

Jeevanand Halidar vs State Of Odisha Opp. Party on 12 February, 2025

Author: Savitri Ratho

Bench: Savitri Ratho

IN THE HIGH COURT OF ORISSA AT CUTTACK

BLAPL No. 13036 of 2023

An application under Section 439 of the Code of Criminal Procedure, 1973

Jeevanand Halidar	Petitioner
	-versus-	

State of Odisha	Opp. Party
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For Petitioner	:	Mr. Kishore Kumar Mishra, Advocate
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For Opp. Party	:	Mr. Gyanalok Mohanty, SC
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CORAM:
HONOURABLE MISS JUSTICE SAVITRI RATHO

JUDGMENT

12.02.2025 Savitri Ratho, J. This application of the petitioner under Section 439 of Cr.P.C.

has been filed by the petitioner in connection with Malkangiri P.S. Case No. 169 of 2023 corresponding to Special G.R. Case No. 91 of 2023 pending in the Court of the learned Sessions Judge-cum-Special Judge, Malkangiri. Preliminary chargesheet had initially been submitted against petitioner-Jeevanand Halidar on 21.09.2023 for commission of offences under Sections 20(b)(ii)(C)/25/29 of the NDPS Act, keeping the investigation open. Thereafter final charge sheet has been submitted on 16.05.2024 against the petitioner Jeevanand Halidar under Sections 20(b)(ii)(C) /25/29 of the NDPS Act, the accused-Sanjay Dhali under Sections 20(b)(ii)(C)/29 of the NDPS Act and Sukesh Baroi for commission of offences punishable under Sections 20(b)(ii)(C)/29 of the NDPS Act, indicating Sukesh Baroi to be an absconder.

2. The prayer for bail of the petitioner has thereafter been rejected on 11.04.2023 by the learned Sessions Judge-cum-Special Judge, Malkangiri in Special G.R. Case No. 91 of 2023.
PROSECUTION ALLEGATIONS

3. The prosecution allegation in brief is that on 26.03.2023 at about 3.30 p.m., the S.I. of Malkangiri Police Station had proceeded on patrolling duty/MV checking duty in Malkangiri town near Goudaguda Chowk Malkangiri. At about 4.00 p.m. he received credible information that one person was transporting ganja in a white colour Swift Dzire car from Korkunda side. He stopped the vehicle at Goudaguda Chowk. On examination, the driver disclosed his identity to be Jeevanand Halder (present petitioner) of Jagdalpur, Bastar (Chhattisgarh). Two plastic tinsel jerry bags were recovered from the dicky of the car and two tinsel jerry bags were found in the middle seat of the car from which acute smell of ganja was emanating. On account of his professional experience, the I.O. suspected the same to be contraband ganja. On further examination, the petitioner confessed that he was transporting ganja to Raipur for sale and the same had been delivered to accused Sanjay Dhali having Mobile no. 8480346589 and 6371020043 of MV-84 Padmagiri at present Malkangiri; and Sukesh Baroi of MV-83, Padmagiri having Mobile No. 6267311361. After arranging two independent witnesses- Santosh Suna and Ramesh Suna, and after complying with the mandatory provisions of the NDPS Act and in the presence of an Executive Magistrate, the vehicle and accused were searched and apart from other materials, cash of Rs. 3000/-, one mobile having number 9406192476 and 8895381072 and another mobile having two sims 9131284300 and 9755484300, one Adhar Card, duplicate driving licence, voter card in the name of Jeevanand Halder (the petitioner) were seized. On weighing, each of the four bags were found to be contain 27 kgs. of ganja. Total 108 kgs. Since the Jeevanand Halder (the petitioner) could not produce any authorization for possession of transportation of the ganja, the ganja was seized and he was arrested. The other accused persons could not be arrested for which the I.O. submitted preliminary charge sheet on 21.09.2023 against Jeevanand Halder keeping investigation open. During investigation, it was found that Malkangiri P.S. Case No. 129 of 2005 under Sections 20(b)(ii)(C) of the NDPS Act had been registered against the accused Sanjay Dhali. During investigation, it was found that the accused Sanjay Dhali (6371020043) and the petitioner- Jeevanand Halder (9131284300) were in regular contact with each other over their mobile phones. The petitioner was arrested from his house on 02.01.2024 and thereafter the charge sheet has been submitted on 16.05.2024 against the petitioner-Jeevanand Halder, accused Sanjay Dhali and Sukesh Baroi indicating Sukesh Baroi to be an absconder.

SUBMISSIONS

4. I have heard Mr. Kishore Kumar Mishra, learned counsel for the petitioner and Mr. Gyanalok Mohanty, learned Standing Counsel.

