IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA
ON THE 28th DAY OF FEBRUARY, 2022
BEFORE
HON'BLE MR. JUSTICE SANDEEP SHARMA
CRIMINAL MISC.PETITION (MAIN) NO.251 of 2022

Between:-

TAHAL SINGH, SON OF SH. SURAT SINGH, AGED ABOUT 30 YEARS, PRESENTLY IN JUDICIAL CUSTODY, RESIDENT OF VILLAGE DAMSEHAD, P.O. MOHAL, TEHSIL BHUNTAR, DISTRICT KULLU, H.P. THROUGH NEXT FRIEND.

……PETITIONER

(BY MS. REETA HINGMANG, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

……RESPONDENT

(BY MR. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH MR. NARINDER THAKUR,DEPUTY ADVOCATE GENERAL)

Whether approved for reporting? Yes.

This petition coming on for orders this day, the Court passed the following:

ORDER

Bail petitioner, namely Tahal Singh, who is behind the bars since 26.10.2020, has approached this Court in the instant proceedings filed under Section 439 Cr.PC, for grant of regular bail in case FIR No. 239/2019, dated 26.10.2019, under Sections 20 & 29 of the Narcotic Drugs and Psychotropic Substances Act (in short "the

Act") registered at Police Station Bhuntar, District Kullu, H.P.

2. Respondent-State has filed status report and ASI Jai Singh, Police Station Bhuntar, District Kullu, H.P., has also come present with record. Record perused and returned. Close scrutiny of status report/record, reveals that on 25.10.2019, policy party comprising of TCP Bajora, stopped a Volvo Bus bearing No. HP661-2204, enroute Manali to Chandigarh. Since, occupant of Seat No.18, namely, Tahal Singh, i.e. present bail petitioner, got perplexed, police after having associated independent witnesses, effected his search and allegedly recovered 1.2 KG of charas from the bag being carried by him. After completion of necessary codal formalities, police lodged FIR, detailed hereinabove, against him and since then, he is behind the bars. During investigation, above-named Tahal Singh disclosed to the police that he purchased contraband in question from a person namely Ramesh Chand for a total sum of Rs. 80000/-. Bail petitioner also disclosed to the police that contraband allegedly recovered from him was to be further sold to a person namely Ghardeep Singh, resident of Ropar, Punjab. He also disclosed that Ghardeep Singh transferred sum of Rs. 25,450/- in the account of other person namely Giridhar. On the basis of aforesaid details revealed by the bail petitioner, police carried out further investigation and found that some money was transferred in bank account of Giridhar by person namely Ghardeep Singh. Police called upon above-named Giridhar and Ghardeep Singh to join investigation and thereafter arrested them. All the

persons named hereinabove, i.e. Ramesh Chand, Giridhar and Ghardeep Singh already stand enlarged on bail. Since, investigation in this case is complete and nothing remains to be recovered from the bail petitioner coupled with the fact that till date charges have not been framed, petitioner has approached this Court in the instant proceedings for grant of regular bail.

3. While fairly admitting factum with regard to filing of challan in the competent court of law, Mr. Desh Raj Thakur, learned Additional Advocate General, contends that though charges are yet to be framed, but keeping in view the gravity of offence alleged to have been committed by the bail petitioner, prayer having been made on his behalf for grant of bail deserves outright rejection. While making this Court to peruse the status report/record, Mr. Thakur, vehemently argued that there is overwhelming evidence collected on record by Investigating Agency, suggestive of the fact that bail petitioner is a drug peddler and in case, he is ordered to be enlarged on bail at this stage, he may not only flee from justice, but may again indulge in such like activities and as such, prayer made on his behalf for grant of bail deserves outright rejection.

4. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that on the date of alleged incident, police after having associated two independent witnesses, effected recovery of 1.2 KG of charas from the bag kept by petitioner under his legs and as such, this Court finds it difficult to agree with Ms. Reeta Hingmang, learned counsel

representing the bail petitioner that he has been falsely implicated. No doubt, material available on record nowhere suggest financial transaction, if any, *inter se* bail petitioner as well as other co-accused, but since, commercial quantity of contraband came to be recovered from the bag being carried by bail petitioner, it may be too premature, at this stage to conclude/ rule out the complicity of bail petitioner in commission of alleged offence. However, having taken note of the fact that more than 2 ½ years have passed after registration of the case and till date, charges have been not framed coupled with the fact that no case in past stands registered against the bail petitioner, prayer made on behalf of the petitioner for grant of bail, deserves to be considered.

5. In the case at hand , FIR was lodged on 26.10.2019 and after completion of investigation, police presented the challan in the competent court of law on 20.05.2020. Approximately, 19 months have passed after filing of challan, but till date, charges have not been framed and matter is being repeatedly adjourned for scrutiny of document. Though, Mr. Desh Raj, learned Additional Advocate General argued that needful by Courts could not be done well within the time on account of COVID-19, but that cannot be a ground to deny the relief to the petitioner, as has been claimed in the instant petition. By now, it is well settled that speedy trial is a right of the accused. Accused/under trials cannot be left to incarcerate in jails for indefinite period during trial, especially when delay is on account of prosecution or on account of pendency of trials.

