

(1991) 05 DEL CK 0059

In the Delhi High Court

Case No : Criminal Miscellaneous (Main) Appeal No's. 370 and 571 of 1991

Anil Kumar Gandhi

APPELLANT

Vs

Narcotic Control Bureau and Others
 Kulwant Singh Vs
S.K. Wadhera

RESPONDENT

Date of Decision : 27-05-1991

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 37

Citation : (1992) CriLJ 1703 : (1991) 3 Crimes 11 : (1991) 44 DLT 582 : (1991) 2 RCR(Criminal) 614

Hon'ble Judges : V.B. Bansal, J

Bench : Single Bench

Advocate : R.L. Mehta, Sunil Mehta, J.S. Arora and Satish Aggarwal, for the Appellant;

Judgement

V.B. Bansal, J.

(1) By this order I will dispose of Cr. M (M) 571/91. Anil Kumar Gandhi v. Narcotic Control Bureau & Ors. and Cr. M(M) 370/91, Kulwant Singh v. S.K. Wadhera I.O. Ncb as the common question for consideration in these petitions is as to whether the petitioners are entitled to be released on bail on account of delay in the disposal of cases.

(2) Anil Kumar Gandhi has prayed for being released on bail in a complaint under Sections, 21, 23 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act).

(3) Intelligence Officer, Narcotic Control Bureau, New Delhi, namely, N.P.Kaushik filed a complaint in the Court of the Additional Chief Metropolitan Magistrate. New Delhi against the petitioner and others on 20th November, 1987. The case is now pending before the Additional Sessions Judge, New Delhi, after the same was committed. Petitioner was allowed interim bail for different periods vide different orders of this Court on account of illness of his father and subsequently

on account of his own illness. Sometimes the bail was extended on account of the illness of the parents of the petitioner. However at present he is in judicial custody and the matter is pending trial.

(4) Shri S.K. Wadhera filed a complaint against Kulwant Singh and others in the Court of Addl. Chief Metropolitan Magistrate, New Delhi for the offences under Ss. 21, 23 and 29 of the Act. Kulwant Singh was arrested on or about 16th June, 1987. The case was committed to the Sessions Court for trial on 11th January, 1988. The charges were framed in the complaint on 16th December, 1988. Recording of the evidence of the prosecution started on 1st March, 1990 and the case is still at the stage of recording of evidence.

(5) Learned counsel for the petitioners has submitted that the petitioners have already been in custody for a period of about 25 months and there has not been any progress in the case. He has, thus, submitted that there is a fundamental right available to the petitioners under Article 21 of the Constitution of India for speedy trial of the cases, and that on account of undue delay in concluding the trial the petitioners have a right of being released on bail forthwith. He has also submitted that Section 37 of the Act is a legislative provision which cannot override the constitutional right available to the petitioners under Article 21 of the Constitution and thus following the provisions of fundamental right of the petitioners they should be bailed out. These applications have strongly been contested by the learned counsel for the respondents who have submitted that a writ petition is already pending in this Court in which the virus of Section 37 of the Act have been challenged. They have also submitted that this Court while dealing with the applications for bail under the provisions of the Code of Criminal Procedure and the Act cannot order for the release of the petitioners on bail and that the remedy for this purpose may be available to the petitioners in some other proceedings. A prayer has, Therefore, been made that these applications may be dismissed .

(6) Article 21 of the Constitution of India provides that there is a fundamental right available to a person to have speedy trial of a criminal case pending against him. Such a person facing trial cannot be deprived of this fundamental right as is clearly stated in the case of Madheshwardhari Singh and Another Vs. State of Bihar, . In case of a violation of such a right the petitioner is entitled to be released unconditionally as is held by the Patna High Court in the case of The State Vs. Maksudan Singh and Others, . Learned counsel for the petitioners has submitted that the normal period for concluding trial of a criminal case is one year and in case the trial is not concluded the under-trial is entitled to be released on bail and reliance has been placed by him on the case of Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna, .

