

GAHC030002042024



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

Case No. : Bail Appln./41/2024

Sh. Nohleisanga
S/o Thakhuaia (L)
R/o Tahan, Myanmar
P/A Rangvamual Mel-4, Mizoram.

VERSUS

The State of Mizoram and Anr.
r/b The Secretary to the Govt. of Mizoram, Home Department. 2:S.I. Lalnunfela
(Complainant)
Excise and Narcotic

Advocate for the Petitioner : Mr Laltanpuia

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

ORDER

BEFORE

HONOURABLE MR. JUSTICE NELSON SAILO

04.04.2024

Heard Mr. Laltanpuia, learned counsel for the petitioner and Mrs. Mary L. Khiangte, learned Addl. Public Prosecutor for the State. By filing this application under Section 439 Cr.PC, the petitioner seeks grant of bail. It is the case of the petitioner that he was arrested on 24.11.2023 for alleged possession of 63 grams

of suspected Heroin. Accordingly, Excise Case No. EX-N-304/23 dated 24.11.2023 under Section 21(b) of the ND&PS Act was registered and investigated into. Upon conclusion of the investigation, the Investigating Authority has filed charge sheet on 23.01.2024. However, charge has not been framed against the petitioner till date.

[2.] The learned counsel submits that the petitioner approached the learned Trial Court through Bail Application No. 140/2024 praying for his release on bail but the same was rejected by the Trial Court vide Order dated 04.03.2024.

[3.] The learned counsel submits that on making the alleged recovery of 63 grams of Heroin from the possession of the petitioner, Section 41 and 42 of the ND&PS Act had been violated in view of the fact that the local NGO i.e., Young Mizo Association (YMA) had entered the rented residential house of the petitioner and detained him in his house. The same being unauthorized entry and in violation of Section 42(1) of the ND&PS Act in particular, bail should be granted to the petitioner. To substantiate his submission, the learned counsel has drawn the attention of this Court to the statement of the Seizing Officer annexed to the Bail Application at page No. 24A. According to the Seizing Officer, on 22.11.2023, she received an information from Rangvamual Branch YMA stating that they were in the residence of the petitioner, who came from Myanmar as a refugee and suspected him to possess Heroin and requested her to take necessary action. After

recording the information in writing, she proceeded to Rangvamual Mel-4, Aizawl and upon reaching, she found the YMA members already in the house of the petitioner. He therefore submits that it is clear that Section 42(1) of the ND&PS Act had been violated and the petitioner be released on bail. The learned counsel in support of his submission relies upon the following authorities:-

(1) *Sarija Banu Alias Janarthani Alias Janani & Anr. -Vs- State through Inspector of Police (2004) 12 SCC 266* and

(2) *Roy V.D -Vs- State of Kerala (2000) 8 SCC 590*.

[4.] The learned counsel further submits that since the alleged recovery is only 63 grams of Heroin and the petitioner having been booked under Section 21(b) of the ND&PS Act, the vigors of Section 37 of the ND&PS will not apply. In this connection, the learned counsel relies upon the case of *Puranmal Jat -Vs- State of Rajasthan 2023 SCC OnLine SC 1418*.

[5.] Mrs. Mary L. Khiangte, learned Addl. Public Prosecutor on the other hand submits that the petitioner nowhere stated that he is not guilty of the alleged offence. She submits that Excise personnel upon receiving the information from Rangvamual YMA about the petitioner having drugs in his possession proceeded to the spot after recording the information received by her in writing. Upon reaching the spot, the Excise personnel seized the Heroin kept in four (4) packets produced

by the petitioner himself. Therefore, there is no violation of Section 41 & 42 of the ND&PS Act as alleged by the petitioner. The learned Addl. Public Prosecutor submits that no search was conducted by the YMA members and that upon suspecting that the petitioner was in possession of drugs, they had accordingly informed the Excise & Narcotics personnel. The learned Addl. Public Prosecutor further submits that the petitioner admittedly is a Myanmarese national and in the event he is released on bail, he will surely abscond. Therefore, bail should not be granted to the petitioner. She also submits that the authorities relied upon by the learned counsel in for the petitioner is not applicable to the instant case inasmuch as, the facts and circumstances involved are not similar and moreover, trial is yet to begin in the present case.

