

GAHC030001662024



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

Case No. : Bail Appln./30/2024

Sh. Athang @ L. Thang Syan Aung
Present address - Lalkhumi Building (Near Model Primary School) Chanmari, Aizawl

VERSUS

State of Mizoram
Aizawl

Advocate for the Petitioner : Mr. Aldrin Zothanmawia

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

ORDER

BEFORE
HONOURABLE MR. JUSTICE NELSON SAILO

08.04.2024

Heard Mr. Aldrin Zothanmawia, learned counsel for the petitioner and Mrs. Mary L. Kiangte, learned Addl. Public Prosecutor for the State. By filing this application under Section 439 Cr.PC, the petitioner prays for his enlargement on bail. The petitioner along with two (2) others were arrested on 01.02.2023 in connection with the alleged recovery of 217 grams of contraband substance

suspected to be heroin. Accordingly, Excise & Narcotics Case No. 32/2023 dated 01.02.2023 under Section 21(b) of the ND&PS Act was registered and investigated into. Upon conclusion of the investigation, charge-sheet dated 25.03.2023 was submitted against all the arrested persons including one (1) person named David Khiang under Section 21(b) of the ND&PS Act.

[2.] The present petitioner along with two (2) others had earlier approached this Court through Bail Application No. 20/2023 and this Court vide Order dated 17.07.2023 rejected the Bail Application. Therefore, this is the second time the petitioner in particular has filed a Bail Application before this Court. The learned counsel for the petitioner submits that in view of their being material developments and new evidence which has come to light in the trial proceedings, the petitioner has filed the instant Bail Application. The learned counsel submits that out of the six (6) cited prosecution witnesses, five (5) prosecution witnesses have already been examined and the sole remaining prosecution witness to be examined is the FSL expert.

[3.] The learned counsel submits that there are number inconsistencies in the Information Report, the Seizure & Arrest Memo and the Report of Seizure & Arrest. The learned counsel submits that Section 42(1) of the ND&PS Act has been violated because the petitioner was detained unauthorizedly by the CADS-CYMA duty in the house of David Khiang and therefore, he should be released on bail. In

this connection, the learned counsel relies upon the Order dated 04.04.2024 passed by this Court in Bail Application No. 41/2024 (*Sh. Nohleisanga -Vs- State of Mizoram & Anr*).

[4.] The learned counsel further submits that there is discrepancy regarding the time recorded in the Malkhana/Go-down receipt. He submits that the date and time recorded is 01.02.2023 01:40 AM in the Go-down receipt whereas, in the Seizure & Arrest Memo, the petitioner was arrested and the suspected heroin seized at 11:50 AM on 01.02.2023. Therefore, it appears that the seized articles were already in the Go-down even before it was recovered from the petitioner and the others.

[5.] The learned counsel submits that there is absence of signatures of independent witnesses and accused persons in the samples drawn. Therefore, even on this ground, the petitioner should be released on bail. In this connection, the learned counsel relies upon the Judgment dated 01.03.2024 passed by the Supreme Court in Criminal Appeal No. 1610/2023 (*Mohammed Khalid & Anr -Vs- State of Telangana*). The learned counsel further submits that the prosecution has failed to cite material witnesses such as the Special Messenger who took the samples drawn to the FSL and also the Officer-in-Charge of the ND&PS Go-down to explain the discrepancy in the time of deposit of the seized article in the Go-down and also the discrepancy in the weight.

[6.] The learned counsel also submits that from the evidence of PW-6, it can be seen that she is the complainant as well as the case I/O who conducted the investigation. Therefore, the biasedness on the part of PW-6 cannot be ruled out and the investigation is therefore questionable. In support of his submission, the learned counsel relies upon the Judgment of the High Court of Punjab & Haryana rendered in *Arjum Sing & Anr - Vs- State of Punjab 2023 SCC OnLine P&H 1044*.

[7.] The learned counsel further submits that considering the developments in the trial, there is every likelihood of the petitioner being acquitted from the charge and therefore, he should be granted bail so that he does not face irreparable loss. In support of his submission, the case of *Mohd. Muslim alias Hussain -Vs- State (NCT of Delhi) 2023 SCC OnLine SC 352* and the case of *Sujit Tiwari -Vs- State of Gujarat & Anr. (2020) 13 SCC 447*.

