

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 10th August, 2018
Decided on: 20th August, 2018

+ **BAIL APPLN. 2343/2017**

IKECHUKWU CHUKWUBUIKEM STANLEY Petitioner
Represented by: Mr.Vikas Gautam, Advocate

versus

NARCOTIC CONTROL BUREAU Respondent
Represented by: Mr.P.C.Aggarwal, Advocate

+ **BAIL APPLN. 503/2018**

ANAND KUMAR THAKUR Petitioner
Represented by: Mr.K.G.Sharma and Mr.R.K.Goel,
Advocates

versus

NAROTIC CONTROL BUREAU Respondent
Represented by: Mr.P.C.Aggarwal, Advocate

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. By these two petitions, the petitioners seek bail in complaint case No.SC/225/17 titled as NCB Vs. Ikechukwu Chukwubuikem Stanley & Ors. pending in the Court of Special Judge, NDPS Act, at Patiala House.
2. Learned counsel for the petitioner Ikechukwu Chukwubuikem Stanley states that from the facts even on the face of the prosecution case, the petitioner cannot be said to be in conscious possession of the narcotics drugs. No recovery has been made at the instance of the petitioner, further

the parcel was given to the petitioner by the co-accused to be booked for Spain. He further states that in terms of the decision of the Supreme Court reported as (2015) 6 SCC 222 Mohan Lal Vs. State of Rajasthan and a decision of this Court reported as 2005 (3) JCC (Narcotic) 220 Kamaljeet Singh Vs. H.K.Pandey, the petitioner is entitled to grant of bail pending trial.

3. Learned counsel for petitioner Anand Kumar Thakur states that the petitioner is running a courier agency and only to facilitate its customer, he provided the ID of his staff which cannot in any way be treated as conscious possession of the contraband. There is no previous involvement of the petitioner and he has been falsely implicated.

4. As per the complaint filed by the respondent, the case of the prosecution is that on 28th January, 2017, a secret information was received from DHL, Rama Road, Kirti Nagar, New Delhi that one parcel booked under airway bill No.5112788656 destined for Spain is lying there and is suspicious. On examination of the parcel, it was found containing 575 grams of heroin concealed in the shock absorber (auto parts). During inquiry, ID documents were looked into and it was found that the courier company i.e. DTDC Courier Company was owned by petitioner Anand Kumar Thakur who disclosed that the parcel in question was booked by Ikechukwu Chukwubuikem Stanley on the basis of aadhar card of one Munna Ansari and that ID documents of his staff were affixed with the parcel in question on the instructions of Anand Kumar Thakur.

5. Thereafter, petitioner Ikechukwu Chukwubuikem Stanley was intercepted and was questioned as to who disclosed that the parcel was given to him by co-accused Edwin Emeka Igbokwe whereafter Edwin was intercepted and his statement was also recorded. Search of house of Edwin

was also conducted where similar type of shock absorbers were found which were used for concealing the recovered heroin in the parcel in question, besides the packing box and other incriminating items.

6. As per the complaint and the status report, petitioner Ikechukwu Chukwubuikem Stanley was earlier also arrested and convicted in FIR No.68/2008 under Sections 21 and 29 of the NDPS Act read with Section 14 of the Foreigners Act at PS Special Cell, New Delhi whereafter he had entered India with another name and committed the present offence. As per the complaint, petitioner Ikechukwu Chukwubuikem Stanley was earlier arrested in the name of Stanely Chubuki.

7. The plea of learned counsel for petitioner Ikechukwu Chukwubuikem Stanley that the petitioner was not in conscious possession of the contraband cannot be accepted for the reason Edwin who gave the parcel to petitioner Ikechukwu Chukwubuikem Stanley was in Delhi only and was thus not required to use Ikechukwu Chukwubuikem Stanley for the purposes of sending the parcel. Even as per his statement on 24th January, 2017 when the booking of the parcel was not showing on the DTDC Website and Edwin having called petitioner Ikechukwu Chukwubuikem Stanley, he went to the DTDC office to know why the parcel was not showing on its website where he was told that he will have to pay more money as the parcel was heavy.

