

IN THE HIGH COURT OF ORISSA AT CUTTACK

BLAPL No.5373 of 2021

Samir Kumar Nanda* *Petitioner

*Mr.Soura Ch. Mohapatra,
Advocate*

-versus-

State of Odisha* *Opp. Party

*Mrs.Susamarani Sahoo,
Addl. Standing Counsel*

**CORAM:
JUSTICE S.K. SAHOO**

**ORDER
29.07.2022**

Order No.

12. This matter is taken up through Hybrid arrangement (video conferencing/physical mode).

Heard Mr. S. Ch. Mohapatra, the learned counsel for the petitioner and Smt. Susamarani Sahoo, learned counsel for the State.

This is an application under section 439 of Cr.P.C. in connection with C.T. Case No.30 of 2020 arising out of Phiringia P.S. Case No.43 of 2020 pending in the Court of learned Sessions Judge -cum- Special Judge, Phulbani for offence punishable under section 20(b)(ii)(C) of the N.D.P.S. Act.

The petitioner moved an application for bail before the Court of learned of learned Sessions Judge -cum- Special Judge, Phulbani which was rejected on 28.06.2021.

Learned counsel for the petitioner submits that the petitioner is in judicial custody since 12.06.2020 and he was a passenger in an auto rickshaw, which was detained by the S.I.

of Phiringia police station on 11.06.2020 and when it was searched, 25 kgs. of ganja was found in a plastic bag in the auto rickshaw. Learned counsel further submitted that the other passengers, namely, Jakhya Digal and Sumitra Sahoo, who were present in the auto rickshaw have already been released on bail in BLAPL No. 4693 of 2020 and BLAPL No. 5378 of 2020 as per orders dated 01.09.2021 and 19.01.2021 respectively. Learned counsel further submitted that while rejecting the earlier bail application of the petitioner in BLAPL No. 4828 of 2020 as per order dated 03.02.2021, this Court directed the learned trial Court to expedite the trial and if possible, to conclude the same within a period of six months from the date of receipt of the copy of the order and the petitioner was given liberty to renew his prayer for bail after examination of the material witnesses in the learned trial Court. It is further submitted that in the trial Court, out of eighteen charge sheet witnesses, only three witnesses have been examined so far and merely because the petitioner was a passenger in the auto rickshaw, it cannot be said that he is guilty of the offence and therefore, in a case of this nature, it cannot be said that section 37 of the N.D.P.S. Act would be a bar for grant of bail. It is further submitted that in view of the slow progress of the trial, the bail application of the petitioner may be favourably reconsidered, particularly when there is no material with regard to any criminal antecedents against the petitioner and it cannot be said that if he is granted bail, he is likely to commit any offence under the N.D.P.S. Act.

Learned counsel for the State has opposed the prayer for bail and submitted that three witnesses have been examined so far in the trial Court, who have specifically stated that the petitioner was one of the persons found in the auto rickshaw from which contraband ganja of commercial quantity was seized and other material witnesses are yet to be

examined and therefore, in view of the bar under section 37 of the N.D.P.S. Act, the petitioner should not be released on bail.

In the case of **Union of India -Vrs.- Niyazuddin Sk and others, reported in (2018) 13 Supreme Court Cases 738**, it is held that once the Public Prosecutor opposes the application for bail to a person accused of the enumerated offences under section 37 of the N.D.P.S. Act, in case the Court proposes to grant bail to such a person, two conditions are to be mandatorily satisfied in addition to the normal requirements under the provisions of Cr.P.C. or any other enactment, i.e. (i) the Court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence; and (ii) that the person is not likely to commit any offence while on bail.

There is no dispute that section 37 of the N.D.P.S. Act starts with a non-obstante clause and sub-section (2) thereof states that the power to grant bail to a person accused of having committed offence under the N.D.P.S. Act is not only subject to the limitations imposed under section 439 of Cr.P.C. but also subject to the restrictions imposed by clause (b) of sub-section (1) of section 37 of the N.D.P.S. Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions i.e. (i) satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on 'reasonable grounds'. The expression 'reasonable grounds' has not been defined in the said Act, but means something more than prima facie grounds. It connotes substantial probable

causes for believing that the accused is not guilty of the offence he is charged with. The 'reasonable belief' contemplated in turn, points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the offence charged. (Ref: **(2009) 42 Orissa Criminal Reports (Union of India (UOI) -Vrs.- Ratan Mallik @ Habul)**).

There is no dispute that while granting bail to the aforesaid co-accused persons, namely, Jakhya Digal and Sumitra Sahoo, the bar under section 37 of the N.D.P.S. Act has not been taken into consideration. In my humble view, when the condition precedent for grant of bail in a case under N.D.P.S. Act where the accused was found to be in possession of commercial quantity of ganja is that the twin conditions mentioned in section 37 of the N.D.P.S. Act are to be satisfied, but while granting bail, the same has not been considered, on the basis of the aforesaid bail orders, the petitioner cannot claim parity. The Judge is not bound to grant bail to an accused on the ground of parity where the order granting bail to an identically placed co-accused has been passed in flagrant violation of well settled principles of law.

Whether the petitioner was a mere passenger or whether he was aware about the ganja being transported in the auto rickshaw or whether he was hand in glove with the co-accused and transporting ganja is to be adjudicated at the appropriate stage by the learned trial Court. It is the duty of the prosecution to establish its case beyond all reasonable doubt and the defence is to discharge its burden by preponderance of probability in bringing out materials on record to show that the petitioner was not aware what was there in the auto rickshaw while he was moving in it and therefore, he cannot be fastened with any liability. Giving any

finding on such issues at this stage will have a serious effect on the trial of the case.

However, it appears that the earlier order of this Court directing the learned trial Court to conclude the trial within a period of six months from the date of receipt of a copy of the said order, has not been complied with and only three witnesses have been examined so far and the prosecution has not brought on record anything about the criminal antecedents against the petitioner.

Considering the submissions made by the learned counsel for the respective parties, the period of detention of the petitioner in judicial custody and the progress of trial so far, while not inclining to release the petitioner on bail on merit, I am inclined to release the petitioner on interim bail for a period of three months from the date of release. The petitioner shall surrender before the learned trial Court immediately on expiry of the three months period.

For the above period, let the petitioner be released on interim bail in the aforesaid case on furnishing bail bond of Rs.50,000/- (rupees fifty thousand) with two local solvent sureties each for the like amount to the satisfaction of the learned Court in seisin over the matter with further terms and conditions as the learned Court may deem just and proper including the conditions that while on interim bail, the petitioner shall appear before the learned trial Court on each date to which the case would be posted for trial and shall not try to tamper with the evidence. The learned trial Court shall do well to conclude the trial by the end of December 2022, if there is no other impediment.

Violation of any of the terms and conditions shall entail cancellation of interim bail.

Accordingly, the BLAPL is disposed of.

Issue urgent certified copy as per Rules.

(S.K. Sahoo)
Judge

PKSahoo

