

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

C.R.M No. 6135 of 2021

Manik Das @Manik Chandra Das

Vs.

The Narcotics Control Bureau

For the petitioner : Mr. Shekhar Bose, Sr. Adv
Mr. Apalak Basu
Ms. Pritha Bhaumik
Mr. Nazir Ahmed
Ms. Snehal Seth

For the Opposite Party : Mr. Y.J. Dastoor, Ld. A.S.G
Mr. Phiroze Edulji
Ms. Amrita Pandey

Heard on : 23.12.2021

Judgement on : 28.01.2022

Bibhas Ranjan De, J.:-

FACTS IN BRIEF:

1. (i) On 07.04.2021 one Sanjiv Kr. Intelligence Officer, Narcotics Control Bureau (NCB) attached to Kolkata Zonal Unit (KZU)

received information in relation to trafficking substantial quantity of “Ganja” by one Susanta Dey allies Ravi and Manik Chanrda Das with a car namely TATA ACE GOLD bearing Reg. No. WB 25J 4944 likely to be unloaded in the house of said Susanta Dey and then to supply to one Asim Mirdha.

(ii) The said information was reduced into writing and after intimating superior Officer a team of NCB Officers led by Superintendent, NCB (KZU), reached near the vicinity of the house of Susanta Dey at 20.15 hrs. At about 20.45 hours they found the said vehicle approaching the house of Susanta Dey. Thereafter two persons got down from the drivers cabin and started unloading nylon sacks. NCB team intervened and those two suspects disclosed their identity as Swapon Biswas and Susanta Dey.

(iii) NCB team then disclosed their identity and searched the five (5) numbers of nylon sacks containing greenish plant having odour similar to that of cannabis/Ganja, in presence of local

witness and both the suspects. Small amount from each sack was taken for testing with Drug detecting kit and found positive for the test of Ganja. Then entire contraband article weighing 215 k.g was seized under Section 43 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act). Thereafter voluntary statement of both the suspects were recorded under Section 67 NDPS Act.

(iv) In course of follow up act the NCB team reached the house of Manik Das and Asim Mirdha. Though Manik Das was not found in his house but Asim Mirdha was found in the house and on being asked he disclosed that he was to procure the said Ganja through the arrangement made by Susanta Dey. Then he was also served with notice under section 67 of the NDPS Act and his statement was recorded.

(v) All seized articles were found to be Ganja by the examination report of chemical laboratory, Kolkata and the report was submitted before the learned jurisdictional Court on

25.06.2021. During investigation Asit Karmakar and Manik Das were arrested and their statements were recorded under section 67 NDPS Act. The mobile numbers used by accused persons were recovered from their possession and CDR linkage was found among them.

ARGUMENT ADVANCED:

2. (i) Mr. Sekhar Bose, Ld. Senior Counsel, appearing on behalf of the petitioner specially relied on the case of ***Tofan Singh Vs State of Tamil Nadu*** reported in ***(2021) 4 SCC 1*** and thereby Mr. Bose tried to make this Court understand that the provision of section 42 (2) of the NDPS Act has not been complied with. In support of his contention Mr. Bose referred to paragraphs 62 to 66 of the reported judgment.

(ii) Mr. Bose further contended that the statement of co-accused is not at all reliable. He, in support of his contention, relied on a case of ***Surinder Kr. Khanna Vs***

Intelligence Officer, Directorate of Revenue

Intelligence, reported in ***(2018) 8 SCC 271***.

(iii) Mr. Bose, again, submitted that the coordinate bench of this High Court ignored the statement of co-accused in CRM no 8145/2020 dated 21.12.2020 (In re: Abdul Malique & Ors), CRM No. 2829/2020 dated 20.10.2020 (In re: Ramesh Manju Bishnoi @ Ramesh Manju Bishnoy @ Ramesh Kumar Bishnoy) and CRM No 10765/2020 dated 14.07.2021 (In re: Samir Dey) and thereby other co-accused were granted bail.

