

GAHC030003782023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL
PRADESH)

Case No. : Bail Appln./28/2023

Sh. Lalbiakkima
Sairang Dawr Veng, Mizoram, Pin-796410

VERSUS

The State of Mizoram
Aizawl

Advocate for the Petitioner : Mr. Jonathan L Sailo

Advocate for the Respondent : P.P./Addl.PP, Mizoram

ORDER

B E F O R E

HON'BLE MR. JUSTICE NELSON SAILO

08.08.2023

Heard Mr. Jonathan L Sailo, learned counsel for the petitioner and Ms. Mary L Khiangte, learned Addl. Public Prosecutor for the State.

[2.] By filing this application under Section 439 Cr.P.C read with Section 37 of the ND&PS Act, the petitioner prays for grant of bail. The case of the petitioner is that he was arrested on 15.05.2023 in connection with Excise & Narcotics Case No. Ex.N-129/2023 dated

13.05.2023 registering commission of alleged offence under Section 21(c) of the ND&PS Act.

[3.] It is the case of the prosecution that 139 grams of heroin was recovered from one Smt. Zohmingliani which she had kept in the house of one Sh. T K David. Further, from the information given by her, 116 grams of heroin was again recovered from the bed-room of one Sh. Lalchhanchhuaha at Sihphir Arpu Veng. In view of the said recovery, Smt. Zohmingliani was arrested on 12.05.2023.

[4.] From the information given by Smt. Zohmingliani, Smt. Romanliani was arrested on 14.05.2023 at Sairang and upon interrogating her, it was learnt that the heroin procured from Zohmingliani was being disposed by her and the petitioner. Accordingly, the Investigating Officer asked the YMA leaders of Sairang to detain the petitioner on 15.05.2023 and the YMA leaders detained the petitioner at the YMA hall at Sairang and later on, the Investigating Officer upon arriving the place, arrested the petitioner.

[5.] In view of his arrest, the petitioner submitted Bail Application No. 1109/2023 before the Special Court, ND&PS Act, Aizawl but the learned Trial Court vide Order dated 03.07.2023 rejected the bail application. As such, the petitioner is before this Court through the instant bail application.

[6.] Mr. Jonathan L Sailo, learned counsel submits that the arresting authority has violated Section 50 of the ND&PS Act since the petitioner was not asked as to whether he desires to be searched before the Gazetted Officer or before a Magistrate. He further submits that in arresting the petitioner, the arresting authority has also violated

Section 42 of the ND&PS Act which provides that the reason to believe the involvement of a person for commission of an offence under the ND&PS Act has to be written down before proceeding to search and arrest the suspect. However, in the instant case, the same was not done and therefore, Section 42 has been clearly violated by the investigating authority. The learned counsel submits that nothing was recovered from the petitioner and he was arrested on mere allegation made by the co-accused persons. He submits that Section 21(c) of the ND&PS Act being a stringent provision providing harsh punishment, the mandatory provisions for making search and arrest has to be scrupulously followed. He also submits that the petitioner is a resident of Sairang Dawr Veng and that there is no possibility of the petitioner absconding or not co-operating with the trial proceedings in event his released on bail. He further submits that the petitioner has no history of having committed crime. Under the circumstance, the learned counsel submits that the petitioner may be released on bail. In support of his submission, the learned counsel has relied upon the following authorities:-

- (i) *Judgment dated 14.06.2022 passed by the Punjab and Haryana High Court in CRM-M-25498/2021 (Pankaj vs. State of Punjab).*
- (ii) *State of Punjab vs. Baldev Singh (1999) 6 SCC 172.*
- (iii) *Beckodan Abdul Rahima vs. State of Kerala, (2002) 4 SCC 229.*
- (iv) *Sarija Banu (A) Janarthani & Anr. vs. State Through Inspector of Police, (2004) 12 SCC 266 and*
- (v) *Karnail Singh vs. State of Haryana, (2009) 8 SCC 539.*

