

IN THE HIGH COURT OF ORISSA AT CUTTACK**BLAPL NO.11613 of 2021**

(In the matter of application under Section 439 of the Criminal Procedure Code).

Rabi Prakash ***Petitioner***

-versus-

State of Odisha ***Opposite Party***

For Petitioner : ***Mr. A.N. Pattanayak, Advocate***

For Opposite Party : ***Mr. P.K. Pattnaik, AGA***

CORAM:

JUSTICE G. SATAPATHY

ORDER

11.11.2022

Order No.

10.

1. This matter is taken up through Hybrid Arrangement (Virtual /Physical Mode).

2. This is an application U/S. 439 of Cr.P.C. by the Petitioner for grant of bail in connection with Semiliguda P.S. Case No.91 of 2019 corresponding to T.R. Case No.27 of 2019 pending in the Court of learned Addl. Sessions Judge-cum-Special Judge, Koraput for

commission of offence punishable U/Ss. 20(b)(ii)(C) of the N.D.P.S. Act.

3. The allegation against the petitioner in gist, on the instruction of I.I.C., Semiliguda, S.I. Anita Nayak and staff, while performing patrolling on 02.10.2019 at about 12.30 P.M. in the afternoon on Nandapur-Semiliguda road MDR-55, found one full body twelve wheeler Truck (Eicher) No. EB-13-BD-5753 coming from Nandapur side in a high speed and accordingly, they chased and detained the truck at Bodenga Chhak and found three persons boarded in the said truck including the driver. On seeing the police, all the three persons took to their heels but the police staff could apprehend all the three. On verification, the said truck was found to have some jerry bags and bundles in the gap between two tarpaulins covering dullah in a concealed manner from which the pungent smell of Ganja was emitting. On being asked, the occupants of the vehicle could not able to produce any authority for possessing the contraband Ganja but the S.I. and staff ascertained the names and address of all the three occupants which includes the petitioner Rabi Prakash and they also seized the contraband Ganja which on weighment came to 246 Kgs. 800 grams and after observing all formalities, the petitioner and others were forwarded to the Court and the case was investigated into by S.I. Bhagaban Mishra who

on finding prima facie case submitted charge sheet against the petitioner and others for commission of offence U/Ss. 20(b)(ii)(C) of the N.D.P.S. Act

4. In the course of hearing of the bail application, Mr.A.N.Pattanayak, learned counsel for the petitioner submits the following points/grounds for consideration of the bail application of the petitioner:-

(i) Three persons including the present petitioner were arrested from the spot and consequently other accused persons were also arrested but in the meantime four accused persons have been granted bail.

(ii) Out of the accused persons granted bail, one Bikram Singh standing on similar footing as that of present petitioner has also been granted bail in BLAPL No. 1739 of 2020 and the petitioner thereby is entitled to bail on the principle of parity.

(iii) No incriminating materials or articles were recovered from the possession of the petitioner in course of his personal search.

(iv) One out of nineteen charge sheet witnesses has been examined till today but the petitioner is inside custody since last three years and one month, and thereby his right to speedy trial has been seriously infringed.

(v) The petitioner has no criminal antecedent except this case.

(vi) If the allegations on record are taken to be true, the petitioner was merely an occupant of the vehicle but the contraband Ganja being recovered from the carriage of the said vehicle which was not within the knowledge of the petitioner, the petitioner cannot be said to be in

conscious possession of contraband Ganja or guilty of the offences.

5. Besides, learned counsel for the petitioner also submits that the petitioner has been falsely implicated in this case and he is no way connected with transportation of any contraband Ganja, rather he was a mere occupant in the vehicle. It is further submitted that since the contraband Ganja was not found in exclusive possession of petitioner, Section 37 of N.D.P.S. Act cannot be attracted to deny bail to the petitioner and the long delay in disposal of the case has resulted in serious infraction of the right to speedy trial as guaranteed under Constitution to the petitioner. Learned counsel has also submitted that the petitioner is a poor person and he had come to Orissa for earning his livelihood but unfortunately he has been detained in custody on false accusations. In relying upon the decisions in ***Hussainara Khatoon Vrs. Home Secretary, State of Bihar; AIR 1979 SC 1360, Bharat Chaudhary Vrs. Union of India; (2021) SCC Online SC 1235, Union of India Vrs. K.A. Najeeb; (2021)3 SCC 713; State of West Bengal Vrs. Rakesh Singh @ Rakesh Kumar Singh; Criminal Appeal No. 923 of 2022 decided on 11th July, 2022***, learned counsel for the petitioner prays to direct release of the petitioner on bail.

