

GAHC030005642023



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

Case No. : Bail Appln./50/2023

Sh. Lalremruata
Zonuam, Aizawl, Mizoram

VERSUS

State of Mizoram and Anr.
aizawl 2:S.I. Clinton Vanzarzoliana
Excise and Narcotics
Anti-Narcotics Squad
Mizoram
Aizawl

Advocate for the Petitioner : Mr B Lalramenga

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

B E F O R E
HON'BLE MR. JUSTICE NELSON SAILO
ORDER

22.11.2023

Heard Mr. B Lalramenga, learned counsel for the applicant and Mrs. Linda L Fambawl, learned Addl. Public Prosecutor for the State. By filing this bail application under Section 439 Cr.P.C read with Section 37 of the ND&PS Act, the applicant seeks for his enlargement on bail. According to the applicant, he was arrested on 03.08.2023

for alleged seizure of 4.5 kgs of cough syrup containing codeine phosphate. Since then, he has been kept in custody. The arrest of the applicant was preceded vide registration of Excise Case No. 213/2023 dated 02.08.2023 under Section 22(b) & (c) of the ND&PS Act.

[2.] The applicant contends that he filed Bail Appln. No. 1525/2023 before the Special Court, ND&PS Act, Aizawl, but the same was rejected vide Order dated 14.09.2023.

[3.] Mr. B Lalramenga, learned counsel submits that the applicant is a permanent resident of Aizawl, Mizoram and therefore there is no chance of absconding if he is enlarged on bail by this Court. He submits that the applicant is also suffering from type 2 diabetes and hypertension and at one point of time he had suffered stroke which has affected his health condition till date. On 28.07.2023, he was advised by his Doctor to visit Birla Heart Centre in Kolkata for angiogram and angioplasty at the earliest. However, as he was arrested on 03.08.2023 he could not proceed to Kolkata for his treatment.

[4.] The learned counsel further submits that there is no prima facie case against the applicant. In fact, the applicant was having a drugs license which however, was cancelled sometime in the year 2022. Prior to such cancellation, the applicant was keeping several medicines including cough syrup which could not be disposed of till the time of his arrest. He submits that the allegation that the applicant sold or tried to

sell the seized article from his shop is not sustainable, since there is no illegal possession on his part and that the seized article was ordered by him prior to the cancellation of his license.

[5.] The learned counsel submits that seizing the seized articles and sending the same for forensic examination, the Seizing Officer had grossly violated the relevant provisions of the Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 (Rules of 2022). He submits that according to the Seizure Officer, 4.5 kgs of cough syrup comprising of 45 phials were recovered from him but however, only six samples were drawn in all. Two phials containing 200 ml of cough syrup was drawn for the FSL, two phials for the I.O and two phials for C.O. However, as per Rule 10 of the Rules of 2022, one sample in duplicate should be drawn from each package and container seized. When the packages and container seized together are of identical size and weight bearing identical marking and the contents of each package give identical results or colour test by the drugs identification kit, conclusively indicating that the packages are identical in all respects, the packages and containers are to be carefully bunched for lots of more than 10 packages or containers and for each such lot of packages and containers, one sample in duplicate is to be drawn. However, in the instant case, the learned counsel submits that only six samples were drawn out of the 4.5 kgs of cough syrup alleged to be recovered from him.

[6.] The learned counsel further submits that as per Rule 13 of the Rules of

2022, the samples after being certified by the Magistrate should be sent directly to the FSL for chemical analysis without any delay and the samples should be dispatched under the cover of test memo which should be prepared in duplicate in Form-6. The FSL shall then submit its report to the Court of Magistrate with a copy to the Investigating Officer within 15 days from the date of receipt of the sample. However, when the quantitative analysis requires longer time, the result of the qualitative test should be dispatched to the Magistrate within the specified time limit and in the next 15 days, the result of quantitative test should be indicated on the duplicate test memo and sent to the Court of Magistrate with a copy to the Investigating Officer. The learned counsel submits that the procedure provided in the Rules of 2022 are mandatory in nature and since the same has not been adhered to, the applicant should be released on bail. In support of his submission, the learned relies upon the following authority:-

- (1) Order dated 09.05.2023 passed by the Supreme Court in Crl. Appeal No. 1443/2023 (Simarnjit Singh vs. State of Punjab).
- (2) Manjilal vs. State of Madhya Pradesh, 2023 SCC Online SC 862.
- (3) Sarija Banu &Anr. vs. State, (2004) 12 SCC 266.

