

Ajay

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL BAIL APPLICATION NO. 2136 OF 2024

Sameer Latif Shaikh

.. Applicant

Versus

Union of India & Anr.

.. Respondent

-
- Mr. Nimesh Mehta a/w Mr. Mohd. Khalik, Ms. Seema Chettri, Advocates for Applicant.
 - Mr. Shreeram Shirsat, SPP a/w Ms. Karishma Rajesh, Mr. Shekar Mane, Mr. Nikhil Daga, Advocates for Respondent No.1 – Union of India.
 - Ms. Shilpa K. Gajare – Dhumal, APP for Respondent No.2 – State.
-

CORAM : MILIND N. JADHAV, J.

DATE : FEBRUARY 7, 2024.

P.C.:

1. This Application is made under Section 439 of Code of Criminal Procedure, 1978 in connection with Special Case No.804 of 2024 for offences under Section 8(c) read with Section 22(c), 27-A, 28 and 29 of Narcotics Drug and Psychotropic Substances Act, 1985 (for short “**NDPS Act**”)

2. The case alleged by the prosecution briefly stated is that on 10.06.2021, the Intelligence Officer of NCB received specific information with regards to the Applicant carrying certain contraband. Applicant upon being intercepted was found to be in possession of 52 grams of Mephedrone (for short “**MD**”) which is 2 grams above the

commercial quantity, contained in a polybag placed in the pocket of his trouser. Applicant was arrested on 11.06.2021 and due to his long incarceration and discrepancies in seizure seeks to be enlarged on bail following a rejection order by the Sessions Court, Thane.

3. Mr. Mehta, learned advocate appearing on behalf of the Applicant would at the outset submit that the Applicant has been incarcerated for **more than three years and seven months**, the chargesheet has been filed and investigation is complete and thus no purpose would be served by keeping the Applicant behind bars. He would submit that even on merits, Applicant has a strong case. He would submit that application of the stringent rigors of Section 37 of NDPS Act is shrouded with uncertainty since there are discrepancies in seizure in the prosecution's case. He would draw my attention to a few documents annexed with the Application viz the Chargesheet, Memorandum Panchanama and Statement of Accused u/s 67 of the NDPS Act. The Chargesheet appended at page 25 of the Application, in paragraph No. 10 mentions "*The weight comes out at 52 Grams*", similarly the Memorandum Panchanama on page No. 42 states that "*The weight comes out at 52 grams*". However, the statement of Accused under Section 67 of the NDPS Act states the weight of contraband is 50 grams and the same is signed by IO of NCB, Mumbai. He would submit that in such a case, the benefit of doubt should be given to the Accused and thus he would pray for the Application to be

allowed.

4. Mr. Shirsat, learned SPP appearing on behalf of Respondent No.1 would submit that the Applicant has been to be found in conscious possession of commercial quantity of MD, hence rigors of Section 37 of the NDPS Act would apply in the case. He would submit that Section 37 of the NDPS act contains a *non obstante* clause over the general rule of bail, in cases where Section 37 of the NDPS clause is applicable, **Negation of bail is the rule** unless the twin conditions of Section 37 are satisfied i.e the court should be satisfied that there exists reasonable grounds for believing that Applicant is not guilty of the alleged offence and he is not likely to commit any offence while on bail. He would submit that Applicant has failed to satisfy the twin condition and thus he should not be enlarged on bail. When queries are posed before Mr. Shirsat by the Court with regard to the discrepancies, he would fairly point out that the same is a by product of a typographical error and would further point out the contents of the Inventory Panchanama under Section 52A at page No. 85, attested overleaf thereto by the Metropolitan Magistrate under his seal which records the gross weight as 56.5 grams. He would thus submit that the gross weight being 56.5 grams makes it clear that the weight of polybag and other packaging material is not accounted for while stating the weight of 52 grams which is commercial quantity of the contraband, MD and thus the same should not have a bearing insofar as deciding whether the rigors

of Section 37 would apply or not. He would thus pray for rejection of the Application.

