille. This Court is anxious over the fact that jails debilitate the under-trial prisoners and if after the long wait, the accused is ultimately acquitted, then how would the long years spent by the under-trial in custody be restored to him/her/them. The fact that the imprisonment of a family member affects the whole family cannot be overlooked and if long incarceration pending trial is considered to be harsh on the accused, then it should also be considered to be equally harsh on the family members of the accused. The rule is that pre-conviction detention is not warranted by law.

There have been repetitive pronouncements by this Court as well wherein considering the fact of long incarceration inter alia other aspects, bail has been granted to accused persons. Indisputably, the petitioner has been in custody since long and the protracted trial will violate his fundamental right to a timely trial.

10. In Writ Petition (Criminal) No 279 of 2022, titled ***Mohammed Zubair Vs. State of NCT of Delhi & Ors***, while granting bail to the accused vide order dated 20.07.2022, the Apex Court observed that the accused was trapped in a vicious cycle of the criminal process where the process had itself become the punishment.

Similarly, in cases where under-trial prisoners are made to wait and the trial is prolonged, the procedure of criminal proceedings itself becomes a punishment for such detainees. If



the provisions laid down in the Code of Criminal Procedure are followed to the letter and not just in spirit, there will be lesser room for grievance related to speedy trial. Having noted the significance and development of the right to speedy trial, it is also important to consider the following factors while adjudicating a bail application against the backdrop of the right to a speedy trial:

i) The delay should not have been a defence tactic. Who has caused the delay is also to be seen. Every delay does not necessarily prejudice the accused.

ii) The aim is not to interpret the right to speedy trial in a manner so as to disregard the nature of offence, gravity of punishment, number of accused and witnesses, prevailing local conditions and other systemic delays.

iii) If there is a strong reason to believe that the accused will surely flee from justice if released on bail and it will be a hard task for the investigating agency to re-apprehend him, then the benefit of bail should not be extended in his favour.

iv) If it is shown by placing compelling material on record that the release of the accused may create a ruckus in the society or that he will create such a situation wherein the prosecution witnesses will not come forward to depose against him or that he may otherwise hamper the evidence of prosecution in any other manner, then utmost caution needs to be exercised in such cases before granting bail to the accused.

The (iii) and (iv) points are to be considered only when strong and cogent evidence is placed on record or a compelling reason in support has come to light but surely not just on the



basis of a simple, blanket submission made by the counsel appearing on behalf of the prosecution/complainant/victim.

11. While hearing a bail plea, if there appears the slightest possibility of acquittal of the accused based on any of the submissions made by counsel for the parties, then there is no harm in inclining towards extending the benefit of bail in favour of the accused so far as it is limited to the justifiable disposal of the bail. It is a settled principle of law that the defence is not required to prove its case beyond reasonable doubt and it can rely on the principle of preponderance of probability. In juxtaposition, the burden to prove its case beyond reasonable doubt always lies upon the prosecution except in exceptions prescribed by law. Thus, whenever a doubt is raised against the story of the prosecution, it needs to be considered objectively but needless to say, it is to be considered only for the limited purpose of deciding the bail application and should not influence the trial court so as to adversely affect the interests of either of the parties in any manner.

While adjudicating a bail plea, the Court should never assume that the case put forth by the prosecution is sacrosanct and true and the accused is guilty; however, the same does not mean that the case of the prosecution should be approached with an initial presumption of doubt. Suffice it to say that if a substantial plea is raised at the time of praying for bail, it can be considered tentatively for the purpose of granting bail at that stage, without deeply speculating the result of the trial as a dead end. In addition, if material is placed on record, it needs to be considered.



12. Coming back to the point of protracted trial and consequent expansion of period of incarceration, this Court is of the firm view that the accused should be released on bail if he has been incarcerated pending trial for more than a reasonable period of time unless extraordinary and overwhelming circumstances prevent the Court from doing so.

