

223

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

CRM-M-3360-2023

Date of Decision: 18.04.2023

Nirmal Singh @ Babbi

..... Petitioner

Versus

State of Punjab

..... Respondent

CORAM: HON'BLE MR. JUSTICE JASGURPREET SINGH PURI

Present: Mr. J.K. Singla, Advocate, Advocate,
for the petitioner.

Ms. Akshita Chauhan, DAG, Punjab.

JASGURPREET SINGH PURI, J. (ORAL)

The present is a second petition filed under Section 439 of the Code of Criminal Procedure for grant of regular bail to the petitioner in case bearing FIR No.118 dated 10.08.2020, under Section 22, 29 of the N.D.P.S. Act, 1985, registered at Police Station Joga, District Mansa.

It has been submitted by learned counsel for the petitioner that the petitioner is in custody since 10.08.2020, which is more than 2 years and 8 months and the charges in the present case were framed by the learned trial Court on 18.02.2021 which is also 2 years and 2 months ago but till date only one prosecution witness has been examined in full and another prosecution witness has been examined in part. He further submitted that the petitioner has been falsely implicated in the present case due to previous enmity and that was the reason as to why for a long time after the framing of the charges, prosecution witnesses have not turned up for deposition with

the result that the petitioner had to face incarceration for more than 2 years and 8 months for no fault of his.

During the course of arguments, the learned counsel for the petitioner supplied the photocopy of the zimni orders which were passed by the learned trial Court after the framing of the charges. The aforesaid zimni orders as supplied by the learned counsel for the petitioner are hereby taken on record and marked as 'X'. While referring to the aforesaid zimni orders, he submitted that the learned trial Court had adjourned the trial for about 23 times after the framing of the charges and for about 4 times bailable warrants were issued against the prosecution witnesses and for 2 times non-bailable warrants were issued against the prosecution witnesses, who were none other than those police officials, who had set the criminal law into motion. He also submitted that a perusal of the order dated 17.03.2021, which was just after the framing of the charges, would show that one of the prosecution witness, namely, SC Jaswinder Singh had refused the service of summons and thereafter, for number of times, summons were issued to him and he was even bound down, and thereafter, he has been examined. He further submitted that even otherwise the aforesaid SC Jaswinder Singh is the person who had only deposited the samples before the laboratory and he was not even material witness and the person, who had apprehended the petitioner, namely, Naib Singh was also summoned repeatedly and he was examined in part on 04.04.2022 and thereafter, for a number of times, summons etc. were issued to him and more that one year has elapsed, he did not come to the Court for cross-examination and he was examined in part more than one year ago. He further submitted that the plea taken by the

petitioner that he has been falsely implicated, is fortified and substantiated from the conduct of the police officials as aforesaid, and therefore, the petitioner may be considered for grant of regular bail. He also submitted that it was not the fault of the petitioner that he had to face incarceration for more than 2 years and 8 months but it was a pure and clear fault of the prosecution witnesses, as is apparent from the zimni orders, which have been produced in the Court today.

Learned counsel for the petitioner has referred to a judgment of the Hon'ble Supreme Court passed in "**Satender Kumar Antil Vs. Central Bureau of Investigation and another**", 2022(10) SCC 51, to contend that the Hon'ble Supreme Court has discussed the serious issue with regard to repeated adjournments and its effect upon the Right to Life under Article 21 of the Constitution of India. He also referred to a latest judgment of the Hon'ble Supreme Court passed in **Criminal Appeal No.943 of 2023** titled as "**Mohd. Muslim @ Hussain Vs. State (NCT of Delhi)**" decided on 28.03.2023 to contend that when there is a long delay in the trial and especially when it is not the fault of the accused and in that situation even the effect of Section 37 of the NDPS Act will be diluted in the given facts and circumstances of each and every case.

On the other hand, Ms. Akshita Chauhan, learned DAG, Punjab has stated that it is correct that the petitioner has faced incarceration for more than 2 years and 8 months and the charges in the present case were framed on 18.02.2021 which is also more than 2 years and till date only one witness, namely, SC Jaswinder Singh has been examined, who had only deposited the samples and one more witness has been examined in part only,

who had apprehended the petitioner. She has however opposed the grant of regular bail to the petitioner on the ground that the recovered quantity from the petitioner and the other co-accused was 1950 tablets of *Tramadol* which falls in the category of commercial quantity, and therefore, the prayer of the petitioner is hit by the bar contained under Section 37 of the NDPS Act.

I have heard the learned counsel for the parties.

