

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO.430 OF 2021

Sachin Atmaram Vartak,
Age 57 years, Occ.Business,
R/o.Avighna Bungalow, Sakai Nagar,
Village Umela, Naigaon (W),
Tal.Vasai, District Palghar.
Presently lodged in Thane Central Prison.

Applicant

versus

The State of Maharashtra

Respondent

Ms.Swarali Joglekar, Advocate for applicant.

Mr.Y.Y.Dabake, APP, for State.

CORAM : PRAKASH D. NAIK, J.

Date of Reserving the Judgment : 29th September 2021

Date of Pronouncing the Judgment : 05th January 2022

JUDGMENT :

1. The applicant has preferred this application for bail under Section 439 of Code of Criminal Procedure in connection with FIR bearing CR No.II-7 of 2016 registered with Wada Police Station, District – Palghar, for offences under Sections 8(c), 22, 27A and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (‘NDPS Act’).

2. The case of prosecution is that information was received through intelligence by ATS, Ahmadabad which was transmitted to Superintendent of Police, Palghar and pursuant to that the raid was conducted on 19th May 2016. A farm house situated at Village Gaurpur, Tal.Wada. District Palghar was raided. There was seizure of

560 kgs. 148 grams of Methaqualone, psychotropic substance. The statements of arrested accused were recorded. The investigation was conducted. The charge sheet was filed.

3. The applicant had preferred Criminal Bail Application No.975 of 2018 seeking bail before this Court. The said application was rejected by order dated 4th February 2019. Thereafter another application for bail was moved before this Court viz Bail Application No.1694 of 2019. The said application was rejected vide order dated 14th October 2019. It was urged that applicant is in custody from 25th May 2016. While disposing the said application it was observed that considering the fact that applicant is in custody as urged by applicant, directions can be issued to the Trial Court to expeditiously conclude the trial. Trial was expedited. The Trial Court was directed to conclude the trial within a period of nine months. The State was directed to take immediate steps to appoint Special Public Prosecutor for conducting trial. The prosecution and the defense were directed to co-operate with the Trial Court in concluding the trial expeditiously. It was also directed that the accused be produced before the Trial Court regularly. However, in spite of passage of time of two years, trial has not commenced. Resultantly applicant has continued to be in custody for five and half years.

4. This application for bail is preferred primarily on the ground that applicant is in custody for a period of more than five years. In spite of directions to conclude trial expeditiously, there is no progress in the trial.

5. Learned advocate for the applicant submitted as follows :-

(i) The applicant is arrested on 25th May 2016 and since then he is in custody. The trial was expedited with direction to conclude the same within a period of nine months. However, trial has not commenced. Even charge has not been framed;

(ii) The period of nine months is over in July-2020 and yet the trial has not yet commenced. Lock down was declared due to Covid-19 from 23rd March 2020 and even prior to that the Trial Court had five months from October-2019 to proceed with trial;

(iii) The offences punishable under Sections 22 and 27A of the NDPS Act are punishable with imprisonment for not less than ten years but which may be extended up to twenty years, which would mean that the minimum punishment for the offence is ten years imprisonment. The applicant was arrested on 25th May 2016 and he had completed five years of imprisonment in May-2021. Thus, he has already completed half the period of minimum sentence that can be awarded to him before commencement of trial. Further custody of the applicant is not justifiable as the applicant cannot be incarcerated in jail for an indefinite period taking into consideration the mandate of Article 21 of Constitution of India, the applicant is entitled for bail;

(iv) On perusal of order dated 14th October 2019 it can be seen that the report was called from Trial Court regarding status of trial, which was submitted before this Court on 23rd September 2019. In the said report it was stated that there was no co-operation from the accused for framing charge, however, on perusal of roznama

from 15th November 2016 to 23rd July 2020, it can be seen that no such observation has ever been recorded by the Trial Court in the roznama and nowhere it has come on record that the accused has refused to co-operate and hence the delay in framing charge or commencement of trial, cannot be attributed to the accused;

(v) Application was made under the provisions of RTI to find out exact number of cases pending before the Trial Court on 30th October 2019. As per the information received it can be seen that the total number of NDPS cases pending before the Trial Court were 583 and the said number dates back to the year 1990. Out of 583 cases only four cases are pending because there is stay to the proceedings and the rest of the cases are pending irrespective of whether they are ready or not. Other cases are also pending before Trial Court and the total number of cases are 1,126;

(vi) The applicant was not named in the FIR and he has been impleaded on the statement of co-accused. There is no recovery from the applicant. He was not present at the place of offence when the raid was conducted and recovery was made. Although it is alleged that the applicant had purchased the land and in consequence was the owner of the farm house, all the cheques of the transactions for purchase were given by Vinod Gupta and his statement is silent about involvement of applicant in the said transaction. The applicant was only connected with the purchase of the said land as an agent and he was never the owner of the said land nor he had purchased the land in someone else's name. The land is still registered in the name of Mr. Girimangal Prasad;

(vii) The applicant is wrongly impleaded on the basis of statement of co-accused. He has no connection with contraband recovered during investigation;

(viii) In the case of **Supreme Court Legal Aid Committee representing Under Trial Prisoners Vs. Union of India and others (1994)6-SCC-731**, the Hon'ble Supreme Court of India had issued directions for grant of bail by categorizing the cases registered under NDPS Act. The direction No.(III) reads as follows :

“(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”.

