

GAHC010042352024



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

**Case No. : Bail Appln./617/2024**

PRITY KUMARI  
D/O YOGENDRA MAHTO  
R/O VILL- SOBALPOR, P.S. BIDARGANJ DIST.PATNA, BIHAR,  
PIN-800008.

2: SHAHEEN KHATUN  
W/O LATE MD. NAEEM ALI  
R/O VILL- BHAGTOLA  
KANPURA  
P.S. GENGO BREEZE  
DIST. VAISALI  
BIHAR, PIN-201019

VERSUS

THE STATE OF ASSAM  
REP BY THE PP, ASSAM

**Advocate for the Petitioner : MR. M KHAN**

**Advocate for the Respondent : PP, ASSAM**

**BEFORE**

**HON'BLE MRS. JUSTICE MALASRI NANDI**

**:: O R D E R ::**

**20-04-2024**

By this petition under Section 439 Cr.P.C., the accused-petitioners, namely,

**1. Prity Kumari** and **2. Shaheen Khatun**, have prayed for grant of bail in connection with **Special (Nar) Case No. 03 (Bgn)/2024**, arising out of Bongaigaon GRPS Case No. 119/2023, registered under Sections **20(b)(ii) C/29 of the NDPS Act.**

2. Heard Mr. M. Khan, learned counsel appearing for the accused-petitioners as well as Mr. R. J. Baruah, learned Additional Public Prosecutor, Assam, appearing for the State respondent.

3. The brief fact of the case is that on 03-11-2023, an FIR was lodged before the New Bongaigaon GRP-IC, alleging *inter alia* that based on secret information an operation of checking was carried out in Tripura Sundari Express Train No. 14619 and recovered approximately 20.5 Kgs of cannabis from three accused persons namely Sanju Devi, Prity Kumari and Shaheen Khatun. Thereafter the alleged contraband was seized and the women were arrested.

4. It is submitted by the learned counsel for the petitioners that the allegation made in the FIR and after going through the charge-sheet, it appears that the alleged quantity of contraband, 20.5 Kgs *ganja*, was recovered from three accused persons and the quantity recovered from each accused is 5.7 Kgs from Sanju Devi; 6 Kgs from Prity Kumari and 3.7 Kgs from Shaheen Khatun. Therefore, the quantity of contraband recovered from each accused is lesser than commercial quantity. The recovery made from the co-accused could not be clubbed together to make the same commercial quantity. Accordingly, the rigors of Section 37 of the NDPS Act could not apply in the facts and circumstance of the case.

5. It is further submitted that both the petitioners have minor children. The petitioner No. 1 has 2 years old baby and the petitioner No. 2 has three minor children and they are suffering a lot for their detention in jail along with their mothers.

6. According to learned counsel of the petitioners, the accused-petitioners have been detained in custody for last 6 months, since their arrest on 03-11-2023, and considering the nature of offence as well as length of detention of the petitioners, they may be enlarged on bail.

7. In support of his submissions, the learned counsel for the petitioners has placed reliance on the case of **Sukhdev Singh vs State of Punjab**, in CRM-M-53872-2021 (O&M), decided on 27-04-2022.

8. In response, learned Additional Public Prosecutor contends that the total quantity of the contraband recovered from both the accused petitioners is to be considered in order to adjudicate upon the bail application in that case the recovery was of a commercial quantity, thereby attracting the bar of Section 37 of the NDPS Act.

9. I have considered the submissions of the learned counsel for the parties and perused the trial court record.

10. It appears from the trial Court record that the case was lodged on 04-11-2023. The accused-petitioners were arrested on the same day and since then they have been languishing in judicial custody. The Investigating Officer has submitted charge sheet against three accused persons including the present petitioners. On 01-04-2024, charges were framed under Section 20(b) (ii) C/29 of the NDPS Act. The case is now fixed on 25-04-2024 for recording of evidence.

11. Admittedly, the contraband seized from the possession of the petitioners individually will not come under the rigors of Section 37 of the NDPS Act, i.e., commercial quantity.

12. In the case of **Amit Dhanak vs State of Haryana CRM-M-33684-2020**, decided on 11-01-2021, it was held that when there is separate recovery from each accused of non-commercial quantity then the recovery of each accused cannot be clubbed together so as to disentitle all the accused to the grant of bail.

