

IN THE HIGH COURT OF ORISSA, CUTTACK

BLAPL No. 5935 of 2021

Application under section 439 of the Code of Criminal Procedure, 1973 in connection with Spl. G.R. Case No.69 of 2020 arising out of Kakatpur P.S. Case No.215 of 2020 pending in the Court of Addl. Sessions Judge -cum- Special Judge, Nimapara.

Roshan @ Mir Raushan
Ali

Petitioner

-Versus-

State of Odisha

Opp. Party

For Petitioner:

Mr. Devashis Panda

For Opp. Party:

Mr. D.K. Pani
Addl. Standing Counsel

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

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Date of Order: 07.02.2022
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S.K. SAHOO, J. This is an application for bail under section 439 of Cr.P.C. filed by the petitioner Roshan @ Mir Raushan Ali in connection with Kakatpur P.S. Case No.215 of 2020 corresponding to Spl. G.R. Case No.69 of 2020 pending in the Court of learned Addl. Sessions Judge -cum- Special Judge, Nimapara in which charge sheet has been submitted against the

petitioner for alleged commission of offences under sections 21(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act').

The prayer for bail of the petitioner has been rejected by the learned Addl. Sessions Judge -cum- Special Judge, Nimapara vide order dated 19.07.2021.

2. The prosecution case, as per the first information report lodged by Sanatan Khuntia, S.I. of Police, Kakatpur police station, in short, is that on 08.11.2020 during M.V. checking at Somanathapur petrol pump, the informant and other police officials found one black colour Pulsar 220 motor cycle without reflecting registration number was coming from Nayahat side to Kakatpur side on Kakatpur-Astarang road with one pillion rider. They tried to stop the motor cycle for verification, but the riders did not stop. On a little chase, they managed to round them up and on being asked, the riders of the motor cycle disclosed their names as Pintu @ Jyotiranjana Mohanty and Kalu @ Akhaya Bhoi. On suspicion, when both of them were interrogated, they admitted that they were piloting another 220 Pulsar black colour motor cycle behind them in which one Muna @ Mir Rahat Ali and his son Roshan @ Mir Raushan Ali (petitioner) from Jaleswar, Balesore were coming with brown sugar with them in order to distribute among the local agents of Kakatpur. After a while, the

informant and his team found another black colour Pulsar motor cycle without any registration number was coming rashly towards them being driven by one person with one pillion rider. With much difficulty, the police detained that motor cycle. On being identified by the persons detained earlier, when the riders of the second motor cycle were asked about their identity, they both disclosed their names as Roshan @ Mir Raushan Ali (petitioner) and Muna @ Mir Rahat Ali and also their addresses. On suspicion, the police searched the person of Muna @ Mir Rahat Ali and found one jerry packet with some suspicious substance from his pant pocket. From the texture, colour and smell of the substance and also basing on their past experience, the informant along with the police personnel were of the view that it was nothing but brown sugar. Accused Muna @ Mir Rahat Ali disclosed that he had procured the brown sugar from one Sk. Muna of Jaleswar who had sent him to Kakatpur for selling purpose to his agents which in turn would be sold among the locals. On demand, the accused persons failed to produce any license or authority for such conscious possession of contraband brown sugar. Two local witnesses were arranged and in their presence, the informant gave his identity and after complying with the formalities of personal search and taking down option of search before any Gazetted Officer or a Magistrate, in presence

of the Executive Magistrate, on being weighed, the contraband brown sugar recovered from the conscious and exclusive possession of the accused Muna @ Mir Rahat Ali was found to be 298 grams including the weight of double layer polythene packet, which weighed about five milligrams. The polythene packet containing brown sugar was then kept inside a white cloth packet, stitched and sealed and the informant then put his brass seal on the packet on which the witnesses, accused persons and the police personnel put their signatures and the packet was marked as Ext. 'A'. Seizure list of the contraband brown sugar, a manual blue and green colour Samsung duos cell phone of accused Muna @ Mir Rahat Ali with sim number was prepared. The black colour Pulsar motor cycle including its key was seized from the possession of the petitioner. Specimen seal impression was taken by the informant on a separate piece of paper where the accused persons, the Executive Magistrate and the witnesses put their signatures. The informant brought the accused persons along with the seized articles to the police station for necessary action as per law.

