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2024:PHHC:000184

CRM-M-59900-2023
Date of decision : 04.01.2024

Versus

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Mr. Jaswinder S. Arora, DAG, Punjab with
ASI Sukhwinder Pal Singh.

This petition has been filed under Section 439 Cr.P.C. for grant of regular bail to the petitioner in case F.I.R. No.113 dated 17.07.2022 registered for the offences punishable under Sections 21 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the NDPS Act') at Police Station Makhu, District Ferozepur.

3. As per the contents of the FIR it has been alleged as under :

“xx Today I ASI alongwith ASI Gurnam Singh 308/FZR, HC Balraj Singh 211/FZR, PHG Swaran Singh 6185 on Govt Vehicle PB05-AB-0866 with driver SIP Harjab Singh No. 1588/FZR Take the laptop printer with us to patrol and check the suspect

Persons in the town of Makhu, village Phemiwala, Jaggewala, Shiha Padi, Chamb, Mallewala, Pir Muhammad etc. Then when the party was patrolling the cross Government Primary Smart Schoo Basti Chamb and toward village Pir Muhammad. a young man was seen coming from the front, who, seeing the vehicle of the police party, got scared and turned back to village Pir Muhammad, who was caught by the ASI with the help of his fellow constable with the light of the torch. he gave his name as Rup Lal son Pira Lal son Alla Diya Basti Chaml Thana Makhu, whose expresion is "about 44 years old, height 05" 06 inches colour brown, without beard & hair clipped, left handed. Pushat but the mar of Morni engraved with surme" to which Man ASI informed his identity an position that I am ASI Harjit Sin I am engaged as an investigating officer a Makhu police station. I suspect that you have some narcotic substance, tha is why I want to search you, but you have the legal right to conduct you search by the Magistrate or any gazetted officer. The chance can be called c you can be taken to him, but the said Mussami Roop Lal was read the notice u/s 50 NDPS ACT, who accepted the notice u/s 50 NDPS ACT as correct and accepted his Punjabi. Signed and duly witnessed. Then the said Mussami Roop Lal thought for a while and said that I want to get my search done by the Gusted Officer Sahib. After signing and attesting, the ASI contacted Mr. Palwinder Singh Pan PS Deputy Captain Police Sub-Division Jira's mobile number 82880-00900 through his mobile number 95013-00288 and informed about the situation. Requested an opportunity to arrive, on which within a short time Shri Palwinder Singh PPS Sub-Capt Police Sub-Division G. The gunman staff along with Ra came to the occasion and informed Musami Roop Lal about his identity and position that I am Palwinder Singh PPS Deputy Captain Police Sub-Division Jira and I I am a gazetted officer of the Punjab government, I suspect that you have any drug, that's why I want to search you, but you have the legal right that you can get your search done by another gazetted officer or the magistrate as per the opportunity. You can

be called or you can be taken to him who thought for a while and said, "I am confident and confident that you alone can search me." But Mussami Roop Lal's signed testimony in Punjabi was found to be correct, then ASI, as per the instructions of Mr. Palwinder Singh PPS Deputy Captain of Police Sub-Division Jira ji, the right pocket of the capri worn by Mussami Roop Lal. Checked the envelope which emerged, out of which a white waxy envelope was revealed which was opened and checked. From which the heroin was found, the weight of the heroin was weighed, but after weighing, there was a wax envelope with 260 grams of heroin, which was put in the same wax envelope and prepared by Man ASI, who stamped it all with his seal letter HS and Mr. Palwinder Singh P. PS Sub-Captain Police Sub-Division Jira also stamped all with his seal letter PS Sample seal separately prepared Moh after.”

4. Counsel for the petitioner submits that apart from the fact that the petitioner is in custody for more than 1 year, 5 months and 18 days there is a startling feature in the FIR which itself points out towards false implication of the petitioner. He refers to item No.9 in the FIR which reads as under :

“9. Particulars of properties of interest (Attach separtae sheet, if necessary)

S. No.	Property Category	Property Type	Description	Value (in Rs/-)
1	DRUGS/NARCOTIC DRUGS	HEROIN (DIACETYLMORPHINE)	260 GRAM	

5. He submits that it is highly unbelievable that even at the time of registration of the FIR the police officials knew and were certain about the nature of the contraband recovered from the petitioner despite the fact that there was no forensic evidence to back the same. It has been further

contended that the petitioner has no criminal antecedents apart from one case wherein he has earned acquittal.

