



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

Case No. : Bail Appln./70/2024

Hmingthansanga r/b Chanchinmawia, r/o Kulikawn
Kawn veng, Champhai

VERSUS

The State of Mizoram
Aizawl

Advocate for the Petitioner : Mr Lalchhanliana Khiangte

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

B E F O R E

HON'BLE MR. JUSTICE KAUSHIK GOSWAMI

23.09.2024

Heard Mr. Lalchhanliana Khiangte, learned counsel for the petitioner. Also heard Mrs. Linda L. Fambawl, learned Public Prosecutor for the State respondent.

2. This petition is filed under Section 483 BNSS read with Section 37 of the ND&PS Act, 1985 to enlarge the petitioner, i.e., Hmingthansanga, who was arrested on 14.06.2023 in connection with Spl. Narcotic Case No. 36/2023 registered under Section 21(c)/25/29(1) of the ND&PS Act, 1985 and charge-sheet dated 12.09.2023.

3. The case of the prosecution is that on 14.06.2023 at around 5:00 PM, one S.I of the Special Narcotics PS, CID (Crime) alongwith his team detained one Truck (TATA 1109 Reg.No. MZ 01 N-7838) at Zemabawk, Aizawl, which was driven by the accused/petitioner.

4. Upon search, 2 (two) bags of Charcoal were seized from the Truck, from which 1.026 kgs of heroin kept in 8 (eight) black polythene bags was also seized. Accordingly, the petitioner was arrested. As such, a case was registered and investigated and charge-sheet been submitted, trial has commenced.

5. Mr. Lalchhanliana Khiangte, learned counsel for the petitioner submits that the petitioner is the sole bread earner of his family and as such, further detention of the petitioner in custody would cause tremendous hardship to the family.

6. He further submits that the petitioner has no criminal antecedent as he has never been arrested nor convicted of any offence before.

7. He further submits that the petitioner is a permanent resident of Ngur village, Champhai District, Mizoram and as such, there is no danger of absconding from bail and there is no danger of hampering the evidence on his part.

8. He further submits that the petitioner is purely innocent of the alleged commission of crime. Further, the petitioner should be presumed to be innocent until proven guilty. It a settled principle of law that there is presumption of innocence and that bail is the rule and jail is the exception.

9. He further submits that the co-accused Shri. Lalsanga Sailo whose occupation was stated in the Arrest Memo as 'drug trafficker' has

already been released on bail. The present petitioner is only a driver but not a drug trafficker and they were from the same village i.e. Ngur Village, Champhai District, Mizoram and no criminal antecedent of both the accused were made on record. There is no material on record to show that the petitioner shall flee from justice and that he is likely to commit any offence on bail while he is on bail. The statement recorded under Section 161 Cr.PC of both the accused persons could not be used as prosecution evidence against the accused.

10. He further submits that there are many irregularities committed by the prosecution in the present case. The prosecution fails to comply with the mandatory provision of law and rules under the ND&PS Act, 1985. Hence, there is no likelihood of conviction of the petitioner.

11. He further submits that the Hon'ble Supreme Court has held that any guidelines issued by way of a notification in consonance with Section 52A has to be followed mandatorily.

12. He further submits that Rule 5(1) of the Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 (hereinafter referred to as the 2022 Rules), which mandated that all the seized material after seizure under the Act shall be deposited by the seizing officer in the nearest designated godown within 48 hours from the time of seizure along with a forwarding memorandum in Form-1. There is nothing on record/chargesheet showing that Rule 5(1) was complied with.

13. He further submits that the case record/chargesheet also reveals non-compliance of Rule 5(2). Acknowledgment Receipt in Form-2 should be given by the officer in-charge of a godown after satisfying himself that the seized materials are properly packed, sealed and in conformity

with the details mentioned in Form-1. But this was not done in the present case.

14. He further submits that Rule 5(3) is also violated. The acknowledgment receipt of seized materials in Form-2 along with other documents relating to the seizure should be handed over by the seizing officer to the Investigating Officer. But this Rule is not followed by the Prosecution.

15. He further submits that Section 52A(2) of ND&PS Act and Rule 8(1) of 2022 Rules are not strictly followed. As per this law/Rule, the officer-in-charge or the case I.O has to prepare an inventory of all the seized materials in Form-4 and apply to the Magistrate u/s 52A(2) of the ND&PS Act in Form-5 for the purposes of certifying the correctness of the inventory so prepared; taking photographs of the seized material in the presence of the Magistrate and for allowing to do samples of the seized drugs or substances.

16. He accordingly submits that in the present case (a) the inventory prepared by the case IO or officer-in-charge does not indicate all the seized materials. The inventory only includes the suspected heroin and does not contain other seized materials viz. mobile phone and truck/conveyance which were seized as per the seizure memo. (b) The inventory does not contain the country of origin of the seized article while it is the mandatory duty of the officer in-charge to mention in the inventory. (c) Photograph of the alleged seized drugs was also not seen in the chargesheet. Further, there is no photograph of the truck/conveyance and mobile phone which has to be certified by the magistrate. (d) The certificate signed by the Magistrate (Page 31 of the bail 4 application) is incorrect/false in as much as the said certificate says that the inventory is as per the seizure documents. However, the

inventory and the seizure documents are not containing the same seized articles.

