

GAHC030000492024



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

Case No. : Bail Appln./7/2024

Sh. Asab Uddin
S/o Abdur Rahman (L)
R/o Bandarkhuna, Patharkandi, Karimganj, Assam.

VERSUS

The State of Mizoram
r/b the Public Prosecutor, Aizawl, Mizoram.

Advocate for the Petitioner : Mr. Jonathan L Sailo

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

B E F O R E
HON'BLE MR. JUSTICE KAUSHIK GOSWAMI
ORDER

14.02.2024

Heard Mr. Jonathan L. Sailo, learned counsel for the applicant/petitioner. Also heard Mrs. Linda L. Fambawl, learned Addl. Public Prosecutor, Mizoram.

2. This is an application under Section 439 CrPC r/w Section 37 of the ND&PS Act, 1985 for grant of bail to the petitioner namely Sh. Asab Uddin in connection with Excise Case No. Ex.N-294/2023 dated 05.11.2023 registered under Section 21(c) of the ND&PS Act.

3. The facts of the case is that on 03.11.2023 at around 11:15 pm, the concerned S.I of Excise & Narcotics Department, Mizoram detained one vehicle i.e. Hyundai Creta alongwith three persons who were inside the vehicle on the roadside at Luangmual, Aizawl. One of the three persons was the applicant. The vehicle was searched however nothing illegal was found or seized. Thereafter the S.I went to the house of the applicant and upon searching, no incriminating materials was recovered except one person who was sleeping at the house. Thereafter, alongwith the three persons, the said person was also detained in custody.

4. On 04.11.2023, the S.I went to another village from where he had taken one Fayjul Islam into custody. Upon interrogating Fayjul Islam, it came into light that he was trying to buy contraband articles from one Lun Mate. Accordingly, the S.I searched for Lun Mate and finally found him and interrogated him. It further appears that Lun Mate during interrogation has stated that he was going to procure the contraband articles from some persons who were staying at Room No. 708 at Lushai Hills Residency at Zarkawt, Aizawl. The S.I alongwith his team proceeded to the above mentioned Room No. 708 along with Sh. Lun Mate wherein they found two persons namely Sh. Lungoulen Haokip and Sh. Seipu Kuki who had travelled from Manipur sleeping in the room. Though no contraband articles were recovered from inside the room, however, upon searching of the motor vehicle i.e. Maruti Suzuki Gypsy, in which they had travelled and parked in the Hotel parking area, 264 grams of heroin kept in 39 soap cases was seized from a secret compartment of the said vehicle wall. Accordingly, the S.I arrested the said four persons. On the same day, the S.I also arrested the three persons including the applicant who he had already detained in the Excise and Narcotics Lock Up in the previous day. It appears that the driver of the Hyundai Creta was released by the S.I. Accordingly case was registered under Section 21(c) of the ND&PS Act against all the seven persons.

5. Mr. Jonathan L. Sailo, learned counsel for the applicant/petitioner submits that

the applicant is totally innocent and has been illegally and forcibly detained in the Excise & Narcotics Lock Up by the jurisdictional S.I and has falsely made a case against him. He further submits that there are no materials whatsoever to indicate that the applicant had knowledge of the contraband articles which had been seized from the vehicle of the co-accused on 04.11.2023. He further submits that on the basis of a letter dated 09.11.2023, the concerned Investigating Officer wrote to the Chief Judicial Magistrate, Aizawl Judicial District, Aizawl Mizoram to discharge Sh. Seipu Kuki who was one of the person found in the Room No. 708 and who was travelling in the Car from which, the contraband articles had been seized alongwith one Ziban Ahmed who was found sleeping in the house of the applicant.

6. Mrs. Linda L. Fambawl, learned Addl. Public Prosecutor, Mizoram on the other hand strongly opposes the prayer of the bail. She submits that Fayjul Islam was tracked down through phone call data of the applicant and therefore the applicant is guilty of the offence alleged. She further submits that no call data record has been collected by the concerned Investigating Officer. She further submits that there is no other incriminating material available on the record to implicate the applicant for the offence alleged.

7. I have heard the submissions made at the bar and I have perused the materials available on record.

8. It appears that the contraband articles has been seized from the Maruti Suzuki Gypsy which was parked by two persons namely, Seipu Kuki and Lungoulen Haokip outside the Hotel Room where they were sleeping. Interestingly, the I.O has prayed for discharging Seipu Kuki despite the fact that he is one of the person from whom the said contraband articles had been seized. It further appears that the applicant was detained on a previous night while he was travelling alongwith two other persons in the Hyundai Creta vehicle though nothing illegal was seized from their possession. Further it appears that no contraband articles also was found in the house of the

applicant. In fact, one person who was found sleeping in the house of the applicant is also now prayed to be discharged by the I.O. Further it appears that on the next date the concerned I.O had arrested one Fayjul Islam from another village and it is through his evidence that the I.O could track down the two persons from whom the contraband articles had been seized. Therefore, it is abundantly clear that the applicant had no knowledge about the contraband articles which was seized from the Maruti Suzuki Gypsy.