13. The procedure of law is that the exact date of imprisonment would commence from the judgment of conviction and the date of order of sentence. The further provision of law is that the period already undergone would be set off against the period of sentence. The purpose of keeping the accused behind bars is to ensure that the accused would not flee from justice and to avoid the apprehension that he may hamper the witnesses or tamper with the prosecution evidence. True it is that the gravity of offences and severity of punishment attached with the crime form vital parts of consideration while adjudicating a bail plea but the period of incarceration pending trial must be a reasonable period. It is the duty of the prosecutor as well as of the Court to ensure that the prosecution evidence is produced within a reasonable period which must not be an unfair and unjust. In order to justify period of incarceration pending trial, the aid of provision for setting off period of incarceration suffered pending trial with the term of imprisonment decided by the convicting Court in the order of sentence cannot be taken in cases where the trial went on for a long period of time and ultimately resulted into acquittal.

14. The right to be freed from detention and get a fast culmination of trial are liberties that every accused should be able to enjoy and in cases where the delay is not caused at the hands



of the accused, he bears the brunt of the follies of the criminal justice system.

15. The right to speedy trial has developed to become an inalienable fundamental right guaranteed under Article 21 of the Constitution of India by way of a slew of judgments passed by Hon'ble the Supreme Court, however, it has been prevalent since

times immemorial and finds mention even in the **Magna Carta Libertatum** commonly called *Magna Carta*, the royal charter of rights agreed to by King John of England in around 1215 A.D.

Among other conventions and precedents, the text of *Magna Carta* was one of the major inspirations that laid the basis for English Common Law and the pre-eminent English luminaries like Lord Macaulay and Sir James Stephen drafted our criminal legislation and statutes. Clause 40 of the *Magna Carta* which reads as "To no one will We sell, to no one will We deny or delay, right or justice", paved the way for right to habeas corpus as well as the idea of adjudication by the jury or the equals of the accused. The idea that no accused person can be detained indefinitely during the pendency of trial also sprang up from this clause.

16. Another aspect that needs to be mulled over pertains to the dilemma before this Court regarding whether to consider the fundamental right of the accused to a speedy trial or to consider application of the fetter contained in Section 37 of the NDPS Act.

The Apex Court has also upheld orders of High Courts granting bail to accused-petitioners, where alleged contraband was above commercial quantity, looking to the fact that they had suffered imprisonment for a considerable period of time and the trial was likely to take further more time to conclude. In **Amit**



Singh Moni Vs. State of Himachal Pradesh (Criminal Appeal No. 668 of 2020), the recovered contraband material '*charas*' weighed 3285 gms which was above the demarcated commercial quantity for *charas*, but Hon'ble the Supreme Court decided that the appellant was entitled to the benefit of bail vide order dated 12.10.2020 as he had completed more than 2 years and 7 months of actual custody and there had been no substantial progress in the trial. In ***Mahmood Kurdeya Vs. Narcotics Control Bureau*** (Criminal Appeal No. 1570 of 2021), the Apex Court had observed that they were persuaded to pass an order in favour of the appellant as the charge sheet had been filed on 23.09.2018 in that particular matter and still no charges were framed and the trial was yet to commence, therefore, despite the fact that the embargo contained under Section 37 was attracted in the case, the accused was enlarged on bail vide order dated 07.12.2021.

While striking a balance between the statutory bar contained under Section 37 of the NDPS Act and the fundamental right of the accused to get a speedy trial, this Court is of the firm view that an accused person cannot be kept in custody for an indefinite period till the trial is concluded and the presumption of innocence, a well-established principle of criminal jurisprudence, i.e. an accused is innocent until proven guilty, operates in the favour of the petitioner.

17. The matter needs to be looked at from a humanitarian lens also. The accused is spending his time as an under-trial in prison where the living conditions are depressing and pitiable. The bellies of prisons all across the country are bloated due to the humongous influx of prisoners in India. The prisons are over-



crowded to an unimaginable extent. Nelson Mandela was the torch-bearer of the movement against apartheid in South Africa and he had the following words to say about his fabled incarceration at the Robben Island Prison from 1964 to 1982:

"No one truly knows a nation until one has been inside its jail. A nation should not be judged by how it treats its highest citizens, but its lowest ones."

