

*** "REPORTABLE"**
HIGH COURT OF DELHI AT NEW DELHI

+ Crl. Rev. (P). 27/2004

Date of decision: February 13, 2009

NARCOTIC CONTROL BUREAU Petitioner
! Through : Mr. Rajesh Manchanda, Adv.

Versus

\$ ALI MOHD. Respondent
^ Through : Mr. Sidharth Luthra, Sr. Adv.
with Ms. Smriti Sinha, Adv.
Ms. Arundhai Katju, Adv.
Mr. Aditya Singla, Adv.

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CORAM:
HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

JUDGMENT

ARUNA SURESH, J.

1. On receipt of secret information on 30.5.1993 C.B. Singh, Superintendent, Narcotics Control Bureau that one Kashmiri, Mohd. Amin had brought with

him 20 to 25 Kg. of hashish from Anantnag, Kashmir, concealed in a bag few days back and the drugs were lying at A-46, Gali no. 4, Bhagirathi Vihar, Delhi with or without the knowledge of the house owner Ali Mohd., respondent.

2. Information was reduced to writing by C.B. Singh who issued search warrants for the search of the said premises. A raiding party was formed and in the presence of two independent witnesses premise no. A-46 Bhagirathi Vihar was searched. Ali Mohd. opened the door and accused Mohd. Amin was also present there. After complying with requisite formalities, premise was searched and a blue coloured air zipper bag marked "Reebok" was found lying in the room on the left side of the main door. The bag was opened and was found to contain 13 packets wrapped with brown adhesive tape and on opening the packets dark brown coloured solid substance in different shapes was recovered. This substance was tested by the NCB officers on the spot with field testing kit and was found to give positive test for hashish which is a

banned substance under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act).

3. Persons of Mohd. Amin and respondent were searched and nothing incriminating was recovered from them. Upon completion of the search panchnama was prepared with required formalities and the Investigating officer submitted his report of search dated 30.5.2003 and summons under Section 67 NDPS Act were served on the Mohd. Amin and respondent for appearance on 31.05.2003. However, both Mohd. Amin and respondent gave their voluntary statement as they did not know reading and writing and the same was recorded. Another summons dated 1.6.2003 were issued to both of them and in response they gave voluntary statements which were duly recorded by the investigating officer.
4. Upon recovery and seizure of 25 kg. of hashish from the premises A-26 Baghirathi Vihar and on the basis of voluntary statements, Mohd. Amin and

respondent were arrested under sections 20 (b) (ii)(C) & 29 of the NDPS Act on 1.6.2003.

5. The accused persons were presented before the trial court for framing charges and on 19.9.2003 after hearing arguments on charge the trial court discharged the respondent Ali Mohd observing that he was not found in conscious possession of the contraband articles.
6. Present revision petition has been filed by the Narcotics Control Bureau (hereinafter referred as NCB) against the discharge order dated 19.9.2003 passed by Ms. R. Kiran Nath, Special Judge, NDPS.
7. Mr. Rajesh Manchanda, counsel for the petitioner has urged respondent was found to be in possession of the premises where from 25 kgs. of hashish was recovered and the recovered contraband article was of huge quantity. Also accused Mohd. Amin had in his statement dated 31.5.2003 stated that respondent was to get Rs. 10,000/- as commission out of the deal of 25 kg. of hashish, therefore, the respondent was in

conscious possession of the contraband article.

8. It is further submitted by the counsel for the petitioner that the trial court did not apply its judicious mind while discharging the accused since the charge can be framed even on grave suspicion. Therefore, at the stage of framing of charges the respondent could not have been discharged by the trial court. He referred to ***Union of India v. Prafulla Kumar Samal and Anr. - 1979 SCC (Cri) 609*** and ***Om Wati v. State - AIR 2001 SC 1507***.

9. Mr. Sidharth Luthra, learned senior counsel for the respondent has submitted that the impugned order was passed with due application of mind and there is no fallacy in the order, further that it could not be prima facie made out by the prosecution during the arguments on charge that respondent Ali Mohd. was in conscious possession of the contraband articles. He has relied upon ***Om Prakash v. The State -1989 Crl.L.J. 1207 (del)*** and ***Sahibe Alam v. State - 2002 (2) JCC 766***.

