

(2001) 05 GUJ CK 0021
In the Gujarat High Court

Case No : Misc. Criminal Application No's. 6523 of 2000 and 1722 of 2001

Bipin Shantilal Panchal (II)

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 01-05-2001

Acts Referred:

Constitution of India, 1950 — Article 141, 21
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 22, 24, 29, 37
Penal Code, 1860 (IPC) — Section 120B

Citation : (2002) 1 GLR 355

Hon'ble Judges : C.K. Buch, J

Bench : Single Bench

Advocate : A.D. Shah and B.B. Naik, for the Appellant; N.D. Gohil, Assistant Public Prosecutor and D.N. Patel, for the Respondent

Judgement

C.K. Buck, J.—Rule. Service of Rule is waived by learned A.P.P. Mr. N.D. Gohil for respondent No. 1-State and learned Spl. P. P. Mr. D.N. Patel for respondent No. 2-Directorate of Revenue Intelligence (D.R.I. for short) in both these applications.

2. Both these Misc. Cri. Applications are preferred u/s 439 of Cr. P. C. praying bail by the petitioners-accused of Sessions Case No. 162 of 1994 pending in the Court of learned Additional City Sessions Judge, Ahmedabad. Since in both the applications similar points are involved, they are heard and disposed of by this common order.

3. The petitioners of both these applications i.e. Misc. Cri. Application Nos. 6523 of 2000 and 1722 of 2001 are facing trial of the offences punishable under Sections 22 & 24 of the Narcotic Drugs & Psychotropic Substances Act, 1985 read with Section 120B of I.P.C. and Section 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985. (hereinafter referred to as the "N.D.P.S. Act"). Both these petitioners had prayed earlier for bail pending trial on more than one occasions before this Court and before the Sessions Court. Sessions

Case No. 162 of 1994 pending in the Court of learned Addl. City Sessions Judge, Ahmedabad, is a commenced trial and some witnesses are also examined. The petitioners came to be arrested for the alleged offences on 8-11-1993 and till then, they are in custody. Sum and substance of these petitions is that though their bail plea had been rejected earlier, they should be enlarged on bail as the trial is protracted for very long period in view of the right flowing from Article 21 of the Constitution. An undertrial languishing in jail for no fault on his part, atleast should be released on bail, if it is not possible or practicable to close the trial or to terminate the proceedings considering the right of speedy trial embodied in Article 21 of Constitution. In some cases, enlargement of accused on bail may be necessary to meet the requirements of Article 21, is the backbone of the submissions advanced by learned Counsel appearing for the petitioners.

4. Learned Spl. P. P. Shri D.N. Patel appearing for department of Deputy Director-Directorate of Revenue Intelligence -- respondent No. 2 and learned A.P.P. Mr. Gohil appearing for respondent No. 1-State have resisted the bail plea and it is argued that considering the ratio of various decisions of the Apex Court, the present accused are not entitled to bail under the alleged right following from Article 21. As it happens in many cases, parties' Counsel have placed their reliance mainly on same judgments cited and have tried to interpret the ratio and observations of the Apex Court from their point of view.

5. It is the case of the prosecution that on receipt of specific information, officers of Directorate of Revenue Intelligence (hereinafter referred to as "D.R.I.") had intercepted export consignment on 4-11-1993 at Air India Warehouse, Mumbai. Consignment was booked from Air Cargo Complex, Ahmedabad by one M/s. Advance Exports, Ahmedabad and was meant for export to Nairobi, Consignment was examined minutely and it was found that it contained Methaqualone tablets popularly known as "Mandrex Tablets". According to the prosecution, diese Mandrex Tablets weighing about 162 kgs. were seized in view of the provisions of the N.D.P.S. Act. It is pleaded by the prosecution that during follow-up action, certain statements of different individuals were recorded and some search was carried out at the residence of Dr. Bipin Panchal-petitioner of Misc. Cri. Application No. 6523 of 2000 on 5-11-1993. Some incriminating documents as well as export seal were sized and statement of accused Bipin Pancha! was recorded after interrogation on 6-11-1993. D.R.I. had investigated the offending act by recording statements of various persons and there were different seizures whereby Mandrex Tablets came to be seized on or about 12th & 13th January, 1994. It is also the case of the prosecution that number of other incriminating documents were seized, and ultimately, complaint came to be filed against the accused persons. Sample drawn from seizure made by D.R.I. were sent to Forensic Science Laboratory, Ahmedabad for testing etc. which confirmed the presence of Methaqualone in the said sample. In short, the petitioners are from the group of accused facing trial of conspiracy to manufacture, possess and export the Methaqualone Tablets viz. Mandrex Tablets. Petitioner-Bipin Panchal, as per the say of the prosecution, is the main accused.

