SUPREME COURT OF INDIA

Thana Singh

Vs.

Central Bureau of Narcotics

Crl.A.No.1640 of 2010

(D.K.Jain and Jagdish Singh Khehar, JJ.)

23.01.2013

ORDER

1. This order, and its accompanying directions, are an outcome of the bail matter in Thana Singh Vs. Central Bureau of Narcotics listed before this bench, wherein an accused, who had been languishing in prison for more than twelve years, awaiting the commencement of his trial for an offence under the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "NDPS Act"), was consistently denied bail, even by the High Court. Significantly, the maximum punishment for the offence the accused was incarcerated for, is twenty years; hence, the undertrial had remained in detention for a period exceeding one-half of the maximum period of imprisonment. An express pronouncement of this Court in the case of Supreme Court Legal Aid Committee Representing Undertrial Prisoners Vs. Union of India Ors.[1], which h
eld that "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", finds constrained applicability in respect of cases under the NDPS Act, in light of Section 37 of the Act. Therefore, this Court in Achint Navinbhai Patel Vs. State of Gujarat Anr.[2] observed that "it has been repeatedly stressed that NDPS cases should be tried as early as possible because in such cases normally accused are not released on bail."

2. We are reminded of Justice Felix Frankfurter's immortal words in Antonio Richard Rochin Vs. People of the State of California[3], coincidentally a case

pertaining to narcotics, wherein he described some types of conduct by state agents, although not specifically prohibited by explicit language in the Constitution, as those that shock the conscience in that they offend those canons of decency and fairness which express the notions of justice. Due process of law requires the state to observe those principles that are so rooted in the traditions and conscience of our people as to be ranked as fundamental. The general state of affairs pertaining to trials of offences under the NDPS Act deserves a similar description.

3. The laxity with which we throw citizens into prison reflects our lack of appreciation for the tribulations of incarceration; the callousness with which we leave them there reflects our lack of deference for humanity. It also reflects our imprudence when our prisons are bursting at their seams. For the prisoner himself, imprisonment for the purposes of trial is as ignoble as imprisonment on conviction for an offence, since the damning finger and opprobrious eyes of society draw no difference between the two. The plight of the undertrial seems to gain focus only on a solicitous inquiry by this Court, and soon after, quickly fades into the backdrop.

4. Therefore, bearing in mind the aforesaid imperatives, after granting the deserved bail in that case, we decided to take cognizance of status quo and gain a first-hand account about the state of trials in such like cases pending in all the states. Accordingly, vide order dated 30.08.2010, we issued notice to all states through their Chief Secretaries to file affidavits furnishing information of all cases under the NDPS Act where the undertrial has been incarcerated for a period exceeding five years. In pursuance of the same, we received the valuable assistance of the Additional Solicitor General of India, Mr. P. P. Malhotra, learned amicus curiae, Ms. Anita Shenoy; Mr. R. K. Gauba, District and Sessions Judge (South), Saket, New Delhi; Registrar Generals of High Courts; Director General, Narcotics Control Bureau, Ministry of Home Affairs, senior-most Officer-in-Charge of Investigations and Prosecution for offences under the NDPS Act; representatives of the Directorate of Revenue Intelligence (DRI), Customs and Excise Departments and Police of the States concerned.

5. We lay down the directions and guidelines specified hereinafter for due observance by all concerned as the law declared by this Court under Article141of the Constitution of India. This is done in exercise of the power available under Article32of the Constitution for enforcement of fundamental rights, especially the cluster of fundamental rights incorporated under Article 21, which stand flagrantly

violated due to the state of affairs of trials under the NDPS Act. We would like to clarify that these directions are restricted only to the proceedings under the NDPS Act.

DIRECTIONS

A. Adjournments

6. The lavishness with which adjournments are granted is not an ailment exclusive to narcotics trials; courts at every level suffer from this predicament. The institutionalization of generous dispensation of adjournments is exploited to prolong trials for varied considerations.

