

Serial Nos. 02-05
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

BA No. 42 of 2023 with
BA No. 43 of 2023
BA No. 44 of 2023
BA No. 45 of 2023

Date of Decision: 15.09.2023

Shri Subrata Sarkar	Vs.	State of Meghalaya
Shri Swarnajit Sarkar	Vs.	State of Meghalaya
Shri Narayan Sarkar	Vs.	State of Meghalaya
Shri Mithan Sarkar	Vs.	State of Meghalaya

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr L. Khyriem, Adv.

For the Respondent(s) : Mrs N.G. Shylla, Sr. GA with
Ms A. Thungwa, GA

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

COMMON JUDGMENT (ORAL)

1. An application under Section 439 Cr.P.C has been preferred with a prayer for grant of bail to the accused person Sujit Sarkar, who was arrested and is still in judicial custody in connection with CrI. (NDPS) Case No. 25

of 2023 under Section 20(b)(ii)(c)/27(A)/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

2. Similar applications have also been filed on behalf of three other accused persons, namely Karnajit Sarkar, Sanjit Sarkar and Tutan Sarkar respectively, who were also arrested in connection with the said CrI. (NDPS) Case No. 25 of 2023.

3. The grounds raised in the respective applications aforementioned being identical and similar and also the argument advanced on behalf of the said accused persons being a common one, therefore, this Court deems it fit and proper to address the issue by passing a common judgment.

4. The genesis of the matter could be found in the FIR dated 19.06.2023 lodged by SI J. Dkhar of Khliehriat Police Station before the Officer-in-Charge, Khliehriat Police Station.

5. From the FIR what can be understood is that on the said date at about 5:15 pm, information was received from Shri B. Jyrwa, MPS, Additional Superintendent of Police, East Jaintia Hills District that one vehicle bearing No. TR 01 BT 0265, being Tata Tigor (white colour) was signaled to stop for checking by the Anti Narcotic Task Force (ANTF) but instead, the vehicle in a very rash and negligent manner at a very high speed ignored the said signal and, in the process, endangered the life of the ANTF staff and police personnel. However, the vehicle managed to be stopped by the police personnel and two occupants of the said vehicle, Shri. Joyel Das and Pranay Masudar along with Gourav Gupta were detained and the vehicle was checked on their voluntary statement that it was loaded with illegal contraband. Shri. Joyel Das has also stated that the owner of the

vehicle and the contraband was one Shri Karnajit Sarkar who, along with three of his friends are travelling in vehicle No. TR 01 BW 0231 are also proceeding together towards the same destination with the intention of transporting and smuggling of the said contraband. Along with Shri Karnajit Sarkar were present Shri Sujit Sarkar, Shri Tutan Sarkar and Shri Sanjit Sarkar. The ANTF along with police personnel recovered about 57 packets weighing about 251.301 kg of pressed grass, when tested proved to be marijuana.

6. All the above mentioned persons were then arrested in connection with a case registered as Khliehriat P.S. Case No. 47(6) of 2023 under Section 307/353 IPC read with Section 20(b)(ii)(c)/29 NDPS Act.

7. On investigation being launched, the Investigating Officer had recorded the statement of all relevant witnesses including the accused persons and after all the formalities have been completed, had filed the Final Form Report under Section 173 Cr.P.C with the charge sheet being presented before the court finding that a prima facie case under Section 20(b)(ii)(c)/29 NDPS Act is found well established against the accused persons mainly Shri Karnajit Sarkar, Shri Sujit Sarkar, Shri Tutan Sarkar Shri Sanjit Sarkar, Shri Gourav Gupta, Shri Pranay Majumdar and Shri Joyel Das. Section 27(A) NDPS Act was also added against the name of Shri Karnajit Sarkar, Shri Sujit Sarkar, Shri Tutan Sarkar and Shri Sanjit Sarkar.

8. As pointed out above, this Court is called upon to decide on the applications for grant of bail as regard the accused Shri Karnajit Sarkar, Shri Sujit Sarkar, Shri Tutan Sarkar and Shri Sanjit Sarkar.

