

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.M.C. 52/2010 & Crl. MA 186/2010**

% Decided on: 12th July, 2011

NARCOTICS CONTROL BUREAU Petitioner

Through: Mr. Satish Aggarwal, Advocate

versus

RAKESH DWIVEDI Respondent

Through: Mr. R.D. Mehra, Advocate

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Not Necessary |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

MUKTA GUPTA, J.

1. The present petition has been filed under Section 482 Cr. P.C, for quashing the order dated 4th December, 2009 passed by the learned Special Judge, NDPS closing the prosecution evidence. The impugned order reads:

“.....The case is of the year 1991. Number of opportunities have been given in this case to lead evidence. Perusal of report

reveals that either the witness are not traceable at her given address or their whereabouts is not known. No report is received regarding service of summons on the foreign witnesses. Considerable time has elapsed. I find that presence of remaining witnesses cannot be secured by due diligence. Sincere efforts were made to get them served.

As such prosecution evidence is closed.

Put up on 16/12/2009 for SA”

2. Learned counsel for the Petitioner contends that the impugned order is bad in law as well on facts. Relying on the documents annexed to the present petition relating to the sending of the summons to the foreign nationals as witnesses from the Indian Government, it is contended that the Petitioner had taken appropriate steps to serve the witnesses. It is further contended that even if the Department does not prosecute and the counsel is negligent in pursuing the matter, it is the duty of the Court, in particular with respect to the cases relating to the NDPS Act, to ensure the presence of the witnesses. It is further urged that Section 135, Indian Evidence Act, 1872 puts the entire burden on the Court to procure the attendance of the witnesses where the prosecution fails to do so. Reliance is placed on *State of Gujarat vs. Mohanlal Jitmaliji Porwal and another*, AIR 1987 SC 1321; *Mohanlal Shamji Soni vs. UOI and others*, AIR 1991 SC 1346; *Rajendra Prasad vs. Narcotic Cell through its Officer-in-Charge, Delhi* 1999 (3) Crimes 106 (SC);

Shailender Kumar v. State of Bihar, 2002 (1) CC Cases (SC) 35 and Godrej Pacific Tech. Ltd. v. Computer Joint India Ltd., 2008 (3) JCC 2010 to contend that if there is failure on part of any witness to remain present, it is the duty of the Court to take appropriate action and the prosecution cannot be frustrated on this count. Thus, the impugned order be set aside.

3. Per contra, the learned counsel for the Respondent submits that the impugned order suffers from no illegality. Right to speedy trial emanates from the fundamental right guaranteed under Article 21 of the Constitution of India. Reliance is placed on *J. Joseph vs. Shri A.P. Nandy, 1999 (2) JCC (Delhi) 340* and *Pankaj Kumar vs. State of Maharashtra and others, 2008 (3) JCC 1932*. The documents now filed with the petition were not before the learned trial court and are correspondences after the impugned order was passed. On account of repeated defaults made by the prosecution in securing the presence of their witnesses, the impugned order be upheld and the petition be dismissed being devoid of any merit.

4. I have heard learned counsel for the parties and gone through the impugned order and the other preceding orders passed by the learned Special Judge, NDPS in the matter in hand. The impugned order was passed by the learned Special Judge, NDPS in Complaint Case No. 244/2001 dated 18th December, 1991 which was received by the learned Special Judge vide

committal proceedings on 14th August, 1992. The charges against the Respondent was framed on 28th November, 1995. The allegations as set out in the complaint are that the Royal Canadian Mounted Police (in short 'R.C.M.P.')

approached the Narcotics Control Bureau (NCB), the Petitioner herein about a major under-cover operation planned by them involving a gang of notorious drug traffickers in Canada. NCB was informed that an undercover agent of R.C.M.P. had been approached by one Abdulla (Khan) Noori for acting as a courier for transporting heroin from New Delhi to Canada. R.C.M.P. requested for permission of 'controlled delivery' in order to apprehend the persons involved who are based in Canada. On consideration of the proposal, it was agreed that 90% of the drugs involved would be seized in India and remaining 10% would be allowed to go to Canada for seizure there, as that would provide adequate evidence against the conspirators both in India and Canada without tampering the suit-case in order to give no doubt to the person receiving at Canada. Pursuant thereto, the R.C.M.P. team comprising of one female undercover agent and two member male cover team landed at IGI Airport in early hours of 26th June, 1991. Smooth clearance of R.C.M.P. team was arranged by the NCB officials through Customs and once out of the arrival hall, the undercover agent was received by the Respondent while the cover-team of two members were taken