6. In repelling the submissions of the petitioner, learned counsel for the State, however, vehemently opposes the bail application

of the petitioner by inter alia submitting that the contraband Ganja recovered and seized in this case being commercial quantity, Section 37(1)(b)(ii) of the N.D.P.S. Act creates an embargo for release of the petitioner on bail unless the twin conditions enumerated therein are fully satisfied by the petitioner for grant of bail to him but the petitioner has failed to satisfy the Court about the conditions as mandated in the aforesaid section. It is also submitted that merely because the trial has not concluded, the detention of the petitioner in this case being for a small period of two years or three years, it cannot be taken as a ground for release of the petitioner on bail. Learned counsel for the State further submits that the principle of parity cannot be extended to the petitioner in view of the fact that the order granting bail to co-accused persons was passed without reference to Section 37 of N.D.P.S. Act and the law laid down by Apex Court in ***Satpal Singh Vrs. State of Punjab; (2018) 13 SCC 813 and Lingaraj Meher Vrs. State of Orissa; BLAPL No. 2524/2021 decided on 11.02.2022.*** It is further submitted that the right to speedy trial and the personal liberty are definitely precious rights but such protection cannot be absolute in every situation and this two rights are to be considered by balancing the same with mandatory provision of Section 37 of N.D.P.S. Act, especially when the collective interest of the community outweigh such rights of the petitioner since

now a days the menace of drug is enormous and the collective interest of society demands protection of gullible person from the menace of drugs. In relying upon the decision in *Narcotics Control Bureau Vrs. Mohit Agarwal; 2022 SCC Online SC 891*, learned counsel for the State submits that the period of custody of the petitioner cannot be treated as a persuasive ground for grant of bail to him. While summing up his argument, learned counsel for the State prays to reject the bail application of the petitioner.

7. Adverting to address the arguments advanced for the petitioner, there appears allegations against the petitioner for transporting commercial quantity of contraband Ganja in a vehicle along with co-accused persons. For grant or refusal of bail under N.D.P.S. Act is to be guided by Section 37 of N.D.P.S. Act which is extracted 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 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.”

8. A literal reading of the above provisions of Sub-Section(2) of Section 37 of N.D.P.S. Act, it is evident that the limitations for granting bail as specified in Clause-b of Sub-Section(1) are in addition to the limitations under the Criminal Procedure Code or any other law for time being in force. Further, it is clear beyond doubt that Section 37 of the N.D.P.S. Act starts with a non-obstante clause incorporated in Sub-Section(1), besides the mandatory conditions imposed in Sub-Section(2), that there are certain restrictions on the power of the Court while granting bail to a person accused of offence involving commercial quantity, besides offences punishable U/Ss. 19 or 24 or 27-A of the N.D.P.S. Act but such restrictions on the power of the Court are not absolute and such person accused of an offence involving commercial quantity or offences U/Ss. 19 or 24 or 27-A of the N.D.P.S. Act can be released on bail or on his own bond provided the public prosecutor has been given an opportunity to oppose the bail application for such release and where the public prosecutor opposes the bail application, the Court is to be satisfied that there are reasonable

grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail.

9. Further, the aforesaid limitations on granting bail arises on merits only but what constitutes “reasonable grounds” as referred to in Section 37(1)(b)(ii) has not been defined in the N.D.P.S. Act and it is clarified by the rulings of Apex Court to the effect that the expression reasonable grounds means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of alleged offence. The reasonable believe as contemplated in the provision requires existence of such facts and circumstance as sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In other words, reasonable grounds would mean credible and plausible grounds for the Court to believe that the accused person is not guilty of alleged offence. It is no doubt tough for the accused to satisfy the Court that he is not guilty of the offence at the time of consideration his bail application, but the Court is not required to record a finding beyond reasonable doubt that the accused is not guilty of the offence by taking into consideration the evidence so collected by the investigating agency. The expression more than prima facie grounds would mean in the context that the uncontroverted allegation on record against the accused would establish his guilt

beyond all reasonable doubt. However, according to the provision of Section 37(1)(b)(ii) of N.D.P.S. Act, the compliance thereunder for grant of bail to the person accused of offences involving commercial quantity is mandatory and any deviation there from is impermissible under law.

