

IN THE HIGH COURT OF ORISSA AT CUTTACK**BLAPL No.5719 of 2022***Sarat Pradhan**.... Petitioner**Mr. A.R. Panda, Adv.**-versus-**State of Odisha**.... Opposite Party**Mr. G.R. Mohapatra, ASC***CORAM:****DR. JUSTICE S.K. PANIGRAHI****Order****ORDER****No.****27.10.2022****03.**

1. This matter is taken up through hybrid mode.
2. The Petitioner is in custody in connection with G. Udaygiri P.S Case No. 49 of 2020 corresponding to C.T Case No.33 of 2020 pending before the court of the Learned Addl. District & Sessions Judge-cum-Special Judge, Balliguda for commission of offences u/s 20 (b) (ii)(C)/29 of N.D.P.S. Act.
3. The prosecution story, in brief, has been summarised in the following points:
 - i. On 08.07.2020, as per direction of the IIC, G. Udaygiri P.S, the informant and the S.I of Police, Kausalya Behera formed a raiding party and proceeded towards Kalinga Ghat Road in order to intercept an Indigo e-CS car having Regd. No. OR

02 BZ 8030 which was carrying contraband articles and likely to pass Kalinga ghat road.

ii. At Kalinga Chhak, the raiding party saw a car coming at high speed and signalled the driver (petitioner) to stop and cordoned the vehicle to prevent the petitioner from escaping. The raiding party searched the vehicle and seized three bags containing 69 kgs 800 grams of contraband 'Ganja'.

iii. Upon interrogation, the petitioner disclosed his name and identity but was not able to produce any license regarding transportation of the contraband. Moreover, the petitioner also disclosed that on the direction of Bhawanisankar Pattnaik of village- Panasapodi, he was merely transporting the bags containing contraband article to be delivered at Nayagarh.

4. It is submitted by Learned Counsel for the Petitioner that the Petitioner was the driver of alleged seized vehicle and was merely acting upon the direction of the owner of the vehicle. He further contended that the petitioner is innocent and has been falsely implicated in this case as he has no criminal antecedents.

5. Per Contra, the Learned Counsel for the State vehemently opposed the bail petition on the grounds that commercial quantity of ganja was seized from exclusive and conscious possession of the accused.
6. On going through the allegations made in the complaint and on perusal of the charge-sheet, it appears that on the relevant time, the petitioner was merely driving the alleged vehicle to deliver the bags containing contraband article at Nayagarh. The petitioner didn't have any knowledge regarding the articles present in the bag and was merely acting according to the instructions of the owner of the vehicle.
7. The Supreme Court in the case of *Avtar Singh v. State of Punjab*¹ held that the driver of the truck vehicle and the persons who were found sitting on gunny bags containing poppy husk could not be attributed "conscious possession" of such bags unless there was proof of the concern of those persons with the goods. The relevant observations of the Apex Court may be reproduced as below.

"possession and ownership need not always go together but the minimum requisite element which has to be satisfied is custody or control over the goods. Can it be said, on the basis of the

¹ 2002) 7 SCC 419 : AIR 2002 SC 3343

evidence available on record, that the three appellants one of whom was driving the vehicle and other two sitting on the bags, were having such custody or control? It is difficult to reach such conclusion beyond reasonable doubt. It transpires from evidence that the appellants were not the only occupants of the vehicle, one of the persons who was sitting in the cabin and another person sitting at the back of the truck made themselves scarce after seeing the police and the prosecution could not establish their identity. It is quite probable that one of them could be the custodian of goods whether or not he was the proprietor. The persons who were merely sitting on the bags, in the absence of proof of anything more, cannot be presumed to be in possession of the goods. For instance, if they are labourers engaged merely for loading and unloading purposes and there is nothing to show that the goods were at least in their temporary custody, conviction under S. 15 may not be warranted.

8. In order to prove “conscious possession” of the bundles of ganja, it is necessary for the prosecution to establish the direct control of the petitioner over the articles. There is no evidence to show that he was the person who loaded the said bundles and had the knowledge about the contents thereof. Mere fact that the bundles were found in the car will not, by itself, show that the petitioner was the actual possession of those bundles.

9. In the case of *State of Punjab v. Balkar Singh*², the Apex Court held that the fact that, the accused were sitting on the poppy husk by itself would not lead to inference regarding their conscious possession. It is observed:

"The respondent Balkar Singh is a resident of village Bire Bedi in district Hisar while respondent Munish Chand is a resident of Farukhabad. The police did not make, any investigation as to how these 100 bags of poppy husk were transported to the place of incident. They also did not adduce any evidence to show the ownership of the poppy husk. The presence of the respondents at the place from where the bags of poppy husk were recovered itself was taken as possession of these bags by the police. In fairness, the police should have conducted further investigation to prove that these accused were really in possession of these articles. The failure to give any satisfactory explanation by the accused for being present on that place itself does not prove that they were in possession of these articles."

10. The fact situation in the present case also is somewhat akin to the fact situation mentioned above. The mere presence of the petitioner in the alleged seized car would not clinch the issue of "conscious possession". In the case of *Madan Lal v. State of Himachal Pradesh*³,

² (2004) 3 SCC 582 : (AIR 2004 SC 4606)

³ (2003) 7 SCC 465

the Supreme Court while dealing with the issue of possession observed that conscious possession of a contraband has to be determined with reference to the factual background of each case. Section 20(b) makes possession of contraband articles, an offence. Section 20 appears in Chapter 4 of the NDPS Act which provides for punishment for offences for possession of such articles. Thus, for making the possession illicit, there must be a conscious possession. In the absence of requisite mental element, mere custody without awareness of the nature of such possession would not amount to conscious possession.

