MOHD MUSLIM @ HUSSAIN

v.

STATE (NCT OF DELHI)

(Criminal Appeal No(s). 943 of 2023)

MARCH 28, 2023

[S. RAVINDRA BHAT* AND DIPANKAR DATTA, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – s.37 – Code of Criminal Procedure, 1973 – s.436A – Appellant accused of committing offences punishable under NDPS Act has been in custody since 2015, if entitled to bail – Held: Recovery of ganja was made from the four co-accused – Appellant was arrested at the behest, and on the statement of one of the co-accused – Prosecution relied on that statement, as well as the confessional statement of the appellant – In addition, it also relied on the bank statements of one of the co-accused who allegedly disclosed that money used to be transferred to the appellant – As against this, the prosecution has not recovered anything else from the appellant – The allegation that he is a mastermind is not backed by any evidence of extensive dealing with narcotics, which would reasonably have surfaced – Further, two co-accused persons have been enlarged on bail – Appellant has been in custody for over 7 years and 4 months – Progress of the trial has been at a snail's pace wherein 30 witnesses have been examined, and 34 more have to be examined – Grant of bail on ground of undue delay in trial, cannot be said to be fettered by s.37, given the imperative of s.436A which is applicable to offences under the NDPS Act too – Thus, on facts, appellant enlarged on bail subject to such conditions as the trial court may impose – Bail.

Bail – Offences under Special Acts – Duty of Courts – Discussed.

Narcotic Drugs and Psychotropic Substances Act, 1985 – s.37 – Special conditions under – Interpretation of.

Words and Phrases – 'Not guilty' – Discussed – Bail.

* Author

Allowing the appeal, the Court

HELD:

1.1 The recovery of ganja was made on 28.09.2015, from the four co-accused, including 'NE'. The present appellant was arrested at the behest, and on the statement of this 'NE'. The prosecution has relied on that statement, as well as the confessional statement of the present appellant; in addition, it has relied on the bank statements of 'VS' @ 'B', who allegedly disclosed that money used to be transferred to the appellant. As against this, the prosecution has not recovered anything else from the appellant; its allegation that he is a mastermind, is not backed by any evidence of extensive dealing with narcotics, which would reasonably have surfaced. The prosecution has not shown involvement of the appellant, in any other case. Furthermore, he was apparently 23 years of age, at the time of his arrest. It is an undisputed fact that two co-accused persons (who also, were not present at the time of raid and from whom no contraband was recovered) - the accused ('VS' @ 'B') who allegedly transferred money to the appellant's account as payment for the ganja, and the accused ('NY' @ 'TP') from whom the original insurance papers and registration certificate of the car from which contraband was seized, was recovered - have both been enlarged on bail. The appellant has been in custody for over 7 years and 4 months. The progress of the trial has been at a snail's pace: 30 witnesses have been examined, whereas 34 more have to be examined. [Para 17]

1.2 The conditions which courts have to be cognizant of are that there are reasonable grounds for believing that the accused is *"not guilty of such offence" a*nd that he is not likely to commit any offence while on bail. What is meant by "not guilty" when all the evidence is not before the court? It can only be a *prima facie* determination. That places the court's discretion within a very narrow margin. Given the mandate of the general law on bails (Sections 436, 437 and 439, CrPC) which classify offences based on their gravity, and instruct

that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted *reasonably.* Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be assessed by courts, require that the court records its satisfaction that the accused might not be guilty of the offence and that upon release, they are not likely to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice: even in serious offences like murder, kidnapping, rape, etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts: likely guilt of the accused and the likelihood of them not committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to - in cases when accused of offences enacted under special laws – be balanced against the public interest. 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. 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 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. 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. In the facts of this case, the appellant deserves to be enlarged on bail. The appellant is directed to be enlarged on bail, subject to such conditions as the trial court may impose. [Paras 18-20, 24]

Kartar Singh v. State of Punjab **(1994) 3 SCC 569 : [1994] 2 SCR 375 – followed.**

Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India **(1994) 6 SCC 731 : [1994] Supp. 4 SCR 386;** *Shaheen Welfare Association v. Union of India* **(1996) 2 SCC 616 : [1996] 2 SCR 1123;** *Satender Kumar Antil v. Central Bureau of Investigation* **(2022) 10 SCC 51;** *Union of India v. K. A. Najeeb* **(2021) 3 SCC 713 : [2021] 2 SCR 443;** *Vijay Madanlal Chaudhary v. Union of India* **2022 SCC Online SC 929:[2022] 6 SCR 382 – relied on.**

Hussainara Khatoon v. Home Secy., State of Bihar **(1980) 1 SCC 81 : [1979] 3 SCR 1276;** *Kadra Pahadiya & Ors. v. State of Bihar* **(1981) 3 SCC 671;** *Abdul Rehman Antulay v. R.S. Nayak* **(1992) 1 SCC 225 : [1991] 3 Suppl. SCR 325;** *State of Madhya Pradesh v. Kajad* **(2001) 7 SCC 673 : [2001] Supp. 2 SCR 617;** *Vaman Narain Ghiya v. State of Rajasthan* **(2009) 2 SCC 281 : [2008] 17 SCR 369;** *A Convict Prisoner v. State* **1993 Cri LJ 3242 – referred to.**

National Crime Records Bureau, Prison Statistics in India **https://ncrb.gov.in/sites/default/files/PSI-2021/Executive_ncrb_Summary-2021.pdf; Donald**

Clemmer, *The Prison Community* **(1968) Holt, Rinehart & Winston, which is referred to in Tomasz Sobecki, 'Donald Clemmer's** *Concept of Prisonisation',* **available at: https://www.tkp.edu.pl/wp- content/uploads/2020/12/Sobecki_sklad.pdf (accessed on 23rd March 2023) – referred to.**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 943 of 2023.

From the Judgment and Order dated 08.09.2022 of the High Court of Delhi at New Delhi in BA No. 2675 of 2022.

Ms. Tanya Agarwal, Mrs. Shubhangi Tuli, Advs. for the Appellant.

Vikramjit Banerjee, A.S.G., Shreekant Neelappa Terdal, Ms. Nachiketa Joshi, Digvijay Dam, Sachin Sharma, Rajan Kr. Chourasia, Ms. Shruti Agarwal, Ms. Janhvi Prakash, Kartik Dey, Advs. for the Respondent.

The Judgment of the Court was delivered by

S. RAVINDRA BHAT, J.

1. Special leave granted. With consent of counsel for parties, the appeal was heard finally.

2. Long back, in *Hussainara Khatoon v. Home Secy., State of Bihar*[1] this court had declared that the right to speedy trial of offenders facing criminal charges is *"implicit in the broad sweep and content of Article 21 as interpreted by this Court".* Remarking that a valid procedure under Article 21 is one which contains a procedure that is "reasonable, fair and just" it was held that:

"Now obviously procedure prescribed by law for depriving a person of liberty cannot be "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

1 [1979] 3 SCR 1276 : (1980) 1 SCC 81

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."

3. These observations have resonated, time and again, in several judgments, such as *Kadra Pahadiya & Ors. v. State of Bihar*[2] and *Abdul Rehman Antulay v. R.S. Nayak*[3]; in the latter the court re-emphasized the right to speedy trial, and further held that an accused, facing prolonged trial, has no option:

"The State or complainant prosecutes him. It is, thus, the obligation of the State or the complainant, as the case may be, to proceed with the case with reasonable promptitude. Particularly, in this country, where the large majority of accused come from poorer and weaker sections of the society, not versed in the ways of law, where they do not often get competent legal advice, the application of the said rule is wholly inadvisable. Of course, in a given case, if an accused demands speedy trial and yet he is not given one, may be a relevant factor in his favour. But we cannot disentitle an accused from complaining of infringement of his right to speedy trial on the ground that he did not ask for or insist upon a speedy trial."

