GAHC010179112026

2026:GAU-AS:13070

IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

BAIL APPLICATION NO. 2433 OF 2026

Asmina Begum
W/o Muzamil Hoque
Resident of Devpukhuri,
Pauripota under Orang Police
Statioon, Dist- Udalguri, Assam

Accused/ Petitioner

-Versus-

The State of Assam
Represented by P. P. Assam.

……. Respondent

– B E F O R E –

HON'BLE MR. JUSTICE SANJEEV KUMAR SHARMA

For the Petitioner(s) **:** Mr. B. M. Choudhury, learned Senior Counsel assisted by Mr. U. Choudhury learned counsel.

For the Respondent(s) **:** Mr. P. Borthakur, learned Addl.P.P, Assam.

Date on which judgment
is reserved : **02.09.2026.**

Date of pronouncement
of judgment : **09.09.2026.**

Whether the pronouncement
is of the operative part
of the judgment ? : **No.**

Whether the full judgment
has been pronounced : **Yes.**

JUDGMENT & ORDER (CAV)

Heard Mr. B. M. Choudhury, learned Senior Counsel assisted by Mr. U. Choudhury, learned counsel for the petitioner. Also heard Mr. P. Borthakur, learned Additional Public Prosecutor for the State.

2. This is an application under Section 483 of BNSS, 2023 for granting bail to the petitioner, namely, **Asmina Begum**, in connection with **Teok P. S. Case No. 73/2026** under **Sections 21(c)/ 25/ 27A/ 29(1)** of the NDPS Act.

3. The brief facts of the case, are that on 23.07.2026, the informant, WSI Baby Neog, In-charge of Lahdoigarh Out Post, lodged an F.I.R. before the Officer-in-Charge of Teok Police Station, alleging, inter alia, that on 22.07.2026, at about 3:30 P.M., reliable source information was received at Lahdoigarh Out Post to the effect that a red-coloured Maruti Bolero motor

vehicle bearing Registration No. AS-01-DP-7060 was transporting a large quantity of narcotic drugs concealed inside sealed soap cases.

4. The said information was duly entered and registered vide Lahdoigarh O.P. GDE No. 439 dated 22.07.2026. Pursuant thereto, a police team headed by senior police officers proceeded towards Meleng Meteli and conducted naka checking/searching. During the course of the operation, the afore-noted suspected vehicle was intercepted and searched in the presence of independent witnesses after observing the mandatory legal formalities.

5. During the search, 29 (twenty-nine) soap cases were allegedly recovered from the vehicle, each containing transparent polythene packets filled with a brown-coloured powdery substance suspected to be heroin. The substance was weighed on a digital weighing machine in the presence of the independent witnesses and was found to weigh 434.38 grams. The recovered contraband was thereafter duly packed, sealed, labelled and seized under a proper seizure memo. The entire search and seizure proceedings were also videographed and recorded through the e-Sakshya system.

6. In addition to the aforesaid contraband, the police also seized the afore-noted vehicle and two mobile phones along with the SIM cards allegedly belonging to the arrested person. Upon lodgement of the aforesaid FIR, the case was registered.

7. The only submission made by learned Senior Counsel on behalf of the petitioner is that the petitioner being a lady was arrested after sunset without obtaining the permission of the magistrate as required under section 46(5) of the BNSS and thereby the police has acted in violation of the aforesaid statutory provisions and having regard to the same the arrest of the petitioner has been rendered illegal and accordingly she is entitled to bail. It is further submitted that the petitioner was brought to Tiok police station on the night of 22.07.2026 and therefore she was taken into police custody then itself and kept in the lockout of Tiok police station throughout the night of 22.07.2026. Later on she was shown to have been formally arrested at 11.30 a.m on 23.07.2026 at Tiok police station. It is further submitted that the sunset at Jorhat, the place of arrest, occurred at 6:06 p.m. on 22.07.2026, whereas the time of arrest has been stated as 6:30 p.m. on the same date in the bail application and also during the submissions advanced by the learned Senior Counsel. Thus, the stated time of arrest was after sunset. In this regard reference has been made to the decision of the co-ordinate Bench of this Court in ***Dr. Sangeeta Dutta Vs. State of Assam and Anr.*** reported in ***2025 SCC Online GAU 4847***.