17. He further submits that Rule 13 is also violated. The sample after being certified by the Magistrate have to be sent directly to the jurisdictional laboratories for chemical analysis without any delay in Form-6. In the present case, he submits that samples were allegedly certified by the Magistrate on 15.6.2023 but was received by the Forensic Science Laboratory, Aizawl only on 16.6.2023 at 1:25 PM. Hence, it appears that the samples were not sent directly to the laboratory.

18. He further submits that the test memo dt.14.6.2023 shows that samples of the seized articles were drawn and dispatched in advance on 3.5.2023 prior to the date of seizure of the SA which is 14.6.2023. Rule 13 of the 2022 Rules appears to have been violated by the prosecution with regard to sending of samples of the seized drugs or substances to the laboratory which is required to be prepared in triplicate in Form-6 after the samples were being certified by the Magistrate. Test memo dt.14.6.2023 apparently indicates that the samples were sent to the laboratories before the same were certified by the Magistrate. The contradiction with regard to drawing of samples and sending of the samples i.e. 3.5.2023 and the alleged date of seizure 5 of the seized articles i.e. 14.6.2023 created doubt on the prosecution case.

19. He further submits that Rule 14 of the 2022 Rules was also grossly violated. According to him, as per the Rule, the chemical laboratory test report should be submitted to the court of Magistrate within 15 days from the date of receipt of the samples, however, in the present case, the samples were shown to have been received by the FSL on 16.6.2023 but the test report was submitted by the FSL to the officer-incharge of

the Spl. Narcotic Police Station only on 25.7.2023 i.e. after a lapse of 39 days from the date of receipt of the sample. He further submits that the chemical laboratory did not submit its report to the court of Magistrate despite the mandate of Rule 14 of the 2022 Rules while the report was wrongly sent to the officer in-charge of the Spl. Narcotic Police Station.

20. He further submits that Section 52(4) of the Act and Rule 27(2) of the 2022 Rules were violated by the prosecution by not producing disposal certificate of the seized articles.

21. He further submits that Section 57 of the Act is also violated by the prosecution. Section 57 mandated that any person who makes any arrest or seizure under the act should make a full report of all the particulars of such arrest or seizure to his immediate official superior within 48 hours of the arrest or seizure. In the present case, the report of seizure and arrest made by the arresting officer contains only the seizure of suspected heroin and exclude other seized materials reflected in the seizure documents.

22. In support of the aforesaid submission, he further relies upon the following decisions of the Apex Court:-

(1) *Mangilal Vs. State of Madhya Pradesh in Crl.Appeal No. 1651/2023.*

(2) *Jalal Uddin Khan Vs. Union of India in Crl.Appeal no. 3173/2024.*

(3) *Arvind Kejriwal Vs. Central Bureau of Investigation in Crl.Appeal No. 3816/2024 with Crl.Appeal No. 3817/2024.*

(4) *Suman Doimary Vs. State of Assam in Crl.Appeal No. 200/2023.*

23. Per contra, Mrs. Linda L. Fambawl, learned Public Prosecutor for the State respondent submits that the Case Diary reveals that on 14.06.2023 at 6:45 P.M, the Joint Operation Team seized 1.026 kgs of heroin from the possession of the accused/petitioner, who is the driver of the Truck and accordingly, on 15.06.2023, the petitioner was forwarded to the learned CJM, Aizawl for judicial remand and upon drawing of exhibit samples conducted before the learned CJM, Aizawl District, the said samples were sent to FSL on 15.06.2023.

24. She further submits that the petitioner was caught red handed while in possession and transporting heroin from Champhai to Aizawl and therefore, no bail ought to be granted to the petitioner.

25. In support of her submission, she relies upon the decisions of the Apex Court in the case of ***Union of India Vs. Rattan Mallik Alias Habul***, reported in ***(2009) 2 SCC 624*** and ***State of Kerala and Ors. Vs. Rajesh and Ors.***, reported in ***(2020) 12 SCC 122***.

26. I have given my prudent consideration to the arguments made by both the parties and have perused the materials available on record and also considered the citations cited at the bar.

27. It appears that the Joint Operation Team upon receiving specific information as regards transportation of contraband articles being transported from the vehicle driven by the petitioner, after recording the information in writing, caught the petitioner red handed with the said contraband articles from his possession.

28. It further appears that the trial is at its concluding stage, where all the prosecution witnesses have already been examined and the next date fixed, i.e., 29.10.2024 is for examination of the petitioner under Section 313 Cr.PC.

29. It further appears from the materials available on record that huge quantities of contraband articles, i.e., 1.026 kgs of heroin have been procured from the possession of the petitioner, which was being transported from Champhai to Aizawl.