9. Heard Mr L. Khyriem, learned counsel for the petitioners who has submitted that the accused persons aforementioned on being arrested, were initially remanded to police custody for three days and on being produced before the Judicial Magistrate First Class, Khliehriat on 22.06.2023 were then remanded to judicial custody and are still languishing in jail till date. In the meantime, an application for bail was preferred before the court of the learned Special Judge (NDPS) East Jaintia Hills District, Khliehriat but the same was rejected.

10. The learned counsel has further submitted that the charge sheet in the case has since been filed and relevant copies have also been received by the accused persons the matter being at the stage of consideration of charges before the trial court.

11. It is also the submission of the learned counsel that the materials on record would show that no ganja/contraband was found nor seized from the vehicle in which the accused persons were travelling. This fact was also evident from the observation of the I/O that no suspected contraband was recovered from the body of Shri Joyel Das and six others and no suspected contraband was recovered from the vehicle of Shri Karnajit Sarkar. The said contraband was only recovered from the vehicle of Shri Joyel Das.

12. This fact would only prove that the accused persons before this Court are not at all involved in the said case and they were implicated only on the basis of the statement given by Shri Joyel Das who is not even known to them, submits the learned counsel.

13. Another contention raised is that the charge sheet having been filed which means that investigation is completed, therefore, the accused persons

are no longer needed as far as questioning or interrogation is concerned and as such, they may be enlarged on bail to defend their case in course of trial.

14. In support of his contention, the learned counsel has referred to a number of decisions by the Hon'ble Supreme Court and High Courts dealing with cases under the NDPS Act which are listed as under:

- i. *Tofan Singh v. State of Tamil Nadu: (2021) 4 SCC 1*, paras 68, 155, 158.1, 158.2;
- ii. *State (By NCB) Bengaluru v. Pallulabid Ahmad Arimutta & Anr.: (2022) SCC 633*, paras 12;
- iii. *State of West Bengal v. Rakesh Singh alias Rakesh Kumar Singh: 2022 SCC Online SC 828*, paras 20, 44-54;
- iv. *Mohd-Muslim alias Hussain v. State (NCT of Delhi): 2023 SCC Online SC 352*, paras 18-21;
- v. *Kishore Bira v. State of Odisha: 2022 SCC Online Ori 2203*, paras 1-15.

15. Per contra, Mrs N.G. Shylla, learned Sr. GA appearing for the State respondent has submitted that the evidence against the accused persons herein are clinching and points to the guilt and complicity of the said accused persons and as such, considering the fact that a huge quantity of illegal contrabands being seized, about 251.301 kg or so of marijuana/ganja, the rigours of Section 37 of the NDPS Act would come into play and from the materials on record there is nothing to show that this Court can come to a prima facie finding that there are reasonable grounds

for believing that the accused persons are not guilty of such offence and that they are not likely to commit the offence, if enlarged on bail.

16. In support of the stand of the State in this matter the learned Sr. GA has referred to the following decisions:

- i. *Union of India through Narcotics Control Bureau Lucknow v. MD. Nawaz Khan: (2021) 10 SCC 100*, paras 25, 26, 27, 28, 29 and 30;
- ii. *Union of India v. Ajay Kumar Singh alias Pappu: (2023) SCC Online SC 346*, paras 14, 16 and 17;
- iii. *Narcotic Control Bureau v. Mohit Aggarwal: 2022 SCC Online SC 891*, paras 14, 15, 16, 17 and 18.

17. Having heard the argument advanced by the learned counsel for the respective parties, this Court has considered the same and has also perused the copy of the case dairy, including the charge sheet filed before the trial court.

18. Facts and circumstances as indicated above, what is apparent is that the main thrust of the petitioners' argument is that the statement of the accused persons in question, allegedly being recorded by the I/O presumably under Section 67 of the NDPS Act cannot be taken note of by this Court as such statement is deemed to be a confessional statement and given before a police officer and is, therefore, hit by the provision of Section 25 of the Evidence Act which makes statement made before a police officer inadmissible in evidence. The case of Tofan Singh(supra) relied upon by the petitioners has extensively dealt with this aspect of the

matter and has, at para 158.1 of the same held that officers who are invested with powers under Section 53 of the NDPS Act are 'police officers' within the meaning of Section 25 of the Evidence Act and consequently, any confessional statement made to such officer(s) would be barred under Section 25 of the Evidence Act.