8. Countering the aforesaid submissions, learned Additional PP has submitted that the provisions of section 43(5) of the BNSS are only directory in nature and non-compliance with the same would not result in rendering the arrest illegal. In support of the submission learned

counsel has referred to a decision of the High Court of Tripura, i.e., ***Anawora Begam vs. the State of Tripura*** in ***Bail Application No. 137 of 2025*** decided on 16.03.2026, wherein the decisions of various high courts on this point have been discussed and ultimately the said provision was held to be in directory and it was held that non-compliance of section 46(4) of the Cr.P.C corresponding to section 43(5) of the BNSS would not confer an indivisible right upon the accused to be released on bail on the same ground in every case. At this stage it would be appropriate to reproduce section 43(5) of the BNSS which reads as follows:

> *"**43(5)** Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made."*

9. The word used herein is "arrest", whereas section 42(1)(d) of the NDPS Act provides for detention, search, arrest etc. The said section reads as follows:

> *"**42 (1)(d)** detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:*
>
> *[Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:*
>
> *Provided further that] if such officer has reason to believe that a search warrant or authorisation*

cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief."

10. From the above, it appears that the aforesaid provision of the NDPS Act contemplates two forms of detention: first, detention simpliciter, during which the petitioner is not formally arrested and no memorandum of arrest is prepared; and second, detention followed by formal arrest at a subsequent stage, after the concerned officer arrives at the requisite satisfaction or otherwise deems it appropriate to formally arrest the accused.

11. The Hon'ble Apex Court had the occasion to consider the meaning and scope of the expression "arrest" in ***Niranjan Singh & Anr. v. Prabhakar Rajaram Kharote & Ors.***, reported in ***(1980) 2 SCC 559***. In the said decision, the Hon'ble Apex Court held that a person who is under the control of the Court or is in the physical hold of an officer exercising coercive authority is considered to be in custody for the purposes of Section 439 of the Cr.P.C. Relevant paragraph of the aforesaid judgment reads as under:

"7. When is a person in custody, within the meaning of Section 439 CrPC? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No

lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose."

12. Relevant paragraphs of the judgment of the Tripura High Court in ***Anawora Begam*** (Supra) reads as under:

*"**6)** (i) **Directorate of Enforcement vs. Subhash Sharma, 2025 SCC OnLine SC 240** wherein an LOC was issued by the Directorate of Enforcement to the Bureau of Immigration and said Bureau of Immigration detained the accused of said case at IGI Airport on 4th March, 2022 and thereafter, physical custody of the accused was handed over by Bureau of Immigration at 11.00 hours on 5th March, 2022 to the Directorate of Enforcement but his arrest was shown at 1.15 hours on 6th March, 2022. Hon'ble Supreme Court observed that the accused was not produced before the nearest Magistrate within 24 hours from 11:00 am on 5th March, 2022 and therefore, held that arrest of the accused was illegal as a result of violation of Article 22(2) of the Constitution. In said case, time of detention was not computed from 01.15 hours of 6th March, 2022 which was shown in the arrest memo as time of arrest.*

> *(iii)* ***Dr. Sangeeta Dutta vs. State of Assam, rep. by the Special PP, Assam and another, 2025 SCC OnLine Gau 4847****- In this case, allegation of the accused was that she was actually arrested at 1:00 am in the night of 06.05.2023 but her formal arrest was shown at 11:00 am on the following day and such arrest was effected without obtaining prior permission of any Judicial Magistrate. Further grievance was also that ground of arrest was not communicated to her or to her near relatives as required under Sections 50 and 50A of Cr.P.C. Gauhati High Court in this case on consideration of the materials placed in said case held that Section 50 of Cr.P.C. was not complied with by the arresting authority and therefore, violation of fundamental rights guaranteed under Articles 21 and 22(1) gives a strong cause or reason to the accused applicant to be enlarged on bail. The High Court also observed in this case that Section 50A, Cr.P.C. was also violated. It was also further held that no permission from Judicial Magistrate First Class was obtained before effecting the arrest. The time of arrest in said case was also treated to be 1:00 am on 06.05.2023. On that score, the High Court further held that the arrest became illegal for violation of provision of Section 46(4) of Cr.P.C. and that violation of such statutory provision gave the accused applicant to argue for bail as the same had violated fundamental right of life and liberty guaranteed under Articles 21 and 22(1) of the Constitution of India."*

