

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A.No.23/2022 with
Crl.M.C.No.47/2022

Date of Order: 08.02.2023

Sangte Paite Vs. State of Meghalaya & anr

Coram:

Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellant

: Mr. S. Ali, Adv with
Mr. I.M. Gogoi, Adv
Mr. B.D. Goswami, Adv
Mr. S.D. Upadhaya, Adv

For the Respondents

: Mr. B. Bhattacharjee, AAG with
Ms. R. Colney, GA

- i) Whether approved for reporting in Law journals etc.: Yes/No
- ii) Whether approved for publication in press: Yes/No

JUDGMENT: (per the Hon'ble, the Chief Justice) (Oral)

The appeal has been carried by one of the two convicts against a judgment of June 15, 2022 and the consequential sentence of June 16, 2022 in a case originating in this State capital.

2. As of now, there is no appeal preferred by the other convict who suffered the same sentence of 10 years' rigorous imprisonment with a fine of Rs.1 lakh. In default of the payment of fine, they are to undergo a further two months of simple imprisonment. The time of detention

already suffered was taken into account and the remainder of the period of detention indicated in the sentence. The sentence followed the appellant's conviction under Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 for possessing or transporting commercial quantity of psychotropic substance. About 4272 capsules of spasmo-proxyvon bearing a net weight in excess of 2.1 kg – where the commercial quantity is reckoned at 500 g – were recovered from the joint possession of the two persons riding a scooty and the trial court found that even though the blue bag containing the contraband was in the physical possession of the pillion rider and not the present appellant, the appellant was deemed to have been in constructive possession thereof.

3. The incident occurred on February 22, 2013. The case made out by the prosecution was that in course of additional checking during the election period, the police party led by PW1 made a chance recovery of the contraband from the scooty and from the joint possession of the appellant and the pillion rider.

4. The further case made out by the prosecution in the oral evidence at the trial was that PW1 immediately informed his superiors whereupon members from the anti-narcotics task force were sent to the spot. In the presence of such personnel, the contraband seized were recorded, a seizure-list prepared and the signatures of both the then accused persons obtained thereon.

5. Three principal grounds have been taken in this appeal. For a start, great emphasis has been laid on the fact that the blue bag which allegedly contained the contraband was apparently recovered from the physical possession of the pillion rider and not from the appellant. The second limb of the submission pertains to the presumption that arises under Section 35 of the Act. The third contention raised is that the material seized could not be linked to the material that was sent for forensic examination or the contraband which was ultimately produced in court at the time of trial. Some murmurs have also been made on Section 52A of the Act and the inadequacies in the manner of dealing with the contraband; however, the contraband seized in this case had not been destroyed and had been preserved and produced at the time of trial where PW1 identified the material exhibits and also proved his signature.

6. The main thrust of the argument is on Section 35 of the Act and the judgments reported at (2000) 2 SCC 513 (*Abdul Rashid Ibrahim Mansuri v. State of Gujarat*, (2018) 17 SCC 627 (*Mohan Lal v. State of Punjab*) and (2020) 16 SCC 709 (*Hanif Khan alias Annu Khan v. Central Bureau of Narcotics*) have been placed to indicate the scope and purport of the provision and the perceived failure on the part of the trial court to apply the law appropriately in the present case. Section 35 of the Act provides as follows:

“35. Presumption of culpable mental state.--(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in the prosecution.

Explanation. – In this section “culpable mental state” includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, 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 a preponderance of probability.”

7. It is evident on a plain reading of the provision that both the explanation in sub-section (1) and the seemingly substantive provision in sub-section (2) are in aid of the primary rule enunciated in sub-section (1). In other words, the provision mandates that a presumption arises as to the culpability of an accused and it is for the accused to prove that he was not culpable in respect of the act charged with by the prosecution. Sub-section (2) merely qualifies the nature of the burden of proof to be discharged by an accused in terms of sub-section (1).

