

Bail Appln. No. 7 of 2021

Mr.Lunkhomang Haokip, aged about 24 years.  
s/o (L) Jangkholan Haokip, a resident of Bazar Veng,  
Tuibuang, Tuibong, P.O. & P.S. Churachandpur,  
District Churachandpur, Manipur.

..... Applicant

- Versus -

Union of India, represented by Intelligence Officer,  
Narcotics Control Bureau, Sub-Zonal Unit Imphal,  
Tiddim Road, Opposite to Airport Complex,  
Imphal West, Manipur-795140.

..... Respondent

For the applicant	::	Mr. Serto T. Kom, Advocate
For the respondent	::	Mr. W. Darakeshwar, Sr.PCCG
Date of reserving judgment	::	16.07.2021
Date of pronouncement	::	<b>27.07.2021</b>

**BEFORE**

**HON'BLE THE CHIEF JUSTICE MR. SANJAY KUMAR**

**The CJ:**

[1] Heard Mr. Serto T. Kom, learned counsel for the applicant, and  
Mr. W. Darakeshwar, learned Sr.PCCG, for the respondent-Union of India.

[2] The applicant is the accused in Special Trial No.54 of 2019 before the  
Special Court (ND & PS), Manipur [Ref: NCB Crime (FIR) No.03/04/NCB/Imp/ATS/  
CL-2019 dated 30.01.2019, registered under Sections 8(c), 22(c), 25, 28, 29, 30, 35  
and 60 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (*for brevity*, 'the  
NDPS Act'). By way of this application filed under Section 439 Cr.P.C. read with  
Section 37 of the NDPS Act, he seeks to be enlarged on regular bail.

[3] The applicant claims to be a school van driver, by profession, in Churachandpur Town, Manipur. According to him, as January, 2019, was an off-season for schools in Churachandpur Town, he offered his services to drive vehicles on daily hire basis to earn his livelihood. In that process, on 28.01.2019, Thangminlen Haokip, his cousin, asked him to drive one Mrs. Nengneichong Lhungdim @ Chochong of Khomoi, Churachandpur, to Moreh and back in her car on the next day. The applicant claims that he accepted this offer on payment of ₹500/- as driving charges along with free food. He further claims that on 29.01.2019, the said lady and he drove from Churachandpur to Moreh in her Hyundai Santro Car bearing Registration No. MN04A-2733. On the return journey from Moreh to Churachandpur, when they reached the check-post of the 12<sup>th</sup> Assam Rifles at Khundengthabi at around 3pm, he stopped the car for verification and checking. The lady, Mrs. Nengneichong Lhungdim, went to the other side of the check-post on foot, which was the normal practice as per the applicant, as all occupants of vehicles would alight and go on foot to the other side of the gate. However, during the checking, a Subedar of the 12<sup>th</sup> Assam Rifles detected WIY tablets, 64,000 in number, later confirmed as containing Methamphetamine, within the vehicle. The applicant claims that he had no knowledge of the existence of these drugs in the car and when he looked for the lady who had hired him, he could not find her. The applicant states that he was thereupon arrested by Gajender Singh, Subedar/General Duty of the 12<sup>th</sup> Assam Rifles, who had himself conducted the search, seizure and counting of the tablets, at around 7.10 am on 30.01.2019, after being detained the whole night, and he remained in custody since then.

[4] The Narcotics Control Bureau, Imphal, filed a charge-sheet/final report against the applicant on 17.07.2019 before the Special Court (ND & PS), Manipur at Lamphelpat. He was charged with offences under Sections 8(c), 22(c), 25, 28, 29, 30, 35 and 60 of the NDPS Act. Charges were framed against him by the Special Court on 13.12.2019 and the Investigating Officer was examined as the first witness on 20.01.2020. While so, the applicant filed Criminal Petition No.8 of 2020 under Section 482 Cr.P.C. before this Court to quash the charge-sheet filed against him. By order dated 24.02.2020 passed therein, this Court directed the Special Court not to proceed with the case till the next date of hearing. The said order was extended from time to time and is stated to be still operative. The trial could not continue thereafter and remained stayed due to the order secured by the applicant himself. The applicant's bail application in Criminal Misc.(B) Case No. 193 of 2020 was dismissed by the Special Court on 18.11.2020. Hence, this application.

