

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MCRC No. 1158 of 2020**

1. Punit Ram Pandey S/o Ramesh Chandra Pandey Aged About 30 Years R/o Badachaka Naini Police Station And District Prayagraj Uttar Pradesh
2. Navnit Dubey S/o Shivakant Aged About 22 Years R/o Mavaiya Police Station Meja District Prayagraj Uttar Pradesh
3. Deepak Kumar Gond S/o Matmbar Aged About 24 Years R/o Bisaijan Khurd Police Station Meja District Prayagraj Uttar Pradesh

---- Applicants

Versus

- State Of Chhattisgarh Through The Police Station Farasgaon District Kondagaon Chhattisgarh

---- Respondent

For Applicants	:	Shri Pravin Tulsyan, Advocate
For State	:	Shri Anurag Verma, Panel Lawyer

Hon'ble Shri Justice Manindra Mohan Shrivastava**Order On Board****29/01/2021**

The applicants have been arrested in connection with Crime No.05/2019 registered at Police Station – Farasgaon, District – Kondagaon (C.G.) for alleged commission of offences under Section 20 (b) (ii) (c) of NDPS Act, 1985.

2. Prosecution case is that upon receipt of information, when police intercepted the applicants, they were found in possession of 106.964 Kgs of *ganja* and according to the prosecution, the applicants failed to produce any valid authority of possession.

3. Learned counsel for the applicants would submit that the mandate of Section 42, 50 and 55 of NDPS Act have not been complied with in its true spirit while drawing proceedings under the Act. The submission is that while sending information regarding

receipt of information of illegal transportation of *ganja*, no specific reason was assigned as to what was the urgency to proceed without obtaining warrant. It is further submitted that there are discrepancies in the sample of the seal alleged to have been fixed on the seized articles because the sample seal as was used to seal the contraband and the sample seal which has been used while preparing inventory by the Executive Magistrate are differently shaped. He would also submit that recovery of *ganja* is said to have been made from the vehicle and not from the personal search but as notice was given under Section 50 of the NDPS Act, provisions of the said Act would become applicable and violation of its mandate would invalidate the entire proceedings because there is nothing to show that the concerned police officer made any effort to take the accused before the gazetted officer or Magistrate irrespective of whether the accused expressed their willingness. Last, but not the least, learned counsel for the applicant would argue that in the present case, the applicants have remained in jail for more than two years but till date, trial has not been concluded. He would argue that as there is inordinate delay in conclusion of trial, irrespective of the bar created under Section 37 of NDPS Act, the applicant is entitled to be released on bail on the ground of violation of constitutionally guaranteed right under Article 21 of the Constitution of India of speedy trial which has been violated. In support of the aforesaid submission, learned counsel for the applicant has placed reliance upon Division Bench judgment of the High Court of Calcutta in the case of **In Re: Sanawar Ali v. Union of India** reported in **AIR online 2020 CAL 561**.

4. On the other hand, learned State counsel would submit that the proceedings, right from recording satisfaction and sending information under Section 42 of the NDPS Act upto registration of FIR have been drawn in substantial compliance of the provisions contained under NDPS Act. According to him, arguments of violation of Section 42 of NDPS Act is of technical nature because the officer, while sending information, also attached along with the information, the reasons why it was not possible to wait for warrant. He would next submit that the alleged ground of

discrepancy of seal, does not in any manner, cast any doubt because the seal is of the same police station. He would submit that the proceedings which were drawn at the time of seizure of *ganja*, were affixed with samples and those samples were deposited in the malkhana. Later on, when the occasion arose for preparation of inventory before the Executive Magistrate, *ganja* was again taken out from the malkhana and it was produced before the Executive Magistrate, where inventory was prepared and it was re-sealed with the seal of the police station. Therefore, it cannot be said to be a case of violation of any of the provisions contained in the NDPS Act. Learned State counsel would further argue that in a case where *ganja* has not been recovered from the person but from the vehicle, proceedings could not be challenged on the ground of defective notice under Section 50 of the NDPS Act. On the aspect of delay in trial, learned State counsel would submit that the applicants are charged of grave offence of transportation of *ganja* in huge quantity which is far more than the commercial quantity for which, minimum 10 years is prescribed. Therefore, only on that ground, at this stage, bail may not be granted.

5. As far as grounds relating to violation of provisions contained in Section 42 of NDPS Act is concerned, this Court *prima facie* finds that while sending information to the higher authority, complete details, which included satisfaction recorded why warrant could not be taken, has been stated, though in separate document. This document was sent along with the information. Therefore, argument of violation of Section 42 of NDPS Act does not impress.

The grounds with regard to discrepancy in the seal also does not hold water because the seal of the police station is one and the same and after preparation of inventory, the seal was again affixed in the presence of the Executive Magistrate. These are matters for consideration during trial and at this stage, charge sheet does not show any discrepancy to say that there has been tampering.

The argument that even though *ganja* has been recovered from the vehicle, compliance of Section 50 of NDPS Act would be mandatory, is liable to be rejected in

view of recent judicial pronouncement of the Supreme Court in the case of **Than Kunwar v. State of Haryana, (2020) 5 SCC 260**, wherein, it has been held that in cases where after giving notice under Section 50 of NDPS Act, recovery is not from the person but from any other place or vehicle, defect in giving notice under Section 50 of NDPS Act, by itself, would not invalidate the proceedings.

