
(2014) 11 OHC CK 0093
In the Orissa High Court
Case No : B.L.A.P.L. No. 19504 of 2014

Nasar Kumbhar

APPELLANT

Vs

State of Odisha

RESPONDENT

Date of Decision : 14-11-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 438
Motor Vehicles Act, 1988 — Section 2(30)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2(iii)(b),
2(viia), 20(b)(ii)(C), 25, 35

Citation : (2014) 11 OHC CK 0093

Hon'ble Judges : S.K. Sahoo, J

Bench : Single Bench

Judgement

S.K. Sahoo, J.—This is an application filed by the petitioner under section 438 Cr.P.C. seeking pre-arrest bail in connection with T.R. Case No. 26 of 2013 pending in the court of learned Sessions Judge-cum-Special Judge, Deogarh which arises out of P.R. No. 8 of 2013-1014 under sections 20(b)(ii)(C) of N.D.P.S. Act, 1985.

2. The prosecution case is that on 28.5.2013 at about 7.00 a.m. while the Sub-Inspector of Excise, Deogarh was performing patrolling duty along with his staff and Executive Magistrate (Tahasildar), Deogarh at village Tinkabir, they noticed a Toyota Qualis Car bearing registration No. CG-04-ZP-1045 was coming from Chhatabar Side. On reasonable suspicion, they detained the car and found that Ganja smell was coming out of the car. The Sub-Inspector of Excise asked the driver of the car as to what he had kept on the backside seat, the driver replied it to be Ganja. The driver disclosed his name as Nasim Khan. The Sub-Inspector of Excise gave his identity to the driver and after maintaining all formalities of search and seizure, he opened the plastic bag kept on the backside seat and found it to be Ganja. The driver Nasim Khan could not produce any authority for possession of the Ganja. The SI of Excise conducted some test and after being confirmed on the basis of his departmental experience that the articles recovered

were nothing but Ganja, it was weighed and found to be 70 Kgs. The seizure list was prepared and it was also sealed. A copy of the seizure list was handed over to the accused driver Nasim Khan and he was forwarded to the Court along with the seized Ganja. As per the order of the learned Sessions Judge-cum-Special Judge, Deogarh, learned S.D.J.M., Deogarh drew sample and sent it for chemical examination to Divisional Excise, Chemical Testing Laboratory, Northern Division, Sambalpur and the rest Ganja was kept in the Court Malkhana. The preliminary report of arrest, search and seizure under section 57 of the N.D.P.S. Act was also prepared.

3. During investigation, the S.I. of Excise made requisition to RTO, Raipur to ascertain the ownership of Toyota Qualis Car bearing Registration CG-04-ZP-1045. He also issued notice to the owner Prabhash Kumar Sahu as per registration certificate which was seized from the driver-accused Nasim Khan to appear before him for the purpose of investigation. The I.O. received the chemical examination report which indicates that the sample marked as Ext. A is found to be Ganja (Cannabis) as it gave positive identification test for Ganja and it comes within the definition under section 2(iii)(b) of the N.D.P.S. Act. Prabhash Kumar Sahu sent a letter to the I.O. indicating therein that though he was the owner of the seized vehicle bearing registration No. CG-04-ZP-1045 but he had sold the vehicle to the petitioner on 2.8.2011. He also sent the affidavit of the seller and purchaser with all the documents regarding the name transfer in the registration certificate of the vehicle to the petitioner in support of the seized Toyota Qualis Car. It was further indicated in the letter that the vehicle in question was earlier seized in connection with another N.D.P.S. case under Handapa Police Station in Angul District vide F.I.R. No. 65 of 2012 dated 11.6.2012 in which the petitioner and one Chandramani Sahoo were the accused. He also sent the Xerox copy of the F.I.R. attested by the Sheristadar, S.D.J.M. Court, Angul. The I.O. verified all the documents sent by Prabhash Kumar Sahu and came to know that on the date of transportation of Ganja, Prabhash Kumar Sahu is not the owner of Toyota Qualis Car bearing registration No. CG-04-ZP-1045 and due to malicious intention, the petitioner who had received all the documents of the vehicle from Prabhash Kumar Sahu did not take any steps to get the said vehicle transferred in his name. After completion of investigation, the I.O. found prima facie case against the driver Nasim Khan as well as the petitioner under section 20(b)(ii)(C) of N.D.P.S. Act and submitted prosecution report along with relevant documents. 4. Learned counsel for the petitioner Mr. S.S. Das, in his irritable style, submitted that the petitioner is in no way involved in the alleged crime and he has been named in the P.R. solely basing on the allegation that he is the owner of Toyota Qualis Car which was seized by the I.O. He further submitted that the petitioner was unaware about the fact that the car was used for unlawful activities by the accused driver. He submitted that the petitioner gave his vehicle for hire in good faith without having any knowledge about the illegal act being committed. Mr. Das pointed out from the statements of the witnesses collected by the Investigating Officer including that of accused

Nasim Khan that it is the driver Nasim Khan who is solely responsible for commission of offence of transporting the Ganja and none of them uttered a single word against the petitioner implicating him in the connection of the crime. He further contended that on the basis of the materials collected, the ingredients of offence under section 20(b)(ii)(C) of the N.D.P.S. Act is not made out against the petitioner and the false implication of the petitioner in the prosecution report speaks volume about the arbitrariness and highhandedness of the Excise Authorities.