On the first information report presented before the Inspector in-charge, Kakatpur police station, Kakatpur P.S. Case No.215 dated 08.11.2020 was registered under section 21(c) and 29 of the N.D.P.S. Act against eight accused persons

including the petitioner. The Inspector in-charge himself took up investigation of the case. He received the seized articles and seizure lists from the informant. The brown sugar was then kept in P.S. Malkhana, the witnesses were examined and the accused persons, namely Pintu @ Jyotiranjana Mohanty, Kalu @ Akhaya Bhoi @ Golden Bhoi, Roshan @ Mir Raushan Ali (petitioner) and Muna @ Mir Rahat Ali were arrested and forwarded to the Court on 09.11.2020 along with the seized contraband articles. First charge sheet was submitted on 30.04.2021 against the petitioner and others keeping the investigation open under section 173(8) of Cr.P.C. and subsequently final charge sheet was submitted under sections 21(c) and 29 of the N.D.P.S. Act.

3. Mr. Devashis Panda, learned counsel for the petitioner argued that there is no iota of material on record against the petitioner that he was in conscious possession of contraband brown sugar. The petitioner was only riding the motorcycle at the request of his father Muna @ Mir Rahat Ali, who was the pillion rider and he was completely unaware of any contraband material being carried by his father. According to Mr. Panda, conscious possession of the contraband article of the petitioner is a sine qua non which is missing in the case. No contraband brown sugar was recovered from the petitioner as per the seizure list and the same was recovered from co-accused

Muna @ Mir Rahat Ali, the father of the petitioner who was the pillion rider of the petitioner's bike and therefore, there is no legal bar to release the petitioner on bail. He further submitted that three of the co-accused persons, namely, Mangu @ Mangaraj Mohanty, Mangu @ Rajkishore Swain and Deba @ Budhadev Bhol have already been released on bail by this Court in BLAPL Nos.9007 of 2020, 8996 of 2020 and 9099 of 2020 respectively. The present petitioner is in no way connected with the manufacture, possession, sale, purchase, transport, import, export, use or preparation of any contraband article and hence the ingredients of the offences under N.D.P.S. Act under which charge sheet has been submitted are not prima facie made out against him. It is further contended that that the petitioner is languishing in judicial custody since 09.11.2020 and though the earlier bail application of the petitioner in BLAPL No.9109 of 2020 was rejected on 30.06.2021 on merit during pendency of the investigation, but in the meantime, the investigation has been completed and charge sheet has been submitted and moreover, the petitioner is having no criminal antecedents and therefore, the bail application may be favourably considered. He placed reliance in the case of **Dharampal Singh -Vrs.- State of Punjab reported in (2010) 9 Supreme Court Cases 608.**

Mr. D.K. Pani, learned Addl. Standing Counsel appearing for the State of Odisha, on the other hand, opposed the prayer for bail and contended that in view of the relationship between the two co-accused persons who were moving together in the Pulsar motor cycle, the distance both of them covered in the motor cycle, the surrounding circumstances in which the brown sugar was seized, the material found during course of investigation that contraband brown sugar was being transported from Jaleswar to Kakatpur for selling the same to the agents and particularly in view of the bar under section 37 of the N.D.P.S. Act for grant of bail in case of seizure of commercial quantity of contraband brown sugar, the petitioner does not deserve to be released on bail. He argued that the defence plea of the petitioner that he was not aware what his father was carrying with him who was sitting behind him as a pillion rider is to be pleaded, proved and adjudicated at the stage of trial and any finding in that respect is likely to cause prejudice to either of the parties. He placed reliance in the case of **Union of India -Vrs.- Shiv Shanker Kesari reported in (2007) 7 Supreme Court Cases 798, Union of India -Vrs.- Rattan Mallik reported in (2009) 2 Supreme Court Cases 624, Union of India through Narcotics Control Bureau, Lucknow -Vrs.- Md. Nawaz Khan reported in (2021) 10 Supreme Court Cases**

100 and Madan Lal & Ors. -Vrs.- State of Himachal Pradesh reported in (2003) 7 Supreme Court Cases 465.

4. Adverting to the contentions raised by the learned counsel for the respective parties, there is no dispute that as per the prosecution case, the quantity of contraband brown sugar seized from the possession of accused Muna @ Mir Rahat Ali, the father of the petitioner was 298 grams including the weight of double layered transparent polythene weighing 5 milligram which comes under 'commercial quantity' as per the notification of the Central Government published in the Official Gazette. The father of the petitioner was the pillion rider in the black colour Pulsar motorcycle which the petitioner was riding at the relevant time. The motor cycle was having no registration number.

