IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.4323 OF 2004
IN
CRIMINAL APPEAL NO.1194 OF 2004

Captain Zarius Dishaw Dastur ...Applicant

Vs

Union of India & Anr. ...Respondents

Mr. V.R. Manohar, Sr. Counsel with Mr. Amit Desai with Ms. R.B. Amrolia & Ms. Y.N. Katpitia for the applicant.

Mr. B.A. Desai, Addl. Solicitor General with Mr. H.V. Mehta for the respondent No.1.

Mr. D.P. Adsule, APP for the State.

CORAM: V.M.KANADE,J.
DATE: 3rd November, 2004

ORAL ORDER:

1. Heard the learned Counsel appearing on behalf of the Applicant and the learned Additional Solicitor General of India appearing on behalf of Union of India.

2. Applicant is the Original Accused No.1. He is convicted by the Trial Court for having committed an offence under Sections 8(c), 21, 23 and 29 of the N.D.P.S. Act, 1985 and sentenced to suffer R.I. for ten years on each count. The Trial Court also directed that he should pay fine of Rs. 1 lac and in

default to suffer R.I. for two years on each count. Applicant was on bail during trial from 9th October 1997 to 29th July 1998.

3. Prosecution's case is that Applicant was working with Air India as a Senior Pilot and was scheduled to operate flight No. AI-101; which was scheduled to go to London from Bombay on 9/10/1997 at about 6.25 a.m. Applicant reached Sahar Airport at 5.10 a.m.and his suitcase was placed on the X-ray machine for security check. Security staff - PW-22 - Mr. Ranshevre and Mr. Kamble noticed some suspicious images on the screen. On inquiry being made by PW-22 as to who had brought the suitcase in question, the Applicant replied that he had brought the suitcase and he was carrying it for some other person. Applicant was, thereafter, asked about the suspicious images which appeared on the screen. Applicant informed PW-22 that it may be electric tooth brush inside the suitcase. However, Security staff said that it was not an electric tooth brush. Applicant, thereafter, asked the Security staff to check suitcase thoroughly as he was carrying it on behalf of some third party. He was, thereafter, asked to open the suitcase. Some articles belonging to the Applicant were found in the suitcase alongwith three sweaters. The contents were

removed. Thereafter, empty suitcase was again put in a Hi-scan X-ray Machine and again square golden orange colour patches were appeared. Customs Officials were summoned. They tore open the cream coloured inner cloth lining of the suitcase and also decorated laminated sheet and behind the said laminated sheet a square shaped polythene pouches containing white coloured powder were found. Polythene bags were weighed and they contained 1080 gms of white powder which tested positive for heroin. Personal search of the Applicant was taken but nothing incriminating was found. The Statement of the Applicant was recorded under Section 108 of the Customs Act read with Section 67 of the N.D.P.S. Act by PW-2 - Mr. Varadkar, in which he stated that this bag was given to him by Mr. Dinshaw Pastakia (Accused No.2) and at no time Applicant was informed about the concealment of the drugs in the suitcase. On the same day, the house of the Applicant was searched. However, nothing incriminating was found. Three sweaters were found in the house which were seized. The house of Dinshaw Pastakia (Accused No.2) was also searched on the same evening. However, nothing incriminating was found in the said search. Accused No.2 was brought to the Office and his statement under Section 108 of the Customs Act was recorded which is exhibited at

Exhibit-51. Accused No.2 admitted that the suitcase was given by him to the Applicant and that the Applicant was unaware of the concealment of the drugs therein. He further stated that the Accused No.3 - Mr. Bhawarlal Somani and Mr. Bawne Rego (Accused No.4) were involved in the acquisition and packing and transporting of the said suitcase to the Applicant. Statements of Accused No.3 and 4 were also recorded. It is an admitted position that the Accused Nos. 2, 3 and 4 did not attribute any role to the Applicant in this application. The confessional statement of Mr. Dinshaw Pastakia (Accused No.2) was recorded by the Magistrate under Section 164 of Cr.P.C. on 2/7/1998, in which he reiterated his earlier statement that the Applicant was unaware about the concealment of the drugs in the suitcase. Prosecution has examined 47 witnesses and the Applicant, in his defence, examined 9 defence witnesses. He also gave his own evidence on Oath alongwith his wife. According to the Applicant, he had purchased a plot of land at Boisar sometime in 1990 in Pangrapada Village, Taluka Palghar, District - Thane from one Mr. Adil Daruwalla (DW-2) and Cyrus Irani (DW-6) who were jointly developing about 40 plots of land. Wife of Accused No.2 - Mrs. Dinshaw Pastakia had purchased similar plot; before the Plot which was purchased by the Applicant. Sometime in May

1996, Applicant and his wife - Manreez Dastur who is examined as PW-31 started construction of a farm house on their plot of land and they used to stay in the house of Adil Daruwalla (DW-2). Applicant's case in his evidence is that he came in contact with Mr. Dinshaw Pastakia (Accused No.2) who also used to stay in the house of Mr. Adil Daruwalla (DW-2). According to the Applicant, he found that the Accused No.2 was extremely popular with everybody because he went out of his way to run errands and oversee construction of other plot owners and apart from being an extremely religious man. He had learnt that Accused No.2 was working as Personnel in Air India and was involved in gold smuggling case. However, he was informed that he was falsely implicated in the said case.

