



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO.1679 OF 2023

Jasar Jahangir Shaikh ... Applicant
versus
The State of Maharashtra ... Respondent

Ms. Anjali R. Awasthi with Mr. Aamir Khan i/by Mr. Bharat Manghani for Applicant.
Mrs. Geeta P. Mulekar, APP for State.
Mr. Sachin Gawde, API, Unit 5, Crime Branch, present.

CORAM: N.J.JAMADAR, J.

RESERVED ON : 4 JANUARY 2024
PRONOUNCED ON : 17 JANUARY 2024

ORDER :

1. Heard the learned Counsel for the parties.
2. The applicant, who has been arraigned for the offences punishable under Sections 8(c), 20(b)(ii)(C) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the Act, 1985) in C.R.No.249 of 2021, has preferred this application to enlarge him on bail.
3. On 25 October 2021, pursuant to an intimation, Dahisar Police conducted a surveillance at Dahisar Check Post. As intimated, a Santro car bearing Registration No.DL-10/CS-4332 came on the flank of the road leading to Mumbai from Gujarat. The said vehicle was intercepted. Two males, two females and a child were boarding the said car. The applicant was at the wheel of the said car.

4. Co-accused Bandu Udanshive, his wife Clera and Daughter Sinthia, the wife of the applicant, along with a child were identified themselves. Except the child, they were informed about their right to be searched in the presence of the Gazetted Officer or a Magistrate. In the personal search of the applicant, contraband article was not found. However, during the search of the car, it was found that in the cavities of the door and dickey, 16 kgs of charas, a contraband article, was found concealed. In the personal search of the co-accused Bandu, 8 kgs charas was also found. The contraband articles were seized. Samples were collected. The applicant and co-accused were arrested. It transpired that the applicant and the co-accused had been transporting contraband articles from Jammu and Kashmir, in the said fashion.

5. Ms. Awasthi, learned Counsel for the Applicant submitted that the offences punishable under Sections 20(b)(ii)(C) and 29 of the Act, 1985 cannot be said to have been prima facie made out against the applicant. It was submitted that no contraband article was found in possession of the applicant. Whatever contraband articles were found were allegedly concealed in the cavities of the doors of car and its dickey. Though the applicant was at the wheel of the said car, yet, in the circumstance of the case, according to the learned Counsel for the Applicant, the applicant cannot be said to have been found in conscious possession of the contraband articles. Mere fact that the applicant was driving the said car, totally unaware of the design of the principal accused Bandu, who is the father in law of the applicant, cannot be a ground

to presume conscious possession of the contraband articles.

6. Ms. Awasthi further submitted that noting the aforesaid position, this Court has granted bail to Clara, another co-accused by an order dated 7 September 2023 in BA No.185 of 2023. The applicant is similarly situated. Therefore, the applicant deserves the same dispensation.

7. Mrs. Geeta Mulekar, learned APP, stoutly contested the prayer for bail. It was submitted that the circumstances of the case are quite telling. The family had allegedly reached Jammu on the night intervening 22 and 23 October 2021 and had returned on the very day at about 3.15 p.m., as is evident from the statement of the Manager of the Hotel where the applicant and co-accused lodged themselves. In the circumstances, the submission that the applicant was wholly unaware of the contraband articles having been concealed in the car, though he was at the wheel thereof, cannot be countenanced. Since the commercial quantity has been seized, the interdict contained in Section 37 of the Act, 1985 comes into play. The conditions enunciated in Section 37 of the Act, 1985 cannot be said to have been fulfilled, urged Mrs. Mulekar.

8. I have perused the order passed by this Court in BA No.185 of 2023, releasing Clara, the co-accused. This Court noted that the said applicant was the a woman and she was in custody for more than one year and 10 months. There was nothing on record to indicate that the said co-accused had knowledge about the

concealment of the contraband articles.

9. Ms. Awasthi, banking heavily upon the aforesaid observations, urged that the aforesaid reasoning of absence of conscious possession applies with equal force to the applicant. To lend support to this submissions, Ms. Awasthi placed a very strong reliance on the judgment of the Supreme Court in the case of **Avtar Singh and Ors. V/s. State of Punjab**¹ wherein it was enunciated that the word “possession” no doubt has different shades of meaning and it is quite elastic in its connotation. Possession and ownership need not always to together but the minimum requisite element which has to be satisfied is custody or control over the goods.

10. In the facts of the said case, the Supreme Court found that apart from the appellants, two persons who were sitting in the truck in which the contraband articles were found, made themselves scarce after noticing the police and the prosecution could not establish their identity. Thus the persons who were merely sitting on the bags in the absence of proof of anything more, cannot be presumed to be in possession of the goods.

11. In the case of **State of Punjab V/s. Balkar Singh and Anr.**² the police party had found a cluster of bags kept in a field and the respondents sitting on them. On search, the bags were found to contain poppy husk. The Supreme Court observed that the presence of Respondents-accused from the place where the bags of poppy

1 (2002) 7 SCC 419

2 (2004) 3 SCC 582

husk were recovered itself was taken possession of these bags, by the police. In fairness, the police should have conducted further investigation to prove that those accused were really in possession of those articles. The failure to give any satisfactory explanation by the accused for being present at that place itself does not prove that they were in possession of those articles. Thus, the Supreme Court found no error in the High Court taking a view that there was no evidence to prove that the respondents were in conscious possession of the poppy husk recovered by the police.

