



Judgment

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPEAL NO.568 OF 2018

State of Maharashtra, through
Police Station Officer,
Police Station, Rajura,
district Chandrapur.

..... **Appellant.**

:: VERSUS ::

Suku Guru Kanra,
aged about 32 years,
occupation labour, r/o Chitapuri,
tahsil Patrai, district Malkanigiri (Orisa). **Respondent.**

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Mrs.H.N.Prabhu, Additional Public Prosecutor for the
Appellant/State.
Shri Nikhil Dawda, Counsel Appointed for the
Respondent/Accused.

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CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 03/12/2024

PRONOUNCED ON : 11/12/2024

JUDGMENT

1. By this appeal, the appellant (the State) has challenged judgment and order dated 4.8.2017 passed by learned Special Judge, Chandrapur (learned Judge of the trial court) in Special (NDPS) Case No.2/2015 whereby

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the respondent (the accused) is acquitted of offence under Section 20(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).

2. The case of the prosecution, in brief, is that, on 17.5.2015, a secret information was received by a police official attached to Rajura Police Station regarding transportation of illicit liquor and, therefore, he along with police staff were checking vehicles at Dewada RTO Check Post. During the checking of vehicles, a bus bearing no.MH-40/Y/5582 proceeding from Mancherial to Nagpur was intercepted and the accused was found travelling with a red colour bag. As the police staff suspected, the accused was brought down from the bus along with the bag and the bag was searched and the accused was found in possession of 3.764 kilograms of "Ganja". In presence of panchas, samples were obtained. An information about the same was forwarded to senior police officials. Assistant Police

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Inspector Gawhane lodged a written report. On the basis of the said report, the offence was registered. After completion of investigation, chargesheet was submitted.

3. After framing of charge vide Exh.5, in support of the prosecution case, the prosecution examined in all eight witnesses namely Chandrakant Nanaji Jaipurkar vide Exh.9 (PW1); Sayyad Jakir Sayyad Nasim vide Exh.11 (PW2); Sudhanshu Madavi vide Exh.15, the police official (PW3); Bandu Bhongde vide Exh.18, the pancha on spot and seizure panchanamas (PW4); Satish Patil vide Exh.28, the carrier who handed over the contraband for analysis to the Chemical Analyzer (PW5); Suraj Paypare vide Exh.33, the photographer (PW6); Abdul Faruk Abdul Hamid vide Exh.45 (PW7), and Sham Gawhane vide Exh.49, the investigating officer (PW8).

4. Besides the oral evidence, the prosecution placed reliance on spot panchanama Exh.19, seizure panchanama

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Exh.20, seizure panchanama Exh.21, duty pass Exhs.29 and 31, bills issued by photographer Exhs.34 and 35, report Exh.50, First Information Report Exh.51, letter to muddemal clerk Exh.59, letter to the Chemical Analyzer Exh.63.

5. After appreciation of the evidence, learned Judge of the trial court held that as exclusive possession of the said contraband article with the accused was not proved, the accused was acquitted.

6. Being aggrieved with the same, the present appeal is preferred by the State on ground that learned Judge of the trial court committed an error to hold that exclusive possession of the accused over the bag was not proved by the prosecution. In fact, the evidence of witnesses is sufficient to show that the bag was in possession of the accused. Thus, the evidence is not appreciated in its proper perspective and, therefore, the judgment impugned deserves to be quashed and set aside. Thus, learned Judge of the trial

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court disbelieved the evidence adduced by the prosecution on ground that possession of the accused over the said bag was not proved.

7. Heard learned Additional Public Prosecutor Mrs.H.N.Prabhu for the State and learned counsel Shri Nikhil Dawda appointed for the accused.

8. Learned Additional Public Prosecutor for the State submitted that the evidence of PW1 Chandrakat Jaipurkar, posted as driver at the Sub Divisional Officer's Office, Rajura was present at the time of the raid, discloses that the accused was found in possession of the said contraband article. The evidence of independent witness PW2 Sayyad Jakir also shows that the accused was found in possession of the said contraband article which is corroborated by police official PW3 Sudhanshu Madavi. PW4 Bandu Bhongde, was acted as pancha on spot and seizure panchanamas. PW5 Satish Patil, is carrier who handed over the contraband for

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analysis to the Chemical Analyzer. PW6 Suraj Paypare is the photographer. PW7 Abdul Faruk is scrap merchant who weighed the contraband article, and PW8 Sham Gawhane is the investigating officer who narrated about the investigation carried out by him. Thus, she submitted that there is a consistent evidence that the accused was found in possession of the contraband article of an intermediate quantity.