8. In certain cases, whether it is in the assessment of a special fact or in the matter of rebuttal of a presumption, the general rule in criminal jurisprudence of beyond reasonable doubt may not apply. In the present case, sub-section (2) above emphasises that the standard of proof in respect of the fact that has to be established by an accused in an NDPS case is beyond reasonable doubt for the rebuttal to be accepted. Sub-

section (2) of Section 35 of the Act has no manner of application beyond the rule enunciated in sub-section (1) of the provision as would be evident from the opening words, “For the purpose of this section ...”

9. The charge against the appellant herein and the resultant ground of his conviction was that the appellant had, in contravention of the provisions of the Act of 1985, possessed or transported a psychotropic substance of commercial quantity. For the prosecution to bring home the charge against the appellant it was necessary to adduce evidence that the appellant herein possessed or was in the process of transporting a psychotropic substance in a manner that was in contravention of the provisions of the said Act; and, that the quantity of the contraband involved was such as would be regarded as commercial quantity.

10. The factum that the substance was a psychotropic substance and the factum that the quantity involved was commercial were required to be affirmatively established by the prosecution. This was done in the present case and required little further proof apart from the recording in the seizure-list with the appellant’s signature appended thereto and stood virtually admitted upon no objection in such regard being raised at the trial.

11. The next aspect was whether, upon the contraband of commercial quantity being recovered from a vehicle being driven by the appellant, the element of mens rea could be attributed to the appellant in

the sense that he was consciously in possession of the commercial quantity of the contraband or that he was consciously transporting the same.

12. It is in such a scenario that Section 35 of the Act would come into play. In the absence of such provision, the prosecution would have had to prove beyond reasonable doubt that the appellant herein was aware that he was acting in contravention of the provisions of the said Act. The mere possession of contraband or the mere transporting of the contraband would, ordinarily, not have sufficed without the element of mens rea being established had it not been for Section 35 of the said Act.

13. In view of Section 35 of the said Act, upon an apparent act of possession of contraband and or upon an apparent act of transportation of contraband being established, it is for the accused to prove beyond reasonable doubt that he was not aware of the contraband or its presence and, as such, had no element of culpability. It is because of this heavy onus that an accused in an NDPS case has to discharge that there are several checks and balances in the statute, including the strict conditions imposed, inter alia, under Section 50 of the Act.

14. Upon the nature of the goods being proved and the quantity involved being established beyond reasonable doubt, it was for the appellant to prove beyond reasonable doubt that he had no such mental state with respect to the act charged as an offence. The appellant

completely failed in such regard and, indeed, made no attempt at all at the trial to prove the absence of the culpable mental state.

15. In the first case cited by the appellant of *Abdul Rashid Ibrahim Mansuri*, the accused was an autorickshaw driver who was intercepted and four gunny bags containing cannabis were found in the autorickshaw. The trial court acquitted the accused, but he was convicted by the High Court which referred to Section 35 of the Act. It is in such context that the Supreme Court analysed Section 35 of the Act to observe as follows at paragraphs 21 and 22 of the report:

“21. No doubt, when the appellant admitted that the narcotic drug was recovered from the gunny bags stacked in the autorickshaw, the burden of proof is on him to prove that he had no knowledge about the fact that those gunny bags contained such a substance. The standard of such proof is delineated in sub-section (2) as “beyond a reasonable doubt”. If the court, on an appraisal of the entire evidence does not entertain doubt of a reasonable degree that he had real knowledge of the nature of the substance concealed in the gunny bags then the appellant is not entitled to acquittal. However, if the court entertains strong doubt regarding the accused’s awareness about the nature of the substance in the gunny bags, it would be a miscarriage of criminal justice to convict him of the offence keeping such strong doubt undisputed. Even so, it is for the accused to dispel any doubt in that regard.”

“22. The burden of proof cast on the accused under Section 35 can be discharged through different modes. One is that he can rely on the materials available in the prosecution evidence. Next is, in addition to that, he can elicit answers from prosecution witnesses through cross-examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in the prosecution case or in the

prosecution evidence are such as to give reasonable assurance to the court that the appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence.”

