

GAHC020003912023



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL
PRADESH)
KOHIMA BENCH**

Case No. : Bail Appln./16/2023

SHRI M SHIBA
S/O MAIKHO PUMAI,
R/O IMKONGLENDEN COLONY,
DIMAPUR TOWN, WARD 20,
NAGALAND

VERSUS

THE STATE OF NAGALAND
NAGALAND

Advocate for the Petitioner : ASENLA WALLING

Advocate for the Respondent : GOVT ADV NL

**BEFORE
HONBLE MR JUSTICE KARDAK ETE**

ORDER

Date : 18-09-2023

Heard Ms. Asenla Walling, learned counsel for the applicant and also heard Ms. S. Mere, learned PP for the State of Nagaland.

2. By filing this application under section 439 of CrPC, 1973 read with section 37 of the NDPS Act, 1985, the applicant prays for release of the accused Smti. Kidurou Lanah, in connection with GR

case no. 339/ 2023 corresponding to West PS Case no. 044/2023 under section 34 of IPC read with Section 22(c) of NDPS Act, 1985.

3. The case set up by the prosecution is that in connection with Suo Moto FIR dated 20.05.2023 of West PS Case no. 044/2023, on 02.06.2023 at around 14:30 hrs, the AET led by ACP West, OC West PS had conducted a raid at Padampukhri near Phom Church and apprehended the accused, her husband and other two friends along with 1) 2 (two) vehicle: i) Baleno B/No NL-07 CA 5143, ii) Xenon Pickup B/R AS 06 BC 0060 2) 5 Mobile Phones 3) 59 packet of suspected heroine (Sun Flower) of approximately 748 grams.

4. Thereafter, the GR Case no. 339/2023 was filed in connection with the aforesaid PS case no. 044/2023 under section 22 (c) of NDPS Act, 1985. Since her arrest on 02.06.2023, the accused Smti. Kidurou Lanah is in jail. The accused approached the Court of Principle District and Sessions Judge for bail of the accused. On 20.07.2023, the bail of the accused was rejected on the ground that the quantities seized from the accused persons are of commercial quantity and that the rigors of section 37 of the NDPS Act comes into effect, as 748 grams of contraband items were recovered from the husband and wife, therefore, it cannot be said that the accused persons are not guilty for the offence charged against them.

5. Ms. Asenla Walling, learned counsel for the applicant submits that the accused is a mother of two minor children who are aged 6 (six) years and 8 (eight) years respectively and since the accused has been arrested on 02.06.2023, her two minor children are living in a traumatic state and it has affected their daily life as they are not able to receive the love and care from their mother and moreover

often this children as individual faced difficulties and even social stigma.

6. The learned counsel for the appellant submits that nothing was seized from her possession though it is claimed from the search and seizure, the alleged item of 748 grams was seized from the store room of their house which is standing next to their house. Therefore, she had no knowledge of the said contraband items as alleged to have been seized from the storeroom.

7. Ms. Asenla Walling, learned counsel for the applicant further submits that on the submission that the accused has made a statement under Section 161 of Cr.PC that the police has seized the contraband item from the store room which was kept by her husband and the statement that she had accompanied her husband during the delivery of the contraband items to the main accused i.e., Romijan Begum (main accused) cannot be relied upon as the statement is alleged to have been recorded before the police while the accused was in police custody. She refers to Section 25 and 26 of the Evidence Act to bring home to her submission that the statement recorded under section 161 cannot be accepted and relied upon.

8. She has placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Sahimina Biswas Vs. The State of West Bengal** passed in **SLP (Crl) No. 12168 of 2022** decided on 01.03.2023 and the case of **Bharat Chaudhary Vs. Union of India** reported in **2021 SCC Online SC 1235**.

9. Ms. S. Mere, learned PP while referring to the case diary submits that the accused has clearly admitted her involvement in

the matter, wherein she admitted to the recovery of the contraband by the police from her house and she had accompanied her husband twice or thrice for delivering the contraband to one Romijan Begum(the main accused in the matter). Therefore, since she has admitted her involvement, there would not be any reasonable ground for this Court to believe that she is not guilty of such offence, which is a pre-requisite condition and mandatory requirement under section 37 of the NDPS Act, 1985.

