

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.54144 of 2022

Arising Out of PS. Case No.-217 Year-2017 Thana- RAXAUL District- East Champaran

Brijesh Rai @ Brejesh Rai Son of Suner Rai R/o village - Gayetri Nagar, P.S.-
Birganj, Dist.- Parsa (Nepal)

... .. Petitioner/s

Versus

The State of Bihar

... .. Opposite Party/s

Appearance :

For the Petitioner/s : Mr. Dhannjay Kumar No 2, Advocate

For the Opposite Party/s : Mr. Anil Kumar, APP

CORAM: HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA
ORAL ORDER

3 05-05-2023 Heard learned counsel for the petitioner and learned
APP for the State.

Petitioner seeks bail, who is in custody since
05.07.2017, in connection with N.D.P.S. Case No. 56/2017
arising out of Raxaul P.S. Case No. 217 of 2017, F.I.R. dated
04.07.2017 registered for the offences punishable under
Sections 20, 22, 23 and 24 of the N.D.P.S. Act.

The case relates to recovery of 8.400 Kg. of *Charas*.

Learned counsel for the petitioner submits that the
petitioner has clean antecedent and he has been falsely
implicated in the present case. He further submits that it
appears from the F.I.R. that 8.400 Kg. of contraband substance
i.e. Charas along with two Nepali currency of Rs. 50/- was
recovered from the conscious possession of the petitioner.



Earlier the bail petition of the petitioner was rejected vide order dated 27.11.2019 passed in Cr. Misc. No. 21887 of 2019.

Learned counsel for the petitioner submits that after 27.11.2019 the prosecution has not examined any witness.

Vide order dated 05.04.2023, a report was called for with respect to the stage of trial. The report of the learned trial Court dated 29.04.2023 reveals that out of six (6) chargesheet witnesses, only three (3) witnesses including the informant have already been examined and remaining three (3) chargesheet witnesses including the Investigating Officer are yet to be examined.

Learned counsel for the petitioner submits that in view of the report of the learned Trial Court, the trial is not concluded in near future and petitioner is in custody since 05.07.2017 (Approx for nearly 05 years and 10 months).

The punishment prescribed for the offence is Rigorous Imprisonment for a term which shall not be less than 10 years along with fine, which shall not be less than 10 years along with fine, which also shall not be less than Rs. 1,00,000/- (one lac).

The confirmed custody of the petitioner due to failure



of the prosecution in concluding the trial offends Section 309 of the Code of Criminal Procedure as well as Articles 14, 19 and 21 of the Constitution of India.

The learned counsel for the petitioner submits that this is the first offence, and the petitioner is in custody for nearly 05 years and 10 months. Court should allow the prayer for bail.

In support of his submissions, learned counsel for the petitioner has relied upon a judgment of the Apex Court in the case of **MOHD MUSLIM @ HUSSAIN VS. STATE (NCT OF DELHI)** reported in 2023 LiveLaw (SC) 260.

Learned counsel for the petitioner relied upon the aforesaid judgment referring the paragraph nos. 10, 11, 12, 13, 14, 15, and 16, which reads as follows :

10. Section 37 of the NDPS Act reads as follows:

“Offences to be cognizable and non-bailable—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973—

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless

—
(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) 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. (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force, or granting of bail.

11. In this case, as it stands, the appellant has been in custody since 03.10.2015, barring grant of interim bail from time to time, for wedding ceremonies and to take care of his ailing mother. It was observed by this court, in *State of Madhya Pradesh v. Kajad* while commenting on Section 37 of the NDPS Act, that a “liberal” approach should not be adopted:

“Negation of bail is the rule and its grant and exception under sub clause (ii) of clause (b) of Section 37(1). For granting the bail the court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail. It has further to be noticed that the conditions for granting the bail, specified in clause (b) of sub-section (1) of Section 37 are in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail.”