4. These issues have pivotal meaning to the facts of this case. The appellant complains that his application for bail ought not to have been rejected by the High Court, in the present case, considering that he has suffered incarceration for over 7 years and the criminal trial has hardly reached the half-way mark. The appellant is accused of committing offences punishable under Sections 20, 25 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'NDPS Act'). His application under Section 439 read with Section 482 of the Criminal Procedure Code (hereafter 'CrPC'), seeking grant of regular bail, before the Delhi High Court, was denied by

2 (1981) 3 SCC 671
3 [1991] Supp. 3 SCR 325: (1992) 1 SCC 225

the impugned judgment[4]. Some other facts important to the decision in this case, are that at the time of his arrest, the appellant was 23 years. He was not found in possession of the narcotic drug; other co-accused were.

5. The prosecution alleges that on 28.09.2015, based on secret information received by the police, a raid was conducted, leading to arrest of four accused persons - Nitesh Ekka, Sanjay Chauhan, Sharif Khan, and Virender Shakiyar/Sakyabar @ Deepak, who were alleged to be in possession of 180 kilograms of *ganja*. During investigation, the accused Nitesh Ekka was taken to Chhattisgarh for identification of co-accused persons. At his instance, the present appellant Mohd. Muslim was arrested on the intervening night of 03/04.10.2015. Pursuant to further investigation, three other co-accused (Virender Singh @ Beerey, Shantilal Tigga @ Guddu, and Nepal Yadav @ Tony Pahalwan) were also arrested. It is the prosecution's case that Virender Singh @ Beerey would purchase *ganja* and make transfers to the bank accounts belonging to Mohd. Muslim, Shantilal Tigga @ Guddu and Nitesh Ekka, and their friends and families, before further supplying the *ganja* to Nepal Yadav @ Tony Pahalwan. On 29.02.2016, the chargesheet was filed under Sections 20/ 25/ 29 of the NDPS Act and Section 120B IPC, and on 05.07.2016 the charges were framed against the appellant and other co-accused. As per pleadings, two supplemental chargesheets were also filed on 01.08.2016 and 08.11.2017.

6. The appellant's bail application was rejected by the district court[5] based on the gravity of the offences alleged, severity of punishment, and the appellant's alleged role. It was noted that he had been in regular contact with the other co-accused to commit the crime, and that material witnesses were yet to be examined.

7. Aggrieved, the present appellant approached the High Court. The impugned judgment records that the present accused was *prima facie* in regular contact with other co-accused as indicated by the

4 Order dated 08.09.2022 in Bail Application No. 2675/2022.
5 Order dated 08.06.2022 in FIR No. 148/2015, passed by the ASJ & Special Judge (NDPS), South East District, Saket Court, New Delhi.

call records, and that the main accused Virender Singh @ Beerey had transferred money from his bank account to the appellant's bank account, several times. One of the witnesses, during trial, had also allegedly mentioned that Rs. 50,000 was received from the present appellant. It was held that there was a *prima facie* case against him, and no grounds to rely on the exceptions of Section 37 of the NDPS Act; therefore, application for regular bail was refused, with a direction to the trial court to expedite the trial and conclude it within six months. Aggrieved, the appellant is now before this court, renewing his plea for grant of regular bail.

8. Ms. Tanya Agarwal, learned counsel appearing on behalf of the appellant, urged that the period of long incarceration suffered, entitled the appellant to grant of bail. Further, 34 more witnesses were yet to be examined, with little or no progress to the trial since the High Court's direction to expedite the trial. It was also pointed out that main accused Virender Singh @ Beerey and another co-accused Nepal Yadav, had both already been granted bail by the High Court[6]. Counsel urged bail on the ground of parity.