8. While dealing with the concept of conscious possession, Supreme Court in Mohan Lal (supra) held as under:-

“16. Coming to the context of Section 18 of the NDPS Act, it would have a reference to the concept of conscious possession. The legislature while enacting the said law was absolutely aware of the said element and that the word “possession” refers to a mental state as is noticeable from

the language employed in Section 35 of the NDPS Act. The said provision reads 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 that 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.”

17. On a perusal of the aforesaid provision, it is plain as day that it includes knowledge of a fact. That apart, Section 35 raises a presumption as to knowledge and culpable mental state from the possession of illicit articles. The expression “possess or possessed” is often used in connection with statutory offences of being in possession of prohibited drugs and contraband substances. Conscious or mental state of possession is necessary and that is the reason for enacting Section 35 of the NDPS Act.

18. In Noor Aga v. State of Punjab, the Court noted Section 35 of the NDPS Act which provides for presumption of culpable mental state and further noted that it also provides that the accused may prove that he had no such mental state with respect to the act charged as an offence under the prosecution. The Court also referred to Section 54

of the NDPS Act which places the burden to prove on the accused as regards possession of the contraband articles on account of the same satisfactorily. Dealing with the constitutional validity of Sections 35 and 54 of the NDPS Act, the Court ruled thus: (SCC p. 449, para 55)

“55. The provisions of Section 35 of the Act as also Section 54 thereof, in view of the decisions of this Court, therefore, cannot be said to be ex facie unconstitutional. We would, however, keeping in view the principles noticed hereinbefore, examine the effect thereof vis-à-vis the question as to whether the prosecution has been able to discharge its burden hereinafter.”

And thereafter proceeded to state that: (SCC p. 450, paras 58-59)

“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.

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt.”

19. In Bhola Singh v. State of Punjab , the Court, after referring to the pronouncement in Noor Aga concurred with the observation that only after the prosecution has discharged the initial burden to prove the foundational facts, then only Section 35 would come into play. While dislodging the conviction, the Court stated: (Bhola Singh case SCC pp. 655-56, para 11)

“11. ... it is apparent that the initial burden to prove that the appellant had the knowledge that the vehicle he owned was being used for transporting narcotics still lay on the prosecution, as would be clear from the word ‘knowingly’, and it was only after the evidence proved beyond reasonable doubt that he had the knowledge would the presumption under Section 35 arise. Section 35 also presupposes that the culpable mental state of an accused has to be proved as a fact beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities. We are of the opinion that in the absence of any evidence with regard to the mental state of the appellant no presumption under Section 35 can be drawn. The only evidence which the prosecution seeks to rely on is the appellant's conduct in giving his

residential address in Rajasthan although he was a resident of Fatehabad in Haryana while registering the offending truck cannot by any stretch of imagination fasten him with the knowledge of its misuse by the driver and others.”

20. *Having noted the approach in the aforesaid two cases, we may take note of the decision in Dharampal Singh v. State of Punjab, when the Court was referring to the expression “possession” in the context of Section 18 of the NDPS Act. In the said case opium was found in the dickey of the car when the appellant was driving himself and the contention was canvassed that the said act would not establish conscious possession. In support of the said submission, reliance was placed on Avtar Singh v. State of Punjab and Sorabkhan Gandhkhan Pathan v. State of Gujarat. The Court, repelling the argument, opined thus: (Dharampal Singh case SCC pp. 613-15, paras 12-13 & 15-16)*

“12. We do not find any substance in this submission of the learned counsel. The appellant Dharampal Singh was found driving the car whereas appellant Major Singh was travelling with him and from the dickey of the car 65 kg of opium was recovered. The vehicle driven by the appellant Dharampal Singh and occupied by the appellant Major Singh is not a public transport vehicle. It is trite that to bring the offence within the mischief of Section 18 of the Act possession has to be conscious possession. The initial burden of proof of possession lies on the prosecution and once it is discharged legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the plea of

the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence. Offences under the Act being more serious in nature higher degree of proof is required to convict an accused.