5. Ms. Gajare – Dhumal would adopt the submissions of Mr. Shirsat and would add that the recovery of commercial quantity is an offence against the state as the menace of drug addiction and trafficking is only increasing in recent years and the biggest losers of this escalating wave of drug trafficking and consumption are young boys who get caught up in the enticement of recreational drug usage. She would submit that enlarging a person alleged to be in possession of commercial quantity of contraband on mere technicalities or non-compliance without meeting the threshold of the twin conditions would be in contravention to the spirit of the NDPS Act and against the legislative intent behind the enactment of the Act.

6. I have heard Mr. Mehta, Mr. Shirsat and Ms. Gajare Dhumal and with their able assistance perused the record of the case.

7. Drug epidemic is a quasi pandemic of modern era, even developed societies have not been saved from the menace of drug traffickers. The repercussions of drug usage are far reaching including but not limited to increasing crime rate, stunted economic growth, lowering health standards, the list could never be exhaustive. Like any other mischief that acts as a threat to the interest of society, drug trafficking also has specific penal laws aimed and enacted to curb the

said mischief. The preamble of NDPS act reads thus:-

“An Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances and for matters connected therewith.”

8. It was indeed with the intention to curb the illicit trafficking of Narcotic and psychotropic substances that the NDPS Act was enacted. It contained certain strict provisions aimed to act as a deterrent for prospective drug dealers dealing in commercial quantities of contraband, Section 37 is one such example. For the sake of brevity, I would refrain to repeat the submissions of Mr. Shirsat who has aptly explained the substance of Section 37 of the NDPS Act. The said section indeed sways the general rule of bail in a diametrically opposite way - where generally grant of bail is the rule however in the NDPS Act where the accused is alleged to be in possession of commercial quantity of contraband, the rule is against grant of bail save the satisfaction of the court with regards to the twin conditions directed under the section. However, where such stringent conditions are imposed upon the accused by virtue of a special act, the reciprocating duty is implicitly cast upon the Investigating Agency to strictly comply with the provisions of the act and ensure that strict compliance of each aspect which may have a negative impact on the Accused, *sans* any ambiguity, to a point of proof beyond reasonable doubt is done. This

duty gets amplified many fold when the question is one involving personal liberty.

9. Before me is a case where the contraband barely qualifies into the segment of commercial quantity, there are two different figures that are contentiously poised to be the 'Net Quantity' of the contraband i.e. the actual quantity of the contraband without any packaging. A thought in such situation that arises is : ***"What if the weight of the contraband mentioned in the Chargesheet and Memorandum Panchanama is inclusive of packaging materials i.e. polybag and / or stapler pin?"*** This thought is further worsened when thought of in the light of the fact that the Accused is incarcerated for a period of more than three years and seven months. Had it been an intermediate quantity the rigors of section 37 would not have applied, I would say that even inspite of the rigors of Section 37 being applicable, incarceration for such an extended period of time would not be justified pending trial. My views are in the light of a diaspora of judgements of the Supreme Court and various High Courts where undertrial accused have been released on bail owing to their long incarceration.

10. It is settled law that a Court while deciding a Bail Application has to keep in mind the principal rule of bail which is to ascertain whether the Accused is likely to appear before the court for trial. There are

other broad parameters also like gravity of offence, likelihood of Accused repeating the offence while on bail, whether he would influence the witnesses and tamper with the evidence, his antecedents which are required to be considered in such cases. However the metrics of judicial decision making gets amplified or rather shuttled to another facet when dealing with offences where Section 37 of NDPS Act is attracted. In such cases one has to satisfy itself with the rigors of the twin conditions as prescribed under Section 37 of the NDPS Act. Section 37 reads thus:-

“37. Offences to be cognizable and non-bailable.:- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

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

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27-A and also for offences involving commercial quantity 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 (2 of 1974) or any other law for the time being in force on granting of bail.”