19. In the case of Phool Chand(supra) relied upon by the petitioners, the facts of the case therein are almost similar to the facts in this case inasmuch as on the strength of the confession or statement made by a co-accused implicating the accused/petitioner Phool Chand in the case, he was arrested accordingly. The Hon'ble Jammu & Kashmir High Court taking note of the authority rendered in the Tofan Singh case, has held that irrespective of the rigours of Section 37 of the NDPS Act, the petitioner therein is entitled to bail.

20. In the said case of Phool Chand(supra), the only available material found in the judgment is that it was on the basis of the statement of the co-accused therein, that is, Muzaffir Ahmed that he was supplied the contraband by the petitioner Phool Chand, Phool Chand was roped in the case. In this instant case, however, the statement made was not only of the accused Joyel Das who has given an accurate detail of how the ganja belonged to the co-accused Karnajit Sarkar but it is also the statement of Karnajit Sarkar as well as the other three accused persons who were present with him in his car that the history of how they have procured the said contraband ganja was brought out. It was not a vague statement that was made to implicate not only Joyel Das but all the other four accused persons whose bail applications are under consideration herein.

21. The Hon'ble Supreme Court in the case of Pullulabid Ahmad Arimutta(supra) at para 12 has reaffirmed the authority of the Tofan Singh case by holding that a confessional statement recorded under Section 67 of the NDPS Act will remain inadmissible during trial and that on the basis of the confession/voluntary statements of the respondents or the co accused under Section 67 of the NDPS Act, the same cannot form the basis of overturning the earlier decision of releasing them on bail.

22. In the case of Rakesh Singh alias Rakesh Kumar Singh(supra), the Hon'ble Supreme Court at the relevant para cited by the petitioners has dealt only on the issue of the applicability of Section 27(A) of the NDPS Act to the case discussed. This decision may not be so relevant to the issue of bail as in the present case in hand as Section 27(A) is only one of the sections involved in the case of the petitioners.

23. In the case of Mohd. Muslim alias Hussain(supra) the Hon'ble Supreme Court having reiterated the implication of the provision of Section 37 NDPS Act, has, in the said case considered the bail application mostly on the ground that undue delay in trial cannot be fettered by Section 37 of the Act. However relevant is the observation at paras 18 and 19 which are reproduced herein as:

“18. The facts in this case reveal that the recovery of ganja was made on 28.09.2015, from the four co-accused, including Nitesh Ekka. The present appellant was arrested at the behest, and on the statement of this Nitesh Ekka. The prosecution has relied on that statement, as well as the confessional statement of the present appellant; in addition, it has relied on the bank statements of Virendar Singh @ Beerey, who allegedly disclosed that money used to be transferred to the appellant...The appellant has been in custody for over 7 years and 4 months. The progress of the trial

has been at a snail's pace: 30 witnesses have been examined, whereas 34 more have to be examined.

19. The conditions which courts have to be of are 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. What is meant by "not guilty" when all the evidence is not before the court? It can only be a prima facie determination. That places the court's discretion within a very narrow margin. Given the mandate of the general law on bails (Sections 436, 437 and 439, CrPC) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted reasonably. Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be assessed by courts, require that the court records its satisfaction that the accused might not be guilty of the offence and that upon release, they are not likely to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice: even in serious offences like murder, kidnapping, rape, etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts: likely guilt of the accused and the likelihood of them not committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to - in cases when accused of offences enacted under special laws - be balanced against the public interest."

24. At this juncture, it would not be out of place to refer to Section 37 of the NDPS Act which reads as follows:

"37. Offences to be cognizable and non-bailable.-(1)
Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be

cognizable;

(b) no person accused of an offence punishable for 2 [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.”

25. In the case of Mohit Agarwal(supra) referred to by the learned Sr. GA the Hon’ble Supreme Court has explained the impact of the provision of Section 37(supra) and has particularly elaborated on the concept of “reasonable grounds”, the relevant paras are brought out herein as under:

“11. It is evident from a plain reading of the non-obstante clause inserted in sub-section (1) and the conditions imposed in sub-section (2) of Section 37 that there are certain restrictions placed on the power of the Court when granting bail to a person accused of having committed an offence under the NDPS Act. Not only are the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973 to be kept in mind, the restrictions placed under clause (b) of sub-section (1) of Section 37 are also to be factored in. The conditions imposed in sub-section (1) of Section 37 is that (i) the Public Prosecutor ought to be given an opportunity to oppose the application moved by an accused person for release and to if such an application is opposed, then the Court must be satisfied that there are reasonable grounds for believing that the person accused is not guilty of such an offence. Additionally, the Court must be satisfied that the accused person is unlikely to commit any offence while on bail.