10. The relevant facts which are not in dispute are:

- i. Respondent Ali Mohd. was a tenant in House No. A-46, Gali No. 4, Bhagirathi Vihar.
- ii. Accused Mohd. Amin was known to the respondent prior to the date of the incident.
- iii. Accused Mohd. Amin had allegedly brought hashish packed in 13 packets and kept it in blue coloured air zipper bag marked 'Reebok'.
- iv. Accused Mohd. Amin had kept this bag in the above said premises belonging to respondent Ali Mohd when Ali Mohd. had gone to Jammu and had handed over the keys of his premises to Mohd. Amin.

11. Accused Mohd. Amin and respondent Ali Mohd. were summoned under Section 67 of the NDPS Act and their statements were accordingly recorded on 31.5.2003 and 1.6.2003. In the statement made under Section 67 of the NDPS Act Ali Mohd. on 31.5.2003 and 1.6.2003 had stated before the investigating officer that accused Mohd. Amin was

his friend as he belonged to Jammu and Kashmir and used to visit him. He had permitted Mohd. Amin to keep his bag in his house believing Mohd. Amin that the said bag contained his clothes. He had no knowledge that the bag contained hashish and also that Mohd. Amin was indulged in illegal activities.

12. The bag was kept by Mohd. Amin in his absence when he had gone to Jammu to leave his wife and daughters in the village. It was after his return back from Jammu that Mohd. Amin had told him that the bag contained clothes. He also stated that he was aware that possession, sale, purchase as well as manufacturing of hashish was an offence and he had no connection with the recovered contraband.
13. In the statement recorded on 31.5.2003 Mohd. Amin did state that Ali Mohd. was to be paid Rs. 10,000/- as a deal money but retracted his statement on 1.6.2003 when he said that Ali Mohd. was not indulged in the business of sale of hashish.

In his initial statement made on 31.5.2003 accused Mohd. Amin had stated that for fear of visit of Police he had kept the bag containing hashish in the house of Ali Mohd. when Ali Mohd. was not in his house and had gone to Jammu after handing over the keys of the house to him. This bag he kept five days before the raid was conducted and hashish was recovered from the house of Ali Mohd. From the statements of both accused persons made to the Investigating Officer it has emerged that Ali Mohd. did not know anything about the contents of the bag kept in his house by Mohd. Amin in his absence when he had gone to Jammu. Needless to say that statements of the accused persons recorded under Section 67 of the NDPS Act are relevant and admissible in evidence against them.

14. Under these circumstances, it is to be seen if the recovery of the bag from the premises belonging to respondent Ali Mohd. can be considered as conscious possession of hashish by Ali Mohd. so as to implicate him for an offence under Section 20 of the NDPS Act. Whether there was a conscious

possession in a given case need not be physical possession but can be constructive possession having power and control over the article in the case in question while the person to whom the physical possession is given holds it subject to that power or control. However, once possession is made out or is established, the person who claims that it was not a conscious possession has to prove as to how he came in possession because the said possession is within his special knowledge.

15. Under Section 35 of the NDPS Act Court has to raise the presumption to the existence of such culpable mental state of the accused for an offence committed under the Act which requires existence of such mens rea for the offence to be committed. However, this presumption is rebuttable. The accused has every right in defence to prove the fact that he had no such mental state with respect to the act charged as an offence in such prosecution. Culpable mental state therefore includes intention, motive, knowledge of a fact and belief in or reason to believe in a fact. It is to be kept in mind that a

fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by the preponderance of probability.

16. In ***Madan Lal and Another v. State of H.P. - (2003) 7 SCC 465*** conscious possession has been dealt with in detail in the following manner:

“19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record are that all the accused persons were travelling in a vehicle and as noted by the trial court they were known to each other and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

21. It is highlighted that unless the possession was coupled with the requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

22. The expression “possession” is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Supdt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja*⁴ to work out a

completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

23. The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended.

24. As noted in *Gunwantlal v. State of M.P.*⁵ possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given holds it subject to that power or control."