4. According to the Applicant, three weeks prior to the incident, Mr. Dinshaw Pastakia (Accused No.2) informed him that his son in U.S.A. had been operated and his daughter has gone there to look after him. However, since she had gone there in a hurry, she has taken a small suitcase with her and he, therefore, requested the Applicant to take a bag for his daughter as she required the same for bringing her belongings back to India. Applicant agreed to take the bag. Suitcase accordingly was delivered at his house.

Applicant and his wife checked the suitcase. They noticed that there were six sweaters inside the suitcase. Applicant removed three sweaters out of six which were found in the bag and, thereafter, on the date of the incident, packed his own small bag and a few articles in the suitcase and put his identification tag on the suitcase.

5. The Trial Court, on perusal of the evidence adduced by the Prosecution and the Applicant, disbelieved the case of the Applicant and held that he had not rebutted the presumption under Section 35 of the N.D.P.S. Act beyond the reasonable doubt and thus had not proved that the Applicant was unaware of the concealment of the drugs in the suitcase. Appeal is admitted and the separate application for bail has been preferred by the Applicant.

6. Shri V.R. Manohar, the learned Senior Counsel appearing on behalf of the Applicant has submitted that there was no evidence adduced by the Prosecution to prove that the possession of the contraband was with the Applicant and that it was a conscious possession and that he was aware of the concealment of the drugs in the suitcase. He submitted that it is an admitted position that the Applicant did not know Mr.

Dinshaw Pastakia (Accused No.2) prior to 1996. He further submitted that it is further an admitted position that Accused No.3 and 4 had never met the Applicant and that there was no evidence to prove that there was a conspiracy or that the possession of the contraband was a conscious possession. Shri Manohar, the learned Senior Counsel appearing on behalf of the Applicant thereafter submitted that the prosecution had brought on record the statements of the Applicant and Accused No.2 which were recorded under Section 67 of the N.D.P.S. Act and Section 108 of the Customs Act and they were exhibited at Exhibit-17 and Exhibit-51. He submitted that the statement of the Applicant was inculpatory and he has stated in the said statement that he was not aware that the drugs were concealed in the bag and the bag did not belong to him; but belonged to Dinshaw Pastakia (Accused No.2). In the statement of Mr. Dinshaw Pastakia (Accused No.2), which was recorded under Section 108 of the Customs Act, the said Accused had admitted that he had concealed the drugs in the bag. However, he has stated that Applicant had no knowledge of the concealment of the drugs. The learned Counsel submitted that the prosecution having adduced the said evidence, it was not open for the prosecution or the Court to ignore the said evidence and the Applicant

was entitled to be given a benefit of the said evidence which was son record and was in his favour. In support of the said submissions, the Learned Counsel relied upon the Judgments reported in the cases of **Imperatrix vs. Pithamber Jina** reported in **1877 ILR(2) Bom.62**, **Ebrahim vs. Emperor** reported in **1911 (12) Cr.L.J., 79**, **Abinashchandra Sarkar vs. Emperor** reported in **1935 ILR (63) Cal., 18**, **Sukhram s/o. Ramratan vs. State of M.P.** reported in **1989 Supp.(1) S.C.C., 214** and in the case of **Bhagatram & Ors. vs. State of M.P.** reported in **1990 Cr.L.J., 2407.**

7. Shri Manohar, the learned Counsel appearing on behalf of the Applicant further submitted that there was no direct evidence to show that the Applicant was aware about the concealment of the drugs in the suitcase. The Trial Court had convicted the Applicant/Accused on the basis of circumstantial evidence. He submitted that the Trial Court had relied on twelve circumstances for the purpose of coming to the conclusion the Applicant was aware about the concealment of the drugs and he had knowledge. He submitted that out of these twelve circumstances only one circumstance was put to the applicant while recording his statement under Section 313 of the

Criminal Procedure Code. He submitted that the only incriminating circumstance which was put to the accused was : whether the applicant was aware of the background of the Accused No.2 - Mr. Dinshaw Pastakia?. The other eleven circumstances were not put to the Applicant while recording his statement under Section 313 of the Criminal Procedure Code. He submitted that the Apex Court had consistently taken a view that the incriminating circumstances which were not put to the accused while recording his statements under section 313 of the Criminal Procedure Code could not be relied upon for the purpose of coming to the conclusion that the accused had committed the Offence. In support of the said submission, he relied upon the judgement of the Supreme Court in the case of **Sharad Birdhichand Sarda vs. State of Maharashtra** reported in **A.I.R. 1984 SC, 1622.**

8. Shri Manohar, learned Counsel appearing on behalf of the Applicant further submitted that the possession of the Applicant was not a conscious possession. He submitted that the presumption under Section 35 of the N.D.P.S. Act was not attracted to all sections of N.D.P.S. Act. He submitted that said Section would be applicable only to such offences under the Act which require culpable mental state of the Accused and

not to all the sections of the Act. He submitted that the Applicant was charged under Section 8(c), 23 and 29 of the said Act and that none of these sections requires culpable mental state. He therefore submitted that the Trial Court had clearly erred in holding that the Applicant had not rebutted the presumption under section 35 of the N.D.P.S. Act.