The learned counsel for the State on the other hand submitted that the petitioner is a habitual offender and he was implicated in Handapa P.S. Case No. 65 of 2012 registered on 11.6.2012 under section 20(b)(ii)(C) of the N.D.P.S. Act and the very same vehicle was utilized in the said case also for transporting Ganja which was seized in that case and subsequently released. The learned State Counsel placed the F.I.R., seizurelist and other documents relating to Handapa P.S. Case No. 65 of 2012 to substantiate his contention. The learned counsel for the State further placed the letter written by Prabhash Kumar Sahu to the Investigating Officer and the affidavits annexed to such letter executed by Prabhash Kumar Sahu and the petitioner which prima facie indicates that the said Prabhash Kumar Sahu had sold Toyota Qualis bearing registration number CG-04-ZP-1045 to the petitioner for a consideration amount of Rs. 2,30,000/- and delivered possession of the vehicle in favour of the petitioner and also handed over the R.C. book to the petitioner. The learned counsel submitted that even though the ownership in the registration certificate has not been changed, but the petitioner on the basis of agreement with Prabhash Kumar Sahu has taken possession over the vehicle after payment of the consideration amount and when he was having control over the vehicle, permitted it to be used for the commission of offence by driver co-accused Nasim Khan, he is equally liable in view of the provisions under section 25 of N.D.P.S. Act and therefore, in view of the bar under section 37 of the N.D.P.S. Act, the anticipatory bail application should not be entertained.

5. Considering the submissions made by respective parties and perusing the materials available on record, it is found that the petitioner was not present in the vehicle on 28.5.2013 when it was seized by the Excise officials for transporting 70 Kgs. of Ganja illegally. The document collected during the investigation, prima facie indicates that even though the vehicle stands recorded in the name of Prabhash Kumar Sahu but he has sold the vehicle to the petitioner on 2.8.2011 for an amount of Rs. 2,30,000/- and handed over the R.C. book to the petitioner and the petitioner has taken possession of the vehicle. It also prima facie appears that the vehicle in question was seized in connection with Handapa P.S. Case 65 of 2012 dated 11.6.2012 for carrying Ganja and in that case the petitioner was very much present in the vehicle and was arrested in that case and the vehicle was also seized. The petitioner was also released in that case and the vehicle was also released. It is stated by the learned counsel for the petitioner that the said Handapa P.S. Case No. 65 of 2012 is now pending for framing of charge.

The learned counsel for the petitioner has not disputed about the contention raised by the learned counsel for the State that the petitioner has taken over possession of the vehicle from Prabhash Kumar Sahu after payment of the consideration amount rather his case is that the vehicle was used by the co-accused driver Nasim Khan in the transportation of Ganja without the knowledge of the petitioner. It is pertinent to extract relevant portion of para-5 of the petition:

"5.....It is pertinent to submit here that though the petitioner was named in the P.R. number No. 8/2013-14 on the allegation that he is the owner of the car that was seized by the I.O., he was unaware about the fact that the car was used for unlawful activities by the accused person. The petitioner gave his vehicle for hire in good faith without having any knowledge about the illegal act being committed. So the petitioner cannot be roped into the commission of offence under section 20(b)(ii)(c) of N.D.P.S. Act."

6. Section 20(b)(ii)(C) of N.D.P.S. Act provides that whoever, in contravention of any provisions of the Act or any rule or order made or condition of licence granted thereunder produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable where such contravention relates to sub-clause (b) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

Section 2(viia) of N.D.P.S. Act defines "commercial quantity?, in relation to narcotic drugs and psychotropic substances which means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette. Central Government notification specifies 20 Kg of Ganja to be of "commercial quantity".

Section 37 of N.D.P.S. Act which is mandatory in nature provides that before grant of bail, the ingredients mentioned therein are required to be examined and bail is to be granted only when the petitioner fulfills the conditions stipulated in section 37. The conditions stipulated so far as offences involving commercial quantity is that the Public Prosecutor should be given an opportunity to oppose the bail application and where the Public Prosecutor so opposes, then the Court can grant bail only after being satisfied on the following aspects:-

(i) there are reasonable grounds for believing that the accused is not guilty of such offence; and

(ii) the accused is not likely to commit any offence while on bail.

