

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 2ND DAY OF JUNE 2015/12TH JYAISHTA, 1937

CRL.A.No. 276 of 2004 (A)

**AGAINST THE JUDGMENT IN CC 3/2003 of SPL. COURT (NDPS ACT CASES),
THODUPUZZHA DATED 21-01-2004**

APPELLANT(S)/ACCUSED.:

**HARIKUMAR, S/O.KEASAVA PILLAI,
RESIDING AT HARIBHAVAN, THONNOOTTIL HOUSE
KOMBAYAR P.O., PARATHODI VILLAGE.**

**BY ADVS.SRI.S.K.MURALEEDHARA KAIMAL
SRI.B.RAJESH
SRI.A.K.MADHAVAN UNNI**

RESPONDENT(S)/COMPLAINANT:

**STATE OF KERALA REP. BY THE
CIRCLE INSPECTOR OF POLICE, NEDUMKANDAM
THROUGH THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 02-06-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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C. R.

P.D. RAJAN, J.

Crl. Appeal No.276 of 2004

Dated this the 2nd day of June, 2015

JUDGMENT

This appeal is preferred against the conviction and sentence in C.C.No.3 of 2003 of the Special Judge for NDPS Cases, Thodupuzha for offence punishable under Section 20(a) r/w Section 20(b) (i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 hereafter referred to as "the Act". The appellant was convicted for the above offence and sentenced to undergo rigorous imprisonment for two years and pay a fine of Rupees ₹10,000/- in default of fine to undergo rigorous imprisonment for another three months.

2. The facts necessary for indictment were that on 07.12.2001 at 11.00 am the Sub Inspector, Nedumkandam Police Station got a telephonic information that appellant was cultivating ganja plants behind his residential house. He recorded that information into writing in the General Diary of the Police Station, reported the matter to his official superior, thereafter proceeded to the place of occurrence with the police party and conducted a search in the residential compound of

the accused. During inspection, the Sub Inspector found four ganja plants aged five months cultivated behind the residential house of the appellant. The appellant was arrested on the spot itself and seized the ganja plants. Reaching at the police station, he registered Crime No.327/2001. The Circle Inspector of Police, Nedumkandam conducted investigation and laid charge against the accused before trial court.

3. For establishing the penal liability, prosecution examined PW1 to PW7 and marked Exts.P.1 to P.17 and admitted MO1 to MO4 in evidence. During cross-examination of the prosecution witnesses, three documents were produced by the defence, which were marked as Exts.D1 to D3. The incriminating circumstances brought out in evidence were denied by the appellant while questioning him under Section 313 Cr.P.C. He was also heard under Section 232 Cr.P.C. and he was asked to tender his defence. He did not adduce any defence evidence. The trial court after sifting and weighing the evidence on record convicted the accused.

4. The learned counsel appearing for the appellant contended that there was no evidence to prove the conscious possession of ganja by the appellant since the property was in possession of his mother. No evidence has been adduced by

the prosecution to prove the possession and ownership of the house by the appellant from where the ganja was seized. There was delay in sending the sample to the court and violation of the principles of search. What happened to the seized article was also not explained by the prosecution. When there is no evidence to prove the conscious possession, the appellant is entitled to get the benefit of doubt.

5. In the instant case, the allegation was that, appellant was cultivating the ganja behind his house violating the provisions of the NDPS Act. At this juncture, I have considered what is the evidence with regard to cultivation of ganja. That allegation was put forward by PW1, who deposed that he got reliable information about the cultivation of ganja, proceeded to the place of occurrence after recording the information in the general diary which was marked in the trial court as Ext.P2 and he forward Ext.P1 information to the superior officer. When he arrived at the property, the appellant was plucking coffee beans from the property. PW1 searched the compound and detected the ganga plants. He deposed that the appellant watered the ganja plants with MO1 hose but he has only hearsay information about such watering. He categorically admitted that he has no case that he saw the appellant

watering the ganja plants. He has no specific answer to the question, who planted the ganja plants in the property. He uprooted two ganja plants and took it as sample, which was marked as MO2 and MO3 by trial court. He also uprooted the remaining two ganja plants which was produced in the trial court and marked as MO4. Reaching at the police station, he registered a crime and Ext.P5 is the FIR and sent Ext.P6 report to Circle Inspector of Police. He prepared Ext.P7 property list. Ext.P8 is the forwarding note for sending the samples for chemical examination. He also prepared Ext.P.9, P10 and P11. Even though, PW1 deposed that the appellant cultivated the ganja plants, no evidence has been produced by him to substantiate that part of his version.