9. Shri Manohar, learned Counsel appearing on behalf of the Applicant further submitted that the presumption under Section 54 of the N.D.P.S. Act could be attracted only after the prosecution had proved the conscious possession on the part of the Accused and only thereafter the presumption regarding possession as envisaged under section 54 would be attracted. He submitted that the Trial Court had therefore erred in holding that the presumption under Section 54 had not been rebutted by the Accused. In support of the said submission, he relied on the judgement in the case of **Rubyana vs. State of Maharashtra** reported in **1996 Cr.L.J., 148** and in the case of **Natibabu Khadka vs. State of Goa** reported in **1996 (5) BCR, 76** and in the case of **Patel Jethabhai Chatur vs. State of Gujarat** reported in **A.I.R. 1977 SC, 294.** He further submitted that statements which were recorded by the prosecution under section 108 of

the Customs Act and 67 of the N.D.P.S. Act clearly showed that even the accused had admitted that the Applicant was not aware of the possession or concealment of the drugs in the suitcase. He submitted that the benefit of this statement should be given to the Applicant and the said evidence therefore was available and could be used in favour of the applicant. He further submitted that reliance placed by the Trial Court on Section 30 of the Indian Evidence Act was clearly unwarranted.

10. Shri Manohar, the learned Counsel appearing on behalf of the Applicant further submitted that the Appellate Court had the power to consider the application for bail and suspension of sentence of the Appellant in Appeal and that there was no express bar imposed by the Section 32A which prohibited the High Court from entertaining the application for bail in Appeal. In support of the said submission, he relied on the judgement of the Apex Court in the case of **Dadu Alias Tulsidas vs. State of Maharashtra** reported in **(2000) 8 SCC, 437.**

11. He submitted on the basis of these submissions that no case was made out by the prosecution against the applicant. And that there were more than

reasonable grounds for believing that he is not guilty of the offence with which he was charged and he is not likely to commit any offence while on bail. He submitted that the Applicant was released on bail by the Trial Court and was allowed to travel abroad and had worked during remaining part of his tenure as a Senior Pilot in Air India and had travelled abroad during this period and no complaint whatsoever was lodged against him. He submitted that he was on bail throughout the Trial for more than six years and he had been commander on 200 flights of Air India out of which 90% were on International Sectors and Visa was granted to him by U.K. and U.S.A. despite his under trial status and that he had appeared in Court either in person or through his Advocate during the pendency of the Trial and that he had never abused his bail conditions though he was flying on International Sectors. He submitted that the Applicant had never committed any breach of the undertaking which he had given to the Court and had informed about his movements at all times. He further submitted that the applicant had retired from Air India in December, 2003 and was on two year Contract with Air India as Commander. He submitted that the applicant had unblemished record of service with Indian Airlines and Air India during his 37 years of flying service and

that at the time of his conviction he was holding the post of Joint General Manager Operations (Training) in addition to being an Instructor/Examiner on the Boeing
- 747 - 400 Aircraft.

12. Shri Desai, the learned Additional Solicitor General opposed the submissions made by the learned Counsel appearing on behalf of the applicant. He submitted that the validity of section 32A had been upheld and it had not been struck off from the statute. He submitted that section 32A was read down to the extent that it clarified that section 32A does not take away power of judicial review conferred on the judiciary by the Constitution as part of the basic structure. He submitted that, therefore, the only course available to the accused was to apply to the High Court under Article 226 and 227 of the Constitution of India. In support of this submission, he relied upon the judgment in the case of **Maktool Singh Vs. State of Punjab** reported in **(1999) 3 SCC 321** and also tried to distinguish the judgment of the Supreme Court in the case of **Dadu Alias Tulsidas Vs. State of Maharashtra** reported in **(2000) 8 SCC 437**. In support of the said submission, he referred to para 23 of the Judgment in the case of Dadu Alias Tulsidas (supra) wherein the Apex Court has observed as under:-

> "23. ....
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> Again in **S.S. Bola Vs. B.D. Sardana** [**(1997) 8 SCC 522**] it was reiterated that judicial review is the basic feature upon which hinges the checks and balances blended with hind sight in the Constitution as people's sovereign power for their protection and establishment of egalitarian social order under the rule of law. The judicial review was, therefore, held to be an integral part of the Constitution as its basic structure. Similarly, the filing of an appeal, its adjudication and passing of appropriate interim orders is concededly a part of the legal system prevalent in our country."

The learned ASG also referred to para 17 of the said judgment in the case of Dadu Alias Tulsidas (supra) which reads as under:-

> "17. Not providing atleast one right of appeal would negate the due process of law in the matter of dispensation of criminal justice. There is no doubt that the right of appeal is the creature of a

statute and when conferred, a substantive right. Providing a right of appeal but totally disarming the court from granting interim relief in the form of suspension of sentence would be unjust, unfair and violative of Article 21 of the Constitution particularly when no mechanism is provided for early disposal of the appeal. The pendency of criminal litigation and the experience in dealing with pending matters indicate no possibility of early hearing of the appeal and its disposal on merits atleast in many High Courts. As the present is not the occasion to dilate on the causes for such delay, we restrain ourselves from that exercise. In this view of the matter, the appellate powers of the court cannot be denuded by executive or judicial process."