11. From the reading of Section 37 of the NDPS Act, it becomes clear that the legislature intends to deny bail to accused alleged to be in possession of commercial quantity of contraband in absence of court

subscribing to a contrary view, however therefore if seen it does not rule out the facet of discretion of Court to grant bail. Furthermore the Court must be satisfied that the accused is unlikely to re-offend. It is seen that while dealing with Bail Applications the material available for consideration and adjudication is limited. In such cases, if we look realistically the provisions of Section 37 leave limited room for a possibility of granting bail to the accused. However employing such limitation would create a dichotomy in the current scenario where one common grievance is made before this Court repeatedly in matter after matter. It is brought to the notice of the Court that trials are taking perpetuity to be concluded and prisons are also simultaneously overcrowded in some segments. This Court regularly deals with Bail Applications of under-trials who have been in custody for long incarceration, and is also equally aware of the conditions of our prisons. To give an example in the city of Mumbai, recently in one of the cases before me, a Report dated 12.12.2024 made by the Superintendent of Mumbai Central Prison addressed to the Chief Government Pleader was placed before me by the Public Prosecutor which stated that the Mumbai Central Prison (Arthur Road Jail) is overcrowded beyond its sanctioned capacity by more than 5 – 6 times and every barrack sanctioned to house 50 inmates, as on date houses anywhere between 220 – 250 inmates. This situation is inhumane, but it also cannot be forgotten that addiction of drugs is also a serious issue

qua the society at large, and therefore provisions such as Section 37 act as a deterrent to prospective wrongdoers. Such an incongruity leads us to answer the proposition: “*How can Courts find a balance between the two polarities?*”

12. Argued before me is a case concerning liberty of an under-trial who has been incarcerated for almost 3 years 7 months, a situation impacting the rights of undertrial conferred by Article 21 of Constitution to speedy justice as also personal liberty. In so far as the power of high courts to grant bail is concerned, when the case is such that involves a question of personal liberty of an undertrial who is incarcerated for a very long period, the powers are wide and unfettered by conditions, the principle rule being that bail is the rule and refusal is the exception, allowing accused persons to better prepare their defense.

13. In the case of *Emperor vs H.L. Hutchinson*¹ the Allahabad High Court, as far back as in the year 1931 held that power of granting bail conferred on High Court is entirely unfettered by any conditions. It held that legislature has given the High Court and the Court of Session discretion unfettered by any limitation other than that which controls all discretionary powers vested in a Judge, viz. that the discretion must be exercised judiciously. The Court has given primacy to the fact that accused person if granted bail will be in a much better position to

¹ AIR 1931 ALL 356

defend himself. In this very case, it was delineated that grant of Bail is the Rule and refusal is an exception. This was in the famous Meerut Conspiracy case. Justice Mukherjea writing for the Bench in paragraph No.9 held as under:-

“9. Speaking for myself, I think it very unwise to make an attempt to lay down any particular rules for the guidance of the High Court, having regard to the fact that the legislature itself left the discretion of the Court entirely unfettered. The reason for this action on the part of the legislature is not far to seek. The High Court might be safely trusted in this matter and it goes without saying that it would act in the best interests of justice whether it decides in favour of the prosecution or the defence. The variety of cases that may arise from time to time cannot be safely classified and it will be dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes.”

14. In the case of *Satender Kumar Antil Vs. Central Bureau of Investigation*², in paragraph Nos.6 to 15 the Supreme Court considered the prevailing situation of prisons in India, definition of trial and bail, principle of presumption of innocence and reiterated the well recognised principle that bail is the rule and jail is the exception in bail jurisprudence on the touchstone of Article 21 of the Constitution of India. Paragraph Nos.6 to 15 of the said judgement read as under:-

“Prevailing situation

6. *Jails in India are flooded with undertrial prisoners. The statistics placed before us would indicate that more than 2/3rd of the inmates of the prisons constitute undertrial prisoners. Of this category of prisoners, majority may not even be required to be arrested despite registration of a cognizable offence, being charged with offences punishable for seven years or less. They are not only poor and illiterate but also would include women.*

² (2022) 10 SCC 51

Thus, there is a culture of offence being inherited by many of them. As observed by this Court, it certainly exhibits the mindset, a vestige of colonial India, on the part of the investigating agency, notwithstanding the fact arrest is a draconian measure resulting in curtailment of liberty, and thus to be used sparingly. In a democracy, there can never be an impression that it is a police State as both are conceptually opposite to each other.

