

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

CRIMINAL BAIL APPLICATION NO. 523 OF 2022

Pravin Dilip Waghela ...Applicant
Versus
State Of Maharashtra ...Respondent

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Mr. A. P. Mundargi, Sr. Advocate a/w Mr. Ayaz Khan i/by Mr. Hrishikesh Mundargi, Advocate for the Applicant.

Ms. P. N. Dabholkar, APP for the Respondent – State.

CORAM : PRAKASH D. NAIK, J.
DATE : 26th APRIL, 2022.

PER COURT:

1. This is an application for bail in C.R. No.2 of 2017 registered with Anti-Narcotic Cell, Ghatkopar Unit, Mumbai on 9th January, 2017 for offences punishable under Section 8(c) r/w Section 22(c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'NDPS Act').

2. The previous application for bail viz. Criminal Bail Application No.3008 of 2018 was disposed of vide order dated 18th December, 2018. Since the Court was not inclined to grant bail, the Advocate for the applicant sought permission to withdraw the application and prayed that the trial may be expedited. Without making any observations on merits of the case, the application was allowed to be withdrawn and considering the fact that the

applicant is in custody, the trial Court was directed to make endeavour to complete the trial expeditiously.

3. The applicant thereafter preferred application for bail before trial Court. It was contended that, the charge in this case was framed on 15th June, 2019. Thereafter, six witnesses were examined. The applicant is in custody for more than four years. There are serious discrepancies in evidence. The panchas are habitual. There is non compliance of Section 42 of NDPS Act. The learned Special Judge, observed that, the applicant is in custody for five years. Trial was expedited by High Court. Six witnesses are examined by prosecution. Prosecution has cited list of 25 witnesses. Prosecution cannot be held responsible for delay in trial. There are may material witnesses, who are yet to be examined. The application was rejected by order dated 29th January, 2022.

4. The case of the prosecution is that on 9th January, 2017 information was received by Anti-Narcotic Cell, Ghatkopar Unit, Mumbai that, a person by name Pravin Waghela is in the business of Mephedrone. On 9th January, 2017 the said person is coming in Honda Civic Car for selling contraband to his customers at Chedda Nagar Bus stop. The information was reduced into writing. Raid was organised. The said person came in his car. He was apprehended. 200 gms. Mephedrone was found in his pant

pocket. 10 Kg. Mephedrone was recovered from car. FIR was registered. Panchanama was recorded on 10th January, 2017. The arrested accused applicant led the Police to Karnataka. Certain chemicals and drugs were seized. Accused No.2 was arrested on 12th January, 2017. On the statement of co-accused accused No.3 was arrested on 11th February, 2017. On completing investigation, charge-sheet was filed.

5. Vide order dated 31st January, 2022, the trial Court was requested to forward the report about status of the trial. The report dated 8th April, 2022 was received from the trial Court.

6. Learned counsel for the applicant submitted that the applicant is in custody for a period of about five years. Although the trial had commenced, the prosecution has so far examined six witnesses and several witnesses are yet to be examined. The applicant cannot be kept in custody for indefinite period. Although the trial was expedited by this Court, it is not yet over. Incarceration of the accused in custody for indefinite period affects the fundamental right of the accused under Article 21 of the Constitution of India. Vide reply filed before the Special Judge, the prosecution had contended that about 25 witnesses were yet to be examined by the prosecution. Trial will not be concluded in near future.