7. Such a practice deserves complete abolishment. The legislature enacted a crucial amendment in the form of a fourth proviso to Section 309(2) of the Code of Criminal Procedure, 1973 (through Section 21 (b) of Act 5 of 2009) to tackle the problem, but the same awaits notification. Once notified, Section 309 will read as follows: -

"309. Power to postpone or adjourn proceedings.

(1)In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

(2)If the Court after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him

Provided also that-

a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

b) the fact that the pleader of a party is engaged in another Court, shall not be a ground or adjournment;

c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross- examination of the witness, as the case may be

Explanation 1.- If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2.- The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."
[Emphasis supplied]

8. The fourth proviso deserves immediate notification. In lieu of the lacuna created by its conspicuous absence, which is interfering with the fundamental right of speedy trial [See: Hussainara Khatoon and Ors. Vs. Home Secretary, State of Bihar[4]], something this Court is duty- bound to protect and uphold, and till the statutory provisions are in place, we direct that no NDPS court would grant adjournments at the request of a party except where the circumstances are beyond the control of the party. This exception must be treated as an exception, and must not be allowed to swallow the generic rule against grant of adjournments. Further, where the date for hearing has been fixed as per the convenience of the counsel, no adjournment shall be granted without exception. Adherence to this principle would go a long way in cutting short that queue to the doors of justice.

9. Perhaps, a provision analogous to Section 22(c) of the Prevention of Corruption Act, 1988 may be seriously considered by the legislature for trials under the NDPS Act. It reads as follow:

"22. The Code of Criminal Procedure, 1973 , to apply subject to certain modifications.- The provisions of the Code of Criminal Procedure, 1973 (2 of 1974 .), shall in their application to any proceeding in relation to an offence punishable under this Act have effect as if,--

XXX XXX XXX (c)after sub- section (2) of section 317, the following sub-section had been inserted, namely:--

'(3) Notwithstanding anything contained in sub- section (1) or sub-section (2), the Judge may, if he thinks fit and for reasons to be recorded by him, proceed with inquiry or trial in the absence of the accused or his pleader and record the evidence of any witness subject to the right of the accused to recall the witness for cross-examination."

B. Examination of Witnesses

10. Between harmonizing the rights and duties of the accused and the victim, the witness is often forgotten. No legal system can render justice if it is not accompanied with a conducive environment that encourages and invites witnesses to give testimony. The web of antagonistic litigation with its entangled threads of investigation, cross-examination, dealings with the police etc., as it is, lacks the ability to attract witnesses to participate in a process of justice; it is baffling that nonetheless, systems of examination that sprout more disincentives for a witness to take the stand are established. Often, conclusion of examination alone, keeping aside cross-examination of witnesses, takes more than a day. Yet, they are not examined on consecutive days, but on different dates spread out over months. This practice serves as a huge inconvenience to a witness since he is repeatedly required to incur expenditure on travel and logistics for appearance in hearings over a significant period of time. Besides, it often causes unnecessary repetition in terms of questioning and answering, and also places greater reliance on one's ever-fading memory, than necessary. All these factors together cause lengthier examinations that compound the duration of trials.

11. It would be prudent to return to the erstwhile method of holding "session's trials" i.e. conducting examination and cross-examination of a witness on consecutive days over a block period of three to four days. This permits a witness to take the stand after making one-time arrangements for travel and accommodation, after which, he is liberated from his civil duties qua a particular case. Therefore, this Court directs the concerned courts to adopt the method of "session's trials" and assign block dates for examination of witnesses.

12. The Narcotics Control Board also pointed out that since operations for prevention of crimes related to narcotic drugs and substances demands coordination of several different agencies viz. Central Bureau of Narcotics (CBN), Narcotics Control Bureau (NCB), Department of Revenue Intelligence (DRI), Department of Custom and Central Excise, State Law Enforcement Agency, State Excise Agency to name a few, procuring attendance of different officers of these agencies becomes difficult. On the completion of investigation for instance, investigating officers return to their parent organizations and are thus, often unavailable as prosecution witnesses. In light of the recording of such official evidence, we direct the concerned courts to make most of Section 293 of the Code of Criminal Procedure, 1973 and save time by taking evidence from official witnesses in the form of affidavits. The relevant section reads as follows:-

"293. Reports of certain Government scientific experts.