13. The learned ASG submitted that so far as section 35 of the N.D.P.S. Act is concerned, it does not refer to conscious possession. He submitted that, in fact, the words "conscious possession" are not to be found in the said section at all. He submitted that section 35

raises presumption which had to be rebutted by the applicant. He submitted that the words "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact. He further relied on sub-clause (2) of section 35 and submitted that the fact was said to be proved only when the Court believes it to exist beyond the reasonable doubt and not merely when its existence is established by a preponderance of probability. He submitted that, therefore, this burden which was cast on the applicant had not been proved beyond reasonable doubt by the accused. He submitted that the applicant had categorically stated that the bag belonged to him till the point of time when he was asked by the P.W.22 who is the Security Officer at the X-ray machine and, at that point of time, he disowned the ownership of the bag. The learned ASG took me through the Judgement and Order of the Trial Court and submitted that the Trial Court had considered the various circumstances from which it had rightly drawn an inference that the applicant obviously had the knowledge. He referred to the evidence adduced by the applicant and also the evidence of his wife and submitted that from the said evidence it was difficult to believe that the applicant was not aware of the concealment of the drugs in the suitcase. He submitted that it was difficult to

believe that having known the fact that Dinshaw Pastakia (accused No.2) was previously suspended on account of case of gold smuggling being filed against him, the applicant would accept the bag which was to be sent to his son in United States. He referred to the evidence of wife of the applicant in which she admitted in the cross-examination that the bag in question was manufactured in USA and was readily available there. He submitted that on the basis of the said statement in the cross-examination that there was no necessity for the applicant to take this bag to the United States particularly when his Flight was to terminate at London. He further submitted that there was no question of sending the bag on humanitarian ground as there was no emergency or urgency for sending the bag. He submitted that there was no question of sending any medicine or other articles which were not available in USA. He submitted that, therefore, this theory of concealment being not known to the applicant could not be believed by any stretch of imagination. He further submitted that the bag in question had arrived at the house of the applicant about three weeks prior to the incident and accused No.2 - Dinshaw Pastakia had informed his wife that it had to be delivered to one Dinesh and the phone number of the said person was given. It is submitted that the accused had neither

inquired about the address of Pastakia's son or his daughter nor had inquired about their telephone number. He submitted that neither Pastakia's son nor his daughter was going to collect the said bag. He submitted that these circumstances clearly indicated that theory of transporting the bag for the sake of Pastakia's son was a story which was made to protect himself.

14. The learned ASG, therefore, submitted that the prosecution has clearly established the conscious possession on the part of the applicant and further the presumption under sections 35 and 54 had not been rebutted. He submitted that it was not necessary that the applicant should have met accused Nos. 3 and 4 as they were all part of a larger conspiracy and all of them were merely clogs in the machine which were supposed to carry out their part of the job without knowing or understanding the general conspiracy. He submitted that the prosecution had proved the conspiracy on the basis of various circumstances which could be inferred from the evidence which was brought on record. The learned ASG further invited my attention to the evidence of P.W.22 Ranshevre. He submitted that the applicant had, for the first time, disowned the ownership of the bag after he was informed

about certain articles which were noticed on the screen. He submitted that the submission made by the learned Counsel appearing on behalf of the applicant that the accused/applicant was not shown the articles on the screen and had immediately replied to the question posed by P.W.22 that he was carrying the bag for some one else cannot be accepted. The learned ASG took me through the evidence of P.W.22 in support of the said submission. He further relied on the statement of the applicant at Exhibit-17 in support of the said submission. The learned ASG relied upon the judgment of the Supreme Court in the case of **Abdul Rashid Ibrahim Mansuri vs. State of Gujarat** reported in **JT 2000(1) SC 471.**

15. The learned ASG further submitted that under section 30 of the Indian Evidence Act, the only inculpatory statement could be relied upon and used in evidence and not exculpatory part. He submitted that the prosecution has relied on Exhibit-51 which was a statement of Mr. Dinshaw Pastakia recorded by the prosecution for the purpose of proving the case against accused No.2. He, therefore, opposed the submissions made by the learned Counsel appearing on behalf of the applicant. So far as the submission regarding the evidentiary value of the statement of the co-accused is

concerned, he tried to distinguish the judgments which are cited by the learned Counsel appearing on behalf of the applicant.

16. The learned ASG further submitted that merely because some of the circumstances are not put to the accused while recording his statement under section 313 of the Criminal Procedure Code as long as no prejudice is caused to the accused, there was no reason to discard those circumstances. He submitted that the circumstances which were to be put to the accused clearly covered the other circumstances and the gist of the incriminating circumstances having been put to the accused, no prejudice was caused and, therefore, the ratio of the judgment in the case of Sharad Birdhichand Sarda (supra) and other judgmetns relied upon by the learned Counsel appearing on behalf of the applicant could not be of any assistance to the applicant. In support of the said submission, he relied upon the Judgment of the Apex Court in the case of **Kalpnath Rai Vs. State (Through CBI)** reported in **(1997) 8 SCC 732**. The learned ASG, thereafter, submitted that the judgments relied upon by the learned Counsel appearing on behalf of the applicant could be distinguished and he took me through the said judgments and submitted that the ratio of the said judgments was not applicable

to the facts of the present case. He submitted that the prosecution has established beyond the reasonable doubt that the applicant had committed the said offence and the Trial Court had given the cogent reasons and had convicted the accused. He submitted that in view of the restrictions imposed by section 32A, the applicant was not entitled to be released on bail and his application for bail was, therefore, liable to be rejected.