(7) It would be appropriate at this stage to refer to the facts of this case. A news item appeared in the Indian Express dated 8th and 9th of January, 1979. The names of many persons were given in the said news and it was stated that many of those persons have been in jail for as many as 5, 7 or 9 years and a few of

them were in jail for even more than 10 years without their trial being done. It was in these circumstances that the Supreme Court observed :

" WHAT faith can these lost souls have in the judicial system which denies them a bare trial for so many years and keeps them, behind bars, not because they are guilty but because they are too poor to afford, bail and the Courts have no time to try them."

(8) The following factors were required to be considered for determining the question as to whether a person is entitled to be released on bail :

(1) the length of his residence in the community, (2) his employment status, history and his financial condition, (3) his family ties and relationships, (4) his reputation, character and monetary condition, (5) his prior criminal record including any record or prior release on recognizance or on bail, (6) the identity of responsible members of the community who would vouch for his reliability, (7) the nature of the offence charged and the apparent probability of conviction and the likely sentence in so far as these factors are relevant to the risk of non-appearance, and (8) any other factors indicating the ties of the accused to the community or bearing on the risk of willful failure to appear."

(9) Supreme Court as an exceptional measure directed that although these persons who have been in jail without trial for several years and in some cases for offences for which the punishment in all probability be less than the period of their detention were ordered to be released forthwith. In case *Vasanta Vs. State of Maharashtra*, it has been held that Art. 21 of the Constitution provides that any procedure which deprives a person of his life or liberty must be just, fair and reasonable. It has further been observed that just, fair and reasonable procedure implies a right to free legal service where he cannot avail of it and it also implies a right of speedy trial.

(10) At this stage, it would be appropriate to refer to the provisions of the Act as originally contained in Sec. 37 and as amended subsequently. Sec. 37 as originally contained in the Act was as under :

"OFFENCES to be cognizable- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be cognizable;".

(11) This Act was subsequently amended vide Act No. 2 of 1989 and Sec. 37 was substituted by the following Section : Sec. 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 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 subsection (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."

(12) The statement of "objects and reasons" accompanying the amendment Bill were : "In recent years India has been facing a problem of transit traffic in illicit drugs. The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for drug trafficking offences. Even though the major offences are non-bailable by virtue of the level of punishments; on technical grounds, drug offenders were being released on bail. In the light of the certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985 they need to amend the law to further strengthen it, has been felt."

(13) After the aforesaid amendment came into force on 29th of May, 1989 a view was taken by this Court that the provisions contained in Section 37 of the Act are meant to be observed by the subordinate Courts but High Court was competent to consider the question of grant of bail in the light of the provisions of bail contained in the Code of Criminal Procedure. This view of the Delhi High Court was set aside by the Supreme Court in the case of Narcotics Control Bureau Vs. Kishan Lal and others, It is, thus, the settled law of the land that while considering the question of grant of bail to a person under the Act it could be compliance of the provisions contained, in Section 37 even by High Court. It is, Therefore, clear that there is a statutory bar to the bail being granted to an accused unless his case is covered by the provisions contained in Sec. 37 of the Act.

(14) In the instant case, learned counsel for the petitioners, have not argued the applications on merit but their only submission had been that on account of inordinate delay in the disposal of the cases the petitioners are entitled to be released on bail immediately. I am afraid this submission cannot be accepted. There is no doubt that liberty of a citizen must be safeguarded by Court. However, where application on merit of an accused facing trial for a very serious offence has already been dismissed, he cannot be ordered to be released just because of his right of liberty and the Court has to keep in mind the collective interest of the community so that people do not lose faith in the institution and indulge in private retribution. In the instant case, the petitioners are facing trial for a serious offence dealing with the Narcotic Drugs which is proving to be very harmful to the health of all.

(15) Learned counsel for the petitioners have referred to the case of Kandra Pehadiya and Others Vs. State of Bihar, . In this case four young boys of 12 and 13 years had been languishing in jail for over 8 years for a crime which perhaps ultimately they may not have found committed. The trial had not yet started. In these circumstances, it was observed that "it is a crying shame upon our

adjudicatory system which keeps men in jail for years on and without a trial. We had occasion in *Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna*, to criticise this shocking state of affairs and we hoped that after the anguish expressed and the serve strictures passed by us, the justice system in the State of Bihar would improve and no one shall be allowed to be confined in jail for more than a reasonable period of time, which I think, cannot and should not exceed one year for a Session Trial."