The offence under Section 27-A of the NDPS Act is punishable with rigorous imprisonment for a term which shall not be less than ten years, but may extend to twenty years. Section 22 of NDPS Act provides punishment of imprisonment of not less than ten years which may extend to twenty years. Thus, the minimum imprisonment prescribed is for a period of ten years and the applicant has undergone the imprisonment for a period of more than five years. The half of the minimum punishment prescribed for the aforesaid offence would be five years. Hence, considering the directions of Supreme Court, the applicant is entitled for bail;

(ix) Learned advocate for applicant also relied on the following decisions :-

- (a) Shaheen Welfare Association Vs. Union of India and others (19962-SCC-616;
- (b) Sanjay Chandra Vs. CBI – AIR-2012-SC-830;
- (c) Thana Singh Vs. Central Bureau of Narcotics – (2013)2-SCC-590;
- (d) Hussain and another Vs. Union of India – (2017)5-SCC-702;
- (e) Union of India Vs. K.A.Najeeb – (20213-SCC-713;
- (f) The National Investigation Agency Vs. Areeb Ejaz Majeed – Division Bench Judgment of Bombay High Court in Criminal Appeal No.389 of 2020 decided on 23rd February 2021;
- (g) Sanawar Ali Vs. Union of India and another – Division Bench Order of Calcutta High Court in C.R.M.No.9314 of 2020, dated 27-11-2020.

6. Learned APP submitted that previous applications for bail were rejected by this Court. There is no change in circumstances. The applicant is not entitled for bail on the ground of delay in trial.

7. The factual matrix as stated above indicate that the applicant is charged with the offences under Sections 8(c), 22, 27-A and 29 of the NDPS Act. The applicant is in custody from 25th May 2016. He is in jail for a period of five and half years. The trial has not commenced and even charge has not been framed. Vide order dated 2nd September 2021 directions were issued to the Trial Court to submit report about the status of trial. The report dated 22nd September 2021 was received from the Trial Court. It was stated that NDPS cases were assigned to the said Court vide District Court order dated 28th August 2020 w.e.f. 1st September 2020. During the said period there was lock down due to Covid-19 pandemic and the

Courts were not functional to its full strength. Since the NDPS cases were assigned to the said Court, other matters were not assigned to the Court. Some of the matters being part heard were kept for hearing before his predecessor. Since then the matters were bifurcated and accordingly listed and time to time the cases were transferred to the said Court. Special Public Prosecutor was appointed to conduct the case. The matter was kept after framing the charge. Due to lock down the accused were not produced from jail and even the advocates were absent. One of the accused filed application for bail. The accused were not produced from jail nor they were produced through video conferencing for recording charge. The advocate for the accused were also absent. Special Public Prosecutor has filed draft charge. From 2nd August 2021 the Court has started to its full strength with 100% staff. The jail authorities are producing the accused before Court or through video conferencing. The matter will be taken up for framing charge through video conferencing if they are not produced from jail.

8. Apparently even thereafter there is no progress in the trial. While adjudicating the previous application for bail, which was disposed of vide order dated 14th October 2019, it was urged that the applicant is in custody from 25th May 2016 and for prolonged custody from the date of arrest he is entitled for bail. Special Public Prosecutor was not appointed to conduct trial. At that point of time report was called from Trial Court about status of trial since it was urged that there is no progress in trial. The report dated 23rd September 2021 was forwarded stating that the charge sheet has been filed in the case. Some of the accused have preferred applications for bail. The accused had refused to co-operate in

framing of charge. Special Public Prosecutor had informed that he is unable to represent the State as he has not been notified as Special Public Prosecutor by notification. The advocate for the applicant has preferred application seeking directions to appoint Special Public Prosecutor and the Court had directed the respondents to take necessary steps to procure presence of Special Public Prosecutor. Learned APP has submitted that Special Public Prosecutor will be appointed shortly. Learned counsel for the applicant has stated that observation in the report about refusal to co-operate with framing of charge is not borne out in the roznama or in any document. Learned APP at that point of time had submitted that trial would proceed soon as Special Public Prosecutor would be appointed for conducting trial. Taking into consideration aforesaid factual aspects, the application for bail was rejected and the trial was expedited. It was directed that Trial Court shall conclude trial within nine months. The steps should be taken to appoint Special Public Prosecutor for conducting trial and both the sides to co-operate with the Trial Court in concluding trial.

9. In the current report the Trial Court has stated that on account of lock down the trial could not be proceeded due to various difficulties. It is pertinent to note that lock down was declared in March-2020. The trial was expedited vide order dated 14th October 2019. In any case, there is nothing to infer that the applicant was responsible for delay in trial. The question which falls for consideration is that the applicant is under incarceration from 25th May 2016. Although trial was expedited by order dated 14th October 2019, the applicant has continued to be in custody for a further period of more than two years thereafter without framing of charge.

