

Tapas Ahmed vs Unknown on 8 October, 2024

Author: Arijit Banerjee

Bench: Arijit Banerjee

IN THE HIGH COURT AT CALCUTTA
CRIMINAL MISCELLANEOUS JURISDICTION
APPELLATE SIDE
CRM (NDPS) 1052 of 2024

In re: An application for bail under Section 439 read with
Section 436A of the Code of Criminal Procedure, 1973.

-And-

In the matter of: Tapas Ahmed.

.....Petitioner.

Before: The Hon'ble Justice Arijit Banerjee
The Hon'ble Justice Apurba Sinha Ray

For the petitioner : Mr. Rajeev Lochan, Adv.

For the State : Mr. Ranadeb Sengupta, Adv.
Mr. Santanu Talukdar, Adv.

For the Amicus Curiae : Mr. Ayan Bhattacharyya, Adv.

CAV On : 18.09.2024

Judgment On : 08.10.2024

Arijit Banerjee, J.: -

1.

The petitioner was arrested on April 3, 2019 in connection with Park Street Police Station Case No 50 of 2019 dated April 3, 2019 for alleged violation of Sections 22(b) / 29 of the NDPS Act, 1985 and section 14 of The Foreigners Act, 1946. From the petitioner's possession 40 grams of Yaba tablets were recovered. Total recovery from the accused persons was to the tune of 84 grams of Yaba tablets. The same being intermediate quantity, charge under sections 22(b) / 29 of the NDPS Act has been levelled. The petitioner, admittedly a Bangladeshi national, could not produce any valid

document in support of his entry in the Indian territory. For this, charge has been brought under Section 14 of the Foreigners Act.

2. The petitioner says that he is in custody for more than five years and five months. The maximum punishment prescribed under Section 14 of the Foreigners Act is five years' imprisonment. He is in custody for more than 5 years. The maximum punishment stipulated under Section 22 (b) / 29 of the NDPS Act is 10 years' imprisonment. He has served more than half of that term. Relying on Section 436-A of Cr. P.C., the petitioner renews his prayer for bail which was earlier rejected on merits by an order dated May 16, 2023, passed in CRM NDPS No. 984 of 2023.

3. The state strongly opposes the prayer for bail. The following submissions were made on behalf of the state:-

(i) The petitioner's prayer for bail was rejected earlier on merits by a Coordinate Bench which directed the Trial Court to conclude the trial on an early date preferably within 2 years from the next date fixed for recording evidence without granting unnecessary adjournments to either of the parties. This was on May 16, 2023.

Therefore, there is sufficient time left for concluding the trial. The order dated May 16, 2023, has not been challenged by the petitioner.

(ii) The petitioner is substantially responsible for the delay in progress of the trial. The relevant order- sheets would show that a total of 11 dates were fixed by the Trial Court after the order dated May 16, 2023, was passed by the Coordinate Bench. On five occasions, cross examination of PW-2 had to be deferred on the prayer of the Advocate representing the present petitioner. Hence, till June 29, 2024, which was the last date fixed for examination of witness, examination of only PW-1 could be concluded out of the 13 charge-sheet named witnesses. Hence, the petitioner cannot rely upon his right to personal liberty or speedy trial as enshrined in Article 21 of the Constitution of India. He has failed to cooperate with the procedures laid down by the law of the land.

(iii) The petitioner is an illegal intruder in the territory of India. He could produce no document which can validate his stay in this country. This means that the moment he is released from custody, his stay in this country would be without sanction and illegal.

(iv) The petitioner, a Bangladeshi National, is an accused in a murder case in Bangladesh.

4. Two issues arose in course of argument. Firstly, whether the petitioner could seek benefit under Section 436-A Cr. P.C.; and secondly, whether a foreign National who has entered India without valid permit can be or should be granted bail?

