

(2022) 07 OHC CK 0055
In the Orissa High Court
Case No : Bail Application No. 9629 of 2021

Kishore Bira

APPELLANT

Vs

State Of Odisha

RESPONDENT

Date of Decision : 11-07-2022

Acts Referred:

Constitution of India, 1950 — Article 21
Code of Criminal Procedure, 1973 — Section 439
Indian Penal Code, 1860 — Section 473
Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 20(b), 20(b)(ii)(C),
25, 29

Citation : (2022) 07 OHC CK 0055

Hon'ble Judges : Dr S.K. Panigrahi, J

Bench : Single Bench

Advocate : Dr. Binoda Kumar Mishra, G.R. Mohapatra

Final Decision : Disposed Of

Judgement

Dr. S.K. Panigrahi, J

1. This matter is taken up by virtual/physical mode.
- 2 . Heard, learned counsel for the Petitioner and learned counsel for the State.
3. The Petitioner being in custody in connection with R. Udayagiri PS Case No. 18 of 2020 corresponding to G.R. Case No.19 of 2020, pending in the court of the learned District and Sessions Judge, Gajapati, Paralakhemundi, registered for the alleged commission of offence under Sections 20(b)(ii)(C), 25 and 29 of the NDPS Act and Section 473 of IPC, has filed this application under Section 439 of CrPC for his release on bail.
4. The allegation of the prosecution is that on 07.03.2020 at about 10 a.m. the S.I. of Police, R. Udayagiri Police Station Mr. Biswajeet Jena reported in the police station that he along with other police staff while returning to the police station after performing their patrolling duty, at about 5 a.m. they found one

commander jeep without number plate was going towards R. Udayagiri in front of their bolero in high speed. On suspicion the police party chased the vehicle and detained the commander jeep on the RD road at Kusum Ghati near village Pariveta. One person was able to run away towards Jungle side while the other two persons were detained. During checking 14 Nos. of jerry bags were found from the jeep and as alleged that carried ganja. The driver disclosed his name as Pratap Majhi and other disclosed his name as Kishore Bira, the present petitioner. On enquiry, the driver told that he along with Junesh Lima of Partipanka collected the ganja at the jungle area of nearby villages and they were transporting the same from Anugur to Berhampur. Junesh Lima who was the owner of the contraband Ganja and inside the jeep fled from the spot seeing the police. On being asked Kishore Bira, the present petitioner confessed that he was assisting Janesh Lima and Pratap Majhi during packing and loading of the jerry bags. The driver also could not produce any license or documents towards the transportation possession of such contraband. After weighing, a total of 400kgs of ganja was seized. After observing all the formalities, the ganja was seized and the petitioner was arrested and forwarded to the learned court below.

5. Learned counsel for the Petitioner submits that the contraband was not seized out of the exclusive possession of the petitioner. The petitioner is a daily wage labourer and earns his livelihood through labour works. On the date of occurrence, the petitioner was hired as a labourer for loading and unloading of the bags. He was fully ignorant about the materials in the bags. So the contraband ganja seized from the vehicle cannot be said to have been seized from the conscious possession of the petitioner.

6. He further submits that the desertion by an owner of a cargo in a vehicle does not entitle possession for the driver and the others sitting inside the vehicle. There is no such law to automatically transfer possessory rights over the cargo deserted by the owner to the driver of the carriage or the workers hired to load and unload the same. Moreover, the petitioner has been languishing in jail for more than 18 months.

7. Learned counsel for the State vehemently opposes the bail prayer of the Petitioner.

8. Section 20(b) of the NDPS Act makes possession of contraband articles an offence. Section 20 appears in chapter IV of the Act which relates to offence for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession. It is highlighted that unless the possession was coupled with requisite mental element, i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

9. Hon'ble Supreme Court in the case of Avtar Singh and others vs. State of Punjab 2002 (7) SCC 419., held that:

"The word "possession" no doubt has different shades of meaning and it is quite

elastic in its connotation. 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 evidence available on record, that the three appellants -- one of whom was driving the vehicle and the 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 the 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 the 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."

10. Another decision on which reliance is placed is the decision of Hon'ble Supreme Court in the case of Sorabkhan Gandhkhan Pathan and another vs. State of Gujarat 2004 (13) SCC 608, wherein it has been held as follows:

"7. 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 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. However, the appeal of the first appellant is dismissed."

11. Hon'ble 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 1979 AIR 1369, wherein the Hon'ble 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.”

8. 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 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.

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

10. The BLAPL is, accordingly, disposed of.

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

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