10. The point for determination is whether the applicant is entitled for bail in view of directions issued by the Hon'ble Supreme Court in Supreme Court Legal Aid Committee representing Undertrial Prisoners case (supra). The submission of learned counsel for applicant is that minimum punishment prescribed for the offence charged against applicant is 10 years imprisonment and the applicant has completed more than five years in custody. The Supreme Court in the aforesaid decision has given directions that the accused charged for the offences under NDPS Act may be released on bail on completing five years of imprisonment when he is charged for the offence under NDPS Act for minimum imprisonment for ten years and a minimum fine of Rs.1,00,000/-. In paragraph 15 it was observed that :

“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 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 Vs. State of Punjab. Despite this provision we have directed as above and issued direction mainly at the call of Article 21 as the right to speedy trial may even require in some cases quashing of criminal proceedings altogether, as held by the Constitution Bench of this Court in A.R.Antulay Vs. 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 right guaranteed by Article 21. Of course, some amount of deprivation of person 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.”

11. It is pertinent to note that the decision in Supreme Court Legal Aid Committee Undertrial Prisoners (supra) was delivered by Hon'ble Supreme Court in the light of pendency of several cases under NDPS Act in Bombay and in many cases foreigners are under detention without trial. The Supreme Court considered the scope and object of NDPS Act and provisions regarding constitution of Special Court to deal with the cases under the said Act. In paragraph 15 the Supreme Court had observed that the main reason which motivated the Supreme Court Legal Aid Society to file the petition under Article 32 of the Constitution, was the delay in the disposal of cases under the Act involving foreigners. The relief claimed included a direction to treat further detention of foreigners, who were languishing in jails as undertrials under the Act for a period exceeding two years, as void or be released on bail and their cases be given priority over others. It was pointed out to petitioners counsel that distinction between foreigners and citizens is not possible. The petition was then amended and it was submitted that all undertrials who are in jail for offences under the Act for more than two years due to delay in trial, be released from jail.

12. The aforesaid decision was delivered prior to introduction of Section 436-A in Code of Criminal Procedure, 1973 with effect from 23rd June 2006, which reads as follows :

“436-A. Maximum period for which an undertrial prisoner can be detained.- Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under the law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties :

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties :

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under the law.”

13. On reading the aforesaid provision it can be seen that it relates to the offences under any law excluding the offense for which punishment of death is specified as one of the punishment under that law. It provides that where an accused has undergone detention for a period extending up to one half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties. Thus, the criteria incorporated under the said provision for release is that if person has undergone detention for a period extending up to

one half of the maximum period of imprisonment specified for that offence under that law. The title of Section 436-A makes it clear that it relates to the maximum period for which the undertrial prisoner can be detained. There are two provisos to said provision. The first proviso indicate that the Court may, after hearing the Public Prosecutor and after recording the reasons in writing, order the continued detention of such person for a period longer than one half of the said period or release him on bail instead of the personal bond with or without sureties. The second proviso states that no such person shall, in any case, be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law. The explanation to the said provision states that in computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceedings caused by the accused shall be excluded. Thus, the amended provision deals with the situation where the undertrial prisoner is languishing in custody and provides release by the Court on personal bond with or without sureties where the accused has undergone detention extending one half of the period of imprisonment specified for that offence.

14. The said provision applies to persons who are, during investigation, inquiry or trial under Cr.PC for the offence under any law, in custody for period stitulated therein. The decision of the Supreme Court in the case of Supreme Court Legal Aid Committee Undertrial Prisoners (supra) deal with the undertrial prisoners charged for the offences under NDPS Act. The direction Nos.15 (iii) referred to hereinabove stipulated in the said decision was only qualified with the fact that benefit of the said direction was not

available to those accused who are in the opinion of the Court for the reasons to be recorded in writing likely to tamper with evidence or influence the prosecution witnesses.

15. The distinction in directions issued in the aforesaid decision and Section 436-A of Cr.PC, is that bail shall be granted to the accused under NDPS Act under the categories mentioned therein and one of the category which is sought to be applied in the present case is based on the sentence undergone by the undertrial prisoner. The Supreme Court judgment provides release of undertrial where he is charged with an offence under the act punishable with minimum imprisonment of ten years and minimum fine of one lakh on completion of five years. Thus, if minimum sentence of imprisonment provided under NDPS Act is 10 years, he shall be released on bail on completing five years. The minimum punishment provided for offences under Sections 22 and 27A of NDPS Act is ten years. Whereas Section 436-A of Cr.PC provides for release of undertrial prisoner on bond with or without sureties when the undertrial prisoner has completed one half of the maximum punishment provided under the law. The Supreme Court decision only relates to NDPS Act, whereas, Section 436-A takes care of all the cases only excluding those offences for which death penalty is provided. Thus, for example, the accused who is being tried for offence under Section 27A of NDPS Act could be released on completing five years, subject to condition stipulated in the said decision. The maximum sentence for conviction under this Section is twenty years and the minimum sentence provided is 10 years and minimum fine of one lakh. If Section 436-A of Cr.PC is made applicable, the accused would be released on bail on completing one