[5] It is a matter on record that 6.160 kgs of Methamphetamine, a psychotropic substance specified under the NDPS Act, was recovered from under the rear seat of the vehicle driven by the applicant on the fateful day. 'Methamphetamine' finds mention at Sl.No.159 of the Table in the 'Notification specifying small quantity and commercial quantity' issued by the Central Government. The commercial quantity for Methamphetamine is 50 grams.

Section 37 of the NDPS Act states that no person accused of an offence involving a commercial quantity shall be released on bail unless the Public Prosecutor is given an opportunity to oppose the bail application and, in the event the Public Prosecutor opposes the application, the Court has to be satisfied that

there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail.

In keeping with the statutory requirement, Mr. W. Darakeshwar, learned Sr. PCCG, opposed this bail application and filed an affidavit-in-opposition along with annexures and written arguments. Mr. Serto T. Kom, learned counsel, also filed his written arguments. Both the learned counsel relied on case law.

[6] Essentially, two grounds are pressed into service by Mr. Serto T. Kom, learned counsel, in support of his plea that the applicant should be granted bail at this stage. Firstly, he would contend that there was violation of the mandatory provisions of the NDPS Act and in consequence, the case against the applicant stands vitiated. More particularly, he would assert that only an officer empowered in writing either by the Central Government or the State Government, in terms of Section 42 (1) of the NDPS Act, could effect search, seizure and arrest if he had reason to believe that an offence was committed under the provisions of the NDPS Act. Learned counsel would point out that Gajender Singh, Subedar/General Duty of the 12<sup>th</sup> Assam Rifles, had no such order of empowerment and therefore, the search, seizure and arrest effected by him on that day was in clear violation of the statutory mandate. Secondly, the learned counsel would contend that as the applicant has remained in custody for a long time and there is no possibility of the trial concluding any time soon, he should be given the benefit of bail pending the trial. He would point out that the applicant has no criminal history and there is no chance of his absconding or evading the reach of the law as he is married and has firm roots in society. He would assert that the requirements of Section 37 of the Act of 1985 also stand satisfied as reasonable grounds exist to believe that the applicant

is not guilty of the offences alleged and there is no reason to believe that he is likely to commit any offence, as he has no criminal past. He would pray that bail be granted to the applicant by imposing suitable conditions.

[7] *Per contra*, Mr. W. Darakeshwar, learned Sr. PCCG, would assert that grant of bail is not the rule but an exception in a case involving a commercial quantity of a prohibited drug or substance. He would contend that the general principles of law applicable in an ordinary bail application under Section 439 Cr.P.C. would not apply in such a case. He would further contend that, as this was a case of a search, seizure and arrest without prior knowledge and while the psychotropic substance was being transported, the provisions of Section 43 of the NDPS Act would be attracted and there was, therefore, no necessity of satisfying the provisions of Section 42 of the NDPS Act. He would point out that the delay of the trial is squarely attributable to the applicant himself as he secured a stay order in February, 2020. Learned counsel would assert that the case against the applicant stands on a firm footing and no grounds are made out for grant of bail at this stage.

[8] The validity or otherwise of the prosecution's case against the applicant would be the subject matter of Criminal Petition No.8 of 2020 pending before this Court, wherein he sought quashing of the charge-sheet filed against him. However, it would also have an impact on his continued incarceration pending disposal of that case/completion of the trial. If the very institution of the case is mired in illegality, in the context of the mandatory procedure, it would have a direct bearing on the applicant's entitlement to grant of bail. Therefore, to that limited extent, this Court is necessarily bound to examine that aspect also.

Chapter V of the NDPS Act deals with 'Procedure' and comprises Sections 41 to 68. Sections 41, 42, 43, 49 and 50 are of relevance.