16. In the case of *Mohan Lal*, 4 kg of opium was recovered from the accused as the contraband was found in a bag carried by him. While the Supreme Court ultimately found that the investigation conducted in the particular case was vitiated, the following observation on, inter alia, Section 35 of the Act is found at paragraph 12 of the report:

“12. Unlike the general principle of criminal jurisprudence that an accused is presumed innocent unless proved guilty, the NDPS Act carries a reverse burden of proof under Sections 35 and 54. But that cannot be understood to mean that the moment an allegation is made and the FIR recites compliance with statutory procedure leading to recovery, the burden of proof from the very inception of the prosecution shifts to the accused, without the prosecution having to establish or prove anything more. The presumption is rebuttable. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability. The stringent provisions of the NDPS Act, such as Section 37, the minimum sentence of ten years, absence of any provision for remission, do not dispense with the requirement of the prosecution to establish a prima facie case beyond reasonable doubt after investigation, only after which the burden of proof shall shift to the accused. The case of the prosecution cannot be allowed to rest on a preponderance of probabilities.”

17. In the final case of *Hanif Khan*, the allegation was in regard to an illegal sale-purchase between the appellant before the Supreme Court and an acquitted co-accused. No appeal was preferred by the State

against the acquittal. It was in such context, when the principal accused had been acquitted, the Supreme Court doubted the conviction of the appellant before it. Paragraph 8 of the report quotes a previous Supreme Court judgment as to the scope of Section 35 of the Act:

“8. We have considered the submissions on behalf of the parties. The prosecution under the NDPS Act carries a reverse burden of proof with a culpable mental state of the accused. He is presumed to be guilty consequent to recovery of contraband from him, and it is for the accused to establish his innocence unlike the normal rule of criminal jurisprudence that an accused is presumed to be innocent unless proved guilty. But that does not absolve the prosecution from establishing a prima facie case only whereafter the burden shifts to the accused. *In Noor Aga v. State of Punjab* [(2008) 16 SCC 417] it was observed as follows:

“58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is “beyond all reasonable doubt” but it is “preponderance of probability” on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established”.

18. There is no doubt in the present case, as appears from the oral evidence at the trial and the meticulous discussion thereon in the

impugned judgment of conviction, that a scooty was apprehended, a bag was found in such scooty which may have been in the physical possession of the pillion rider and, inter alia, commercial quantity of contraband found in the bag. Since this was the case of a chance recovery, the trial court dwelt at length on the applicability of Section 50 of the Act and the limited rigours that such provision carries in case of a chance recovery. Ultimately, upon relying on a judgment reported at (1999) 6 SCC 172 (*State of Punjab v. Baldev Singh*), the trial court concluded that Section 50 of the Act would come into play only in the case of a search of a person as distinguished from search of any premises and that in case of a chance recovery such provision would not apply.

19. The trial court also considered at length whether the accused persons were in conscious possession and knowingly transporting the contraband. On such aspect, the trial court recorded the articles that were seized, noticed that the seized articles had been duly deposited and that they had been produced at the time of the trial. According to the appellant, there was no link between the goods that were seized and the goods that were ultimately produced at the trial. A further point is taken that though the first page of the seizure-list had been signed by the appellant herein, the second page does not bear the signature of either the appellant herein or the other convict.

20. It is evident from the seizure-list that several bundles of spasmo-proxyvon capsules were recovered from the bag in question. There cannot be any denial of such fact, particularly at this stage, when the appellant did not question either the seizure-list or the appellant's signature thereon at the trial. It is true that the second page of the seizure-list does not bear the signature of the appellant or the other convict; but if the appellant was minded to seriously question the veracity of the second page of the seizure-list, that should have been done in course of the trial since the appellant, no doubt, had been forwarded a copy of the seizure-list in accordance with the requirements of, inter alia, Section 207 of the Code of Criminal Procedure, 1973.

21. The further point made on behalf of the appellant is that at the time of seizure, no recording was made of the batch numbers of the capsules or the expiry dates thereof for it to be later established that the articles produced at the trial were the same articles that had been seized from the possession of the accused. Ideally, the officers seizing the contraband should have indicated the particulars just as a chemist's bill would. Ideally, the batch numbers of the strips or the expiry dates thereof or both ought to have been recorded. However, what is of relevance is whether the failure to indicate such particulars has resulted in any miscarriage of justice.

