

22.09.2023

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***Calcutta High Court
In the Circuit Bench at Jalpaiguri***

CRM (NDPS) 632 of 2023

In Re:- An application for bail under Section 439 of the Code of Criminal Procedure filed on 17.08.2023 in connection with New Jalpaiguri Police Station Case No. 101 of 2023 dated 10.02.2023 under Section 21(c)/22(c)/23(c)/29 of the NDPS Act, 1985.

In the matter of : Pratap Thapa & Anr.

... petitioners

Mr. Partha Pratim Sarkar,
Mr. Sudip Guha,
Mr. Sandip Guha Ray

...for the petitioner

Mr. Niloy Chakraborty

...for the State

1. Learned counsel appearing for the petitioners argues that two persons, who were cited as witnesses in the First Information Report, admittedly were called by the raiding team. It is submitted that the First Information Report factually mentions that the said two witnesses were called prior to the seizure and apprehension. As such, the independence of the said witnesses is suspect.
2. It is further argued that the sample sent was about 5 grams, which is in contravention of the 2022 Rules, which stipulates that 10 grams is to be sent for chemical examination. Further, no notice has been issued against

the owner of the vehicle, which the petitioners were riding.

3. However, the quantity of the seized articles was miniscule and the same was not seized from the persons of the petitioners, but from the vehicle. Thus, the involvement of the petitioners is doubtful. Further, it is argued that the ACP (Traffic) has acted as the Gazetted Officer, which vitiates the process of seizure as well.
4. Learned counsel for the State opposes the prayer for bail and submits that 5 grams is the quantity of sample which is required to be sent for chemical examination as per the Rules. Moreover, the process of search and seizure was in due process of law as the ACP is also a Gazetted Officer and not a part of the raiding party. It is submitted that the witnesses who were called are people of locality. Insofar as the allegations of the petitioners are concerned, that the seizure was made at night, which violates Section 42 of the NDPS Act as it was made in private vehicle, it is argued that the vehicle was a two-wheeler (scooty) and it was apprehended in a public place. As such, learned counsel for the State argues that Section 42 is not attracted to the present case.
5. Insofar as the 2022 Rules is concerned, 5 grams is the quantity of sample which is required to be sent for

chemical examination. Thus, the petitioners' argument on such score is not tenable in law.

6. We find from the First Information Report that at about 18:20 hours, the raiding party arrived at the concerned junction and called two independent witnesses, whose addresses have been shown to be of the concerned locality.
7. As per First Information Report, the witnesses were present there and were made aware about the information and in their presence, the search and seizure took place.
8. We do not find, per se, any illegality in the witnesses being called and informed about the apprehension of the raiding party immediately prior to the arrest. The provisions of law have been sufficiently satisfied since the witnesses are of the concerned locality.
9. Insofar as the ACP acting as Gazetted Officer, there is substance in the argument of the State that the ACP, being a Gazetted Officer and not a part of the raiding party, is not debarred from acting as a Gazetted Officer for the purpose of search and seizure under the NDPS Act.
10. The petitioners have raised a more fundamental issue as to whether the scooty, which the petitioners were riding,

is to be treated as a private space, beyond the purview of Section 43 of the NDPS Act.

11. The judgment of the Supreme Court cited by the petitioners in *Boota Singh & Ors. Vs. State of Haryana* clearly records that the vehicle, which was being discussed in the said judgment, was a jeep and not an open two-wheeler as in the present case.
12. A jeep being a closed vehicle, owned by a private person, might have been held by the Supreme Court in the context of Section 43 of the NDPS Act not to be a “public place”, since the confines of such a vehicle provide privacy to the passengers.
13. However, an open scooty, which the petitioners were riding on a public road, need not necessarily be classified as a private space as opposed to a public space, as contemplated in Section 43 of the NDPS Act, even in deference to the ratio laid down by the Supreme Court, the logic thereof does not apply to a scooty, which is an open two-wheeler which was being driven in public place at the relevant juncture.
14. Section 43 deals with power of seizure and arrest in public place. Section 42 of the NDPS Act, on the other hand, contemplates that if the seizure is from any building, conveyance or place, as contemplated therein,

the rigours of the said section apply. A Scooty in motion in a public place cannot strictly be labelled as a “building, conveyance or place”.

15. In any event, the said question is at best arguable, and, as such, fit for being decided in the trial of the case and not within the limited confines of a bail application.

16. As yet, charges have not been framed but only the charge sheet having been filed. As such, we find it premature to grant bail to the petitioners, particularly since the charges have not yet been framed.

17. Accordingly, at this stage we are not confident that the exceptions to the rigours of Section 37 of the NDPS Act can be attributed to the petitioners.

18. Accordingly, CRM (NDPS) 632 of 2023 is dismissed.

19. However, liberty is granted to the petitioners to seek bail subsequently, upon charges being framed and the commencement of trial.

(Sabyasachi Bhattacharyya, J.)

(Uday Kumar, J.)