Section 41 pertains to the power to issue a warrant and authorization. Sub-section (1) thereof provides that a specifically empowered Magistrate may issue a warrant for the arrest of any person, whether by day or by night, whom he has reason to believe has committed an offence under the NDPS Act, or for the search of any building, conveyance or place, whether by day or by night, if he has reason to believe that any such offence-related narcotic drug or psychotropic/controlled substance, etc., is kept or concealed there. Section 41(2) provides that a duly empowered gazetted officer of the named departments of the Central Government, or a duly empowered officer of the named departments of the State Government, or any subordinate officer authorized by them, such subordinate officer being above the rank of peon, sepoy or constable, may arrest a person or search a building, conveyance or place, whether by day or by night, if such duly empowered gazetted officer/officer has reason to believe, from personal knowledge or from information given by any person and taken in writing, that a person committed an offence under the NDPS Act or that such offence-related narcotic drug or psychotropic/controlled substance, etc., is kept or concealed there. Section 41(3) states that the officer to whom a warrant is issued under sub-section (1), the duly empowered gazetted officer/officer and the subordinate officers authorized by them, under Section 41(2), shall have all the powers of an officer acting under Section 42.

Section 42 of the NDPS Act speaks of the power of entry, search, seizure and arrest without warrant or authorization. Section 42(1) states that a duly empowered officer of the named departments of the Central or State Governments,

being superior in rank to a peon, sepoy or constable, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug or psychotropic/controlled substance in respect of which an offence under the NDPS Act has been committed or any document or other article liable for seizure is kept or concealed in any building, conveyance or place, may, between sunrise and sunset, enter into and search it even by force and seize any drug, substance and other incriminating materials. At that time, he can also detain, search and arrest any person whom he has reason to believe to have committed any offence under the NDPS Act. The first *proviso* thereunder states that such power of search, seizure and arrest shall be exercised only by an officer not below the rank of Sub-Inspector in the case of a manufacturer of a drug/substance, who has a license under the NDPS Act. The second *proviso* states that if the officer has reason to believe that a search warrant/ authorization cannot be obtained without the risk of concealment of evidence or escape of an offender, he may enter and conduct a search even between sunset and sunrise after recording the grounds of his belief. Section 42(2) states that an officer taking down information in writing under sub-section (1) or recording grounds of belief under the second *proviso*, shall communicate it to his immediate official superior.

Section 43 of the NDPS Act deals with the power of seizure and arrest in a public place or in transit. It states that any officer of any of the departments mentioned in Section 42 may seize in any public place or in transit, any narcotic drug or psychotropic/controlled substance in respect of which he has reason to believe an offence under the NDPS Act has been committed, and, along with such drug or substance, any animal or conveyance or article, etc., liable to confiscation

under the NDPS Act. He can also detain and search any person whom he has reason to believe to have committed an offence under the NDPS Act, and if such person has any narcotic drug or psychotropic/controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company. The 'Explanation' states that 'public place', for the purposes of this Section, includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

Section 49 of the NDPS Act provides the power to stop and search a conveyance. It states that an officer authorized under Section 42 may stop a conveyance if he has reason to suspect that it is, or it is about to be, used for the transport of any narcotic drug or psychotropic/controlled substance and the provisions of the NDPS Act would be contravened thereby.

Section 50 of the NDPS Act prescribes the conditions under which search of persons shall be conducted. Sub-section (1) thereof provides that when any officer authorized under Section 42 is about to search any person under the provisions of Sections 41, 42 or 43, he shall, if such person so requires, take him without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. The other sub-sections of Section 50 are not of relevance presently.

[9] Certain crucial aspects and differences in the context of the above statutory provisions need to be identified and recognized. It may be noted that, as per Section 41(2) of the NDPS Act, a duly empowered gazetted officer of the Central Government or a duly empowered officer of the State Government or the officers authorized by them may conduct a search or effect a seizure or arrest at any time,



be it day or night, if such duly empowered gazetted officer/officer has reason to believe that a person committed an offence under the NDPS Act or has kept or concealed any such offence-related drug, substance or other material. His reason to believe may stem from personal knowledge or from information given by any person and taken in writing.

