

The State Of Tripura vs Sri Mahabul Alam on 27 September, 2023

Author: Arindam Lodh

Bench: Arindam Lodh

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HIGH COURT OF TRIPURA
AGARTALA

B.A. 23/2023

The State of Tripura
Represented by Ld. Public Prosecutor,
Hon'ble High Court of Tripura.

....Applicant(s)

Versus

1. Sri Mahabul Alam,
S/o-Md. Sahid Miah, of Boxanagar, PS-Kalamchoura,
Dist-Sepahijala.
2. Jahir Miah,
S/o-Md. Abdul Ali, of Asha Bari, Dupiriban, P.S- Kalamchoura,
Dist-Sepahijala.
3. Piklu Bhowmik,
S/o-Ajit Bhowmik, of K.K. Nagar, P.S-Bishalgarh,
Dist-Sepahijala.

....Respondent(s)

For Applicant(s)	:	Mr. S. Debnath, Addl. PP
For Respondent(s)	:	Mr. J. Bhattacharjee, Advocate Mr. Sajib Ghosh, Advocate
Date of hearing & Delivery of judgment & order :		27.09.2023
Whether fit for reporting	:	No

HON'BLE MR. JUSTICE ARINDAM LODH

JUDGMENT & ORDER(ORAL)

Heard Mr. S. Debnath, learned Addl. PP appearing for the applicant. Also heard Mr. J. Bhattacharjee and Mr. Sajib Ghosh, learned counsel appearing for the accused-respondents.

2. This is an application filed under Section 439(2) read with Section 482 Cr.P.C. for recalling/cancelling the order of bail dated 26.05.2023 passed in connection with Kamalpur PS case No.2023 KMP 34 (NDPS) registered under Sections 22(C)/25/29 of the NDPS Act, by learned Special Judge In-charge (NDPS), Kamalpur, Dhalai Judicial District, wherein the accused-respondents herein were enlarged on bail.

3. The grounds taken in the present application for cancellation of bail by the applicant-State of Tripura is firstly, that violation of procedure embodied under the provisions of the NDPS Act is not to be considered during the course of granting bail to the accused-respondents arrested under the penal provisions of NDPS Act and secondly, the accused-respondents are habitual offenders and they are found to be involved in the trading of illicit psychotropic substances.

4. Mr. Debnath, learned Addl. PP has drawn the attention of this Court stating that the accused-respondents nos.1 and 2 after being released on bail on 27.02.2023 in connection with Ganganagar PS case no.2023 GNR 002 were again arrested in connection with Kamalpur PS case No.2023 KMP

034. They were released on bail on 26.05.2023 by the Court of learned Special Judge In-charge, Kamalpur, Dhalai Judicial District and subsequently the accused-respondents no.1 and 3 were arrested in connection with Ambassa PS case No.2023 ABS 032 and at present the accused-respondents nos.1 and 3 are in custody in connection with Ambassa PS case No. 2023 ABS 032. It is also submitted by learned Addl. PP that the accused-respondent no.3 was also involved with another case being Kamalpur PS case No.2022 KMP 034 under Sections 20(b)(ii)(c)/25/27A of NDPS Act. Learned Addl. PP has strenuously argued that while granting bail to the accused-respondents, learned Special Judge In-charge could not consider the parameters of granting bail as embodied under Section 37 of the NDPS Act. It is further argued that in cases of NDPS Act and UAPA Act, bail is not a rule but an exception.

5. Opposing the submissions advanced by learned Addl. PP, Mr. Bhattacharjee, learned counsel appearing for the accused-respondents has tried to persuade this Court that the accused-respondents are innocent and they have been falsely implicated in the case. According to learned counsel for the accused-respondents, learned Special Judge In-charge has rightly observed that Section 42(1) of the NDPS Act has been grossly violated by the police officers. Further, according to him, there is no cogent ground to cancel the bail of the accused-respondents.

