

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 26 OF 2019

ALLAN BAINBRIDGE,
PRESENTLY AT CENTRAL JAIL,
COLVALE, THR. PARESH
NARVEKAR.

... Appellant

Versus

THE STATE OF GOA, THR. POLICE
INSPECTOR, ANTI NARCOTIC CELL
POLICE STATION, PANAJI.,

... Respondent

Mr. Ryan Da Piedade Menezes, Advocate under Legal Aid Scheme for the Appellant.

Mr. Pravin Faldessai, Additional Public Prosecutor for the Respondent.

Coram:- M. S. SONAK, J.

Reserved on:- 18th September, 2020

Pronounced on:- 24th September, 2020

JUDGMENT:

Heard Mr. Ryan Da Piedade Menezes under Legal Aid Scheme for the Appellant and Mr. Pravin Faldessai, Additional Public Prosecutor for the Respondent.

2. This appeal is directed against the judgment and order dated 23.02.2016 made by the learned NDPS Court at Mapusa in Special Criminal Case (NDPS) No.38/2014 by which the accused was convicted of the offence punishable under Section 8(c) r/w. Section 22(c) of the NDPS Act, 1985, for being found in illegal possession of 6.6 grams of LSD Liquid and 11.4 grams of MDMA, both being the commercial quantities and sentenced to the Rigorous Imprisonment for ten years and payment of fine of ₹1,00,000/- and in default of payment of fine further Simple Imprisonment for a period of one year.

3. The case of the prosecution is that on 17.05.2014 between 14.55 hrs. to 19.00 hrs. at Bamonwado, Anjuna, Bardez, Goa, the accused was found in illegal possession of 6.6 grams of LSD Liquid and 11.4 grams of MDMA, both being the commercial quantities, in a narcotic raid conducted by PSI Dinesh Gadekar (PW6), Anti narcotic Police Station Panaji on the basis of specific and reliable information, for which the accused failed to account.

4. Accordingly, a charge was framed against the accused to which he pleaded not guilty. The prosecution examined six witnesses and thereafter the statement of accused was recorded under Section 313 of the Code of Criminal Procedure (Cr.P.C.). The accused did not examine himself but examined Pallavi Narvekar (AW1) as defence witness. By the impugned judgment and order the learned NDPS

Court, has convicted and sentences the accused. Hence the present appeal.

5. Mr. Ryan Menezes, learned counsel for the appellant at the outset submitted that the appellant had raised a ground that when the complainant as also the investigating officer were one and the same, the entire prosecution is vitiated as held by the Hon'ble Apex Court in ***Mohan Lal v. State of Punjab – 2018 (17) SC 627***. However, Mr. Menezes, quite fairly pointed out that the decision in *Mohan Lal (supra)* no longer represents the correct position in law as held in ***Mukesh Singh v. State (Narcotic Branch of Delhi), SLP CRI C Diary 39528 of 2018 decided on 31.08.2020***.

6. Even otherwise, in ***Varinder Kumar v. State of Himachal Pradesh – 2020 (2) SCC 321***, the Hon'ble Apex Court had itself clarified that the law laid down in *Mohan Lal (supra)* was only prospective and therefore inapplicable to prosecutions, trials and appeals instituted prior to the said decision i.e. 16.06.2018.

7. Mr. Menezes, learned counsel for the appellant also submitted that in this case the ground that there was violation of the mandatory provisions of Section 50 of the NDPS Act was also raised. However, even this ground, stands answered against the accused by the decision of this Court in ***Raymond Locke v. State of Goa - Criminal Appeal No.82 of 2018 delivered on 04.09.2020***.

8. According to me, reference can also be usefully made to the decision of this Court in ***Kushal Puri v. State in Criminal Appeal No.9/2017 decided on 17.09.2020*** which will fully answer the ground about breach of the provisions of Section 50 of the NDPS Act, as raised in the appeal memo.

9. In this case, the evidence on record indicates that the accused was clearly informed of his right to be searched in the presence of a gazetted officer or the Magistrate if he so desires. However, the accused, declined to exercise this right. In any case, the prosecution, in this case, is not relying upon any contraband recovered from the person of the accused. In this case, the prosecution is relying upon the contraband recovered from the refrigerator of the house which was owned and possessed by the accused. These are additional reasons as to why the provisions of Section 50 of the NDPS Act were not attracted and in any case, if attracted, were duly complied.

