

14.08.2024.

Item No. 2

Court No.1

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*CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI
APPELLATE SIDE*

C.R.M. (NDPS) No. 323 of 2024

In Re:- An application for bail under Section 439 of the Code of Criminal Procedure, 1973 filed on 18.07.2024 in connection with Jaigaon Police Station Case No. 26 of 2024 dated 31.01.2024 under Sections 21(c)/25/29 of the Narcotic Drugs & Psychotropic Substance Act, 1985.

And

In the matter of: **Akash Mangar @ Ashok Mangar.**

...Petitioner.

Mr. Sourav Ganguly,
Mr. Bibek Tarafder,
Mr. Gopal Roy,
Ms. Rishita Chakraborty.

...For the petitioner

Mr. Nilay Chakraborty, ld. APP,
Ms. Sukanya Adhikary.

....For the State

1. Mr. Sourav Ganguly, the learned Advocate appearing on behalf of the petitioner has prayed for bail on behalf of his client citing infirmities in the search, seizure and arrest not only under the Narcotic Drugs & Psychotropic Substance Act, 1985 but also of the Code of Criminal Procedure.

2. The brief facts relevant to the instant case are that on 31st January, 2024, S.I. Arup Baidya of Jaigaon Police Station on receiving information of contraband, likely to pass through at Bhanu Bhakta Toll near Rathi Maidan Ground, Daldabari under Police Station – Jaigaon, District – Alipurduar prepared a search party and set up a check point on the road.

3. In course of inspecting vehicles, the Investigating Officer of the case spotted the petitioner along with another person on a motorcycle. The petitioner was carrying a grey coloured back pack on which the word “Arctic Mountain” was written. Upon seeing the police party approaching him fled. The petitioner was chased and arrested.

4. The petitioner was searched in the presence of two witnesses, namely, Rajesh Sharma and Suman Thapa. 2304 SPSPHEN+ Capsules were recovered from the petitioner’s back pack. The said tablet is normally used for specific medicinal purposes. The said capsules contain the drug called Trihexyphendiyl. It is narcotic drug.

5. The associate, who was riding with the petitioner in the said motorcycle, escaped. The petitioner was arrested under a Memo of Arrest in which one Divesh Mangar was stated to be present. It further transpires from the FIR dated 31st January, 2024 that the petitioner in course of interrogation has confessed the name of his associate being Adarsh Limboo. He also named several persons to whom he received supplies and the specific name of the person to whom he was going to deliver the aforesaid contraband.

6. He was produced before the Special Court on the next date. Bail was denied. He is in custody and hence the instant bail application.

7. Mr. Ganguly, learned Advocate for the petitioner urged twofold arguments, assailing the arrest as also the process adopted by the complainant, Sub-Inspector of Police in the seizure and arrest.

8. In so far as the Memo of Arrest is concerned, Mr. Ganguly, would argue that the name Divesh Mangar in Column 10 of the Memo of Arrest, is without the father's name and address. It is submitted that the Divesh Mangar is not a relative of the petitioner. It is argued that no respectable person of the Society or the relative of the petitioner has signed on the Memo of Arrest. Reference in this regard is made to a decision of a Co-ordinate Bench of this Court in the case of **Laxmi Sardar & Anr. Vs. – The State of West Bengal** reported in **2015 SCC OnLine Cal 2281** and another decision of a Co-ordinate Bench of this Court in the case of **Mangal Sarkar @ Guddu – Vs.- The State of West Bengal** being an order dated 22nd July, 2024 in C.R.M. (NDPS) No. 248 of 2024.

9. Mr. Ganguly, therefore, submits that the infirmity in the Memo of Arrest as indicated above constitutes violation of Section 41B of the Code of Criminal Procedure and would actually acquit the petitioner in the trial. It is, therefore, submitted that the petitioner ought to be granted bail on this ground alone.