However, under Section 42(1) of the NDPS Act, the Central and the State Governments can duly empower any officer of the named departments, as long as he is superior in rank to a peon, sepoy or constable, and such officer may enter, search, seize and effect an arrest, as provided in the Section, at any time during the day, i.e., between sunrise and sunset. He is required to have reason to believe, be it from personal knowledge or from information given by any person and taken down in writing, that any drug or substance in respect of which an offence under the NDPS Act has been committed or any document or other article liable for seizure is kept or concealed in the building, conveyance or place. At that time, he can also detain, search and arrest any person whom he has reason to believe to have committed an offence under the NDPS Act. Section 42(1) covers all duly empowered officers above a particular rank. However, it does not provide for any authorization being given to subordinate officers by the officers duly empowered thereunder. Be it noted that the officers duly empowered under Section 41(2) clearly stand on a higher footing than the officers duly empowered under Section 42(1) inasmuch as their power of search, seizure and arrest extends to nighttime also. The duly empowered officers under Section 42(1) do not need a warrant for daytime searches, seizure and arrests, but to exercise such power during the nighttime, i.e., after sunset and before sunrise, they would require a warrant under Section 41(1)

or an authorization under Section 41(2). Only one exception is made under the second *proviso*, which states that if the duly empowered officer under Section 42(1) has grounds to believe that the time consumed in securing a warrant/authorization would facilitate concealment of evidence or escape of an offender, he may proceed to exercise the power of entry, search, seizure and arrest even during the nighttime without a warrant/authorization. He is however required to record the grounds for such belief and must convey the same to his superior officer. So too, the information received from a person and taken down in writing must be informed to the immediate superior officer.

Section 43 is presently the bone of the contention as the ambiguity in the provision lends it to contradictory interpretations. It states that 'any officer of any of the departments mentioned in Section 42 may' seize in any public place or in transit any narcotic drug or psychotropic substance and so on and so forth. There is no comma or other punctuation mark in the verbatim portion extracted above, within the inverted commas. The sentence, read literally, could encompass all officers of the departments mentioned in Section 42 or it could be restricted to any officer in such departments as mentioned in Section 42. If the first interpretation is accepted then it would mean that an officer need not be duly empowered or authorized and could straightaway exercise power under Section 43 to seize and also effect arrest. The latter interpretation would mean that only those officers covered by Section 42 would have the power to seize and arrest even under Section 43. Sections 49 and 50(1), pertaining to stopping/searching of conveyances and search of a person respectively, shed some illumination for resolving this controversy as they explicitly state that only an authorized officer under Section 42 can carry out such exercises.

[10] The above being the relevant scheme of this law, it would be apposite to now consider precedential law on the subject. Reference was made by both sides to **State of Punjab vs. Balbir Singh [(1994) 3 SCC 299]**, wherein the Supreme Court dealt with the interpretation of various provisions of the NDPS Act. The cases before the Supreme Court involved search, seizure and arrests by police officers, not on prior information, but on reasonable suspicion that offences punishable under the NDPS Act had been committed. The Supreme Court found, on facts, that the police officers had not proceeded under the provisions of the NDPS Act, but under the provisions of the Code of Criminal Procedure, 1973. It was noted that, in terms of Section 51 of the NDPS Act, the Code of Criminal Procedure, 1973, has applicability only in so far as it is not inconsistent with the provisions of the NDPS Act.

Referring to Section 43 of the NDPS Act, the Supreme Court noted that this provision was slightly different from Section 42 in certain respects. It was observed that under this provision any empowered officer under [Section 42](#) has power to seize, detain, search or arrest in a public place or in transit if he has reason to believe that an offence punishable under Chapter IV relating to such drug or substance has been committed and seize any document or other article which may furnish evidence of the commission of such offence and can seize any animal or conveyance or article liable to confiscation and can detain and search any person similarly. It was further observed that the empowered officer while acting under [Section 43](#) need not record any reasons for his belief and this Section also did not mention anything about the empowered officer having prior information given by any person or about recording the same, as compared to [Section 42](#).