10. Mr. Menezes, in this case, urged with vehemence that the prosecution has totally failed to establish that the accused was in “*conscious possession*” of the contraband and therefore, he submits that the conviction and sentence is liable to be set aside. Mr. Menezes submits that the learned NDPS Court, has misconstrued the scope and ambit of the presumption provided in Section 35 of the NDPS Act and on such basis, convicted the accused. He submits that the

construction of this provision by the learned NDPS Court in the present case, is contrary to the manner in which this provision has been construed and explained by the Hon'ble Apex Court in ***Bhola Singh v. State of Punjab – 2011 (11) SCC 653***. For all these reasons, Mr. Menezes submits that the accused is entitled to be acquitted of the charge which has been entirely falsified upon him.

11. Mr. Menezes points out that in this case the house was purchased by means of a sale deed which bears no signature of the accused. He points out that in any case, the house was co-owned and co-possessed by the accused and his wife and two minor daughters. He points out that almost five months after the arrest of the accused in this matter, PW6 once again conducted a raid on the very same house whilst the accused was in custody and found similar narcotics in the house. This time, however, it is the wife of the accused who was charged for possessing the same. From this he urges that no conclusion could have been drawn that on this occasion, it is the accused who was in conscious possession of the contraband. He submits that this aspect has not been properly and adequately considered by the learned NDPS Court and on this ground as well the accused is entitled to an acquittal.

12. Mr. Menezes points out that the evidence on record in this case clearly bears out that there was a maid who had access to this house

with a spare key which was always with her. He points out to the deposition of this maid who was examined as AW1 and submits that this witness had in fact worked in this very house between 10.00 a.m. and 1.00 p.m. on the date of the raid when the accused, had gone to the railway station to drop his wife and two minor children, who were visiting Gujarat as tourists. He points out that AW1 has deposed that even her husband used to accompany her. He submits that this clearly establishes that the house was not in exclusive possession of the accused and therefore, it would not be said that the accused was in conscious possession of the contraband which was found in the refrigerator of the said house. Mr. Menezes submits that all these aspects have not been considered and in any case not properly considered by the learned NDPS Court and therefore, the accused is entitled for an acquittal.

13. Mr. Menezes points out that the evidence on record clearly establishes that the accused did not offer any resistance whatsoever to the raiding party. He submits that this is significant because it establishes that the accused had really nothing to hide and he did not even have knowledge of the contraband in the refrigerator of his kitchen. Mr. Menezes submits that even this circumstance has not been properly appreciated by the learned NDPS Court on account of which the accused is entitled for an acquittal.

14. Mr. Menezes, apart from relying upon *Bhola Singh (supra)* relied on the following decisions in support of his contentions:

- (i) Mohammad Razzak Pathan & Others v. State of Maharashtra & Others – 1995(1) Bom.C.R. 229.
- (ii) Avtar Singh v. State of Punjab – (2002) 7 SCC 419.
- (iii) Jeevan Chand v. State of Goa – 1988 Cri.L.J. 1878.
- (iv) Prem Singh @ Pappu @ Papiya v. Union of India – 1995 Cri.L.J. 1122.
- (v) Zubeda Khatoon v. Asstt. Collector of Customs – 1991 Cri.L.J. 1392.
- (vi) Bashir Shaikh v. State of Goa – 1991 (1) Bom.C.R. 266.

15. For all the aforesaid reasons Mr. Menezes urges that this appeal be allowed; the impugned judgment and order be set aside; and the accused be acquitted of the offence for which he was charged and set at liberty forthwith.