Definition of trial

7. The word “trial” is not explained and defined under the Code. An extended meaning has to be given to this word for the purpose of enlargement on bail to include, the stage of investigation and thereafter. Primary considerations would obviously be different between these two stages. In the former stage, an arrest followed by a police custody may be warranted for a thorough investigation, while in the latter what matters substantially is the proceedings before the court in the form of a trial. If we keep the above distinction in mind, the consequence to be drawn is for a more favourable consideration towards enlargement when investigation is completed, of course, among other factors.

8. Similarly, an appeal or revision shall also be construed as a facet of trial when it comes to the consideration of bail on suspension of sentence.

Definition of bail

9. The term “bail” has not been defined in the Code, though is used very often. A bail is nothing but a surety inclusive of a personal bond from the accused. It means the release of an accused person either by the orders of the court or by the police or by the investigating agency.

10. It is a set of pre-trial restrictions imposed on a suspect while enabling any interference in the judicial process. Thus, it is a conditional release on the solemn undertaking by the suspect that he would cooperate both with the investigation and the trial. The word “bail” has been defined in Black's Law Dictionary, 9th Edn., p. 160 as:

“A security such as cash or a bond; esp., security required by a court for the release of a prisoner who must appear in court at a future time.”

11. Wharton's Law Lexicon, 14th Edn., p. 105 defines “bail” as:

“to set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and at a place certain, which security is called bail, because the party arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required, in order that he may be safely

protected from prison, to which they have, if they fear his escape, etc. the legal power to deliver him.”

Bail is the rule

12. *The principle that bail is the rule and jail is the exception has been well recognised through the repetitive pronouncements of this Court. This again is on the touchstone of Article 21 of the Constitution of India. This Court in Nikesh Tarachand Shah v. Union of India [Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 1 : (2018) 2 SCC (Cri) 302] , held that : (SCC pp. 22-23 & 27, paras 19 & 24)*

“19. In Gurbaksh Singh Sibbia v. State of Punjab [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] , the purpose of granting bail is set out with great felicity as follows : (SCC pp. 586-88, paras 27-30)

27. It is not necessary to refer to decisions which deal with the right to ordinary bail because that right does not furnish an exact parallel to the right to anticipatory bail. It is, however, interesting that as long back as in 1924 it was held by the High Court of Calcutta in Nagendra Nath Chakravarti, In re [Nagendra Nath Chakravarti, In re, 1923 SCC OnLine Cal 318 : AIR 1924 Cal 476] , AIR pp. 479-80 that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment. In two other cases which, significantly, are the “Meerut Conspiracy cases” observations are to be found regarding the right to bail which deserve a special mention. In K.N. Joglekar v. Emperor [K.N. Joglekar v. Emperor, 1931 SCC OnLine All 60 : AIR 1931 All 504] it was observed, while dealing with Section 498 which corresponds to the present Section 439 of the Code, that it conferred upon the Sessions Judge or the High Court wide powers to grant bail which were not handicapped by the restrictions in the preceding Section 497 which corresponds to the present Section 437. It was observed by the court that there was no hard-and-fast rule and no inflexible principle governing the exercise of the discretion conferred by Section 498 and that the only principle which was established was that the discretion should be exercised judiciously. In Emperor v. H.L. Hutchinson [Emperor v. H.L. Hutchinson, 1931 SCC OnLine All 14 : AIR 1931 All 356] , AIR p. 358 it was said that it was very unwise to make an attempt to lay down any particular rules which will bind the High Court,

having regard to the fact that the legislature itself left the discretion of the court unfettered. According to the High Court, the variety of cases that may arise from time to time cannot be safely classified and it is dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes. It was observed that the principle to be deduced from the various sections in the Criminal Procedure Code was that grant of bail is the rule and refusal is the exception. An accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence.