9. In the case of ***Onyx Maiphok & Others Vs. State of Assam & Another***, reported in ***2010 (4) GLT 565***, this Court has observed and held as under:-

“11. In the case of Murlidhar Soni (supra), the son was driving a scooter and his father was a pillion rider and carrying few Kgs of ganja in a cloth bag. In this situation also the Hon'ble Supreme Court has held that the son, who was driving the scooter, cannot be said to have conscious possession of ganja and his acquittal was approved. In the case of Balkar Singh (supra), the accused persons were found sitting on a cluster of bags kept in a field, containing large quantity of poppy husks. Despite that the Apex Court has approved the acquittal of the accused persons holding that there was no investigation as to how the strangers (accused persons) had transported 100 bags of poppy husks to the place of recovery nor the prosecution adduced any evidence about their ownership. In the case of Avtar Singh (supra), the accuseds were travelling in a truck and the bag, over which they were found sitting, was containing narcotic drug and in this case also it has been held that the accused cannot be said to be in conscious possession of the narcotic drug. Their Lordships have held that possession and ownership need not always go together but the minimum requisite element which has to be satisfied is custody or control over the goods. While acquitting the accused persons, their Lordships have further observed that the persons who were merely sitting on the bags, in absence of prove and nothing more, cannot be presumed to be in possession of the goods. In the case of Hari Singh

(supra), the Hon'ble Supreme Court was examining a case wherein three men and two women were found sitting on the bags, containing narcotic drugs. Their Lordships have held that the word "conscious" means awareness about a particular fact and it is a state of mind which is deliberate or intended. Their Lordships have further observed that to hold a person in "conscious possession" it is not necessary to prove that he was found in physical possession of offending articles but it has to be proved that such person had constructive knowledge of such an article and had the power and control over it. Having said so, the acquittal of the accused persons for possessing 30 Kgs of popy husk was upheld.

12. In the case before me, the factual scenario is little better. Not a single appellant was found sitting in the truck that was carrying ganja. In the case of State of Maharashtra Vs. Sukdeo: AIR 1992 SC 2100 and in many other judicial pronouncements it has been held that more stringent is the provision of conviction more rigorous investigation and trial is necessary. Besides this, in the case of Ismailkhan Aiyubkhan Pathan (supra), it has been held that mere presence of a person at the place of recovery is not sine qua non of his involvement in the offence. It is also the settled law that suspicion, howsoever grave cannot take the place of proof. Even if moment of appellants at the place of recovery in suspicious manner is considered to be an adverse circumstance that is not enough to affirm their conviction in absence of corroborative additional incriminating circumstances."

10. From the aforesaid decision, it transpires that in order to constitute conscious possession, there has to be an awareness of the contraband articles seized. In the instant case as observed earlier, there is no evidence to indicate that the applicant had any control over the contraband articles seized and/or that the applicant was aware of the contraband articles seized. Hence, it can reasonably be said that the applicant is not found guilty for the offence alleged. Further, there is nothing adverse available on record as regards the antecedent of the applicant. Hence, there is also no reasonable

ground for believing that the applicant shall commit any offence while on bail.

11. On consideration of the materials as a whole as well as the rival submissions made by the respective learned counsels for the parties as indicated above, it appears to this Court that further detention of the applicant in the interest of the investigation of the case is not necessary. Therefore, the applicant is granted bail. However, any observation made in this order is tentative and for the purpose of disposal of this bail application only and shall not be used for any other purpose, including in the trial.

12. Accordingly, the applicant petitioner named above shall be released on bail in connection with the aforementioned case on furnishing bail bond of Rs. 50,000/- (Rupees fifty thousand) with two suitable sureties of the like amount to the satisfaction of the jurisdictional learned Special Judge, under the ND&PS Act.

13. The direction for bail is further subject to the conditions that the accused/petitioners -

1) Shall not leave the territorial jurisdiction or jurisdiction of the learned Special Judge, under the ND&PS Act without prior permission from him.

2) Shall surrender her passport, visa etc, if any, in the Court of the learned jurisdictional Special Judge, ND&PS Act, Aizawl.

3) Shall not hamper and temper with the evidence of the case.

4) Shall regularly appear before the concerned Trial Court on all dates to be fixed from time to time till the case is disposed.

5) Shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any Police Officer.

6) Shall appear before the Investigating Police Officer once in a month until the entire investigation of the case is completed and as and when called by the Investigating

Police Officer for the purpose of investigating of the case.

14. Return the LCR.

With the aforesaid directions and observations, the Bail Application stands disposed of.

JUDGE

Comparing Assistant