(1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject- matter of his report.

(3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This section applies to the following Government scientific experts, namely:-

(a) any Chemical Examiner or Assistant Chemical Examiner to Government;

(b) the Chief Controller of Explosives;

(c) the Director of the Finger Print Bureau;

(d) the Director, Haffkeine Institute, Bombay;

(e) the Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government."

(g) any other Government scientific expert specified, by notification, by the Central Government for this purpose.

C. Workload

13. The courts are unduly overburdened, an outcome of the diverse repertoire of cases they are expected to handle. We are informed by the Narcotics Control Board that significant time of the NDPS Court is expended in dealing with bail and other criminal matters. Besides, many states do not even have the necessary NDPS courts to deal with the volume of NDPS cases.

14. Therefore, we issue the following directions in this regard:

i) Each state, in consultation with the High Court, particularly the states of Uttar Pradesh, West Bengal and Jammu Kashmir (where the pendency of cases over five years is stated to be high), is directed to establish Special Courts which would deal exclusively with offences under the NDPS Act.

ii) The number of these courts must be proportionate to, and sufficient for, handling the volume of pending cases in the State.

iii) Till exclusive courts for the purpose of disposing of NDPS cases under the NDPS Act are established, these cases will be prioritized over all other matters; after the setting up of the special courts for NDPS cases, only after the clearance of

matters under the NDPS Act will an NDPS court be permitted to take up any other matter.

D. Narcotics Labs

15. Narcotics laboratories at the national level identify drugs for abuse and their accompanying substances in suspected samples, determine the purity and the possible origin of illicit drugs, carry out drug-related research, particularly on new sources of drugs liable to abuse, and, when required by the police or courts of law, provide supportive expertise in drug trafficking cases. Their role in the effective implementation of the mandate of the NDPS Act is indispensible which is why every state or region must have proximate access to these laboratories so that samples collected for the purposes of the Act may be sent on a timely basis to them for scrutiny. These samples often form primary and clinching evidence for both the prosecution and the defence, making their evaluation by narcotics laboratories a crucial exercise.

16. The numbers of these laboratories speak for themselves and are reproduced here. The numbers for Central Forensic Science Laboratories (CFSL) are as follows: -

|S. No |CFSL Location |Status | |1. |Chandigarh |In operation | |2. |Hyderabad |In operation | |3. |Kolkata |In operation | |4. |Delhi (Under Central Bureau of Investigation)|In operation | |5. |Bhopal |Being established | |6. |Pune |Being established | |7. |Guwahati |Being established |

17. Similarly, numbers for the state and regional Forensic Science Laboratories (FSL) are as follows:-

|S. No.|Name of State |Existing State Facilities | | |Main State FSL |Regional FSL | |1. |Andhra Pradesh |1 |9 | |2. |Arunachal Pradesh |1 |0 | |3. |Assam |1 |0 | |4. |Bihar |1 |1 | |5. |Chattisgarh |1 |2 | |6. |Goa |Being established |0 | |7. |Gujarat |1 |5 | |8. |Haryana |1 |2 | |9. |Himachal Pradesh |1 |0 | |10. |Jammu Kashmir |1 |1 | |11. |Jharkhand |1 |0 | |12. |Karnataka |1 |4 | |13. |Kerala |1 |2 | |14. |Madhya Pradesh |1 |3 | |15. |Maharashtra |1 |4 | |16. |Manipur |1 |0 | |17. |Meghalaya |1 |0 | |18. |Mizoram |1 |0 | |19. |Nagaland |1 |0 | |20. |Orissa |1 |2 | |21. |Punjab |1 |0 | |22. |Rajasthan |1 |3 | |23. |Sikkim |0 |1 | |24. |Tamil Nadu |1 |9 | |25. |Tripura |1 |0 | |26. |Uttar Pradesh |1 |2 | |27. |Uttarakhand |1 |0 | |28. |West Bengal |1 |2 | | | |UNION TERRITORIES | | |Andaman and Nicobar Islands |1 |0 | | |Chandigarh |0 |0 | | |Dadra Nagar Haveli |0

|0 | | |Daman Diu |0 |0 | | |Lakshadweep |0 |0 | | |NCT of Delhi |1 |0 | | |Puducherry |0 |0 | | |TOTAL |28 |52 |