care of by the officers of NCB. On 1st July, 1991 at about 1630 hours, the Respondent allegedly arrived at Hotel Hyatt Regency where the undercover agent was staying and delivered a navy-blue colour suitcase believed to be containing heroin to Ms. Rose Marry Abbruzzese, the undercover agent in her room. After the respondent left, the suitcase was examined and as it was not possible to recover the heroin concealed in the suitcase without damaging it, it was decided that the suitcase containing heroin may be allowed to go as it is with the R.C.M.P. undercover agent, accordingly, the R.C.M.P. team including the undercover agent left on the same day i.e. 1st July, 1991 for Toronto. On 3rd July, 1991, the officers of R.C.M.P. seized 951 gms. of heroin, which was recovered from the false-side of the suitcase carried by the undercover agent Ms. Rose Marry Abbruzzesse to Toronto. Abdulla (Khan) Noori and other conspirator Sadeq Sedigi were arrested in Toronto and this was communicated to NCB. The NCB requested the R.C.M.P. to send the relevant documents and attested photographs of the accused. On receipt of documents, residential premises of the Respondent was searched on 20th September, 1991 by the officers of the Petitioner and upper-part of a Echolac suitcase (brownish black colour) whose portion bearing numbered lock was also broken from three sides was recovered. The Respondent was examined under Section 67 of the NDPS Act and he admitted having packed the heroin

and handed over the same to the undercover agent along with Rs.15,000/- for her expenses. Thus, the complaint case is primarily based on the evidence of these foreign witnesses, statement recorded under Section 67 of the NDPS Act and recoveries made thereunder.

5. A perusal of the order sheet shows that on 17th May, 1996, which was a date fixed for examination of prosecution witnesses, no prosecution witness was present. Further, on the next date of hearing, though PW1 was present and his statement was got recorded, but no other prosecution witness was present on that date of hearing. Summons were issued against the other prosecution witnesses. On most of the subsequent dates of hearing, similar situation prevailed wherein either no prosecution witness was present or only one prosecution witness remained available in the Court for examination. On 21st January, 1999, another date of hearing was fixed by the Court, when no prosecution witness was present. Bailable warrants were issued against PW3 and PW4 was summoned to appear on the next date of hearing. On the subsequent various dates of hearing, the accused had filed application for exemption from personal appearance on medical grounds accompanied by a statement that he shall have no objection if the witness is cross-examined in the absence of the accused and the identity of the accused is not disputed. On 20th September, 2004, it was observed by the learned Special Judge that the

case pertains to the year 1991 and since then only four witnesses out of a list of 29 witnesses were examined by the prosecution.

6. The primary issue in the present case is the non-appearance of foreign witnesses. A perusal of the order sheets of the trial Court shows that despite repeated opportunities neither serious efforts were made to produce and examine these witnesses nor any opportunity was sought to examine them through video conferencing. No doubt that the Respondent had been absent and had been moving applications for exemption, however, finally he moved an application for exemption stating that the witnesses be examined in his absence and he would not dispute his identity. Thus, after the order dated 26th October, 2004, non-appearance of the respondent in no way hindered the trial. On 22nd August, 2006, it was noted that no prosecution witness was appearing for the last 1-1/2 years and the same had nothing to do with the absence of the accused. On 30th October, 2006, last opportunity was granted to NCB for adducing the evidence as the case pertains to the year 1992 and the Petitioner had not been able to conclude its evidence. It may be noted that PW5 was examined on the 30th November, 2000 and thereafter PW6 was examined on 27th August, 2008. PW7 was examined on 18th March, 2009. It may be noted that the Respondent was subsequently detained under COFEPOSA and was thus also produced from the judicial custody. On 3rd August, 2009, it was

noted by the learned trial Court that summons of PW Ms. Rose Marry were received back with report that she is posted in Canada and she be served through post or through embassy. Similarly, on 4th August, 2009, the summons of Cst. E. Vani and office representative of Canada Court were not received back. The prosecution was directed to take necessary steps so that the prosecution evidence was concluded by 10th August, 2009, the date already fixed. On 6th August, 2009, the learned trial Court directed the Director of NCB to follow this case personally and get the summons of public witnesses served for evidence for 10th August, 2009 as PWs. Jagdish Kumar and Jagdoo Mahto also could not be served. On 7th August, 2009, summons of witness Cat. Sean Neary, Inspector Wayne Blackburn, Mr. G.D. Gulkiewich Attache and David Drummond Molenie were received with the report that it was not feasible to serve the summons at the short notice through MHA and sufficient time of 12 weeks was requested. The Court, therefore, directed that the summons to the foreign witnesses be served for evidence for 2nd and 4th December, 2009 and for local witnesses be served for 16th, 17th and 18th September, 2009. The Petitioner was directed to conclude its evidence qua examination of local witnesses and the matter was fixed for 10th August, 2009. On 10th August, 2009, no prosecution witness was present. Again on 16th September, 2009, 17th September, 2009, 18th September, 2009, no

prosecution witness was present. On 2nd December, 2009, the trial Court observed qua the service of summons sent to Ms. Rose Marry Abbruzzese, Mr. David Drummond Molenie and Cst. E Vani through Ministry of External Affairs that no report is received qua their service nor any communication whether these witnesses have been served or whether they would be coming in the Court for evidence

