

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

CRM-M-52519-2022 (O&M)

Date of decision: 08.02.2023

Malkit Singh @ Fauji

...Petitioner

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present:- Mr. Vipul Jindal, Advocate
for the petitioner.

Mr. Ayush Sarna, AAG, Punjab.

ARVIND SINGH SANGWAN, J. (Oral)

This is the third petition that has been filed under Section 439 of the Code of Criminal Procedure for grant of regular bail to the petitioner in FIR No. 82 dated 08.05.2019, registered under Sections 3, 4, 5 and 9 of the Official Secrets Act, 1923 read with Section 120-B of the IPC and Sections 21, 27-A, 29 of the NDPS Act, 1985 at Police Station Gharinda, Amritsar (Rural).

The first petition, bearing CRM-M-48002-2019, was dismissed as withdrawn on 27.02.2020 and the second petition, bearing CRM-M-42356-2020, was dismissed by passing a detailed order on 29.03.2022.

Learned counsel for the petitioner submits that the new ground for filing the present petition is that along with the aforesaid second petition of the petitioner, the bail applications of two more co-accused, namely Harpreet Singh and Gurlal Singh, i.e. CRM-M-12350 & 35335-2021, were also dismissed by this Court and now they have been granted concession of

regular bail by this Court, vide common order dated 26.09.2022 passed in CRM-M-42953 & 42957-2022.

Brief facts of the case as noticed in the order dated 29.03.2022 are as under:

“Brief facts of the case are that the FIR was registered by SI Prabhjit Singh that while on patrol duty, he got a secret information that petitioner-Malkit Singh @ Fauji, who was serving as a Sepoy in Indian Army and was posted at Jammu and Kashmir had developed relationship with Pakistani smugglers and secret agencies of Pakistan and he was sharing important information of Indian Army regarding training; location of the important establishments, etc. on Whatsapp or e-mail of the secret agencies of Pakistan. It is further stated that he is coming to meet his accomplice in Amritsar for supplying the confidential documents and can be apprehended with the secret documents, like photographs, maps, etc. The information was brought to notice of DSP, Sub Division, Attari and the FIR was registered by sending a ruqa to the Police Station. Later on, the petitioner was arrested on 9.5.2019 and from him, a manual of Indian Army regarding the training, photographs and documents of communication of Indian Army, training exercises, map of Army Cantt., and three mobile phones were recovered. During investigation, he suffered a disclosure that on 14.5.2019 that in one phone he was having a Pakistani SIM, which he had concealed at his residence and another mobile phone having Pakistani SIM was given to his accomplice Gajjan Singh. Thereafter, one mobile phone was recovered and Gajjan Singh was arrested and 10 grams of heroine along with car was recovered from him. Gajjan Singh made a disclosure that he along with Malkit Singh @ Fauji were doing business of selling

heroine by taking consignment from Pakistan and got recovered one mobile phone having Pakistani SIM. Again, the petitioner in another disclosure told that one Army person Princedeeep Singh was also doing illegal work with him and were in contact with a Pakistani smuggler Akib Ali Nisar and were sharing information of places of Indian Army. Princedeeep Singh was nominated in the case and was arrested and some documents and mobile phones were recovered and in disclosure he has admitted his aforesaid Pakistani smugglers and conversation on Whatsapp.

It is stated that a consignment of 5 packets of heroine was sent by Pakistan, 3 packets were taken by him and remaining were taken by Baba Saraj and Akib Ali Nisar, who further told to contact Hatish Chopra @ Kaku and sent Rs.24 lacs,, which he has paid to him. This accused further disclosed that he is also in contact with other Pakistani smuggler Akash Bular on Whatsapp, who told him that he had sent heroin to Gurmaj Singh-petitioner and he should handover Rs.8 lacs to Gurlal Singh on receiving the heroine. Princedeeep Singh further disclosed that he has transferred Rs. 8 lacs in the account of Gurlal Singh's wife and took a packet of heroin from him and sold it to co-accused Harpreet, who gave him Rs. 8 lacs, which he has concealed in his living room. On the basis of the above disclosure, Hatish Chopra @ Kaku, Gurlal Singh and Harpreet Singh and Akib Ali Nisar were nominated and Rs. 8 lacs were recovered from Malkit Singh @ Fauji. After arrest of Hatish Chopra @ Kaku, mobile phones were recovered from him."

Learned counsel for the petitioner further submits that as on today, the petitioner is in judicial for the last about 03 years and 09 months and after the arrest of some more accused, the case is now fixed for framing

of fresh charge for 28.02.2023, therefore, the trial is yet to start and till date, no PW has been examined. In this regard, learned counsel for the petitioner relies upon various zimini orders passed by the trial Court (Annexure P-16 Colly.).

Another ground taken by learned counsel for the petitioner for grant of regular bail to the petitioner is that no recovery under the NDPS Act was effected from the petitioner and the allegation against him is of committing offence under Sections 3, 4, 5 and 9 of the Official Secrets Act read with Section 120-B IPC, though qua co-accused Gajjan Singh, there was recovery of 10 grams of Heroin, for which provisions of the NDPS Act were added subsequently.

Learned counsel for the petitioner further submits that the charge against the petitioner can be framed either under Section 3 or Section 5 of the Official Secrets Act. It is further submitted that the punishment given under Section 3 of the Official Secrets Act, i.e. penalties for spying, is 14 years of sentence, whereas the punishment under Section 5, i.e. Wrongful communication of information, is 03 years of sentence.

Learned counsel for the petitioner further submits that the allegations in the FIR overlap each other and it will be a matter of trial whether the offence under Sections 3 or 5 of the Official Secrets Act is made out or not against the petitioner and even if the petitioner is held guilty under Section 5, the maximum punishment provided is sentence of 03 years, whereas the petitioner has already undergone a custody of more than 03 years as undertrial.