10. It is next argued by Mr. Ganguly that the seizure was effected in terms of Section 43 of the Narcotic Drugs & Psychotropic Substance Act, 1985 which has no manner

of application in the facts of the case. The arrest and seizure were before the sunset. The complainant SI, who was required to comply with the provisions of Section 42 of the Narcotic Drugs & Psychotropic Substance Act, 1985 i.e. first reduce information that he had in writing and to subsequently inform his superior officer within 72 hours and confirm his actions as proposed i.e. intended to arrest, search and seizure was not done in this case.

11. It is submitted that there is no such document available in the case diary indicating that the mandate under Section 42(2) of the NDPS Act, 1985 has not been complied with. Counsel for the petitioner relies upon a decision of the Hon'ble Supreme Court of India in the case of ***State of Rajasthan – Vs. – Jagraj Singh @ Hansa*** reported in ***(2016) 11 Supreme Court Cases 687*** particularly paragraph 21 thereof, the case of ***Karnail Singh – Vs. – State of Haryana*** reported in ***(2009) 8 Supreme Court Cases 539*** paragraph 32 thereof and the decision of the Single Judge of Punjab & Haryana High Court in the case of ***Gurjant Singh – Vs. – State of Haryana*** reported in ***1999 SCC OnLine P&H 1351*** particularly paragraph 7 thereof. The Punjab & Haryana High Court relied upon a decision of the Hon'ble Supreme Court of India in the case of ***State of Punjab – Vs. – Balbir Singh*** reported in ***(1994) 3 Supreme Court Cases 299***.

12. Mr. Nilay Chakraborty, learned Counsel for the State relies upon a decision in the case of ***Union of India & Ors. – Vs. – Nawaz Khan*** reported in ***(2021) 10 Supreme Court Cases 100*** on the scope of Section 42 of the Narcotic Drugs & Psychotropic Substance Act, 1985 has made detailed arguments opposing the submissions of Mr. Ganguly.

13. The Investigating Officer of the case is personally present in Court. He has placed an E-mail of the complainant to his superior sent at 00:05 hours on 1st February, 2024 i.e. in less than 10 hours, intimating and confirming his actions to his superior officer under Section 42(2) of the Act of 1985.

14. In so far as the requirement of the document to form part of the case diary, Mr. Ganguly relies upon a decision in the case of ***Mahabir Singh – Vs. – State of Haryana*** reported in ***(2001) 7 Supreme Court Cases 148***. This Court, however, finds that the Hon'ble Supreme Court has held that firstly entries in the case diary cannot be used against an accused person. If such entries are required to be used, the procedure under Section 145 of the Evidence Act, 1872 is required to be followed. Paragraphs 13 and 14 of the said judgment are set out hereinbelow:

“13. If a Public Prosecutor failed to get the contradiction explained as permitted by the last limb of the proviso to Section 162(1) of the Code, is it permissible for the court to invoke the powers under Section 172 of the Code for explaining such contradiction? For that purpose we may examine the scope of Section 172 of the Code. That section deals with the diary of proceedings in investigation. Sub-section (1) enjoins on the investigating officer to enter in a

diary the time at which he began and the place or places visited by him during the course of investigation. Such entries should be made on a day-to-day basis. Sub-sections (2) and (3) of Section 172 read thus:

“172. (2) Any criminal court may send for the police diaries of a case under enquiry or trial in such court, and may use such diaries, not as evidence in the case, but to aid it in such enquiry or trial.

(3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the court; but, if they are used by the police officer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer, the provisions of Section 161 or Section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply.”

14. *A reading of the said sub-sections makes the position clear that the discretion given to the court to use such diaries is only for aiding the court to decide on a point. It is made abundantly clear in sub-section (2) itself that the court is forbidden from using the entries of such diaries as evidence. What cannot be used as evidence against the accused cannot be used in any other manner against him. If the court uses the entries in a case diary for contradicting a police officer it should be done only in the manner provided in Section 145 of the Evidence Act i.e. by giving the author of the statement an opportunity to explain the contradiction, after his attention is called to that part of the statement which is intended to be so used for contradiction. In other words, the power conferred on the court for perusal of the diary under Section 172 of the Code is not intended for explaining a contradiction which the defence has winched to the fore through the channel permitted by law. The interdict contained in Section 162 of the Code, debars the court from using the power under Section 172 of the Code for the purpose of explaining the contradiction.”*

15. This Court is of the view that ***Mahabir Singh (supra)*** decision referred to hereinabove lays down that case diary entries maintained under Section 172 of the Code of Criminal Procedure cannot be used to confront an accused or the police against the evidence on record. It follows therefore that, while it is desirable that the intimation under Section 42(2) of the NDPS Act, 1985 is part of the case diary, its absence in the case diary cannot

be fatal to a prosecution. The prosecution can always prove the said intimation independently in the trial.

