

**HIGH COURT OF TRIPURA
AGARTALA**

AB 107 OF 2018

Sri Tapan Shil,
Son of Debendra Shil of
Ananganagar, P.S. Airport, West Tripura

----Petitioner(s)

Versus

The State of Tripura

----Respondent(s)

For Petitioner(s) : Mr. D.C.Kabir, Advocate
Mr. S. Sarkar, Advocate.

For Respondent(s) : Mr. A. Roy Barman, Addl. P.P.

Argument heard on : 11.10.2018

Order passed on : 23.10.2018

Whether fit for reporting : **Yes**

HON'BLE MR.JUSTICE ARINDAM LODH

Order

The accused-petitioner, Tapan Shil has approached this Court with a prayer for granting anticipatory bail, who is wanted in connection with Airport P.S. Case No.2018 ARPO 49, under Sections 21(a)/25/29 of the Narcotic Drugs and Psychotropic Substance Act (for short NDPS Act).

2. According to prosecution case, 701 bottles of phensedyl were recovered from the house of one driver Haridhan Debnath on the basis of a secret information. Haridhan Debnath on interrogation had confessed that the real owner of these bottles of phensedyl one Sri Tapan Shil of Ananganagar under Airport P.S. and on his instruction he being the driver of said Tapan Shil brought those articles to his house by means of two vehicles of Tapan Shil one bearing No.TR-01-E-3891 (Auto) and another TR-01-AM-0338 (Wagon R) and stored the articles in his house. The

police personnel led by SDPO raided both the houses of Tapan Shil, petitioner herein, as well as Haridhan Debnath. During raid, Tapan Shil was found absconding. Later on, Haridhan Debnath was arrested after registering a case under Sections 21(a)/25/29 of the NDPS Act, 1985 against Sri Haridhan Debnath and Sri Tapan Shil. Investigation of the case was also started to find out the persons in the racket. It is also the case of the prosecution that those phensedyl bottles were brought to the State for smuggling purpose and to poison the society.

3. Heard Mr. Deep C. Kabir, learned counsel appearing for the accused-petitioner as well as Mr. A. Roy Barman, learned Addl. Public Prosecutor on behalf of the State-respondent.

4. Mr. Kabir, learned counsel for the accused-petitioner has submitted that the petitioner Tapan Shil is innocent and has been falsely implicated in the instant case. Inviting my attention to the FIR, learned counsel has pointed out that the arrest was made at 22.20 hours on 11.08.2018 i.e. in the intervening period between sunset and sunrise, so, according to him, if the police had any reason to believe from personal knowledge that offences were committed or materials which might furnish evidence of commission of such offences were concealed in any building, etc. he might carry out the arrest or search without warrant had to record his reasons or grounds of belief. But the investigating officer of the instant case did not follow the procedures as incorporated in the NDPS Act and also failed to give any satisfactory explanation about the raid and search which was conducted at night.

5. Learned counsel for the petitioner has further submitted that the investigating agency has only implicated the petitioner

Tapan Shil based on the confessional statement of co-accused Haridhan Debnath and referring a decision passed by the Hon'ble Apex Court in **Surinder Kumar Khanna Vrs. Intelligence Officer Directorate of Revenue Intelligence in Criminal Appeal No.949 of 2018** has submitted that conviction and sentence of accused Surinder Kumar Khanna based on the confessional statement of a co-accused without any other substantive evidence is *per se* not admissible, and *can at best be used or utilized in order to lend assurance to the Court. In the absence of any substantive evidence it would be inappropriate to base the conviction of the appellant purely on the statements of co-accused. The appellant is, therefore, entitled to be acquitted of the charges leveled against him.*

6. With the aforesaid observation, the Apex Court has set aside the conviction and sentence of the appellant Surinder Kumar Khanna.

7. Mr. Kabir, learned counsel for the petitioner has also pressed in service some orders passed by the Hon'ble Calcutta High Court to substantiate that anticipatory bail can be granted to the accused, in connection with the offence committed under the provisions of the NDPS Act.

8. Mr. Kabir, learned counsel in his usual fairness has also drawn attention of this Court to a decision of the Apex Court in **Satpal Singh Vrs. State of Punjab** reported in **Manu/SC/0413/2018** which is decided on 27.03.2018 wherein, the larger bench (Three Judges bench) of the Court has rejected the anticipatory bail application of an accused on the ground that

the Courts below had not taken note of the limitations under Section 37 of the NDPS Act.

9. In the backdrop of the above submissions, I find it appropriate to reproduce Section 37 of the NDPS Act which reads as follows:

"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 27A 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. From a plain reading of Section 37 of the NDPS Act, it is clear that the legislatures in their wisdom and considering the present social scenario has thought it fit to incorporate a special provision for consideration of bail application under Section 37 of the NDPS Act. Under this provision, when a person is accused of an offence punishable under Sections 19 or 24 or 27(a) and also for offences involving commercial quantity, he shall not be released on bail unless and until the Public Prosecutor has been given an

opportunity to oppose the application for such release, and in case Public Prosecutor opposes the application, the Court must be satisfied that there are reasonable grounds for believing that the person is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. It is also one of the essential conditions that the Court is to take note of the materials on record and the antecedents of the accused before entering such satisfaction.