(16) It was further observed that the fundamental right in case of these four petitioners has merely remained a paper promise and has been grossly violated and that they should have been released on bail in view of *Hussainara Khatoon's* case. (supra) It was in these circumstances that a direction was issued to the Sessions Judge for early disposal of the case by proceeding with the trial on day-to-day without interruption. It may, Therefore, be noted that no outer limit was fixed for trial of all the Sessions cases in all circumstances and the reasonable time would depend on the facts of each case. The aforesaid four persons were ultimately acquitted As per the case *Kedar Pahadiya v. State of Bihar* 1982 Sc 1167.

(17) Learned counsel for the petitioner has also submitted that u/s 306(4)(b) of the Code of Criminal Procedure an approver has to be detained in custody till the termination of trial if he has already not been on bail but in exceptional cases in spite of these provisions even an approver can be released on bail and referred to the case of *Noor Taki alias Mammu Vs. State of Rajasthan*, He has, thus, submitted that similarly in spite of a bar in Section 37 of the Act the petitioner should be allowed bail on account of inordinate delay in the disposal of the case I have not been able to persuade myself to agree with this submission. That Was the case referred to the Full Bench for decision as to whether an approver can be detained for indefinite period even when principal accused in the case has been released on bail. It was held that the provisions of Section 439 of the Code of Criminal Procedure did not apply in a case of approver in view of the bar under Sec. 306(4)(b) of the Code of Criminal Procedure.

(18) It was also observed that the object of making such a provision was that the approver must make a complete and correct disclosure of entire facts and circumstances. The approver was expected to make a statement which is not only exculpatory but is inculpatory and in case of release a situation may arise when the relation of the accused or accused, if on bail, may win over the approver or he may even be removed from the scene so as to be not available at all for evidence. It was also held that detention of a person even by due process of law has to be reasonable, fair and just and if it is not so, it will amount to violation of Art. 21 of the Constitution of India. The question was answered by the Full Bench that "according to Section 306(1)(b) Cr.P.C. the approver should be detained in custody till the termination of the trial if he is not already on bail, at the same time, in exceptional and reasonable cases the High Court has power under Sec. 482 Cr.P.C. to enlarge him on bail in case there are circumstances to

suggest that his detention had been so much prolonged, which would otherwise out live the period of sentence, if convicted, his detention can be declared to be illegal as violative of Art. 21 of the Constitution..."

(19) In that case all the accused had already been released on bail and the approver had been in custody for over 22 months. There was no immediate prospect of the case being concluded. It was in these circumstances that the approver was released on bail.

(20) This judgment in my view, cannot be of any help to the petitioners in the instant case in view of the latest pronouncement of the Supreme Court in *Ncb v. Kishan Lal*. (supra) that it was not within the competence of the Court to grant bail to a person for the offences under the Act except in compliance of provisions contained in Section 37.

(21) Learned counsel for the petitioners has also submitted that the Supreme Court had even given a direction to the Magistrate for considering the cases of under-trials for bail even suo moto if they were eligible for bail when there has been a delay in the trial of cases. He has referred to the case *Kadra Pahadiya v. State of Bihar* 1982 Sc 1167 and submitted that it is a law of the land to be observed by all the Courts all over India. He has also submitted that in view of this judgment also the petitioner is eligible to be released on bail.

(22) I have not been able to persuade myself to agree to this submission.

(23) In the said case it was found that 18133 sessions cases were pending in different Sessions Courts where commitment was made more than 12 months ago but trial had not yet commenced. There were numerous cases committed in 1974 and 1976 and so the cases were pending for more than 5 to 7 years. It was in these circumstances that a direction was issued to the Magistrate and Sessions Judges in the State of Bihar to comply with the principles laid down and direction given in *Hussainara Khatoon's* case for the trial of cases and for bail. This judgment, thus, in my view, does not lay down the law that all the accused persons in all circumstances must be released on bail on account of non-concluding the trial expeditiously.