[7.] Ms. Mary L Khiangte, learned Addl. Public Prosecutor, on the other hand, submits that it is not true that the petitioner has been directly charged under Section 21(c) of the ND&PS Act. Referring to the gist of the case as mentioned in the charge-sheet, the learned Addl. Public Prosecutor submits that the petitioner is said to have violated Section 29(1) read with Section 21(c) of the ND&PS Act. In other words, the petitioner has been charged for abetting the alleged crime. The learned Addl. Public Prosecutor further submits that the stand of the petitioner that no grounds have been indicated by the Trial Court in rejecting the bail application vide Order dated 03.07.2023 is irrelevant in view of the fact that the present application is a fresh bail application and not an appeal against the rejection of the bail application filed by the petitioner before the Trial Court. She further submits that from the report of arrest submitted by the Investigating Officer before the Officer-in-Charge, Anti-Narcotic Squad, Excise & Narcotics, it is clear that the petitioner was arrested at 11:40 AM at Sairang Dawr Veng and therefore, neither Section 50 is attracted nor the same has been violated by the same arresting authority. She also submits that there are no materials on record to show that search was committed upon the petitioner, much less, the fact of he being stripped before his arrest. The learned Addl. Public Prosecutor submits that although the signature of the petitioner may have been taken in his statement made before the Excise personnels but that by itself will not vitiate the investigation proceedings. In this connection, she relies upon the case of *State of Rajasthan vs. Teja Ram & Ors., reported in (1999) 3 SCC 507*.

[8.] The learned Addl. Public Prosecutor further submits that the investigating authority initially arrested one Smt. Zohmingliani on 12.05.2023 and upon interrogating her, the involvement of one Sh.

Romanliani came to light and accordingly, the latter was arrested on 14.05.2023. Thereafter, upon interrogating Smt. Romanliani, it was learnt that the heroin supplied by Smt. Zohmingliani was being disposed by Smt. Romanliani along with the instant petitioner and that is how, the petitioner came to be arrested on 15.05.2023. She submits that since the same is an on-going process and since grounds of belief, reasons recorded in writing and report to the higher authorities have already been made at the initial stage, there is no further requirement for repeating the same before arresting the petitioner since it all comes under one and the same case being investigated by the deputed officer of the Excise & Narcotics Department. She, therefore, submits that the allegation of the petitioner that Section 42 of the ND&PS Act has been violated is without any basis and therefore, the bail application submitted by the petitioner should be rejected.

[9.] I have heard the submissions made by the learned counsels for the rival parties and I have perused the materials available on record including the authorities relied upon by the parties.

[10.] Be it stated herein that after the filing of bail application since the charge-sheet was submitted by the investigating agency, the petitioner was permitted to file an additional affidavit incorporating the charge-sheet. Accordingly, the petitioner on 28.07.2023 filed the additional affidavit incorporating the charge-sheet. From a perusal of the charge-sheet, it is seen that on 12.05.2023 at 4:25 PM, the Excise Officer concerned had seized 139 grams of heroin kept in 11 soap cases kept inside a shopping bag in the residence of Sh. T K David of Sairang Vengalai. The possessor of the contraband articles i.e., Smt. Zohmingliani was arrested and on the same day about 7:00 PM, 116 grams of heroin

was kept in 9 soap cases and concealed inside a speaker was recovered from the residence of Sh. Lalchhanchhuaha in Sihphir Arpu Veng. In this connection, after registration of a case and making further investigation, one Smt. Romanliani was arrested on 14.05.2023 and from her arrest, it came to light that the petitioner was also involved in the disposal of the heroine procured from Smt. Zohmingliani. Accordingly, the petitioner was arrested on 15.05.2023 and the Investigating Officer upon finding a prima facie case against the petitioner for having violated Section 29(1) read with Section 21(c) of the ND&PS Act as well as Section 8(c) of the ND&PS Act submitted the charge-sheet.