half of maximum sentence i.e. ten years (the maximum being twenty years). The scope and object of incorporating of Section 436-A in Cr.P.C, which was brought in force w.e.f. 23rd June 2006 (subsequent to the decision of Supreme Court) is to take care of the situation where the accused were tried for any offences are languishing in jail. It is also clear that Section 436-A of Cr.P.C is subject to proviso incorporated therein. It would be pertinent to note that for all the other offences (other than NDPS act), Section 436-A would be made applicable where the prisoner can be released in the event he is in custody for a period of half of the maximum imprisonment provided for the said offence. Whereas the accused who are prosecuted for the serious offence under NDPS Act will have to be directed to be released on bail on completion of half of the minimum sentence of imprisonment provided by law. There would be discrimination amongst persons tried for offences under NDPS Act and other laws. Thus, after incorporating Section 436-A of Cr.P.C, debatable issue had arisen on account of conflict between the directions in the said decision and Section 436-A since both are based on sentence and arithmetical calculation of period of custody. Learned advocate for applicant has brought to my notice the decision of Calcutta High Court in the case of Sanawar Ali Vs. Union of India (supra). The Court considered the directions of Supreme Court in the case of Supreme Court Legal Aid Committee (supra). The Union of India had argued that no law under Article 141 was declared in the above decision. It was 'one time direction'. The Calcutta High Court held that right of bail to an undertrial prisoner flows from Article 21 of Constitution of India. The Court referred to import of Section 436-A of Cr.P.C. However, the decision does not refer to distinction between directions of Supreme Court for NDPS cases and Section 436-A of

Cr.P.C. It is pertinent to note that Section 436-A does not exclude offences under NDPS Act. In P.Ramchandra Rao Vs. State of Karnataka, the question before Supreme Court was whether the earlier decisions of Supreme Court in Common Cause registered Society Vs. Union of India (1996)4-SCC-33, Common A Registered Society Vs. Union of India (1996)6-SCC-775, Rajdeo Sharma Vs. State of Bihar (1998)7-SCC-507 and Rajdeo Sharma (II) Vs. State of Bihar (1999)7-SCC-604, would apply to cases under Prevention of Corruption Act and other economic offences. It was observed that no person shall be deprived of his life or his personal liberty except according to procedure established by law. Life and liberty, the words employed in shaping Article 21, are not to be read narrowly, in the sense drearily dictated by dictionaries; they are organic terms to be construed meaningfully. Speedy trial would encompass within its sweep all its stages including investigation, inquiry, trial, appeal, revision and retrial, in short every thing commencing with an accusation and expiring with the final verdict. It was held that the dictum in A.R.Antulay's case is correct. The propositions emerging from Article 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in A.R.Antulay's case, adequately take care of right to speedy trial. The time limits prescribed in the above cases viz common cases (1) Rajdeo Sharma (i) and Raj Deo Sharma (ii) could not have been prescribed. The bar of limitation amounts to judicial legislation. Thus, although limitations were set aside, it was held that the propositions emerging from Article 21 of the Constitution and expounding right to speedy trial laid down in A.R.Antuley's case, adequately take care of right to speedy trial which was upheld and reaffirmed.

16. The second question which arises for consideration is that the applicant is in jail for a period of more than five years and even without applying the criteria laid down under the decision in the case of Supreme Court Legal Aid Committee Undertrial Prisoners (supra), whether the applicant would be entitled for bail for prolonged custody resulting in violation of Article 21 of Constitution of India. There is no progress in trial. The accused has not delayed the trial. This Court has expedited the trial. Even after the directions to expedite the trial, may be for the reasons beyond the control of Trial Court, practically the applicant has continued to be in custody for a period of two years thereafter. The learned counsel for applicant has contended that there are several witnesses to be examined after framing charge. Charge has not been framed. In the light of the overt act attributed to the applicant and considering the fact that it is not clear as to when the trial could commence and would come to an end and also considering the fact that applicant is in custody for a period of more than five years, the applicant is entitled for bail. Incarcerating the applicant in custody for indefinite period violates fundamental rights guaranteed under Article 21 of Constitution of India.

17. In the case of Shaheen Welfare Association Vs. Union of India and others (supra), it was observed by Supreme Court that it was necessary to grant relief to those persons who have been deprived of their personal liberty for a considerable length of time without any prospect of trial being concluded in the near future. Undoubtedly, the safety of the community and of the nation needs to be safeguarded looking to the nature of the offences these undertrials have been charged with. But the ultimate justification for such

deprivation of liberty pending trial can only be their being found guilty of the offences for which they have been charged. If such a finding is not likely to be arrived at within a reasonable time some relief becomes necessary. The Court was dealing with the cases registered under the provisions of TADA Act. The Court was conscious of the fact that there is embargo for release of prisoners prosecuted for the offences of TADA u/s.20(8) of the said Act. The Supreme Court divided the undertrial prisoners under TADA based on their role/hard core criminals into various classes and by adopting pragmatic and just approach relief was directed to be granted considering gravity of the charges. The Courts were given discretion to consider grant/refusal of bail based on antecedents and on conclusion that there is no likelihood of harm to lives of complainant and others in the event of their release.