17. The question whether the Appellate Court has power to suspend the sentence awarded to the convict under the N.D.P.S. Act is no longer res integra. Though, initially, in the case of **Maktool Singh Vs. State of Punjab** reported in **(1999) 3 SCC 321,** it was held that section 32A had taken away the power of the Court to suspend the sentence passed on the persons convicted of offences under the Act, in subsequent judgment in the case of **Dadu Alias Tulsidas Vs. State of Maharashtra,** reported in **(2000) 8 SCC 437** delivered by three Judge Bench of the Apex Court, it is specifically held that the validity of the section in so far as it completely debars the Appellate Court's power to suspend the sentence awarded to the convict under the Act cannot stand test of constitutionality. The Apex Court in clear terms, therefore, held that section 32A in so far

as it oust the jurisdiction of the Court to suspend the sentence awarded to a convict under the Act is unconstitutional. The Apex Court in para 25 of the said Judgment in the case of Dadu Alias Tulsidas (supra) has observed as under:-

> "25. Judged from any angle, the section insofar as it completely debars the appellate courts from the power to suspend the sentence awarded to a convict under the Act cannot stand the test of constitutionality. Thus Section 32-A insofar as it ousts the jurisdiction of the court to suspend the sentence awarded to a convict under the Act is unconstitutional. We are, therefore, of the opinion that the Allahabad High Court in Ram Charan case [(1991) 9 LCD 160 (All)] has correctly interpreted the law relating to the constitutional validity of the section and the judgment of the Gujarat High Court in Ishwar Singh M. Rajput case [(1990) 2 Guj LR 1365 : (1991) 2 Crimes 160] cannot be held to be good law."

Finally in para 29 of the said judgment in the case of Dadu Alias Tulsidas (supra), the Apex Court has

observed as under:-

> "29. Under the circumstances the writ petitions are disposed of by holding that:
>
> (1) Section 32-A does not in any way affect the powers of the authorities to grant parole.
>
> (2) It is unconstitutional to the extent it takes away the right of the court to suspend the sentence of a convict under the Act.
>
> (3) Nevertheless, a sentence awarded under the Act can be suspended by the appellate Court only and strictly subject to the conditions spelt out in Section 37 of the Act, as dealt with in this judgment."

Thus, in view of the judgment of the Apex Court in the case of Dadu Alias Tulsidas (supra), the High Court has power to consider the application for suspension of sentence awarded to the convict under the N.D.P.S. Act. This judgment has been subsequently followed by the Supreme Court in the case of **Union of India Vs. Mahaboob Alam** reported in **2004 SCC (Cri) 912.** In para 9 of the said judgment the Supreme Court has observed

as under:-

> "9. Following the above dangerous trend arising out of narcotics trade, this Court in the said case held that though the court has the power of granting bail in spite of the language of Section 32-A, that the same should be done only and strictly subject to the conditions spelt out in Section 37 of the Act."

In view of the judgment of the Supreme Court in the Dadu's case, the judgment in the case of Maktool Singh (supra) is partly overruled.

18. The second question which falls for consideration is : whether the possession of the contraband with accused No.1 - applicant herein was conscious possession or in other words whether he had the knowledge that the contraband was concealed in the bag when he had carried it to the Airport and had lodged it on the X-ray machine for the purpose of clearing it to the security check. Prosecution's case is that the accused had brought the bag containing the contraband drugs which were concealed in the bag and upon being questioned by the Airport Authorities, the accused had disowned the ownership

of the bag. Only evidence against the applicant - accused is that he had carried the bag containing contraband to the Airport and, therefore, it is alleged that he had knowledge about the concealment of the drugs as the bag was found in his possession. Apart from the said evidence, there is no other evidence available against the accused No.1. The case of accused No.1 as deposed by him in the Court when he had examined himself, is that accused No.2 had given bag to him for being taken to New York in order to enable the daughter of accused No.2 to bring back her belonging from New York. The case of the accused No.1 in his evidence is that he was not aware about the drugs being concealed in the said bag and that at the first available opportunity, he had informed the Officer at the Airport that he was carrying the bag for some one else. Accused No.1 has given the same statement to the Custom Authorities when his statement was recorded under section 108 of the Customs Act and 67 of the N.D.P.S. Act. His wife also in her statement has stated that they both were not aware about the drugs being concealed in the false bottom of the bag and before taking the bag to the Airport both of them had checked the bag thoroughly and had not found any thing suspicious in the said bag. This version also is accepted by

accused No.2 who has confessed in his statement which is recorded under section 108 by the Customs Authorities and under section 67 of the N.D.P.S. Act that the accused had no knowledge about the concealment of the drugs in the false bottom of the suitcase which he had delivered to the accused No.1 in his absence. Accused No.2 also has stated in his evidence that he had once given similar bag to two other Officials of Air India viz. Motewala (DW-26) and Joglekar (DW-29) without their knowledge about the drugs being concealed in the suitcase and they had, without suspecting the concealment, had delivered the bag at New York. P.W.26 and 29 have corroborated the statement of accused No.2. Apart from the said statement made by accused No.2, he had also given confession to the Magistrate which was recorded as per the provisions of section 164 of the Criminal Procedure Code and in the said confessional statement also, he admitted that the accused No.1 had no knowledge about the concealment of drugs in the suitcase. Accused No.2 has further stated in his statement that accused Nos. 3 and 4 had never met accused No.1 at any time. It is on the basis of this evidence the case of the prosecution is that it could be inferred that the accused No.1 had knowledge about the concealment of the drugs in the false bottom of

the suitcase. The Trial Court on the basis of this evidence has inferred and has recorded various circumstances which prove the fact about the knowledge of the accused regarding the concealment of the contraband in the suitcase. Prosecution has also relied upon the provisions of section 34 and section 54 and has argued that there was a presumption about the intention of the accused in carrying the contraband and regarding possession of the contraband.

