IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on: 21.12.2022
Pronounced on: 30.12.2022

Bail App No.109/2022

MANZOOR AHMAD MIR …PETITIONER(S)

Through:- Mr. N. A. Ronga, Advocate.

Vs.

UT OF J&K …RESPONDENT(S)

Through:- Mr. Sajad Ashraf, GA.
Mr. Tawheed Ahmad, Advocate.

CORAM:-HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE.

JUDGMENT

1) The petitioner has sought bail in FIR No.118/2010 for offences under Section 302, 380 and 457 RPC registered with Police Station, Batamaloo, Srinagar.

2) As per the case of the prosecution, deceased Rukhsana Jabeen was married to the petitioner in the year 2006. The deceased was working as a Nurse in the Health Department of the J&K Government whereas the petitioner was working as Constable in the Police Department. After the marriage, the petitioner is alleged to have harassed his wife and taken away her gold ornaments. On 25.08.2010 when the deceased was proceeding to her duty during night in an ambulance, the petitioner boarded the said ambulance and forcibly

tried to deboard the deceased from the said ambulance. The petitioner is stated to have beaten up his wife besides extending threats to her. On 29.09.2010, the deceased was found dead in her room. The police was, accordingly, informed and after lodging of the FIR, investigation was set into motion. During the investigation of the case, it was found that, the deceased, had been done to death by the petitioner. The challan against the petitioner was filed and he is facing trial for offences under Section 302, 380 and 457 RPC.

3) The petitioner has sought bail only on the ground of his long incarceration and on account of violation of his right to speedy trial. According to the petitioner, he is in custody for the last more than 12 years but the trial against him has not concluded as yet. It has been contended that there is no likelihood of completion of trial in near future, as such, the petitioner deserves to be enlarged on bail.

4) I have heard learned counsel for the parties and perused the record of the case including the trial court record.

5) Learned counsel for the petitioner has reiterated during his arguments that the speedy trial is a fundamental right of an accused and once this right is violated, the accused is entitled to be enlarged on bail. In this regard, learned counsel has relied upon the judgments of the Supreme Court in the cases of **Indrani Pratim Mukerjea vs. Central Bureau of Investigation and anr.** (Petition for Special Leave to Appeal (Crl.) No.1627/2022 decided on 18.05.2022) and **Saudan Singh vs.**

State of Uttar Pradesh (Criminal Appeal No.308/2022 decided on 25th February, 2022).

6) *Per contra,* Mr. Sajjad Ashraf, learned Government Advocate, has submitted that the petitioner has committed a heinous offence by murdering his wife and there is enough evidence on record to prima facie show his involvement in the alleged crime, as such, rigour of Proviso (1) to Section 437 of the Criminal Procedure Code is attracted to the instant case having regard to the fact that the offences committed by the petitioner carry maximum punishment of deaths sentence. It is also averred that on an earlier occasion when the petitioner was granted temporary bail in the year 2014, he had threatened the prosecution witnesses.

7) A perusal of the record shows that the petitioner has been arrested in the instant case on 15.12.2010 and the challan against him was laid before the trial court on 12.01.2011. The record further shows that 44 witness have been cited in the challan and till date evidence of the prosecution has not been completed.

8) In the light of aforesaid facts, the question arises as to whether a person who has been accused of having committed a heinous offence like murder, is entitled to be enlarged on bail on the ground of his long incarceration of more than 12 years. This question has been a matter of discussion before the Supreme Court in a number of cases. It

would be apt to refer to some of the judgments of the Supreme Court on this issue.

9) One of the earliest judgments on the concept of speedy trial was delivered by the Supreme Court in the case of **Hussainara Khatoon vs. Home Secretary, State of Bihar, (**1980) 1 SCC 81. In the said case, the Supreme Court deprecated the delay in commencement of trials, which would apply equally to long pendency of trials. The Court observed that un-necessarily prolonged detention in prison of undertrials before being brought to the trial, is an affront to all civilized norms of human liberty. The Court observed as under:

> *"There is also one other infirmity of the legal and judicial system which is responsible for this gross denial of justice to the undertrial prisoners and that is the notorious delay in disposal of cases. It is a bad reflection on the legal and judicial system that the trial of an accused should not even commence for a long number of years. Even a delay of one year in the commencement of the trial is bad enough; how much worse could it be when the delay is as long as 3 or 5 or 7 or even 10 years. Speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice. It is interesting to note that in the United States, speedy trial is one of the constitutionally guaranteed rights. The Sixth Amendment to the Constitution provides that:*
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> *"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."*
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> *So also Article 3 of the European Convention on Human Rights provides that:*
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> *"every one arrested or detained…..shall be entitled to trial within a reasonable time or to release pending trial."*
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> *We think that even under our Constitution, though speedy trial is not specifically enumerated as a*