The Supreme Court then recorded that certain embargos were envisaged under [Sections 41](#) and [42](#) of the NDPS Act as only a Magistrate empowered under [Section 41](#) could issue a warrant for search and arrest where he had reason to believe that an offence under Chapter IV had been committed and under sub-section (2), only a gazetted officer or other officers mentioned and empowered therein could give an authorization to a subordinate to search and arrest if such officer had reason to believe that an offence had been committed. The Supreme Court further noted that under Section 42, only officers mentioned therein and duly empowered could make the arrest or search as provided, if they had reason to believe from personal knowledge or from information, and in both these provisions there are two important requirements - that the Magistrate or the officers mentioned therein firstly be empowered and they must have reason to believe that an offence under Chapter IV has been committed or that such arrest or search was necessary for other purposes mentioned in the provision. It was opined that the Legislature intended that only certain Magistrates and certain officers of higher rank, who were empowered, could act to effect the arrest or search and this was a safeguard provided, having regard to the deterrent sentences contemplated and with a view that innocent persons were not harassed. The Supreme Court therefore held that if the search or arrest contemplated under Sections 41 and 42 was made under a warrant issued by any other Magistrate or was made by an officer not empowered or authorized, it would *per se* be illegal and would affect the prosecution's case and, consequently, vitiate the trial.

In **Roy V.D. vs. State of Kerala [(2000) 8 SCC 590]**, the Supreme Court affirmed that no officer other than an empowered officer could take resort to Section 41(2) or exercise powers under Section 42(1) of the NDPS Act and observed that it would follow 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 authorized officer, under Section 41(2) of the NDPS Act, would lack sanction of law and be inherently illegal and, as such, cannot form the basis of a proceeding in respect of offences under Chapter IV of the NDPS Act and the use of such material by the prosecution would vitiate the trial.

In **State of Haryana vs. Jarnail Singh and others [(2004) 5 SCC 188]**, the Supreme Court observed that Sections 42 and 43 of the NDPS Act contemplate two different situations – Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. It was pointed out that if seizure is made under Section 42 between sunset and sunrise, the requirement of the *proviso* thereto has to be complied with but there is no such *proviso* in Section 43 and, therefore, it is obvious that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the *proviso* to Section 42 for searching the vehicle between sunset and sunrise. In that case, the search was conducted by a party that included a Superintendent of Police, a gazetted officer. Taking this into account, the Supreme Court observed that where the search is conducted by a gazetted officer himself, acting under Section 43 of the NDPS Act, it was not necessary to comply with the requirement of the *proviso* to Section 42 of the NDPS Act.

In **Hamidhbhai Azambhai Malik vs. State of Gujarat [(2009) 3 SCC 403]**, the Supreme Court held that Section 42 of the NDPS Act would be applicable only if the search is made by a police officer or authority upon prior information. However, when such information or intimation comes to the knowledge of the Investigating Officer in the course of regular patrolling or an investigation of some other offence, it is not necessary to follow in all cases the conditions incorporated in Section 42 of the NDPS Act.

[11] Exercise of powers under Sections 41 and 42 of the NDPS Act is therefore clearly delineated and defined, be it by the statute itself or through case law, but the issue presently is about the exercise of powers under Section 43, i.e., as to who can legally effect seizure and arrest thereunder. It may be noticed that the Supreme Court, in **Balbir Singh** (*supra*), opined that any empowered officer under Section 42 could exercise power under Section 43 and that an empowered officer, while acting under Section 43, need not record any reasons for his belief. This view of the apex Court is mirrored in Sections 49 and 50 of the NDPS Act. Be it noted that Section 43 speaks of seizure while the drug/substance is in transit. This would also include transport of such drug/substance in a conveyance. In that context, Section 49 makes it clear that only an officer authorized under Section 42 can stop and search a conveyance. Similarly, Section 50 speaks of only an officer authorized under Section 42 searching a person under the provisions of Sections 41, 42 and 43. The clear mention of Section 43 in this provision puts it beyond the pale of doubt that even in a public place or when the drug/substance is in transit, it is only an empowered/authorized officer who can conduct the search of a person. It would be paradoxical to state that, when illicit drugs/substances are in transit and the vehicle