6. So far as petitioner-accused Bipin Panchal is concerned, he has preferred Misc. Cri. Application No. 3122 of 1993 before the City Sessions Court and the same was rejected by the learned City Sessions Judge vide order dated 4-2-1994. Said petitioner had also submitted an application for bail before this Court and the same was also rejected. Thereafter, petitioner-Bipin Panchal had preferred SLP No. 1402 of 1994 before the Apex Court and the same was also rejected. In the month of July, 1994, prosecution applied to join other persons as accused in exercise of powers u/s 319 of Cr. P. C. and the trial Court, vide order dated 4-1-1996, directed to join one Amrut Soni @ Mama and Aniruddhasinh Jadeja as accused in this case. As accused Aniruddhasinh was not available on the day of framing of charge, learned Addl. City Sessions Judge, Ahmedabad, after considering all the papers, framed charge against 8 accused. Thereafter, on 13-3-1997, said Aniruddhasinh was apprehended at International Airport. Bail plea of this accused Aniruddhasinh was accepted by the High Court and he was ordered to be enlarged on bail vide order dated 8-4-1997. Said accused Aniruddhasinh had also preferred discharge application before the Court of learned Addl. Sessions Judge, Ahmedabad and on consideration of relevant material, the order discharging accused Aniruddhasinh came to be passed on 12-5-1997. The said order of discharge was challenged before the High Court of Gujarat vide Cri. Revision Application No. 472 of 1997 and on 22-10-1997, the order of stay of trial was obtained by prosecution in the said Revision Application. Ultimately, said Cri. Revision Application was allowed and accused Aniruddhasinh was joined as an accused vide order dated 5-5-1998. Ultimately, fresh charge was framed by the trial Judge on 13-7-1998.

7. Accused Aniruddhasinh applied before the trial Court to drop proceedings against him on 11-3-1999. The said application was rejected by the trial Court on the very same day. So, accused Aniruddhasinh moved the High Court by preferring Misc. Cri. Application No. 2284 of 1999 and the High Court, stayed the proceedings of trial vide order dated 9-4-1999. Thereafter, vide order dated 23-9-1999, High Court discharged the accused Aniruddhasinh Jadeja.

8. Mr. A. D. Shah, learned Senior Counsel appearing for petitioner-accused Bipin Panchal has submitted that the Supreme Court of India, while rejecting the application for bail filed by the petitioner, had given direction to expedite the trial vide order dated 8-1-1996, but as referred hereinabove, because of other ancillary proceedings and intervening stay, the trial was not concluded and the petitioner was languishing in jail since many years. So, he moved another application for bail before the High Court being Misc. Criminal Application No. 2898 of 1999 which also came to be rejected by the High Court vide order dated 29-10-1999. The order of the High Court was challenged before the Apex Court by filing Spl. Leave Petition (Criminal) No. 223 of 2000. Meanwhile, learned Addl. City Sessions Judge again framed fresh charge against original accused Nos. 1 to 7 on 8-2-2000. Supreme Court of India, while disposing of aforesaid SLP (Cri.) No. 223 of 2000, passed the following order, on 31-3-2000 :-

"As the Special Judge who is trying the case has reported to us that he reasonably expects to close the trial within six months, we dispose of this SLP permitting the petitioner to move for bail again in case the trial is not closed within six months."

Prosecution, while recording evidence of Mr. Daniel Rajkumar Wellington, (P.W. 23, Exh. 301), prosecution wanted certain documents to be exhibited and defence objected to the admission of said documents. Objection raised by the defence was sustained by the trial Judge and trial Court refused to take/ exhibit documents intended to be exhibited and taken on record. This order of trial Judge dated 16-8-2000 came to be challenged by the complainant before the High Court by filing Spl. Criminal Application No. 789 of 2000. On 11-9-2000, High Court issued notice and stayed further proceedings of Sessions Case No. 162 of 1994. This Spl. Criminal Application No. 789 of 2000 is pending before this Court. According to the petitioner-Bipin Panchal, he has been languishing in jail for more than seven years and yet trial is not over. Grievance of the petitioner is that though the Apex Court has earlier expedited the trial vide order dated 8-1-1996, and thereafter, vide order dated 31-3-2000 observing that the trial should be over within a period of six months, trial has not proceeded further satisfactorily. Considering number of witnesses to be examined and multiplicity of ancillary proceedings, suggests that it is not possible for the petitioner to assess as to when trial will conclude. Mr. Shah has submitted that the prosecution relies on the evidence of 144 witnesses and after a period of almost more than seven years, less than 50% of witnesses could be examined. Mr. Shah has submitted that considering the order of the Apex Court dated 31-3-2000, this application is moved again for bail. Mr. Shah has taken me through certain observations made by the Apex Court in number of decisions. I would like to refer some of the decisions relied on by learned Senior Counsel Mr. A. D. Shall for the petitioner-accused :-

- (1) Common Cause, A Registered Society Vs. Union of India (UOI) and Others, .
- (2) Common Cause A Registered Society through its Director Vs. Union of India (UOI) and Others, .
- (3) Raj Deo Sharma Vs. The State of Bihar, .
- (4) Raj Deo Sharma Vs. The State of Bihar, .
- (5) Anil Kumar Gandhi Vs. Narcotic Control Bureau and Others, .
- (6) Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc., .

9. Mr. Achint Navinbhai Patel -- petitioner of Misc. Cri. Application No. 1722 of 2001, has also prayed for bail pointing out the facts stated hereinabove. He has specifically submitted that he had applied for grant of bail before the trial Court, High Court and the Apex Court, but the said applications have been rejected. Because of protraction of trial, petitioner-accused Anchit has again approached this Court for bail by filing Misc. Cri. Application No. 5397 of 1999 which was

heard and rejected by this Court (Coram: R. P. DholakiaJ.) vide order dated 10-12-1999. He had moved the Apex Court by filing Special Leave to Appeal against the order of this Court dated 10-12-1999, but the said SLP also came to be dismissed by the Apex Court vide order dated 1-9-2000. Mr. B. B. Naik, learned Counsel appearing for the petitioner-accused Mr. Achint Patel has pointed out that while dealing with other matters pertaining to this very crime filed by accused - Bipin Panchal, the Apex Court, vide its order dated 22-2-2001, has observed that :-

"Now, for disposal of the present application we may state that there is no point in our granting further time to the trial Court to complete the trial. It is for the trial Court to complete it as early as possible. But, we would not do anything to deprive the accused in custody of his right to move for bail on account of delay thus far occasioned. The bail application would be disposed of by the Court concerned on its own merits. With the above observations, we dispose of this application." (Para 17 of Bipin Shantilal Panchal v. State of Gujarat 2001 (3) GLR 2024 .