18. In the case of Sanjay Chandra Vs. CBI (supra), it was observed that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court

to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. The grant or denial is regulated to a large extent by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required.

19. In the case of *Thana Singh Vs. Central Bureau of Narcotics* (supra), it was observed that the accused was languishing in prison for more than 12 years and awaiting his trial for the offences under the provisions of NDPS Act. He was consistently denied bail. The maximum punishment for the offence was 20 years and he remained in detention for the period exceeding one half of the maximum period of imprisonment. The Court issued directions on various issues, which would be of assistance to conclude trials pending in Courts expeditiously.

20. In the case of *Hussain and another Vs. Union of India* (supra) it was observed that the Supreme Court has given directions in number of cases about speedy conclusion of trials. Speedy trial is part of reasonable, fair and just procedure guaranteed under Article 21 of Constitution of India. Deprivation of personal liberty without

ensuring speedy trial is not consistent with Article 21. While deprivation of personal liberty for some period may not be avoidable, period of deprivation pending trial/appeal cannot be unduly long. If the accused is in custody for a grave offence such person may not be released if trial is delayed. While a person in custody for a grave offence may not be released if trial is delayed, trial has to be expedited or bail has to be granted in such cases. The Court issued directions and one of them was, as a supplement to Section 436-A but consistent with the spirit thereof, if an undertrial has completed period of custody in excess of the sentence likely to be awarded if conviction is recorded, such undertrial must be released on personal bond. Such an assessment must be made by the Trial Courts concerned from time to time. Timely delivery of justice is a part of human rights. Denial of speedy justice is a threat to public confidence in the administration of justice.

21. In Abdul Rehman Antulay Vs. R.R.Nayak (1992)1-SCC-225, while holding that speedy trial at all stages is part of right under Article 21. In the case of Hussainara Khatoon Vs. State of Bihar (1995)5-SCC-326, it was observed that general orders for release of undertrials without reference to specific fact situations in different cases may prove to be hazardous. While there can be no doubt that undertrial prisoners should not languish in jails on account of refusal to enlarge them on bail, for want of their capacity to furnish bail, these are matters to be dealt with on case to case basis keeping in mind guidelines laid down by Court. Sympathy for undertrials who are in jail for long time on account of the pendency of cases, has to be balanced having regard to the impact of crime.

22. In Vivek Kumar Vs. State of U.P. (2000)9-SCC-443, bail was granted to accused by Supreme Court on the ground that it is quite a long period that he is in custody. In Babba Vs. State of Maharashtra (2005)11-SCC-569, the accused was in custody for a long period for offence under TADA Act. In Paramjit Singh Vs. State (NCT of Delhi), the Supreme Court granted bail. The accused was prosecuted under TADA Act. Earlier the application was rejected and trial was expedited. There was no progress in trial. In the case of Angela Sontakke Vs. State of Maharashtra (2021)3-SCC-723, the Supreme Court granted bail to the accused facing prosecution under UAPA Act on the ground that accused is in custody for five years.

23. The settled principle of law is that prolonged custody affects fundamental rights under Article 21 of Constitution of India. The conflict at the most could be in the directions issued in the case of Supreme Court Legal Aid Committee (supra) and Section 436-A of Cr.P.C; since the criteria for releasing the accused is based on sentence and mathematical calculation of period of custody. However, there is no debate that incarceration in custody for long period without trial or completion of trial affects personal liberty guaranteed under Article 21 of Constitution of India.

24. In relation to some offences under special legislations, there are restrictions for granting bail. For example, Section 37 of NDPS Act, Section 20(8) of TADA Act, Section 21(4) of MCOC Act and Section 43-D(5) of Unlawful Activities (Prevention) Act (UAPA Act). The present case relates to offences under NDPS Act. Speedy trial is right of all the undertrial prisoners. The decisions referred to herein relates to grant of bail on the ground of prolonged custody in

different kind of offences including those wherein there are statutory restrictions. In the recent decision in the case of Union of India Vs. K.A.Najeeb (supra), the Hon'ble Supreme Court was dealing with an appeal challenging bail granted to the accused for the offence under UAPA Act and IPC. The accused therein was granted bail by the High Court of Kerala, for the offences under Sections 143, 147, 148, 120B, 341, 427, 323, 324, 326, 506, 201, 202, 153A, 212, 307, 149 IPC, u/s.31 of Explosive Substances Act and u/s.16, 18, 18B, 19 and 20 of UAPA act, 1967. The accused had approached the High Court for third time questioning the Special Court's order denying bail. The High Court through the impugned order released the accused on bail noting that trial is yet to begin, though the respondent had been in custody for four years. Placing emphasis on the mandate for an expeditious trial under the National Investigation Agency Act, 2008, the High Court held that the undertrial-respondent could not be kept in custody for too long when the trial was not likely to commence in the near future, for not doing so would cause serious prejudice and suffering to him. The accused had spent nearly five years and five months in judicial custody. In the appeal before Supreme Court, the contention of the appellants-Union of India was that the High Court erred in granting bail without advertent to the statutory rigours of Section 43-D(5) of UAPA Act. Relying upon the judgment in the case of National Investigation Agency Vs. Jahoor Ahmad Shah Watali (2019)5-SCC-1, it was highlighted that bail proceedings under the special enactment were distinct and the courts are duty bound to refuse bail where the suspect is prima facie believed to be guilty. It was further contended that in numerous prior rounds before the Special Court and the High Court, there emerged enough reasons to believe that the respondent was, prima facie, guilty of the