3. (i) In opposition to that, Mr. Dastoor, Ld. Additional Solicitor General, appearing on behalf of the NCB (KJU) strenuously contended that even if we overlook the statement of co-accused in terms of decision of ***Tofan Singh's case (supra)*** we cannot ignore the call details report (CDR). In support of his contention he relied on the case of ***Union of India through NCB, Lucknow Vs Md. Nawaz Khan*** reported in ***2021 (10) SCC 100***.

(ii) Mr. Dastoor further contended that another coordinate bench of this Court in CRM No 1761 of 2021 dated 8.10.2021 (Manotosh Ghosh vs. The State of West Bengal) relied on call details report (CDR) being crucial circumstance in terms of decision of the Hon'ble Apex Court in Md. Nawaz Khan's case (*supra*).

DECISION

4. Hon'ble Apex Court, in ***Nawaz Khan's (supra)*** case, with regard to grant of bail for offences under the NDPS Act, relied on a case of ***Union of India Vs Shiv Shanker Kesari (2007) 7 SCC 798*** where Hon'ble Apex Court observed that bail may be cancelled if it has been granted without adhering to the parameters under section 37 of NDPS Act. Hon'ble Apex Court further relied on a case of ***Union of India Vs Prateek Shukla (2021) 5 SCC 430*** where Hon'ble Apex Court noted that non-application of mind to the rival submissions and the seriousness

of the allegations involving an offence under the NDPS Act are grounds for cancellation of bail.

5. Section 37 of the NDPS Act which regulates the grant of bail reads as follows:

“(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.”*

6. Limitations under Section 37 of the NDPS Act regarding grant of bail for offence 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 ground to believe’ that

(a) the person is not guilty of such offence; and

(b) he is not likely to commit any offence while on bail.

7. That apart the Hon’ble Apex Court interpreted the standard of ‘reasonable grounds to believe’, in the case of **Shiv Sanker Kesari (supra)** and held that :

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.....In 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 Municipal Corpn. Of Delhi v. Jagan nath Ashok Kumar [(1987) 4 SCC 497] (SCC p. 504, para 7) and Gujarat Water Supply and 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. [(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.”

8. In the aforesaid view of the legal matrix the test which this

Court is required to apply while granting bail is whether there

are 'reasonable grounds to believe' that the accused has not committed an offence and whether petitioner is likely to commit any offence while on bail. Considering the seriousness of offence punishable under NDPS Act and in order to control the menace of drug trafficking, stringent parameters for grant of bail under the NDPS Act has been prescribed.

9. After careful scrutiny of section 37 of the NDPS Act 1985 we find that the exercise of power to grant bail is not only subject to the limitations contained in section 439 Cr.P.C, but is also subject to the limitations placed by section 37 which commences with non-obstante clause. The operative part of that section is in the negative form proscribing the enlargement on bail of any person accused of commission of an offence under the NDPS Act unless two conditions are satisfied. First condition is that the persecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are 'reasonable grounds for believing' that he

is not guilty of such offence. If either of these two conditions is not satisfied, rejection of bail is rule.

10. It is axiomatic that 'reasonable grounds' means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. It requires existence of such facts and circumstances as are sufficient to justify satisfaction that the accused is not guilty of the alleged offence. Section 37 of the NDPS Act mandates a more stricter approach than an application for bail sans the NDPS Act.

11. With regard to the argument advanced on the point of compliance of section 42 of NDPS Act 1985 we would like to refer to the ratio of the decision of ***Kanail Singh Vs. State of Haryana (2009) 8 SCC 539*** which was relied upon by the Hon'ble Apex Court in Nawaz Khan's case (supra). Here the Hon'ble Apex Court held that though the writing down of information the receipt of it should normally precede 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. Hon'ble Apex Court observed as follows:

“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.

(c) *While total non-compliance with requirements of subsections (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.”

12. That apart in the case of Nawaz Khan case (supra) it was held that the contention of non-compliance of section 42 of the NDPS Act is a question of fact which should be raised in course of trial.