> *fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted by this Court in Maneka Gandhi v. Union of India. We have held in that case that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that Article that some semblance of a procedure should be prescribed by law, but that the procedure should be "reasonable, fair and just". If a person is deprived of his liberty under a procedure which is not "reasonable, fair or just", such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release. Now obviously procedure prescribed by law for depriving a person of his 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 reasonable quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21.*
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> *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. Would he be entitled to be released unconditionally freed from the charge levelled against him on the ground that trying him after an unduly long period of time and convicting him after such trial would constitute violation of his fundamental right under Article 21 ? That is a question we shall have to consider when we hear the writ petition on merits on the adjourned date….”*

10) In **Supreme Court Legal Aid Committee vs. Union of India,** (1994) SCC 731, the Supreme Court dealt with the issue of delay in trial in the following manner:

> *“……..In substance the petitioner now prays that all under-trials who are in jail for the commission of any offence or offences under the Act for a period*

*exceeding two years on account of the delay in the disposal of cases lodged against them should be forthwith released from jail declaring their further detention to be illegal and void and pending decision of this Court on the said larger issue, they should in any case be released on bail. It is indeed true and that is obvious from the plain language of Section 36(1) of the Act, that the legislature contemplated the creation of Special Courts to speed up the trial of those prosecuted for the commission of any offence under the Act. It is equally true that similar is the objective of 6 19 NE 2d 902: 60 Ohio App 119 * Words and Phrases, Permanent Edn., Vol. 10, p. 380 Section 309 of the Code. It is also true that this Court has emphasised in a series of decisions that Articles 14, 19 and 21 sustain and nourish each other and any law depriving a person of "personal liberty" must prescribe a procedure which is just, fair and reasonable, i.e., a procedure which promotes speedy trial….*

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 Punjab10. 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. Nayak11, 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 quashing 7 (1980) 1 SCC 98 : 1980 SCC (Cri) 40 8 (1986) 4 SCC 481 :1986 SCC (Cri) 511 9 (1983) 2 SCC 104 : 1983 SCC (Cri) 361 10 (1994) 3 SCC 569: 1994 SCC (Cri) 899 11 (1992) 1 SCC 225 :1992 SCC (Cri) 93 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. 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. This suggestion commends to us…."*

11) Again, **Umarmia vs. State of Gujarat,** (2017) 2 SCC 731, the Supreme Court, while granting bail to an undertrial who had been in custody for about 12 years, observed as under

> ***"…..**This appeal is filed against the judgment dated 16-6-2010 in Criminal Misc. Sr. No. 44 of 2010 by which the Court of Designated Judge (TADA) at Porbandar (hereinafter referred to as "the Designated Court") rejected the bail application filed by the appellant under Section 439 CrPC and Section 20(8) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "the Act"). Crime No. I-43 of 1994 was registered under Section 154 CrPC for the offences committed under Sections 121, 121-A, 122, 123, 124-B read with Section 34 of the Penal Code, 1860, Sections 25(1-A), (1-B) and 25(1-AA) of the Arms Act, Section 9-B of the Explosives Act, Sections 3, 4, 5 and 6 of the Explosive Substances Act and Sections 3, 4 and 5 of the Act.*
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> ***2.** The statement of one Suresh recorded under Section 108 of the Customs Act revealed that explosive*

substances, powder RDX boxes, bags containing firearms, 45 bags of weapons, 15 boxes of RDX and 225 pieces of silver ingots were smuggled into the country and taken to Zaroli and Dhanoli Villages of Valsad District. The first charge-sheet was filed on 12-1-1995 in which the name of the appellant is found at Serial No. 1 in Column 2 which refers to persons who were absconding. The 11th supplementary charge-sheet was filed on 6-6-2005 wherein it was mentioned that the appellant was arrested at 1700 hrs on 10-12-2004.

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10. *After considering the submissions of both sides, we are of the opinion that the appellant is entitled to be released on bail for the following reasons:*

A. The prior approval required under Section 20-A(1) of the TADA Act was not taken from the District Superintendent of Police before the FIR was recorded.

B. Admittedly, the appellant had been suffering incarceration for more than 12 years.

C. Only 25 out of 192 witnesses have been examined so far.

D. There is no likelihood of the completion of trial in the near future.

E. Though there is a confessional statement of the appellant recorded under Section 15 of the TADA, the same cannot be looked into by us in view of the violation of Section 20-A(1) of the TADA Act.

