

GAHC030006562023



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

Case No. : Bail Appln./64/2023

Smt. Zodinthari and Anr.
D/o Thanglianchhunga
R/o Zuangtui, Aizawl, Mizoram.

2: Sh. Lalhriatpui

VERSUS

The State of Mizoram
r/b the Secretary to the Govt. of Mizoram, Home Department.

Advocate for the Petitioner : Mr. LS Lalramchhuana

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

BEFORE
HONOURABLE MRS. JUSTICE MARLI VANKUNG
ORDER

Date : 15-12-2023

Heard Mr. Aldrin Zothanmawia, learned counsel for the appellant/petitioner along with Ms. Mary L. Khiangte, learned Additional Public Prosecutor for the State respondent.

The instant bail application is filed under Section 439 Cr.P.C. for enlargement of the petitioner on bail in CrI.Tr.(Ex.) No. 1475/2023 under Section 21(b) of the ND&PS Act.

The learned counsel submits that the charge sheet has been filed in the

instant case and the case is at its evidence stage. 3 (three) prosecution witnesses have been examined so far. The learned counsel submits that from the evidence adduced by PW-1 to PW-3, it can be clearly made out that the mandatory provisions of Sections 41 & 42 of the ND&PS Act has not been followed. He submits that the witnesses themselves have admitted that the CADS & CYMA, who are the NGOs had also participated in checking the Sumo Cab and 10 (ten) soap cases containing Heroin weighing 130 grams was alleged to be found in the luggage of the petitioners. He submits that the CADS & CYMA have not authority to conduct search and seizure of the seized articles. He submits that PW-1 admitted that in her cross-examination, she did not record the information written down in the information report. In support of his submission, he has cited the decision of this Court in *Krosmawii Vs. State of Mizoram*, reported in *2022 SCC Online Gau 2214*, wherein this Court had allowed the appeal amongst other grounds for the non-compliance of Sections 41 & 42 of the ND&PS Act. He has also relied on the judgment of the Apex Court in *State of Punjab Vs. Balbir Singh*, reported in *(1994) 3 SCC 299*, where the Apex Court held that under Section 41(2) of the ND&PS Act only the empower officer can give the authorization to his Sub-ordinate officer to carry out the arrest of a person or search as mentioned therein.

The learned counsel also submits that in the statements recorded under Section 161 Cr.P.C., it is stated that the driver had informed the Seizing Officer that the luggage/bag where the seized articles was seized belonged to the accused persons. However, in the deposition of the Seizing Officer before the Court, no such statement was made. He also submits that the driver is also a necessary witness for the prosecution but his name has not been listed as a prosecution witness in the charge sheet.

The learned counsel further submits that the petitioners are the parents of a minor child who is aged only 1 year and a few months. It is seen from an RTI application that the Central Jail do not have the facilities which are to be given minor children who have to be kept in Jail along with their parents for the offence committed by their parents. The facilities which are to be given as held by the Apex Court in *State of Punjab Vs. Balbir Singh*, reported in (1994) 3 SCC 299 have not been complied with. The learned counsel submits that the minor child is now made to suffer and be deprived of proper health facilities and nutrition, while being kept in Jail along with his parents. He also submits that there were no independent witnesses at the time of the seizure since PW-2 and PW-3, who are the sole civilian witnesses had themselves actively participated in the conduct of search.

The learned counsel further submits that there is non-compliance of Section 46(4) Cr.P.C. which mandates that no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstance exists, the woman police shall, by making a written report, obtain prior permission of the JMFC, within whose local jurisdiction the offence is committed. It is seen that the information was received on 30.06.2023 at around 9:00 PM and thereafter, they had conducted the search of the Maxi Cab. The seizure and arrest memo mentions that on 1st July, 2023 at 3:35 AM, he had arrested the possessor of the seized articles on the same date, time and place in the presence of the reliable civilian witnesses. He submits that it can thus be seen that the petitioner No. 1 who is a female was arrested after sunset and before sunrise violating the provisions of Section 46 of the Criminal Procedure Code. He has also submitted that the bag from where the seized articles was seized said to be blue coloured was also not seized by the Seizing Officer to prove that the seized

articles was seized from the said bag.

Ms. Mary L. Khiangte, learned Additional Public Prosecutor, on the other hand submits that the seizure of the said blue coloured bag is not mandatory and will not vitiate the trial against the accused persons. She has also submitted that the prosecution has enough evidence against the accused persons and it is not necessary to make the driver a prosecution witness. The learned Additional Public Prosecutor also submits that since the seized article was seized from a public conveyance which is a Maxi Cab, the provisions of Sections 41 & 42 need not be followed. That the seizure was made as required under Section 43 of the ND&PS Act being seized from a public place. The learned Additional Public Prosecutor also submits that the evidence shows that the CADS and CYMA who are members of the NGOs did not search the luggage but had only helped in checking the vehicle and therefore, there is no violation of Sections 41 & 42 of the ND&PS Act. She also submits that it is seen that permission was obtained for the petitioner No. 1 under Section 46(4) Cr.P.C. from the CJM, Aizawl Judicial District, Aizawl and therefore, there are no grounds for granting the bail application to the petitioner.

Having heard the submissions made by the learned counsels for both the parties, this Court finds that the seized articles was seized in a public place from a public conveyance which is the Maxi Cab and that the S.A was seized as per the provisions of Section 43 ND&PS Act and not seized under the provision of Section 41 & 42 of the ND&PS Act. It is also seen that it is for the prosecution witness to decide whether the driver of the said Maxi Cab is required to be made a witness in the instant case. This Court also finds that further evidence is yet to be adduced with regards to the actual involvement of the CADS and CYMA. This Court however finds that on perusal of the arrest and seizure memo,

it appears that the Seizing Officer had arrested the petitioner No. 1 who is a female on the spot, since it is mentioned that she had arrested the person at the same date, time and place in the presence of reliable witnesses. In the said permission of the arrest of the female persons said to have been obtained from the CJM it is seen that it is not dated and therefore at this stage, unless proved otherwise, this Court finds that it appears that the provisions of Section 46 of the Cr.P.C. has not been fully complied with.

In view of the above, this Court find it fit to grant bail to the petitioner No. 1, namely, Smt. Zodinthari with a bail bond of Rs. 20,000/- and with one surety of the like amount. The surety shall be to the satisfaction of the Trial Court. However, this Court finds that no sufficient grounds have been made out for release of the petitioner No. 2, namely, Mr. Lalhriatpuia on bail at this stage.

Accordingly, Bail Application No. 64/2023 stands disposed of as above.

JUDGE

Comparing Assistant