5. We had requested Mr. Ayan Bhattacharyya, Ld. Advocate, to assist this Court as amicus curiae. Mr. Bhattacharya very kindly consented and has rendered immense assistance to us in the form of oral arguments, filling written notes of submission and also providing us with photocopies of relevant judgments. We record our deep appreciation for the assistance that he has extended to us.

6. From the case law that we have gone through, there does not appear to be any absolute bar to enlarging a foreign National on bail although he may not have a valid visa in his favour. Ordinarily in such a case the person concerned has to be pushed back to the country of his nationality since without an Indian visa, his presence in this country would be illegal. In some cases, the concerned Foreign National may be lodged in a detention centre subject to obtaining specific orders from the Appropriate Authority in terms of the provisions of Section 3 of The Foreigners Act. There may be other options like the Foreigners Regional Registration Officer (FRRO) may explore the possibilities of requiring the accused person to remain at a particular place other than a detention centre, restricting his movements, regulating his conduct and association with persons, requiring him to report to an authority at regular intervals of time, etc.

7. Jurisprudentially, it is not that an order of bail can not be passed in favour of a Foreigner. The problem concerns implementation of such order since the Foreigner can not stay within the territory of India without possessing valid document in terms of The Passports Act.

8. Section 436-A Cr. P.C. pertains to the maximum period for which an undertrial prisoner can be detained. The Section reads as follows:-

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

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

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

Explanation - In computing the period of detention under this Section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded."

9. In so far as the charge under The Foreigners Act is concerned, the petitioner has undergone detention for a period which is more than the maximum period of imprisonment specified for the offence. In so far as the charge under NDPS Act is concerned, he has suffered detention for a period exceeding one half of the maximum period of imprisonment prescribed for that offence. Hence, the Court has no discretion but to release the petitioner in so far as the offence under The Foreigners Act is concerned. However, it is the Court's discretion as to whether or not the petitioner will be

released from detention in connection with the offence under NDPS Act.

10. We find that in a plethora of cases, different High Courts have granted bail to a Foreign National. Some of such decisions are as follows:-

(i) Amar Chandra Das v. The State of West Bengal, reported at (2024) SCC OnLine Cal 3715.

(ii) Ranjit Kumar Mazumder & Anr. v. The State of West Bengal, reported at (2016) SCC OnLine Cal 308.

(iii) Malek Bipul Chowdhury v. The State of West Bengal, reported at (2015) SCC OnLine Cal 8457.

(iv) Swapna Akter @ Swapna Aktar v. The State of West Bengal, reported at 2014 SCC OnLine Cal 15876.

(v) Charles Kingsley Okokaso v. State (NCT of Delhi), reported at 2023 SCC OnLine Del 4265.

(vi) Chuks Collins v. State of Himachal Pradesh, reported at 2020 SCC OnLine HP. 4476.

11. Most importantly, we note the decision of the Hon'ble Supreme Court in the case of Ana Parveen and Anr. v. Union of India & ors., In writ petition (Crl.) No. 43/2022. Although the facts of that case of that case were different, the important thing to note is that the Hon'ble Supreme Court directed release of a Pakistani National on the touchstone of Article 21 of the Constitution of India. The person concerned was kept in detention for more than 7 years even after he had served out the sentence of imprisonment imposed on him upon being convicted under the provisions of the Foreigners Act. That person had expressed his intention to obtain Indian Citizenship since he had married an Indian lady and had children who were all born in India and were Indian citizens. He had applied for Indian citizenship. He could not be deported because Pakistan did not confirm that he was a Pakistani national. The Hon'ble Supreme Court directed release of that person on furnishing a personal bond of Rs. 5000/- with 2 sureties of Indian Citizens in the like amount. The detainee was directed to furnish the address of his place of permanent residence in Meerat where he proposed to reside, to the SHO of the police station concerned and report to the local police station on the 7th day of every month pending further orders. It was further directed that the decision of the Union Government in the Ministry of Home Affairs with regard to the grant of a long term VISA or VISA to the concerned person shall be placed on record before the Hon'ble Supreme Court on the adjourned date.