accusations made against him. The fact that the respondent had absconded for years was pressed into aid as legitimate apprehension of his not returning if set free. The NIA had filed an affidavit suggesting to examine 276 witnesses and at the same time expecting to conduct the trial on a day to day basis and complete it within a year. The respondents, however, had contended that many co-accused had been acquitted and few had been convicted. They were awarded sentence of not more than eight years. The accused had suffered incarceration of five and half years without trial having started. Relying on the decision in the case of Shaheen Welfare Association (*supra*) and Hussain and another (*supra*), it was argued that protracted incarceration violates the respondent's right to speedy trial and access to justice, in which case, Constitutional Courts could exercise their powers to grant bail, regardless of limitations specified under special enactments. In paragraph 10 it was observed that it is a fact that the High Court in the said case has not determined the likelihood of the respondent being guilty or not, or whether rigours of Section 43-D(5) of UAPA Act are alien to him. The High Court instead appears to have exercised its power to grant bail owing to the long period of incarceration and the unlikelihood of the trial being completed anytime in the near future. The reasons assigned by the High Court are apparently traceable back to Article 21 of Constitution, of course without addressing the statutory embargo created by Section 43-D(5) of UAPA Act. In paragraph 11 it is observed that the High Court's view draws support from the batch of decisions of Supreme Court including Shaheen Welfare Association (*supra*) laying down that gross delay in disposal of such cases would justify the invocation of Article 21 of Constitution and consequential necessity to release the undertrial on bail. The Court quoted

paragraph 10 of the decision in the case of Shaheen Welfare Association (supra).

25. In paragraph 12 of the decision in Union of India Vs. K.A.Najeeb, it was observed as follows :

“12. Even in the case of special legislations like the Terrorist and Disruptive Activities (Prevention) Act, 1987 or the Narcotic Drugs and Psychotropic Substances Act, 1985 (‘the NDPS Act’) which too have somewhat rigorous conditions for grant of bail, this Court in Paramjit Singh Vs. State (NCT of Delhi) (1999)9-SCC-252, Babba Vs. State of Maharashtra (2005)11-SCC-569 and Umarmia Vs. State of Gujarat (2017)2-SCC-731 enlarged the accused on bail when they had been in jail for an extended period of time with little possibility of early completion of trial. The constitutionality of harsh conditions for bail in such special enactments, has thus been primarily justified on the touchstone of speedy trials to ensure the protection of innocent civilians.”

26. The Supreme Court then referred to the orders enlarging similarly situated accused under UAPA Act in Angela Harish Sontakke Vs. State of Maharashtra (2021)3-SCC-723. It was further observed that the Court in its earnest effort to draw balance between the seriousness of the charges with the period of custody suffered and the likely period within which the trial could be expected to be completed took note of the five years incarceration and over 200 witnesses left to be examined, and thus granted bail to the accused notwithstanding Section 43-D(5) of UAPA Act. Reference was made to the decisions in the case of Sagar Tatyaram Gorkhe Vs. State of Maharashtra (SLP {Cri.} No.7947 of 2015, order dtd.3.1.2017) wherein the accused under UAPA Act was enlarged on bail since he

was in custody for four years and there were several witnesses to be unexamined. The Court analyzed the factual aspects of the matter which were also weighed in granting bail.

27. Observations in paragraphs 15 to 18 of the decision in Union of India Vs. K.A.Najeeb needs to be looked upon which are as follows:-

“15. This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) Vs. Union of India, it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, the courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge them on bail.

16. As regards the judgment in NIA Vs. Zahoor Ahmad Shah Watali, cited by the learned ASG, we find that it dealt with an entirely different factual matrix. In that case, the High Court had reappreciated the entire evidence on record to overturn the Special Court’s conclusion of their being a prima facie case of conviction and concomitant rejection of bail. The High Court had practically conducted a mini-trial and determined admissibility of certain evidence, which exceeded the limited scope of a bail petition. This not only was beyond the statutory mandate of a prima facie assessment under Section 43-D(5), but it was

premature and possibly would have prejudiced the trial itself. It was in these circumstances that this Court intervened and cancelled the bail.

17. It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonized. Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.

18. Adverting to the case at hand, we are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail. 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."

28. In paragraph 19 of the said decision, however, the Supreme Court has noted that Section 43-D(5) of UAPA Act is comparatively less stringent unlike Section 37 of NDPS Act. However, in the earlier

paragraph the Court has reiterated the fact that even in cases where there are stringent provisions for bail, on the ground of prolonged custody, bail has been granted. Reference is made to several decisions of Apex Court.