7. From the trial court record, it becomes clear that prosecution was not serious at any stage for conducting the trial much less a speedy trial. Since 2000 to 2008 no prosecution witness was examined despite last opportunity being given for about 10 times and last and final opportunity for about 3 times, then two witnesses were examined one in 2008 and another in 2009. Learned counsel for the Petitioner has strenuously contended that an application for change of date fixed i.e. 2nd December, 2009 was filed by him as he was not available being busy in the election of the Bar Counsel of Delhi, where he himself was contesting and the learned Court did not even take the personal difficulty into consideration and passed the order. A perusal of the application dated 26th November, 2009 on page 311 of the Trial Court record shows that the change of date for 2nd December, 2009 only was sought. No request was made for the 4th December, 2009, the other date fixed for the appearance of the foreign witnesses. The learned Trial Court has passed no

adverse order on the 2nd December, 2009. The impugned order closing the prosecution evidence has been passed on 4th December, 2009 for which date no exemption or change was sought. Finally, on 4th December, 2009, on observing that the case being of the year 1991 and several opportunities being given to the prosecution for examining their witnesses, and the prosecution still not filing any report qua the service or whether the witnesses would appear in Court for evidence, the impugned order directing the closure of the prosecution evidence was passed by the learned Special Judge, NDPS.

8. From a perusal of the impugned order and the preceding orders, it appears that the Petitioner has been prosecuting this case with total indifference and laxity. The complaint case had been pending for about 18 years. The prosecution is duty bound to ensure that it leads its evidence in an expeditious manner, in which it has miserably failed in the present case. However, at the same time, it is the duty of the Courts to ensure that the trials do not suffer on account of the callous attitude of the prosecution or the accused. In a case where the witnesses are material and their presence can be ensured, the Court will permit a chance to the parties to lead the evidence. The NCB has not stated anything in this petition on facts as to why or in what manner the witnesses which remain to be examined are material to the case,

coupled with the fact that this was a case of no recovery from the accused and that their presence can be ensured.

9. One of the major grievances of the Petitioner is also that in the impugned order, the observations of the trial Court are that no report regarding the service of summons on the foreign witnesses was received. According to learned counsel for the Petitioner, a report dated 30th November, 2009 was filed which stated that G.D. (George), Gulkiewich Attache, Ms. Rose Marry Abbruzzese, Mr. David Drummond Molenie, Cst. E vani, Inspector Wayne Blackburn, Cat. Sean Neary and Recovery and Seizure officer and related concerned officers have been served through High Commissioner along with letters enclosed. The enclosed letters are dated 25th August, 2009 addressed to the Protocol Officer, Ministry of External Affairs and the High Commission of India, Canada. These letters at pages 307 and 309 of the trial Court bear no endorsement of the receipt thereof nor has any acknowledgment has been sent. Be that as it may, despite service of summons, the witnesses were not present either on the 2nd or the 4th December. There was no request that the matter be adjourned to a particular date for appearance of the witnesses. Thus, this report filed by the Petitioner is a meaningless report and serves no purpose.

10. Moreover, this report dated 30th November, 2009 runs counter to the communication dated 13th November, 2009 sent to the learned Trial Court by Ms. Usha Venkatesan, Consular, High Commission of India, Ottawa, Canada. As per the letter, the summons were forwarded to the Canadian authorities on 12nd October, 2009 and a reply from the International Assistance Group, Department of Justice Canada was enclosed. As per the enclosed reply dated 3rd November, 2009 it is stated even earlier when a request was sent on 20th December, 2007 for service of summons to Ms. Rose Marry Abbruzzese to appear in Court, additional information was sought from India to assist the RCMP in their review of the request. In order to assist their review RCMP counsel has asked for information in relation to the nature of evidence that was expected from Ms. Abbruzzese, an account of the proceedings to date and the status of the charges against Mr. Dwivedi. Thus it is apparent that the Petitioner despite letters did not send the requisite information and thus no decision was taken so as to permit the witnesses to come to India for evidence.