9. Mr. Vikramjit Banerjee, learned Additional Solicitor General of India, appearing for the State, strongly opposed grant of bail, citing Section 37 of the NDPS Act. It was urged that the appellant was actively involved in the commission of the offence – with call records and bank transactions implicating him with the main accused Virender Singh @ Beerey. The ASG submitted that such cases are deeply concerning, as the accused persons are said to be involved in a drug peddling network. The public interest of protection against sale and use of illegal drugs, outweighed the concerns regarding individual liberty of the accused, and justified continued custody of the appellant. Provisions like Section 37 of the NDPS Act have been upheld by this court, as necessary to ensure public order and to prevent recurrence of serious crimes like drug dealing. The learned ASG also submitted that the role of the appellant, though he is a co-accused is prominent, as he

6 Order dated 10.12.2018 in Bail Application No. 2188/2018, and order dated 26.07.2018 in Bail Application No. 944/2018, respectively

appears to be the mastermind behind the supply and delivery of narcotic substances from Chhattisgarh.

Analysis and Conclusions

10. Section 37 of the NDPS Act reads as follows:

"Offences to be cognizable and non-bailable—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973—

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

(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act 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 or any other law for the time being in force, or granting of bail."

11. In this case, as it stands, the appellant has been in custody since 03.10.2015, barring grant of interim bail from time to time, for wedding ceremonies[7] and to take care of his ailing mother[8]. It was observed by this court, in *State of Madhya Pradesh v. Kajad*[9] while commenting on Section 37 of the NDPS Act, that a "liberal" approach should not be adopted:

"Negation of bail is the rule and its grant and exception under sub clause (ii) of clause (b) of Section 37(1). For granting the bail the court must, on the basis of the record produced before it, be satisfied

7 Order dated 03.05.2016 by the Special Judge; and Order dated 28.01.2022 by the Special Judge.
8 Order dated 24.07.2020 in Bail Application No. 1859/2020.
9 [2001] Supp. 2 SCR 617: (2001) 7 SCC 673.

that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail. It has further to be noticed that the conditions for granting the bail, specified in clause (b) of sub-section (1) of Section 37 are in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail."

12. This court has to, therefore, consider the appellant's claim for bail, within the framework of the NDPS Act, especially Section 37. In *Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India*[10], this court made certain crucial observations, which have a bearing on the present case while dealing with denial of bail to those accused of offences under the NDPS Act:

"On account of the strict language of the said provision very few persons accused of certain offences under the Act could secure bail. Now to refuse bail on the one hand and to delay trial of cases on the other is clearly unfair and unreasonable and contrary to the spirit of Section 36(1) of the Act, Section 309 of the Code and Articles 14, 19 and 21 of the Constitution. We are conscious of the statutory provision finding place in Section 37 of the Act prescribing the conditions which have to be satisfied before a person accused of an offence under the Act can be released. Indeed we have adverted to this section in the earlier part of the judgment. We have also kept in mind the interpretation placed on a similar provision in Section 20 of the TADA Act by the Constitution Bench in Kartar Singh v. State of Punjab [(1994) 3 SCC 569]. Despite this provision, we have directed as above mainly at the call of Article 21 as the right to speedy trial may even require in some cases quashing of a criminal proceeding altogether, as held by a Constitution Bench of this Court in A.R. Antulay v. R.S. Nayak [(1992) 1 SCC 225] , release on bail, which can be taken to be embedded in the right of speedy trial, may, in some cases be the demand of Article 21. As we have not felt inclined to accept the extreme submission of

10 [1994] Supp. 4 SCR 386: (1994) 6 SCC 731

quashing the proceedings and setting free the accused whose trials have been delayed beyond reasonable time for reasons already alluded to, we have felt that deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21. Of course, some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21, which has to be telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness in procedural matters."