12. The expression “reasonable grounds” has come up for

discussion in several rulings of this Court. In “Collector of Customs, New Delhi v. Ahmadalieva Nodira”, a decision rendered by a Three Judges Bench of this Court, it has been held thus:-

“7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are: the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. **The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.**” [emphasis added]

14. To sum up, the expression “reasonable grounds” used in clause (b) of Sub-Section (1) of Section 37 would mean credible, plausible and grounds for the Court to believe that the accused person is not guilty of the alleged offence. For arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Dove-tailed with the aforesaid satisfaction is an additional consideration that the accused person is unlikely to commit any offence while on bail.

15. We may clarify that at the stage of examining an application for bail in the context of the Section 37 of the Act, the Court is not required to record a finding that the accused person is not guilty. The Court is also not expected to weigh the evidence for arriving at a finding as to whether the accused has committed an offence under the NDPS Act or not. The entire exercise that the Court is expected to undertake at this stage is for the limited purpose of releasing him on bail. Thus, the focus is on the availability of reasonable grounds for believing that the accused is not guilty of

the offences that he has been charged with and he is unlikely to commit an offence under the Act while on bail.”

26. Similarly, the Hon’ble Supreme Court in the case of Ajay Kumar Singh alias Pappu(supra) at paras 14, 16 and 17 has also discussed the provision of Section 37, in the context of a case involving commercial quantity of ganja which was recovered from the accused person therein who was released on bail by a relevant order of the High Court but whose bail was subsequently cancelled by the order herein.

27. Paras 14, 16 and 17 of the Ajay Kumar Singh case is set out herein below as:

“14. This apart, it is noticed that the High Court, in passing the impugned order of bail, had lost sight of Section 37 of the NDPS Act, which, inter alia, provides that no person accused of an offence involving commercial quantity shall be released on bail unless the twin conditions laid down therein are satisfied, namely, (i) the public prosecutor has been given an opportunity to oppose the bail application; and (ii) the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any such offence while on bail.

16. In view of the above provisions, it is implicit that no person accused of an offence involving trade in commercial quantity of narcotics is liable to be released on bail unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any offence while on bail.

17. The quantity of “ganja” recovered is admittedly of commercial quantity. The High Court has not recorded any finding that the respondent-accused is not prima facie guilty of the offence alleged and that he is not likely to commit the same offence when enlarged on bail rather his antecedents are indicative that he is a regular offender. In the absence of recording of such satisfaction by the court, we are of the opinion that the High Court manifestly erred

in enlarging the respondent-accused on bail.”

28. Keeping the observations and decision in the above cited authorities, in the correct perspective, as regard the particular facts and circumstances of the case of the petitioners herein, what is observed is that a huge quantity of alleged contraband substances that is, ganja was seized from the possession of one of the accused in the case that is, Shri Joyel Das who was the driver and owner of the said vehicle No. TR 01 BT 0265.

29. Though the authority of the case of Tofan Singh(supra) cannot be overlooked, however, the seizure made and the detailed explanation given by the accused person appears to be irrefutable which can only lead to the conclusion of the existence of prima facie evidence against the accused persons apart from the statements made by them.

30. This Court also has to keep in mind the other accompanying factors which has led to the lodgment of the FIR again, which was based on the seizure of the said ganja and the same being of commercial quantity, the provision of Section 37 NDPS would come into play

31. The charge sheet having been filed, the petitioners have not been able to argue the case on its merits and therefore, as has been noted above, the rigours of the provision of Section 37 would apply to the case of the accused persons in question.

32. From the materials on record and the submission made, nothing could be placed before this Court to convince it that the accused persons are not guilty of the offence alleged and if enlarged on bail, would not commit the same offence.

33. Accordingly, at this point of time, this Court is not inclined to allow the prayer made for grant of bail. These petitions are hereby dismissed as devoid of merits.

34. Petition disposed of. No costs.

Judge

Meghalaya

15.09.2023

"Tipilynti-PS"