7. Learned counsel for the applicant relied upon following decisions :-

- i.** Order dated 16th August, 2021 passed by the Hon'ble Supreme Court in the case of Mukesh V/s. The State of Rajasthan in Criminal Appeal No.824 of 2021.
- ii.** Order dated 7th February, 2020 passed by the Hon'ble Supreme Court in the case of Chitta Biswas Alias Subhas V/s. The State of West Bengal in Criminal Appeal No(s).245 of 2020.
- iii.** Order dated 7th October, 2021 passed by the Hon'ble Supreme Court in the case of Tapan Das V/s. Union of India in Special Leave Petition (Cri.) No.5617 of 2021.
- iv.** Order dated 3rd August, 2021 passed by this Court in the case of Pramod Krishna Pandey V/s. The State of Maharashtra in Criminal Bail Application No.2103 of 2021.
- v.** Order dated 5th January, 2022 passed by this Court in Bail Application No.430 of 2021 in the case of Sachin Atmaram Vartak V/s. The State of Maharashtra.
- vi.** Order dated 31st March, 2022 passed by this Court in the case of Sajid Yusuf Electricwalla V/s. The State of Maharashtra in Bail Application No.3076 of 2021.

8. Learned APP submitted that the trial had already commenced. The prosecution has examined seven witnesses. The delay is not caused by the prosecution. There is recovery of

contraband from the applicant. The trial can be expedited. The trial Court can be directed to conduct the trial on day to day basis. The decisions relied upon by the learned counsel for the applicant were delivered in the facts of the said cases and the same are not applicable in this case. On instructions it is submitted that the prosecution proposes to examine about 17 more witnesses. The report from trial Court indicate that efforts are made by trial Court to dispose of case by giving top priority.

9. It is not disputed that the applicant is in custody from 9th January, 2017. The previous application preferred by the applicant was allowed to be withdrawn with directions to the trial Court to make an endeavour to complete the trial expeditiously. The charge was framed on 15th June, 2019. The report dated 8th April, 2022 submitted by the trial Court mentions that the prosecution had cited list of 40 witnesses. The evidence of six prosecution witnesses has been recorded and the seventh witness is under cross examination. Due to Covid-19 pandemic situation and SOP, trial could not be proceeded regularly. Attempts are made to dispose of the matter giving shorter dates but due to unavoidable circumstances and lengthy evidence in the matter, it takes lot of time to complete the deposition of witnesses. Seventh witness is under examination since 3rd December, 2021. The accused were

not produced in the Court on 3rd December, 2021. The examination of PW-7 conducted and at the request of learned APP examination-in-chief was deferred till next day since according to APP presence of accused was necessary for identification purpose. was deferred till the next date. The prosecution filed an application for permission to lead the secondary evidence in respect of panchanama dated 10th January, 2017. Say was filed by the accused to the said application on 16th December, 2021. Application was adjourned to 24th December, 2021. On 24th December, 2021 witness was absent and accused was not produced. On 27th December, 2021 witness was absent. Accused were produced. Arguments were heard. On 6th January, 2022 application was allowed. Accused No.1 preferred an application for bail which was rejected on 29th January, 2022. On 15th February, 2022 the evidence of PW-7 was recorded partly and at the request of the witness it was adjourned. The examination-in-chief of PW-7 was concluded on 9th March, 2022. The cross examination has commenced on 4th April, 2022. The case was adjourned to 4th April, 2022 and thereafter to 19th April, 2022 for further cross examination of PW-7. The Court has other time bound matters and expedited matters and the Court is trying to dispose of the case by giving priority.

10. In the reply dated 23rd September, 2021 filed by the prosecution to application for bail preferred by the applicant before trial Court it was stated that 25 more witnesses are yet to be examined by the prosecution.

11. In the case of Mukesh V/s. The State of Rajasthan (supra) the appellant was prosecuted for the offences under Sections 8 & 15 of the NDPS Act, 1985. He has been in custody for a period of less than 5 years. Eleven witnesses out of Eighteen were examined before the trial Court. The witnesses to the seizure were hostile. The appeal was allowed and the appellant was directed to be released on bail. In the case of Chitta Biswas Alias Subhas V/s. The State of West Bengal (supra) the appellant was prosecuted for offence under Section 21-c of the NDPS Act, 1985. He was arrested on 21st July, 2018. Out of ten witnesses cited by the prosecution, four witnesses were examined in the trial. Without expressing any opinion on the merits or demerits of the rival submissions and considering the facts and circumstances on record, the Hon'ble Supreme Court granted bail to the appellant vide order dated 7th February, 2020. In the case of Tapan Das V/s. Union of India (supra) the appellant/accused was in custody since 16th October, 2017 and suffered incarceration for around 4 years. It was observed that there is no likelihood of completion of the trial in the