9. Learned counsel for the accused submitted that exclusive possession of the accused over the contraband article was not proved and he supported the judgment impugned in the appeal.

10. On appreciation of the evidence, it reveals that driver PW1 Chandrakat Jaipurkar, posted at SDPS Rajura, testified that on 17.5.2015, Assistant Police Inspector Shri Gawhane was directed by the SDPO Rajura to visit Dewada Check Post as an information was received as to transportation of illicit

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liquor and, therefore, he took said Gawhane and 2 panchas and staff to Dewada Check Post. At about 11:00 am, one ST Bus No.MH-40/Y/5582 was intercepted. On interception of the said bus, the accused sitting at rear side, was found in a scared condition possessing a red colour bag and, therefore, the same bag was brought out of the bus and from his possession, 3.764 kilograms “Ganja” was seized. Out of that, 24.00 grams leaves were taken out for sample purpose and it was sent to the Chemical Analyzer at Nagpur. He admitted during the cross examination that there was a crowd of passengers in the bus. Independent witness PW2 Sayyad Jakir’s evidence is to the extent that he had been to a marriage by motorcycle and while returning, at Dewada Check Post, the police were enquiring a person and from possession of the said person one packet of “green leaves” was found which was “Ganja”. It was seized by the police and weighed as 3.750 kilogram. His cross examination

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shows that several persons were gathered at the spot of the incident. The scrap merchant was also present there.

11. The evidence of police official PW3 Sudhanshu Madavi is to the extent that when he along with other police officials was at Dewada Check Post, one ST Bus was intercepted. Assistant Police Inspector Shri Gawhane suspected a person sitting in the last row of the bus and checked the bag and found containing “Ganja” in a polythene. He was asked to bring a weighting machine. One letter was also issued in the name of the SDPO at Rajura. He handed over the said letter to the SDPO and brought a scrap merchant along with the weighing machine. From the said bag, one big and one small packets were found. “Ganja” 24 grams was taken out from the big packet as a sample. The entire “Ganja” was seized. His evidence further shows that when the bus was intercepted, it was fully occupied. Some passengers were sitting and some

were standing. He specifically admitted that while checking the bus, they found one suspicious bag which was with the person who was scared. There were other passengers who were also sitting in the last row of the bus.

12. Pancha on spot and seizure panchanamas PW4 Bandu Bhongde, stated that he along with other raiding party members entered into the bus. In the last row of the bus, the accused was sitting. The police seized “Ganja” from him and accordingly seizure panchanama was drawn. He admitted that after entering the bus, officers were checking all bags at front side and while checking, they found a suspicious bag.

Thus, the evidence of the pancha witness shows that the bag was found at the front side, whereas the accused was sitting on the rear seat of the bus.

13. Carrier PW5 Satish Patil, carried the muddemal to the Chemical Analyzer. Photographer PW6 Suraj Paypare

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scrap merchant PW7, obtained photographs of the seized article. Scrap merchant PW7 Abdul Faruk, weighed the contraband article. PW7 is the scrap merchant who weighed the contraband article.

14. The evidence of investigating officer PW8 Sham Gawhane shows that at the place, where the accused was sitting, there were other people around him. He mentioned in the report that wet “green leaves” were shown in a seizure memo. It further shows that in photographs only the bag is seen and not the contraband article. The substance like “Ganja” was properly kept in property room and entry is to be taken. He further stated that the accused was not knowing language Marathi, but understanding language Hindi. No written notice was given to him.

15. On the basis of the said evidence, the prosecution claimed that the prosecution proved the case against the accused.

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16. Learned counsel for the accused submitted that conscious possession of the contraband was not proved by the prosecution.

17. On the contrary, learned Additional Public Prosecutor for the State submitted that the accused was found in possession of the contraband article in the bag which he was holding. Thus, conscious possession was proved.