6. I have considered the rival submissions advanced by learned counsel appearing for the parties.

7. I am in agreement with the submissions of learned Addl. PP that the Courts should not forget the rigors of NDPS and UAPA Act where it is, by now well settled that bail is not a rule, but, an exception. In my opinion, the Courts cannot bypass the twin conditions embodied in Section 37 of the NDPS Act. Before granting bail, the Courts should prima facie arrive at finding that there are

reasonable grounds for believing that the accused arrested in connection with NDPS case is not guilty of the offence and he would not likely to commit such offence. After perusal of the order dated 26.05.2023, it is found that there is no finding of learned Special Judge In-charge in this regard. Learned Special Judge In-charge has only considered the aspect of procedural violation while allowing the application for granting bail to accused-respondents.

8. This Court in series of judgments has settled the ratio that procedural violations or irregularities should not be taken into consideration while deciding an application for granting bail filed by an accused arrested in connection with the penal provisions under the NDPS Act. In spite of that, it is unfortunate that some of the Special Courts(NDPS) are irresponsibly and rampantly enlarging the accused on bail in total disregard to the limitations embodied in Section 37 of the NDPS Act.

9. Section 37 itself envisages the limitations on granting bail in addition to the limitations prescribed in the Cr.P.C. or any other law for the time being in force on granting of bail. For convenience, Section 37 of the NDPS Act may be reproduced here-in-below:

"37. Offences to be cognizable and non-bailable.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), -

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27-A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless----

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

10. On bare perusal of the above provision, it becomes aptly clear that while considering the application for bail with reference to Section 37 of NDPS Act the Public Prosecutor must be given an opportunity to oppose the application for bail; and in case the Public Prosecutor opposes, then, there must exist "reasonable grounds to believe" that (a) the person is not guilty of committing such an offence; and (b) he is not likely to commit any offence while on bail. If the Court arrives at a finding that there are reasonable grounds for believing the accused is not guilty, then, it has to record reasons of its satisfaction about the existence of such grounds. However, while doing such exercise, the Court has not to consider the matter as if it is pronouncing a judgment of acquittal and

recording a finding of not guilty.

11. This Court is fortified by a decision of the Hon'ble Supreme Court in Union of India Through Narcotics Control Bureau, Lucknow vs. Md. Nawaz Khan, (2021)10 SCC 100 where the crucial requirements to grant bail has been explained in the following manner:[SCC p.110, 111 paras 21, 22, 23, 24] "21. Under Section 37(1)(b)(ii), the limitations on the grant of bail for offences punishable under Sections 19, 24 or 27-A and also for offences involving a commercial quantity are:

(i) The Prosecutor must be given an opportunity to oppose the application for bail; and

(ii) There must exist "reasonable grounds to believe" that : (a) the person is not guilty of such an offence; and (b) he is not likely to commit any offence while on bail.

22. The standard prescribed for the grant of bail is "reasonable ground to believe" that the person is not guilty of the offence. Interpreting the standard of "reasonable grounds to believe", a two-Judge Bench of this Court in Shiv Shanker Kesari [Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798 : (2007) 3 SCC (Cri) 505] , held that : (SCC pp. 801- 02, paras 7-8 & 10-11) "7. The expression used in Section 37(1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

8. The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word "reasonable".

„7. ... Stroud's Judicial Dictionary, 4th Edn., p. 2258 states that it would be unreasonable to expect an exact definition of the word "reasonable". Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy. [See MCD v. Jagan Nath Ashok Kumar [MCD v. Jagan Nath Ashok Kumar, (1987) 4 SCC 497] , SCC p. 504, para 7 and Gujarat Water Supply & Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd. [Gujarat Water Supply & Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd., (1989) 1 SCC 532]]

10. The word "reasonable" signifies "in accordance with reason". In the ultimate analysis it is a question of fact, whether a particular act is reasonable or not depends on the circumstances in a given situation. (See Municipal Corpn. of Greater Mumbai v. Kamla Mills Ltd. [Municipal Corpn. of Greater Mumbai v. Kamla Mills Ltd., (2003) 6 SCC 315])

11. The court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable

grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty."

(emphasis supplied)

23. Based on the above precedent, the test which the High Court and this Court are required to apply while granting bail is whether there are reasonable grounds to believe that the accused has not committed an offence and whether he is likely to commit any offence while on bail. Given the seriousness of offences punishable under the NDPS Act and in order to curb the menace of drug-trafficking in the country, stringent parameters for the grant of bail under the NDPS Act have been prescribed.