10. Grievance of learned Counsel Mr. Naik is that even today, trial is not completed and it is not known to the petitioner that when trial would be completed by the trial Court. He has also tried to point out the complexity of the facts and nature of evidence against accused Achint Patel. The petitioner-accused Achint had prayed for bail before the trial Court and had pointed out relevant part of the order passed by the Apex Court on 31-3-2000. Relying on the contents of the order passed by me trial Judge rejecting the bail application, learned Counsel Mr. Naik has submitted that me trial Judge is of the view that accused could have been granted bail. Trial Judge, in its order dated 10-11-2000, has stated that :

"I may state that trial has begun, yet it is not completed till now. Neither accused nor prosecution is at fault for the delay. In the circumstances, such application should have been allowed, but here as observed by the High Court, the accused is actively involved in huge quantity of contraband articles. There is no guarantee when the matter will be completed, but the circumstances are beyond the control of the Court and the prosecuting agency".

Mr. Naik has submitted that feeling aggrieved with the order passed by the trial Court, the present plea of bail is raised before this Court in view of the right of speedy trial embodied in Article 21 of the Constitution. He has placed reliance on all the judgments cited by learned Senior Counsel Mr. A. D. Shah and has further submitted that ratio propounded in the decision in the case of Supreme Court Legal Aid Committee (supra) can squarely be applied to the present case. Pressing his reliance on the decisions; viz (i) Dadu @ Tulsidas v. State of Maharashtra 2000 (4) Crimes 124 (SC), and (ii) Smt. Akhtari Bi v. State of M. P. JT 2001 (4)"SC 40, (iii) Supreme Court Legal Aid Committee Representing Undertrial Prisoners Vs. Union of India (UOI) and Others, , and (iv) Shaheen Welfare Association Vs. Union of India and others, , learned Counsel Mr. Naik has

submitted that speedy justice is a fundamental right flowing from Article 21. Therefore, where nobody could be held responsible for protraction of trial or playing dilatory tactics, accused atleast should be enlarged on bail. Apex Court had requested the Chief Justices of the High Courts where criminal cases are pending for more than five years, to take immediate effective steps for their disposal by constituting regular and special Benches for that purpose. Convict lady was ordered to be enlarged on bail by placing order of conviction and sentence passed against her in abeyance. The criminal appeal pending before the Madhya Pradesh High Court was considered as "trial deemed to be continuing despite conviction".

11. Spl. P.P. Mr. D.N. Patel has tried to distinguish the decisions relied upon by the Counsel appearing for the petitioners, stating that most of the cases relied on by the petitioners are for the offences punishable under the I.P.C. or which can be termed as less grievous offences than the charges which the present petitioners are facing. Quoting certain observations of the Apex Court from the decisions of the Apex Court where bail plea of the accused of the offences punishable under the N.D.P.S. Act was rejected, has submitted that each offence punishable under the N.D.P.S. Act should be viewed with all sensibility and caution. Strength of the country, mental and physical health of coming generation of the nation along with international illicit trafficking of drugs etc. should be considered on different footing. While exercising judicial discretion, the Court has to consider many aspects touching the crime, its gravity, quantum of punishment vis-a-vis other aspects as to scope for the accused to jump the bail or to play with or influence the witnesses etc. Period consumed on account of stay against the proceedings granted by the higher forum should be excluded while considering the alleged period of delay or protraction. Maximum punishment prescribed is relevant for the purpose. Looking to the quantity of Mandrex tablets seized by the Investigating Agency, period of 7 years or more cannot be said to be unreasonably long period. Mr. Patel has submitted that verdict of Apex Court while dealing with Common Cause cases (supra) & Rajdeo Sharma cases (supra), should be considered in proper perspective. These decisions are mainly dealing with the cases where punishment prescribed is less than 7 years. Decision of the Apex Court in the case of Shaheen Welfare Association (supra), helps the prosecuting agency. Trial is now proceeding day-to-day basis and the prosecution is examining witnesses regularly. According to Mr. Patel, decision in the case of Supreme Court Legal Aid Committee (supra) does not help the petitioner. On the contrary, on more than one occasions, bail plea of both the petitioners has been rejected by the Apex Court on merits. So, embargo of Section 37 of the N.D.P.S. Act would come in the way of petitioners even while praying bail on account of alleged protraction of trial. Section 37 of the N.D.P.S. Act is a separate provision and language of Section 37 of the N.D.P.S. Act itself suggests that unless the Court is of the view that there is no scope to hold the accused guilty, the application for bail either under Cr. P. C. or under any other law cannot be considered. Some portion of vital period is spent by the

Investigating Agency in dealing with technical objections raised by the defence side during the trial and in handling other proceedings. Now, the prosecuting agency would be able to conclude the trial at the earliest in view of the decision of the Apex Court dated 22-2-2001 in Misc. Cri. Petition No. 862 of 2001 in Petition for Special Leave to Appeal (Cri.) No. 223 of 2000. Respondent Prosecuting Agency had moved the Apex Court by filing Misc. Cri. Petition No. 223 of 2000 for modification. So, there will be no scope for farther protraction of trial. So, in the nutshell, according to Mr. Patel, bail applications preferred by both the petitioners should be dismissed. In response to the query raised by this Court, learned Spl. P.P. Mr. Patel has objected grant of even temporary bail on stringent conditions viz. to mark presence before responsible officer of respondent No. 2-D.R.I. frequently viz. even on the day on which they are not required to appear before respondent No. 2.