5. Mr. Kishore Kumar Mishra, learned counsel for the petitioner submits that the petitioner does not have any antecedents under the NDPS Act and is in custody since 27.03.2023 (almost two years), but till date trial has not been completed. He further submits that on account of violation of the mandatory provisions of Section 52-A of the NDPS Act, the investigation and trial are vitiated, for which the petitioner is entitled to bail. His alternate submission is that if this Court is not inclined to grant regular bail, the petitioner may be released on interim bail to arrange for his defence. He has relied on the decisions of the Hon'ble Supreme Court in the cases of:-

(i) Union of India vrs. Mohanlal: AIRONLINE 2016 SC 606 ::

2016 (1) SCC (CRI) 864,

(ii) Ginkala Meddilety vrs. State: AIRONLINE 2023 DEL 903

(iii) Mangilal vrs. State of Madhya Pradesh: AIRONLINE 2023 SC 621 ;

the Bombay High Court in the cases of

(iv) Shivraj Gorakh Satpute vrs. State of Maharashtra (passed in Bail Application No. 2865 of 2022 disposed of on 15.09.2023),

(v) Kuldeep Suresh Raut vrs. State of Maharashtra : 2023 (3) ABR (CRI) 569 ;

the Delhi High Court in the case of

(vi) Arvind Yadav in JC Through His Pairokar vrs. Govt. NCT Delhi through Standing Counsel.

6. Mr. Gyanalok Mohanty, learned Standing Counsel opposes the prayer for bail stating that although the petitioner does not have any antecedents under the NDPS Act , but in view of the fact that the petitioner belongs to Chattishgarh and 108 kgs. of ganja have been recovered from the exclusive and conscious possession . In view of requirements of Section 37 of the NDPS Act, his prayer for bail is liable to be rejected .

STATUTORY PROVISION

7. Section 37 of the NDPS Act is extracted below:-

"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 27A 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. Section 37 of the NDPS Act states that bail should not be granted to an accused unless the accused is able to satisfy the twin conditions i.e. reasonable ground for believing that the accused is not guilty of such an offence and that the accused would not commit an offence or is not likely to commit an offence, if granted bail. JUDICIAL PRONOUNCEMENTS

9. In the case of NCB vs. Kashif (Criminal Appeal No.5544 of 2024 @ SLP (Crl.) No. 12120 of 2024), the Hon'ble Supreme Court has held as follows :

"39. The upshot of the above discussion may be summarized as under:

(i) The provisions of NDPS Act are required to be interpreted keeping in mind the scheme, object and purpose of the Act; as also the impact on the society as a whole. It has to be interpreted literally and not liberally, which may ultimately frustrate the object, purpose and Preamble of the Act.

(ii) While considering the application for bail, the Court must bear in mind the provisions of Section 37 of the NDPS Act which are mandatory in nature. Recording of findings as mandated in Section 37 is sine qua non is known for granting bail to the accused involved in the offences under the NDPS Act.

(iii) The purpose of insertion of Section 52A laying down the procedure for disposal of seized Narcotic Drugs and Psychotropic Substances, was to ensure the early disposal of the seized contraband drugs and substances. It was inserted in 1989 as one of the measures to implement and to give effect to the 34 International Conventions on the Narcotic drugs and psychotropic substances.

(iv) Sub-section (2) of Section 52A lays down the procedure as contemplated in sub-section (1) thereof, and any lapse or delayed compliance thereof would be merely a procedural irregularity which would neither entitle the accused to be released on bail nor would vitiate the trial on that ground alone.

(v) Any procedural irregularity or illegality found to have been committed in conducting the search and seizure during the course of investigation or thereafter, would by itself not make the entire evidence collected during the course of investigation, inadmissible. The Court would have to consider all the circumstances and find out whether any serious prejudice has been caused to the accused.

(vi) Any lapse or delay in compliance of Section 52A by itself would neither vitiate the trial nor would entitle the accused to be released on bail. The Court will have to consider other circumstances and the other primary evidence collected during the course of investigation, as also the statutory presumption permissible under Section

54 of the NDPS Act.

40. The impugned order based on the inferences and surmises, in utter disregard of the statutory provision of the Act and in utter disregard of the mandate contained in Section 37 of the Act, and granting bail to the accused merely on the ground that the compliance of Section 52A was not done within reasonable time, is highly erroneous and deserves to be quashed and set aside. Since, the High Court has not considered the application of the respondent on merits and has also not considered the mandatory requirement under Section 37(1)(b) of the Act, we deem it appropriate to remand the case to the High Court for deciding the bail application of the respondent afresh on merits and in accordance with law. The Supreme Court has also held thus : -