10. Above being the requirements of law for grant of bail to person accused of offences involving commercial quantity, whether the present petitioner allegedly indicted for commission of offences punishable U/S 20(b)(ii)(C)/29 of the N.D.P.S. Act can be released on bail, notwithstanding to the provision of Section 37 of N.D.P.S. Act on the grounds canvassed for the petitioner. Addressing the first plank of submission of extending parity to the petitioner as co-accused has been granted bail, it appears that the petitioner has annexed copy of the orders granting bail to co-accused persons, but on a careful perusal of above orders would go to indicate that the mandatory provision U/S. 37 of N.D.P.S. Act has not been considered while granting bail to co-accused person or the co-accused has been granted bail by taking into consideration of his implication solely on the basis of confession of co-accused. It is never in dispute that grant of bail to accused is not a mechanical act but it involves the process of evaluation of accusations by balancing the same with different parameters such as prima facie

case, severity of punishment for offences alleged against the accused, nature of supporting evidence collected, apprehension of tampering the witnesses by the accused, nature and gravity of the offence, apprehension of accused absconding, criminal antecedents of the accused etc. The above lists are not exhaustive but indicative only.

11. Besides, a Court is not bound to exercise its discretion to grant bail to an accused on the ground of parity when the order granting bail to a similarly placed co-accused is devoid of any reason or the same has been secured in violation of statutory provision of law and there the Court can ignore such order granting bail to co-accused without following the mandatory provisions. Law never advocates/compels any Court to exercise discretion in violation of statutory requirement of the legal provisions merely on the ground that co-accused has been granted bail. For declining to extend the principle of parity on the premises of non-compliance of Section 37 of N.D.P.S. Act, this Court is fortified with the decision of our Apex Court in ***Satpal Singh Vrs. State of Punjab; (2018) 13 SCC 813***, wherein a three Judge Bench of the Apex Court in paragraph-1 has observed as under:-

01 xx xxx “Though it was argued that a co-ordinate Bench of the High Court had granted anticipatory bail to the co-accused, namely, Beant Singh and Gurwindr Singh who are brothers of

the appellant, as per order dated 21.09.2017, the learned Judge was not inclined to accept the contention since there was no question of parity as far as the bail is concerned and in view of the fact that the co-ordinate Bench had not taken note of the limitation U/S. 37 of N.D.P.S. Act. In our view the learned Judge is perfectly right in his approach and in declining the protection U/S. 438 of the Code of Criminal Procedure, 1973.”

12. In *State of Kerala and others Vrs. Rajesh and others; (2020) 12 SCC 122*, a two Judge Bench of the Apex Court at paragraph-22 held thus;-

22. “The submission made by the learned counsel for the respondents that in crime No. 14 of 2018, the bail has been granted to the other accused persons(A1 to A4), and no step has been taken by the prosecution to challenge the grant of post-arrest bail to the other accused persons, is of no consequence for the reason that the consideration prevailed upon the Court to grant bail to the other accused persons will not absolve the acts the respondent-accused(A5) from the rigor of Section 37 of N.D.P.S. Act.”

13. *Narcotics Control Bureau Vrs. Mohit Agrawal; (2022) SCC Online Supreme Court 891*, a three Judge Bench of Apex Court at paragraph-18 of the decision has laid down as follows:-

18. “In our opinion the narrow parameters of bail available under Section 37 of the Act have not been satisfied in the fact of the instance case. At this stage, it is not safe to conclude that the respondent has successfully demonstrated that there are reasonable grounds to believe that he is not guilty of the offence alleged against him, for him to have been admitted to bail. The length of

*period of his custody or the fact that the charge sheet has been filed and the trial has commenced are by themselves not consideration that can be treated as **persuasive grounds for granting relief to the respondent** U/S. 37 of the N.D.P.S. Act.”*

14. In **Union of India Vrs. Ratan Mallik @ Habul;(2009)**

OCR(SC) 697, the Apex Court while dealing a matter under N.D.P.S.

Act in paragraph-11 has held as under;-

“ However, when a prosecution/conviction is for offence(s) under a special statute and that statute contains specific provisions for dealing with matters arising thereunder, including an application for grant of bail, these provisions cannot be ignored while dealing with such application.”