6. The Constitution Bench of Hon'ble Apex Court in ***Abdul Rehman Antulay vs. R.S. Nayak (1992) 1 SCC 225*** has laid down the guidelines with respect to speedy trial and observed 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 21encompasses 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) At the same time, one cannot ignore the fact that it is usually the accused who is interested in delaying the proceedings. As is often pointed out, "delay is a known defence tactic". Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. Of course, there may be cases where the prosecution, for whatever reason, also delays the proceedings. Therefore, in every case, where the Right to speedy trial is alleged to have been infringed, the first question to be put and answered is-who is responsible for the delay? Proceedings taken by either party in good faith, to vindicate their rights and interest, as perceived by them, cannot be treated as delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay. It goes without saying that frivolous proceedings or proceedings taken merely for delaying the day of reckoning cannot be treated as proceedings taken in good faith. The mere fact that

an application/petition is admitted and an order of stay granted by a superior court is by itself no proof that the proceeding is not a frivolous. Very often these stays obtained on ex-parte representation.

(5) While determining whether undue delay has occurred (resulting in violation of Right to Speedy Trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the work-load of the court concerned, prevailing local conditions and so on-what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one.

(6) Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. As has been observed by Powell, J. in Barker "it cannot be said how long a delay is loo long in a system where justice is supposed to be swift but deliberate". The same ideal has been stated by White, J. in U.S. v. Ewell, 15 Law Edn. 2nd 627, in the following words :

'……...the sixth amendment right to a speedy trial is necessarily relative, is consistent with delays, and has orderly expedition, rather than more speed, as its essential ingredients; and whether delay in completing a prosecution amounts to an un-constitutional deprivation of rights depends upon all the circumstances.'

However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the

fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become prosecution, again depends upon the facts of a given case.

(7) We cannot recognize or give effect to, what is called the 'demand' rule. An accused cannot try himself; he is tried by the court at the behest of the prosecution. Hence, an accussed's plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial. If in a given case, he did make such a demand and yet he was not tried speedily, it would be a plus point in his favour, but the mere non- asking for a speedy trial cannot be put against the accused. Even in U.S.A., the relevance of demand rule has been substantially watered down in Barker and other succeeding cases.

(8) Ultimately, the court has to balance and weigh the several relevant factors-'balancing test' or 'balancing process'-and determine in each case whether the right to speedy trial has been denied in a given case.

(9) Ordinarily speaking, where the court comes to the conclusion that Right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order-including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the

sentence where the trial has concluded-as may be deemed just and equitable in the circumstances of the case.

(10) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of Right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of U.S.A. too as repeatedly refused to fix any such outer time limit inspite of the Sixth Amendment. Nor do we think that not fixing any such outer limit in effectuates the guarantee of Right to speedy trial.

(11) An objection based on denial of Right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis"

7. Aforesaid guidelines have been further reiterated by seven Judges Bench of Hon'ble Supreme Court in ***P. Ramachandra Rao vs. State of Karnataka (2002) 4 SCC 578.*** Subsequently, Honble Apex Court in ***Pankaj Kumar vs. State of Maharashtra (2008) 16 SCC 117*** has laid down the following test with regard to the application of guidelines:

> 23. *In every case, where the right to speedy trial is alleged to have been infringed, the court has to perform the balancing act upon taking into consideration all the attendant circumstances, enumerated above, and determine in each case whether the right to speedy trial has been denied in a given case. Where the court comes to the conclusion that the right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, may be quashed unless the court feels that having regard to the nature of offence and other relevant circumstances, quashing of proceedings may not be in the interest of justice. In such a situation, it is open to the court to make an appropriate order as it may deem just and equitable including fixation of time for conclusion of trial."*

8. Recently Apex Court vide order order dated 7.12.2021, passed in ***Mahmood Kurdeya vs. Narcotics Control Bureau*** in ***Criminal Appeal No. 1570 of 2021 (@ SLP (Crl.) No. 7085 of 2021)*** granted bail to a person accused of having possessed/transported commercial quantity of contraband on the ground of delay. In the aforesaid order Hon'ble Apex Court specifically observed that factor, which persuades us to pass an order in favour of the appellant despite there being rigors of Section 37 of the Act is that charge sheet was filed on 23rd September, 2018, but till date, neither charges have been framed nor trial has commenced. Relevant para of the aforesaid judgment is as under:-

> *" We may notice the stand of the learned counsel*

for the respondent that this transaction took place after the sunset clause even if the drugs were purchases within the sunset clause.

What persuades us to pass an order in favour of the appellant is the fact that despite the rigors of Section 37 of the said Act, in the present case though charge-sheet was filed on 23.09.2018 even the charges have not been framed nor trial has commenced. The manufacturer who sold the drugs to the appellant during the sunset clause himself has been granted bail."