6. For seizure of ganja, PW2 and PW3 were examined by the prosecution as independent witnesses who attested Ext.P4 mahazar. They admitted the signature in the Ext.P4, but denied the seizure of the ganja from the property. The seizure was supported by PW5, a Police Constable who accompanied the Sub Inspector. PW2 and PW3 attested Ext.P4 mahazar, admitted their signature in the mahazar. They have no knowledge about the content of Ext.P4. In this situation, what is relevant is regarding cultivation of ganja, which is punishable

with imprisonment and fine. In order to establish the penal liability, it must be proved that accused had cultivated prohibited ganja plant in his property. There must be specific evidence that appellant sow the seeds in his property, when sprouted, he manured it, watered it regularly and nurtured it. Therefore, four plants found in the property of his mother, reasonable presume that the seeds embedded in the earth may sprout up in natural process and grown as a plant. In such cases, it cannot be said that appellant cultivated ganja in his property. In this situation primary responsibility of the investigating officer was to see as to who planted the ganja plants there, whether the owner or any other person who is dealing with the property. However, that initial responsibility was not discharged by the prosecution in this case.

7. The cultivation of ganja and the nature of proof required to prove in a case has been discussed by the apex court in **Alakh Ram V. State of U.P 2004 SCC (Crl.)363** as follows;

“We heard the appellants counsel and the counsel for the respondent. Under Section 8(b) of the NDPS Act, cultivation of opium poppy or any cannabis plant is prohibited and under Section 20 of the NDPS Act, such cultivation of cannabis plant is made punishable with imprisonment and fine. In order to prove the guilt, it must be proved that the accused had

cultivated this prohibited plant. There must be supporting evidence to prove that the accused cultivated the plant and it is not enough that few plants were found in the property of the accused. It is quite reasonable to assume that sometimes the plants may sprout up, if seeds happen to be embedded in earth due to natural process. If plants are sprouted by natural growth, it cannot be said that it amounts to cultivation.”

8. The learned Public Prosecutor contented that the evidence of PW1 is sufficient to prove the possession of the property by the appellant. The Village Officer of Parathode Village also supported the possession of the property by the appellant and he is not entitled to get the benefit of doubt when conscious possession is proved.

9. I do not find any substance in the submission made by the learned Public Prosecutor. Possession is *prima facie* evidence of ownership and it means continuing exercise of a claim to the exclusive use of it. Possession consist of two elements, first a thing or corpus and second, mental feeling or animus *possidendi*. If the possession is restricted to the actual concept of possession, it means actual physical control and custody. Attributing this meaning in the strict sense in the present case, it would understand the contextual purpose of the expression “possession”. To prove the possession of the property, the prosecution examined PW6 the Village Officer,

Parathode Village. He visited the property and prepared Ext.P15 site plan and issued Ext.P16 possession certificate in respect of the property. According to PW6, the property is in survey No.479/1 Parathode Village having an extend of 34.35 ares owned by Bhavaniamma and she possess the property. If the evidence of PW6 is analysed, it is clear that the aforesaid property was owned by the mother of the appellant. In this back ground, appellant made an attempt to prove that he is residing in another property and for substantiating his residence in the other property he produced Ext.D1 to D3. PW6 admitted that Thandapper No. was not given to the property comprised in Ext.D1. When possession of the property is concerned, Ext.P16 records obtained from the revenue authorities are relevant. PW4, the mother of the appellant admitted that she is the owner of the property comprising survey No.479/1 of Parathode Village. When direct oral and documentary evidences were available, the investigating officer committed a mistake. He charge sheeted the appellant and prosecuted him instead of prosecuting the actual owner who possessed the property.

10. Apex Court in **Mohanlal V. State of Rajasthan**, held that;

Dr.Harris, in his essay titled "The Concept of Possession in English Law(16)" while discussing the various rules relating to possession has stated that "possession" is a functional and relative concept, which gives the Judges some discretion in applying abstract rule to a concrete set of facts. The learned author has suggested certain factors which have been held to be relevant to conclude whether a person has acquired possession for the purposes of a particular rule of law. Some of the factors enlisted by him are; (a) degree of physical control exercised by person over a thing, (b) knowledge of the person claiming possessory rights over a thing, about the attributes and qualities of the thing, (c) the person's intention in regard to the thing, that is, 'animus possessionis' and 'animus domini',