19. In order to attract the penal provisions of sections 20 and 21 of the N.D.P.S. Act, the prosecution has to prove that the appellant is found to be in possession of the contraband. The term "possession" is not defined in the N.D.P.S. Act. However, it has been held in various judgments of the Apex Court and the High courts that the possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. In the case of **Rubyana Vs. State of Maharashtra** reported in **1996 CRI.L.J. 148**, the Division Bench of this Court, while construing the term "possession", has observed in para 6 of the said judgment as under:-

"6. The sine qua non for attracting the

penal provisions viz. Sections 20 and 21 of the N.D.P.S. Act, and Section 25 read with Section 7 of the Arms Act is that the appellant must be found in possession of the contrabands and the fire arms. The term "possession" is not defined in the N.D.P.S. Act. The term "possession" has been judicially construed to mean, in various decisions as under :-

. ‘Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object.

(See in this connection Dula Singh v. Emperor, AIR 1923 Lahore 272 : (1928(29) Cri LJ 481), Kuldip Chand v. Emperor, AIR 1934 Lahore 718 : (1935(36) Cri LJ 300), Sunder Singh v. Emperor, AIR 1936 Lahore 738 : (1936(37) Cri LJ 939), and

Ram Charan V. Emperor, AIR 1933 ALL 437 : (1933 (34) Cri LJ 930).

The Apex court in Supdt. and L.R. v. Anil Kumar Bhunja, (1979) 4 SCC 274 : (1979 Cri LJ 1390), observed that the test for determining "whether a person is in possession of anything is whether he is in general control of it. "The Apex Court, after examining Salmond's jurisprudence and other earlier decisions rendered by the Court, observed thus (at pp 1392-93 of Cri LJ):-

13. 'Possession' is a polymorphous term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of 'possession' uniformally applicable to all situations in the contexts of all statutes. Dias and Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorising it is that of 'possession'. Much of this difficulty and confusion is (as pointed out in

Salmond's Jurisprudence, 12th Ed. 1966) caused by the fact that possession is not purely a legal concept. 'Possession', implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control. (See Dias and Hughes, 11th Ed.)

14. According to Pollock and Wright, when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing.

15. While recognising that 'possession' is not a purely legal concept but also a matter of fact, Salmond (12th Ed. Pag 52) describes 'possession, in fact", as relationship between a person and a thing.

According to the learned author the test for determining 'whether a person is in possession of anything is whether he is in general control of it'.

16. In Gunwantilal v. State of M.P. (1973) 1 SCR 508: (1972 Cri LJ 1187), this Court while noting that the concept of possession is not easy to comprehend, held that, in the context of Section 25(a) of the Arms Act, 1959, the possession of firearm must have firstly, the element of consciousness or knowledge of that possession in the person charged with such offence, and secondly, he has either the actual physical possession of the firearm, or where he has not such physical possession, he has nonetheless a power or control over that weapon. It was further recognised that whether or not the accused had such control or dominion to constitute his possession of the firearm, is a question of fact depending on the facts of each case. In that connection it was observed (at p 1189 of Cri.L.J.):

> . In any disputed question of possession, specific facts submitted or proved will alone establish the existence of the de facto relation of control or the dominion of the person over it necessary to determine whether that person was or was not in possession of the thing in question."

The Division Bench in the case of Rubyana (supra) has also considered the observations made by the Apex Court in the case of **Supdt. and L.R. Vs. Anil Kumar Bhunja** reported in **(1979) 4 SCC 274**. It would be profitable to consider whether in the facts and circumstances of the present case, it can be said that the accused No.1 was in conscious possession of the said concealed contraband.

20. In the present case, the only evidence which is available with the prosecution is that the accused had brought the suitcase to the Airport and even, according to the prosecution, this was given to him by accused No.2. P.W.26 and P.W.29 are the witnesses which are examined by the prosecution who have also stated that the accused No.2 had given similar

suitcases for the purpose of taking those suitcases to New York. Both these witnesses have stated that they had no knowledge about the concealment of the said drugs. It has not come in evidence that P.W.26 and P.W.29 were prosecuted or tried by the prosecution. Both P.W.26 and 29 were working in Air India. P.W. 26 J.N. Motewalla was working as cabin crew and P.W. 29 Sanjeev Joglekar was working as Flight Purser in Air-India. P.W.22 Vijay Ranshevre who is examined by the prosecution has stated in his deposition that he was working as Junior Security Assistant in Air-India and was allotted a duty at screening machine at Module-II and one Shri Kamble was on duty alongwith him. In the cross examination this witness has stated as under:-

> "When the images were seen I asked accd. no.1 as to whose bag it was and accd.no.1 replied that he was carrying the bag for somebody else. It is true that accd. no.1 told me to see the same properly, open the same and check the same."