9. Reliance is placed on judgment passed by the Hon'ble Apex Court in case titled **Umarmia Alias Mamumia** v. **State of Gujarat**, (2017) 2 SCC 731, relevant para whereof has been reproduced herein below:-

> "11. This Court has consistently recognised the right of the accused for a speedy trial. Delay in criminal trial has been held to be in violation of the right guaranteed to an accused under Article 21 of the Constitution of India. (See: Supreme Court Legal Aid Committee v. Union of India, (1994) 6 SCC 731; Shaheen Welfare Assn. v. Union of India, (1996) 2 SCC 616) Accused, even in cases under TADA, have been released on bail on the ground that they have been in jail for a long period of time and there was no likelihood of the completion of the trial at the earliest. (See: Paramjit Singh v. State (NCT of Delhi), (1999) 9 SCC 252 and Babba v. State of Maharashtra, (2005) 11 SCC 569).

10. In the case at hand, FIR, was registered on 26.10.2019 and charge-sheet was filed on 26.05.2020, but till date, charges have not been framed and matter is being repeatedly adjourned for checking of documents. Record reveals that prosecution intends to examine as many as 17 witnesses, meaning thereby, considerable time is likely to

be consumed for final conclusion of trial, Trial Court below has posted the matter on 4th March, 2022, for checking of documents. Hon'ble Apex Court as well as this Court in catena of cases have repeatedly held that till the time, guilt of a person is not proved in accordance with law, he/she is deemed to be innocent and as such, no fruitful purpose would be served by keeping the bail petitioner behind the bars for an indefinite period during trial. No doubt, petitioner has been found to be carrying commercial quantity of contraband and as such, rigors of rigors of Section 37 are attracted, but bare perusal of Section 37 of the Act, nowhere suggests that there is complete bar for this Court to grant bail in cases involving commercial quantity, rather, in such like cases, court after having afforded an opportunity of being heard to the public prosecutor can always enlarge person involved in the case on bail, if it is convinced that he/she has been falsely implicated and in the event of his/her being enlarged on bail, he/she shall not indulge in these activities again. Peculiar circumstances, which compels/persuades this Court to consider prayer made on behalf of the petitioner in the case at hand is the inordinate delay in commencement of trial and as such, this Court finds it to be a fit case to intervene, to ensure speedy justice to the accused, who has already suffered for more than 2½ years, that too, when trial has not even commenced. Apprehension expressed by learned Additional Advocate General that in the event of bail petitioner being enlarged on bail, he may flee from justice, can be best met by putting him to the stringent conditions.

11. The Hon’ble Apex Court in Criminal Appeal No. 227/2018,

Dataram Singh vs. **State of Uttar Pradesh & Anr.,** decided on 6.2.2018, has categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Hon'ble Apex Court has further held that if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

> ***"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.***
>
> ***3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge***

considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements

> ***of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.***

12. Needless to say object of the bail is to secure the attendance of the accused in the trial and 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. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

13. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)1 Supreme Court Cases 49; held as under:-

> ***" 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 can be 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. 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 India , 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. 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 propose of giving him a taste of imprisonment as a lesson."

14. In **Manoranjana Sinh Alias Gupta** versus **CBI** 2017 (5) SCC 218, The Hon'ble Apex Court has held as under:-

" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that 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 found guilty. It was underlined that the object of bail is neither punitive or preventive. This Court sounded a caveat 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 a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him to taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in

> ***nature, it has to be exercised with care ad caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."***

15. The Hon'ble Apex Court in ***Prasanta Kumar Sarkar v. Ashis Chatterjee and Another*** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

> **(i)** ***whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;***
> **(ii)** ***nature and gravity of the accusation;***
> **(iii)** ***severity of the punishment in the event of conviction;***
> **(iv)** ***danger of the accused absconding or fleeing, if released on bail;***
> **(v)** ***character, behaviour, means, position and standing of the accused;***
> **(vi)** ***likelihood of the offence being repeated;***
> **(vii)** ***reasonable apprehension of the witnesses being influenced; and***
> **(viii)** ***danger, of course, of justice being thwarted by grant of bail.***

16. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, bail petitioner has carved out a case for grant of bail, accordingly, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR,

subject to his furnishing personal bond in the sum of Rs. 5,00,000/- with one local surety in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial Court, with following conditions:

a. ***He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;***

b. ***He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;***

c. ***He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and***

d. ***He shall not leave the territory of India without the prior permission of the Court.***

17. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

18**.** Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this application alone. The petition stands accordingly disposed of.

19. There would be no need for a certified copy of this order for furnishing bonds. Any Advocate for the petitioner can download this order along with the case status from the official web page of this Court and attest it to be a true copy. In case the

attesting officer or the Court wants to verify the authenticity, such officer can also verify its authenticity and may download and use the downloaded copy for attesting bonds.

(Sandeep Sharma)
Judge

28th February, 2022
(reena)