Learned counsel for the petitioner further argues that under Section 13(3) of the Official Secrets Act, no Court can take cognizance of

any offence under this Act unless upon a complaint made by order or by an officer, duly appointed by the Government.

Learned counsel for the petitioner further argues that the trial is substantially delayed as though the challan was filed in the Court, however, till date, no formal complaint under Section 13(3) of the Official Secrets Act has been filed by the prosecution as it is the stand of the prosecution that necessary permission was sought from the Ministry of Home Affairs, Govt. of India. Hence, in the absence of any such complaint, the petitioner cannot be prosecuted and even for this reason, the petitioner is entitled to get bail.

Learned counsel for the petitioner relies upon a judgment of Hon'ble Supreme Court rendered in **2021 (2) RCR (Criminal) 145, Union of India vs. K. A. Najeeb**, wherein the following observations have been made:

“...16. 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 v. Union of India, (1994) 6 SCC 731**, 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, 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,

Courts would ordinarily be obligated to enlarge them on bail.

- 17. xxx xxx xxx xxx
- 18. xxx xxx xxx xxx
- 19. xxx xxx xxx xxx

20. Yet another reason which persuades us to enlarge the Respondent on bail is that Section 43D(5) of the UAPA is comparatively less stringent than Section 37 of the NDPS. Unlike the NDPS where the competent Court needs to be satisfied that prima facie the accused is not guilty and that he is unlikely to commit another offence while on bail; there is no such precondition under the UAPA. Instead, Section 43D (5) of UAPA merely provides another possible ground for the competent Court to refuse bail, in addition to the wellsettled considerations like gravity of the offence, possibility of tampering with evidence, influencing the witnesses or chance of the accused evading the trial by absconsion etc....”

Learned counsel for the petitioner further argues that since the petitioner is in long custody of about 03 years and 09 months and the charges, subsequent to filing of the complaint, are yet to be framed, the petitioner is entitled to bail.

Learned counsel for the petitioner further submits that since there is no allegation against the petitioner of commission of offence under the NDPS Act, therefore, Section 37 of the NDPS Act will not be a bar and the petitioner may be granted bail.

Reply, filed by way of the affidavit of the SHO of the police station concerned, is on record, wherein, after verifying the allegations in the FIR and the recoveries effected, it is stated that the petitioner, in his disclosure statement, has admitted that his associate Gajjan Singh has a

mobile phone and by using the same, they used to talk to Pakistani smugglers and used to provide secret information of Army. It is further stated that after the arrest of Gajjan Singh, 10 grams of Heroin was recovered from him. It is also stated that from the petitioner, recovery of Rs. 8 Lakh was effected, which was drug money along with certain confidential documents.

Learned State counsel submits that another disclosure statement was suffered by the petitioner stating that he was previously involved in the business of selling narcotics and on the basis of disclosure statement, some more accused were arrested. It is further submitted that supplementary challan under Section 173 (8) Cr.P.C. was presented on 27.01.2021 against co-accused Harpreet Singh. It is also stated that there was a delay in trial on account of restrictions imposed upon functioning of the Court due to COVID-19 situation. With regard to allegations of Section 13(3) of the Official Secrets Act, it is stated that now the authorization has been received from the competent authority i.e. Under Secretary to Govt. of India, vide letter dated 16.09.2022, issued by the Ministry of Home Affairs, which was received by the Govt. of Punjab on 07.10.2022 and a formal complaint under Sections 3, 4, 5 and 9 of the Official Secrets Act is being filed.

On a Court query, learned State counsel, on instructions from the Investigating Officer, submits that the said complaint has been filed yesterday only and the Court is yet to take cognizance of the same. It is also submitted that in fact the delay is either procedural delay seeking permission from the competent authority or on account of COVID-19 situation.

Learned State counsel further submits that since the petitioner

was serving in Army and the allegations are regarding supplying certain documents to Pakistani smugglers, therefore, looking into the gravity of the offence, the present petition may be dismissed as it was earlier dismissed.

In reply, learned counsel for the petitioner submits that co-accused Harpreet Singh and Gurlal Singh have already been granted the concession of regular bail by this Court as noticed above and two more co-accused, namely Princedeeep and Gajjan Singh, have also been granted bail by the Court of Sessions.

Learned counsel for the petitioner further submits that the only allegation against the petitioner is under the Official Secrets Act as no recovery was effected from him under the NDPS Act and considering his long custody, he may be granted the concession of regular bail in view of the judgment rendered in *K. A. Najeeb's* case (supra).

After hearing learned counsel for the parties, it is apparent that the petitioner is in judicial custody for the last about 03 years and 09 months and a formal complaint under the Official Secrets Act has been filed yesterday only as per statement of learned State counsel made on the basis of the instructions received from the Investigating Officer, who is present in Court and the trial Court is yet to take cognizance of the same and frame charges and thereafter record the statements of 23 prosecution witnesses, which may take a long time in conclusion of trial.

It is also noticed that some of the accused have already been granted the concession of regular bail and the maximum punishment provided under Section 5 of the Official Secrets Act is 03 years, whereas the petitioner has already undergone judicial custody of about 03 years and 09 months as an undertrial and it will be a matter of trial whether the charge

under Section 3 or Section 5 of the Official Secrets Act is made out out against the petitioner or not.

In view of the above, the instant petition is allowed. The petitioner is ordered to be released on regular bail on his furnishing bail bonds and two sureties to the satisfaction of the trial Court/Duty Magistrate/Illaqa Magistrate, concerned.

08.02.2023
Waseem Ansari

(ARVIND SINGH SANGWAN)
JUDGE

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No