13. In the facts of the present case, the intelligence officer, on receipt of information, reduced the same in writing and after initiating the same to the superior officer, a team of NCB officers lead by the Superintendent, NCB (KZU) conducted the raid. In the facts of the present case, therefore, it cannot be said that the petitioner was arrested or the raid conducted was in violation of the provision of Section 42 of the NDPS Act.

14. We shall now deal with the argument advanced by Mr. Bose with reference to the absence of certificate under section 65-B of the Evidence Act. It is contended by Mr. Bose that the mobile call record cannot be accepted without certificate which is the condition precedent within the meaning of section 65-B of the Evidence Act.

15. Complaint of this case notes that the CDR analysis of the mobile number used by the petitioner indicates that the petitioner was in regular touch with other accused who were known to him. Section 65-B of the Evidence Act deals with admissibility of the electronic records. Production of certificate under section 65-B(4) of the Evidence Act may be necessary safeguard to ensure authenticity of the record. But that may be done at any stage of trial at the instance of the trial Court either by directing the production of certificate under section 65-B(4) of the Evidence Act or even by summoning the person having possession of laptop/tab/mobile, where the electronic record is

stored, to the witness box. We are not called upon evaluate evidence at the stage of consideration of grant of bail. It is for the petitioner to establish by cogent and unimpeachable evidence that he was not in conversation or contact with the arrested co-accused through the mobile phones which the NCB relies upon to claim nexus between the petitioner and the other co-accused and the conspiracy between them. Given the mandate of Section 37 of the NDPS Act in the facts of the present case, the petitioner has failed to discharge such onus.

16. Next we would like to deal with the argument advanced on behalf of Mr. Bose to the effect that other coordinate bench of this Court granted bail to other co-accused relying on the principle enunciated in Tofan Singh's case (supra) that statement of co-accused under section 67 of the NDPS Act is of no value.

17. In ***Ramesh Manju Bishnoi (Supra)*** the Co-ordinate Bench noted that investigation revealed active communication between

the petitioner and the co-accused prior to the seizure of the articles and that one call had been recorded even after seizure and arrest of the co-accused persons. The Co-ordinate Bench noted that in case of a conspiracy, conduct and/or communication between the conspirators as evident from call detail records are relevant under Section 10 of the Evidence Act to prove the factum of conspiracy.

18. In Re **Samir Dey (Supra)** the Co-ordinate Bench considered the application for bail liberally in view of the ongoing pandemic and granted bail. In the facts of that case the Co-ordinate bench found that apart from the confessional statement there was no other substantive materials against the petitioner. It observed that the call detail records of the telephonic conversation may give rise to mere suspicion but would not justify a case of conspiracy.

19. The Co-ordinate Bench **Manotosh Ghosh (Supra)** considered **Ramesh Manju Bishnoi (Supra)** and In Re **Samir**

Dey (Supra). It has observed that call details report is one of the prima facie grounds on the petitioner's involvement in the offence under the NDPS Act.

20. In **Md. Washim (Supra)** the Co-ordinate Bench has observed that once a prima facie link is established between the petitioner and the co-accused, the onus lies on the petitioner to rebut the presumption under the NDPS Act.

21. Even if we ignore the statement of co-accused under section 67 of the NDPS Act in terms of ratio of the decision in **Tofan Singh's case (supra)** we are unable to ignore the call details report. At this stage while dealing with a bail application we cannot overlook the complicity of the petitioner in terms of section 10 of the Evidence Act. Hon'ble Apex Court in **Surinder Khanna's case (supra)** dealt with a judgment of Trial Court and observed that conviction of accused on the basis of statement of co-accused cannot be accepted unless substantiated by other

cogent evidence. But in our case we are dealing with a bail application which is not in the stage of appreciation of evidence.

22. In view of the discussions above we are unable to grant bail to the petitioner as prayed for. CRM 6135 of 2021 is rejected.

[BIBHAS RANJAN DE, J.]

I Agree.

[DEBANGSU BASAK, J.]