

06.09.2023
Sl. No.9
akd
[ALLOWED]

C. R. M. (NDPS) 1454 of 2023

In Re: An application for bail under Section 439 of the Code of Criminal Procedure filed on 21.08.2023 in connection with Hili Police Station Case No.116 of 2022 dated 09.05.2022 under Sections 21(c)/22(c)/23(c)/27A of the NDPS Act.

And

In Re: ***Biswanath Mahata @ Biswanath Mahato***

... .. Petitioner

Mr. Kaushik Choudhury
Ms. Busra Khatoon

... .. for the petitioner

Mr. Sanjay Bardhan
Ms. Baisakhi Chatterjee

... .. for the State

1. It is submitted on behalf of the petitioner that he is in custody since 27th July, 2023. It is further submitted no narcotics was recovered from his possession. He is not the owner of the motorcycle bearing registration No. WB62J-4958 which was used to transport narcotics. Accordingly, he prays for bail.
2. In course of hearing of the application, learned Advocate for the State relied on an undertaking signed by the petitioner in course of a village *salish* on 13.05.2022 wherein it is stated that on 09.05.2022 in the evening he had taken the motorcycle from the mother of the owner i.e. Priyanath Pramanik. Priyanath was not present in the area at the material point of time.
3. It may not be out of place to note BSF personnel had apprehended the motorcycle in the evening of 08.05.2022. The incident had occurred prior to the day petitioner took custody of the motorcycle as per the undertaking. Learned Advocate for the State submits the date in the undertaking is incorrectly stated. Statements of witnesses to the undertaking say the petitioner had taken delivery of the motorcycle in the evening of 08.05.2022. This Court was also

informed the owner of the motorcycle i.e. Priyanath Pramanik had been discharged from the case.

4. In view of the aforesaid dichotomy, we directed the Investigating Officer to make enquiries with regard to the difference in the date on which the petitioner took delivery of the motorcycle as per the undertaking and the oral statements of witnesses respectively. Explanation was sought why owner of the motorcycle was discharged.
5. Pursuant to our earlier direction, Investigating Officer is personally present before this court. His presence is noted and dispensed with.
6. Report is placed on record. Report is singularly silent why date on which the petitioner took possession of the motorcycle as per the undertaking is at variance with the statements of witnesses. With regard to discharge of the owner it is merely stated he was not present near the spot. Report emphasises tower location and Call Detail Records (CDRs.) of petitioner and co-accused to show they were present at the place of occurrence.
7. We have considered the materials on record. Petitioner is not the owner of the motorcycle from which narcotics was recovered. Owner of the motorcycle viz. Priyanath Pramanik claimed he was not in the locality on the material date. He had gone to Berhampore and thereafter to Kolkata. Statements of witnesses show petitioner and co-accused had taken away the motorcycle from the owner's mother in the evening of 08.05.2022. Incident occurred on the same day at 22.15 hrs. when the motorcycle with narcotics was apprehended by BSF personnel. After registration of the case on 13.05.2022 an undertaking was recorded in course of village *salish* where petitioner claimed he had taken the motorcycle in the evening of 09.05.2022. This undertaking is signed by the very witnesses who made oral

statements that the petitioner had taken the motorcycle on the earlier day.

8. Report of the Investigating Officer does not explain away this dichotomy. On the other hand, it relies on Call Detail Records (CDRs.) and tower location to affix culpability on the petitioner.
9. Range of a mobile tower is variable. Exact location of an individual on the strength of a mobile tower location cannot be ascertained. For this a GPS report of the mobile phone is necessary. No such effort to obtain such report has been made. Statement of service provider has also not been obtained.
10. In this backdrop, we are loath to rely on the scanty and contradictory evidence with regard to involvement of the petitioner in the crime. He has been able to rebut the statutory restrictions under Section 37 of the NDPS Act. Under such circumstances and in view of the period of detention suffered by the petitioner, we are of the opinion further detention of the accused/petitioner is not necessary.
11. Therefore, the accused/petitioner, namely **Biswanath Mahata @ Biswanath Mahato**, be released on bail upon furnishing bond of Rs.10,000/- (Rupees Ten thousand only), with two sureties of like amount each, one of whom must be local, to the satisfaction of the learned Judge, Special Court, under the NDPS Act-cum-Additional District Judge, 3rd Court, Balurghat, Dakshin Dinajpur subject to condition that the said petitioner shall appear before the trial court on every date of hearing until further orders and shall not intimidate witnesses or tamper with evidence in any manner whatsoever or commit similar offences in future.
12. In the event he fails to appear before the trial court without any justifiable cause, the trial court shall be at liberty to cancel his bail automatically without reference to this court.

13. We note with concern the lackadaisical manner in which the investigation has been conducted. No explanation is forthcoming with regard to the contradictory oral statements of witnesses vis-à-vis the undertaking relied upon to show control and possession of the motorcycle by the petitioner. These contradictory materials and the fact that the owner was absent at the place of occurrence had led the Investigating Officer to come to a conclusion that the owner is not involved and may be discharged. He did not investigate the angle that the owner of the motorcycle may utilise the services of others to commit the crime even if he was not in the area. Mere absence from the place of occurrence does not affect constructive ownership of the registered owner over the motorcycle.
14. Evidence on record that the motorcycle had gone out of control and custody of the owner appears to be contradictory. Further investigation with regard to the role of the owner is necessary in these facts.
15. We record our disapproval with regard to the manner in which the Investigating Officer has investigated the case.
16. Accordingly, we direct the Officer-in-charge, Hili Police Station to divest the Investigating Officer of the duty to investigate the case. Investigation of the case shall be handed over to a superior police officer not lower than the rank of Additional Superintendent of Police who shall conduct investigation into the crime particularly the role of the registered owner of the motorcycle.
17. The application for bail, thus, stands allowed.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)