carrying the same is stopped and searched by an ordinary police officer, an empowered officer would be required only to conduct the search of the persons found in such vehicle while the ordinary police officer can effect seizure of the drugs/substances and the arrest of such persons, though he is neither empowered nor authorized. Therefore, despite the lack of clarity in the opening phrase of Section 43, the other provisions of the NDPS Act shed clear light on its true meaning and by applying the doctrine of harmonious construction, it can be safely concluded that even under Section 43 of the NDPS Act, it is only a duly empowered or authorized officer who can legally effect seizure and arrest.

As pointed out in **Balbir Singh** (*supra*), in the event a police officer acting under the provisions of the Code of Criminal Procedure, 1973, comes across a person travelling in a vehicle transporting illicit drugs/substances, i.e., they are in transit, and he is not an empowered/authorized officer under the NDPS Act, the obvious thing he must do is to inform such empowered/authorized officer who would then proceed from that stage in accordance with the provisions of the NDPS Act. That is perhaps the reason why Section 43 does not refer to 'search' but only 'seizure' and 'arrest'. Search in a public place or of a vehicle, while the drug/substance is in transit, may be conducted in the course of patrolling by an ordinary police officer under the provisions of the Code but once he finds any illicit drugs/substances upon such routine search, he no longer has jurisdiction to proceed and must bring in an empowered/authorized officer to effect the seizure and arrest.

That, to the misfortune of the respondent herein, did not happen in the case on hand. Gajender Singh, Subedar/General Duty of the 12<sup>th</sup> Assam Rifles, was neither a gazetted officer nor was he an empowered/authorized officer, but he chose

to effect the seizure of the tablets as well as the arrest of the applicant on that fateful day. *Ex facie*, this lacuna impacts the very institution of the case against the applicant. This is an aspect that would be considered more fully in the applicant's quash petition but limited examination of the issue for deciding this bail application tilts the balance in his favour. The very foundation of the prosecution's case against the applicant having been rendered shaky, this Court is also inclined to accept the plea that the requisites of Section 37 of the NDPS Act are duly satisfied.

The Methamphetamine tablets were found concealed under the rear seat of the vehicle which did not belong to the applicant and he was in it only as a hired driver. His knowledge of the hidden tablets is therefore in the realm of uncertainty and it is very well possible that he is totally innocent. Presumption of a culpable mental state, under Section 35 of the NDPS Act, would arise only if such knowledge is established. That apart, the fact that he has no past criminal record and is a married man with roots in society, makes it improbable that he would commit any offence, if set free. Thus, upon testing his claim on these parameters also, this Court must hold in his favour.

In consequence, the applicant would be entitled to grant of bail at this stage. However, keeping in mind the pendency of his quash petition as well as the main case, it would be proper that suitable conditions be imposed therefor.

The bail application is accordingly allowed directing the release of the applicant, Lunkhomang Haokip, on regular bail in Special Trial No.54 of 2019 before the Special Court (ND & PS), Manipur [Ref: NCB Crime (FIR) No.03/04/NCB/Imp/ATS/CL-2019 dated 30.01.2019, upon his furnishing a personal bond for a sum of ₹50,000/- (Rupees Fifty Thousand only) along with one surety for a like sum to



the satisfaction of the Special Court (ND & PS), Manipur at Lamphelpat. Further, the applicant shall not leave the State of Manipur without the leave and permission of the Special Court and shall not offer any inducement, threat or promise to anyone connected with the case.

A copy of this order shall be supplied online/through WhatsApp to both the learned counsel.

CHIEF JUSTICE

*FR/NFR*

*Opendro/Bidya*