11. It is the duty of the Court to ensure that a speedy trial be given to the accused as mandated by Article 21 of the Constitution. Keeping in mind the pendency of the case for about 18 years, the learned Special Judge was right in closing the evidence of the prosecution. This is in accordance with the

mandate of the Hon'ble Supreme Court in *P. Ramachandra Rao vs. State of Karnataka*, 2002 (4) SCC 578:

“21.....The Criminal Procedure Code, as it stands, incorporates a few provisions to which resort can be had for protecting the interest off the accused and saving him from unreasonable prolixity or laxity at the trial amounting to oppression. Section 309, dealing with power to postpone or adjourn proceedings, provides generally for every inquiry or trial, being proceeded with as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same to be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded. Explanation-2 to Section 309 confers power on the Court to impose costs to be paid by the prosecution or the accused, in appropriate cases, and putting the parties on terms while granting an adjournment or postponing of proceedings. This power to impose costs is rarely exercised by the Courts, Section 258, in Chapter XX of Cr.P.C. on Trial of Summons-cases, empowers the Magistrate trying summons cases instituted otherwise than upon complaint, for reasons to be recorded by him, to stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, to pronounce a judgment of acquittal, and in any other case, release the accused, having effect of discharge. This provision is almost never used by the Courts. In appropriate cases, inherent power of the High Court, under Section 482 can be invoked to make such orders, as may be necessary, to give effect to any order under the Code of Criminal Procedure or to prevent abuse of the process of any Court, or otherwise, to secure the ends of justice. The power is wide and, if judiciously and consciously exercised, can take care of almost all the situations where interference by the High Court becomes necessary on account of delay in proceedings or for any other reason amounting to oppression or harassment in any trial, inquiry or proceedings. In appropriate cases, the High

Courts have exercise their jurisdiction under Section 482 of Cr.P.C. for quashing of first information report and investigation, and terminating criminal proceedings if the case of abuse of process of law was clearly made out. Such power can certainly be exercised on a case being made out of breach of fundamental right conferred by Article 21 of the Constitution. The Constitution Bench in *A.R. Antulay's case* referred to such power, vesting in the High Court (vide paras 62 and 65 of its judgment) and held that it was clear that even apart from Article 21, the Courts can take care of undue or inordinate delays in criminal matters or proceedings if they remain pending for too long and putting to an end, by making appropriate orders, to further proceedings when they are found to be oppressive and unwarranted.

29. For all the foregoing reasons, we are of the opinion that the Court could not have prescribed periods of limitation beyond which the trial of a criminal case or a criminal proceedings cannot continue and must mandatorily be closed followed by an order acquitting or discharging the accused. In conclusion we hold:-

(1)

(2)

(3)

(4)

(5) The Criminal Courts should exercise their available powers, such as those under Sections 309, 311 and 258, of Code of Criminal Procedure to effectuate the right to speedy trial. A watchful and diligent trial judge can prove to be better protector of such right than any guidelines. In appropriate cases jurisdiction of High Court under Section 482 of Cr.P.C. and Articles 226 and 227 of Constitution can be invoked seeking appropriate relief or suitable directions.”

12. This Court in exercise of its powers under Section 482 Cr.P.C. to prevent abuse of process of the Court will certainly take steps to ensure a fair trial. During the course of hearing, a specific query was put to the learned counsel for the Petitioner, whether the prosecution can produce the witnesses for examination and within what time. Learned counsel for the Petitioner categorically stated that he is not in a position to make a statement as to whether the witnesses will appear or not and in how much time if at all they can be produced. On a further query also as to whether the witnesses could be examined through videoconferencing, the learned counsel for the Petitioner had no answer.

13. Thus, in view of the law laid down by the Hon'ble Supreme Court, it is clear that the Court is empowered to undertake means to ensure a speedy trial. Despite ensuring the same and granting ample opportunity to the prosecution no efforts were made by the prosecution to procure the attendance of their witnesses for examination in the Court. Thus the test to be applied is whether the continuation of the proceedings was oppressive and unwarranted. After the charges were framed against the Respondent in nearly 14 years it has examined seven witnesses. There is no averment in the petition that the prosecution is in a position to produce the witnesses in future. It has taken no steps in two years to send reply to the request of Canadian Department of

Justice. It was thus proper that the learned Special Judge had closed the prosecution evidence after about 18 years of the alleged offence.

14. The reliance of the counsel for the Petitioner on *Rajendra Prasad (supra)*, *Shailendra Kumar (supra)*, *Mohanlal Jitamalji (supra)* and *Godrej Pacific (supra)* is misconceived, as these decisions relate to cases where an application under Section 311, Cr.P.C was dismissed. In the present case, no such application under Section 311 Cr.P.C. was filed before the learned Special Judge. Even before this Court, the learned counsel for the Petitioner is not in a position to state the time within which the attendance of the witnesses can be procured or whether they will even appear or not for evidence.

15. In view of the above, the impugned order passed by the learned Special Judge, NDPS is maintained and the petition and the pending application are hereby dismissed. Trial Court record be sent back.

(MUKTA GUPTA)
JUDGE

JULY 12, 2011
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