(24) Learned counsel for the petitioners has also referred to the case *Anurag Baitha Vs. State of Bihar*, and submitted that Article 21 of the Constitution is available to a person even at the stage of appeal and that he does not lose its protective shield after the order of conviction and sentence is imposed. He has, thus, submitted that it makes abundantly clear that it is fundamental right of the petitioners to have their cases tried expeditiously and in case of delay they are entitled to be released on bail being violative of the protection of Art. 21 of the Constitution. There can possibly be no dispute about the legal proposition of a fundamental right of the petitioners to have their cases decided expeditiously. Similarly, in case *Ashok Solomon v. State* 1988 (1) DL 407 the petitioner was allowed bail by this Court for the offences under Ss. 20, 21, 29 and 85 of the *Ndps Act* since there was no progress in the trial in spite of the petitioner being

in custody for over two years. This case has also referred to the case of Hussainara Khatoon & Others v. Home Secretary, State of Bihar, Patna (supra).

(25) The only question, however, for consideration is as to whether the petitioners can be allowed bail at present on account of the cases having not been disposed of expeditiously. It is necessary to note that the aforesaid judgment of Ashok Solomon is dated 13th September, 1988 when there were no conditions for the grant of bail under S. 37 of the Ndps and the grant of bail was governed under the provisions of the code of criminal procedure only. However, after the amendment of the Ndps Act stringent provision has been made and it has been provided that a person alleged to have committed an offence under the Act punishable with punishment of 5 years or more shall not be released on bail unless the conditions prescribed under Sec. 37 of the Ndps are fulfilled. High Court has no discretion to relax these conditions in order to give the benefit of bail to an accd. as has specifically been so held by the Supreme Court in the case Ncb v. Kishan Lal (supra). The petitioners, thus, are not entitled to claim the benefit of bail by way of these applications. For the aforesaid reasons the case Munna @ Kamta Prasad and another v. State of Madhya Pradesh 1986(3) Cri 429 cannot be of any assistance to the petitioners to claim the benefit of bail. It was also a case under the Indian Penal Code and, thus, distinct from the offence under the Ndps Act.

(26) At this stage, it would be appropriate to refer to a recent judgment of the Karnataka High Court in case Shivaram Gowda Vs. State of Karnataka, In this case it was held that the detention of an accd. for an unreasonable period during trial for offences would attract the provisions of Art. 21 of the Constitution but considering all the facts and circumstances including the judgment of Supreme Court in Hussainara Khatoon case bail was not granted but the trial Court was asked to expedite the disposal of the case. It is also pertinent to note that a reference has been made to a Full Bench decision of Patna High Court in case Madheshwardhari Singh and Another Vs. State of Bihar, . Point No. 5 formulated for decision was as under:

"WHERE an outer time limit to concretise the right to speedy public trial is envisioned both by principle and precedent..."

(27) This point has been answered in para 53 (v) as under :

"THAT an outer limit to concretise the right to speedy public trial is envisioned both by principle and precedent. A callous and inordinately prolonged delay of seven years or more (which does not arise from the default of the accused or is otherwise not occasioned by any extraordinary or exceptional reason) in investigation and original trial for offences other than capital ones would plainly violate the constitutional guarantee of a speedy public trial under Article 21."

(28) It may also be noted that the legislature in its wisdom has not prescribed any time limit during which a trial must conclude though time limit has been fixed for completing the investigation. Sec. 167 of the Code of Criminal

Procedure provides that where the charge-sheet is not filed before the expiry of 90/60 days of the arrest of an accused he shall be entitled to be released as of right. It is, thus, clear that the legislature in its wisdom thought it necessary to make provision that in cases where investigation is not completed within the specified period the accused should be allowed bail as of right. No such provision, however, has been made for concluding the trial and it is for sound reasons also. It is a matter of common experience that there are cases in which the number of the accused and the number of the witnesses may be very large. Still there may be cases where the number of the accused may be limited but the evidence may be consisting of numerous witnesses and documents. Yet, there may be cases where the number of the witnesses may not be large but otherwise the evidence may be lengthy and in spite of efforts the trial may not conclude for years. It is perhaps in view of these facts that no outer limit has been fixed by the legislature for concluding the trial in criminal cases.

