

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.R. 3654 of 2011

**Biplab Kumar Dey
-Vs-
Union of India & Anr.**

For the Petitioner	: Mr. Sumanta Ganguly Mr. Debapratim Guha Mr. Priyanjit Kundu Ms. Anchita Sarkar
For the D.R.I.	: Mr. Kaushik Dey
Heard on	: 17.01.2024, 21.02.2024, 16.04.2024, 24.04.2024, 27.08.2024
Judgment on	: 07.11.2024

Ananya Bandyopadhyay, J.:-

1. The instant revisional application has been filed by the petitioner praying for quashing of proceedings in N.D.P.S. Case No.20 of 2010 pending before the Learned Judge, Special Court, under N.D.P.S. Act, District – Murshidabad arising out of D.R.I. Crime No. NDPS/07/BRM/DRI/2009-10 dated 19.02.2010 registered with the Directorate of Revenue Intelligence, Berhampore Sub-Zonal Unit, under Kolkata Zonal Unit, 8 Ho-Chi Minh Sarani, Kolkata – 71 and all the orders passed therein including the order dated 04.10.10 under Section 20(b)(ii)(c)/27A read with Section 2(VIII-a)/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (as amended).

2. The petitioner herein had been implicated in the instant case on the basis of a complaint filed before the Learned Judge, Special Court (NDPS) Act, by the opposite party no.2.
3. The case was initiated pursuant to a search conducted by officers in a truck bearing Registration No.NL/02-G/6882. During such search contraband article, i.e. Ganja of an approximate amount of 2147.85.700 kgs (net) was recovered.
4. One Malkit Kumar Singh who was the driver of the said truck was arrested and being in custody of the opposite party no.2 the aforesaid accused person confessed to have carried the said contraband with full knowledge and also confessed complicity of other persons.
5. The petitioner contended that on the basis of the statement of the aforesaid accused person and other inadmissible evidence without material corroboration the investigating agency claimed that the contraband articles were being carried under the instruction of the petitioner and one Yashwant of Silchar whereby the said contraband was supposed to be supplied to the petitioner herein.
6. The Learned Advocate representing the petitioners submitted a confessional statement made by co-accused person while being in the custody of the investigating agency was no evidence in the eyes of law. Such purported confessional statements made by the co-accused person of the petitioner who was in custody had been taken by the officers attached to the opposite party no.2 under threat and coercion with ulterior motive of harassing and humiliating the petitioner.

7. The Learned Advocate representing the State submitted that contraband article in the nature of 'ganja' was recovered from the offending truck to the amount of 2147.85 kgs. as reflected in the case diary and the instant proceeding at a nascent stage should not be quashed.
8. The Hon'ble Supreme Court in the case of ***Naresh Kumar v. State of H.P***¹ held the following:-

“8. In a case of sudden recovery, independent witness may not be available. But if an independent witness is available, and the prosecution initially seeks to rely upon him, it cannot suddenly discard the witness because it finds him inconvenient, and place reliance upon police witnesses only. In the stringent nature of the provisions of the Act, the reverse burden of proof, the presumption of culpability under Section 35, and the presumption against the accused under Section 54, any reliance upon Section 114 of the Evidence Act in the facts of the present case, can only be at the risk of a fair trial to the accused. Karamjit Singh v. NCT of Delhi [Karamjit Singh v. NCT of Delhi, (2003) 5 SCC 291 : 2003 SCC (Cri) 1001 : AIR 2003 SC 1311] is distinguishable on its facts as independent witness had refused to sign because of the fear of terrorists. Likewise S. Jeevanantham v. State [S. Jeevanantham v. State, (2004) 5 SCC 230 : 2004 SCC (Cri) 1584] also does not appear to be a case where independent witnesses were available.

9. The presumption against the accused of culpability under Section 35, and under Section 54 of the Act to explain possession satisfactorily, are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt. The presumptive provision with reverse burden of proof, does not sanction conviction on basis of preponderance of

¹ (2017) 15 SCC 684

probability. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability. That the right of the accused to a fair trial could not be whittled down under the Act was considered in Noor Aga v. State of Punjab [Noor Aga v. State of Punjab, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748] observing : (SCC p. 450, paras 58-59)

“58. ... 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.”

9. The following was observed by the Hon’ble High Court in the case of **Madan Lal v. State of H.P.**²:-

“19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record are that all the accused persons were travelling in a vehicle and as noted by the trial court they were known to each other and

² (2003) 7 SCC 465

it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

20. *Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.*

21. *It is highlighted that unless the possession was coupled with the requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.*

22. *The expression “possession” is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Supdt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja [(1979) 4 SCC 274 : 1979 SCC (Cri) 1038 : AIR 1980 SC 52] to work out a completely logical and precise definition of “possession” uniformly applicable to all situations in the context of all statutes.*

23. *The word “conscious” means awareness about a particular fact. It is a state of mind which is deliberate or intended.*

24. *As noted in Gunwantlal v. State of M.P. [(1972) 2 SCC 194 : 1972 SCC (Cri) 678 : AIR 1972 SC 1756] possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given holds it subject to that power or control.*

25. *The word “possession” means the legal right to possession (see Heath v. Drown [(1972) 2 All ER 561 : 1973 AC 498 : (1972) 2 WLR 1306 (HL)]). In an interesting case it was observed that where a person keeps his firearm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See Sullivan v. Earl of Caithness [(1976) 1 All ER 844 : 1976 QB 966 : (1976) 2 WLR 361 (QBD)] .)*

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.”

10. In view of the aforesaid decisions, there are several issues to be dealt with regard to the disposal of cases instituted under the NDPS Act. Possession of the contraband article, consciousness or knowledge of such physical possession, relevance of presence and absence of independent witnesses, preponderance of probabilities, criminal intentions, are certain examples amongst others to be considered through recording of evidence during trial.
11. The allegations under Section 20(b)(i)(c)/27A read with Section 2(VIII-a)/29 of the Narcotic Drugs and Psychotropic Substances Act are cognizable in nature which required to be verified through the process of trial, irrespective of a confessional statement by a co-accused which is a subject matter to be considered through trial.
12. In view of the above discussions, the instant criminal revisional application being CRR 3654 of 2011 is dismissed.
13. There is no order as to costs.
14. Let the copy of this judgment be sent to the Learned Trial Court as well as the police station concerned for necessary information and compliance.
15. All parties shall act on the server copy of this judgment duly downloaded from the official website of this court.

(Ananya Bandyopadhyay, J.)