14.1. In **Babua Vrs. State of Orissa; (2001) 2 SCC 566**, the Apex

Court at Para-3 has held thus:-

“3.The reason given by the petitioner for claiming grant of bail become insignificant if one bears in mind the scope of Section 37(1)(b) of the Act. At this stage of the case all that could be seen was whether the statements made on behalf of the prosecution witnesses, if believable, would result in conviction of the petitioner or not. At this juncture, one cannot say that the accused is not guilty of the offence if the allegations are made in the charge sheet are established. Moreover, the evidence having not been completely adduced before the Court one cannot say that there were no grounds to hold that he was not guilty of such offence. Further, the liberty of a citizen has got to be balanced with the interest of the society. In cases where Narcotic Drugs and Psychotropic Substances are involved, the accused would indulge in activities which are lethal to the

society. Therefore, it would certainly be in the interest of the society to keep such person behind bars during the pendency of the proceeding before the Court.”

15. In the course of hearing, learned counsel for the petitioner has undoubtedly relied on the decision **Bharat Choudhury(supra)** but the Apex Court while granting bail to accused has observed at paragraph-11 which is extracted as under:-

*“In absence of any psychotropic substance found in conscious possession of A-4, we are of the opinion that mere reliance on statement made by A-1 to A-3 under Section 67 of N.D.P.S. Act is too tenuous a ground to sustain the impugned order dated 15th July, 2021. This is all the more so when such a reliance runs contrary to the ruling in **Tofan Singh (supra)**. The impugned order qua A-4 is, accordingly, quashed and set aside and the order dated 2nd November, 2020 by the learned Special Judge, EC and N.D.P.S. cases, is restored. As per Raja Chandrasekharan (A-1), since the charge sheet has already been filed and by now the said accused has remained in custody for over a period of two years, it is deemed appropriate to release him on bail subject to satisfaction of the learned trial Court.”*

A careful perusal of the allegation in the case at hand would go to indicate that commercial quantity of contraband articles was allegedly recovered from a vehicle in which the petitioner was one of the occupants and thereby, the case of the petitioner cannot be considered similar to the case **Bharat Choudhury(supra)** nor the petitioner was implicated in this case solely on the confession of co-accused.

16. The petitioner has also relied upon *K.A.Najeeb(supra)*

wherein, the Apex Court at paragraph-13 has held thus:-

*“Even in case of special legislations like the Terrorist and Disruptive Activities(Prevention) Act, 1987 and Narcotic Drugs and Psychotropic Substances Act, 1985 which too have some what rigorous conditions for grant of bail, this Court in **Paramjit Singh Vrs. State (NCT of Delhi), Baba @ Sankar Raghuman Rohida Vrs. State of Maharashtra and Umarmia @ Mamumia Vrs. State of Gujurat** enlarged the accused on bail when they had been in jail for an extended period of time with little possibility of early completion of trial. The constitutionality of harsh condition for bail in such special enactments, has thus being primarily justified on the touch stone of speedy trials to ensure the protection of innocent civilians.”*

17. It is also not in dispute that speedy trial is not specifically enumerated as a fundamental right but it is implicit in the broad swift and content of Article 21 as interpreted by Apex Court in ***Manaka Gandhi Vrs. Union of India;(1978) 2 SCR 621***, which was reiterated in ***Hussainara Khatoon(supra)*** wherein after taking into consideration the plight of under trial prisoners **charged for minor offences** languishing in custody for **5-10 years without initiation of trial**, the Apex Court had held that speedy trial is the essence of criminal justice and delay in trial by itself constitutes denial of justice. Right of speedy trial is undeniably a right of the accused guaranteed under Article 21 of our Constitution, but each and every day delay does not necessarily

amount to long delay causing prejudice to the accused, besides how long time would be considered as long delay affecting the right of the accused to speedy trial has not been precisely explained. In this context, while determining undue delay that has occurred in a case resulting in violation of Right to speedy trial, all the attendant circumstances such as nature of offences, number of accused and witnesses, the work load of the Court concerned, prevailing the local condition and the punishment prescribed for the offences and so on... may be considered while balancing the Right of speedy trial of the accused in coming out the delay to be considered as undue delay. In order to safe guard the Right of speedy trial to accused, legislatures has enacted and introduced the provision of Section 436(A) of the Cr.P.C. in general by way of amendment as also Section 437(6) of the Cr.P.C. for cases triable by a Magistrate. Further, Section 436(A) of the Cr.P.C. prescribes the maximum period for which an under trial prisoner can be detained for an offence under law except where punishment for the offence is death. In other words, where the accused has been charged for offences punishable with life or minimum for ten years which may extend to twenty years and the offences are heinous and serious having deep impact over society at large, mere detention of accused in custody for two or three years in a peculiar facts and circumstance of the case may

not be considered as undue delay, but it is not absolute in each and every case especially when deprivation of personal liberty of an accused without assurance of a speedy trial which is the legitimate expectation of the under trial prisoner, cannot be countenanced under law, more so, when the delay is not attributable to the accused. Besides, in ***Mohit Agarwal(supra)***, a three Judge Bench of Apex Court has observed:-