16. Mr. Faldessai, learned Additional Public Prosecutor defends the impugned judgment and order on the basis of reasoning reflected therein. He points out that the accused in this case refused to accept and acknowledge the search warrant which was served upon him. He also refused to cooperate in the course of the raid. He points out that the documents establish the co-ownership of the accused along with his wife to the house in which the contraband was found. He points out that the evidence on record also establishes that the exclusive possession of the house was with the accused and his wife. He points out that the accused examined the maid AW1 and she has categorically

deposed that she does not even touch the refrigerator and had no knowledge about whether or not the accused was a dealer in drugs. Mr. Faldessai submits that in such circumstances the prosecution had discharged the initial burden and it was upto the accused to rebut the presumption as provided under Section 35 of the NDPS Act. Mr. Faldessai pointed out the distinguishing circumstances in the decisions relied upon by Mr. Menezes and finally submitted that this appeal may be dismissed.

17. The rival contentions now fall for my determination.

18. In this case, the prosecution has examined PW4 (pancha), PW5 (Police Inspector) and PW6 (Police Sub-Inspector) in respect of actual raid and the seizure of the contraband. These witnesses have consistently deposed that they raided the house of the accused at around 14.55 hrs. on 17.05.2014. PW6 knocked on the door of the house and it is the accused, who opened the door. The raiding party then introduced themselves to the accused and PW6 informed the accused that he had received information and the accused is suspected to be dealing in drugs and therefore, they want to take search of the house as well as the personal search of the accused. They have deposed that PW6 then showed the accused the search warrant of the house and informed the accused that he has a right for such search to be conducted in the presence of a Gazetted Officer or a Magistrate. They

have deposed that the accused declined the offer.

19. These witnesses have then deposed that a police constable Sushant Pagi was sent to bring the drug detection kit and the kit box and upon the police constable bringing the same they all entered into the house. These witnesses have then deposed that they first searched the hall but nothing was found therein. These witnesses then deposed that they searched the bedroom but nothing was found therein. These witnesses have then deposed that they then searched the kitchen but nothing was found in the kitchen as well. Thereafter, they found one door in the kitchen which was leading to the back side of the house. On the right side of this door, there was one refrigerator. Accordingly, this refrigerator was searched. In the top compartment of the refrigerator nothing was found. In the second compartment of the refrigerator PW6 found one white colour bottle having green colour cap. There was some liquid in the said bottle. They also found one packet containing brown colour pieces. The witnesses have then deposed that PW6 opened the cap of the said white bottle, took a drop of the liquid from the bottle tested the same with the help of the drug detection kit and informed the other witnesses that it was found positive for LSD. The bottle was then closed with the cap, weighed and found to be 12.5 gms.

20. The witnesses have then deposed that PW6 took one empty

brown glass bottle from the kit box which was having white colour cap and which was leak proof. The said bottle was then weighed and was found to be 32.20 grams. The liquid from the white colour bottle was then poured into the glass bottle. The bottle was then recapped with a lid. This was weighed and PW6 informed the remaining witnesses that the weight of the LSD liquid was 6.6. grams. The witnesses have then deposed to the packing and sealing of this bottle with 7 seals of ANC Panaji Goa No.4.

21. The witnesses have then deposed to the seizure of the transparent polythene packet containing brown colour pieces and PW6 informed the remaining witnesses that this was suspected to be MDMA. PW6 then took a small pinch of the substance and tested the same with the help of drug detection kit and informed the remaining witnesses that it was tested positive for MDMA. PW6 then weighed this packet and the weight was found to be 11.4 grams. The witnesses have then deposed to the packing and sealing of this material as well. In the cross-examination of all these witnesses, there is absolutely no dent made to this version of the prosecution.

22. PW5 and PW6 have deposed that when the search warrant was sought to be served upon the accused he refused to accept, acknowledge or sign for the same. These witnesses have also deposed

about the search of the house and the finding of contraband in the refrigerator just outside the kitchen of the house of the accused.