11. Another decision on which reliance is placed is the case of *Sorabkhan Gandhkhan Pathan and another vs. State of Gujarat*⁴, wherein it has been held as follows:

“However, we notice that so far as Accused 1, Appellant 1 herein is concerned, the contraband in question has been seized from his possession and, in our opinion, the prosecution has established the case against the said accused and the courts below have rightly convicted the said appellant. Whereas in regard to Appellant 2, it is the prosecution case itself that he was travelling in the autorickshaw, along with three other persons. The prosecution has not produced any material whatsoever to establish that either this appellant had the knowledge that Appellant 1

⁴ 2004 (13) SCC 608

was carrying the contraband or was, in any manner, conniving with the said accused in carrying the contraband. In the absence of any such material, to convict the second appellant only on the ground that he was found in the autorickshaw, in our opinion, is not justified. As a matter of fact, the courts below have rightly acquitted the other two accused on similar ground and, in our opinion, the said benefit ought to have gone to Accused 2 also. For the reasons stated, we find the prosecution has failed to establish its case against Appellant 2. Therefore, this appeal, so far as he is concerned, succeeds and the same is allowed. The said Appellant 2, if in custody, shall be released forthwith, if not wanted in any other case.

12. The conduct of the petitioner is also required to be seen.

There was no attempt on the part of the petitioner to flee from the vehicle and it has also been stressed multiple times that the petitioner has no criminal antecedents. The petitioner was first apprehended by the raiding party and had there been any culpable mental state, he would have tried to escape.

13. Furthermore, for inferring the act of hatching conspiracy (u/s 29 of the NDPS) on the part of the Petitioner and Bhawanisankar Pattnaik (co-accused), there has to be positive evidence about an agreement to do an unlawful act or to do lawful act by unlawful means and such agreement must precede with meeting of minds. So as to

infer the case of conspiracy against the petitioner, there is absence of material on record of him having such meeting of the mind with Bhawanisankar Pattnaik who handed him over the car with contraband articles loaded in it. However, according to the chargesheet filed by the police, the co-accused is absconding whereas the petitioner has been languishing in custody since 09.07.2020.

14. There cannot be any doubt that persons indulging in illegal trafficking in contraband drugs and psychotropic substances must be dealt with, with iron hands. The activities of such persons have a widespread deleterious effect on the society at large. Countless members of the society, often of tender age, fall prey to the heinous and nefarious activities of drug peddlers. However, the decision in each case must depend on the facts of the case and no principle of law can be applied blindly to a given set of facts.

15. In the facts of the present case, on an assessment of the material on record, this court of the prima facie view that the petitioner may not have committed the offence that he is charged with. Further, considering the past history of the petitioner and absence of any criminal antecedents, there is nothing on record to suggest that

he is likely to commit an offence under the NDPS Act while on bail.

16. The Supreme Court has held that right to have speedy trial is a fundamental right of a citizen. Hence, keeping a person in custody for such a long time without any trial is not justified and violative of his fundamental right. The importance of speedy trial has been emphasized in the case of *Hussainara Khatoon & Ors vs Home Secretary, State of Bihar*⁵, wherein the Supreme Court has iterated that:

"Speedy trial is, as held by us in our earlier judgment dated 26th February, 1979, an essential ingredient of 'reasonable, fair and just' procedure guaranteed by Article 21 and it is the constitutional obligation of the State to devise such a procedure as would ensure speedy trial to the accused. The State cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the State has no adequate financial resources to incur the necessary expenditure needed for improving the administrative and judicial apparatus with a view to ensuring speedy trial."

17. Considering the submissions made, facts and circumstances, perusal of the case record, the Petitioner makes out a fit case for grant of bail and it is directed that the Petitioner be released on bail with some

⁵ 1979 AIR 1369

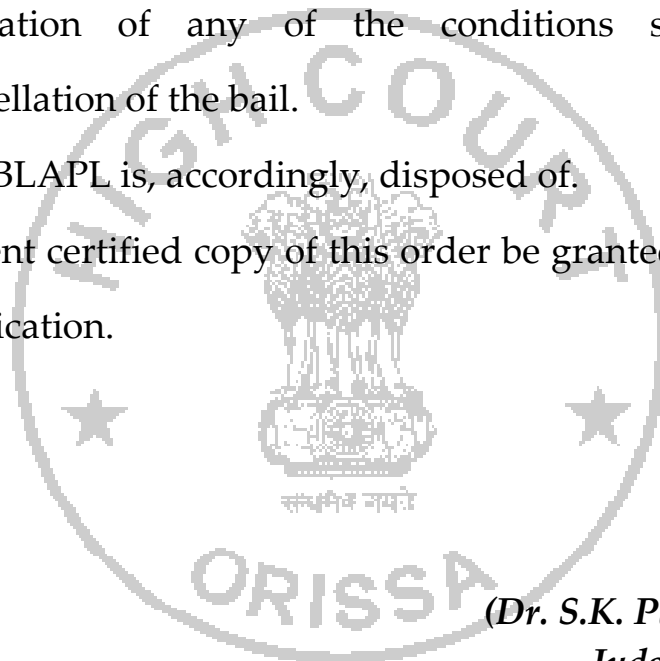
stringent terms and conditions as deemed just and proper by the court in seisin over the matter in the aforesaid case with further conditions that: -

- i. the Petitioner shall appear before the learned trial court on each date of posting of the case;
- ii. he shall not indulge in similar activities in future; and
- iii. he shall not tamper the evidence of the prosecution witnesses in any manner.

18. Violation of any of the conditions shall entail cancellation of the bail.

19. The BLAPL is, accordingly, disposed of.

20. Urgent certified copy of this order be granted on proper application.



(Dr. S.K. Panigrahi)
Judge

B.Jhankar