13. When provisions of law curtail the right of an accused to secure bail, and correspondingly fetter judicial discretion (like Section 37 of the NDPS Act, in the present case), this court has upheld them for conflating two competing values, i.e., the right of the accused to enjoy freedom, based on the presumption of innocence, and societal interest – as observed in *Vaman Narain Ghiya v. State of Rajasthan*[11] ("*the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal....*"). They are, at the same time, upheld on the condition that the trial is concluded expeditiously. The Constitution Bench in *Kartar Singh v. State of Punjab*[12] made observations to this effect. In *Shaheen Welfare Association v. Union of India*[13] again, this court expressed the same sentiment, namely that when stringent provisions are enacted, curtailing the provisions of bail, and restricting judicial discretion, it is on the basis that investigation and trials would be concluded swiftly. The court said that Parliamentary intervention is based on:

11 [2008] 17 SCR 369: (2009) 2 SCC 281
12 [1994] 2 SCR 375: (1994) 3 SCC 569
13 [1996] 2 SCR 1123: (1996) 2 SCC 616

"a conscious decision has been taken by the legislature to sacrifice to some extent, the personal liberty of an undertrial accused for the sake of protecting the community and the nation against terrorist and disruptive activities or other activities harmful to society, it is all the more necessary that investigation of such crimes is done efficiently and an adequate number of Designated Courts are set up to bring to book persons accused of such serious crimes. This is the only way in which society can be protected against harmful activities. This would also ensure that persons ultimately found innocent are not unnecessarily kept in jail for long periods."

14. In a recent decision, while considering bail under the Unlawful Activities Act (Prevention) Act, 1967, this court in *Union of India v. K. A. Najeeb*[14] observed that:

"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), (1999) 9 SCC 252] , Babba v. State of Maharashtra, (2005) 11 SCC 569 and Umarmia v. State of Gujarat, (2017) 2 SCC 731 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."

The court concluded that statutory restrictions like Section 43-D(5) of the UAPA, cannot fetter a constitutional court's ability to grant bail on ground of violation of fundamental rights.

15. Even in the judgment reported as *Vijay Madanlal Chaudhary v. Union of India*[15] this court while considering bail conditions under the Prevention of Money Laundering Act, 2002, held that:

14 [2021] 2 SCR 443: (2021) 3 SCC 713
15 [2022] 6 SCR 382: 2022 SCC Online SC 929

"If the Parliament/Legislature provides for stringent provision of no bail, unless the stringent conditions are fulfilled, it is the bounden duty of the State to ensure that such trials get precedence and are concluded within a reasonable time, at least before the accused undergoes detention for a period extending up to one-half of the maximum period of imprisonment specified for the concerned offence by law."

16. In the most recent decision, *Satender Kumar Antil v. Central Bureau of Investigation*[16] prolonged incarceration and inordinate delay engaged the attention of the court, which considered the correct approach towards bail, with respect to several enactments, including Section 37 NDPS Act. The court expressed the opinion that Section 436A[17] (which requires *inter alia* the accused to be enlarged on bail if the trial is not concluded within specified periods) of the Criminal Procedure Code, 1973 would apply:

"We do not wish to deal with individual enactments as each special Act has got an objective behind it, followed by the rigour imposed. The general principle governing delay would apply to these categories also. To make it clear, the provision contained in Section 436-A of the Code would apply to the Special Acts also in the absence of any specific provision. For example, the rigour as provided under Section 37 of the NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person. We do feel that more the rigour, the quicker the adjudication ought to be. After all, in these types of cases number of witnesses would be very less and there may not be any justification for prolonging the trial. Perhaps there is a need to comply with the directions of this Court to expedite the process and also a stricter compliance of Section 309 of the Code."

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16 (2022) 10 SCC 51

17 *Section 436A provides as follows:*

"Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties;

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties;

Provided further that no such person shall in any case be detained during the period of investigation inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law."