[8] The learned counsel submits that the petitioner is said to be an Myanmarese national and for that reason, apprehension has been expressed that he will abscond. The learned counsel submits that in fact, all the relatives of the petitioner are in Mizoram and there is no reason for him to abscond. Further, the law does not authorize or permit any discrimination between a foreign national and an Indian national in the matter of grant of bail. What is permissible is the Court may impose different conditions in respect of a foreign national as may be found necessary. In this connection, the learned counsel relies upon the case of *Md.*

Kyaw Kyaw Naing -Vs- State of Manipur 2022 OnLine Mani 212.

[9.] The learned counsel lastly submits that the mother of the petitioner expired on 18.12.2023 and that he was not able to pay respect and bid farewell to his late mother since he was locked-up in jail since his arrest. Therefore, even on humanitarian ground, the petitioner may be released on bail.

[10.] Mrs. Mary L. Khiantge, learned Addl. Public Prosecutor on the other hand submits that the petitioner was not detained by the CADS-CYMA as alleged. Referring to the charge-sheet, the learned counsel submits that the petitioner and one David Khiang while they were in the process of selling the heroin, while heading towards Zarkawt *thlanmual* and before their customers arrived, they were detained and taken back to the residence of David Khiang. Therefore, there is no violation of Section 42(1) of ND&PS Act as alleged. The learned Addl. Public Prosecutor also submits that during the time of investigation, the petitioner managed to escape from custody but fortunately, he was apprehended again. Therefore, the petitioner is likely to abscond in the event if he is released on bail.

[11.] I have heard the submissions made by the learned counsels for the rival parties and I have perused the materials available on record. Although this Court had rejected the earlier Bail Application filed jointly by the present petitioner and two (2) others vide order dated 17.07.2023, the petitioner has now again filed the

instant Bail Application on his own. Court is informed that out of the six (6) prosecution witnesses cited, five (5) prosecution witnesses have been examined. As submitted at the bar, it is only the FSL expert who remains to be examined by the prosecution. PW-2 in his examination-in-chief deposed that he knows the accused persons and as CADS member, they detained the accused David Khiang and the present petitioner on the road side of Edenthur on 01.02.2023 on suspicion of possessing contraband drugs. Accused David Khiang was carrying a bag and they informed the matter to the Excise personnel. When the Excise personnel arrived, they asked the accused persons to produce the contraband drugs if they were in possession of the same and accordingly, accused David Khiang took out one (1) soap case containing Heroin and the Excise personnel seized the same from his possession. On interrogation, the accused persons confessed that the seized articles was brought by his two (2) female guests and that they were helping them to sell it. The accused David Khiang also admitted that he possess more Heroin in his residence. The Excise personnel then brought the accused David Khiang and the instant petitioner to the rented house of David Khiang and PW-2 and others accompanied them. At his residence, on being asked to take out his concealed drugs, David Khiang took out one (1) soap case containing heroin from the bag hanging on the wall and another 17 soap cases containing heroin kept in a black polythene from behind a silpouline hanging on the wall and handed over the same to the Excise personnel. In his cross-examination, PW-2 denied of having

checked the bag of accused David Khiang before information was given to the Excise personnel. PW-3 who was also a member of CADS made similar depositions like the PW-2. Therefore, from the evidence of these two (2) witnesses, it cannot be said that there has been violation of Section 42(1) of the ND&PS Act.

[12.] Inconsistency in the Malkhana Go-down receipt and the Seizure & Arrest Memo has also been raised. The time of arrest and seizure of the contraband substance was recorded as 11:50 AM in the Seizure & Arrest Memo while the time of receipt of the contraband substance in the ND&PS Go-down was recorded as 01:40 AM. From the materials available on record, it may be seen that it is nobody's case that recovery of the contraband substance was made early in the morning on or before 01:40 AM. The inconsistency therefore only appears to be an error committed at the time of making entry in the Go-down. Having regard to the nature of the charge and the other evidence available, this discrepancy by itself cannot be the basis for claiming non-involvement in the case and grant of bail at this stage.