18. In support of her contentions, learned Additional Public Prosecutor for the State placed reliance on the decision of the Hon'ble Apex Court in the case of **Mohanlal vs. State of Rajasthan**¹ wherein concept of possession was considered and it was held that "possession" is a flexible concept, and its meaning depends upon the contextual purpose and objective of statute concerned and an appropriate meaning has to be assigned to the word to effectuate the statutory object. It is further held that ordinarily, there are two elements of possession. The term

¹ (2015)6 SCC 222

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"possession" consists of two elements. First, it refers to the corpus or the physical control and the second, it refers to the animus or intent which has reference to exercise of the said control. 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. 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. On perusal of Section 35 of the NDPS Act, it is plain as day that it includes knowledge of a

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fact. Section 35 of the NDPS Act raises a presumption as to knowledge and culpable mental stage from the possession of illicit articles.

19. Learned counsel for the accused placed reliance on the decision in the case of **Shri D.Bhambri vs. Eknath Marutirao Kalmetkar and anr**² wherein the Division Bench of this court by referring earlier decision of learned Single Judge of this court in the case of **Premnarayan Prabhulal Mina and anr vs. State of Maharashtra**³ held that in order to prove "conscious possession" of the contraband, it is necessary for the prosecution to establish direct control of the accused over the articles. Mere fact that the bundles were found in the truck will not by itself show that the accused were actual possessors of those bundles.

He further placed reliance on the decision of the Hon'ble Apex Court in the case of **Bothilal vs. The**

² 2022 ALL MR (Cri) 569

³ 2008 ALL MR (Cri) 599

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Intelligence Officer, Narcotics Control Bureau⁴, reported in 2013(6) SCALE 377 wherein it is held that the prosecution has not produced any evidence to show that the accused brought the contraband to the room of the accused No.4 and held that the case of the prosecution is not free from suspicion and acquitted the accused.

20. Admittedly, the evidence of pancha on spot and seizure panchanamas PW4 Bandu Bhongde shows that police officials were checking all bags in front side and they found a suspicious bag. The evidence of all witnesses shows that there was a crowd around the accused. None of witnesses stated that the accused was holding the said bag. The evidence of photographer PW6 Suraj Paypare shows that he had no personal knowledge as to the seizure of the bag. Even the cross examination of investigating officer PW8 Sham Gawhane shows that on searching of the bag, a

4 2013(6) SCALE 377

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substance like “Ganja” i.e. “green leaves” was found in the said bag.

21. Whether “Ganja” i.e. “green leaves” found in the bag covers under definition of “Ganja”, is required to be seen.

22. Definitions under Section 2(iii)(b) and 2(iii)(b)(c) specify “Ganja” as flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever, name they may be known or designated, and any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom.

23. Thus, the definitions of terms “Ganja” clarify that “Ganja” is the flowering or fruiting tops of the cannabis plants excluding the seeds and leaves when not accompanied by the tops.

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24. Here, in the present case, the evidence of witnesses shows that whatever seized from the bag were “green leaves”. Seizure panchanama Exh.20 also shows that article seized was “Ganja” like substance emitting a smell, i.e. “green leaves”.

25. Thus, the above state of affairs make it clear that there is nothing on record *prima facie* to show that seized contraband was “Ganja”. In fact, neither oral evidence nor the seizure panchanama nor the spot panchanama shows that “green leaves” were accompanied with flowering tops or fruiting tops. Thus, fundamental facts, that the seized contraband was “Ganja”, itself are not proved by the prosecution.

26. Another aspect comes for determination is, whether the prosecution succeeded in proving that the accused was found in a conscious possession of the contraband article?

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27. The evidence of driver PW1 Chandrakat Jaipurkar shows that one person sitting at rear side chair of the bus was in possession of one black-red colour bag.

28. The evidence of police official PW3 Sudhanshu Madavi also shows that investigating officer PW8 Sham Gawhane suspected about the bag of the accused who was sitting at the last row of chairs of the bus and, therefore, he was brought outside the bus. His evidence further shows that the bus was completely crowded and while checking, they found a suspicious bag.

29. The evidence of pancha on spot and seizure panchanama PW4 Bandu Bhongde shows that police officials were checking all bags in front side inside the bus and while checking, they found a suspicious bag.