11. *This Court has consistently recognised the right of the accused for a speedy trial. Delay in criminal trial has been held to be in violation of the right guaranteed to an accused under Article 21 of the Constitution of India. (See Supreme Court Legal Aid Committee v. Union of India [Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India, (1994) 6 SCC 731: 1995 SCC (Cri) 39] and Shaheen Welfare Assn. v. Union of India [Shaheen Welfare Assn. v. Union of India, (1996) 2 SCC 616 : 1996 SCC (Cri) 366] .) The accused, even in cases under TADA, have been released on bail on the ground that they have been in jail for a long period of time and there was no likelihood of the completion of the trial at the earliest. [See Paramjit Singh v. State (NCT of Delhi) [Paramjit Singh v. State (NCT of Delhi), (1999) 9 SCC 252 : 1999 SCC (Cri) 1156] and Babba v. State of*

Maharashtra [Babba v. State of Maharashtra, (2005) 11 SCC 569 : (2006) 2 SCC (Cri) 118.

***12.** Though the appellant is involved in serious offences and has absconded for a period of 10 years before he was arrested in 2004, we see no reason to confine him to jail as he has already suffered more than 12 years in custody and the trial may not be completed in the near future. Taking note of the above, we grant relief of bail to the appellant subject to the following conditions……."*

12) Recently, in the case of **Union of India vs. K. A. Najeeb,** (2021) 3 SCC 713, a three Judge Bench of the Supreme Court, while considering the long incarceration as also the effect of rigour of Section 43-D(5) of the UAPA Act, observed as under:

*"**17.** It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial."*

13) In yet another judgment in the case of **Ashim alias Asim Kumar Haranth Bhattacharya vs. National Investigation Agency,** (2022) 1 SCC 695, the Supreme Court observed as under:

*"**9.** We have to balance the nature of crime in reference to which the appellant is facing a trial. At the same time, the period of incarceration which has been suffered and the likely period within which the trial can be expected to be completed, as is informed*

> *to this Court that the statement of PW 1/de facto complainant has still not been completed and there are 298 prosecution witnesses in the calendar of witness although the respondent has stated in its counter-affidavit that it may examine only 100 to 105 witnesses but indeed may take its own time to conclude the trial. This fact certainly cannot be ignored that the appellant is in custody since 6-7-2012 and has completed nine-and-half years of incarceration as an undertrial prisoner.*
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> ***10.*** *This Court has consistently observed in its numerous judgments that the liberty guaranteed in Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial is imperative and the undertrials cannot indefinitely be detained pending trial. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge him on bail.*
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> ***11.*** *Deprivation of personal liberty without ensuring speedy trial is not consistent with Article 21 of the Constitution of India. While deprivation of personal liberty for some period may not be avoidable, period of deprivation pending trial/appeal cannot be unduly long. At the same time, timely delivery of justice is part of human rights and denial of speedy justice is a threat to public confidence in the administration of justice."*

14) Again, in the case of **Jagjeet Singh & Ors. Vs. Ashish Mishra @ Monu & anr. 2021** LiveLaw (SC) 376, the Supreme Court, relying up the ratio laid down in **K. A. Najeeb's** case (supra), observed that no accused can be subjected to unending detention pending trial, especially when law presumes him to be innocent until proven guilty. It has been further observed that even when statutory provisions expressly bar the grant of bail after a reasonably long period of incarceration, such stringent provision will melt down.

15) From the foregoing enunciation of the law laid down by the Supreme Court, it becomes clear that long incarceration of an undertail without any likelihood of conclusion of trial in near future infringes upon the right of speedy trial of such undertrial. While the Supreme Court has, in some cases, gone to the extent of quashing the trial itself but consistent view of the Supreme Court has been that in case the delay in conclusion of the trial amounts to oppression or harassment, the Court can interfere in such situations and grant bail to an accused in a heinous crime like murder also. While doing so, the Court has to take into consideration several factors like, length of delay, the justification for the delay, the accused's assertion of his right to speedy trial, and prejudice caused to the accused by such delay. It is also clear that the Criminal Courts are not obliged to terminate the trial or criminal proceedings only on account of lapse of time and acquit the accused but in appropriate cases, the Court can grant appropriate relief or suitable directions in favour of the accused. Thus, in deciding bail applications, one of the important factors which should be taken into account is the delay in concluding the trial. If an accused is denied bail but is ultimately acquitted, nobody is going to compensate him for the period he has spent in custody. Therefore, long incarceration of an accused may not be by itself a ground for grant of bail but it certainly becomes a ground for grant of bail to an accused, if the delay in conclusion of trial is attributable to the prosecution.