11. Mr. Roy Barman, learned Addl. Public Prosecutor has strongly opposed the bail application filed by the petitioner and submitted that investigation is at a very preliminary stage and till now sufficient materials have been collected by the investigating agency and further materials shall be gathered after the availability of the accused Tapan Shil who is one of the kingpins of the drug peddling in the State of Tripura.

12. Learned Addl. P.P. has also produced case diary before this Court.

13. Now, dealing with the first contention of Mr. Kabir, learned counsel for the petitioner that there is a serious procedural lapse in the raids conducted by the police personnel in the houses of the accused persons at night, I find, after perusal of the case diary that there are sufficient explanations stating the grounds therein to raid the houses of the accused persons at night. The raids were made only to prevent trading and marketing of the said phensedyl in the State as well as the smuggling of the same to the border States.

In the circumstances, I hold that procedural lapses, if any, shall appropriately be dealt with in course of trial. It is the

bounden duty of the trial Court to deal with all procedural lapses considering the impact of such lapses upon the accused and further, keeping in mind the stringent provisions of punishment under the NDPS Act. Thus, I repel the first submission urged the learned counsel for the petitioner.

14. Mr. Kabir, learned counsel has strenuously argued placing reliance upon the decision of **Surinder Kumar Khanna (supra)** that on the basis of the confessional statement of Haridhan Debnath, a co-accused of the case, the petitioner Tapan Shil cannot be implicated and arrested in connection with the instant case under the NDPS Act. He has further submitted that ultimately, the petitioner Tapan Shil will be acquitted in the instant case only because of the fact that his implication is only based on a confessional statement of a co-accused. The learned counsel has tried to persuade this Court that if the petitioner Tapan Shil is arrested under the present facts and circumstances of the case, the valuable right enshrined under Article 21 of the Constitution of India shall be violated.

15. In view of the above submission of Mr. Kabir, learned counsel, I have meticulously examined the judgment of **Surinder Kumar Khanna(supra)**. After perusal of the facts, and discussions of the judgment, this Court has noticed that this is a case the Apex Court was hearing on appeal against the conviction and sentence passed against Surinder Kr. Khanna, and their Lordships have found that the conviction was only based on a confessional statement of a co-accused of the case. Their Lordships in interpreting Section 67 of the NDPS Act after referring some earlier

decisions of the Apex Court at Para 9 and 10 of the judgment has observed that:—

"9. Thus the issue whether statement recorded under Section 67 of the NDPS Act can be construed as a confessional statement even if the officer who recorded such statement was not to be treated as a police officer, has now been referred to a larger Bench.

10. Even if we are to proceed on the premise that such statement under Section 67 of the NDPS Act may amount to confession, in our view, certain additional features must be established before such a confessional statement could be relied upon against a co-accused. It is noteworthy that unlike Section 15 of Terrorist and Disruptive Activities Act, 19876 which specifically makes confession of a co-accused admissible against other accused in certain eventualities; there is no such similar or identical provision in the NDPS Act making such confession admissible against a co- accused. The matter therefore has to be seen in the light of the law laid down by this Court as regards general application of a confession of a coaccused as against other accused."

16. Ultimately, their Lordships have held in Paragraph 13 & 14 that—

"13. The law so laid down has always been followed by this Court except in cases where there is a specific provision in law making such confession of a co-accused admissible against another accused.

14. In the present case it is accepted that apart from the aforesaid statements of co-accused there is no material suggesting involvement of the appellant in the crime in question.

We are thus left with only one piece of material that is the confessional statements of the co-accused as stated above. On the touchstone of law laid down by this Court such a confessional statement of a co-accused cannot by itself be taken as a substantive piece of evidence against another co-accused and can at best be used or utilized in order to lend assurance to the Court. In the absence of any substantive evidence it would be inappropriate to base the conviction of the appellant purely on the statements of co-accused.

The appellant is therefore entitled to be acquitted of the charges leveled against him. We, therefore, accept this appeal, set

aside the orders of conviction and sentence and acquit the appellant. The appellant shall be released forthwith unless his custody is required in connection with any other offence."

17. From a plain reading of the judgment, it is aptly clear that the Apex Court was examining and testing the various facts and circumstances as well as the evidence and materials on record relating to that case. Particularly, it is not the case, where their Lordships was considering a bail application like the present petition. The Apex Court has tested various aspects of the merits of the judgment passed by the trial Court as well as the High Court in **Surinder Kumar Khanna (supra)**.

