

**HIGH COURT OF TRIPURA
AGARTALA
AB 42 of 2021**

Shri. Tapash Sarkar @ Rakesh ----- Applicant(s)

Versus

The State of Tripura

----- Respondent(s)

B E F O R E

HON'BLE MR. JUSTICE S.G. CHATTOPADHYAY

For Applicant (s) : Mr. P.Roy Barman, Sr. Adv.
Mr.K.Nath, Adv.

For Respondent(s) : Mr. Ratan Datta, PP.

ORDER

09.07.2021

[1] Apprehending arrest in Belonia P.S. case No. 2021/BLN/011 which has been registered under Sections 22(b),25,27(a) and Section 29 of the Narcotic Drugs and Psychotropic Substances Act,1985 (NDPS Act, for short) the FIR named accused Tapash Sarkar @ Rakesh has approached this court by filing an application under Section 438 of the Code of Criminal Procedure, 1973(Cr.P.C, hereunder) for granting pre-arrest bail to him.

[2] On the factual score, 11.52 grams of heroin contained in 455 plastic containers was recovered and seized by police from the dwelling house of the accused on 14.02.2021 and his father Dipak Sarkar and younger brother Ranjit Sarkar were arrested at the spot.

[3] The case of the prosecution, as projected in the FIR, is that pursuant to a secret information police conducted raid in the house of the accused in the afternoon at about 4.25 p.m of the said date and recovered the said contraband from the backyard of the house of the accused in presence of his father and younger brother and after recovery and seizure of the said contraband from there, both of them were arrested by police. The present accused, who is also an inmate of the house, managed to escape police arrest by absconding from his house. It was also stated in the FIR that police complied with the statutory provisions laid down under Sections 42 and 50 of the NDPS Act before the said search and seizure were carried out in the dwelling house of the accused and the arrest of his father and younger brother was made.

[4] Bikash Debbarma, Sub-Inspector of Police of Belonia police station who was a member of the police team which conducted the alleged search and seizure lodged a suo moto FIR with the Officer-in-charge of Belonia police station on 14.02.2021. Based on his FIR, the case was registered against the petitioner and also against his father and younger brother. As noted, his father Dipak Sarkar and his younger brother Ranjit Sarkar were arrested at the

spot. In this backdrop of circumstances Tapas Sarkar@Rakesh seeks pre-arrest bail under Section 438, Cr.P.C.

[5] Heard Mr.P.Roy Barman, learned Sr. Advocate, appearing for the petitioners along with Mr.K.Nath, learned advocate.

Also Heard Mr.Ratan Datta, learned PP who is representing the state respondent.

[6] Counsel appearing for the accused contends that Section 25 of the NDPS Act under which the case has been registered against the accused has no application because accused does not own the house from where the contraband was allegedly seized by police. Similarly, Section 27(a) is not also applicable because there is no allegation of consumption of any narcotic drug or psychotropic substances against the accused. It is also contended by the counsel that no material has been placed before the court even to guess that the seized contraband was recovered from his possession and as a result, Section 22(b) cannot also be used against him. Moreover, there is no allegation against the accused that he abated the commission of the offence or conspired with his father and brother to commit the offence. Therefore, he cannot also be booked under Section 29 of the NDPS Act. Counsel appearing for the petitioner,

therefore, argues that the allegations made out in the FIR do not constitute any of the offences, aforesaid, under which the case has been registered against the accused. As a result, accused is entitled to pre-arrest bail. Mr.Roy Barman, learned Sr. Advocate, submits that the contraband was allegedly seized from the backyard of the house owned by his father which is also inhabited by others. Since there is no material to suggest that he ever possessed the said contraband, the charge of illegal possession of contraband against him is unfounded. It is also contended by the counsel of the petitioner that he is a patient of chronic renal failure which has been certified by a nephrologist vide certificates dated 20.04.2021 and 02.07.2021 issued by Dr.Anupam Majumder, a consultant nephrologist and renal transport physician. Counsel submits that the accused is on restricted diet and his imprisonment will have a serious impact on his health. Learned counsel, therefore, urges that court to protect the accused from arrest and detention by granting pre-arrest bail to him.