Any prison that was built with the infrastructure to hold a certain number of prisoners would be overpopulated and congested if it would be required to house a percentage of prisoners which is way beyond its capacity. Prisoners in India sleep in turns as there is no space for all of them to sleep at the same time. They are packed like sardines in the cells and are deprived of basic needs like balanced diet, sanitation, sewage, hygiene etc. From food and ration to commodities like soap, detergent, toothpaste etc., everything is provided by the state in measured quantities for the number of prisoners that the prison is designated to hold and not for the number of prisoners that it actually holds in reality. In such cases, an under-trial prisoner cannot be subjected to such harsh and inhuman conditions for eons.

The Amnesty International India's Report titled **Justice Undertrial: A Study of Pre-trial Detention in India** reveals that as of 2019, 69% of the prisoners in Indian prisons are under-trials which means that the under-trial prisoners are more than twice in number than the convicted prisoners. As per the report, the average occupancy rate of Indian jails is 114%. There are very few prisons that are equipped and able to decide which under-trial prisoners are eligible for release under Section 436A of



the CrPC. As per the Prison Statistics India 2020 published by the National Crime Records Bureau (Ministry of Home Affairs), Government of India, 76.12% of the total prisoners across the country are under-trial prisoners. Nothing can be assumed about the life expectancy of an accused, rather if an accused is made to stay in prisons in such miserable conditions, it would lead to more health problems and impair the health of the accused person.

While sharing his thoughts about his experience in jail, Mahatma Gandhi had once said, "Men in prison are 'civilly dead' and have no claim to any say in policy." Ours is not a despotic nation rather it is a democratic nation which proudly upholds the liberties of its citizens. Despite Supreme Court guidelines, legal and executive reforms, there is no significant improvement in the state of the under-trials. The issue of large number of under-trial prisoners and their poor living conditions has been standing stubborn against the otherwise incandescent face of our democracy. It is high time that the judicial system works on the lacuna of implementation and ensure that a trial is concluded as expeditiously as possible. The State should maintain a computerised record of all the prisoners and use tools that would indicate the names of the prisoners who have become eligible for release under Section 436A and the names of the prisoners who have otherwise spent a long duration awaiting trial from the database. There should be a reservoir of police officials as well as legal-aid lawyers in the State to secure the presence of an under-trial prisoner before the lower court timely and to see that no prisoner awaiting trial is made to stay in the prisons longer than necessary. In '**The Closed Prisons of Rajasthan**', a detailed



study by Ms. Smita Chakraborty, who was commissioned to inspect the prisons of Rajasthan, it has been reported that over 50% of the prisoners do not go for their court proceedings owing to the shortage of police guards which has led to irregular court production. The lawyers should take up such cases pro bono every now and then as so many of the prisoners awaiting trial in the prisons are poor, illiterate or lacking proper primary and secondary education and are unable to chart out their legal course of action.

18. Considering the above observations, specially the right to speedy trial being a fundamental right, the over-crowdedness and a skewed prison-prisoner ratio, the rightful object of detaining an arrestee and being cognizant of the rigour of Section 37 of the NDPS Act, and in light of the guiding pronouncements of the Apex Court on this issue, this Court deems it just and proper to enlarge the petitioner on bail.

19. This Court does not wish to go into the niceties of the matter or the gravity of punishment and nature of the offence; the long period of detention spent by the accused in custody awaiting trial without any hope of conclusion of trial in the near future has shaken the conscience of this Court and thus, this Court feels persuaded to enlarge the petitioner on bail. Needless to say, the above observations are limited to the justifiable disposal of the present bail application and shall not influence the trial judge in any manner so as to adversely affect the rights of either of the parties.

20. Accordingly, the instant bail application under Section 439 Cr.P.C. is allowed and it is ordered that the accused-petitioner shall be enlarged on bail provided he furnishes a personal bond in the



sum of Rs.50,000/- with two sureties of Rs.25,000/- each to the satisfaction of the learned trial Judge for his appearance before the court concerned on all the dates of hearing as and when called upon to do so.

(FARJAND ALI),J

RAJAT KUMAR /82



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