near future. The appellant was granted bail vide order dated 7th October, 2021. This Court in the case of Pramod Krishna Pandey V/s. The State of Maharashtra (supra) granted bail to the applicant therein who was prosecuted for offences under Section 8(c) r/w Sections 22(c), 28, 29 & 30 of the NDPS Act. His previous application was allowed to be withdrawn since the Court had expedited the trial. The said order was challenged before the Hon'ble Apex Court. The Hon'ble Apex Court had issued directions to complete the trial with liberty to prefer application for bail, in the event, the trial is not completed within stipulated time. In the case of Sajid Yusuf Electricwalla V/s. The State of Maharashtra (supra), the accused was prosecuted for offence under the NDPS Act. The applicant was in custody for a period of about seven and half years. He was granted bail. In the case of Sachin Atmaram Vartak V/s. The State of Maharashtra (supra) the applicant was in custody for a period of five and half years. He was granted bail after relying upon several decisions of the Hon'ble Apex Court on the ground that he was in prolonged custody.

12. The applicant herein is in custody for more than 5 years. Before the trial Court, prosecution had contended that, 25 more witnesses are examined. In this application, it is submitted by prosecution that 17 more witnesses are to be examined.

Assuming that prosecution is yet to examine 17 more witnesses, it is difficult to assess how much period it is going to take to conclude the trial.

13. In the case of Shaheen Welfare Association Vs. Union of India and others (1996) 2-SCC-616, 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 they 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.

14. In the case of Sanjay Chandra Vs. CBI – AIR-2012-SC-830, 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 preventive. 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 un-convicted 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.

15. In the case of Thana Singh Vs. Central Bureau of Narcotics – (2013)2-SCC-590, 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.

16. In the case of Hussain and another Vs. Union of India (2017) 5-SCC-702, 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.

17. In Abdul Rehman Antulay Vs. R.R.Nayak (1992)1-SCC-225, held 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.

18. 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.

19. The settled principle of law is that prolonged custody affects fundamental rights under Article 21 of Constitution of India.

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.

20. 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 (2021)3-SCC-713, 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).

21. In paragraph 12 of the decision in Union of India Vs. K.A.Najeeb (supra), 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.”

22. 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.

23. Observations in paragraphs 15 to 18 of the decision in Union of India Vs. K.A.Najeeb (supra) 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."

24. 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.

25. 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.”

26. 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.

27. 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 UAPA 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.

28. 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.

29. 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.

30. 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.

31. In light of the aforesaid facts, the applicant is entitled for bail. Hence, I pass the following order :-

ORDER

- i.** Criminal Bail Application No. 523 of 2022 is allowed;
- ii.** The applicant is directed to be released on bail in connection with C.R. No.2 of 2017 registered with Anti-Narcotic Cell, Ghatkopar Unit, Mumbai on executing P.R. Bond in the sum of Rs.50,000/- with one or more sureties in the like amount;
- iii.** The applicant shall report Anti-Narcotic Cell, Ghatkopar Unit, Mumbai once in a month on first Saturday of the month between 11:00 a.m. to 1:00 p.m. till conclusion of trial;
- iv.** The applicant shall not tamper with the evidence.

v. The applicant is permitted to furnish cash bail in the sum of Rs.50,000/- for a period of eight weeks in lieu of surety.

vi. The applicant shall attend Trial Court regularly on the date of hearing of the case unless exempted by the Court.

vii. The applicant shall cooperate in concluding the trial.

viii. Application stands disposed of accordingly.

(PRAKASH D. NAIK, J.)