[7] Mr.Ratan Datta, learned Public Prosecutor, has emphatically submitted that in view of the nature, the charges and the materials available against him, in no circumstances the accused would be entitled to bail at this case. It is submitted by the learned PP that for the restrictions provided under Section 37 of the NDPS

Act, accused cannot be released on bail unless this court is satisfied that there are reasonable grounds for believing that he is not guilty of the offence and he is not likely to commit any offence while on bail. In support of his contention Mr.Datta, learned PP, besides referring to the statute, relies on the decision of the Apex Court in *Superintendent of Narcotic Control Bureau, Chennai vs. R.Paulsamy* reported in (2009)9 SCC 549, wherein the Apex Court has held that recording of findings in terms of Section 37 of the NDPS Act is a sine qua non for granting bail to an accused involved in an offence under the NDPS Act. Further submissions of the PP on behalf of the state respondent is that Section 54 of the NDPS Act shifts the onus of proving his innocence upon the accused which states that in trial under the NDPS Act, it may be presumed, unless and until the contrary is proved that an accused has committed an offence under it in respect of the articles recovered from his possession which he fails to account satisfactorily. In support of his contention, Mr. Datta, learned PP has relied on the decision of the Apex Court in *Saiyad Mohd. Saiyad Umar Saiyad and Others vs. State of Gujarat* reported in (1995)3 SCC 610, wherein the Apex Court vide paragraph 6 of the said judgment has held as under:

“6.It is to be noted that under the NDPS Act punishment for contravention of its provisions can extend to rigorous imprisonment for a term

which shall not be less than 10 years but which may extend to 20 years and also to fine which shall not be less than Rupees one lakh but which may extend to Rupees two lakhs, and the court is empowered to impose a fine exceeding Rupees two lakhs for reasons to be recorded in its judgment. Section 54 of the NDPS Act shifts the onus of proving his innocence upon the accused; it states that in trials under the NDPS Act it may be presumed, unless and until the contrary is proved, that an accused has committed an offence under it in respect of the articles covered by it "for the possession of which he fails to account satisfactorily". Having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act, namely, the shifting of the onus to the accused and the severe punishment to which he becomes liable, the legislature has enacted the safeguard contained in Section 50. To obviate any doubt as to the possession by the accused of illicit articles under the NDPS Act, the accused is authorised to require the search for such possession to be conducted in the presence of a Gazetted Officer or a Magistrate. We endorse the finding in Balbir Singh's case that the provisions in this behalf are mandatory and the language thereof obliges the officer concerned to inform the person to be searched of his right to demand that the search be conducted in the presence of a Gazetted Officer or a Magistrate."

[8] Mr.Datta, learned PP has also referred to the judgment dated 08.03.2019 of this high court in **Haricharan Biswas vs. state of Tripura** rendered in **Bail Application No.149 of 2018** wherein this court after a detailed examination of the alarming situation prevailing in the state with regard to consumption and smuggling of narcotic drugs and psychotropic substances, emphasized on the need of taking care of the restrictions put under Section 37 of the NDPS Act. while considering the bail applications of accused booked under the NDPS Act. It is contended by Mr.Datta, learned PP that materials collected against the accused during investigation of the case is more

than sufficient to justify his arrest and detention. Producing the CD, Mr.Datta, learned PP submits that materials available in the CD demonstrate that the 3 FIR named accused of this case are engaged in selling narcotic drugs and psychotropic substances and for this purpose they stored the seized contraband in their dwelling house which was recovered by police. Learned PP robustly submits that without thorough interrogation of the accused, it would be difficult for the investigating agency to book the other members of their gang and for this purpose arrest and detention of the petitioner is necessary.

[9] With regard to the submission of the counsel of the petitioner about the illness of the accused, Mr.Datta, learned PP submits that the certificate issued by the doctor is not enough to reach a conclusion about the illness of the accused without any prescription accompanied by his diagnostic reports. Learned counsel, therefore, urges the court to reject the bail application of the accused.

[10] Perused the entire record including the Case Diary(CD) which have been produced by the prosecution. Considered the submissions of the counsel representing the parties.

[11] It is not denied that the house from where the seized contraband was recovered and seized is the dwelling house of the

accused where he dwells along with his accused father Dipak Sarkar and brother Ranjit Sarkar. The investigating agency has stated that the present accused managed to escape from the spot before the search and seizure was carried out there by police. In view of the incriminating statements of witnesses and seizure of the contraband from his dwelling house, the present accused has been implicated by police and investigation of the case is in progress against him. Whether in these circumstances he should be released on pre arrest bail is the matter to be considered by this court.