12. I have gone through all the decisions cited by the Counsel appearing for the parties and their scholarly submissions on legal as well as procedural aspects of the matter coupled with right of speedy trial embodied in Article 21 of the Constitution in special reference to various cases on different set of facts. Learned Spl. P.P. Mr. D.N. Patel has hammered that in view of the observations of the Apex Court in the case of A. R. Antulay (supra) and Rajdeo Sharma (II) (supra) (Paras 12, 13 & 17), this Court should hold that looking to the peculiar set of facts, the petitioners should not be enlarged on bail on the alleged right flowing from Article 21 of the Constitution. Learned Spl. P.P. Mr. Patel has placed further reliance on the following decisions :-

(i) Rajdeo Sharma v. State of Bihar (supra) (1998 SCC 1692)

(ii) "Common Cause" A Registered Society through its Director v. Union of India & Ors., (supra) (AIR 1996 SC 1619).

(iii) Dadu @ Tulsidas v. State of Maharashtra (supra)

(iv) Anil Kumar Gandhi & Ors. v. N. C. B. (supra) (Paras 9 & 12)

13, After giving anxious consideration to all the factual as well as legal aspects brought before me, it is not a matter of dispute that the petitioners are facing trial of a very serious offence prescribing 20 years of R./I. and very heavy amount of fine. Apprehension of jumping bail, on this lone count, is more likely. It can legitimately be said that if liberty is made available, then accused of such crime may try to influence the witnesses. It is also pertinent to note that the Sessions Court has started recording evidence and trial has commenced, but the fact remains that both the petitioners are in judicial custody since more than seven years. I agree that petitioner Bipin Panchal has not approached the Court of Sessions for bail, after dismissal of his SLP on 31-3-2000, but it is rightly submitted by learned Senior Counsel Mr. Shah that the petitioner had approached this Court for bail considering the provisions of Article 21 of the Constitution of India as he was languishing in jail for no fault on his part in protracting the trial. So, as per the observations of the Apex Court, he has

approached this Court for the same plea and it is not necessary to go before the Court of Sessions. He, considering the concurrent jurisdiction and the fact that other co-accused who had approached Court of Sessions for bail on the strength of very observations of the Apex Court and failed, has therefore, pleaded that the application preferred for bail before this Court, can be considered. So, I am not inclined to dismiss the application of the petitioner accused-Bipin Panchal on this technical submission made by learned Spl. P.P. Mr. Patel.

14. The petitioners are under trials for more than seven years. So, they have yet not spent even 50% of the maximum period of punishment prescribed. So, they would not be entitled for bail on account of delayed trial. This submission of Mr. Patel would not sustain in light of the decision of the Apex Court in the case of Supreme Court Legal Aid Committee (supra), because the Apex Court, after considering all the relevant decisions i.e. (i) Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna, , (ii) Raghubir Singh and Others Vs. State of Bihar, , and (iii) Kadra Pahadiya v. State of Bihar, AIR 1981 SC 939 , has observed that Arts. 14, 19 and 21 sustain and nourish each other and any law depriving a person of personal liberty must prescribe procedure which is just, fair and reasonable. While categorising the offences punishable under the N.D.P.S. Act, the Apex Court has considered minimum period of imprisonment while granting bail to the undertrial prisoners. When this Court is not considering the question of closure of proceedings or termination of trial, the maximum period of punishment prescribed for a particular offence, would not be very relevant otherwise, it can be argued that undertrials of the offences punishable under N.D.P.S. Act where the maximum punishment prescribed is R./I. for 20 years, cannot be enlarged on bail till they spent about 10 years in custody as undertrials. Sensitivity attached to the crime and gravity are relevant aspects, but whether such offender can be put behind the bar for 19 years, 11 months and 29 days, is the question to be decided. The Apex Court, while dealing with the case of Supreme Court Legal Aid Committee (supra), has considered each aspect including the provisions of Section 37 of the N.D.P.S. Act. Learned Spl. P.P. Mr. Patel has tried to emphasize that as the bail plea of both these petitioners was entertained and rejected on merits on more than one occasions, they cannot be enlarged on bail in view of the embargo of Section 37 of the N.D.P.S. Act in view of the observations of the Apex Court in the case of Supreme Court Legal Aid Committee (supra). This submission is not sustainable. The Apex Court has, in the aforesaid decision, said :-

"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 T.A.D.A. Act by the Constitution Bench in Kartar Singh v. State of Punjab. 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 proceedings

altogether, as held by a Constitution Bench of this Court in *A. R. Antulay v. R. S. Nayak*, release on bail, which can be taken to be embedded in the right of speedy trial, may in some cases be demand of Article 21. As we have not felt inclined to accept the extreme submission of 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 Art. 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. What then is the remedy? The offences under the Act are grave, and therefore, we are not inclined to agree with the submission of the learned Counsel for the petitioner that we should quash the prosecutions and set free the accused persons whose trials are delayed beyond reasonable time. Alternatively, he contended that such accused persons whose trials have been delayed beyond reasonable time and are likely to be further delayed should be released on bail on such terms as this Court considers appropriate to impose."