18. A qualitative and quantitative overhaul of these laboratories is necessary for ameliorating the present state of affairs, for which, we are issuing the following directions:

i) The Centre must ensure equal access to CFSL's from different parts of the country. The current four CFSL's only cater to the needs of northern and some areas of western and eastern parts of the country. Therefore, besides the three in the pipeline, more CFSL's must be established, especially to cater to the needs of southern and eastern parts of the country.

ii) Analogous directions are issued to the states. Several states do not possess any existing infrastructure to facilitate analysis of samples and are hence, compelled to send them to laboratories in other parts of the country for scrutiny. Therefore, each state is required to establish state level and regional level forensic science laboratories. However, the decision as to the numbers of such laboratories would depend on the backlog of cases in the state.

19. The above mentioned authorities must ensure adequate employment of technical staff and provision of facilities and resources for the purposes of proper, smooth and efficient running of the facilities of Forensic Science Laboratories under them and the Laboratories should furnish their reports expeditiously to the concerned agencies.

20. The Directorate of Forensic Science Services, Ministry of Home Affairs, must take special steps to ensure standardization of equipment across the various forensic laboratories to prevent vacillating results and disallow a litigant an opportunity to challenge test results on that basis.

E. Personnel

21. We have also been apprised of the following vacancies at three CFSLs, namely Chandigarh, Kolkata and Hyderabad.

|Posts |Sanctioned |Filled |Vacant | |Scientific |99 |64 |35 | |Technical |45 |40 |05 |

Shortage of staff is bound to hamper with the smooth functioning of these laboratories, and hence, we direct the Directorate of Forensic Science Services, Ministry of Home Affairs to address the same on an urgent basis.

22. Further, steps must be taken by the concerned departments to improve the quality and expertise of the technical staff, equipment and testing laboratories.

E. Re-testing Provisions

23. The NDPS Act itself does not permit re-sampling or re-testing of samples. Yet, there has been a trend to the contrary; NDPS courts have been consistently obliging to applications for re-testing and re- sampling. These applications add to delays as they are often received at advanced stages of trials after significant elapse of time. NDPS courts seem to be permitting re-testing nonetheless by taking resort to either some High Court judgments [See: State of Kerala Vs. Deepak. P. Shah[5]; Nihal Khan Vs. The State (Govt. of NCT Delhi)[6]] or perhaps to Sections 79 and 80 of the NDPS Act which permit application of the Customs Act, 1962 and the Drugs and Cosmetics Act, 1940. While re-testing may be an important right of an accused, the haphazard manner in which the right is imported from other legislations without its accompanying restrictions, however, is impermissible. Under the NDPS Act, re-testing and re-sampling is rampant at every stage of the trial contrary to other legislations which define a specific time-frame within which the right may be available. Besides, reverence must also be given to the wisdom of the Legislature when it expressly omits a provision, which otherwise appears as a standard one in other legislations. The Legislature, unlike for the NDPS Act, enacted Section 25(4) of the Drugs and Cosmetics Act, 1940, Section 13(2) of the Prevention of Food Adulteration Act, 1954 and Rule 56 of the Central Excise Rules, 1944, permitting a time period of thirty, ten and twenty days respectively for filing an application for re- testing

24. Hence, it is imperative to define re-testing rights, if at all, as an amalgamation of the above- stated factors. Further, in light of Section 52A of the NDPS Act, which permits swift disposal of some hazardous substances, the time frame within which any application for re-testing may be permitted ought to be strictly defined. Section 52A of the NDPS Act reads as follows: -

“52A. Disposal of seized narcotic drugs and psychotropic substances

(1)The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure herein- after specified.