13. It needs no emphasis that the expression 'possession' is not capable of precise and completely logical definition of universal application in the context of all the statutes. 'Possession' is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18 of the Act once possession is established, the accused who claims that it was not a conscious possession has to establish it because it is within his special knowledge.

15. From a plain reading of the aforesaid it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the appellants have not been able to satisfactorily account for the possession of opium.

16. Once possession is established the court can presume that the accused had culpable mental state and have committed the offence. In somewhat similar facts this Court had the occasion to consider this question in Madan

Lal v. State of H.P., wherein it has been held as follows: (SCC p. 472, paras 26-27)

'26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

27. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act.'"

21. From the aforesaid exposition of law it is quite vivid that the term "possession" for the purpose of Section 18 of the NDPS Act could mean physical possession with animus, custody or dominion over the prohibited substance with animus or even exercise of dominion and control as a result of concealment. The animus and the mental intent which is the primary and significant element to show and establish possession. Further, personal knowledge as to the existence of the "chattel" i.e. the illegal substance at a particular location or site, at a relevant time and the intention based upon the knowledge, would constitute the unique relationship and manifest possession. In such a situation, presence and existence of possession could be justified, for the intention is to exercise right over the substance or the chattel and to act as the owner to the exclusion of others."

9. The Supreme Court thus held that there should be animus and the mental intent to show and establish possession. In the present case, petitioner Ikechukwu Chukwubuikem Stanley brought the articles and sought to book the same on the ID of one Munna Ansari knowing fully that the articles belonged to Edwin. It is thus evident that the petitioner was conscious that a non-genuine ID was required to send the courier. At this stage, from the evidence on record, this Court cannot infer that the petitioner Ikechukwu Chukwubuikem Stanley had no conscious possession of the contraband.

10. Further Section 37 of the NDPS Act reads as under:-

“37. Offences to be cognizable and non-bailable – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless —

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under

the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.”

11. Petitioner Ikechukwu Chukwubuikem Stanley having already been convicted and deported thereafter for an earlier offence under Sections 21 and 29 of the NDPS Act, this Court cannot arrive at a satisfaction that there is no likelihood of the petitioner in not indulging in this activity again or in view of the facts noted above that he is not guilty of the offence. Hence this Court finds no ground to grant bail to Ikechukwu Chukwubuikem Stanley.

12. As regards petitioner Anand Kumar Thakur is concerned, even as per the case of the prosecution, the petitioner is running a courier agency and petitioner's company received pre-packed goods purportedly shock absorbers. Both the cartons contained similar type of shock absorbers and on cutting open only concealed contraband therein was found. In order to increase the business, Anand Kumar Thakur also offered to lend the ID of a staff which he would not have done, if he had known that it contained contraband. Prima facie, thus from the manner of concealment it cannot be said that Anand Kumar Thakur had conscious possession of the contraband in terms of the law laid down by the Supreme Court in Mohan Lal (supra). Further the rate charged by Anand Kumar Thakur for sending the courier also does not show that he was conscious that a contraband was being sent and that he charged enhanced fee.

13. Consequently, this Court deems it fit to grant bail to Anand Kumar Thakur. It is, therefore, directed that Anand Kumar Thakur be released on bail on his furnishing a personal bond in the sum of ₹1 lakh with two surety bonds of the like amount to the satisfaction of the learned Trial Court, further subject to the condition that he will not leave the country without the

prior permission of the Court concerned and in case of change of residential address, he will intimate the same to the Court concerned by way of an affidavit.

14. Bail Appln.No.2343/2017 is dismissed and Bail Appln.No.503/2018 is disposed of.

15. Order dasti.

(MUKTA GUPTA)
JUDGE

AUGUST 20, 2018

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