It is a case where the petitioner has faced incarceration for more than 2 years and 8 months. The learned counsel for the petitioner during the course of argument has supplied photocopy of the zimni orders which are marked as 'X' and a perusal of the same would show that the charges in the present case were framed on 18.02.2021, which is more than 2 years ago and repeatedly for 23 times, adjournments were granted by the trial Court out of which for 4 times, bailable warrants were issued against the prosecution witnesses, who are none others but those police officials, who had set the criminal law into motion and that too at the initial stages they were served and warrants were issued for a number of times. Thereafter, for 2 times even non-bailable warrants were issued against the prosecution witnesses. In the NDPS matters normally the prosecution witnesses are the police officials unless there is some independent or private witnesses and these are the police officials who had set the criminal law into motion and it becomes the duty of those police officials to come forward and depose before the Court in accordance with law and whereas in the present case repeatedly they have been summoned and even bailable and non-bailable warrants were issued against them but they did not care to depose before the Court. The only witness who has been examined in full is SC Jaswinder Singh who is stated

to be no other but a person who had deposited the samples to the laboratory. As per the learned counsel for the parties, the aforesaid witness was not a part of the police party. However, one Naib Singh, who was part of the police party and had allegedly apprehended the petitioner and the other co-accused was examined in part on 04.04.2022 and till date he has not been examined in full although more than one year has elapsed and he was summoned repeatedly thereafter. It is very surprising to note that as to why the police officials, who are the prosecution witnesses, have not cared to depose before the Court for more than 2 years after the framing of the charges and the net result of the same was that the petitioner had to face incarceration for more than 2 years and 8 months.

During the course of arguments, this Court had raised a specific query to the learned State counsel that as to what was the justification as to why in the present case the prosecution witnesses have not deposed before the Court for more than 2 years after the framing of the charges to which she could not offer any justification or explanation in this regard.

The Hon'ble Supreme Court in *Satender Kumar Antil's case (supra)* discussed this issue with regard to delay in trial and its effect on the right to life under Article 21 of the Constitution of India. Para No.40 of the aforesaid judgment is reproduced as under:-

“40. Sub-section (1) mandates courts to continue the proceedings on a day-to-day basis till the completion of the evidence. Therefore, once a trial starts, it should reach the logical end. Various directions have been issued by this Court not to give unnecessary adjournments resulting in the witnesses being won over. However, the non-compliance of Section 309 continues

with gay abandon. Perhaps courts alone cannot be faulted as there are multiple reasons that lead to such adjournments. Though the section makes adjournments and that too not for a longer time period as an exception, they become the norm.

We are touching upon this provision only to show that any delay on the part of the court or the prosecution would certainly violate Article 21. This is more so when the accused person is under incarceration. This provision must be applied inuring to the benefit of the accused while considering the application for bail. Whatever may be the nature of the offence, a prolonged trial, appeal or a revision against an accused or a convict under custody or incarceration, would be violative of Article 21. While the courts will have to endeavour to complete at least the recording of the evidence of the private witnesses, as indicated by this Court on quite a few occasions, they shall make sure that the accused does not suffer for the delay occasioned due to no fault of his own.”

Now recently, Hon’ble Supreme Court in ***Mohd. Muslim @ Hussain's case (supra)*** also discussed the issue with regard to delay in trial and the long custody of the accused person *vis-a-vis* the bar contained Section 37 of the NDPS Act. The relevant Paras of the aforesaid judgment is reproduced as under:-

“19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted

under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

20. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India v. Rattan Malik¹⁹). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.”

The facts and circumstances of the present case and a perusal of the zimni orders and the submissions made by the learned counsel for the parties would show that there is no justification which has come forth that as to why the prosecution witnesses have been evading the service and even warrants were issued against them and consequently, the trial Court had to adjourn the trial for about 23 times out of which 4 times bailable warrants were issued and for 2 times non-bailable warrants were issued and at the

initial stages after the framing of the charges, the witness who has been examined in full had rather refused to the service of summons, therefore, this Court has got no other option except to draw an adverse inference against the prosecution for the purpose of considering the grant of regular bail and while considering the argument raised by the learned counsel for the petitioner that the petitioner was falsely implicated in the present case.

Therefore, considering the totality of the facts and circumstances of the present case as aforesaid, this Court has *prima facie* reasons to believe that at least at this stage only for the purpose of considering the prayer of regular bail that the petitioner is not guilty of offence. Furthermore, it is not the case of the State nor it has been so argued by the learned State counsel that in case the petitioner is released on regular bail then he may repeat the offence or may abscond or flee from justice or he may influence the witnesses. Therefore, both the ingredients for making a departure from the bar contained Section 37 of the NDPS Act remain satisfied.

Apart from the above, in view of the aforesaid judgment of the Hon'ble Supreme Court passed in ***Mohd. Muslim @ Hussain's case (supra)***, the custody of the petitioner and considering the facts and circumstances of the present case, would also become a ground for making a departure from the aforesaid bar contained under Section 37 of the NDPS Act.

Therefore, considering the aforesaid facts and circumstances of the present case especially in the light of the long custody of the petitioner and in the light of Article 21 of the Constitution of India, the present petition

deserves to succeed.

Consequently, the present petition is allowed and the petitioner is ordered to be released on regular bail on furnishing bail bond/surety bond to the satisfaction of the trial Court/Duty Magistrate concerned, if not required in any other case.

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.

18.04.2023
Bhumika

(JASGURPREET SINGH PURI)
JUDGE

- | | |
|-------------------------------|--------|
| 1. Whether speaking/reasoned: | Yes/No |
| 2. Whether reportable: | Yes/No |