29. Although it is not necessary to go deep into the restrictions like Section 37 of NDPS Act, Section 20(8) of TADA Act and Section 21(4) of MCOC act, since the right to speedy trial is supreme, it is required to be noted that above provisions carrying embargo for grant of bail under TADA Act, NDPS Act and MCOC Act are *pari materia*. It is true there is distinction qua UAPA act. However, that should not be hurdle in granting bail on the ground of infringement of Article 21 of Constitution of India. No decision has been brought to notice of the Court wherein bail has been refused by Supreme Court, in spite of accused being in prolonged custody on the basis of such restrictions. It is also pertinent to refer to extent to which such rigours can be interpreted while granting bail. In the case of Ranjitsingh Sharma Vs. State of Maharashtra and another 2005-ALL.MR (Cri)-1538-(SC), it is observed in quoted paragraphs as follows :

“28. Section 21 provides for modified application of certain provisions of the Code of Criminal Procedure, sub-section (4) whereof is as under :

(4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless -

(a) the Public Prosecutor has been given an opportunity to oppose the application of such release; and

(b) 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.”

45. The Act is deterrent in nature. It provides for deterrent punishment. It envisages three to ten years of imprisonment and may extend to life imprisonment. Death penalty can also be imposed if somebody commits a murder. Similarly, fines ranging between three to ten lakhs can be imposed.

46. Presumption of innocence is a human right (See Narendra Singh and another Vs. State of MP (2004)10-SCC-699:2004 ALL MR (Cri)2557 (SC). Para31). Article 21 in view of its expansive meaning not only protects life and liberty but also envisages a fair procedure. Liberty of a person should not ordinarily be interfered with unless there exist cogent grounds therefor. Sub-section (4) of Section 21 must be interpreted keeping in view the aforementioned salutary principles. Giving an opportunity to the public prosecutor to oppose an application for release of an accused appears to be reasonable restriction but Clause (b) of sub-section (4) of Section 21 must be given a proper meaning.

47. Does this statute require that before a person is released on bail, the Court, albeit prima facie, must come to the conclusion that he is not guilty of such offence ? Is it necessary for the Court to record such a finding ? Would there be any machinery available to the Court to ascertain that once the accused is enlarged on bail, he would not commit any offence whatsoever ?

48. Such findings are required to be recorded only for the purpose of arriving at an objective finding on the basis of materials on records only for grant of bail and for no other purpose.

49. We are furthermore of the opinion that the restrictions on the power of the Court to grant bail should not be pushed too far. If the Court, having regard to the materials brought on record, is satisfied

that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the Court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. If such an expansive meaning is given, even likelihood of commission of an offence under Section 279 of the Indian Penal Code may debar the Court from releasing the accused on bail. A statute, it is trite, should not be interpreted in such a manner as would lead to absurdity. What would further be necessary on the part of the Court is to see the culpability of the accused and his involvement in the commission of an organized crime either directly or indirectly. The Court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea. Every little omission or commission, negligence or dereliction may not lead to a possibility of his having culpability in the matter which is not the sine qua non for attracting the provisions of MCOCA. A person in a given situation may not do that which he ought to have done. The Court may in a situation of this nature keep in mind broad principles of law that some acts of omission and commission on the part of a public servant may attract disciplinary proceedings but may not attract a penal provision.

55. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the Court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the Legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the Court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the Court will be required to record a

finding as to the possibility of his committing a crime after grant of bail. However, such an offence in future must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.”

30. Thus, embargo under the provisions of Special Acts shall not be an impediment in grant of bail by this Court on the ground of incarceration of accused in custody for a long time, more particularly in the light of various decisions of Supreme Court.

31. The Division Bench in a recent decision delivered in Criminal Appeal No.389 of 2020 in the case of NIA Vs. Areeb Ejaz Majeed (supra) has dealt with a similar issue. The respondent therein was prosecuted by NIA under the provisions of UAPA Act. He was arrested on 29th November 2014. He had preferred applications for bail which were rejected. Subsequently he was granted bail by NIA Court. While passing the order granting bail the Special Court proceeded on two aspects, firstly that the pace of the trial was slow and there was likelihood that there was long time for examining the remaining witnesses. The NIA Court concluded that since law laid down by Hon'ble Supreme Court in Shaheen Welfare Association (supra) apply in favour of accused, the bail application should be granted on the aspect of the matter. The other aspect which was considered by the NIA Court was that the witnesses were examined before the said Court and prima facie case is not made out. The Court, therefore, held that even taking recourse to Section 43-D(5) of NIA Act, the accused is entitled to be released on bail. Other decisions of the Supreme Court were placed for consideration before

the Court. The accused was in custody for a period of six years. About 107 witnesses were remained to be examined. The NIA Court considered the decisions in the case of Union of India Vs. K.A.Najeeb (supra) and Shaheen Welfare Association (supra). Bail was granted on the ground that accused is in jail for six years and also on the basis of evidence adduced before Trial Court. Previous applications were rejected on merits and only on the basis of evidence which was recorded subsequently the NIA Court came to the conclusion with regards to the prima facie case against accused when the accusations had rendered twice by rejecting previous applications for bail. The Division Bench accepted the contention of appellant that in view of previous rejection of bail application, on the basis of evidence recorded by the Court, the Court could not have granted bail on merits. The Division Bench also observed that case of the accused on second aspect of the matter appears to be on firm footing. In paragraph 29 it is observed as follows :

“29. There is no dispute about the fact that right to fair and speedy trial is a right recognized under Article 21 of the Constitution of India. The Hon’ble Supreme Court and various High Courts including this High Court have consistently held that undertrials cannot be allowed to languish for years together in jail while the trial proceeds at the snail’s pace. If ultimately the accused are found to be not guilty, the number of years, months and days spent by such accused as undertrials in jail, can never be given back to them and this is certainly a violation of their valuable right under Article 21 of the Constitution of India. Therefore, right to speedy trial has been recognized and reaffirmed consistently by the judgments of the superior courts.”