15. While dealing with the case of undertrials languishing in jail facing trial for the offences punishable under T.A.D.A. Act, the Apex Court, in the case of *Shaheen Welfare Association (supra)*, has observed in Para 6 that :-

"6. We are conscious of the fact that even the trial of ordinary criminal cases does take some time because of the Courts being overloaded with work and the concept of a speedy trial in the case of T.A.D.A. cases must be viewed in the context of pendency in relation to criminal trials also. "But when the release of undertrials on bail is severely restricted as in the case of T.A.D.A. by virtue of the provisions of Section 20(8) of T.A.D.A., it becomes necessary that the trial does proceed and conclude within a reasonable time. Where this is not practical, release on bail which can be taken to be embedded in the right of a speedy trial may, in some cases, be necessary to meet the requirements of Article 21."

16. So, when the persons have been found deprived of their personal liberty for a considerable length of time without any prospects of trial being concluded in near future, while dealing with bail plea by such persons, the Court has to consider the privilege in-built in Article 21. Therefore, earlier rejection of bail plea of the present petitioners on merits attracting embargo of Section 37 of N.D.P.S. Act, would not help D.R.I. in putting resistance. Illicit trafficking of dangerous narcotic drugs and/or psychotropic substances is the worry of the whole Globe and widespread victims have become an encouraging factor to the organised crime in

this field. So, in view of the tough stand taken by D.R.I. while resisting the present petitions and the concern expressed by the learned trial Judge while rejecting the bail plea of accused Achint Patel, if this Court intends to exercise discretion in favour of the present petitioners, shall have to consider other relevant peripheral aspects. Learned trial Judge on one hand has accepted that this is a case wherein such applications should have been allowed, but in view of the observations of the High Court as to the nature of the activities involving huge quantity of contraband articles, the bail plea was not accepted by the learned trial Judge. So far as the petitioner Achint Patel is concerned, even as per the ease of the prosecution, he is being tried as one of the co-conspirator of the crime u/s 29 of the N.D.P.S. Act. Each conspirator if found guilty of the offence charged against him, is otherwise liable for equal punishment. The trial Court found that this is an exceptional case, and therefore, it would not be desirable or justifiable to use the discretionary powers. It seems that the quantum of punishment and sensitivity of the crime has weighed much with the trial Judge. The Apex Court, while dealing with the cases (i) Shaheen Welfare Association, and (ii) Supreme Court Legal Aid Committee (supra), was considering the cases of undertrials facing trials of very grave offences and sensitive areas covered mostly by organised criminals. Even then, the Apex Court has made certain observations referred to herein above. When an undertrial prays for bail on the ground that he is languishing in jail for considerable length of time without any prospects of trial being concluded in a near future and if Court finds that for no fault on the part of the accused or prosecution or both, delay caused in culminating the trial would be unreasonably long or if it is found that protraction of trial resulted in to unreasonable languishment, then the Court has to think about the enlargement of the undertrial concerned on bail by imposing more and/or variety of stringent conditions which would be able to take care of the apprehensions expressed by the prosecution. These conditions, by way of device, shall have to be evolved in view of the set of facts and nature of apprehensions expressed against the accused. When key witnesses are closely related or connected with the prosecuting agency and the bail Court finds that many key witnesses might have interest in the result favourable to the prosecution, then scope of tampering with such witnesses or inducement would be very limited. If such contingencies are taken care of, then such apprehension should not be given much weightage. The cases where borderline or independent key witnesses are large in number, then the ability to influence such witnesses on the part of the accused needs careful consideration to strike the balance.

17. Decision of the Apex Court in the case of Raj Deo Sharma Vs. The State of Bihar, , deals with speedy trial. This decision is known as Rajdeo Sharma (f) decision. This decision relied on by the learned Counsel for the petitioners, if construed in proper perspective, it helps the prosecuting agency to some extent. As per the precedent and basic principle of jurisprudence, when the Apex Court has considered the very decision at any subsequent stage and has supplemented

the earlier decision with modification or other qualifications, then it is the duty of the Court to appreciate both the decisions. In the cited case, Apex Court also considered the proposition laid down in the case of Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc., and considered all relevant aspects as to delay in conducting trial. Gist of decisions of Rajdeo Sharma (I) & (II) (supra), if considered in light of the facts of the bail application on hand, I am of the view that these decisions would help the petitioners in light of the background of other referred decisions. While dealing with the case of Rajdeo Sharma (I) (supra), the Apex Court has considered following decisions which are relevant for our purpose :- (i) "Common Cause" A Registered Society (I), (ii) "Common Cause" A Registered Society (II), (iii) Hussainara Khatoon (IV), and (iv) Abdul Raheman Antulay (all supra).

18. In the case of "Common Cause" A Registered Society (supra), the Apex Court has said that pendency of criminal proceedings for long period operates as engine of oppression. Depending on nature of cases, accused may be released on bail or appropriate orders for discharging or acquitting the accused, can be passed. Considering the scope to release the undertrial on bail reflected in both the "Common Cause" cases (supra), it is clear that no party should be put to advantage where pendency of proceedings is wholly or partly attributable to dilatory tactics adopted by it. Where the proceedings are stayed by the Higher Court, the same also cannot be treated as disadvantage or adverse to either. Offences affecting public health, safety, convenience, decency and morals as listed in Chapter 14 of I.P.C., or such offences under any other law for the time-being in force, bail discretion should not be exercised mechanically and the Court should strike the balance. I would like to quote some part of the decision of the Apex Court in Rajdeo Sharma (!) (supra). Para 8 of said decision reads as under :-

"8. The entitlement of the accused to speedy trial has been repeatedly emphasized by this Court. Though it is not enumerated as a fundamental right in the Constitution, this Court has recognized the same to be implicit in the spectrum of Article 21. In Hussainam Khatoon (I) v. Home Secy., State of Bihar, the Court while dealing with the cases of undertrials who had suffered long incarceration held that a procedure which keeps such large number of people behind bars without trial for so long cannot possibly be regarded as reasonable, just or fair so as to be in conformity with the requirement of Article 21. The Court laid stress upon the need for enactment of a law to ensure reasonable, just and fair procedure which has creative connotation after Maneka Gandhi case in the matter of criminal trials."