(2)Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer- in- charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub- section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub- section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

(a)certifying the correctness of the inventory so prepared; or

(b)taking, in the presence of such magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c)allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3)Where an application is made under sub- section (2), the Magistrate shall, as soon as may be, allow the application.

(4)Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub- section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

25. Therefore, keeping in mind the array of factors discussed above, we direct that, after the completion of necessary tests by the concerned laboratories, results of the same must be furnished to all parties concerned with the matter. Any requests as to re-testing/re-sampling shall not be entertained under the NDPS Act as a matter of course. These may, however, be permitted, in extremely exceptional circumstances, for cogent reasons to be recorded by the Presiding Judge. An application in such rare cases must be made within a period of fifteen days of the receipt of the test report; no applications for re-testing/re-sampling shall be entertained thereafter. However, in the absence of any compelling circumstances, any form of re-testing/re-sampling is strictly prohibited under the NDPS Act.

G. Monitoring

26. A monitoring agency is pivotal for the effective management of these recommendations and for the general amelioration of the state of affairs. Therefore, it is directed that nodal officers be appointed in all the departments dealing with the NDPS cases, for monitoring the progress of investigation and trial. This nodal officer must be equivalent or superior to the rank of Superintendent of Police, who shall ensure that the trial is not delayed on account of non-supply of documents, non- availability of the witnesses, or for any other reason.

27. We have also learnt from the Narcotics Control Bureau that some form of informational asymmetry is prevalent with respect to the communication of the progress of cases between courts and the department. Therefore, there must be one Pairvi Officer or other such officer for each court who shall report the day's proceedings to the nodal officer assigned for that court.

H. Public Prosecutors

28. Public prosecutors play the most important role in the administration of justice. Their quality is thus of profound importance to the speed and outcome of trials. We have been informed that Special Public Prosecutors for the Central Bureau of Narcotics are appointed by the Ministry of Home Affairs after scrutiny by the Ministry of Law and Justice, on the recommendation of the District and Sessions Judge concerned. We suggest that the procedure of appointment, placed before us, be brought in line with that generally followed for the appointment of public prosecutors, as mandated under Section 24 of the Code of Criminal Procedure, 1973. However, for the present, we direct that the District and Sessions Judge shall make recommendations for such appointments in consultation with the

Administrative Judge/Portfolio Judge/Inspecting Judge, incharge of looking after the administration of the concerned Sessions Division.

I. Other Recommendations.

29. Delays are caused due to demands of compliance with Section 207 of the Code of Criminal Procedure, 1973 which reads as follows:-

"207. Supply to the accused of copy of police report and other documents. In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

(i)the police report;

(ii)the first information report recorded under section 154; (iii)the statements recorded under sub- section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;

(iv)the confessions and statements, if any, recorded under section 164;

(v)any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub- section (5) of section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

For the simplification of the above detailed process, we direct that the filing of the charge- sheet and supply of other documents must also be provided in electronic

form. However, this direction must not be treated as a substitute for hard copies of the same which are indispensable for court proceedings.

30. We expect and hope that the aforesaid directions shall be complied with by the Central Government, State Governments and the Union Territories, as the case may be, expeditiously and in the spirit that these have been made.

31. Before parting, we place on record our deep appreciation for the able assistance rendered to us by the learned Additional Solicitor General; amicus curiae; Mr. Utkarsh Saxena, Law Clerk-cum-Research Assistant and all the officers who were requested to participate in the deliberations.

32. The matter stands closed.

[1] (1994) 6 SCC 731
[2] (2002) 10 SCC 529
[3] 96 L. Ed. 183 (1951)
[4] (1980) 1 SCC 81
[5] 2001 CriLJ 2690
[6] 2007 CriLJ 2074