30. In the present case, the offence being the provision of ND&PS Act. Apt to refer to the principles laid down by the Apex Court in the case of ***Union of India through Narcotics Control Bureau, Lucknow Vs. Md. Nawaz Khan*** in ***Crl.Appeal No. 1043/2021***. Paragraph Nos. 18, 19 and 20 of the aforesaid judgment is reproduced hereunder for ready reference:-

"18. Under Section 37(1)(b)(ii), the limitations on the grant of bail for offences punishable under Sections 19, 24 or 27A and also for offences involving a commercial quantity are:

(i) The Prosecutor must be given an opportunity to oppose the application for bail; and

(ii) There must exist reasonable grounds to believe' that (a) the person is not guilty of such an offence; and (b) he is not likely to commit any offence while on bail.

19. The standard prescribed for the grant of bail is 'reasonable ground to believe' that the person is not guilty of the offence. Interpreting the standard of 'reasonable grounds to believe', a two-judge Bench of this Court in Shiv Shanker Kesari (supra), held that:

"7. The expression used in Section 37(1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence DRID charged.

8. The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor,

called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word "reasonable".

"7. ... In Stroud's Judicial Dictionary, 4th Edn., p. 2258 states that it would be unreasonable to expect an exact definition of the word 'reasonable'. Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy."

(See Municipal Corpn. of Delhi v. Jagan Nath Ashok Kumar [(1987) 4 SCC 497] (SCC p. 504, para 7) and Gujarat Water Supply and Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd. [(1989) 1 SCC 532]
[...]

10. The word "reasonable" signifies "in accordance with reason". In the ultimate analysis it is a question of fact, whether a particular act is reasonable or not depends on the circumstances in a given situation. (See Municipal Corpn. of Greater Mumbai. Kamla Mills Ltd. [(2003) 6 SCC 315]

11. The court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.

20. Based on the above precedent, the test which the High Court and this Court are required to apply while granting bail is whether there are reasonable grounds to believe that the accused has not committed an offence and whether he is likely to commit any offence while on bail. Given the seriousness of offences punishable under the NDPS Act and in order to curb the menace of drug-trafficking in the country, stringent parameters for the grant of bail under the NDPS Act have been prescribed."

31. Reading of the above, apparent that the test which this Court is required to apply while granting bail under Section 37 of the ND&PS Act

is to see whether there are reasonable grounds to believe that the petitioner has not committed an offence and whether he is likely to commit any offence while on bail.

32. Undoubtedly, given the seriousness of offences punishable under the ND&PS Act, 1985, stringent parameters for the grant of bail under the ND&PS Act have been prescribed in order to curb the menace of drug trafficking in the Country.

33. In the present case, it is pertinent to note that the contraband articles of huge quantity have been seized from the truck driven by the petitioner.

34. The argument of Mr. Lalchhanliana Khiangte, learned counsel for the petitioner to the effect that the petitioner should be presumed to be innocent until proven guilty is totally fallacious in the context of the offence alleged.

35. Section 8 of the ND&PS Act, 1985 prohibits a person from possessing any narcotic drugs or psychotropic substance.

36. Section 22 of the ND&PS Act, 1985 makes possession of contraband articles an offence.

37. Section 22(c) of the ND&PS Act, 1985 relates to offences for possession of such articles which is reproduced hereunder for ready reference:-

"[Section 22. Punishment for contravention in relation to psychotropic substances.-Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter- State or uses any psychotropic substance shall be punishable,-

(a)...

(b)...

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.]"

38. In the present case, the contraband articles having being seized from the possession of the petitioner, the possession is established, therefore, the burden is shifted to the petitioner to show how the same has been seized from his Truck. The trial having not been concluded, the petitioner has not yet discharge the said burden.

39. Apt to refer to Section 35 of the ND&PS Act, 1985, which gives a statutory recognition of his possession because of the presumption available in law, which is also reproduced hereunder for ready reference:-

"35. Presumption of culpable mental state.-(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation. In this section "culpable mental state" includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."

40. Similar is the position in terms of Section 54, where also presumption is available to be drawn from possession of psychotropic substances, which is also reproduced hereunder for ready reference:-

"[54. Presumption from possession of illicit articles. In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of-

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or (d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily.]"

41. Therefore, it is established that the petitioner was possessing the seized contraband articles.

42. It further appears that the trial is yet to be completed, wherein the petitioner will get a chance to adduce his evidence. The arguments of the petitioner that the trial is vitiated for non-compliance of statutory procedural prescription under the relevant provisions of law is a matter of fact, which cannot be looked into at the stage of consideration of bail.

43. Further, the arguments of the petitioner to the effect that the co-accused has been granted bail is of no relevance, inasmuch as, the co-

accused was granted bail by this Court on the ground that he was arrested only because of the confessional statement of the petitioner and he was not at the spot when the contraband articles was seized.

44. Thus, what cannot be over looked at this stage is that the petitioner was caught with the seized contraband articles of huge quantity which established possession at this stage. Hence, it appears that there are materials to indicate that the petitioner is guilty of the offence alleged.

45. Therefore, considering the facts and circumstances of the case and by keeping the rigours of Section 37 of the ND&PS Act, 1985 in mind, this Court is not inclined to grant bail to the petitioner at this stage.

46. As such, the bail application stands rejected.

JUDGE

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