

D/L.29.
September 22, 2023.
MNS

**Calcutta High Court
In The Circuit Bench at Jalpaiguri
Appellate Side**

CRM (NDPS) 737 of 2023

In Re: - An application for bail under Section 439 of the Code of Criminal Procedure filed on 11.09.2023 in connection with Bhaktinagar Police Station Case No. 158 of 2023 dated 03.03.2023 under Sections 21(c)/22(c)/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

And

In the matter of: Suresh Roy and another

.... Petitioners

Mr. Sourav Ganguly,
Mr. Bibek Tarafder,
Mr. Gopal Roy

... for the petitioners

Mr. Abhijit Sarkar,
Mr. Subhasis Misra

... for the State.

1. Learned counsel for the petitioners argues that the provisions of Section 41B of the Cr.P.C. were violated inasmuch as both the named witnesses were not of the exact locality of apprehension of the petitioners.
2. It is submitted that one of the attesting witnesses, even as per the FIR and the charge-sheet, resides more than six kilometers away from the spot and the other about four kilometers away from the spot.
3. The only person who signed as witness, namely Palash Roy, is of an area which is about six kilometers away from the spot and, as

such, cannot be termed as a witness who is a respectable member “of the locality where the arrest is made”.

4. It is further argued that just above commercial quantity of the substance was seized by the police. However, since the same was recovered from a zipper plastic, it had to be recovered from the person of either of the two, whereas the complaint shows it was recovered from the vehicle.
5. However, in the absence of such mention, it cannot be said that either of the petitioners is guilty of carrying above commercial quantity of the substance at the relevant point of time.
6. That apart, it is argued that allegedly the witnesses were called at about 11.20 hours whereas the arrest was made at about 2.42 p.m., the time lapse between which is sufficient to dislodge the presumption under Section 37 of the NDPS Act.
7. Learned counsel appearing for the State argues that the expression “called” the witnesses does not necessarily mean that they were produced by the police from some other area. Even from the statement made under Section 161 of the Cr.P.C of the signing witness, it is seen that he was present on the spot when he was called as a witness.
8. That apart, since the seizure is of above-commercial quantity, it is argued that the technical point taken by the petitioners as to recovery from a person of either of the accused persons, need not be looked into.

9. Upon hearing learned counsel for the parties, we are of the opinion that even abiding by the ratio laid down in the judgment cited by the petitioners, that is, a co-ordinate Bench judgment in ***Laxmi Sardar and another Vs. the State of West Bengal reported at 2015 SCC OnLine Cal 2281***, we are of the opinion that the seizure and arrest are not vitiated.
10. In the present case, Column 10 was filled up duly by one of the witnesses, who is a resident of the same police station area which for the purpose of Section 41B(b)(i) of the CrPC, falls within the zone of "locality of arrest".
11. Secondly, since substance above commercial quantity was recovered from the petitioners, it is a matter of argument in trial as to whether the same was seized from the person of one of the petitioners or both together.
12. Thirdly, the discrepancy alleged, that is, of about the lapse of two hours between the witnesses being called and the arrest being formally made, it is not so incredible so as to vitiate the restrictions under Section 37 of the NDPS Act.
13. The entire process, from apprehension and seizure to the signing and filling up of the memo of arrest, might very well take up two hours, which is not an absurd proposition.
14. In such view of the matter and also taking into account the rigours of Section 37 of the NDPS Act, we are not inclined to grant bail to the petitioners.

15. Accordingly, CRM (NDPS) 737 of 2023 is dismissed.

(Sabyasachi Bhattacharyya, J.)

(Uday Kumar, J.)