

Serial No. 03
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

BA No. 59 of 2023

Date of Decision: 15.12.2023

Shri. Jahangir Alom

Vs.

State of Meghalaya

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. B. Deb, Adv.

For the Respondent(s) : Mr. H. Kharmih, Addl. P.P with
Mr. H. Abraham, GA

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| i) | Whether approved for reporting in Law journals etc.: | Yes/No |
| ii) | Whether approved for publication in press: | Yes/No |

JUDGMENT (ORAL)

1. Heard Mr. B. Deb, learned counsel appearing for the petitioner/accused who has submitted that an FIR dated 20.06.2023 was lodged before the Officer-in-Charge, Khliehriat Police Station, East Jaintia Hills District by one ABSI W. Lamare wherein, on reliable information received by the police that two drug peddlers are travelling in a Tourist Taxi carrying a consignment of illegal contraband, the same to be delivered to the petitioner herein and one Shahnawar Ali at

Guwahati, on a check post being erected the vehicle in question being No. NL 07 T 0815 (Tata Winger) was intercepted at BMS Fuel Station, Nongsning. On a search being conducted from the vehicle, about 200 soap cases containing yellowish-orange powder were found concealed in various hidden compartments in the vehicle, preliminary test of the powder giving a positive result for heroin. The total gross weight of the said powder comes to 2.738 kg.

2. Upon registration of a criminal case being Khliehriat P.S Case No. 8(6) 2023 under Section 21(c)/29 NDPS Act, the two persons were arrested. In course of investigation, Shri. Jahangir Alom the petitioner herein was also arrested having been named by the co-accused as one of the main persons involved in the said drug peddling operation. On completion of the investigation, the Investigating Officer has filed the charge sheet on 06.09.2023 finding a prima facie case under section 21(c)/29 NDPS Act well established against the petitioner and other co-accused.

3. The learned counsel has again submitted that in the process of arrest of the petitioner, the concerned authorities have breached a number of mandatory procedures, one of which is evident on perusal of the arrest memo, wherein at the time when the petitioner herein was arrested, one witness was present, however, the said witness is a police

personnel whereas the mandate of law as indicated in the case of D.K. Basu v. State of West Bengal, (1997) 1 SCC 416 at para 35(2), wherein the provision of Section 41B (b)(i) Cr.P.C, which provides that a memorandum of arrest shall be attested by at least one witness who is a member of the family of the person arrested, has been restated, has also not been complied with.

4. Another contention raised by the learned counsel is that the alleged seizure of the contraband drugs was about 2.738 kg of heroin. The sample collected was only from Ex-A1-3.34 gms, Ex-B1-3.55 gms, Ex-C1- 3.54gms and Ex-D1-3.54 gms, the total sample collected being 7.75 gms. The sample of the contents of all the soap boxes seized was not taken and as such, the alleged seized contraband is only of an intermediate quantity and not of a commercial quantity, the provision of Section 37 of the NDPS Act is therefore not attracted, further submits the learned counsel. The case of Naim Khan v. The State of Madhya Pradesh, wherein vide order dated 05.12.2022, the Hon'ble High Court of Madhya Pradesh in Misc. Criminal Case No. 56923 of 2022 pertaining to a prayer for grant of bail of an accused in connection with a case under the NDPS Act, has taken into account the argument of the applicant therein, when it was pointed out that the procedure adopted by the concerned police authority in the process of sampling is contrary to

the relevant rule, particularly Standing Order No. 01 of 1989 dated 13.06.1989. On this ground, bail was granted.

5. In continuation of his contention on the issue of sampling and the procedure thereof, the learned counsel has cited the provisions of Narcotic Drug and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 and has referred to Rules 3, 10(1) and 11 of the same to say that the procedure prescribed therein has not been followed by the arresting authorities in the case where the petitioner was arrested.

6. Another limb of argument advanced by the learned counsel in support of his case is that the alleged contraband drug has not been seized from his possession and as such, as was held in the case of State of Delhi v. Ram Avatar alias Rama, (2011) 12 SCC 207, wherein at para 28 of the same, it was held that to secure conviction under Section 21 of the NDPS Act, possession of the illicit article is a *sine qua non*, and also on a similar view held by the Hon'ble Supreme Court in the case of Noor Aga v. State of Punjab & Another, (2008) 16 SCC 417 at para 59 of the same, the petitioner is entitled to be enlarged on bail, submits the learned counsel.

7. It is also the submission of the learned counsel that the petitioner was arrested only on the basis of the statement of the co-

accused in this case and such statement made before the police cannot be taken cognizance of as was held in the case of Tofan Singh v. State of Tamil Nadu, reported in (2021) 4 SCC 1, wherein the Hon'ble Supreme Court has held that Officers who are invested with powers under Section 53 of the NDPS Act are "Police Officer" within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act and the same cannot be taken into account in order to convict an accused under the NDPS Act.

8. Yet again, the learned counsel has submitted that the petitioner was arrested on the basis of the confession of the co-accused and also that there is evidence that he was possessing two sim cards by which he used to communicate with the co-accused. However, the said sim cards and the mobile phone were never seized from the possession of the petitioner. Thus, there is no reasonable ground for believing that the petitioner has abetted or conspired in the commission of the alleged crime. The case of State of Kerala v. Rajesh reported in (2020) 12 SCC 122 was cited by the learned counsel in this regard, wherein at para 21 of the same, the Hon'ble Supreme Court has observed that "the expression '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...”