[7.] Mrs. Linda L Fambawl, learned Addl. Public Prosecutor, on the other hand, submits that the 4.5 kgs of cough syrup containing codeine phosphate recovered from the possession of the applicant were in two tray parcels. Each tray parcel contained 25

phials of the cough syrup. The applicant prior to the seizure had disposed of 5 phials of the cough syrup and therefore one of the tray parcels contained only 20 phials. Since the seized articles were in two parcel trays, two samples were drawn for FSL examination, two samples for I.O and two samples for C.O. In doing so, the Excise authorities had only complied with the provisions of Rule 10 of the Rules of 2022. She further submits that the samples were drawn and certified by the Magistrate on 04.08.2023 and immediately sent to the FSL on the same date. Therefore, there is no delay in the process of sending the sample to the FSL. The learned Addl. Public Prosecutor submits that as the seized article is of commercial quantity and the fact that the drugs license of the applicant was cancelled in view of his rampant sell of cough syrup containing codeine phosphate, no grounds for bail has been made out by the applicant. He being a habitual offender indulging in selling of cough syrup containing codeine phosphate, the bail application should be rejected.

[8.] I have heard the submissions made by the learned counsels for the rival parties and I have perused the materials available on record.

[9.] It is seen that charge-sheet has already been filed by the Excise authorities on 18.09.2023 and the same indicates that 45 phials of cough syrup containing codeine phosphate kept in a paper box under the table and inside the shop of the applicant was recovered. The weight of the seized articles was 4.5 kgs and packing and sealing was done on the spot. According to the applicant, only six samples were drawn from the seized article comprising of only 100 ml for each phial. Since the

recovery alleged was 45 phials, samples ought to have been drawn from each of the phials. In this connection, it is the case of the prosecution as per the charge-sheet that 45 phials of cough syrup containing codeine phosphate kept in a paper box under the table and inside the shop of the applicant was recovered and therefore, it will not be necessary to draw samples from each of the 45 phials having regard to the provisions contained in Rule 10 of the Rules of 2022. Rule 10(1) provides that one sample in duplicate shall be drawn from each package and container seized. Therefore, had it been a seizure of multiple packages or containers, the procedure to be followed would have been Rule 10(2) of the Rules of 2022. It is also seen that the samples were drawn and duly certified by the Magistrate on 04.08.2023 and then sent to the FSL on the same date. The FSL also received the samples on 04.08.2023. No doubt the results of the test conducted by the FSL was not received within the time stipulate in Rule 14 of the Rules of 2022. However, the present application being an application for grant of bail under Section 37 of the ND&PS Act apart from Section 439 Cr.P.C, the presumption of the applicant being innocent of the charge cannot be made in view of the materials available on record which shows that the very basis of the cancellation of his drugs license was due to his unaccounted sell of cough syrup containing codeine phosphate.

[10.] The facts and circumstances involved in the present case and the facts and circumstances involved in the authorities relied upon by the learned counsel for the applicant is only distinguishable. In the case of *Simarnjit Singh* (supra), the issue

involved was the requirement of the present of the Magistrate to supervise the collection of the sample and its certification. The importance in this regard was stress since certification of the samples drawn in compliance to Section 52A (2) & (3) of the ND&PS Act constitute primary evidence for the purpose of trial. In the case of *Manjilal* (supra), the omission on the part of the Constitution to produce the seized articles and the simple argument raised that the same had been destroyed without any details of how and under what authority the same was destroyed was found to be unacceptable by the Supreme Court. Moreover, out of the two seizure witnesses, one had not been examined and the other had turned hostile. Therefore, the seizure memo itself had simply become a document written by the Police Officer concerned. In the case of *Sarija Banu &Anr.* (supra), the allegation made was non compliance of Section 42 of the ND&PS Act by the arresting authority which was otherwise held to be mandatory to be complied with before taking any action. In the present case, the issue involved and the facts narrated are not similar. Moreover, the Rules of 2022 are also found to be not violated as alleged by the learned counsel for the applicant. Insofar as the medical condition of the applicant is concerned, no fresh medical document has been annexed in the application except for what was prescribed to him on 28.07.2023. Therefore, it appears that the health condition of the applicant is manageable even his lodged in Jail.

[11.] Thus under the facts and circumstances, this Court is not inclined to grant bail to the applicant and the Bail Application stands rejected.

JUDGE

Comparing Assistant