28. *Coming nearer home, it was observed by Krishna Iyer, J., in Gudikanti Narasimhulu v. Public Prosecutor [Gudikanti Narasimhulu v. Public Prosecutor, (1978) 1 SCC 240 : 1978 SCC (Cri) 115] that : (SCC p. 242, para 1)*

“1. ... the issue [of bail] is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process. ... After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of “procedure established by law”. The last four words of Article 21 are the life of that human right.”

29. *In Gurcharan Singh v. State (Delhi Admn.) [Gurcharan Singh v. State (Delhi Admn.), (1978) 1 SCC 118 : 1978 SCC (Cri) 41] it was observed by Goswami, J., who spoke for the Court, that : (SCC p. 129, para 29)*

“29. ... There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail.”

30. *In American Jurisprudence (2nd Edn., Vol. 8, p. 806, para 39), it is stated:*

“Where the granting of bail lies within the discretion of the court, the granting or denial is regulated, to a large extent, by the facts and circumstances of each particular case. Since

the object of the detention or imprisonment of the accused is to secure his appearance and submission to the jurisdiction and the judgment of the court, the primary inquiry is whether a recognizance or bond would effect that end.”

It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail.’

* * *

24. *Article 21 is the Ark of the Covenant so far as the Fundamental Rights Chapter of the Constitution is concerned. It deals with nothing less sacrosanct than the rights of life and personal liberty of the citizens of India and other persons. It is the only article in the Fundamental Rights Chapter (along with Article 20) that cannot be suspended even in an emergency [see Article 359(1) of the Constitution]. At present, Article 21 is the repository of a vast number of substantive and procedural rights post Maneka Gandhi v. Union of India [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] .”*

13. *Further this Court in Sanjay Chandra v. CBI [Sanjay Chandra v. CBI, (2012) 1 SCC 40 : (2012) 1 SCC (Cri) 26 : (2012) 2 SCC (L&S) 397] , has observed that : (SCC p. 52, paras 21-23)*

“21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, “necessity” is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon

which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. *Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson.”*

Presumption of innocence

14. *Innocence of a person accused of an offence is presumed through a legal fiction, placing the onus on the prosecution to prove the guilt before the court. Thus, it is for that agency to satisfy the court that the arrest made was warranted and enlargement on bail is to be denied.*

15. *Presumption of innocence has been acknowledged throughout the world. Article 14(2) of the International Covenant on Civil and Political Rights, 1966 and Article 11 of the Universal Declaration of Human Rights, 1948 acknowledge the presumption of innocence, as a cardinal principle of law, until the individual is proven guilty.”*

15. The Supreme Court in a landmark decision of 1978 in the case of ***Gudikanti Narasimhulu & Ors. v. Public Prosecutor, High Court of Andhra Pradesh***³ observed as under:-

“6. Let us have a glance at the pros and cons and the true principle around which other relevant factors must revolve. When the case is finally disposed of and a person is sentenced to incarceration, things stand on a different footing. We are concerned with the penultimate stage and the principal rule to guide release on bail should be to secure the presence of the applicant who seeks to be liberated, to take judgment and serve sentence in the event of the court punishing him with imprisonment. In this perspective...” (emphasis supplied)

3 1978 (1) SCC 240

16. Thereafter the Supreme Court in a plethora of judgements have discussed the rights conferred by Article 21 qua grant of bail and that such rights cannot be taken away unless the procedure is reasonable and fair and in cases where there is unreasonable delay in trial it would undoubtedly impact the rights of an undertrial. Some of the important decisions of the Supreme Court and some of the High Courts are discussed hereinunder:-

16.1. In the landmark judgment of *Maneka Gandhi V Union of India*⁴, Supreme Court held that the right to life and personal liberty under Article 21 is not limited to mere animal existence but includes the right to live with dignity. The court emphasized that the procedure established by law must be fair, just, and reasonable, and it cannot be arbitrary, oppressive, or unreasonable.

16.2. In the case of *Hussainara Khatoon Vs. Home Secy, State of Bihar*⁵ the Supreme Court held as under:-

“Now obviously procedure prescribed by law for depriving a person of liberty cannot “reasonable, fair or just” unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as “reasonable, fair or just” and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21.”