It is submitted by the learned counsel appearing on behalf of the applicant that the applicant had informed the P.W.22 that the bag did not belong to him and that he was carrying the bag on behalf of

some one else. It is submitted, therefore, that at the first available opportunity, before knowing that there was any contraband in the suit case, he had disowned the ownership of the bag. The learned ASG, however, on the basis of the said evidence urged that the accused No.1 had disowned the ownership of the bag, after he was informed that there was some thing suspicious in the said bag. In my view, the fact remains that the accused No.1, on being asked as to whose bag it was, had promptly informed that he was carrying the bag on behalf of some one else. The chronology of events as stated by various witnesses reveals that the bag was delivered about three weeks before the incident in the house of accused No.1 when he and his wife were not in the house and that the bag was checked before putting his own clothes and belongings and he did not find any thing suspicious. The contraband being sealed in the false bottom of the bag, it was not possible for any person to know about the concealment on examination with the naked eye. Prosecution itself has examined two witnesses P.W.26 and P.W.29 who have revealed that on two occasions accused No.2 had given similar bags for being transported to New York and they had no knowledge that the contraband was concealed in the bag. Thus, in my view, it is not

possible to come to the conclusion on the basis of this evidence which is adduced by the prosecution that the accused No.1 had knowledge about the concealment of the contraband. Unless the prosecution discharges its burden of proving conscious possession of the contraband with the accused No.1, in my view the presumption under section 54 of the N.D.P.S. Act would not arise. Similarly the reliance is placed by the prosecution on section 35 of the N.D.P.S. Act. Section 35 of the N.D.P.S. Act would not be attracted to the provisions of section 21, 23 and 29 of the said Act.

Section 35 of the N.D.P.S. Act reds as under:-

> "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 that prosecution.
>
> Explanation.- In this section "culpable mental state" includes intention,

motive, knowledge of a fact and belief in, or reason to belive, 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."

From the fair reading of section 35, it can be seen that it applies only to such offences where the Act specifically provide for mens rea or culpable mental state as an ingredient of the offence. Sections 21, 23 and 29 are not such sections. The Division Bench of this Court in the case of **Natibabu Khadka Vs. State of Goa** reported in **1996(5) BCR 76** has observed in para 34 as under:-

"34. In our opinion section 35 of the Narcotic Drugs and Psychotropic Substances Act, 1985, applies only to such offences where the Act specifically provided for mens rea or culpable mental state as ingredient of the offence. Section 20(b) of the Act is not one of such sections. The said section can be compared and

contrasted with sections of the Act for purpose of appreciating the submission made by the learned counsel for the the appellant in this behalf. In our opinion section 54 of the said Act is a specific section and the same is clearly attracted in a case where conscious possession of the appellant in respect of the contraband articles is duly proved by the prosecution. The expression "conscious possession" has not been in terms used under the Act. We are however of the view that on a true and correct interpretation of the relevant provisions of the Act it is necessary for the prosecution to prove conscious possession of the appellant in respect of the contraband before section 54 of the Act can be attracted. This view is already taken by the Division Bench of our High Court in Criminal Appeal No.22 of 1993 in the context of some very provisions of the Narcotic Drugs and Psychotropic Substances Act, i.e. section 20(b) of the Act. We are also in respectful agreement with the view taken by the High Court of Karnataka on this

> subject. We are also fortified in taking this view by the ratio of the decision of the Supreme court and other courts while interpreting section 66(b) of the Bombay Prohibition Act, 1949."

Thus, the submission of the learned ASG that the accused No.1 had not rebutted the presumption raised under section 35 of the N.D.P.S. Act cannot be accepted. Similarly, though the expression "conscious possession" has not been in terms used under the Act, on interpretation of the relevant provisions of the Act, it is necessary for the prosecution to prove the conscious possession of the accused in respect of the contraband before section 54 of the Act can be attracted. In my view, prosecution has not adduced evidence to prove conscious possession of the contraband with accused No.1.

21. The Trial Court has taken into consideration 12 circumstances in its judgment while coming to the conclusion that the accused has knowledge about the contraband. Out of these 12 circumstances only one circumstance has been put to the accused in his statement under section 313 of the Criminal Procedure

Code. The said 12 circumstances are (1) that the accused No.1 disassociated himself from the suitcase only after noticing the suspicious images on the screen, (2) he removed his name tag from the suit case, after the contraband was found in the suitcase, (3) though he was travelling upto London, he agreed to make arrangements to transport the suitcase to New York, (4) he was aware about the background of accused No.2, (5) he knew accused No.4 and his family, (6) the reason given by him for carrying the suitcase was not convincing, (7) wife of accused No.2 Pastakia had no idea of the suitcase which was to be taken to her daughter in New York (8) Accused No.1 enquired about the name of the person who would collect the bag at New York only the day before his departure, (9) he did not make any enquiry about the name or the address of the son of accused No.2 (10) Accused No.2 did not give the name, telephone number or the address of his son or daughter to the accused No.1 but only gave the name of one Dinesh without the surname, (11) wife of accused No.1 rechecked the suitcase at 3.00 a.m. before he proceeded to the Airport, (12) accused No.1 pressurised accused No.2 It is submitted that except circumstance No.4, the other circumstances were not put to the applicant - accused No.1 in his statement which was recorded

under section 313 of the Criminal Procedure Code. It is further submitted that this finding also was contrary to the evidence of P.W.22 - Ranshevre. Regarding circumstance No.5, there was no evidence that the accused No.1 knew accused No.4 and his family. It is further submitted that circumstance Nos. 7 and 8 were contrary to the evidence of P.W.1 and D.W.1. Further, regarding circumstance No.12, there was no evidence to come to the conclusion that the accused No.1 had pressurised accused No.2. It is an admitted position that except circumstance No.4, the other circumstances were not put to the accused while his statement was recorded under section 313 of the Cr.P.C. The Apex Court in the case of **Sharad Birdhichand Sarda Vs State of Maharashtra** reported in **A.I.R. 1984 SC 1622** has observed in para 142 and para 143 as under:-