12. In the present case, we find that the petitioner is in custody for 5 years 5 months. That is far too long a period of time to keep an undertrial incarceration. He prays for bail on the ground of delay in progress of trial and also relying on section 436-A of Cr. P.C.

13. Although the State argued that the petitioner himself contributed to the delay in trial, we don't find from the records that it was the petitioner alone who caused such delay. He may have obtained adjournments on certain occasions. It was not imperative for the Ld. Trial Court to allow his prayer for adjournments if the same was not based on good grounds. The very fact that the adjournments were allowed would prima facie indicate that the Ld. Trial Court granted such prayer, being satisfied that the same was a reasonable prayer in the facts and circumstances. If the petitioner prayed for deferment of cross-examination of Prosecution-witnesses relying on section 231 Cr. P.C., then also the petitioner cannot be faulted since that is a legal right granted to an accused person.

14. The Ld. Trial Court while rejecting the Petitioner's bail prayer by the order which is impugned before us, recorded that there was substantial delay by reason of outbreak of Covid Pandemic. Again, the petitioner cannot be blamed for that.

15. We don't find that the petitioner alone can be blamed for the long pendency of the trial for almost five and a half years. The State argued that a coordinate Bench by the order dated May 16, 2023, directed that the trial should be concluded within two years. Therefore, adequate time is left for completing the trial. However, we find that even after that order was passed which was about one and half years ago, no substantial progress has been made in the trial. Further, very recently in the case of *Rup Bahadur Magar @ Sanki @ Rabin v. The State of West Bengal*, Petition(s) for Special Leave to Appeal (Crl.) No(s). 11589/2024 the Hon'ble Supreme Court has deprecated the practice of directing the Trial Court to conclude the trial within a specified period of time without enlarging on bail an under trial accused who is in judicial custody. As we understand, the said judgement of the Hon'ble Supreme Court is to the effect that when an accused is in judicial custody for a long period of time, keeping in mind the paramount importance of the right of a person to personal liberty and speedy trial, the detenu should be granted bail, may be on stringent conditions, rather than continuing his custodial detention and directing the Trial Court to conclude the trial within a specified time frame. It is indeed true that the Trial Courts are overburdened.

16. In view of the aforesaid, we feel constrained to enlarge the petitioner on bail. He has served out more than the maximum period of imprisonment specified for an offence under Section 14 of the Foreigners Act. He has also served out more than one half of the maximum period of imprisonment prescribed for the offence under the NDPS Act with which he has been charged. We see that only one prosecution witness, out of thirteen charge- sheet named witnesses has been examined in full. The cross-examination of PW-2 is going on. We do not see that the trial will conclude on an early date.

17. Accordingly, we direct that the petitioner shall be released on bail on furnishing a bond of Rs. 50,000/- of a Citizen of India along with 2 sureties of like amount, one of whom should be local, to the satisfaction of the Ld. Trial Court. He shall not leave the jurisdiction of the Park Street P.S. without the leave of the Ld. Trial Court, except for attending Court proceedings. He shall report to the Park Street Police station once every week and shall furnish to that Police Station the address where he shall reside upon being released from judicial custody. He shall attend each and every hearing before the Ld. Trial Court. He shall not try to tamper with evidence or influence prosecution witnesses. He shall also apply to the Concerned Authority for special temporary visa in view of the

ongoing trial where his presence is necessary. The concerned Authority shall consider such application in accordance with law in the light of the present judgement and order.

18. In the event the petitioner breaches any of the conditions mentioned above, the Ld. Trial Court will be at liberty to cancel the petitioner's bail without reference to us. Since the Trial is pending for a long time, we request the Ld. Trial Court to expedite the trial and conclude the same as soon as possible without granting unnecessary adjournments to either of the parties.

19. CRM 1052 of 2024 is accordingly disposed of.

20. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

(ARIJIT BANERJEE, J.) I agree.

(APURBA SINHA RAY, J.)