"24. Section 52A was inserted only for the purpose of early disposal of the seized contraband drugs and substances, considering the hazardous nature, vulnerability to theft, constraint of proper storage space etc. There cannot be any two opinions on the issue about the early disposal of the contraband drugs and substances, more particularly when it was inserted to implement the provisions of International Convention on the Narcotics Drugs and Psychotropic Substances, however delayed compliance or non-compliance of the said provision by the concerned officer authorised to make application to the Magistrate could never be treated as an illegality which would entitle the accused to be released on bail or claim acquittal in the trial, when sufficient material is collected by the Investigating Officer to establish that the Search and Seizure of the contraband substance was made in due compliance of the mandatory provisions of the Act. 25. It is significant to note that as per Section 54 of the said Act, the courts are entitled to presume, unless and until the contrary is proved that the accused had committed an offence under the Act in respect of any narcotic drug or psychotropic substance etc. for the possession of which he failed to account satisfactorily. Therefore, unless such statutory presumption is rebutted by the accused during the course of trial, there would be a prima facie presumption that the accused had committed the offence under the Act, if he is found to have possessed the contraband drug and substance, and if he fails to account satisfactorily, as contemplated in the said provision of Section

54. An anomalous situation would arise if a non-compliance or delayed compliance of Section 52A is held to be vitiating the trial or entitling the accused to be released on bail, though he is found to have possessed the contraband substance, and even if the statutory presumption is not rebutted by him. Such could not be the intention of the legislature.

26. It is further pertinent to note that as per the settled legal position even the evidence collected by an illegal search or seizure could not be excluded or discarded. Whether the evidence collected by an illegal search or seizure is admissible or not has been considered by this Court in a series of decisions and one of the earliest decisions is the decision of the Constitution Bench in case of Pooran Mal Vs. Director of Inspection (Investigation) New Delhi and Others (supra). It was observed therein

that:

"24. So far as India is concerned its law of evidence is modelled on the rules of evidence which prevailed in English Law, and Courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure."

CONCLUSION

10. Considering the nature of allegations against the petitioner, the decision of the Supreme Court in the case of Kashif (supra), I am of the prima facie view that non-compliance of Section - 52 A of the Act cannot be a ground to acquit an accused or release him on bail. The alleged non-compliance of Section 52 of the Act and its effect is a however a matter to be gone into by the learned trial Court while deciding the case.

11. In view of his lack of criminal antecedents, it may be said that the petitioner is not likely to commit an offence if he is released on bail. But as commercial quantity of ganja has been recovered from the exclusive conscious possession of the petitioner, I am not prima facie satisfied that he is not guilty of the offence. As the twin requirements of Section 37 of the NDPS Act are not fulfilled, the prayer for bail is rejected.

12. In report dated 13.08.2024 and report dated 20.01.2025 of the learned Special Judge, Malkanagiri, it has been stated that in Special G.R. Case No. 91 of 2023 (A), the case record is posted to 11.09.2024 awaiting production of Suresh and in Special G.R. Case No.91 of 2023, out of twenty chargesheet witnesses, nine witness were examined and ten witnesses remain to be examined.

13. Considering the fact that the petitioner is in custody since 27.03.2023 (almost two years), and fortified by the decision of the Delhi High Court in the case of Athar Pervez vs State: 2016 SCC OnLine Del 6662 and the Supreme Court in the case of Arvind Kejriwal v. Directorate of Enforcement, (2024) 9 SCC 577 on grant of interim bail, I am inclined to direct for release of the petitioner on interim bail for a period of three months, so as to enable him to arrange for his defence, if any.

14. The petitioner-Jeevanand Haldar shall be released on interim bail for a period of three months by the learned Court below in seisin over the matter in connection with the aforesaid case, on such terms and conditions as deemed fit and proper, including the following conditions:-

i)He shall furnish cash surety of Rs 30,000/-.

ii)He shall not leave Malkangiri District, without permission of the learned trial Court.

iii) He will furnish his local address and permanent address to the Court, which will be verified through the Police, before the petitioner is released on bail.

iv) He shall furnish his active mobile number to the Court, which shall be verified, before he is released on bail. He shall intimate any change in his mobile number to his counsel immediately, so that it can be intimated to the Court.

v) He shall appear in the learned trial court on each date it is fixed for trial.

vi) He shall appear before the Malkanagiri Police Station on each Sunday between 10.00 am to 11.00 a.m. unless he is permitted by the learned trial court to leave Malkanagiri District.

vii) He shall surrender before the learned trial court on or before 15th May 2025 positively.

15. Violation of any condition will entail in cancellation of bail / recall of this order.

16. The BLAPL is accordingly disposed of.

17. The learned trial Court is requested to make an endeavour to dispose of the trial within a period of three months, if there is no other impediment.

18. Copy of this order shall be sent by Mr. Gyanalok Mohanty, learned Standing Counsel for onward transmission to the IIC, Malkangiri Police Station.

19. The IIC Malkangiri Police Station shall immediately bring to the notice of the learned trial court, if the conditions imposed are violated.

20. No observation in this order should influence the learned trial court during trial, as they have been made for the purpose of consideration of the prayer for bail.

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(Savitri Ratho, J.) Orissa High Court, Cuttack.

Signature Not The Verified 12th February, 2025, Digitally Signed Puspa, Personal Assistant. Signed by: PUSPANJALI MOHAPATRA Reason: Authentication Location: Orissa High Court Date: 13-Feb-2025 20:28:03