22. It is plain from the first page of the seizure-list that several bundles of the contraband had been recovered from the blue bag, whether or not such bag was in the actual physical possession of the appellant. Even without referring to second page of the seizure-list, the quantum of the contraband indicated in the first page thereof would make up commercial quantity of contraband. Since the appellant did not question either the veracity of the seizure-list or the contents thereof, even on the first page thereof, it matters little whether the batch numbers or the expiry dates of the seized material had been recorded or not. The appellant herein is deemed to have accepted that the goods as recorded in the first page of the seizure-list had been recovered from the scooty or the constructive possession of the appellant or, at least, from the physical possession of the pillion rider. So much cannot be questioned. Since the quantum of the material seized made the seizure one of commercial quantity, the exact identity of the material became immaterial.

23. As to whether the goods were found in the possession of the appellant or the goods had to be regarded to have been found solely from the possession of the pillion rider, the trial court has examined the matter at great length. Referring to the concept of constructive possession in such a scenario, particularly when the driver of a vehicle would scarcely be in a position to physically carry the contraband on his person, the trial court concluded that in the absence of the appellant herein demonstrating

that he had no connection with the seized contraband, he was deemed to be in constructive possession thereof. It is for such purpose that Section 35 of the Act has been stressed upon by the appellant in course of the present proceedings.

24. For such purpose, the appellant suggests that if possession of the contraband by an accused is not established beyond reasonable doubt or if the goods are not identified beyond reasonable doubt then the burden in terms of Section 35 of the Act is not required to be discharged by the accused. Further, it is the case of the appellant that in his response to the first question put to him in course of his examination under Section 313 of the Code, he disowned the bag and indicated that he had nothing to do with the same. The appellant submits that in the light of such statement and the admitted position that the blue bag which contained the contraband was recovered from the physical possession of the pillion rider, the appellant could not have been prosecuted or convicted.

25. In reading a provision or applying the same, there is a bandwidth of reasonableness that has to be maintained. It is possible that in a bigger vehicle there are several persons and a bag is discovered therein containing the contraband which is not actually in the physical possession of any of the passengers. In such a scenario, unless there is a suitable explanation as the one required under Section 35 of the Act, the passengers would be deemed to be in constructive possession of the bag

and the contraband contained therein. In a less spacious vehicle as a scooty where the driver has both hands on the steering wheel and the levers and the only available spaces are, probably, a little footboard to the front, a little carrier behind and the person of any pillion rider, it is not surprising that any goods carried in such a scooty would not be actually in the lap of the driver or in the driver's actual physical possession. But that would not, by itself, imply that the driver was not in possession of the contraband since the said Act has a built-in principle of constructive possession as has been referred to in copious detail by the trial court.

26. It may have been possible for the appellant herein to demonstrate that the appellant had no nexus with the pillion rider or that the pillion rider had merely requested the appellant to give him a ride or the like. However, no attempt was made by the appellant in course of the trial to either establish the circumstances in which the pillion rider came on board or the lack of the appellant's connection with the pillion rider or the blue bag that was found in the physical possession of such pillion rider.

27. The trial court has referred to the circumstances of the seizure, the quantity of the contraband seized and arrived at a just conclusion that the appellant herein could not have been regarded as not to possess a mental culpable state since the recovery of contraband from the vehicle or from another person that the appellant was driving was established

beyond reasonable doubt. In the order on sentencing, appropriate considerations have been taken into account before directing the appellant to suffer the sentence of 10 years' rigorous imprisonment and a fine of Rs.1 lakh.

28. Based on the material that the prosecution put on display and the appreciation thereof by the trial court, neither the judgment of conviction nor the consequent sentence call for any interference.

29. CrI.A.No.23 of 2022 is dismissed.

30. CrI.M.C.No.47 of 2022 is disposed of.

31. Let an authenticated copy of this judgment and order be immediately made available to the appellant free of cost.

(W. Diengdoh)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya
08.02.2023
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