19. While dealing with A. R. Antulay 's case (supra), the Constitutional Bench of the Apex Court has dealt with many aspects. Relevant aspects for our purpose are the guidelines reflected in Paras 85 & 86 of the judgment. In Para 85 of the aforesaid decision, the Apex Court has observed as under :-

"85, In cases, where quashing of charges / convictions may not be in the

interest of justice, it shall be open to the Court to pass such appropriate orders as may be deemed just in the circumstances of the case. Such orders may, for example, take the shape of order for expedition of trial and its conclusion within a particular prescribed period, reduction of sentence when the matter comes up after conclusion of trial and conviction, and so on."

Phrase "and so on" is indicative of powers to issue further directions including enlarging the accused on bail on demand or otherwise. Obviously, it can extend time for conclusion of trial. The Apex Court has not extended the time in the case on hand. Para 86 of the judgment stipulates propositions emerged for the discussion as mentioned therein. The Apex Court has said that these propositions are meant to serve as guidelines and Apex Court has forewarned that these propositions are not exhaustive. Right to speedy trial flowing from Article 21 encompasses all stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial. In sub-para (3) of Para 86 of the aforesaid judgment, the Apex Court has said :-

"(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 not be subjected to unnecessary or unduly long incarceration prior to his conviction.

(b) xxx xxx xxx

(c) xxx xxx xxx"

Delay is a known defence tactic. Learned Special P.P. Mr. D.N. Patel for the D.R.I., has therefore, shown anxiety on behalf of the D.R.I. that they are anxious to see that stay granted by this Court is either vacated or any other appropriate order is passed at the earliest so that trial can get some momentum. One should also consider that there may be cases where prosecution for whatever reasons also indulges in delaying tactics. Therefore, in every case, where right to speedy trial is alleged to have been infringed, the question to be raised and answered is as to who is responsible for the delay? These are the exact words by the Apex Court in sub-para (4) of Para 86 of the aforesaid judgment. Undisputedly, the delay in present case is not attributed to the petitioners.

20. One important aspect which struck to my mind while I was attentive to the submissions of learned Spl. P.P. Mr. D.N. Patel appearing for D.R.I., is that according to D.R.I., period of IV years approximately as an undertrial is a long period, and prima facie, this period can be said to be unreasonably long period. Even D.R.I. itself undisputedly accepts that the trial is unreasonably protracted, but according to the prosecuting agency, the petitioners should not find fault of the prosecuting agency for that. Prosecuting agency was bound to take certain steps and further proceedings to the higher forum with a view to see that all evidence collected by it is tendered and admitted during trial. Period of maximum punishment prescribed under the Act is focused by learned Spl. P.P. Mr. Patel. By

giving flashes on the sensitivity of the offences and modus adopted by the accused persons, Mr. D.N. Patel has tried to submit that in no event, any period till its logical end can be termed as unduly long period for trial in such a serious and complex case. While quoting sub-Para 5 and 8 of the judgment of the Apex Court in the case of A, R, Antulay (supra). Mr. Patel has submitted that this Court has to consider all the attendant circumstances. I would like to quote sub-Paras 5 and 8 of Para-86 of the aforesaid judgment for the purpose. The Apex Court has said therein :-

"(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 workload 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."

Sub-para (8) of Para 86 says :

(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."

Apex Court has observed that it is neither advisable nor practicable to fix any time-limit for trial of offence. Any such rule is bound to be a qualified one. Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under the Constitution, has to be read" in light of the concept of speedy trial. In light of guidelines issued by the Apex Court and to supplement proposition laid down by the Constitutional Bench in Abdul Raheman Antulay's case (supra), while dealing with Rajdeo Sharma's case (supra), the Apex Court has issued certain directions. These directions mainly deals with the trials concerning the offences punishable (i) for imprisonment for a period not exceeding 7 years, and (ii) the cases where the accused have remained in jail as an undertrial for a period not less than half of the maximum period of sentence / punishment prescribed for the offence, etc.

21. Considering the ratio in the cases of (i) Satya Brat Gain Vs. State of Bihar, and Akhtari Bi v. State of M. P., JT 2001 (4) SCC 40, it can be legitimately inferred that the submissions advanced by the petitioners that period of 7½ years undergone by them in the judicial custody as an undertrial can be termed as unduly long, and therefore, this Court has to think positively in response to the bail plea by the petitioners. Constitutional validity scrutinised by the Apex Court as to Section 32A of the N.D.P.S. Act while dealing with the case of Dadu @ Tulsidas Vs. State of Maharashtra, , has scanned Section 32A and Section 37 of the N.D.P.S. Act in light of the provisions of Article 21 of the Constitution of India. The Apex Court has observed in Para 17 in the aforesaid judgment as under :-

"17. Not providing at least one right of appeal would negate the due process of law in the matter of dispensation of criminal justice. There is no doubt that the right of appeal is the creature of a statute and when conferred, a substantive right. Providing a right of appeal but totally disarming the Court from granting interim relief in the form of suspension of sentence would be unjust, unfair and violative of Article 21 of the Constitution particularly when no mechanism is provided for early disposal of the appeal. The pendency of criminal litigation and the experience in dealing with pending matters indicate no possibility of early hearing of the appeal and its disposal on merits atleast in many High Courts. As the present is not the occasion to dilate on the causes for such delay, we restrain ourselves from that exercise, In this view of the matter, the appellate powers of the Court cannot be denuded by executive or judicial process."