18. In my considered view, the case of **Surinder Kumar (supra)** should not be relied upon since the present case is for considering the prayer for grant of anticipatory bail to the petitioner Tapan Shil. In furtherance thereof, the investigation has just commenced and is at a preliminary stage. Thus, in my opion, the case of Surinder Kumar Khanna(supra) should not have any relevance to decide the present anticipatory bail application of the accused-petitioner.

19. I have also taken note of the orders passed by the Calcutta High Court while extending the benefit of anticipatory bail to the accused-petitioners of those cases. I find none of the Hon'ble Judges of the Calcutta High Court has made any endeavour to take note of the limitations of Section 37 of the NDPS Act. Even, there is no reference of Section 37 of the said Act in the orders passed by the Hon'ble Judges. As many as copies of 5(five) orders passed by Hon'ble Judges of the Calcutta High Court have been pressed into service for consideration. One of the orders of such copies is extracted hereunder in extenso, for convenience:

"The petitioner seeks anticipatory bail in connection with NDPS Case No.373 of 2017 arising out of Lalgola Police Station Case No. 442 of 2017 dated 20.09.2017 under Sections 21(c)/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

The petitioner claims that merely on the basis of a statement of an accused, the investigating agency has proceeded against the petitioner.

The State is represented and it does not appear that there is any material against the petitioner other than the uncorroborated statement of an accused. No contraband was recovered from the petitioner.

In such circumstances, the petitioner is entitled to anticipatory bail, subject to the petitioner regularly meeting the investigating officer when called for. In default, it will be open for the State to seek cancellation.

Accordingly, in the event of arrest, the petitioner will be granted bail upon furnishing security of Rs.10,000/- (Rupees ten thousand only) with two sureties of Rs.5,000/- (Rupees five thousand only) each, one of whom must be local, to the satisfaction of the Arresting Officer, subject to the conditions as laid down in Section 438(2) of the Code of Criminal Procedure, 1973.

The petitioner for anticipatory bail is allowed subject to the conditions as indicated above.

A certified copy of this order be immediately made available to the petitioner subject to compliance with all requisite formalities."

20. The orders passed in all other cases placed before me are similar and identical in nature.

In my considered view, the Courts while dealing with the bail application in connection with the NDPS Act has to take note of Section 37 of the NDPS Act as it is a special provision enacted in the said Act to combat the social menace the nation is facing at present. In view of the seriousness of the offence, the law makers have consciously put such stringent restrictions on the discretion available to the Court while considering application for release of a person on bail. As the Calcutta High Court in those orders has not taken note of Section 37 of the NDPS Act, there is no hurdle for me to take a different view of the orders passed by

the Calcutta High Court while considering the anticipatory bail applications of the accused.

21. The statement of objects and reasons of the NDPS Act makes it clear that to make the scheme of penalties sufficiently deterrent to meet the challenge of well-organized gangs of smugglers, and to provide the offences of a number of important Central enforcement/agencies like Narcotics, Customs, Central Excise, etc. with the power of investigation of offences with regard to new drugs of addiction which have come to be known as psychotropic substances posing serious problems to national governments, this comprehensive law was enacted by parliament enabling exercise of control over.....

22. I have given my anxious thought to the decision of **Satpal Singh(supra)** decided by three Judges Bench of the Apex Court, wherein, their Lordships while deciding an anticipatory bail application for an accused who was wanted in connection with the offence under the NDPS Act, in Para 15 has observed thus:

"15. Be that as it may, the order dated 21.09.2017 passed by the High Court does not show that there is any reference to Section 37 of the NDPS Act. The quantity is reportedly commercial. In the facts and circumstances of the case, the High Court could not have and should not have passed the order under Sections 438 or 439 Cr.P.C. without reference to Section 37 of the NDPS Act and without entering a finding on the required level of satisfaction in case the Court was otherwise inclined to grant the bail. Such a satisfaction having not being entered, the order dated 21.09.2017 is only to be set aside and we do so."

23. In Para 16 of **Satpal Singh (supra)**, their Lordships expressed their anguish in the manner:

"16.....This is once again to remind the police and the prosecutor that they need to show due diligence and vigilance while dealing with the cases under the NDPS Act."

24. However, I have given due importance to the submission of learned counsel appearing for the petitioner that the petitioner Tapan Shil is totally innocent and is not connected with the instant case and that he is a reputed person in the locality. Be that as it may, I direct the petitioner Tapan Shil to make himself available before the investigating officer or the Superintendent of Police, West Tripura District and to assist and co-operate with the process of investigation and further to prove his innocence. This Court hopes and trusts that the State functionaries will not harass an innocent citizen on the pretext of drug peddlers. I further believe that State functionaries in this regard are wholly conscious that life and liberty enshrined under Article 21 of the Constitution of India are valuable properties of a human being.

25. In the backdrop of aforesated discussions on factual and legal positions, this Court is not inclined to extend the benefit of anticipatory bail to the accused-petitioner Tapan Shil. Hence, the instant bail application is rejected.

Return back the case diary.

With the above observation and direction, the bail application stands dismissed.

JUDGE