6. This Court finds that the applicants have remained in jail for about two years and trial has not been concluded till date. In this regard, reliance has been placed on the judgment of the Calcutta High Court in the case of **Sanawar Ali** (supra). In that case, on facts, it was found that the accused had remained in detention for more than 5 years and trial had not been concluded. Applying the directions issued by the Supreme court in the case of **Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India and ors. (1994) 6 SCC 731**, bail was granted to the accused on that ground alone.

In the case of **Supreme Court Legal Aid Committee** (supra), an issue arose for consideration as to whether in view of bar created under Section 37 of NDPS, undertrial prisoners should be admitted to bail only on the ground of delay in trial. The Supreme Court had an occasion to deal with the situation where the accused charged of commission of offence under NDPS Act were in jail and trial was being inordinately delayed. It was observed as below -

“15.We are conscious of the statutory provision 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 adverted to this section in the earlier part of the judgment. 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 v. State of Punjab*, (1994) 3 SCC 569. 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 in *A.R. Antulay v. R.S.Nayak*, (1992) 1 SCC 225, release 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. Of course, some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21, which has to be telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness in procedural matters. What then is the remedy? 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 persons whose trials have been delayed beyond reasonable time and are 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.

.....”

A series of directions were issued by the Supreme Court as to how the accused of undertrial prisoners who were charged of commission of offence under the NDPS Act have to be dealt with in the matter of bail, depending upon the gravity of offence and period of undertrial detention as below -

- (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.

The directives in clauses (i), (ii) and (iii) above shall be subject to the following general conditions:

(i) The undertrial accused entitled to be released on bail shall deposit his passport with the learned Judge of the Special Court concerned and if he does not hold a passport he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;

(ii) the undertrial accused shall on being released on bail

present himself at the police station which has prosecuted him at least once in a month in the case of those covered under clause (i), once in a fortnight in the case of those covered under clause (ii) and once in a week in the case of those covered by clause (iii), unless leave of absence is obtained in advance from the Special Judge concerned;

(iii) the benefit of the direction in clauses (ii) and (iii) shall not be available to those accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;

(iv) in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner-accused belongs, that the said accused shall not leave the country and shall appear before the Special Court as and when required;

(v) the undertrial accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;

(vi) the undertrial accused may furnish bail by depositing cash equal to the bail amount;

(vii) the Special Judge will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out; and

(viii) after the release of the undertrial accused pursuant to this order, the cases of those undertrials who have not been released and are in jail will be accorded priority and the Special Court will proceed with them as provided in Section 309 of the Code.”

Their Lordships in the Supreme Court, however, clarified that those directions intend to operate as one-time direction for cases in which accused are in jail and trials are delayed and they are not intended to interfere with the Special Court's power to grant bail under Section 37 of the NDPS Act in following words -

“16. We may state that the above are intended to operate as one-time directions for cases in which the accused persons are in jail and their trials are delayed. They are not intended to interfere with the Special Court's power to grant bail under Section 37 of the Act. The Special Court will be free to exercise that power keeping in view the complaint of inordinate delay in the disposal of the pending cases. The Special Court will, notwithstanding the directions, be free to cancel bail if the accused is found to be misusing it and grounds for cancellation of bail exist. Lastly, we grant liberty to apply in case of any difficulty in the implementation of this order.”

7. The Division Bench of the Calcutta High Court in the above referred decision considered the aforesaid directives of the Supreme Court in the case of **Supreme Court Legal Aid Committee** (supra). The argument that such directions were intended to operate as “one time measure” was also dealt with and it was noted that subsequently, those very directions were extended to the State of West Bengal and other States vide order dated 17/04/1995 in the case of **Supreme Court Legal Aid Committee representing Undertrial Prisoners v. Union of India and another, (1995) 4 SCC 695**. It was further held that the directives given by the Supreme Court is applicable to achieve universal equality and directives may be extended to all undertrials who are similarly situated and are suffering protracted detention through out the length and breadth of the country.

8. In the present case, on facts, this Court finds that the applicants have remained in jail for more than two years but it cannot be said to be half of the minimum sentence prescribed in the alleged commission of offence. In the directives issued by the Supreme Court in the case of **Supreme Court Legal Aid Committee** (first case), the Supreme Court issued directions that where undertrial accused is charged with an offence under the Act punishable with minimum imprisonment of 10 years and minimum fine of Rs.1 lakh, such 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 Rs.10 lakhs

with two sureties of the like amount. But in the present case, the period of detention is two years which is far less than 5 years. Since the applicants are alleged to have been found in possession of commercial quantity, the applicants are not entitled to grant of bail at this stage, only on the ground of inordinate delay in trial by applying the directions issued by the Supreme Court in the case of **Supreme Court Legal Aid Committee** (first case).

9. It needs to be clarified at this stage that this does not affect the right of the accused to apply for bail by satisfying the Court in terms of provisions contained in Section 37 (1) (b) (ii) of the NDPS Act that there are reasonable grounds for believing that he is not guilty of such offence and he is not likely to commit any offence while on bail. Since in the present case, the aforesaid ground is not made out and this Court is not satisfied that there are reasonable grounds to believe that the applicants are not guilty of such offence and other grounds of long pre-trial detention is also not made out, application is being rejected. In view of the directions issued in the case of **Supreme Court Legal Aid Committee** (first case), the bail application has to be rejected and is, accordingly, rejected.

Sd/-
(**Manindra Mohan Shrivastava**)
Judge