[11.] From the materials enclosed with the charge-sheet, it is seen that the officer concerned upon receiving certain information on 12.05.2023 at around 2:00 PM had recorded the information before proceeding to arrest Smt. Zohmingliani. The said officer had also recorded his grounds of belief under Section 42 of the ND&PS Act on 12.05.2023. It was, thereafter, that Smt. Zohmingliani was arrested for the recovery of heroin from Sairang as well as from Sihphir Arpu Veng. Thereafter, from the interrogation of Smt. Zohmingliani, Smt. Romanliani was arrested on 14.05.2023 and subsequently on 15.05.2023, as already stated earlier, the petitioner was arrested at Sairang Dawr Veng after he was detained by the YMA leaders as requested by the Investigating Officer. It may be noticed that by this time, it was not the earlier Investigating Officer but a new Investigating Officer who continued with the investigation. It is further seen that prior to the arrest of the petitioner, unlike the earlier instance, there are no materials to show that the information received has been recorded before the proceeding to Sairang to arrest the petitioner. The petitioner

has also annexed a part of the case-diary where entry was made on 15.05.2023 at 1:00 PM. A perusal of the same does not indicate that the gist of information received about the petitioner was recorded before proceeding to arrest him. In this connection, the learned Addl. Public Prosecutor had submitted that since it is a on-going process of investigation, there was no such requirement to once again record the gist of information received before proceeding to arrest the petitioner. In order to appreciate the requirements in this regard, Section 42 of the ND&PS Act may be abstracted hereunder:-

“42. Power of entry, search, seizure and arrest without warrant or authorisation.❧

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intellegence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture

under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act: Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.]”

[12.] From the above abstract, it may be seen that Section 42

deals with the power of entry, search, seizure and arrest without warrant or authorization. The officer empowered to exercise powers under this Section if he has reason to believe from person's knowledge or information given by any person and taking down the same in writing that an offence punishable under the ND&PS Act has been committed or document or other article which may furnish evidence for commission of such acts has taken place, he may between sunrise and sunset, enter into and search any such building, conveyance or place, etc., and further detained and search or arrest any person whom he has reason to believe has committed an offence punishable under the Act. It further provides that if such officer has reason to believe that a search warrant or authorization cannot be obtained and there being chances of concealment of the evidence or chances of escape of the offender, he may enter between sunset and sunrise such building after recording his grounds of belief. Therefore, from the above provision, it may be seen that the source of knowledge and belief has to be taken down by the officer concerned authorized in this behalf in writing and if he has to enter a building without authorization of warrant, he has to record the grounds of his belief before making such entry and search but he has to send a copy of the same within a period of 72 hours to his immediate superior officer.

[13.] In the present case, from the materials available before this Court, it is noticed that no such knowledge or information about the commission of an offence under the ND&PS Act has been taken down in writing prior to arrest of the petitioner. The Constitution Bench of the Apex Court in *Karnail Singh (supra)* while considering as to whether Section 42 of the ND&PS Act was mandatory or not, at paragraph 35(d) held as follows:-

“35(d) While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of [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 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.”

[14.] In the present case, it may be seen that the Investigating Officer prior to proceeding to Sairang cannot be said not to have sufficient time to enter the information received by him when it is an on-going investigation and when he had the time to inform the YMA of Sairang to detain the petitioner. Therefore, having regard to the mandatory nature of the compliance of Section 42 of the ND&PS Act and at the same time, having regard to the fact that no recovery of the alleged heroin was made from the petitioner, I am inclined to grant bail

to the petitioner.

[15.] Accordingly, the petitioner is directed to be released on bail on his furnishing a bail bond of Rs. 20,000/- with one surety of the like amount who should be a local permanent resident of Aizawl having his/her own property and certified by the Local Council concerned. Bail is granted to the petitioner with the further condition that he shall co-operate with the trial proceedings and shall appear before the Court whenever he is required to do so. While on bail, the petitioner shall not indulge himself in a commission of any such offence under the Act covered by the ND&PS Act.

[16.] In view of the conclusion made, there will be no requirement to refer to the other authorities cited by the parties.

[17.] It is further provided herein that the observation made in this bail application is for the purpose of considering the instant bail application and the same should not affect the merit of the case to any manner in the trial proceedings.

[18.] With the above observations and directions, the bail application is disposed of.

JUDGE

Comparing Assistant