22. During the course of submissions, it was pointed out by learned Spl. P.P. Mr. Patel that the trial Court is now dealing with the matter against the petitioners on day-to-day basis and the same has substantially progressed. Responding to this submission, the petitioners have denied that trial has "geared up. There is a long list of witnesses to be examined and even 50,% of the witnesses are yet not examined. Because of disruption on account of last earthquake, many trials have been derailed. It is submitted that because of one reason or the other, for no fault on the part of the either side, there is no hope as to culmination of trial in a near future. According to learned Senior Counsel Mr. A. D. Shah, even when D.R.I. had obtained ex-parte modification by Filing Misc. Criminal Petition No. 862 of 2001 in SLP (Cri.) No. 223 of 2000, the Apex Court had not granted farther time to trial Court to complete the trial. Direction given by the Apex Court may give rise to some other or farther proceedings, is also one of the submissions. Apex Court has observed that :-

"Now, for disposal of the present application we may state that there is no point in our granting further time to the trial Court to complete the trial. It is for the trial Court to complete it as early as possible. But we would not do anything to deprive the accused in custody of his right to move for bail on account of the delay thus far occasioned. The bail application would be disposed of by the Court concerned on Us own merits."

I am of the view that above observations have impliedly accepted the right to continue bail plea agitated by the petitioner-Bipin Panchal on account of protraction of trial.

23. Irrespective of the pronouncement of the judgments in other cases decided by the Apex Court or High Courts, it can be said that in the case pending against the present petitioners, bail plea on account of protraction of trial under the right embodied in Article 21 of the Constitution was agitated before the trial Court, thereafter, before this Court and in turn before the Apex Court. When it was agitated before the Supreme Court by moving SLP (Cri.) No. 223 of 2000, the Apex Court was aware about the sensitivity of the crime and its gravity. Even then, bail plea was not rejected on the count. At the end of sixth month from the

date of order i.e. 31-3-2000, in view of the liberty granted by the Apex Court, the petitioner-Bipin Panchal was entitled to raise bail plea on the same grounds. I am told that Presiding Officer of the Court concerned had not obtained any extension from the Apex Court, at the relevant point of time. It seems that the prosecuting agency has tried to get extension from the Apex Court by moving Misc. Cri. Petition No. 862 of 2001 which has been disposed of by making certain observations vide order dated 22-2-2001. One of the observations, for the purpose, is quoted in Para 22 hereinabove.

24. The words "Court concerned" and "on its own merits" in the above order, include this Court as well as the trial Court having concurrent powers to deal with the bail plea u/s 439 of Cri. P.C. As the petitioner-Bipin Panchal had approached the Apex Court against the order passed by this Court, he has agitated bail plea again before this Court and petitioner-Achint Patel, in view of the observations made in the order dated 31-3-2000, had approached the trial Court where he has failed. This Court is called upon to determine whether undue delay has occurred resulting into violation of right of speedy trial and considering the period of around 7¹/₂ years, the Court if accepts that right embodied under Article 21 has been violated, then other attending circumstances including nature of offence, number of accused and witnesses, documents etc. are very relevant. Significance of maximum punishment prescribed for the offence, sensitivity of the crime and impact of the bail order on the society remain relevant in the context of total period undergone as undertrial prisoner. If Court finds that it is not possible to evolve any device, by imposing stringent conditions, only then such aspects should be given more weightage. The facts and circumstances of each case would provide "scales". On objective, mental evaluation and without putting it in mathematical percentage, the Court has to strike the balance otherwise hi no sensitive or grave offence, accused can get bail under the right emerged because of violation of right to speedy trial. In the instant case, considering (i) number of witnesses remained to be examined, (ii) other facts and circumstances emerging from record, and (iii) observations of the Apex Court in the orders dated 31-3-2000 and 22-2-2001, I feel that the other things namely gravity of offence or sensitivity of the crime and other apprehensions as to scope of influencing the prosecution witnesses etc. have very limited role to play. The Court has to think whether these contingencies can be taken care of by imposing appropriate stringent conditions. As discussed earlier, the petitioners have undergone long period of more than 7 years and 4 months in judicial custody, in my view, this is a fit case to exercise discretion in favour of the petitioners, not fully but partly. This Court is not asked to direct the trial Court to close the proceedings or to terminate the proceedings, and so, maximum period of punishment prescribed would not be of much relevance, in view of the decision of the Apex Court in the case of Supreme Court Legal Aid Committee (supra). In that decision, the Apex Court has held that the liberty of a person without ensuring speedy trial is violative of Article 21. The Apex Court was dealing with the offence punishable under N.D.P.S. Act. Observations of the Apex Court

indicate that irrespective of statutory embargo of Section 37 of N.D.P.S. Act, right visualised by Article 21, has some precedence over such statutory embargo. The petitioners are facing trial for offence where the maximum punishment is life imprisonment, if we do not talk about capital punishment. In the aforesaid decision, the Apex Court issued certain directions. Direction Nos. (ii) & (iii) are relevant for the purpose. That -

"With respect to pending cases, we direct as under :-

(i) xxx xxx xxx

(ii) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount in no case be less than Rs. 50,000 with two sureties for like amount.