13. What follows from the above decisions, clearly, is that the crucial factor is the point of time from which the petitioner was no longer a free agent to move as he or she pleased. That point evidently commences from the time the petitioner is detained by an authority with coercive powers regardless of whether any formal arrest has been made or not. In other words the accused gets taken into custody which is nothing but an another form of arrest without however following the formalities like issuance of memorandum of arrest under section 36 of the BNSS and other statutory notices under section 47/48 of the BNSS. Therefore, for the purposes

of determining whether the petitioner was arrested before or after sunset would be the point of time when she was under effective detention. It is not disputed that the petitioner after the apprehension of the vehicle was under the effective custody of the police and was no longer free to move as she pleased and her freedom of movement stood effectively curtailed. Section 42(1)(d) of the NDPS Act makes it abundantly clear that the authorized officer may firstly detain a suspect and after being satisfied regarding the necessity of arrest would make the formal arrest. This is so because in case the search, pursuant to the detention yields no fruitful result, the authorized officer would perhaps have no option but to release the said suspect. But in the event that the authorized officer deems it proper to make the formal arrest, the point of time from which the arrest commences would relate back to the point of time at which the suspect was first detained. That much is evident from a reading of the decision of the Hon'ble Apex Court in ***Niranjan Singh*** (supra) as well as ***Subhash Sharma*** (supra). In the case of ***Dr. Sangeeta Dutta*** (supra) cited on behalf of the petitioner, the court had held the time of effective detention of the petitioner during the midnight hours as the time of arrest for the purpose of determining the question of violation of the provisions of section 46(4) of the Cr.P.C/ 43(5) of the BNSS, although she was shown to have been formally arrested much later.

14. A perusal of the case record reveals that the date and time of seizure has been recorded in the seizure list on

22.07.2026 at 6:05 p.m. Therefore, the detention of the petitioner must necessarily have taken place sometime prior to 6:05 p.m. on 22.07.2026, since the search and seizure contemplated under Section 42(1)(d) of the NDPS Act is preceded by the detention of the person concerned. Such detention, for the purposes of determining the commencement of the period of custody, is liable to be treated as the time of arrest within the meaning of Section 46 read with Section 43(5) of the BNSS, or Section 46(4) of the Cr.P.C., as the case may be. Consequently, the period of 24 hours prescribed for production of the arrestee before the nearest Magistrate under Article 22(2) of the Constitution of India would commence from the time of such detention, excluding only the time necessarily required for travelling from the place of arrest to the Court.

15. By the own submission of the learned Senior Counsel for the petitioner, which fact has also been verified by this Court, the time of sunset on 22.07.2026 was subsequent to 6:05/ 6:06 p.m., when the arrest of the petitioner was effected. In view of the discussion hereinabove, it is, therefore, evident that the petitioner was arrested before sunset on 22.07.2026.

16. Therefore on the perusal of the factual aspects of the case as revealed in the case diary as well as the contentions on behalf of the petitioner herself, there appears to be no force in the contentions of learned senior counsel for the petitioner. In other words since the petitioner is found to have

been arrested before sunset, there is no scope for application of section 43(5) of the BNSS mandating the permission of a magistrate before the arrest of a woman is affected after sunset.

17. Furthermore on a perusal of the material available in the case diary, it prima facie appears that a commercial quantity of contraband drugs were recovered from the conscious possession of the petitioner and therefore the bar imposed by section 37 of the NDPS Act is clearly attracted.

18. In view of the above the prayer for bail stands rejected and the petition stands dismissed.

19. Send back the case diary.

JUDGE

Comparing Assistant