Now, let me first discuss the citations placed by the learned counsel for the respective parties. In the case of **Shiv Shanker Kesari** (supra), while analysing the provision under section 37 of the N.D.P.S. Act, the Hon'ble Supreme Court held as follows:

"6. As the provision itself provides no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit any offence while on

bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

7. The expression used in Section 37(1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

8. The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know.

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11. The Court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the Court has not to consider the matter as if it is

pronouncing a judgment of acquittal and recording a finding of not guilty.

12. Additionally, the Court has to record a finding that while on bail, the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion.”

In the case of **Rattan Malik** (supra), the Hon’ble Supreme Court held as follows:

“12. It is plain from a bare reading of the non obstante clause in Section 37 of the N.D.P.S. Act and sub-section (2) thereof 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 the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed 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 viz. (i) the 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'.

13. 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 alleged offence (vide **Shiv Shanker Kesari** (supra)). Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the N.D.P.S. Act.

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the N.D.P.S. Act, the court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the N.D.P.S. Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on

bail. The satisfaction of the court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.”

In the case of **Md. Nawaz Khan** (supra), the Hon’ble Supreme Court relying on **Shiv Shanker Kesari** (supra) held that the test which the Courts are required to apply while granting bail is whether there are reasonable grounds to believe that the accused has not committed an offence and whether he is likely to commit any offence while on bail. Given the seriousness of offences punishable under the N.D.P.S. Act and in order to curb the menace of drug-trafficking in the country, stringent parameters for the grant of bail under the N.D.P.S. Act have been prescribed. It was further held that a finding of the absence of possession of the contraband on the person of the accused does not absolve the Court of the level of scrutiny required under section 37(1)(b)(ii) of the N.D.P.S. Act.

In the case of **Dharampal Singh** (supra), it was held that the initial burden of proof of possession lies on prosecution and once it is discharged, legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be

preponderance of probability. Once the plea of accused is found probable, discharge of initial burden by the prosecution will not nail him with offence. Offences under the Act being more serious in nature, higher degree of proof are required to convict an accused. It was further held that it needs no emphasis that the expression 'possession' is not capable of precise and completely logical definition of universal application in the context of all the statutes. 'Possession' is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. It was further held that from a plain reading of the section 54 of the N.D.P.S. Act, it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and section 35 of the N.D.P.S. Act gives statutory recognition to culpable mental state. It includes knowledge of fact.

In the case of **Madan Lal** (supra), it was held that once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the N.D.P.S. Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of section 54 of the N.D.P.S. Act where also

presumption is available to be drawn from possession of illicit articles.

5. The following circumstances are crucial to assess as to whether the application for bail is to be allowed having regard to the provisions of section 37 of the N.D.P.S. Act.

(i) The petitioner was riding the motor cycle all the way from Jaleswar in the district of Balasore to Kakatpur in Puri district with his father, the co-accused which was more than 250 Km.;

(ii) The co-accused father of the petitioner had concealed the brown sugar in his pant pocket while travelling with the petitioner;

(iii) The motor cycle was having no registration number;

(iv) The quantity of contraband brown sugar found from the co-accused father of the petitioner was of commercial quantity;

(v) The petitioner and his father could not produce any authority to possess such contraband articles;

(vi) Even if from the personal possession of the petitioner, no contraband brown sugar was found, but in view of the ratio laid down in the case of **Md. Nawaz Khan** (supra), it would not absolve this Court

of the level of scrutiny required under section 37(1)(b)(ii) of the N.D.P.S. Act;

(vii) From the available circumstances, it cannot be said that there are reasonable ground for believing that the petitioner is not guilty of the offence which is one of the conditions to be satisfied under section 37(1)(b) of the N.D.P.S. Act;

(viii) Though some of the co-accused persons have been released on bail, but the case of the petitioner stands in a completely different footing. Moreover, bail is granted on the totality of facts and circumstances of a case and parity cannot be a sole ground but is one of the grounds for consideration of the question of bail.

6. For the above reasons and particularly in view of the availability of prima facie case, the nature and gravity of the accusation, the severity of punishment prescribed for the offences and when there is reasonable apprehension of the witnesses being influenced, I am not inclined to release the petitioner on bail. Accordingly, the application for bail stands dismissed. The learned trial Court shall do well to expedite the trial.

Before parting, I would like to place it on record by way of abundant caution that whatever has been stated hereinabove in this order has been so said only for the purpose of disposing of the prayer for bail made by the petitioner. Nothing contained in this order shall be construed as expression of a final opinion on any of the issues of fact or law arising for decision in the case which shall naturally have to be done by the trial Court at the appropriate stage of the trial.

Urgent certified copy of the order be granted on proper application.

Orissa High Court, Cuttack
Dated 7th February 2022/PKSahoo



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S.K. Sahoo, J.