6. Learned counsel for the petitioner relies upon order passed by Apex Court in the case of **Rabi Prakash Vs. The State of Odisha** passed in **Special Leave to Appeal (Crl.) No(s). 4169 of 2023** decided on 13.07.2023 wherein it has been held 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.”

7. Earlier to **Rabi Prakash's case** (supra) also Apex Court has consistently held that the prolonged incarceration has to be considered de hors bar contained under Section 37 of the NDPS Act. The Supreme Court in order dated 22.08.2022 passed by the Supreme Court in **Special Leave to Appeal (Crl.) No.5530-2022** titled as "**Mohammad Salman Hanif Shaikh Vs. The State of Gujarat**, had held as under:-

"We are inclined to release the petitioner on bail only on the ground that he has spent about two years in custody and conclusion of trial will take some time.

Consequently, without expressing any views on the merits of the case and taking into consideration the custody period of the petitioner, this special leave petition is accepted and the petitioner is ordered to be released on bail subject to his furnishing the bail bonds to the satisfaction of the Special Judge/ concerned Trial Court.

The special leave petition is, accordingly, disposed of in the above terms.

Pending application(s), if any, shall also stand disposed of."

8. The above-said case was also a case under the NDPS Act, 1985 and the FIR had been registered under Sections 8(c), 21(c) and 29 of the said Act. The case of the prosecution therein was that the recovery from the said petitioner (therein) was of commercial quantity. The Supreme Court had observed that the concession of bail was granted to the petitioner (therein) only on the ground that he had spent about two years in custody and the conclusion of trial will take some time.

9. Supreme Court in order dated 07.02.2020 passed by the Hon'ble Supreme Court in **Criminal Appeal No.245/2020** titled as "**Chitta Biswas Alias Subhas vs. The State of West Bengal**" was pleased to grant concession of bail to the petitioner (therein) in a case where the custody was of 1 year and 7 months approximately. The relevant portion of the said order dated 07.02.2020 is as under: -

"Leave granted.

This appeal arises out of the final Order dated 30.7.2010 passed by the High Court of Calcutta in CRM No.6787 of 2019.

The instant matter arises out of application preferred by the appellant under Section 439 Cr.P.C. seeking bail in connection with

Criminal Case No.146 of 2018 registered with Taherpur Police Station for offence punishable under Section 21-C of the Narcotic Drugs and Psychotropic Substances Act, 1985.

According to the prosecution, the appellant was found to be in possession of narcotic substance i.e. 46 bottles of phensydryl cough syrup containing codeine mixture above commercial quantity.

The appellant was arrested on 21.07.2018 and continues to be in custody. It appears that out of 10 witnesses cited to be examined in support of the case of prosecution four witnesses have already been examined in the trial.

Without expressing any opinion on the merits or demerits of the rival submissions and considering the facts and circumstances on record, in our view, case for bail is made out. We therefore, allow this appeal and direct as under:

- (a) Subject to furnishing bail bond in the sum of Rs.2 lakhs with two like sureties to the satisfaction of the Judge, Special Court, NDPS Act, Nadia at Krishnagar, the appellant shall be released on bail.
- (b) The Special Court may impose such other conditions as it deems appropriate to ensure the presence and participation of the appellant in the pending trial. With the aforesaid directions, the appeal stands allowed."

10. In order dated 05.08.2022 passed by the Supreme Court in **Criminal Appeal No.1169 of 2022 titled as "Gopal Krishna Patra @ Gopalrusma vs. Union of India,"** the Supreme Court was pleased to observe as under: -

"Leave granted.