4 1978 (1) SCC 248

5 (1980) 1 SCC 81

16.3. The Supreme Court in the case of ***Shaheen Welfare Association vs Union Of India***⁶ dealing with a Public Interest Litigation seeking relief for undertrial prisoners charged under the Terrorist and Disruptive Activities (Prevention) Act, 1987 due to gross delay in disposal of cases qua Article 21 of the Constitution of India held as under:-

“10. Bearing in mind the nature of the crime and the need to protect the society and the nation, TADA has prescribed in Section 20(8) stringent provisions for granting bail. Such stringent provisions can be justified looking to the nature of the crime, as was held in Kartar Singh’s case (supra), on the presumption that the trial of the accused will take place without undue delay. No one can justify gross delay in disposal of cases when undertrials perforce remain in jail, giving rise to possible situations that may justify invocation of Article 21.”

16.4. The Supreme Court in the case of ***Union of India v. K. A. Najeer***⁷ while commenting upon the possibility of early completion of trial and extended incarceration held as under:-

“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), Babba v. State of Maharashtra and Umarmia v. State of Gujarat 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.”

17. Applicant in present case has been in custody for almost 3 years and 7 months. There is no possibility of the trial commencing in near future. Detaining an under-trial prisoner for such an extended

⁶ 1996 SCC (2) 616

⁷ Criminal Appeal No. 98 of 2021

period further violates his fundamental right to speedy trial flowing from Article 21 of the Constitution. At this juncture I deem it appropriate to list certain observations of the Supreme Court shedding light on concerns underlying the “Right to speedy trial” from the point of view of an accused in custody whose liberty is affected. In the case of *Abdul Rehman Antulay & Ors. Vs R.S. Nayak & Anr.*⁸ the Supreme Court held as under:-

“86. In view of the above discussion, the following propositions emerge, meant to serve as guidelines. We must forewarn that these propositions are not exhaustive. It is difficult to foresee all situations. Nor is it possible to lay down any hard and fast rules. These propositions are:

(1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the societal interest also, does not make it any-the-less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

(2) Right to Speedy Trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial. That is how, this Court has understood this right and there is no reason to take a restricted view.

(3) The concerns underlying the Right to speedy trial from the point of view of the accused are:

(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.”

(4) – (11) -----X----- (emphasis supplied)

8 1992 (1) SCC 225

18. The Supreme Court has also held in a series of judgments and orders that in situations where the under-trial prisoner / accused persons have suffered incarceration rather long incarceration for considerable period of time and there is no possibility of the trial being completed within the foreseeable future, Constitutional Courts can exercise power to release the accused under-trial on bail, as bail is the rule and jail is the exception.

19. In the case of *Supreme Court Legal Aid Committee (Representing undertrial prisoners) Vs. Union of India*⁹ the Supreme Court has held that:-

“17. We are conscious of the fact that the menace of drug trafficking has to be controlled by providing stringent punishments and those who indulge in such nefarious activities do not deserve any sympathy. But at the same time we cannot be oblivious to the fact that many innocent persons may also be languishing in jails if we recall to mind the percentage of acquittals. Since harsh punishments have been provided for under the Act, the percentage of disposals on plea of guilt is bound to be small; the State Government should, therefore, have realised the need for setting up sufficient number of Special Courts immediately after the amendment of the Act by Amendment Act 2 of 1989. Even after the Division Bench of the Bombay High Court refused to grant en bloc enlargement on bail on 1-2-1993 in Criminal Application No. 3480 of 1992 and B.D. Criminal No. 565 of 1992, no substantial improvement in the pendency is shown since new cases continue to pour in, and, therefore, a one-time exercise has become imperative to place the system on an even keel. We also recommend to the State Government to set up Review Committees headed by a Judicial Officer, preferably a retired High Court Judge, with one or two other members to review the cases of undertrials who have been in jail for long including those released under this order and to recommend to the State Government which of the cases deserve withdrawal. The State Government can then advise the Public Prosecutor to move the court for withdrawal of such cases. This will not only help reduce the pendency but will also increase

9 (1995) 4 SCC 695

the credibility of the prosecuting agency. After giving effect to this order the Special Court may consider giving priority to cases of those undertrials who continue in jail despite this order on account of their inability to furnish bail.”

