

## IN THE HIGH COURT OF SIKKIM GANGTOK

*Bail Application No.2 of 2006*

1. Karma Bhutia,  
S/O Gyatso Bhutia.
2. Ashok Bardewa,  
S/O Nar Bahadur Bardewa.
3. Tilak Singh Tiwari,  
S/O Lt. B. P. Tiwari.

All residents of Singtam,  
P.O. & P. S. Singtam,  
East Sikkim. *..... Petitioners.*

***Versus***

State of Sikkim *..... Respondent.*

For the Petitioners : Mr. N. B. Khatiwada, learned Senior Counsel  
Assisted by Mr. D. R. Thapa, Mr. N. Rai and  
Miss Jyoti Kharka, learned Counsels.

For the Respondent : Mr. J. B. Pradhan, Public Prosecutor and Mr.  
Karma Thinlay, Addl.Public Prosecutor.

***Date of Order : 28<sup>th</sup> September, 2006.***


### **ORDER**

A.P.Subba,J.

This is a petition filed by the Petitioners u/Ss. 439 and 482 of the Cr. P. C., r/w Article 227 of the Constitution, for grant of bail.

2. The Petitioner No.1 who is a government contractor, the Petitioner No.2 who is a driver and the Petitioner No.3 who is a






government servant are facing trial in S.T. Case No.8 of 2006 in the Court of Id. Special Judge (NDPS), Sikkim at Gangtok. According to the prosecution, the Petitioners were arrested on 18.7.2006 at Singtam by Singtam police in connection with Singtam PS Case No.24 of 2006 u/S. 22 and 27 of NDPS Act. After the hearing on charge, charges U/Ss. 22(a) and 27(b) of NDPS Act have been framed against each of the three Petitioners, and the trial is in progress. The two bail applications, moved before the Special Judge, NDPS Act having been rejected, they are languishing in judicial custody for the last two months now. Hence, this bail application.

3. Mr. N. B. Khatiwada, learned Senior Counsel assisted by Mr. D. R. Thapa, Mr. N. Rai and Ms. Jyoti Kharka, learned Counsel for the Petitioners and Mr. J. B. Pradhan and Mr. Karma Thinlay, learned Public Prosecutors for the State – Respondent were heard.

4. Even though number of grounds including non-compliance of the mandatory provision of Section 41 to 58 of the NDPS Act had been raised in the petition, the main ground urged by the learned Sr. Counsel for the Petitioners is that the offences with which the Petitioners stand charged are bailable, and, as such, they are entitled to bail U/S. 436 Cr.P.C. The learned Public Prosecutor, on the other hand, contended that the NDPS Act does not classify the offences with which the Petitioners have been charged as bailable ones, and, as such the question of releasing the Petitioners on bail does not arise.

5. The question that falls for consideration is whether the present offences which fall under Section 22(a) and 27(b) of the







NDPS Act are bailable and if so whether the Petitioners are entitled to be released on bail.

6. It is not disputed that the amount of contraband seized is a small quantity as per the charge sheet filed in the case. The offences, therefore, fall under Sec.22 (a) and 27(b) of the NDPS Act and accordingly the learned Special Judge has framed charges under these Sections. While Sec. 22(a) provides for punishment for rigorous imprisonment for a term which may extend to six months with fine which may extend to ten thousand rupees or with both, Sec. 27(b) provides for punishment for imprisonment for a term which may extend to six months or with fine which may extend to ten thousand rupees, or with both. Thus, the extent of punishment in terms of imprisonment in case of both the offences extends to six months and not more.

7. Before proceeding to ascertain whether these offences can be categorized as bailable offences, it is pertinent to notice the provisions under the Act which deal with bail. A perusal of the different provisions of the Act would show that question of bail has been dealt with in Section 37 of the Act. This Section has been substantially amended along with other provisions by the Amending Act 9 of 2001. It is relevant to notice both the unamended and the amended provisions. The unamended Section 37 stood 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 the Act shall be cognizable;
- (b) no person accused of an offence punishable for a term of imprisonment of five years or more under

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this Act 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”.

After the amendment the Section stands 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 offences under Section 19 or Section 24 or Section 27-A 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 the opportunity to oppose the application for such release, and
  - (ii) Where the Public Prosecutor opposes an 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.

(3) 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) of any other law for the time being in force, on granting of bail.”

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The scope of Section 37 came to be considered in many cases by the Hon'ble Supreme Court including in the case, "Intelligence Officer, Narcotic Bureau v. Sambhu Sonkar reported in 2001 Cr.L.J. 1082 : AIR 2001 SC 830.


.....

The result is that no accused can be granted bail by any Court, if the offence involved is punishable with imprisonment for 5 years or more, unless the twin conditions contained in Section 37 are satisfied.

....."

8. It is noticeable from the above that in place of the words "offences punishable for a term of imprisonment of 5 years or more" occurring in the unamended Section, have been substituted with the words "offence punishable for offences u/S 19 or Section 24 or Section 27-A and also for offences involving commercial quantity". It is also clear that the two conditions for granting bail specified in the Section have been made applicable to the offences falling under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity.

Shri Karma Thinlay, the Id. Addl. P.P. relying on the decision of the Apex Court in Narcotic Central Bureau vs. Dilip Prahlad 2004 Cr.L.J. 1815 and few other decisions submitted that clause (b) of sub-section (1) of Section 37 imposes limitations on granting of bail in addition to those provided under Cr. P. C. and that such embargo has been placed keeping in view the deleterious nature of the offence. It is however conceded by him that the cases in which such observations were made involved offences which were punishable with higher punishment than in the present case. Therefore, the observations do not obviously cover cases of small quantity as the present one.





