

GAHC030001822024



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

Case No. : Bail Appln./33/2024

Sh. Md. Nur Ahmed
S/o Sh. Abdul Kalam (L)
R/o Mangalkhali, Jubarajnagar, North Tripura.

VERSUS

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

2: The Officer-in-Charge
Aizawl Police Station

Advocate for the Petitioner : Mr. C Lalfakzuala

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

ORDER

BEFORE
HONOURABLE MR. JUSTICE NELSON SAILO

27.03.2024

Heard Mr. C. Lalfakzuala, learned counsel for the applicant who submits that the applicant by filing this application under Section 37 of the ND&PS Act read with Section 439 Cr.PC prays for grant of bail.

[2.] The learned counsel submits that the applicant was arrested along with one

(1) co-accused person by the police personnel on 16.08.2023 at around 5:15 am at Dawrpui New Market, Aizawl for alleged possession of suspected Methamphetamine weighing about 2.330 kgs. which was kept in a wooden box and carried by the applicant along with the co-accused person. As a result, Aizawl P.S Case No. 558/23 dated 16.08.2023 under Section 22(C)/29 of the ND&PS Act was registered and investigated into. Upon completion of the investigation, charge sheet No. 376/2023 dated 15.11.2023 was filed by the investigating agency. Thereafter, charge was framed against the applicant under Section 22(C)/29 of the ND&PS Act and to which the applicant pleaded not guilty and claimed for trial. Accordingly, trial commenced and in order to establish their case, the prosecution cited as many as five (5) prosecution witnesses.

[3.] The learned counsel submits that the applicant had filed Bail Application No. 106/2024 before the Special Court, ND&PS Act but the same was rejected by the Special Court and therefore, the applicant is before this Court with the instant Bail Application.

[4.] Mr. C. Lalfakzuala, learned counsel submits that from the trial proceedings conducted so far, it can be very well seen that there is hardly any scope for convicting the applicant. The learned counsel submits that the applicant is a resident of Tripura and that he does not know or understand the local language. Despite the same, his statements were recorded in the local language by the police

and therefore grave prejudice has been caused to the applicant. The learned counsel submits that there are also discrepancies in the weightment of the samples drawn for examination in the FSL. He submits that ten (10) samples each weighing about 5 grams were drawn but at the FSL, the samples except for two (2) samples, all were found to be less than five (5) grams. The learned counsel further submits that according to the prosecution, samples were drawn before the Magistrate First Class but however, the Magistrate concerned has not been cited as one (1) of the prosecution witnesses. He therefore submits that Section 52A(2)(b) of the ND&PS Act has been violated. The learned counsel further submits that the statements of the applicant was recorded by the informant and therefore, the same cannot be used against him.

[5.] Mr. C. Lalfakzuala, learned counsel also submits that the instant case is covered by the Judgment of this Court dated 19.09.2019 passed in *Criminal Appeal No. 38/2018 (Lalmawia & Anr. -Vs- State of Mizoram & Anr.)*. He also submits that the applicant is likely to be acquitted in view of the discrepancies in the prosecution case, he should therefore be granted bail. In this connection, the learned counsel refers to the case of *Sujit Tiwari -Vs- State of State of Gujarat & Anr. (2020) 13 SCC 447*. The learned counsel submits that although charge sheet was filed on 29.11.2023, none of the five (5) prosecution witnesses have been examined till now and under the given circumstance, the applicant should be released on bail. In

support of his submission, the learned counsel relies upon the following authorities:-

(1) Megha Singh -Vs- State of Haryana (1996) 11 SCC 709.

(2) Order dated 23.02.2024 passed by this Court in Bail Application No. 12/2024 (Sh. Challianmanga -Vs- State of Mizoram).

[6.] Mrs. Mary L. Khiangte, learned Addl. Public Prosecutor on the other hand submits that as per the list of samples drawn in terms of Section 52A(2)(c) of the ND&PS Act, the Magistrate concerned certified that the seized articles were brought before the Magistrate with seals intact and from which, samples were drawn and packed in the presence of the Magistrate. The FSL vide their letter dated 21.09.2023 acknowledged receipt of samples drawn and kept in a sealed packet and therefore, there cannot be any suspicion about the samples being tampered with as sought to be projected by the applicant. She submits that there can be some variation in the weightment of the samples drawn on different weighing machines and also due to exposure of the samples drawn to atmosphere. Therefore, the discrepancies projected on the samples drawn cannot be a ground to grant bail at this stage. The learned Addl. Public Prosecutor further submits that the statements of the applicant may have been recorded in the local language but the same does not cause any prejudice to the applicant since the applicant was explained why he has been detained and the steps being taken in the language

which he understands. At any rate, the learned Addl. Public Prosecutor submits that the statements made before the police under Section 161 Cr.PC being not admissible in evidence, the applicant cannot have any grievance. She also submits that the applicant was not only arrested on the basis of the statements made by the co-accused person but also on the basis of the statements made by the Seizure witnesses. She therefore submits that having regard to the conditions to be satisfied under Section 37 of the ND&PS Act for cases involving commercial quantity of contraband substance, no ground for granting bail is made out by the applicant and the application should therefore be dismissed. In support of her submission, the learned Addl. Public Prosecutor relies upon the following authorities:-

(1) Order dated 22.09.2023 passed by this Court in Bail Application No. 38/2023 (Z.D. Lalchhuanawma -Vs- State of Mizoram).