*“xx xx The **length of period of his custody** or the fact that charge sheet has been filed and trial has commenced are by themselves not consideration that can be treated as persuasive grounds for granting relief to the respondent U/S. 37 of the N.D.P.S. Act.”*

18. In Union of India Vrs. Saurabh Chatterji; (2006) 9 SCC 759, the Apex Court has held thus:-

“3. The respondent was charged under section 8/21 of the N.D.P.S. Act. By the impugned order he was released on bail on the ground that he has been in jail for fifteen months. There was no whisper about the provision of Section 37 of the Act. In this case the provision of Section 37 of the Act has been completely given a go bye by the High Court.”

19. In ***Supreme Court Legal Aid Committee(Representing under trial prisoners) Vrs. Union of India; (1994) 6 SCC 731***, the Apex Court after noticing the Right of accused to speedy trial and

stringent provision for grant of bail under N.D.P.S. Act has directed inter alia at paragraph-15(iii) that:-

“ where the under trial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an under trial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for the like amount.”

On reverting back, it is not the case of the petitioner that he has already suffered incarceration for a period of five years and it cannot be forgotten that the petitioner has been implicated in this case for offences punishable with minimum imprisonment of ten years and a fine of Rupees one lakh.

20. For grant of bail to the petitioner, learned counsel for the petitioner has also relied upon ***Rakesh Singh(Supra)***, wherein the Apex Court declines to interfere the order granting bail to the accused therein, but the fact remains that the High Court of Calcutta while granting bail to accused Rakesh has formed a opinion that the restriction of Section 37 of N.D.P.S. Act would not apply to the case and further the allegation against accused Rakesh Singh therein is for financing illicit trafficking in contrabands and harbouring offenders and he was not apprehended from the spot, and thereby, the facts in ***Rakesh Singh(Supra)***, are quite distinguishable from the facts of the present

case wherein petitioner was allegedly apprehended from the vehicle transporting contraband Ganja. In *Satender Kumar Ankil Vrs. C.B.I. and another; (2022) SCC Online SC 825*, the Apex Court while laying down a guidelines in the matter of grant of bail in special Act case like N.D.P.S. Act cases has been pleased to observe about additional condition of compliance of the provisions of Section 37 of N.D.P.S. Act. In the present case, on a conspectus of materials on record requires satisfaction of Court under section 37 of N.D.P.S. Act before grant of bail to the petitioner.

21. On a cumulative assessment of law laid down by Apex Court in the decisions referred to above and the provision of grant of bail for commission of offence relating to Narcotics and Psychotropic Substance, it appears that satisfaction of provision of Section 37 of N.D.P.S. Act by the accused is mandatory before granting him bail for offences involving commercial quantity of Narcotics Substance. Adverting to the materials on record, it appears that the petitioner was one of the occupants of the vehicle in which contraband Ganja was allegedly being transported and the petitioner was allegedly apprehended from the spot. It is therefore clear that the petitioner has to satisfy the twin conditions of Section 37(1)(b)(ii) of N.D.P.S. Act so as to entitle him the discretion of bail.

22. In ultimate appraisal of totality of facts and circumstance on the bedrock of legal principle enunciated for grant of bail to person accused of offence involving commercial quantity of contraband substance, there appears no hesitation in the mind of the Court that in absence of mandatory compliance Section 37(1)(b)(ii) of N.D.P.S. Act, the petitioner cannot be granted bail merely on the ground of detention in custody for some period. In this case, when the State counsel opposes the bail application of the petitioner for want of compliance U/S. 37 of N.D.P.S. Act, this Court, however, on conspectus of materials on record considers it hard to record satisfaction at this stage of the case that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is unlikely to commit any offence while on bail. Hence, when the petitioner has not been able to comply Section 37 of N.D.P.S. Act, his bail application cannot be considered affirmatively enuring to his benefit.

In the result, the BLAPL of the petitioner stands rejected.

(G. Satapathy)
Judge

Kishore