10. She has relied on the judgment of the Hon'ble Supreme Court in the case of **Union of India Vs. Ajay Kumar Singh** reported in **2023 SSC Online SC 346**.

11. I have considered the submissions of the learned counsel for the parties and also perused the Case Diary.

12. Section 37 of the NDPS Act inter-alia provides that no person accused of the offence involved in commercial quantity shall be released on bail unless the terms and conditions laid therein are satisfied that the Public Prosecutor has been given the opportunity to oppose the bail application and the Court is 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 such offence while on bail.

13. It is apposite to refer to the Section 37 of NDPS Act which is reproduced herein below:

"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."

14. In the case of **Sahimina Biswas Vs. The State of West Bengal** (Supra), the Hon'ble Supreme Court has observed as follows:

"4. Learned counsel for the State points out that the children were not arrested but keeping in mind the fact that they could not be separated from the mother, they too were taken in custody along with her. This Court is of the opinion that prima facie the police authorities did not apply their minds while taking into the custody petitioner a woman with three minor children. The allegation is that prohibited substance was recovered from the possession of the husband; and the petitioner-wife was travelling with him. Taking into account these circumstances, the arrest of the petitioner-wife was wholly unnecessary- even excessive, as she had no previous history of alleged criminal behavior."

15. In the case of **Bharat Chaudhary Vs. Union of India** (Supra), the Hon'ble Supreme Court has observed as under:

"10. After carefully examining the arguments advanced by learned counsel for the parties and having cursorily glanced at the records, we are of the opinion that the impugned order cancelling the bail granted in favour of Bharat Chaudhary [A-4], is not sustainable in view of the fact that the records sought to be relied upon by the prosecution show that one test report dated 6th December, 2019, two test reports dated 17th December, 2019 and one test report dated 21st December, 2019 in respect of the sample pills/tablets drawn and sent for testing by the prosecuting agency conclude with a note appended by the Assistant Commercial Examiner at the foot of the reports stating that "quantitative analysis of the samples could not be carried out for want of facilities". In the absence of any clarity so far on the quantitative analysis of the samples, the prosecution cannot be heard to state at this preliminary stage that the petitioners have been found to be in possession of commercial quantity of psychotropic substances as contemplated under the NDPS Act. Further, a large number of the tablets that have been seized by the DRI admittedly contain herbs/medicines meant to enhance male potency and they do not attract the provisions of the NDPS Act. Most importantly, none of the tablets were seized by the prosecution during the course of the search conducted, either at the office or at the

residence of A-4 at Jaipur, on 16th March, 2020. Reliance on printouts of Whatsapp messages downloaded from the mobile phone and devices seized from the office premises of A-4 cannot be treated at this stage as sufficient material to establish a live link between him and A-1 to A-3, when even as per the prosecution, scientific reports in respect of the said devices is still awaited."

16. In the case of **Union of India Vs. Ajay Kumar Singh** (Supra), the Hon'ble Supreme Court has observed as follows:

"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. On careful consideration of the case diary and the observation made by the Hon'ble Supreme Court and the provisions of section 37 of NDPS Act, 1985 it is clear that no person accused of an offence involved in commercial quantity is to be released on bail unless the Court is satisfied that there is reasonable grounds to satisfy that the accused is not guilty of such offence and he is not likely to commit any offence while on bail.

18. It is not disputed that 748 grams of alleged contraband items have been seized from the house of the accused, which is more than the commercial quantity. It is also seen from the record that the accused has stated that she has accompanied her husband

while delivering the contraband item to the main accused, in such a situation, it is difficult for this Court to conclude that there are reasonable grounds to believe that she is not guilty of such an offence and that she is not likely to commit any offence while on bail. As the Section 37 mandates that unless the Court is satisfied that there are reasonable grounds to believing that the accused is not guilty of such offence and he is not likely to commit any offence while on bail, this Court is unable to hold the same in view of the materials against the accused as the contrabands were seized from the house of the accused and she had accompanied her husband on few occasions while delivering the contrabands to the main accused.

19. In view of the above, the prayer for release of the accused on bail cannot be allowed at this stage.

20. Accordingly, this bail application stands rejected.

Sd/-
JUDGE

Comparing Assistant