**13.** A similar view has been taken in the case of **Sukhwinder Singh Vs State of Punjab CRM-M-13534-2022**, decided on 05-04-2022.

**14.** Similarly, the Hon'ble Supreme Court in **Amarsingh Ramjibhai Barot Vs State of Gujarat, 2005 AIR (Supreme Court) 4248** held as under:

*"A number of contentions were urged in the High Court by the appellant in support of his appeal. It was contended that the conviction was liable to be set aside as there was non-compliance with the provisions of section 42(2), 50, 52 and 57 of the NDPS Act. There is no substance in this contention. The High Court, however, was of the view that the conviction of the appellant under section 17 and 18 read with section 29 of the NDPS Act was not correct. On the other hand, the High Court came to the conclusion that the appellant was liable to be convicted under Section 21(c) and also under Section 21(c) read with Section 29 of the Act, for individually being in possession of 920 grams and for being jointly, in conspiracy with the deceased, in possession of 4.250 kgs. of the prohibited substance recovered. In the view of the High Court, the total amount of prohibited substance recovered (personally from the appellant and also from the joint possession of the two accused) being more than "commercial quantity" as defined under the applicable notification, the appellant was liable to be visited with the minimum punishment of 10 years rigorous imprisonment plus fine of Rs. 1 lakh. The High Court was also of the view that, even if the quantity of 920 grams recovered from the appellant alone were to be considered, it would warrant conviction under Section 21(c) and the minimum sentence of 10 years rigorous imprisonment plus fine of Rs. 1 lakh. Being aggrieved thereby, the appellant is before this Court.*

*The learned counsel appearing for the appellant urged only one contention in support of the present appeal. He contended that the High Court fell into an error in taking the total quantity of the offending substances recovered from the two accused jointly and holding that the said quantity was more than the commercial quantity, warranting punishment under Section 21(c) of the NDPS Act. He contended that as far as the appellant is concerned, the High Court erred by assuming that there was criminal conspiracy within the meaning of Section 29 of the NDPS Act, and erroneously proceeded under the said section. The High Court fell into a further error of assuming that because Section 29 was applicable, the total quantity of opium recovered was 920 grams plus 4.250 kgs. The counsel urged that because of this error the High Court took the wrong view that the total recovered opium was of "commercial quantity" and, therefore, attracted Section 21(c) of the NDPS Act.*

*Although, at first blush, the argument of the learned counsel appeared attractive, on careful appreciation of the facts on record we are satisfied that the High Court judgment is fully justified and needs to be upheld. It is true that the High Court proceeded on the footing that there was a criminal conspiracy between the appellant and the deceased, Danabhai Virabhai Rabari. In our view, however, there was no warrant for this conclusion at all as there is no evidence to suggest that there was any such abetment and/or criminal conspiracy within the meaning of Section 29 of the NDPS Act. The appellant and Danabhai Virabhai Rabari were found together, but individually carrying the recovered substances. Hence, it was not possible for the High Court to take the view that Section 29 was attracted."*

**15.** In view of the aforesaid legal proposition, it appears that the total quantity of contraband recovered from both the accused petitioners are not to be seen collectively when individual recovery from each accused is of non-commercial quantity.

**16.** In view of above, since the recovery from each petitioner is of a non-commercial quantity, the rigors of Section 37 of the NDPS Act is not applicable to the case of the petitioners. It also appears that the petitioners have been in custody for last six months and the investigation has been completed. Though the charge has been framed by the trial court, no witness has been examined in the case.

**17.** Accordingly, the accused-petitioners, named above, shall be released on bail, on furnishing bail bond of **Rs.1,00,000/-** each with **two suitable sureties** each of the like amount, to the satisfaction of learned **Special Judge, Bongaigaon.**

**18.** The direction for bail is further subject to the conditions that the petitioners:

- (a) shall not leave the territorial jurisdiction of learned Special Judge, Bongaigaon, without prior written permission from him/her;
- (b) shall not tamper with the evidence of the case;

The learned Special Judge, Bongaigaon, will be at liberty to impose any other condition(s) as it deems fit and proper at the time of releasing the accused/petitioners on bail to procure their attendance during trial.

**19.** In terms of the above, this bail application stands disposed of.

**JUDGE**

**Comparing Assistant**