[12] The Supreme Court laid down parameters to be followed while considering application for bail moved by an accused involved in offence under the NDPS Act. In the case of **Union of India vs. Ram Samujh and Anr.** reported in (1999) 9 SCC 429, the Apex Court succinctly held that accused of offence under the NDPS Act should not be released on bail unless the mandatory conditions as provided under Section 37 of the NDPS Act are satisfied. Observation of the Apex Court in paragraphs 7 and 8 of the said judgment are as under:

“7.It is to be borne in mind that the aforesaid legislative mandate is required to be adhered and followed. It should be borne in mind that in murder case, accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instruments in causing death or in inflicting death blow to number of innocent young

victims, who are vulnerable: it causes deleterious effects and deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under NDPS Act, has succinctly observed about the adverse effect of such activities in *Durand Didien v. Chief Secy., Union Territory of Goa.* as under (SCC p.104, para24):

"24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportion in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, the Parliament in the wisdom has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine,"

8. To check the menace of dangerous drugs flooding the market, the Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless mandatory conditions provided in Section 37, namely,

- (i) there are reasonable grounds for believing that accused is not guilty of such offence; and
- (ii) that he is not likely to commit any offence while on bail

are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in the dangerous drugs, the Court should implement the law in the spirit with which the Parliament, after due deliberation, has amended"

[13] In **State of Madhya Pradesh vs. Kajad**,(2001)7 SCC 673, the Apex Court, while taking note of Section 37 of the Act, also held as under:

“5. “negation of bail is the rule and its grant an exception under Section 37 of the Act and for granting the bail the Court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail”.

[14] Mr.Roy Barman, learned Sr. Advocate has emphasized on the health ground of the accused and submitted before the court that apart from what has been submitted on the merit of the case, bail of the accused may also be considered on his health ground. It has been contended by the counsel of the accused that liberty of a person cannot be curtailed on baseless and unfounded allegations. According to My Roy Barman, learned Sr. Advocate, materials available against the accused do not justify the deprivation of his liberty by his detention in prison. In this regard, the Apex Court in **Ash Mohammad vs. Shiv Raj Singh alias Lallababu and Anr.**(2012)9 SCC 446, has observed that individual liberty is always restricted by a larger social interest. The Apex Court has made the following observation in the case:

“17. We are absolutely conscious that liberty of a person should not be lightly dealt with, for

deprivation of liberty of a person has immense impact on the mind of a person. Incarceration creates a concavity in the personality of an individual. Sometimes it causes a sense of vacuum. Needless to emphasize, the sacrosanctity of liberty is paramount in a civilized society. However, in a democratic body polity which is wedded to Rule of Law an individual is expected to grow within the social restrictions sanctioned by law. The individual liberty is restricted by larger social interest and its deprivation must have due sanction of law. In an orderly society an individual is expected to live with dignity having respect for law and also giving due respect to others' rights. It is a well accepted principle that the concept of liberty is not in the realm of absolutism but is a restricted one. The cry of the collective for justice, its desire for peace and harmony and its necessity for security cannot be allowed to be trivialized. The life of an individual living in a society governed by Rule of Law has to be regulated and such regulations which are the source in law subserve the social balance and function as a significant instrument for protection of human rights and security of the collective. It is because fundamentally laws are made for their obedience so that every member of the society lives peacefully in a society to achieve his individual as well as social interest. That is why Edmond Burke while discussing about liberty opined, "it is regulated freedom".

18. It is also to be kept in mind that individual liberty cannot be accentuated to such an extent or elevated to such a high pedestal which would bring in anarchy or disorder in the society. The prospect of greater justice requires that law and order should prevail in a civilized milieu. True it is, there can be no arithmetical formula for fixing the parameters in precise exactitude but the adjudication should express not only application of mind but also exercise of jurisdiction on accepted and established norms. Law and order in a society protect the established precepts and see to it that contagious crimes do not become epidemic. In an organized society the concept of liberty basically requires citizens to be responsible and not to disturb the tranquility and safety which every well-meaning person desires. Not for nothing J. Oerter stated:

“Personal liberty is the right to act without interference within the limits of the law.”

19. Thus analyzed, it is clear that though liberty is a greatly cherished value in the life of an individual, it is a controlled and restricted one and no element in the society can act in a manner by consequence of which the life or liberty of others is jeopardized, for the rational collective does not countenance an anti-social or anti-collective act.”

[15] In the present context, the allegations against the accused are serious. A detailed discussion of the materials available against him in the case diary would not be appropriate at this stage. Suffice it to say that the prosecution has been able to make out a strong prima facie case against the accused and in view of the materials available on record, this court cannot come to a finding at this stage that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit similar offence while on bail. In view of the nature of the offence, accused should be thoroughly interrogated by the investigating agency to find out his associates so as to prevent the recurrence of such crime. For this purpose, necessity of his custodial interrogation may not be ruled out.

[16] In these circumstances, this court is of the view that release of the accused on pre-arrest bail at this stage of the investigation would not be appropriate. Resultantly, his bail application stands rejected.

[17] In view of the submissions made by counsel of the accused, the investigating agency will ensure proper medical treatment to the accused in custody in the event of his arrest.

[18] In terms of the above, his bail application is disposed of.

Interim order(s), if any, also stands vacated.

Return the CD.

JUDGE

HIGH COURT OF TRIPURA



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