12. This court has to, therefore, consider the appellant’s claim for bail, within the framework of the NDPS Act, especially Section 37. In *Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India*¹⁰, this court made certain crucial observations, which have a bearing on the present case while dealing with denial of bail to those accused of offences under the NDPS Act:

“On account of the strict language of the said provision very few persons accused of certain offences under the Act could secure bail. Now to refuse bail on the one hand and to delay trial of cases on the other is clearly unfair and unreasonable and contrary to the spirit of Section 36(1) of the Act, Section 309 of the Code and



Articles 14, 19 and 21 of the Constitution. We are conscious of the statutory provision finding place in Section 37 of the Act prescribing the conditions which have to be satisfied before a person accused of an offence under the Act can be released. Indeed we have adverted to this section in the earlier part of the judgment. We have also kept in mind the interpretation placed on a similar provision in Section 20 of the TADA Act by the Constitution Bench in Kartar Singh v. State of Punjab [(1994) 3 SCC 569]. Despite this provision, we have directed as above mainly at the call of Article 21 as the right to speedy trial may even require in some cases quashing of a criminal proceeding altogether, as held by a Constitution Bench of this Court in A.R. Antulay v. R.S. Nayak [(1992) 1 SCC 225] , release on bail, which can be taken to be embedded in the right of speedy trial, may, in some cases be the demand of Article 21. As we have not felt inclined to accept the extreme submission of quashing the proceedings and setting free the accused whose trials have been delayed beyond reasonable time for reasons already alluded to, we have felt that deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21. Of course, some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21, which has to be telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness in procedural matters.”

13. When provisions of law curtail the right of an accused to secure bail, and correspondingly fetter judicial discretion (like Section 37 of the NDPS Act, in the present case), this court has upheld them for conflating two competing values, i.e., the right of the



accused to enjoy freedom, based on the presumption of innocence, and societal interest – as observed in *Vaman Narain Ghiya v. State of Rajasthan* (“the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal....”). They are, at the same time, upheld on the condition that the trial is concluded expeditiously. The Constitution Bench in *Kartar Singh v. State of Punjab* made observations to this effect. In *Shaheen Welfare Association v. Union of India* again, this court expressed the same sentiment, namely that when stringent provisions are enacted, curtailing the provisions of bail, and restricting judicial discretion, it is on the basis that investigation and trials would be concluded swiftly. The court said that Parliamentary intervention is based on:

“a conscious decision has been taken by the legislature to sacrifice to some extent, the personal liberty of an undertrial accused for the sake of protecting the community and the nation against terrorist and disruptive activities or other activities harmful to society, it is all the more necessary that investigation of such crimes is done efficiently and an adequate number of Designated Courts are set up to bring to book persons accused of such serious crimes. This is the only way in which society can be protected against harmful activities. This would also ensure that persons ultimately found innocent are not unnecessarily kept in jail for long periods.”

14. In a recent decision, while considering bail under the Unlawful Activities Act (Prevention) Act, 1967, this court in *Union of India v. K. A. Najeeb*¹⁴ observed that:

“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 v. State (NCT of Delhi), (1999) 9 SCC 252] , Babba v. State of Maharashtra, (2005) 11 SCC 569 and Umarmia v. 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.”

The court concluded that statutory restrictions like Section 43-D(5) of the UAPA, cannot fetter a constitutional court’s ability to grant bail on ground of violation of fundamental rights.

15. Even in the judgment reported as Vijay Madanlal Chaudhary v. Union of India¹⁵ this court while considering bail conditions under the Prevention of Money Laundering Act, 2002, held that:

“If the Parliament/Legislature provides for stringent provision of no bail, unless the stringent conditions are fulfilled, it is the bounden duty of the State to ensure that such trials get precedence and are concluded within a reasonable time, at least before the accused undergoes detention for a period extending up to one-half of the maximum period of imprisonment specified for the concerned offence by law.”