(29) It may also be noted that the order of bail under Sec. 167(2) Cr. P.C. is not on merit but is what one may call an order of default and that order can be rectified for special reasons after the defect was cured, In this regard a reference can be made to the case *Rajni Kant Jivan Lal Patel & Another v intelligence Officer Narcotic Control Bureau, New Delhi*, SLP No. 1090-91 of 1989 decided by the Supreme Court on 26th June, 1989. This was a case in which the charge against the accused was of a very serious nature and they had entered into a conspiracy to export Heroin out of India. The accused had managed to take 3 kgs. of Heroin to U.S.A. through two persons H.S. Gola and Manjit. After the challan was filed in Court on an application by respondent the bail of the accused persons was cancelled by the High Court. Relying upon its own judgment in case *Raghubir Singh and Others Vs. State of Bihar*, it was held:

"THE accused cannot, Therefore, claim any Special right to remain on bail. If the investigation reveals that the accused has committed a serious offence and charge sheet is filed, the bail granted under proviso (a) to Section 167(2) could be cancelled."

(30) Thus, merely because the trial has not been concluded, in these cases would not be a ground for the release of the petitioners on bail keeping in view the provisions contained in Sec. 37 of the Act.

(31) Learned counsel for the petitioners has submitted that without challenging the provisions contained in Sec. 37 of the Act it would be possible for this Court to grant relief to the petitioners. He has, submitted that this Court has to read down the provisions of Sec. 37 of the Act in the light of the provisions contained in Art. 21 of the Constitution. He has, thus submitted that normally an accused is not entitled to be released on bail except in the light of the provisions contained in Sec. 37 of the Act read with the relevant provisions of the Code of Criminal Procedure. However, if there is a delay of more than a year in concluding the trial the petitioner should be released on bail being vocative of his fundamental right under Article 21 of the Constitution of India. I have not been able to persuade

myself to agree with this submission As already referred to the virus of Sec. 37 of the Act has already been challenged by way of a writ petition which is pending in this Court. I dealing with the application for bail do not find it permissible to allow bail to the petitioner without the condition under Sec. 37 of the Act being complied with while dealing with this application for bail.

(32) Learned counsel for the petitioners has submitted that the respondent has not been taking adequate steps for the early disposal of the case. This submission has been controverted by learned counsel for the respondent who has submitted that except on some dates when the evidence was not produced in Court evidence is being produced but the Court finds it difficult to proceed with the case on priority basis on account of the pendency of a large number of cases of under-trial prisoners.

(33) It is the admitted case of the parties that number of cases pending with the Courts are disproportionate to the number of the Courts dealing with them. It is, thus, high time that High Court on Administrative Side takes immediate and adequate steps for posting of more officers to deal with the cases of the under-trials in custody. If the persons in custody cannot be left their fate and the State has to take some urgent steps to solve this problem. High Court, I am sure, would take immediate steps for solving this problem.

(34) It is not disputed that the petitioners have a fundamental right that their cases are disposed of expeditiously. To ensure speedy justice to The litigants, the Government has to increase the number of Courts. On March 14, 1988, Wadhwa J. while deciding Cr. M(M) 1123 of 1988 remarked that it was desirable that authorities should take urgent steps for appointing sufficient number of Additional Sessions Judges to cope with the ever increasing session cases where accused were languishing in jail. This was repeated by Bahri J. in case Jagdish Kumar alias Pinkey Vs. State (Delhi Administration), It appears that nothing substantial has been done and the number of the Additional Sessions Judges had rather gone down while the number of session cases with accused in custody has increased to a large number after the amendment of Sec. 37 of the Act.

(35) I am, Therefore, of the firm view that a stage has reached when the High Court should, on administrative side, take effective steps for posting more officers to deal with the cases of under-trial prisoners so that there is no frustration and a feeling in the general public that the Courts are unable to do justice to them.

(36) In view of my aforesaid discussion, no case has been made out for the release of the petitioners on bail. As such the applications of A.K. Gandhi and Kulwant Singh stand dismissed.