

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

213

CRM-M-42582 of 2021
Date of Decision:01.12.2022

Elezabaith Moto @ Leej

....Petitioner

Versus

State of Punjab

.....Respondent

CORAM: HON'BLE MR. JUSTICE JASGURPREET SINGH PURI

Present: Mr. Arjun Veer Sharma, Advocate
for the petitioner.

Mr. Amit Rana, Senior Deputy Advocate General, Punjab

JASGURPREET SINGH PURI, J. (Oral)

The present petition has been filed under Section 439 of the Code of Criminal Procedure for the grant of regular bail to the petitioner in FIR No.90 dated 16.05.2021, under Sections 21(c) of the NDPS Act, registered at Police Station Shahkot, Jalandhar.

It has been submitted by the learned counsel for the petitioner that the petitioner is in custody from 16.05.2021, which is almost more than 1½ years. He submitted that it is a case where the petitioner is a lady of the age of about 30 years and is a foreign national who has been falsely implicated in the present case by the police authorities. He submitted that the petitioner is not a habitual offender and is not involved in any other case. He further submitted that the charges in the present

case were framed on 28.09.2021 but more than one year has lapsed and only one prosecution witness has been examined and that too a formal witness namely Constable Nishan Singh who sent the sample to the Forensic Science Laboratory. He submitted that the petitioner is entitled for the grant of regular bail due to the following reasons:-

(i) The offer under Section 50 of the NDPS Act which was given to the petitioner was totally defective and there is a direct violation of mandatory provision of Section 50 of the NDPS Act and therefore the recovery itself gets vitiated. He referred to the photocopy of the notice under Section 50 of the Act and supplied a copy to this Court during the course of arguments. The aforesaid photocopy is hereby taken on record as Mark-X and a copy of the same has been supplied to the learned State counsel. While referring to the notice, he submitted that at the first instance notice was given by making an offer to the petitioner that the authorised officer who was the Sub-Inspector has suspicion that the petitioner and the other co-accused are possessing some contraband/drug and that the petitioner has a legal right to get herself searched either from some senior officer or Magistrate or gazetted officer to which the petitioner stated that she wants to get herself searched from a senior officer. He referred to the provisions of Section 50 of the Act and submitted that it is the clear intent of the legislature to provide for only two authorities i.e. a Magistrate or a gazetted officer and the authorised officer who made an offer had no jurisdiction or power to expand the scope of Section 50 of the Act and to give a third offer and therefore on the face of it the offer was totally defective and the recovery if any gets vitiated. He referred to two judgments passed by this Court in Simrandeep Singh @ Soni versus State of

Haryana (CRM-M-7980 of 2022, date of decision 12.10.2022 and Amarjit Singh versus State of Punjab (CRM-M-46182 of 2021, date of decision 16.08.2022) in this regard and contended that in view of the violation of the provisions of Section 50 of the Act which provide safeguard, the petitioner is entitled for the grant of regular bail.

(ii) Learned counsel submitted that the charges in the present case were framed on 28.09.2021 and thereafter 14 adjournments were granted but only one prosecution witness i.e. Constable Nishan Singh has been examined who was none other than the person who had sent the sample to the FSL. He submitted that there were about five persons in the police party which allegedly raided the place which included one ASI, S/CT, L/C, PHG who are the material official witnesses and all of them have been evading from the Court and did not depose before the Court for more than one year and there was no justification as to why they have absented themselves from the Court and not deposed for more than one year and two months with the result that the entire trial has got delayed. He referred to the photocopies of the zimni orders which the learned counsel has supplied during the course of arguments and the same are hereby taken on record as Mark-Y. While referring to the aforesaid zimni orders, he submitted that for a number of times the case was adjourned because the co-accused namely Shammi Kapoor had filed an application for personal exemption and the prosecution witnesses were summoned from time to time. Even one witness who was formal witness i.e. PW1 Nishan Singh after his statement was recorded in examination-in-chief the same was deferred for cross-examination and he also did not turn up and consequently the learned Judge, Special Court on 12.07.2022 issued bailable warrants against him and thereafter

he was examined.