20. In the present case, it appears that possibility of the trial being completed in the foreseeable future is doubtful. It is also an admitted position that Applicant has suffered incarceration for about Three years and seven months.

21. In the following decisions of the Supreme Court and various High Courts concerning such long detention and imprisonment of undertrial prisoner / accused on being apprehended with commercial quantity of various contrabands, the Courts have in the backdrop of the aforementioned propositions exercised its unfettered jurisdiction in releasing an undertrial on bail on account of long incarceration by using its discretionary powers:-

21.1. In the case of *Vijay Singh Vs. Union of India*¹⁰ the Supreme Court granted bail to an undertrial-accused who was incarcerated for a period of **4 years and 1 Month** holding that Article 21 of the Constitution overrides Section 37 of NDPS Act if there is undue delay in completion of trial on the part of prosecution.

21.2. In the case of *Rabi Prakash Vs. State of Odisha*¹¹ the Supreme Court, considering the long incarceration of an undertrial accused who was incarcerated for 3 years and 7 months granted him

¹⁰ Special Leave Petition (Criminal) Diary No. 43071/2024

¹¹ 2023 SCC OnLine SC 1109

bail. The contraband in question was Ganja, the commercial quantity of which is 20 Kilograms. In this case recovery of 247 Kilograms was allegedly made from the accused despite which the court invoking the right to speedy justice flowing from Article 21 and forceable delay in trial granted bail to the accused.

21.3. In the case of *Dheeraj Kumar Vs. State of Uttar Pradesh*¹² the Supreme Court considering long incarceration granted bail to an undertrial-accused who was incarcerated for **2 years and 6 months** granted him bail. The contraband in question was Ganja the commercial quantity of which is 20 Kilograms. In this case recovery of 65 Kilograms was allegedly made from the accused despite which, the Court invoking the right to speedy justice flowing from Article 21 and forceable delay in trial granted bail to the Accused.

21.4. In the case of *Balkishan Vs. State of Madhya Pradesh*¹³ the Supreme Court considering long incarceration of an undertrial-accused who was incarcerated for **2 years and 5 months** granted him bail. The contraband in question was Poppy Straw, the commercial quantity of which is 50 kilograms when recovery of 80 kilograms was allegedly made from the accused.

21.5. In the case of *Badsha Sk. Vs. State of West Bengal*¹⁴ the Supreme Court considering long incarceration of an undertrial-accused

¹² 2023 SCC OnLine 918

¹³ Petition for Special Leave to Appeal (Cri) No. 8415 of 2024

¹⁴ 2023 SCC OnLine SC 1867

who was incarcerated for **2 years and 4 months** granted him bail. The contraband in question was Codeine Phosphate, the commercial quantity of which is 1 kilograms when recovery of 100 bottles each of 100 ml. was allegedly made from the accused.

21.6. In the case of *Man Mandal and Anr. Vs. State of West Bengal*¹⁵ the Supreme Court considering long incarceration of an undertrial-accused who was incarcerated for **2 years** granted him bail despite being alleged to be in possession of commercial quantity of contraband.

21.7. In the case of *Ankur Chaudhary Vs. State of Madhya Pradesh*¹⁶ the Supreme Court considering long incarceration of an undertrial-accused granted him bail to an undertrial-accused who was incarcerated for about 2 years.

21.8. In the case of *Nitish Adhikary alias Bapan Vs. State of West Bengal*¹⁷ the Supreme Court considering long incarceration of an undertrial-accused granted him bail to an undertrial-accused who was incarcerated for **1 year and 7 months** despite being alleged to be in possession of commercial quantity of contraband.