(iii) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount."

25. In the aforesaid decision, the Apex Court has, while enlarging undertrials facing charge of the offences punishable under the N.D.P.S. Act, had imposed certain general conditions. As discussed earlier, some special conditions can be imposed which can work as device against the apprehension expressed by the prosecuting agency. This Court could have granted regular bail to the petitioners, but considering the sensitivity of the crime, gravity of offence and the fact that trial is gradually progressing, temporary bail can be the very good alternative. During the course of submissions, Mr. A. D. Shah, learned Senior Counsel as well as learned Counsel Mr. B. B. Naik, both appearing for the petitioners-accused have submitted that the petitioners would be satisfied even if they are granted temporary bail and that they are ready to get their presence marked on every alternate day when they may have not to attend the criminal trial pending with the City Sessions Court. They are also eager to abide by whatever conditions which may restrict their movement along with other prohibitions. Normally, such submissions are not made, but it seems that under the great desperation, this submission appears to have been made. Considering the case against the petitioners, they can be released on temporary bail on certain stringent conditions coupled with usual terms and conditions. I have also considered the reasons given by the Apex Court while granting bail to the accused where sufficient number of witnesses were examined by the trial Court, in the case of *Dineshkutnar Bhatti v. State of N.C.T. of New Delhi* AIR 2000 SCW 1736. In that case, accused were in judicial custody since 5 years and 29 out of 59 eye-witnesses were examined. Here in the case on hand, number of eye-witnesses are yet to be examined. So, temporary bail on certain special terms can be granted. In my view, such order, in any manner, would not prejudice either side.

It is, however, always open to the prosecution to pray for cancellation of bail by stating cogent reasons.

26. Under the totality of discussion made as above, I am of the view that both these applications require to be allowed partly by releasing petitioners of both the applications on temporary bail. Hence, following order is passed :-

27. Both these applications are partly allowed and petitioner-accused Shri Bipin Shantilal Panchal petitioner of Misc. Cri. Application No. 6523 of 2000 and petitioner accused Achint Navinbhai Patel petitioner of Misc. Cri. Application No. 1722 of 2001, are hereby ordered to be released on temporary bail for a period of 90 (ninety) days from the date of their release in connection with Sessions Case No. 162 of 1994 pending in the Court of learned Addl. City Sessions Judge, Ahmedabad for the offences punishable u/s 120B of the I.P.C. read with Sections 22 23 & 24 read with Section 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 on each of them executing a bond of Rs. 1,00,000/- (Rs. One Lakh only) with two sureties of Rs. ONE LAKH each of a person having immovable properties in the State of Gujarat to the satisfaction of the lower Court and subject to the conditions that they shall :

(i) the petitioners shall deposit their passports with the learned trial Judge concerned and if petitioners, do not hold passports, they shall file an affidavit to that effect in the form that may be prescribed by the learned trial Judge. In the latter case, the learned trial Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within two weeks. If he fails to reply within the said time, the learned trial Judge will be entitled to act on the statement of the petitioners-undertrials;

(ii) the petitioners shall on being released on temporary bail, not apply for passport after their release and shall supply their 3 passport size recent photographs within one week from their release to the learned trial Judge and 2 passport size recent photographs to the prosecuting agency so that either of the two can instruct the Passport Officer of the concerned region or at the outlet to reduce scope of petitioners obtaining or using another passport in any fictitious name. Trial Court as well as prosecuting agencies are entitled to take appropriate steps in this regard;

(iii) shall mark their presence in the office of D.R.I., Ahmedabad on every Monday, Wednesday & Friday, once during the office hours. However, the petitioners are exempted to appear before D.R.I. on any of the aforesaid days if they appear before the trial Court on that particular day, as required by the trial Court.

(iv) may furnish bail by depositing cash equal to the bail amount;

(v) shall not deal in the business of pharmaceuticals or any allied products in any manner whatsoever till further orders. There shall also be ban on transportation

of pharmaceutical products by them;

(vi) shall not directly or indirectly try to establish contacts with prosecution witnesses and shall not try to influence them.

(vii) shall furnish sureties as ordered of a person having immovable properties in the State of Gujarat. Trial Court shall verify the genuineness of the solvency tendered at the time of execution of bail bonds;

(viii) shall surrender on expiry of 90th day from the date of their release. It is, however, observed that petitioners will be at liberty to apply for extension of temporary bail before reasonable period of expiry of 90 days, if the trial is not concluded on the date of making such application. In the event of such application being made, the same shall be decided on merits and in accordance with law considering existing circumstances and contingencies;

(ix) not take undue advantage of their liberty or abuse their liberty;

(x) not act in a manner injurious to the interest of the prosecution;

(xi) maintain law and order;

(xii) not leave the local limits of Ahmedabad District without the prior permission of the Sessions Judge concerned; (xiii) furnish the address of their residence at the time of execution of the bond and shall not change the residence without prior permission of this Court; (xiv) If case for cancellation" bail is made out and/or if breach of any of the above conditions is committed, the Sessions Judge concerned will be free to issue warrant or take appropriate action in the matter.

(xv) Bail before the lower Court having jurisdiction to try the case.

28. Rule is made absolute accordingly in both the applications. Direct Service is permitted. Yadi to concerned Police Station.