(2) Order dated 18.03.2024 passed by this Court in Bail Application No. 24/2024 (Sh. Lalpianthanga & Anr. -Vs- State of Mizoram).

[7.] I have heard the submissions made by the rival parties and I have perused the materials available on record. The applicant was arrested on 16.08.2023 for alleged possession of 2.330 kgs of suspected Methamphetamine, which was kept inside a wooden box which the applicant and the co-accused person were carrying at Dawrpui New Market, Aizawl. In view of the recovery, Aizawl P.S Case No.

558/2023 dated 16.08.2023 under Section 22(C)/29 of the ND&PS Act was registered and investigated into. Upon completion of the investigation, charge sheet was filed on 29.11.2023 which states that a prima facie case under Section 22(C)/29 of the ND&PS Act was found well established against the applicant and the co-accused person. As many as ten (10) samples weighing five (5) grams each were drawn and marked as exhibits. However, when the samples were received by the FSL, the quantity of the samples drawn from each exhibits varied from 4.3 grams to 5.1 grams. The applicant was arrested on 16.08.2023 and on the same day, an application for certification of correctness of the inventory, photograph and samples of the seized narcotic drugs was submitted to the Chief Judicial Magistrate, Aizawl and the Magistrate certified that the seized articles were brought with the seals intact by the case I/O and from which, samples were drawn and packed in his/her presence. Samples were then sent to the FSL on 18.08.2023 and upon examination of the same, they were found to contain Methamphetamine. Although there appears to be some discrepancies in the weight of the samples drawn before the Magistrate and received in the FSL but the same can very well be an issue to be decided at the time of final hearing of the trial. This Court in *Z.D. Lalchhuanawma* (supra) has also held that slight difference in the weightment of the samples drawn and examined may not be so crucial while considering the innocence of the applicant. Trial in the instant case is at the initial stage and one cannot lose sight of the fact that a commercial quantity of Methamphetamine has

been recovered from the possession of the applicant and the co-accused person. Therefore, a presumption that the applicant is not guilty of the alleged offence cannot be drawn at this stage.

[8.] In the case of *Mohd. Muslim alias Hussain -Vs- State (NCT of Delhi) 2023 SCC OnLine SC 352*, the Apex Court held that a plain and literal interpretation of the conditions under Section 37 (i.e., that court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the Court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. As already stated, a commercial quantity of Methamphetamine has been recovered from the possession of the applicant and the co-accused person. Therefore, a presumption that the applicant is not guilty of the alleged offence cannot be drawn at this stage.

[9.] Although the learned counsel for the applicant has relied upon the case of *Lalmawia* (supra), the fact remains that the same was an appeal filed against the conviction under Section 21(c) of the ND&PS Act and the discrepancies found in the samples drawn and later in the FSL were not just marginal like the present

case but substantial. Having regard to the provision of Section 37 of the ND&PS Act and the fact that the amount of Methamphetamine recovered is of commercial quantity, no presumption can be drawn at this stage about the innocence of the applicant.

[10.] The counsel for the applicant has submitted that grave prejudice has been cause to the applicant since his statements were recorded by the police in the local language which he did not understand. However, from the materials available on record, it is seen that the charge leveled against him has been duly explained to the applicant with the language he understand. Moreover, as pointed out by the learned Addl. Public Prosecutor, statements recorded under 161 Cr.PC cannot be relied upon by the prosecution to prove the case against the accused person. Therefore, the allegation of being prejudiced is found to be without any basis.

[11.] Reliance have been placed on the case of *Sujit Tiwari* (supra) by the learned counsel for the applicant but however it may be seen that the facts and circumstance involved in that case and in the present case are not similar. Facts in that case was that the appellant was a young man aged about 25 years and a B.Tech graduate and he was behind bars for more than two (2) years. The Apex Court observed that there was reasonable possibility that he may be acquitted for being unaware of the illegal activities of his brother and other two (2) members. However, in the present case, the materials available on record prima facie shows

that the applicant was aware about the Methamphetamine, which they were carrying and which was kept inside the wooden box. At any rate, this aspect of the matter can be considered by the Trial Court at the time of conclusion of the trial on the basis of evidence led by the parties.

[12.] The case of *Megha Singh* (supra) has also been relied upon by the learned counsel for the applicant to contend that the informant had recorded that statements of the applicant as well and therefore, there is every possibility of acquittal of the applicant and he should be released on bail at this stage. However, the Supreme Court in that case observed that the complainant had proceeded with the investigation of the case and examined witnesses under Section 161 Cr.PC. Such practice according to the Supreme Court should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation but the same was not only the reason for interfering with the conviction of the appellant concerned. The Supreme Court found that there was discrepancy in the deposition of PW Nos. 2 & 3 and therefore, in the absence of any independent corroboration, such discrepancy does not inspire confidence about the reliability of the prosecution case. Therefore, upon overall consideration, the order of acquittal was passed. In the present case, it may be seen that trial is at a very initial stage to conclude that the investigation conducted was neither fair nor impartial. Similarly, the reliance upon the authorities cited by this Court in *Sh. Chalianmanga* (supra)

only appears to be premature in view of the fact that the trial has only begun against the accused person.

[13.] Thus, upon due consideration, the Bail Application is found to be without merit and accordingly, the same stands rejected.

JUDGE

Comparing Assistant