9. On the applicability of Section 37 of the NDPS Act as far as the case of the petitioner is concerned, the learned counsel has cited the case of Narcotics Control Bureau v. Mohit Aggarwal, 2022 SCC OnLine SC 891 and has referred to para 15 & 16 of the same which reads as follows:

“15. We may clarify that at the stage of examining an application for bail in the context of the Section 37 of the Act, the Court is not required to record a finding that the accused person is not guilty. The Court is also not expected to weigh the evidence for arriving at a finding as to whether the accused has committed an offence under the NDPS Act or not. The entire exercise that the Court is expected to undertake at this stage is for the limited purpose of releasing him on bail. Thus, the focus is on the availability of reasonable grounds for believing that the accused is not guilty of the offences that he has been charged with and he is unlikely to commit an offence under the Act while on bail.

16. Coming back to the facts of the instant case, the learned Single Judge of the High Court cannot be faulted for holding that the appellant- NCB could not have relied on the confessional statements of the respondent and the other co-accused recorded under Section 67 of the NDPS Act in the light of law laid down by a Three Judges Bench of this Court in Tofan Singh (supra), wherein as per the majority decision, a confessional statement recorded under Section 67 of the NDPS Act

has been held to be inadmissible in the trial of an offence under the NDPS Act. Therefore, the admissions made by the respondent while in custody to the effect that he had illegally traded in narcotic drugs, will have to be kept aside. However, this was not the only material that the appellant- NCB had relied on to oppose the bail application filed by the respondent. The appellant-NCB had specifically stated that it was the disclosures made by the respondent that had led the NCB team to arrive at and raid the godown of the co-accused, Promod Jaipuria which resulted in the recovery of a large haul of different psychotropic substances in the form of tablets, injections and syrups. Counsel for the appellant-NCB had also pointed out that it was the respondent who had disclosed the address and location of the co-accused, Promod Jaipuria who was arrested later on and the CDR details of the mobile phones of all co-accused including the respondent herein showed that they were in touch with each other.”

10. On the basis of the submission made before this Court, the learned counsel has submitted that the petitioner may be enlarged on bail with any conditions as deem fit and proper to be imposed by this Court.

11. Mr. H. Kharmih, learned Addl. PP while opposing the prayer made by the petitioner has submitted that the petitioner has a criminal antecedent, inasmuch as, he was earlier involved in a case in the Court of the Chief Judicial Magistrate, Goalpara District of Assam

being GR-2278/2016. Though he was acquitted by the court vide order dated 04.03.2023, however, the case involved not only Section 324 IPC, but also the provision of Section 22 of the NDPS Act.

12. As far as this instant case is concerned, the learned Addl. PP has submitted that a perusal of the case diary which was produced before this Court today, would show that the co-accused had implicated the petitioner in the case, inasmuch as, it was in the statement of one of the co-accused that he has met the petitioner herein on one occasion in the month of March, 2023 at Guwahati, wherein 20(twenty) soap cases of heroin were delivered to the petitioner near a shopping mall and also another 80(eighty) soap cases of heroin was also delivered to the petitioner in the parking lot of the shopping mall. As far as this case is concerned, the fact that a seizure of 2.738 kg of heroin which has been properly accounted for cannot be denied by the petitioner and also the fact that the petitioner as is evident from the CDR (Call Details Report) of the phone calls made between the petitioner and the co-accused, the petitioner may not be allowed to be released on bail.

13. This Court has carefully considered the case in hand and the contention as well as the submission by the respective counsel for the parties and has come to the understanding that a case of seizure of alleged contraband drugs being heroin weighing about 2.738 kg was

seized from a vehicle, whereupon the occupants of such vehicle were arrested on a case under the NDPS Act being registered.

14. That in course of investigation, the petitioner herein was also arrested, the Investigating Officer having found a credible link between the petitioner and the co-accused persons in the commission of the offence alleged, is a matter of record. However, the petitioner has maintained that he is innocent and not at all involved in the commission of the said offence and has therefore approached this Court for grant of bail.

15. From the submission of the learned counsel for the petitioner, what could be understood is that objection has been made on technical grounds, inasmuch as, the alleged wrongful application of the procedure as far as the seizure and the sampling process of the seized contraband substance by the arresting authority would enable the petitioner to be enlarged on bail. A number of decisions, mostly of the Apex Court has been cited by the learned counsel for the petitioner to press home the point that factually, there has been a breach of procedure, wherein the manner in which the sample was collected from the seized material was not done so according to the proper and legal format, and on this ground alone, bail ought to have been given to the accused person therein and by extension to the petitioner herein.

16. This Court has no quarrel with the proposition set out in the said authorities cited, but is of the opinion that the ground of defence on such count can only be made in course of trial when evidence is led and the prosecution as well as the defence have had the opportunity to place before the court their respective case on this point. As far as the same being the consideration for grant of bail, this Court is of the opinion that the totality of the facts and circumstances has to be taken into account before any effective order is passed.

17. What is pertinent herein is that admittedly, the case was one under Section 21(c) of the NDPS Act which speaks of, inter alia, possession involving commercial quantity of contraband substances or drugs and as far as the issue of bail is concerned, the provision of Section 37 NDPS Act comes into play!

18. Section 37 1(b)(ii) speaks of a situation where bail cannot be granted for an offence involving commercial quantity unless the Court is satisfied that there are reasonable grounds for believing that the accused person is not guilty of such offence and that he is not likely to commit any offence while on bail.

19. The involvement of the petitioner in the case cannot be ruled out at this point of time, though it is reiterated that it would be a matter of evidence in course of trial for the petitioner to prove his innocence,

however, at this juncture, this Court is not convinced that he is not guilty of the offence alleged.

20. Under the circumstances, this petition is found to be devoid of merit, the same is hereby dismissed and stands disposed of. No costs.

21. The case diary produced before this Court is hereby returned to the learned Addl. PP.

Judge

Meghalaya
15.12.2023
"D. Narv, PS"