[6.] I have heard the submissions made by the rival parties and I have perused the materials available on record. The petitioner as can be seen from the charge sheet was arrested on 24.11.2023 for alleged possession of 63 grams of contraband substance suspected to be Heroin on the basis of the information given by the Rangvaml Branch YMA. Pursuant to the registration of the case, charge sheet has been filed on 23.01.2024 as submitted at the bar. However, charge has not been framed till date. It has been submitted on behalf of the petitioner that the petitioner is now in custody for the last more than four (4) months. Further, Section 41 & 42 of the ND&PS Act has been grossly violated due to the fact that

unauthorized persons had entered the house of the petitioner and detained him. It was only thereafter that the Excise personnel came to the spot and made the alleged recovery of contraband substance suspected to be Heroin. The stand taken by the petitioner can be appreciated from the information report recorded by the Seizing Officer which states that on 24.11.2023 at 9:00 am, she received a phone call from the Rangvamual YMA stating that they detained one male person who possessed some contraband articles. Then they requested her to take further investigation and accordingly, she and party went to the reported place at Rangvamual Mel-4. During the investigation, the Investigating Officer apart from recording the statement of the petitioner had also recorded the statements of two (2) witnesses namely, Rex Mawia and K.C. Lalhminganga, who both stated that upon getting an information that the petitioner, who hailed from Myanmar was in possession of Heroin and selling the same they proceeded towards his house and upon reaching, they asked him whether he was in possession of Heroin or not. The petitioner in reply stated that he was in possession of Heroin. Accordingly, they informed the Excise & Narcotics personnel, who came to the spot and asked the petitioner to produce the contraband substance that he was having. The petitioner accordingly took out four (4) packets, which contain the suspected Heroin. The same was seized by the duty officer and the petitioner was arrested in their presence. Therefore, from the materials available on record, it can be seen that the petitioner was detained by the local YMA before information was given to the

Excise & Narcotics personnel inside his own rented house. There is no material available on record to show that search was conducted by the YMA members but the fact remains that the petitioner was detained in violation of Section 42(1) of the ND&PS Act.

[7.] The Apex Court in *Sarija Banu Alias Janarthani Alias Janani & Anr.* (supra) in the given facts of that case held that in the Bail Application of the appellants, it was alleged that there was serious violation of Section 42 of the NDPS Act but in the impugned order challenged before the Apex Court, there was nothing stated about the alleged violation of Section 42. Instead, it was observed that it was not necessary to consider such violation at this stage. The Apex Court held that compliance of Section 42 was mandatory and that the same is a relevant fact which should have engaged the attention of the Court while considering the bail application.

[8.] The Apex Court in *Roy V.D.* (surpa) in the given facts of that case held that arrest and search by an Officer not empowered or authorized in violation of Section 41 and 42 being per se is illegal would vitiate the trial. Paragraph No. 16 of the said judgment may be abstracted herein:-

“16. Now, it is plain that no officer other than an empowered officer can resort to Section 41(2) or exercise powers under Section 42(1) of the NDPS Act or make

a complaint under clause (d) of sub-section (1) of Section 36A of the NDPS Act. It follows that any collection of material, detention or arrest of a person or search of a building or conveyance or seizure effected by an officer not being an empowered officer or an authorised officer under Section 41(2) of the NDPS Act, lacks sanction of law and is inherently illegal and as such the same cannot form the basis of a proceeding in respect of offences under Chapter IV of the NDPS Act and use of such a material by the prosecution vitiates the trial.

[9.] In the present case, as already stated herein above, the petitioner was detained by the local NGO who entered his rented house for the purpose of finding out as to whether he was in possession of any contraband substance or not. In other words, it was not just any other visit made to the petitioner but it was for the purpose of finding out as to whether he was having any contraband substance or not as there was some inputs. The amount alleged to have been recovered is said to be 63 grams which is a quantity more than the small quantity but lesser than the commercial quantity as per the ND&PS Act. In other words, it is an intermediate quantity and for which, Section 37 of the ND&PS Act may not be strictly applicable. The learned Addl. Public Prosecutor has also raised concern about the petitioner absconding in view of the fact that he is a Myanmarese national. However, it may be seen from the charge sheet submitted, the petitioner has not been booked under any relevant provision of law applicable to foreigners.

[10.] Thus, upon due consideration, this Court is of the view that the petitioner is entitled to be granted bail and accordingly, it is hereby directed that the petitioner be released on bail upon his presentation of a bail bond of Rs. 50,000/- with one (1) local surety of the like amount who is a permanent resident of Aizawl and to the satisfaction of the learned Trial Court. The petitioner shall not leave the jurisdiction of the learned Trial Court without obtaining prior permission from the said Court. The petitioner shall make himself available as and when his appearance is required by the Trial Court.

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

[12.] With the above observations and directions, Bail Application stands disposed of.

JUDGE

Comparing Assistant