24. In the present case, the High Court while granting bail to the respondent adverted to two circumstances, namely, (i) absence of recovery of the contraband from the possession of the respondent; and

(ii) the wrong name in the endorsement of translation of the statement under Section 67 of the NDPS Act."

12. Having observed thus, while dealing with the circumstances of the case of Md. Nawaz Khan(supra), the Hon'ble Supreme Court held that "the High Court has clearly overlooked crucial requirements and glossed over circumstances which were material to issue, as to whether case for grant of bail was established- In failing to do so, order of High Court becomes unsustainable." Moreover, in Md. Nawaz Khan(supra), it has emerged during the course of hearing that after the respondent was enlarged on bail he had consistently remained away from the criminal trial resulting in the issuance of a non-bailable warrant against him. The High Court ought to have given due weight to the seriousness and gravity of the crime which it has failed to do and accordingly dismissed the bail application directing the accused persons to surrender forthwith.

13. It is apt to notice that Hon'ble Supreme Court in Md. Nawaz Khan(supra) has relied upon and considered the principle laid down in Karnail Singh vs. State of Haryana, (2009) 8 SCC 539, the extract of which is reproduced hereunder, for convenience: [SCC p.113, 114 para 31] "31.....though the writing down of information on the receipt of it should normally precede the search and seizure by the officer, in exceptional circumstances that warrant immediate and expedient action, the information shall be written down later along with the reason for the delay : (SCC p. 555, para 35) "35. ... (c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub- sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non- sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

(emphasis in original)

14. The principle laid down in Karnail Singh (supra) has been followed by the Hon'ble Supreme Court in Boota Singh vs. State of Haryana, (2021) 19 SCC 606.

15. This Court while deciding the case of Ashish Sarkar vs. State of Tripura, reported in (2018) 1 TLR 483 had held thus: [TLR p.502 para 38 and 39] "38. Keeping pace with the aforesaid view and in the light of aforesaid discussions, in my opinion, a distinction has to be made in cases where the legislature made a provision different from section 439 Cr.P.C. The twin tests as enumerated in section 37 of the NDPS Act are to be satisfied by the court while considering the grant or rejection of bail. Failure to satisfy these two conditions, would disentitle the accused to get the privilege of bail. In the case at hand, after considering the materials on record, emanated from the case diary, I am convinced that the present accused has not been able to satisfy these twin tests of section 37 of the NDPS Act.

39. To summarize the different aspects of the case, as discussed above, according to this court the legislature in its wisdom with a clear intention to achieve its object to control and regulate illicit drug trafficking has imposed limitations and restrictions in the provisions of section 37 of the NDPS Act and thereby curtails the scopes of extending the discretionary power of the courts. I am gainfully referring a recent decision of the Apex court in State of Bihar vs. Rajballav Prasad alias Rajballav Prasad Yadav alias Rajbalabh Yadav, reported in (2017) 2 SCC 178 wherein the Apex court referring to the earlier decisions has discussed the issue of maintaining balance between personal liberty and community interest. The Apex court in paragraph 27 has held as follows:

"27. This very aspect of balancing of two interests has again been discussed lucidly in Neeru Yadav v. State of Uttar Pradesh & Anr. Reported in (2014) 16 SCC 508, in the following words: "16. The issue that is presented before us is whether this Court can annul the order passed by the High Court and curtail the liberty of the second respondent? We are not oblivious of the fact that liberty is a priceless treasure for a human being. It is founded on the bedrock of the constitutional right and accentuated

further on the human rights principle. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilised society. It is a cardinal value on which the civilisation rests. It cannot be allowed to be paralysed and immobilised. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to the rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. Society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society. A society expects responsibility and accountability from its members, and it desires that the citizens should obey the law, respecting it as a cherished social norm. No individual can make an attempt to create a concavity in the stem of social stream. It is impermissible. Therefore, when an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the court has a duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law".

Therefore, no leniency should be shown to those who are found to be involved in the illicit trade of narcotic drugs and psychotropic substances, as it may completely ruin the life of a large body of persons."

16. Recently, the Hon'ble Supreme Court in Union of India vs. Ajay Kumar Singh alias Pappu reported in 2023 SCC OnLine SC 346 with reference to Section 37 of the NDPS Act has observed thus:

"16. In view of the above provisions, it is implicit that no person accused of an offence involving trade in commercial quantity of narcotics is liable to be released on bail unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any offence while on bail."