16) That takes us to the facts attending to the instant case because it is in the light of the facts of a particular case that courts have to come to a conclusion whether an accused is entitled to bail on the ground of long incarceration. The trial court record shows that out of 44 witnesses, at the present moment of time two prosecution witnesses are yet to be examined. The record further shows that for the last three years PWs (26), (41), (42) and (44) are being summoned for recording their statements and the prosecution has succeeded in procuring the presence of only one witness out of these four witnesses during these three years whereas statements of PWs (26), (41) and (44) are yet to be recorded. PWs (26), (41) and (44) are all police officials but the learned trial court is struggling to procure their attendance for recording their statements. Even the warrants of arrest against these three witnesses have been issued by the trial court but the same are not being executed. The record further shows that on 03.10.2022, the learned trial court has even issued a show cause notice to SHO, P/S, Batamaloo, for his failure to execute the warrants against the witnesses but no fruitful purpose has been achieved in spite of taking such steps.

17) From the foregoing sequence of events, it is clear that the delay in conclusion of the trial is solely attributable to the prosecution. The officers and officials of the police department, who are obliged and duty bound to assist in the speedy trial of the cases, are avoiding to appear before the Court as witnesses thereby protracting the trial. It is

not a case where some civil witnesses, who may have been won over by the accused and avoiding to depose in support of the prosecution but it is a case where even the police officials have scant regard for the process of the Court and they are avoiding to help the prosecution in speedy trial of the case. Without the cooperation and assistance of the prosecuting agency and the police department, the speedy trial will always remain a distant dream. The present case is a classic example of prolongation of the trial by the prosecuting agency and the police department whose officials are duty bound to render assistance in speedy trial of cases. It is high time that the respondents should put their house in order and instruct their officers and officials to render all possible assistance in conclusion of criminal trials instead of blaming the Criminal Courts for the delay.

18) The trial court does have power to terminate the trial by closing the prosecution evidence but I am conscious of the fact that in heinous offences like murder, the Courts generally do not take this extreme step, particularly when the witnesses to be examined are material witnesses like witnesses to memo of disclosure and recovery and the investigating officer, as is the present case. The Courts refrain from closing the evidence in such cases as it amounts to failure of justice but this should not be taken as a device by the prosecution to protract the trial.

19) Learned counsel for the respondents has, while relying upon the judgment of this Court in the case of **Sohan Singh vs. UT of J&K**

(Bail App No.253/2020 decided on 24.06.2021), contended that long incarceration of an accused cannot be the sole ground for enlarging him on bail, particularly in a murder case.

20) There cannot be any quarrel with the proposition of law propounded by learned Government Advocate but in a case where trial has been prolonged to infinite limits on account of non-cooperation of the prosecution and the police department, the accused can certainly be enlarged on bail even in a murder case. As already discussed hereinbefore in the case of long incarceration of an accused without any hope of conclusion of trial in near future, the rigour of 1st Proviso to Section 437 of the Cr. P. C would melt down. If the argument of learned Government Advocate is accepted, then the respondent and its officials can very well avoid appearance in the Court for another ten years thereby ensuring that the petitioner does not come out of jail for next one decade.

21) The reliance placed by the learned Government Advocate on the ratio laid down in **Sohan Singh's** case (supra) is misconceived as the said ratio cannot be made applicable to the facts of the instant case. In **Sohan Singh's** case, the period of incarceration of the accused was about five years, out of which, the trial of the case had been stayed by the High Court/Supreme Court for a couple of years and, as such, the delay in trial was not attributable to the prosecution. In the instant case, the responsibility of delay in trial is wholly attributable to

the prosecution. The contention of the learned Government Advocate is, therefore, without any merit.

22) Contention of the respondents that the petitioner has misused the concession of temporary bail by threatening prosecution witnesses, at this stage of the trial is not tenable because statements of all the civil witnesses in the case have already been recorded and there is no chance of threatening of civil witnesses by the petitioner at this stage.

23) For all what has been discussed hereinbefore, I find that the petitioner has carved out a case for grant of bail on account of his long incarceration for more than 12 years and on account of the fact that by the conduct of the prosecution and the police department, there is hardly any chance of conclusion of trial in near future.

24) Accordingly, the petitioner is directed to be released on bail subject to the following conditions:

(I) That he shall furnish personal bond along with two local sureties in the amount of Rs.1,00,000 (rupees one lac) each to the satisfaction of the trial court;

(II) That, in case he has a passport, he shall surrender the same before the trial court and he shall not travel out of the Union Territory of Jammu and Kashmir without permission of the trial court;

(III) That he shall not tamper with the prosecution evidence and he shall not indulge in any act or omission that is unlawful or that would prejudice the proceedings in the pending trial;

(IV) That he shall appear before the trial Court on each and every date of hearing;

25) The application stands disposed of in above terms.

(SANJAY DHAR)
JUDGE

SRINAGAR
30.12.2022
"Bhat Altaf, PS"

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No