21.9. In the case of *Babor Ali Mondal Vs. State of West Bengal*¹⁸ the Supreme Court considering the long incarceration granted

¹⁵ 2023 SCC OnLine SC 1868

¹⁶ Petition for Special Leave to Appeal (Cri) No. 4648 of 2024

¹⁷ 2022 SCC OnLine SC 2068

¹⁸ Criminal Appeal No. 3349 of 2024

bail to an undertrial-accused who was incarcerated for 1 year and 4 months.

21.10. In the case of *Sukhvinder Singh Bittu Vs. State of Punjab*¹⁹ the Supreme Court considering long incarceration of an undertrial-accused granted him bail who was incarcerated for **1 year** despite being alleged to be in possession of commercial quantity of poppy straw.

21.11. In the case of *Tinku Vs. State (NCT of Delhi)*²⁰ the Delhi High Court considering the long incarceration of an undertrial-accused granted him bail who was incarcerated for 2 years and 5 months. The contraband in question was Heroin, the commercial quantity of which is 250 grams. In this case recovery of 945 grams was allegedly made from the accused despite which the High Court invoking the right to speedy justice flowing from Article 21 of the Constitution and forceable delay in trial granted bail to the accused.

21.12. In the case of *Kulwinder Singh Vs. State of Punjab*²¹ the Punjab and Haryana High Court considering long incarceration of an undertrial-accused granted him bail who was incarcerated for 2 years and 8 months. The contraband in question was Etizolam Salt, the commercial quantity of which is 2.5 grams. In this case recovery of 99.876 grams was allegedly made from accused despite which the

¹⁹ Cri. Appeal No.1204 of 2024

²⁰ 2024 SCC OnLine Del 9132

²¹ CRM-M-26704 of 2024

High Court invoking the right to speedy justice flowing from Article 21 of the Constitution and delay in trial granted bail to the accused.

21.13. In the case of *Amey Sanjay Jadhav Vs. State of Maharashtra*²² this Court on 03.01.2025 considering long incarceration of the undertrial-accused has granted bail to the undertrial accused who was incarcerated for 2 years and 11 months. The contraband in question was 1.3 kilograms of Charas, the commercial quantity of which is 1000 grams.

21.14. In the case of *Mohd. Mobin Jahurul Hasan Manihar Vs. State of Maharashtra*²³, this Court on 20.01.2025 considering long incarceration of the under-trial accused granted bail to him who was incarcerated for 1 year 11 months. The contraband in question was 220 gms of MD , the commercial quantity of which is 50 gms.

22. In view of the ambiguity and dichotomy in recording the correct weight of the contraband at the time of seizure which is seen and coupled with the facet of Right to Speedy trial flowing from Article 21 of the Constitution and keeping in mind that the Applicant is a young man with a future full of opportunities I am inclined to allow the Bail Application considering the totality of circumstances. One of the reason which impels me is that if the contraband seized would be having total weight of 52 grams, then in such a case, the actual weight would be

²² BA No.911 of 2024 decided on 03.01.2025

²³ BA No.713 of 2024 decided on 20.01.2025

below 50 grams and rigors of Section 37 of the NDPS Act would not apply.

23. In view of the above, present Application is allowed in terms of prayer clause (a) subject to the following terms and conditions:-

- (i) Applicant is directed to be released on bail on furnishing P.R. Bond in the sum of Rs. 25,000/- with one or two sureties in the like amount;
- (ii) Applicant shall report to the Investigating Officer of concerned Police Station as and when called;
- (iii) Applicant shall co-operate with the conduct of trial and attend the Trial Court on all dates unless specifically exempted and will not take any unnecessary adjournments, if he does so, it will entitle the prosecution to apply for cancellation of this order;
- (iv) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;
- (v) Applicant shall not influence with any of the witnesses or tamper with the evidence in any manner;
- (vi) Applicant shall keep the Investigating Officer informed of his current address and mobile contact number and / or change of residence or mobile details, if any, from time to

time;

(vii) Any infraction of the above conditions shall entail cancellation of this order.

24. It is clarified that the observations in this order are limited for the purpose of granting Bail only and I have not made any observations on merits of the case.

25. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

Ajay

Digitally signed
by RAVINDRA
MOHAN
AMBERKAR
Date:
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+0530