9. The scope of the unamended Sec. 37 of the Act came to be considered by the Apex Court in ***Intelligence Officer Narcotics C. Bureau v. Sambhu Sonkar & Another 2001 Crl. L. J. 1082*** where it has been observed as follows: -

"..... As per the mandate of S. 37 no person accused of an offence punishable for a term of imprisonment of 5 years or more under the Act can be released on bail unless the conditions mentioned in sub-clauses (i) and (ii) of Clause (b) are satisfied. ....Plain reading of the abovesaid clause makes it clear that in case where the person is accused of an offence punishable for a term of imprisonment of 5 years then he cannot be released unless the conditions mentioned therein are satisfied....."

10. It is clear from the amended provision, that no person accused of an offence punishable for offences u/Ss. 19 or 24 or 27-A and for offences involving commercial quantity can be released on bail if the two preconditions mentioned in the Sections, are not satisfied. This provision came up for consideration in a number of decisions and it has been uniformly held that all other offences not covered by the Sections and not falling within the commercial quantity mentioned therein, fall outside the purview of Sec. 37 and would be covered by the schedule in the Cr. P. C. for the purpose of bail. This would be clear from the following decisions relied on by the Id. Sr. Counsel for the Petitioners.

In ***Abdul Aziz v. State of U. P. 2002 Crl.L.J. 2913*** the Allahabad High Court held as follows: -

**"9. From the analysis of provisions of section 37 of the N.D.P.S. Act and sections 4 and 5 of the Cr. P. C. it is clear that except for offence under sections 19, 24 and 27-A of the Act, the provisions for bail as given in the Cr. P. C. will apply. The offences no doubt are also cognizable and to this extent also the provisions of the Act will prevail over the provisions of the Cr. P. C. Therefore, in the matter of bail the provisions of Cr. P. C. will apply in the present case."**



In ***Manoj Kumar vs. State of H. P. 2003 Cr.L.J. 1644*** the H.P. High Court observed as follows: -

**"11. Rigor of Section 37, relating to bail for offences under the Act, has also been relaxed by the amendment so far possession of small and less than commercial quantity of contraband is concerned."**


In ***State of H.P. vs. Munshi Ram 2003 Cr.L.J. 1946***, the same High Court observed as follows: -

"6. ....small quantity and non-commercial quantity continue to be cognizable and non-bailable and limitations for granting bail for these offences will be under the Code of Criminal Procedure or any other law for the time being in force, on granting of bail."

11. It is amply clear from the above decision that all offences which are not covered by the offences specified in the Sections and the amount falls short of the commercial quantity mentioned therein fall outside the scope of Sec. 37 and the twin conditions specified therein for grant of bail do not apply.


12. This brings us to the question as to whether these offences are bailable. A bailable offence has been defined in Clause (a) of Sec. 2 of Cr. P. C. as an offence which is shown as bailable in the first schedule or which is bailable by any other law for the time being in force. It is now well settled that on the basis of Sec.4(2) of Cr.P.C. if there is any specific provision in respect of bail in a particular special or local Act, then that specific provision of bail contained in that Act shall apply to determine whether a particular offence is bailable or non-bailable, but if there is no such specific provision then second part of the schedule appended to Cr. P. C.,

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shall operate to ascertain the classification of offences as bailable or non-bailable. We have already come to the conclusion above that the offences under the NDPS Act not falling under Secs. 19, 24 and 27-A and not involving commercial quantity are not covered by and fall within the purview of Sec.37 which deals with provision of bail under the Act. It is evident that there is no other provision under the Act which deals with classification of offences as bailable or non-bailable and in the circumstances, a reference has to be made to the second part of the schedule to ascertain the classification of the offence as bailable or non-bailable. Therefore, coming to the schedule, it may be noticed that it consists of two parts. The first part contains list of offences under the Indian Penal Code and show which of them are bailable and which are non-bailable. The second part of the schedule which is relevant for our purpose lays down that if an offence under the special or local Act is punishable with death, imprisonment for life and imprisonment for 3 years and upwards, it shall be non-bailable and, if such offence is punishable with imprisonment for less than 3 years or with fine only, it shall be bailable. The offences in the present case being admittedly punishable with imprisonment for less than three years fall in the category of offences classified as bailable under part two of the schedule.

13. Thus, in view of the foregoing discussions and observations, it follows that the offences falling under Sec. 22(a) and 27(b) of the NDPS Act fall in the category of bailable offences. Accordingly, taking into consideration the quantum of the contraband seized, the fact that the offences are punishable with imprisonment of 6 months only, and the fact that the Petitioners are in custody for






over two months now, I allow the Petition on the following conditions: -

- (i) The Petitioners shall execute bond for Rs.25,000.00 (Rupees twenty five thousand) with two solvent sureties each of the like amount to the satisfaction of the Special Judge, N.D.P.S. Act, Sikkim at Gangtok.
- (ii) They shall not do anything to influence the witnesses and shall be present on each date of hearing before the Special Court.
- (iii) They shall not leave the State without prior permission of the Special Court.

Send a copy of this order to the concerned Court below for needful compliance.

  
( **A. P. Subba** )  
**Judge**  
**28/09/2006**