17. In the present case, even the secret information received by the petitioner was that the bag containing drugs was brought by Mohd. Amin and was lying at premises No. A-46, Gali No. 4, Bhagirathi Vihar might be with or without the knowledge of the house owner Ali Mohd. The door of the house was opened by Ali Mohd. when NCB officers had knocked at the door of his house. The statement of Mohd. Amin and that of Ali Mohd. make it clear that Ali Mohd. had nothing to do with hashish which was recovered from the bag admittedly belonging to Mohd. Amin. Though presence of Ali Mohd. is not in dispute, prima facie there is no evidence to indicate that Ali Mohd. had knowledge of hashish kept in the bag. This bag

was kept in his house in his absence when he had gone to Jammu leaving keys of his house with accused Mohd. Amin as he was known to him from before. The premises of the respondent were misused by Mohd. Amin for concealing hashish in his absence and without his knowledge with a view to save himself from the Police.

18. The trial court under these circumstances rightly observed:

“It is seen that in the present case, there is no evidence which if put to the trial against accused Ali Mohd. could result in his conviction. It is apparent on record that accused Ali Mohd. did not know, that the said bag belonging to Mohd. Amin contained hashish. The ld. Spl. PP has pointed out to me that the co-accused Mohd. Amin in his statement has stated that Ali Mohd. had to get a commission of Rs. 10,000/- in this deal. However, this co accused when present before the IO again on 01.06.2003 has gone back on his statement and had retracted his earlier stand before the IO himself and has stated that accused Ali Mohd. had nothing to do with the same and that Ali Mohd. did not deal with charas. The secret information received in the office of the NCB also specifically says that the said contraband was kept in the hosue of Ali Mohd. at A-46, Bagirathi Vihar, Delhi. In the secret information, it has been specifically stated that the said bag containing the contraband may have been kept there with or without the

knowledge of the house owner Ali Mohd. This itself shows that even the NCB was not sure whether Ali Mohd. was aware if the bag containing the contraband hashish or not and they collected no evidence to prove that he was in fact aware."

19. The trial court also rightly rejected the plea of the special public prosecutor when he argued that Ali Mohd. could have known that there was something fishy kept in the bag of Mohd. Amin as hashish emanates a very strong foul smell and he could have known the same when a large quantity of hashish weighing about 25 kg. was kept in the said bag, when it observed that the bag was a zipper bag and the contraband was found contained in 13 packets wrapped in brown adhesive cello tape and therefore there could not have been any foul smell emanating from the hashish so concealed, and could not have been, therefore, detected easily by respondent; Ali Mohd.
20. There is no statutory provision for drawing any presumption that a person who was present at any particular place would be presumed to be in possession of the narcotic/contraband nor any such

presumption can be drawn under Section 114 of the Evidence Act merely because the said person was present when the premises were raided.

21. ***Om Prakash v. The State (supra)*** and ***Sahibe Alam v. State (supra)*** case as referred to by the learned counsel for the respondent speak about the inadmissibility of a disclosure statement made by an accused against co-accused being not a substantive piece of evidence and it was observed that charge could not be framed on the basis of such an incriminating statement of the co-accused. Both these judgments have no relevance to the facts and circumstances of this case as statements under Section 67 of the NDPS Act are relevant and admissible in evidence.

22. Proposition of law as laid down in ***Union of India v. Prafulla Kumar Samal and Anr. (supra)*** as well as ***Om Wati v. State (supra)*** are no longer res-integra. The trial court did apply its judicious mind while discharging the respondent to the facts and circumstances of this case. Had the court

acted mechanically without application of mind it would have proceeded with framing of charge under Section 20 of the NDPS Act against the respondent as well. From the prosecution evidence as placed on record, there is hardly a probability that it would result into conviction of the respondent. Since court found and rightly so, that the case of the prosecution was weak, discharged the respondent in this case.

23. I find no illegality or infirmity in the order of the trial court dated 19.9.2003. Hence, I find no merits in the revision petition and the same is accordingly dismissed.

**(ARUNA SURESH)
JUDGE**

**February 13, 2009
jk**