

205

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-52627-2023
Date of decision: 08.01.2024

UPKAR SINGH @ MINTU

...Petitioner

VERSUS

STATE OF PUNJAB

...Respondent

CORAM: HON'BLE MR. JUSTICE JASGURPREET SINGH PURI

Present:- Ms. Kashish Sahni, Legal Aid Counsel and
Mr. K. S. Bal, Advocate
for the petitioner.

Mr. Rajiv Verma, DAG, Punjab.

JASGURPREET SINGH PURI, J. (Oral)

1. The present is a second petition filed under Section 439 of the Code of Criminal Procedure for the grant of regular bail to the petitioner in FIR No.51 dated 21.03.2022, under Sections 21(b), 25 and 29 of the NDPS Act, registered at Police Station Special Task Force (STF) Mohali, Punjab.
2. Learned counsel for the petitioner submitted that it is a case where the petitioner has faced incarceration for more than 1 year and 9 months and as per the allegations, there had been a recovery of 350 grams of *heroin* from the toolkit of a motorcycle which was allegedly being driven by the petitioner and there was one co-accused, who was a pillion rider. She further submitted that the present case has been planted upon the petitioner by the police only because of the reason that earlier he was falsely implicated in one other case under the

NDPS Act and there has been no recovery from the conscious possession of the petitioner. She also submitted that be that as it may, the aforesaid ground that the petitioner has been falsely implicated gets substantiated from the fact that charges in the present case were framed by the learned trial Court on 25.04.2023 and thereafter, for about five times the matter was adjourned and none of the prosecution witnesses cared to depose before the Court. While referring to the zimni orders she also submitted that for about four times, even the petitioner was not produced before the learned trial Court by the jail authorities and there is no justification as to why he was not produced before the Court by the jail authorities. She further submitted that the learned trial Court has been repeatedly summoning the prosecution witnesses, who are none other but the police officials who themselves had set the criminal law into motion and there is no justification as to why for about 9 months the prosecution witnesses did not care to depose before the Court with a result that the custody of the petitioner got prolonged and now the total incarceration of the petitioner comes out to be more than 1 year and 9 months for no fault of his. She further submitted that although the alleged recovery from the petitioner was shown to be 350 grams of *heroin* from the toolkit of a motorcycle and as per the NDPS Act, the same falls in the category of commercial quantity but the bar contained under Section 37 of the NDPS Act will not apply to the petitioner in view of the aforesaid peculiar facts and circumstances of the present case where the prosecution witnesses themselves did not care to depose before the learned trial Court well in time and on repeatedly being summoned. She has referred to a judgment of the Hon'ble Supreme Court in *Satender Kumar Antil versus Central Bureau of Investigation and another, [2022 (10) SCC 51]* and

contended that when there is a long custody, which is not attributable to the accused and the delay has been caused by the prosecution, then Rights under Article 21 of the Constitution of India are effected. She also referred to another judgment of Hon'ble Supreme Court in "Mohd. Muslim @ Hussain versus State (NCT of Delhi)", 2023 AIR (SC) 1648, wherein the scope of Section 37 of the NDPS Act *vis-a-vis* Article 21 of the Constitution of India has been discussed by taking a serious view with regard to long trial. She further referred to a judgment of Hon'ble Supreme Court in "Dheeraj Kumar Shukla versus The State of Uttar Pradesh", 2023 SCC Online SC 918 and also a judgment of Hon'ble Supreme Court in "Rabi Prakash versus The State of Odisha", Special Leave to Appeal (Criminal) No.4169 of 2023 to contend that long custody itself is a ground for grant of bail notwithstanding the bar contained under Section 37 of the NDPS Act.

3. On the other hand, Mr. Rajiv Verma, DAG, Punjab has filed the custody certificate of the petitioner in Court today and the same is taken on record. As per the custody certificate, the petitioner is in custody for 1 year, 9 months and 19 days. He submitted that till date none of the prosecution witnesses have been examined. However, on 30.11.2023, one prosecution witness, namely, ASI Nirmail Singh was given up by the learned Additional P.P. for the State being unnecessary at that stage. He further submitted that since the aforesaid quantity involved in the present case falls in the category of commercial quantity under the NDPS Act, the petitioner does not deserve the concession of regular bail.

4. I have heard the learned counsel for the parties.

5. It is being argued by the learned counsel for the petitioner that the petitioner is in custody for more than 1 year and 9 months and charges in the present case were framed by the learned trial Court on 25.04.2023 and about 9 months have elapsed and not even a single prosecution witness has been examined despite the prosecution witnesses being summoned number of times. During the course of arguments, this Court had put a specific query to the learned State counsel as to what was the justification as to why the prosecution witnesses did not care to depose before the learned trial Court despite the fact that they were the persons who themselves had put the criminal law into motion, to which he could not offer any justification. Learned State counsel has only opposed the grant to regular bail to the petitioner on the ground of application of Section 37 of the NDPS Act.

6. Hon'ble Supreme Court in Satender Kumar Antil's case (supra) has discussed this serious issue with regard to delay in trial and its effect on the Right to Life of an individual under Article 21 of the Constitution of India. Para 49 of the aforesaid judgment is reproduced as under:-

“49. 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”.

7. Hon'ble Supreme Court in **Mohd. Muslim @ Hussain's case** (**supra**) has dealt with the issue regarding delay in trial and long custody of the accused person *vis-a-vis* the bar contained under Section 37 of the NDPS Act. The relevant portion of the aforesaid judgment contained in para Nos.19 and 20 are 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 Malik). 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.

8. The Hon'ble Supreme Court in **Dheeraj Kumar Shukla's case** (**supra**) has observed as under:-

“3. It appears that some of the occupants of the 'Honda City' Car including Praveen Maurya @ Puneet Maurya have since been released on regular bail. It is true that the quantity recovered from the petitioner is commercial in nature and the provisions of Section 37 of the Act may ordinarily be attracted. However, in the absence of criminal antecedents and the fact that the petitioner is in custody for the last two and a half years, we are satisfied that the conditions of Section 37 of the Act can be dispensed with at this stage, more so when the trial is yet to commence though the charges have been framed.”

9. The Hon'ble Supreme Court in *Rabi Prakash's case (supra)* has also discussed the effect of Section 37 of the NDPS Act in such like cases of long custody. The relevant portion of the aforesaid judgment contained in para No.4 is reproduced as under:-

“4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent – State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act.”

10. After hearing learned counsel for the parties, this Court is of the view that considering the long custody of the petitioner to be 1 year, 9 months and 19 days and the fact that about 9 months have elapsed after the framing of the charges and not even a single prosecution witness has been examined and even for about four times, the petitioner was not produced before the Court by the jail authorities and resultantly, the petitioner had to face such long incarceration for no fault of his, the bar contained under Section 37 of the NDPS Act will not apply to the petitioner in the light of Article 21 of the Constitution of India and also in the light of the aforesaid judgments of the Hon'ble Supreme Court.

11. Therefore, considering the aforesaid totality and circumstances of the present case, this Court deems it fit and proper to grant regular bail to the petitioner.
12. Consequently, the present petition is allowed. The petitioner shall be released on regular bail, if not required in any other case, subject to furnishing bail bonds/surety bonds to the satisfaction of the learned trial Court/Duty Magistrate concerned.
13. However, anything observed hereinabove shall not be treated as an expression of opinion on the merits of the case and is meant for the purpose of deciding the present petition only.

08.01.2024
Chetan Thakur

(JASGURPREET SINGH PURI)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No