16. In the most recent decision, Satender Kumar Antil v. Central Bureau of Investigation prolonged incarceration and inordinate delay engaged the attention of the court, which considered the correct approach towards bail, with respect to several enactments, including Section 37 NDPS Act. The court expressed the opinion that Section 436A (which requires inter alia the accused to be enlarged on bail if the trial is not concluded within specified periods) of the Criminal Procedure Code, 1973 would apply:

“We do not wish to deal with individual enactments as each special Act has got an objective behind it, followed



by the rigour imposed. The general principle governing delay would apply to these categories also. To make it clear, the provision contained in Section 436-A of the Code would apply to the Special Acts also in the absence of any specific provision. For example, the rigour as provided under Section 37 of the NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person. We do feel that more the rigour, the quicker the adjudication ought to be. After all, in these types of cases number of witnesses would be very less and there may not be any justification for prolonging the trial. Perhaps there is a need to comply with the directions of this Court to expedite the process and also a stricter compliance of Section 309 of the Code.”

Learned counsel for the petitioner has also relied upon a judgment of the Hon’b’le Apex Court in the case of **Supreme Court Legal Aid Committee Representing Undertrial Prisoners vs. Union of India and Another** reported in (1994) 6 SCC 731, the directions and general terms and conditions laid down by the Apex Court in paragraph nos. 15 and 16, relevant extract of which reads as follows :

“....We were told by the learned Counsel for the State of Maharashtra that additional Special Courts have since been constituted but having regard to the large pendency of such cases in the State we are afraid this is not likely to make a significant dent in the huge pile of such cases. We, therefore, direct as under:

(i) Where the undertrial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is



charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the concerned Special Judge with two sureties for like amount.

(ii) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs. 50,000 with two sureties for like amount.

(iii) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.

(iv) Where an undertrial accused is charged for the commission of an offence punishable under [Sections 31](#) and [31A](#) of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order.

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

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



of the undertrial accused;

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

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

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

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

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

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

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

16. We may state that the above are intended to



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

Directions issued in the case of ***Supreme Court Legal Aid Committee (Supra)*** was made applicable to the State of Bihar and some other States by subsequent order passed in the same case which has been reported in ***(1995)4 SCC 695***.

Learned counsel for the petitioner submits that in the present case, it is admitted fact that the petitioner is in custody since 05.07.2017 almost 05 years and 10 months.

The learned Additional Public Prosecutor for the State has vehemently opposed the prayer for bail of the petitioner and submits that the recovered contraband is *Charas* and referring to Section 37 of the N.D.P.S. Act has submitted that unless this Court comes to a finding for the purposes of grant of bail that offence is not made out, the petitioner would not be entitled to the privilege of bail but fairly submits that the petitioner is in custody since 05.07.2017 and as per the report of the learned



Trial Court, only three (3) witnesses have been examined as yet.

Considering the rival submissions, the period of custody and judgements of the Hon'ble Apex Court in the case of **MOHD MUSLIM @ HUSSAIN VS. STATE (NCT OF DELHI) reported in 2023 LiveLaw (SC) 260** as well as in the case of **Supreme Court Legal Aid Committee Representing Undertrial Prisoners vs. Union of India and Another reported in (1994) 6 SCC 731**, this Court is of the view that case has been made out for grant of bail to the petitioner.

Let the petitioner, above named, be released on bail on furnishing bail bond of Rs. 25,000/- (Rupees Twenty Five Thousand) with two sureties of the like amount each to the satisfaction of learned 1st Additional District & Sessions Judge cum-Special Judge (N.D.P.S.), East Champaran at Motihari, in connection with N.D.P.S. Case No. 56 of 2017 arising out of Raxaul P.S. Case No. 217 of 2017, subject to the following conditions :-

(1) Petitioner shall co-operate in the trial and shall be properly represented on each and every date fixed by the Court and shall remain physically present as directed by the Court and on his absence on two consecutive dates without sufficient reason, his bail bond shall be cancelled by the Court below.



(2) If the petitioner tampers with the evidence or the witness, in that case, the prosecution will be at liberty to move for cancellation of bail.

(3) And, further condition that the court below shall verify the criminal antecedent of the petitioner and in case at any stage, it is found that the petitioner has concealed his criminal antecedents, the court below shall take step for cancellation of bail bond of the petitioner. However, the acceptance of bail bonds in terms of the above-mentioned order shall not be delayed for purpose of or in the name of verification.

(Rajesh Kumar Verma, J)

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