Learned counsel has submitted that when the criminal law is set into motion by the police itself and after the framing of the charges more than one year and two months the police itself makes a default in appearing before the Court for deposition despite the fact that for a number of times summons were issued would mean that the petitioner has been falsely implicated in the present case. He submitted that no justification has come forward as to what prevented the prosecution witnesses who are the raiding party to have deposed before the Court. He has referred to a recent judgment of the Hon'ble Supreme Court **Satender Kumar Antil v. Central Bureau of Investigation and another** 2022 AIR (SC) 3386 and contended that right to speedy trial is a right guaranteed under Article 21 of the Constitution of India. He also submitted that it was not due to the fault of the petitioner but it was only because of the fault of the prosecution itself that the trial has been delayed and consequently the petitioner who is a lady and a foreign national had to suffer incarceration for about 1½ years.

(iii) The petitioner is not a habitual offender and she is not involved in any other case.

On the other hand, Mr. Amit Rana, learned Senior Deputy Advocate General, Punjab has stated that it is correct that the petitioner has faced incarceration for about 1½ years and only formal witness i.e. Constable Nishan Singh who had sent the sample to the FSL has been examined till date. He submitted that he has sought instructions to say that the petitioner is not involved in any other case.

On a query being raised to learned State counsel during the course of

arguments as to what was the justification for the prosecution witnesses for not deposing before the trial court for more than one year and two months, he sought instructions from the police official who is present in Court and was not able to give any justification in this regard.

Another query was raised to learned State counsel during the course of arguments as to what is the justification for giving an offer pertaining to three persons including one senior officer which is not incorporated in the provisions of Section 50 of the Act, again he was not able to give any explanation in this regard. It may be noted here that when the offer with regard to three persons was given to the petitioner as per the offer memo, she had given consent for being searched from a senior officer which is apparent from the offer memo itself. Interestingly, the expression Senior officer is not mentioned anywhere in Section 50 of the Act.

I have heard the learned counsel for the parties.

The petitioner is a lady of the age of 30 years and is stated to be not a habitual offender and she is not involved in any other case. Dealing with the first ground raised by the learned counsel for the petitioner that there is a violation of Section 50 of the Act, this Court is of the considered view that the legislative intent under Section 50 of the Act is that when an offer is to be given for getting searched in the presence of a Magistrate or a gazetted officer, the scope of the same cannot be enlarged by the police authorities. The police officer has no power and has no jurisdiction to add or subtract any expression under the provisions of NDPS Act. Section 50 of the Act is aimed at providing safeguard to the accused and therefore on the face of it the police officer exceeded jurisdiction and apparently violated the provision of Section 50 of the Act.

The second argument which has been raised by the learned counsel for the petitioner with regard to non-deposition of the prosecution witnesses for more than one year and two months, the Hon'ble Supreme Court in *Antil's* case (supra) dealt with the issue of repeated adjournments and the right of the speedy trial. A perusal of the interlocutory orders/zimni orders which have been passed by the learned Judge, Special Court would show that 14 times the matter was adjourned but no material official witness has been examined and only a formal witness who was examined was Constable Nishan Singh. Therefore, this Court for the purpose of considering the petition for regular bail would draw an adverse inference against the prosecution since no justification has come from the State counsel as to why the police officers have absented themselves for a long period of time i.e. One year and two months which has prejudiced the right of the petitioner who is stated to be not a habitual offender.

In view of the aforesaid totality of facts and circumstances, this Court is of the considered view that this Court *prima facie* has reasons to believe at this stage at least that the petitioner is not guilty of the offence and so far as the second ingredient for making a departure from Section 37 of the NDPS Act is concerned, the petitioner is stated to be not a habitual offender and not involved in any other case. Apart from the same, it is not the case of the State counsel that in case the petitioner is released on bail, then he may repeat the offence or may abscond from justice. Therefore, both the conditions for making a departure from the bar contained in Section 37 of the NDPS Act remain satisfied.

In view of the aforesaid position, the present petition is allowed. The petitioner shall be released on regular bail subject to furnishing bail bonds/surety

to the satisfaction of the learned trial Court/Duty Magistrate concerned subject to further condition that if the passport of the petitioner has not been deposited either with the police or with a Judicial *Malkhana* then the same shall be deposited by the petitioner.

However, anything observed hereinabove shall not be treated as an expression of opinion on merits of the case and is only meant for the purpose of decision of present petition.

(JASGURPREET SINGH PURI)
JUDGE

December 01, 2022
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Whether speaking	:	Yes/No
Whether reportable	:	Yes/No