23. The accused, was questioned under Section 313 of Cr.P.C. In respect to the omnibus question no.313 as to whether the accused had anything more to state regarding this case, the accused answered in the following terms:

***Q.313.** Do you want to state anything more regarding this case?*

***Ans:** I say that on 17/5/2014, I had gone with my wife along with children at about 7.00 a.m. to Thivim Railway Station as my wife was leaving to go to Gujarat. I returned home at about 2.30 p.m. after having some light snacks outside. My servant Pallavi was to prepare food and keep and as she had one key of the house she comes to work at about 10.00 a.m. and leaves by 1.00 p.m. I say that the police came at about 14.55 hours and knocked at the door and after searching the house they said they had found drugs in the house. I am not aware of it."*

24. From the aforesaid, it is absolutely clear that at least at the time of the raid, the accused was all alone at home and it is from the refrigerator in the house of the accused that the contraband narcotics were seized. There is also evidence on record that the accused together with his wife were the co-owners of this house in which they were residing since last several years. The circumstance that the accused has not signed the sale deed which is produced on record by the prosecution does not in any manner, detract from the ownership rights

of the accused. There is explanation as to why the accused has not signed the sale deed to be found in the sale deed itself. Even the defence witness AW1 has deposed to the house being possessed by the accused and his wife Jane. Therefore, nothing really turns upon the absence of the actual signature of the accused on the sale deed by which the accused and his wife purchased the house from which the contraband narcotics were ultimately seized on 17.05.2014. Despite all this, the accused contends that the prosecution has not succeeded in establishing that the accused was in conscious possession of the contraband. For this purpose, heavy reliance is placed on the decision in *Bhola Singh (supra)* to point out that the learned NDPS Court in this matter, erred in invoking the presumption under Section 35 of the NDPS Act. In fact, this was the only point which was pressed in this appeal.

25. Section 35 of the NDPS Act provides that in prosecution for an offence under this Act which shall require 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. The explanation to Section 35(1) provides that in this section, culpable mental state includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact. Further, Section 35(2) provides that for the purpose of this Section, a fact is said to be proved

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

26. In *Bhola Singh (supra)* the Hon'ble Apex Court has held that before invoking the presumption under Section 35 of the NDPS Act, the prosecution is required to discharge the initial burden that the accused had the knowledge that his house or vehicle was being used for storage or transportation of narcotics as would be clear from the word “*knowingly*” and it was only after the evidence proved beyond reasonable doubt that the accused had the knowledge, would the presumption under Section 35 of the NDPS Act arise. Section 35 of the NDPS Act 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.

27. There can absolutely, be no doubt about the law laid down by the Hon'ble Supreme Court in the context of the provisions of Section 35 of the NDPS Act. However, it is important to advert to the factual circumstances in which such proposition was laid down and thereafter applied. In *Bhola Singh (supra)*, the only evidence on record indicated that the accused was the co-owner of a truck which was intercepted by the raiding party and wherein, 30 kgs. of contraband was found. The

truck was neither being driven by the accused nor was the accused in the truck at the time when it was intercepted. Relying solely on the circumstance that the accused was the co-owner of the truck and had furnished a false residential address for registration of the truck, the convicting courts had invoked the presumption under Section 35 of the NDPS Act and convicted the accused. It is in these circumstances that the Hon'ble Supreme Court held that the prosecution had failed to discharge the initial burden of proving beyond reasonable doubt that the contraband was in the truck with the knowledge of the accused.

28. Now the factual situation in the present case, is entirely different and is in no manner comparable to the factual situation in *Bhola Singh (supra)*. Here, there is not only impeachable evidence that the accused, along with his wife were the owners of the house but further, it is the accused who was found to be in possession of the house in which the contraband was discovered from the refrigerator in the house. The accused, tried to point out that even the maid (AW1) had access to the house and therefore, the possibility of her having kept the contraband in the refrigerator cannot be ruled out. The maid Pallavi Narvekar (AW1) was examined as a defence witness. No doubt, she deposed that she was working as a maid servant in the house of the accused for around 12 years prior to the year 2014. She also deposed that on 17.05.2014 i.e. the date of the raid she worked in the house

from 10.00 a.m. to 1.30 p.m. However, she very specifically deposed that she was engaged to do the work of cleaning and dusting the house and looking after the children in the house. She also categorically deposed that it is the wife of the accused who used to do the cooking and that her work as a maid was outside the kitchen. Further, in the cross-examination, she clearly and categorically deposed that she used to never touch the refrigerator and she was not aware if the accused was doing any business in dealing with drugs. Thus, the defence evidence, rules out the possibility of the maid having kept the contraband narcotics in the refrigerator of the accused in the house of the accused.