> 142. Apart from the aforesaid comments, there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court, viz. circumstances Nos. 4,5,6,8,9,11,12,13, 16 and 17. As these circumstances were not put to the appellant in his statement under section 313 of the Criminal

Procedure Code they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of Hate Singh Bhagat Singh v. State of Madhya Bharat AIR 1953 SC 468 this Court held that any circumstance in respect of which an accused was not examined under Section 342 of the Criminal Procedure Code cannot be used against him. Ever since this decision, there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under Section 342 or section 313 of the Criminal Procedure Code, the same cannot be used against him. In Shamu Balu Chaugule v. State of Maharashtra, (1976) 1 SCC 438 : (AIR 1976 SC 557) this Court held thus:

. "The fact that the appellant was said to be absconding not having been put to him under Section 342, Criminal Procedure

Code, could not be used against him."

143. To the same effect is another decision of this Court in Harijan Megha Jesha v. State of Gujarat, AIR 1979 SC 1566 where the following observations were made:

. "In the first place, he stated that on the personal search of the appellant, a chadi was found which was bloodstained and according to the report of the serologist, it contained human blood. Unfortunately, however, as this circumstance was not put to the accused in his statement under section 342, the prosecution cannot be permitted to rely on this statement in order to convict the appellant."

It is an admitted position that out of 12 circumstances, only one circumstance is put to the accused while recording his statement under section 313 of the Code of Criminal Procedure. This is an additional lacuna in the judgment of the Trial Court. The reliance is placed by the learned ASG appearing on behalf of Union of India on the

judgment of the Apex Court in the case of **Kalpnath Rai Vs. State (Through CBI)** reported in **(1997) 8 SCC 732**. In the said judgment, the Apex Court in para 62 has observed that the designated court ought not to have confronted the accused with any circumstance which is not in evidence. In the said case, Trial Court had confronted the accused with letters written by the accused to the Court from Jail during pre-trial period and without adducing the letters in evidence, the Trial Court had confronted the accused with these letters. In the light of these facts the Apex Court observed that section 313 of the Cr.P.C. was not intended to be used as an interrogation. The said judgment, in my view, will not be of any assistance to the learned ASG appearing on behalf of Union of India. However, the fact remains that it has been held by the Apex Court that if the gist of the incriminating evidence is put to the accused, requirement of section 313 would be satisfied. In the present case, however, it appears that even the gist of the incriminating circumstances was not put to the accused and, therefore, prima face, it appears that the said circumstances will be excluded.

22. The learned ASG also relied upon the judgment

in the case of **State of Punjab Vs. Nain Din** reported in **(2001) 8 SCC 578**. In the said judgment, it is laid down by the Apex Court that if there is an omission to put the question to the accused under section 313 concerning the evidence of formal nature and remaining evidence is sufficient to bring home the guilt of the accused, the said lapse could be sidelined. The said ratio, however, will not be applicable to the facts of the present case as, in the present case, circumstances on which the conviction is based have not been put to the accused and there is no other evidence on record which can be said to be sufficient to bring home the guilt of the accused. Similarly, reliance is placed by the learned ASG on the judgment of the Apex Court in the case of **Vijay Kumar Vs. Narendra and Others** reported in **(2002) 9 SCC 364**. The ratio of the said judgment will not be applicable to the facts of the present case since in the said case the High Court had neither given any reason nor had indicated the exceptional circumstances for granting the bail to the respondents and, under the circumstances, the Apex Court has set aside the order of the High Court.

23. Thus, in my view, prima facie case is made out by the applicant - accused for grant of bail and I am satisfied that there are reasonable grounds for believing that he is not guilty of the said offence and that he is not likely to commit any offence while on bail. It is an admitted position that the applicant was on bail during trial and was permitted to fly as Commander to International Designations. Even visa was granted by UK and USA when he was facing the trial. Applicant was working as Senior Pilot with Air-India at the time of his retirement and has put in 38 years of service and had an unblemished record during the said period. The other witnesses examined by the prosecution viz. P.W. 26 and P.W.29 have stated that the accused No.2 had delivered similar bags through them to New York and they were not aware whether any drugs were concealed. These two witnesses were also not tried by the prosecution. Atleast there is no evidence on record to show that they were tried by the prosecution. Applicant, therefore, is entitled to be released on bail. Accordingly the following order is passed:-

ORDER

. Applicant be released on bail in the sum of Rs 50,000/- with one or two sureties in the like amount. He shall, however, surrender his passport to the Commissioner of Customs. He shall not leave the country without taking leave of this Court. He shall report to AIU, Sahar Airport once in a month.

. Hearing of the appeal is expedited. Liberty to the parties to apply for a fixed date of hearing after the paper book is ready.

. Applicant is permitted to furnish cash security and thereafter fresh sureties.

. All concerned to act on a copy of this order duly authenticated by the Court Sheristedar.

V.M.KANADE, J.