[13.] The learned counsel for the petitioner has contend that since the complainant and the Investigating Officer are one and the same person, there can be no assurance about the investigation being not biased or being unfair. It may be seen that PW-1 is a Sub-Inspector of Excise & Narcotics, Anti Narcotic Squad and he on 01.02.2023 at around 10:10 AM, upon receiving certain information from

CADS and reducing the information into writing while submitting the same to the Officer-in-Charge of Anti Narcotic Squad, left for the place of occurrence with his party. After the accused persons had produced the contraband substance suspected to be Heroin, he seized the contraband substance and arrested the accused persons. Thereafter, he submitted a report of seizure and arrest to the Officer-in-Charge of the Anti Narcotic Squad, who then registered the case against the arrested persons and endorsed the matter to PW-6 for further investigation. PW-6 accordingly made investigation and consequently submitted that charge sheet. The learned counsel for the petitioner had relied upon the case of *Arjun Singh & Anr.* (supra) to contend that fairness and impartiality in the investigation process will be questionable if the investigation is done by the Officer-in-Charge who has made the search and arrest. However, as may be seen in the present case, the seizure and arrest has not been made by PW-6 but PW-1. Therefore, in the absence of any element of biasness, unfairness or partiality, noticeable from the materials available, an adverse inference on the fairness of the investigation conducted by PW-6 cannot be simply drawn.

[14.] The learned counsel for the petitioner has also relied upon the case of *Mohammed Khalid & Anr.* (supra) to contend that in the absence of a disclosure about *panch chits* and seals and signature of the accused on samples, the samples sent to the FSL and the opinion rendered cannot be accepted. However, the case of

the defense in the case relied upon by the learned counsel for the petitioner is that the prosecution failed to ensure compliance of the requirements of Section 52A of the ND&PS Act inasmuch as, no sampling procedure was undertaken before the Magistrate. Whereas, in the present case, the samples drawn have been duly compared and certified by the Magistrate concerned in terms of the provision of law and the Magistrate has also been cited as one (1) of the prosecution witnesses i.e., PW-4. It is also noticed from the charge sheet that the Magistrate concerned has been cited as PW-4 but in the examination-in-chief, she has been shown to be PW-5. Be that that as it may, the Magistrate has deposed on oath in her examination-in-chief that at the relevant time, she was posted at Aizawl as Judicial Magistrate, First Class. On 2.2.3 (02.02.2023), she received an application from the PW-6 for certification of correctness of inventory, photograph and drawing of samples in connection with Excise Case No. 32/2023 dated 01.02.2023. She compared the inventory and the seized article brought before her and found the samples drawn to be correct and as per the seizure documents and thereafter subscribed her signature. As many as seven (7) photographs of the seized articles were also taken in her presence. Therefore, as Section 52A of the ND&PS Act having appeared to have not been violated, the authority relied upon is found to be not applicable to the present case.

[15.] The Order dated 04.04.2024 passed by this Court in Bail Application No.

41/2024 cannot be relied upon in the instant case since the materials on record goes to show that the petitioner and David Khiang were found at Zarkawt *thlanmual* trying to sell drugs as per the report of the CADS member. It was from there that they were taken to the rented house of David Khiang since David Khiang had revealed that he was keeping more drugs in his rented house. Therefore, the facts in respect of the present petitioner are different to those in Bail Application No. 41/2024.

[16.] The identity of the petitioner as per the charge sheet has been revealed to the effect that he is a member of Chin Land Defence Force (CDA) and has been staying in Aizawl for a few months now. During his questioning, he escape from custody and was luckily caught again. Considering the role of the petitioner and the facts and circumstances involved, no parity can be drawn with the other accused person who has been granted bail and further, the case of *Sujit Tiwari* (supra) cannot be automatically applied to the instant case. The learned counsel for the petitioner has also prayed for the release of the petitioner on humanitarian ground since his mother had expired on 18.12.2023. However, the fact remains that the said incident has already happened almost four (4) months back and therefore, considering the nature of allegation, the trial also being almost completed (subject to the defence leading their evidence), I am of the considered view that no ground of allowing bail to the petitioner has been made out. Accordingly, the Bail

Application is rejected.

[17.] It is however made clear that any observation made herein above is only for the purpose of considering grant of bail to the petitioner and it shall have no bearing whatsoever on the merit of the case in the trial proceeding.

JUDGE

Comparing Assistant