In paragraph 31 the Division Bench has observed that :

“In cases where the accused are facing charges under special Acts like UAPA Act, parameters for grant of bail are more stringent as a consequence of which the undertrials in such cases remain in custody while the trials are pending. This is because they are accused in serious and heinous offences and their rights are required to be balanced with the rights of the society and citizens at large. The Courts then are required to perform a balancing act, so as to ensure that a golden mean is reached between the rights of the individual and those of the society at large.”

In paragraph 32 the Court then referred to the decision of Supreme Court in the case of Shaheen Welfare Association (supra) wherein it was held that long time taken by courts in disposal of the cases would justify invoking Article 21 of Constitution of India to issue directions to release the undertrials on bail. By analyzing the facts of the case and considering the fact that accused was in custody for a substantial period of time, it was held that it cannot be said that the NIA Court committed an error in granting bail to the accused. The Court did not distinguish the order granting bail on the basis that the effect of rigours under Section 43-D(5) of UAPA Act is lesser than other Special Laws.

32. In the case of Union of India Vs. K.A.Najeeb (supra), the Supreme Court has considered the stringent conditions for grant of bail under Section 43-D(5) of UAPA Act. In the said case the accused was in custody for the offences under UAPA Act. In the case of The NIA Vs. Areeb Ejaz Majeed (supra), the accused was tried for the offences under UAPA Act. In both the cases, the accused was granted bail by High Court and NIA Court on the ground that accused was in

custody without trial for long period of time, which affected his right under Article 21 of Constitution of India. Both the orders were confirmed by the Appellate Courts.

33. In the case of Supreme Court Legal Aid Committee (supra), the Court had directed proviso for grant of bail that benefit of direction in clause (ii) and (iii) shall not be available to those persons who are in the opinion of the Trial Court for the reasons to be stated in writing likely to tamper with evidence or influence the prosecution witnesses. In the case of Shaheen Welfare Association (supra), it was cautioned that bail can be granted unless Court comes to conclusion that their antecedents are such that releasing them may be harmful to the lives of complainant, family members of complainant or witnesses. In the case of Hussainara Khatoon, it was observed that sympathy for undertrials who are in jail for long terms on account of pendency of cases, has to be balanced having regard to impact of crime. The Division Bench of this Court, in the case of NIA Vs. Areeb Majeed has observed that in cases under Special Acts, parameters for grant of bail are more stringent and they remain in custody. The courts are required to perform balancing act, so as to reach a golden mean in between the rights of an individual and those of society at large. The court has to look into those aspects while granting bail even on the ground that the undertrial is in prolonged custody.

34. In the light of observations of Supreme Court and this Court as stated above, the Court has to perform balancing act. The sympathy for undertrials who are in custody has to be balanced with gravity/magnitude of crime, likelihood of threat to witnesses. The analysis may be based on facts of each case.

35. I have analyzed the factual aspects of the matter as stated above and noted that in spite of expediting the trial vide order dated 14th October 2019 and directing the Trial Court to conclude the trial within a period of nine months, there is no progress in the trial. The applicant has remained in custody without charge being framed against him. This clearly violates the right of applicant under Article 21 of Constitution of India. The applicant has been seeking bail on the ground of prolonged custody. In the previous application for bail it was contended that applicant is in custody for three years. This Court had expedited trial, instead of granting bail. However, even after two and half years thereafter, there is no progress in trial. Prolonged custody infringes Article 21 of Constitution of India. The Trial Court had stated that there were difficulties on account of lock down due to pandemic of Covid-19. The situation has not improved. It is not clear as to when the trial would commence and conclude. There is no evidence that applicant has tried to tamper with evidence.

36. Hence, I pass following order :

ORDER

- (i) Bail Application No.430 of 2021 is allowed and disposed of;
- (ii) The applicant is directed to be released on bail in CR No.II-7 of 2016 registered with Wada Police Station, District – Palghar, on his executing PR bond in the sum of Rs.1,00,000/- with one or more sureties in the like amount;
- (iii) The applicant shall report Palghar Police Station once in a month on every first Saturday between 11 am and 1 pm till conclusion of trial;

- (iv) The applicant shall not leave India without prior permission of Special Court;
- (v) The applicant shall deposit his passport before Special Court;
- (vi) The applicant shall not tamper with evidence;
- (vii) The applicant shall furnish details of his residence to the Trial Court as well as Palghar Police Station.

(PRAKASH D. NAIK, J.)

MST