16. Hence, to establish infraction of Section 42(2) of the NDPS Act, 1985, the procedure under Section 145 of the Evidence Act, 1872 is required to be followed, which can only be done in course of trial.

17. At this stage, given the fact that the electronic mail intimation to the superior officer has been placed by the Investigating Officer present in the Court, this Court cannot assume any infraction of Section 42(2) of the NDPS Act, 1985 at this stage. The decisions of **Karnail Singh (supra)** and **Jagraj Singh (supra)** would also consequently have no manner of application for the purpose of instant application for bail.

18. In so far as the first argument is concerned, indeed it is true that the named witness in Column 10 of the Memo of Arrest has signed as “Divesh Mangar”. His name does not feature in the list of witnesses of the prosecution in the charge-sheet. The charge-sheet refers to the witnesses at the time of seizure, namely, Rajesh Sharma and Suman Thapa.

19. This Court has held in several cases that a mere infraction of column 10 of the Memo of Arrest would not ipso facto amount to any atrocity by the police and consequently infraction of the Guidelines of the Hon’ble Supreme Court of India in the case of **Dilip Kumar Basu – Vs. – The State of West Bengal** reported in (1997) 4

Supreme Court Cases 416. There are several reasons that have been referred to by one of us (sitting in another Division Bench) in column 10 of the Memo of Arrest being left blank or the person mentioned in the Memo of Arrest not being either a relative or any respectable member of the society.

20. It is unlikely that a relative of an arrested person would be available at a public place away from his house. It is also a reality that most people are reluctant to sign on an arrest memo as they feel intimidated by a police raid or arrest and to depose in a criminal trial. The complainant could easily have put in the names of the two witnesses, who were there, namely, Rajesh Sharma and Suman Thapa in Column 10 of the Arrest Memo as well, since seizure was done immediately at the time of arrest.

21. The object and purpose behind inserting column 10 and insisting on its mandatory compliance as directed by the Hon'ble Supreme Court of India in the case of **Dilip Kumar Basu – Vs. – The State of West Bengal** reported in **(1997) 4 Supreme Court Cases 416** as fairly elucidated by Mr. Ganguly, learned Counsel for the petitioner appear to have been complied with.

22. The other parts of the FIR which indicate that, the petitioner was trying to flee after seeing the police, the escape of his associate Adarsh Limboo and the naming of the source and the destination of the contraband and seizure of the quantity of the contraband of offences

under the NDPS Act of 1985 are clear prima facie evidence before this Court of the prosecution's case against the petitioner.

23. It further appears that ***Laxmi Sardar & Anr. (supra)*** was rendered when legality of a conviction under the Narcotic Drugs & Psychotropic Substance Act, 1985 was being considered by the High court after the trial was completed. The said decision cannot be applied in a bail plea before the trial has commenced.

24. In the backdrop of the above, this Court is of the prima facie view that no infraction of any procedure under the NDPS Act, 1985 or the provisions of the Code of Criminal Procedure has been established, for the purpose of consideration of an application for bail under Section 483 of the BNSS, 2023.

25. Recording due appreciation for the efforts and the arguments of Mr. Sourav Ganguly, the learned Counsel for the petitioner and Mr. Nilay Chakraborty, learned Counsel for the State, the application for bail is rejected.

26. C.R.M. (NDPS) No. 323 of 2024 is, thus, dismissed.

27. All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(Ajay Kumar Gupta, J.)

(Rajasekhar Mantha, J.)