Therefore, the plain language of section 37(1)(b) indicates that the court must first adopt a negative attitude towards bail but can turn positive only on

fulfillment of the conditions mentioned in the section itself. At this stage, it is not at all necessary 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. The twin conditions is to be assessed only for a limited purpose and confined to the question of releasing the accused on bail.

Section 25 of the N.D.P.S. Act provides that whoever, being the owner or occupier or having the control or use of any house, room, enclosure, space, place, animal or conveyance, knowingly permits it to be used for the commission by any other person of an offence punishable under any provisions of the Act, shall be punishable with the punishment provided for that offence.

Thus the ingredients of section 25 of the N.D.P.S. Act appears to be as follows:

- (i) The accused must be either the owner, or occupier or he must have the control or use of the house, room, enclosure, space, place, animal or conveyance;
- (ii) He must have knowingly permitted such house, room etc. to be used for the commission by any other person of an offence punishable under any provision of N.D.P.S. Act.

Mere ownership of vehicle which was found to have been used for transporting material like Ganja in itself is not an offence. The words "knowingly permits" are significant. It is for the prosecution to establish that with the owner's knowledge, the vehicle was used for commission of an offence under the Act. However, once the prosecution establishes the ownership as well as grant of permission by the accused to use his house or vehicle by another person for commission of any offence under N.D.P.S. Act, the burden shifts to the accused and he has to give rebuttal evidence to disprove such aspects.

Section 35 of the N.D.P.S. Act deals with presumption of "culpable mental state" and it provides that in any prosecution for an offence under N.D.P.S. Act which requires a "culpable mental state" of the accused, the Court shall presume the existence of such mental state. The "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact. However, it is for the defence to prove that the accused had no such mental state with respect to the act charged as an offence in that prosecution. The accused is to prove that he was not in conscious possession of the contraband if it is proved that he was in possession thereof and he is also prove that he had no such mental state with respect to the act charged as an offence.

7. Even though the ownership of the Toyota Qualis vehicle which was seized in connection with this case has not been transferred in the name of the petitioner from the original owner Prabhash Kumar Sahu but all the contemporaneous documents seized in connection with this case, prima facie indicates that the vehicle was in possession of the petitioner and he was in control over the vehicle. This fact has not been disputed by the learned counsel for the petitioner during the course of his argument.

Possession is a polymorphous term which carries different meaning in different context and circumstances. Control over the goods is one of the texts to ascertain conscious possession so also title.

It is clear from the materials collected during investigation that the vehicle was carrying Ganja of commercial quantity. Sub-section (3) of section 60 of Act provides that any animal or conveyance used in carrying any narcotic drug or psychotropic substance, is liable to confiscation. Though in absence of any definition of "owner" in the N.D.P.S. Act, it would be reasonable to construe that the expression "owner" must be held to mean the registered owner of the vehicle, in whose name the vehicle stands registered under the provisions of Motor Vehicle Act, 1988 but section 2(30) of the Motor Vehicle Act, 1988 also states that "owner" means in relation to a motor vehicle which is the subject of a hire purchase, agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement.

In view of the available materials on record, which is not disputed by the learned counsel for the petitioner, it can be prima facie held that the Toyota Qualis vehicle was not only under the possession of the petitioner but he was also having in full control over the vehicle.

The contention of the learned counsel for the petitioner that the petitioner gave his vehicle for hire in good faith without having any knowledge about the illegal act being committed by the co-accused driver Nasim Khan, cannot be considered at this stage as it is to be assessed only on the basis of the evidence adduced during trial from the side of the petitioner. Therefore, whether the petitioner knowingly allowed the co-accused to use the vehicle for the illegal purpose, is to be ascertained at appropriate stage. At this stage, the petitioner cannot be permitted to urge that he was unaware about the fact the vehicle was used for carrying any narcotic substance.

After bestowing my anxious consideration and considering the nature and gravity of accusations, I am not satisfied that there are no reasonable grounds for believing that the petitioner is not guilty of the offence under section 20(b)(ii)(C) of N.D.P.S. Act. Since the petitioner was an accused in Handapa P.S. Case No. 65 of 2012 which relates to allegation of carrying Ganja in the same Toyota Qualis vehicle and after being released on bail in the said case, he has allowed his vehicle to be involved in this case, I am also not satisfied that the petitioner is not likely to commit any offence while on bail.

Accordingly, in view of the previous conduct of the petitioner and prima facie material available on record and in view of the specific bar under section 37 of the N.D.P.S. Act, I am not inclined to exercise the discretionary power under section 438 Cr.P.C. by granting pre-arrest bail to the petitioner. The anticipatory bail application is, therefore, rejected.