

HIGH COURT OF CHHATTISGARH, BILASPUR**• MCRC No. 3804 of 2021**

- Basudeo Mahto S/o Joginath Mahto Aged About 33 Years R/o Negada (Wrongly Written As Nemar In The Order Sheet), Police Station- Goudiya, District- Navagarh, (Odisha)

---- Applicant**Versus**

- State Of Chhattisgarh Through Station House Officer, Police Station- Kota, District : Bilaspur, Chhattisgarh

---- Respondent

For Applicant	:	Mr. Rajeev Kumar Dubey, Advocate.
For State	:	Mr. Ashutosh Mishra, P.L.

Hon'ble Shri Justice Manindra Mohan Shrivastava**Order On Board****10/09/2021**

Heard.

1. This is repeat bail application. Earlier application was dismissed as withdrawn.
2. The applicant has moved this application for grant of bail as he is arrested in connection with Crime No.362/2019 registered at Police Station- Kota, District- Bilaspur, (C.G.) for the alleged commission of offence under Section 20 (b) ii (c) of NDPS Act.
3. Prosecution case is that upon receipt of Mukhbir information when the vehicle was intercepted on the road, huge quantity of ganja was found being carried.
4. Learned counsel for the appellant would argue that the applicant has been falsely implicated in the alleged commission of offence. He would submit

that search warrant was not obtained as required under the provisions of Section 42 of the NDPS Act. He would submit that though the Investigating Officer has come out with a *Panchnama* as to why search warrant could not be obtained, there is no compliance of provisions contained in Section 42 (2) of the NDPS Act inasmuch as no information was sent to the immediate superior authority with regard to the proceedings of receipt of information and reason for not obtaining search warrant. Therefore, it is argued, there is violation of mandatory provision and this renders the entire case of the prosecution highly doubtful.

The second contention of learned counsel for the applicant is that even though, according to the prosecution, the quantity of ganja was allegedly found in the vehicle, in all the cases of interception and seizure of ganja, it is mandatory to comply with the provisions of Section 50 of the NDPS Act.

The third contention of learned counsel for the applicant is that in the present case, there is non-compliance of the Section 57 of the NDPS Act as the information with regard to proceedings have not been duly forwarded to the higher authority which again renders the entire prosecution case highly doubtful. Learned counsel for the applicant would submit that the report under Section 57 of the NDPS Act has not been sent immediately but after about three days.

Learned counsel for the applicant would further argue that in the present case, the trial has not been concluded till date though the applicant has remained in jail and he cannot be kept in jail for indefinite period without conclusion of trial.

The last submission of learned counsel for the applicant is that out of 9 witnesses, till date, only 5 witnesses have been examined which includes witnesses of seizure and weighment but those witnesses have not supported

the prosecution case.

5. On the other hand, learned State counsel submits that in the present case, the contents of the charge sheet would prima facie show that a *Mukhbir Panchnama* was prepared and effort was made to obtain search warrant but the office of the next superior officer was closed and, therefore, search warrant could not be obtained and a *Panchnama* to this effect was also prepared. However, on the next day, the information was actually submitted in the office of the Sub Divisional Officer. Further submission is that since in the present case, seizure is not from the personal search but from the vehicle therefore, the requirement of Section 50 of the NDPS Act is not attracted. Next submission of learned State counsel is that the provisions of Section 57 of the NDPS Act are not mandatory but directory though in the present case, two days after the incident, the information has been sent to the higher authority. He would further submit that in the present case, the Investigating Officer has not been examined and only on the basis some of the witnesses have not fully supported the case of the prosecution, at this stage, it cannot be said that there are reasonable grounds to believe that the applicant is not involved in the alleged commission of offence. He would further submit that out of 9, 5 witnesses have already been examined and trial is likely to be concluded early. If the applicant is granted bail at this stage, he is likely to abscond also as the applicant is resident of State of Odisha.

6. I have heard learned counsel for the parties and perused the case diary as also contents of charge sheet.

7. On prima facie considerations, it appears that when the information with regard to transportation of ganja was received, the *Mukhbir Panchnama* was prepared and one of the police officials was sent to the office of the Sub Divisional Magistrate for obtaining search warrant but the office was closed, it

being around 6:30 p.m. in the evening and therefore, a *Panchnama* as to why search warrant could not be obtained was also prepared. There is another document which shows that on the next day i.e. on 31.07.2019 the information was submitted in the office of the Sub Divisional Magistrate police station Kota.

Present is not a case where the narcotics has been obtained through personal search. Obviously it could not be because quantity is more than 500 kg. According to the charge sheet, this was found in a container which was attached to the part of the body of the vehicle, in which, bags of narcotics/ 'ganja' were found. In such circumstances, as is well settled, the alleged violation of Section 50 of the NDPS Act may not be fatal to prosecution.

The requirement of Section 57 of the NDPS Act, though belatedly, *prima facie* appears to have been done because there is a document of sending the information with regard to complete proceedings to the higher authority. Whether it caused prejudice to applicant is a matter for consideration at the stage of trial.

8. One of the arguments raised by learned counsel for the applicant is that as the independent witnesses of seizure have not supported the case of the prosecution, this by itself is sufficient to form an opinion for the Court that there are reasonable grounds to believe that the applicant is not involved in the alleged commission of offence.

It is difficult to accept the contention of learned counsel for the applicant in view of settled legal position that even where the independent witnesses of seizure of narcotics have not supported, yet the conviction could be ordered in case the Court is satisfied that the evidence of the Investigating Officer with regard to drawl of proceedings and compliance of mandatory provisions of the NDPS Act is reliable and credible. Since Investigating Officer so far has not

been examined, at this stage, it cannot be said that merely because the independent witnesses of seizure have not supported, that by itself, is sufficient to draw an inference that the applicant is not involved in the alleged commission of offence. At this stage, this Court does not wish to comment upon this aspect because the Investigating Officer is yet to be examined and it would be for the learned trial Court to appreciate the entire evidence including the evidence of witnesses of seizure.

9. There can be no doubt that there has been delay of about 2 years in conclusion of trial and still 4 witnesses are yet to be examined. However, in cases relating to narcotics or psychotropic substances including commercial quantity, the ground on which the bail has been sought cannot be accepted in view of order of this Court in MCRC No.1158 of 2020 decided on 29.01.2021 relying upon judgment of Hon'ble Supreme Court, wherein, this Court held :-

“ 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 throughout the length and breadth of the country.”

3. In view of above, this Court is unable to form an opinion at this stage that there are reasonable grounds to believe that the applicant is not involved in the alleged commission of offence. Additionally, the applicant is said to be resident of other State.

4. The bail application is therefore rejected.

5. Before parting with the case, keeping in view that the accused is entitled to speedy trial, the trial Court is directed to expedite the trial and conclude the same at the earliest, without granting adjournments except for unavoidable reasons. The witnesses shall be summoned and if they do not appear, the trial Court should not hesitate to issue coercive process including warrant for appearance of the witnesses to ensure that the trial is concluded at the earliest.

Sd/-
(Manindra Mohan Shrivastava)
Judge