12. In the case of **Premnarayan Prabhulal Mina and Anr. V/s. State of Maharashtra**³ the Appellants were found in the cabin of the truck which was loaded with five gunny bags of ganja. This Court held that in order to prove conscious possession of bundles of ganja, it was necessary for the prosecution to establish direct control of the appellants over the articles. Referring to the aforesaid pronouncement in the case of **Avtar Singh and Ors. (supra)**, this Court held that the fact situation in the said case was akin to the fact situation in the aforementioned cases. Mere presence of the appellants in the truck would not clinch issue of conscious possession.

13. Lastly, Ms. Awasthi placed reliance on a judgment of Punjab and Haryana High Court in the case of **Ranjit Singh V/s. State of Punjab**⁴ wherein it was found that there was no recovery from the Petitioner, nor the Petitioner was the owner of the vehicle in which the contraband article was found and, therefore, bail was

3 2008 SCC Online Bom 1738

4 CRM-M-34513 of 2021 dt. 27 Jan 2022

granted.

14. Section 20(b) inter alia punishes possession of the contraband articles. The term 'possession' is, in a sense, a relative term. It takes different colours in different contexts. When possession of any article is made a punishable offence, ordinarily the law presupposes existence of a mental state associated with the factum of possession. That mental state is described as a 'conscious possession'.

15. In the case of Madan Lal and Anr. V/s. State of Himachal Pradesh⁵ the Supreme Court, inter alia, observed as under :

“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 traveling in a vehicle and as noted by the trial Court they were known to each other and 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.

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 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/s. 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' uniform[ly] applicable to all situations in the context of all statutes.

23. The word 'conscious' means awareness about a particular fact.

5 (2003) 7 SCC 465

It is a state of mind which is deliberate or intended.

26. Once possession is established, the person who claims that it is 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”. (emphasis supplied)

16. In the case of **Dharampal Singh V/s. State of Punjab**⁶ after following the aforesaid pronouncement in the case of **Madan Lal and Anr. (supra)**, and distinguishing the judgment of the Supreme Court in the case of **Avtar Singh and Ors. (supra)**, the Supreme Court enunciated that the vehicle in that case was not a public transport vehicle and, therefore, the test applied in case of public transport vehicle in which several persons travelled, cannot be applied.

17. In **Mohanlal V/s. State of Rajasthan**⁷ after adverting to the legislative object in enacting the provisions contained in Sections 18 and 35 of the Act and the previous pronouncements and connotation of the term ‘possession’ in the context of the offence punishable under the Act, 1985, the Supreme Court expounded the law as under :

“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

6 (2010) 9 SCC 608

7 (2015) 6 SCC 222

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."

18. In the light of the aforesaid exposition of law, reverting to the facts of the case, the thrust of the submission of Ms. Awasthi was that nothing was found in the personal search of the applicant, and, therefore, he stands at par with Clara, co-accused, who has been released on bail.

19. I find it difficult to accede to this submission unreservedly. The distinction in the capacity of the applicant and co-accused Clara cannot be lost sight of. The applicant was at the wheel of the vehicle purportedly from Jammu to Mumbai. There is material to indicate that the family stayed at Jammu for less than 12 hours. The concealment of the contraband articles in the cavities of the doors of the car must have required an effort. The applicant claimed that the principal accused Bandu was his father in law. The entire family, as alleged, travelled together.

20. In this backdrop, the propositions which govern the ascertainment of conscious possession of the persons who were found in public transport vehicle, along with the unknown co-passengers, cannot be applied. The fact that the applicant was

at the wheel of the car all along, right from Mumbai to Jammu and return journey, in the context of the statement of the co-accused based at Srinagar that the said car was provided to facilitate transport of the contraband articles, cannot be brushed aside lightly, at this stage, as an innocuous presence.

21. In the facts of the case, the interdict contained in Section 37 of the Act, against grant of bail. operates with full rigour. The fact that the applicant was not the owner of the car, or for that matter, nothing was found in possession of the applicant cannot be said to be a substantially probable cause to believe that the accused is not guilty of the offences charged.

22. Reliance placed by learned APP on the judgment of the Supreme Court in the case of **Union of India through Narcotics Control Bureau, Lucknow V/s. Md. Nawaz Khan**⁸ appears to be on all four with the facts of the case at hand. In the said case, the Supreme Court discussed the connotation of the term ‘conscious possession’ and in the light of the interdict contained in Section 37 of the Act, 1985, cancelled the bail granted to the accused therein, who was found travelling in a car, in which the contraband was concealed under the place where wiper is connected to the front bonnet of the car. The Supreme Court, in the facts of the said case, observed as under :

“30. The following circumstances are crucial to assessing whether the High Court has correctly evaluated the application for bail, having regard to

8 Criminal Appeal No.1043 of 2021

the provisions of Section 37 :

- (i) The Respondent was travelling in the vehicle all the way from Dimapur in Nagaland to Rampur in Uttar Pradesh with the co-accused;
- (ii) The complainant notes that the CDR analysis of the mobile number used by the respondent indicates that the respondent was in regular touch with the other accused persons who were known to him;
- (iii) The quantity of contraband found in the vehicle is of a commercial quantity; and
- (iv) The contraband was concealed in the vehicle in which the respondent was travelling with the co-accused.”

23. All the aforesaid circumstances, prima facie, emerge in the facts of the case at hand, as the principal accused Bandu is stated to be the father in law of the applicant.

24. In the aforesaid view of the matter, I am not inclined to accede to the submission on behalf of the applicant that he is entitled to claim parity with the co-accused Clara, who has been released on bail.

25. Hence, the following order :

ORDER

- (i) The Application stands rejected.
- (ii) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of

the applicant and the trial Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

(N.J.JAMADAR, J.)