This appeal challenges the judgment and order dated 25.01.2022 passed by the High Court Of Madhya Pradesh, Principal Seat at Jabalpur, in MCRC No.117/2022. The appellant is in custody since 18.06.2020 in connection with crime registered as

N.C.B. Crime No.02/2020 in respect of offences punishable under Sections 8, 20, 27-AA, 28 read with 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

The application seeking relief of bail having been rejected, the instant appeal has been filed.

We have heard Mr. Ashok Kumar Panda, learned Senior Advocate in support of the appeal and Mr. Sanjay Jain, learned Additional Solicitor General for the respondent.

Considering the facts and circumstances on record and the length of custody undergone by the appellant, in our view the case for bail is made out.

We therefore, direct that:

- (a) The appellant shall be produced before the Trial Court within five days from today.
- (b) The Trial Court shall release the appellant on bail subject to such conditions as the Trial Court may deem appropriate to impose.
- (c) The appellant shall not in any manner misuse his liberty.
- (d) Any infraction shall entail in withdrawal of the benefit granted by this Order.

The appeal is allowed in aforesaid terms."

11. In order dated 01.08.2022 passed by the Supreme Court in Special Leave to Appeal (Crl.) No.5769/2022 titled as "**Nitish Adhikary @ Bapan Vs. The State of West Bengal**" Supreme Court has observed as under: -

"As per the office report dated 29.07.2022, copy of the show cause notice along with Special Leave Petition was supplied to the Standing Counsel for the State of West Bengal and separate notice has been served on the State also. However, no one has entered appearance on their behalf.

The petitioner seeks enlargement on bail in F.I.R. No. 612 of 2020 dated 17.10.2020 filed under Section 21(c) and 37 of the NDPS Act, registered at Police Station Bongaon, West Bengal.

During the course of the hearing, we are informed that the petitioner has undergone custody for a period of 01 year and 07 months as on 09.06.2022. The trial is at a preliminary stage, as only one witness has been examined. The petitioner does not have any criminal antecedents.

Taking into consideration the period of sentence undergone by the petitioner and all the attending circumstances but without expressing any views in the merits of the case, we are inclined to grant bail to the petitioner.

The petitioner is accordingly, directed to be released on bail subject to him furnishing bail bonds to the satisfaction of the Trial Court.

The Special Leave Petition is disposed of on the aforesaid terms.

Pending application(s), if any, shall stand disposed of."

12. Counsel further contends that the petitioner is in custody for long time. Investigation already stands concluded. Challan stands presented. Majority of the witnesses being official witnesses there can't be any apprehension that the petitioner shall tamper with the evidence.

13. State Counsel is not in position to dispute the factual assertions made by counsel for the petitioner based on record.

14. Having heard rival contentions and after going through records of the case, without commenting on the merits of the case, keeping in view the incarceration already suffered by the petitioner and the fact that the investigation already stands concluded and Challan stands presented, the

present petition is allowed. The petitioner is ordered to be released on bail on his furnishing bail bonds/surety bonds to the satisfaction of the Trial Court/Duty Magistrate concerned.

15. However, in addition to conditions that may be imposed by the Trial Court/Duty Magistrate concerned, the petitioner shall remain bound by the following conditions :-

- (i) The petitioner shall not mis-use the liberty granted.
- (ii) The petitioner shall not tamper with any evidence oral or documentary during the trial.
- (iii) The petitioner shall not absent himself on any date before the trial.
- (iv) The petitioner shall not commit any offence while on bail.
- (v) The petitioner shall deposit his passport, if any with the trial Court.
- (vi) The petitioner shall give his cellphone number to the police authorities and shall not change his cellphone number without permission of the trial Court.
- (vii) The petitioner shall not in any manner try to delay the trial.

16. In case of breach of any of the aforesaid conditions and those which may be imposed by the Trial Court, the prosecution shall be at liberty to move cancellation of bail of the petitioner.

17. Needless to say that anything observed hereinabove shall not

be construed to be an expression of opinion on the merits of the case.

January 04, 2024	(Pankaj Jain)
Dpr	Judge
Whether speaking/reasoned	: Yes/No
Whether reportable	: Yes/No