17. The facts in this case reveal that the recovery of *ganja* was made on 28.09.2015, from the four co-accused, including Nitesh Ekka. The present appellant was arrested at the behest, and on the statement of this Nitesh Ekka. The prosecution has relied on that statement, as well as the confessional statement of the present appellant; in addition, it has relied on the bank statements of Virender Singh @ Beerey, who allegedly disclosed that money used to be transferred to the appellant. As against this, the prosecution has not recovered anything else from the appellant; its allegation that he is a mastermind, is not backed by any evidence of extensive dealing with narcotics, which would reasonably have surfaced. The prosecution has not shown involvement of the appellant, in any other case. Furthermore, he was apparently 23 years of age, at the time of his arrest. It is an undisputed fact that two co-accused persons (who also, were not present at the time of raid and from whom no contraband was recovered) - the accused (Virender Singh @ Beerey) who allegedly transferred money to the appellant's account as payment for the *ganja*, and the accused (Nepal Yadav @ Tony Pahalwan) from whom the original insurance papers and registration certificate of the car from which contraband was seized, was recovered[18] - have both been enlarged on bail. The appellant has been in custody for over 7 years and 4 months. The progress of the trial has been at a snail's pace: 30 witnesses have been examined, whereas 34 more have to be examined.

18. The conditions which courts have to be cognizant of are that there are reasonable grounds for believing that the accused is *"not guilty of such offence"* and that he is not likely to commit any offence while on bail. What is meant by "not guilty" when all the evidence is not before the court? It can only be a *prima facie* determination. That places the court's discretion within a very narrow margin. Given the mandate of the general law on bails (Sections 436, 437 and 439, CrPC) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the

18 As per the counter-affidavit dated 21.02.2023 filed by the respondent-state before this court.

court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted *reasonably*. Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be assessed by courts, require that the court records its satisfaction that the accused might not be guilty of the offence and that upon release, they are not likely to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice: even in serious offences like murder, kidnapping, rape, etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts: likely guilt of the accused and the likelihood of them not committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to - in cases when accused of offences enacted under special laws – be balanced against the public interest.

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*[19]). 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.

21. Before parting, it would be important to reflect that laws which impose stringent conditions for grant of bail, may be necessary in public interest; yet, if trials are not concluded in time, the injustice wrecked on the individual is immeasurable. Jails are overcrowded and their living conditions, more often than not, appalling. According to the Union Home Ministry's response to Parliament, the National Crime Records Bureau had recorded that as on 31st December 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the country[20] Of these 122,852 were convicts; the rest 4,27,165 were undertrials.

22. The danger of unjust imprisonment, is that inmates are at risk of "prisonisation" a term described by the Kerala High Court in *A Convict Prisoner v. State*[21] as*"a radical transformation"* whereby the prisoner:

"loses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems result from loss of freedom, status, possessions, dignity any autonomy of personal life. The inmate culture of prison turns out to be dreadful. The prisoner becomes hostile by ordinary standards. Self-perception changes."

23. There is a further danger of the prisoner turning to crime, *"as crime not only turns admirable, but the more professional the crime, more honour is paid to the criminal"*[22] (also see Donald Clemmer's *'The*

19 (2009) 2 SCC 624

20 *National Crime Records Bureau, Prison Statistics in India https://ncrb.gov.in/sites/default/files/PSI-2021/Executive_ncrb_Summary-2021.pdf*

21 1993 Cri LJ 3242

22 Working Papers - Group on Prisons & Borstals - 1966 U.K.

Prison Community' published in 1940[23]). Incarceration has further deleterious effects - where the accused belongs to the weakest economic strata: immediate loss of livelihood, and in several cases, scattering of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in the event of an acquittal, the loss to the accused is irreparable), and ensure that trials – especially in cases, where special laws enact stringent provisions, are taken up and concluded speedily.

24. For the above reasons, the appellant is directed to be enlarged on bail, subject to such conditions as the trial court may impose. The appeal is allowed, in the above terms. No costs.

Headnote prepared by: Divya Pandey
(*Assisted by:* Roopanshi Virang, LCRA)

Result of the case: Appeal allowed.

23 Donald Clemmer, The Prison Community (1968) Holt, Rinehart & Winston, which is referred to in Tomasz Sobecki, 'Donald Clemmer's Concept of Prisonisation', available at: **https://www.tkp.edu.pl/wp-content/uploads/2020/12/Sobecki_sklad.pdf accessed on 23rd March 2023).**