17. From the aforesaid enunciations of law on the subject, it is abundantly clear, that the Courts while considering the application for bail must strictly adhere to the two conditions embodied in Section 37 of the NDPS Act, and must record its reason of satisfaction that there are substantial probable causes for believing that the accused is not guilty of committing such offence and that there is no likelihood of repetition of committing such offence by the accused while on bail. It is re-iterated that while considering the bail application filed by the accused arrested under the penal provisions of the NDPS Act, learned Special Judges should be confined within the limits embodied in Section 37 of the NDPS Act. Procedural violations, if any, shall be taken into consideration during the course of trial, and not at the stage of consideration of bail application.

18. I have given due consideration to the submissions of Mr. Bhattacharjee, learned counsel appearing for the accused-respondents and the decisions he relies upon in order to support his plea that very cogent and overwhelming circumstances are necessary for an order seeking cancellation of the bail as held by the Supreme Court in State(Delhi Administration) vs. Sanjay Gandhi, (1978) 2 SCC 411: AIR 1978 SC 961; Bhagirath Singh Judeja vs. State of Gujarat, (1984) 1 SCC 284: AIR 1984 SC 372; Bhuri Bai vs. State of Madhya Pradesh, 2022 LiveLaw (SC) 956.

19. A Full-Bench of the Hon'ble Supreme Court in Sanjay Gandhi (supra) held that in order to succeed in an application for cancellation of a bail the Court should make an endeavour to test the balance of probabilities that the accused has abused his liberty or that there is a reasonable apprehension that he will interfere with the course of justice. The bench further held that:

"24. Section 439(2) of the Code of Criminal Procedure confers jurisdiction on the High Court or Court of Session to direct that any person who has been released on bail under Chapter XXXIII be arrested and committed to custody. The power to take back in custody an accused who has been enlarged on bail has to be exercised with care and circumspection. But the power, though of an extraordinary nature, is meant to be exercised in appropriate cases when, by a preponderance of probabilities, it is clear that the accused is interfering with the course of justice by tampering with witnesses. Refusal to exercise that wholesome power in such cases, few though they may be, will reduce it to a dead letter and will suffer the courts to be silent spectators to the subversion of the judicial process. We might as well wind up the courts and bolt their doors against all than permit a few to ensure that justice shall not be done."

20. Similar view has been expressed in Bhagirath Singh Judeja(supra) and Bhuri Bai(supra). At this juncture, I must say, as I said earlier, the Courts should not forget the limitations under Section 37 of the NDPS Act in addition to the limitations prescribed in Cr.P.C.

21. In the context of the case, it is found that after being enlarged on bail two of the accused, namely, Mahabul Alam and Piklu Bhowmik had abused the benefit of liberty granted by the Court by way of allowing their applications for bail. The accused-respondents were found to be involved in two other cases registered under different police stations during the period of bail.

22. That apart, learned Special Judge In-charge while releasing the accused-respondents on bail was totally misdirected and misread the provisions of Section 37 of the NDPS Act. As I said earlier, learned Special Judge In-charge did not consider at all the twin conditions as embodied in Section 37 of the NDPS Act and released the accused-respondents on bail on erroneous conception that since there was procedural violations/irregularities, the accused-respondents were entitled to get the benefit of bail.

23. In the light of above analysis on facts and law, the order of granting bail to the accused-respondents passed by learned Special Judge In-charge is not sustainable, and is liable to be interfered with, which is accordingly interfered. As a sequel, the instant application for cancellation of bail filed by the State stands allowed.

24. The respondent no.2 is directed to surrender before the Court of learned Special Judge In-charge, Kamalpur, Dhalai Judicial District forthwith. It is submitted that the respondents nos.1 and 3 are already in custody in connection with a different case.

25. A copy of this order may be communicated to learned Special Judge In-charge, Kamalpur, Dhalai Judicial District forthwith. A copy of this order may also be circulated to all the Special Judges exercising jurisdiction under the NDPS Act throughout the judicial districts of the State of Tripura for necessary consideration while granting or rejecting bail applications related to NDPS cases.

JUDGE Snigdha SANJAY Digitally signed by SANJAY GHOSH GHOSH 16:39:58 +05'30' Date: 2023.09.30