29. Mr. Menezes then referred to the raid on the very same house after five months when the accused was in custody in the present case, He pointed out that once again narcotics were found and this time, it is the wife of the accused who was charged for possessing the same. He submits that from this it cannot be ruled out that the accused, was not connected with the narcotics found in the refrigerator during the raid on 17.05.2014.

30. According to me, the accused cannot take any significant benefit from this latter raid. Strictly speaking, the two raids and the seizure of narcotics therein, cannot be said to be linked with one another. Besides, it is not as if the accused had come up with some bold defence stating that the contraband belonged to his wife and he had no

knowledge about the same. This is not to suggest that in a criminal case, the accused, is required to take any defence at all in a matter of this nature. However, at the same time, it is not sufficient for the accused to simply attempt to raise some hypothetical doubts and on the basis of the same, seek the benefit of such hypothetical doubts. In order to seek any benefit of doubt, such doubt, has to reasonably arise from the material on record. Therefore, based upon the second raid, it cannot be said that some doubt has been created as to whether or not the accused was in conscious possession of the contraband in the present case. In the facts of the present case, the prosecution has succeeded in proving beyond reasonable doubt that the accused, had full knowledge about the contraband in the refrigerator in his house. In such circumstances, the learned NDPS Court, was not in error in invoking the presumption under Section 35 of the NDPS Act.

31. The statement of the accused under Section 313 of Cr.P.C. as also the leading of defence evidence was precisely an attempt to rebut the presumption which was quite correctly raised in terms of Section 35 of the NDPS by the learned NDPS Court. However, the accused, has failed to establish such defence or rebut such presumption even by applying the test of preponderance of probabilities. In these circumstances, there is really no case made out to interfere with the impugned judgment and order made by the learned NDPS Court.

32. Mr. Menezes relied upon several decisions, which according to me, turn on their own peculiar facts and cannot therefore assist the accused in the matter of his defence. For example in *Mohammad Razzak Pathan (Supra)*, the prosecution held that the accused ran away on seeing the police approach his house and such evidence was not sufficient for discharge of initial burden which is cast upon the prosecution.

33. In *Avtar Singh (Supra)* a truck was intercepted carrying several persons as well as sixteen bags of poppy husk. Two of the persons ran away. In these circumstances, the Hon'ble Apex Court ruled that the initial burden was not discharged by the prosecution because it is quite possible that the persons who ran away were the actual custodians of the poppy husk. Besides, in this case, the court found that the incriminating circumstances were never put to the accused under Section 313 of Cr.P.C. Again, these circumstances, are not at all comparable to the circumstances borne out of the evidence in the present case.

34. In *Jeevan Chand (Supra)*, the accused was acquitted because the prosecution failed to establish the link between recovery of narcotics and the accused. In fact, this court noted that the prosecution had failed to prove beyond reasonable doubt that the accused was in actual

possession of the seized drugs. Again, even this decision offers no parallel whatsoever to the facts in the present case.

35. In *Prem Singh (Supra)*, again, there was no evidence that the accused was in exclusive and conscious possession of the contraband. The evidence on record indicated the presence of several persons who were in joint possession of the house and it is in these circumstances, it was held that the accused could not have been convicted.

36. *Zubeda Khatoon (Supra)*, was also a case where there were number of occupants in the house and in particular number of male persons. In these circumstances, the court held that it would not be safe to hold that it was only the accused who was in conscious possession of the contraband.

37. In *Bashir Shaikh (Supra)*, the contraband was found in a certain pillow in the house. There was evidence to show that the house was in possession of other persons as well. There was absolutely no evidence on record to connect the accused with the pillow. It is in these circumstances, the court held that it would not be safe to convict the accused.

38. Therefore, on the basis of the decisions relied upon by Mr. Menezes, which are clearly distinguishable, it is not possible to

interfere with the impugned judgment and order made by the learned NDPS Court in this matter. As noted earlier, each of the cases, turn on their own peculiar facts which are not comparable to the facts and circumstances borne out from the evidence on record in the present matter.

39. For the aforesaid reasons, this appeal is liable to be dismissed and is hereby dismissed.

40. There shall be no order as to costs.

M. S. SONAK, J.