(d) possession of land on which the thing is claimed is lying; also the relevant intention of the occupier of a premises on which the thing is laying thereon to exclude others from enjoying the land and anything which happens to be laying there; and Judges' concept of the social purpose of the particular rule relied upon by the plaintiff. The learned author has further proceeded to state that quite naturally the policies behind different possessory rules will vary and it would justify the courts giving varying weight to different factors relevant to possession according to the particular rule in question. According to Harris, the Judges have at the back of their mind a perfect pattern in which the possessor has complete, exclusive and unchallenged physical control over the subject; full knowledge of its existence; attributes and location, and a manifest intention to act as its owner and exclude all others from it. As a further statement he elucidates that courts realize that justice and expediency compel constant modification of the ideal pattern. The person claiming possessory rights over a thing may have a

very limited degree of physical control over the object or he may have no intention in regard to an object of whose existence he is unaware of, though he exercises control over the same or he may have clear intention to exclude other people from the object, though he has no physical control over the same. In all this variegated situation, states Harris, the person concerned may still be conferred the possessory rights. The purpose of referring to the aforesaid principles and passages is that over the years, it has been seen that courts have refrained from adopting a doctrinaire approach towards defining possession. A functional and flexible approach in defining and understanding the possession as a concept is acceptable and thereby emphasis has been laid on different possessory rights according to the commands and justice of the social policy. Thus, the word "possession" in the context of any enactment would depend upon the object and purpose of the enactment and an appropriate meaning has to be assigned to the word to effectuate the said object."

11. Therefore when prosecution alleges the possession of the land by a particular person, the official burden is upon the prosecution to show that the seized ganja was cultivated by the appellant. The relevant intention of the occupier of the premises, from where the ganja seized is material for proving the culpable possession of the property. The possession consists of two elements. The physical control of the property and the animus part of its control. Nowhere it is stated by PW1 that the property was in the possession of the appellant.

12. In the instant case appellant claimed that he is residing in another property and has no control over the alleged place of occurrence. Ext.D1 to D3 were marked in support of that claim. The house and its premise belong to his mother and he is residing in another property as per Ext.D1, it is difficult to fasten criminal liability upon the appellant from the available evidence. When possessory right was claimed by PW4, there is only a limited scope for prosecuting the appellant. Therefore, the actual and conscious possession of the property was in the possession of PW4, the mother. Similar question was considered by this Court in ***Mohanan V. State of Kerala 1995 (2) Crl. Law Journal 2325***, wherein it was held as follows;

“The conviction is also not sustainable for another reason. The article is stated to have been dug out from a place near a shed attached to house No.253/VII. The house is stated to be one belonging to the accused. But the house tax assessment register was produced at the instance of the accused to show that he is not the person in possession of that house. Ext.XI assessment register shows that the house is assessed in the name of one Janardhanan. Number of the house possessed by the accused is 254. This according to the prosecution is a mistake. But the evidence on the side of the prosecution is to the effect that the article was taken out from a spot near the shed attached to house No.253. Since that house is registered in the name of the Janardhanan and accused being in possession of another house nearby, the

plot adjoining the house (No.253) cannot be said to be in the possession of the accused so as to fasten a liability on him for the article taken out from that plot. Witnesses were no doubt examined to speak about possession of the property adjoining the house. An extent of 1.04 acres of land adjoining the house is stated to be in the possession of the accused. But the question as to the identity of the property possessed by the accused has to be determined. Since he is in possession of house No.254 of Ward VII as per the assessment records the prosecution has to show that the spot from where the contraband article was dug out lies adjoining that house and is in his possession. Mere possession of a property in that area will not enable the prosecution to contend that the article was taken from the property of the accused. More so, when house No.253 is found to be in the possession of another person and the article seized from a place near that house, The prosecution has therefore failed to prove that the article was taken out from the property adjoining the house of the accused. For that reason also the conviction is unsustainable.”

13. In short, mere presence of the appellant in the property does not establish the ownership or possession of the property from where the ganja was seized. The burden lies upon the prosecution to prove by cogent and reliable evidence that the appellant was in exclusive possession of the seized ganja. In the absence of such evidence, the conviction and sentence passed by the trial court under Section 20 of the NDPS Act is liable to be set aside.

In the result, the conviction passed by the Special Court under Section 20(a) r/w 20(b) (i) of the NDPS Act is set aside and accused is set at liberty. The fine amount, if any, remitted shall be returned forthwith.

This appeal is allowed.

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**P.D. RAJAN,
JUDGE**