30. Thus, as far as possession of the accused over the said bag is concerned, there is no consistent evidence as to the possession of the accused over the said bag.

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31. To prove conscious possession of the contraband, it is necessary for the prosecution to establish a direct control of the accused over the said bag.

32. An aspect of conscious possession was considered by the Hon'ble Apex Court in the case of **Avtar Singh and ors vs. State of Punjab**⁵ wherein it is observed 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 go together but the minimum requisite element which has to be satisfied is custody or control over the goods. Can it be said, on the basis of the evidence available on record, that the three appellants one of whom was driving the vehicle and the other two sitting on the bags, were having such custody or control? It is difficult to reach such conclusion beyond reasonable doubt. It transpires from the evidence that the appellants were not the only occupants of the vehicle. One of the persons who

5 AIR 2002 SC 3343

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was sitting in the cabin and another person sitting at the back of the truck made themselves scarce after seeing the police and the prosecution could not establish their identity. It is quite probable that one of them could be the custodian of the goods whether or not he was the proprietor. 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."

33. The expression "possession" is not capable of precise and completely logical definition of universal application in the context of all the statutes. Once plea of accused is found probable, the same requires to be accepted. Admittedly, the offence alleged under the NDPS Act being stringent provision, higher degree of proof is required to convict the accused.

34. As far as the present case is concerned, the evidence as to the possession of the bag by the accused is

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inconsistent. As per the evidence of driver PW1 Chandrakant Jaipurkar, the accused was found possessing the bag. Whereas, the evidence of independent witness PW2 Sayyad Jakir shows that the accused was found in a scared condition. The evidence of police official PW3 Sudhanshu Madavi shows that raiding officers suspected about the said bag and, therefore, the bag was checked. It also reveals from the evidence that while checking, they found a suspicious bag. There were other passengers also. The evidence of pancha on spot and seizure panchanama PW4 Bandu Bhongde shows that while checking all bags in front side inside the bus, they found a suspicious bag.

Thus, as per the evidence of pancha on spot and seizure panchanama PW4 Bandu Bhongde, a suspicious bag was found on front side inside the bus. Whereas, the accused was sitting, as per the evidence, on rear seat of the bus.

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35. Thus, facts and the evidence on record are sufficient to show that the prosecution failed to prove the conscious possession of the accused over the said bag. Once possession is established, presumption under Section 35 of the NDPS Act would attract.

36. Thus, considering the evidence adduced, admittedly, there is no material on record to show that the accused was found in a conscious possession of the said bag.

37. The present appeal is preferred by the State challenging acquittal of the accused.

38. The law is settled as regards appeals against acquittal. It is cardinal principle of law that in appeal against acquittal, if other view is possible, then also the appellate court cannot substitute its own view by reversing acquittal into conviction unless findings of the trial court are perverse and contrary to material on record.

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39. It is well settled that while exercising appellate powers, especially while dealing with appeals against acquittal, cardinal principle to be kept in mind is that there is a presumption of innocence in favour of the accused unless the accused is proved guilty. The presumption continues and finally culminates into a fact when the case ends in acquittal. The possibility of two views in a criminal case is not an extraordinary phenomenon. A fact cannot lose sight of the same.

40. Learned Judge of the trial court appreciated the entire evidence and reversal of an order of acquittal is not to be based on mere existence of a different view or mere difference of opinion. Normally, while exercising appellate jurisdiction, it is the duty of the appellate court whether decision is correct or incorrect on law and facts. While dealing with appeals against acquittal, the court cannot examine the impugned judgment only to find out whether

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view taken was correct or incorrect. After re-appreciating oral and documentary evidence, the appellate court must first decide whether trial court's view was possible view. The appellate court cannot overturn acquittal, and order of acquittal cannot be reversed, only on the ground that after re-appreciating evidence, it is of the view that guilt of the accused was established beyond reasonable doubt. The correctness or otherwise of any conclusion reached by a court has to be tested on the basis of what the superior judicial authority perceives to be correct conclusion. A possible view, on the other hand, denotes a conclusion which can reasonably be arrived at regardless of the fact where it is agreed upon or not by the higher court. The fundamental distinction between the two situations have to be kept in mind.

41. By applying the above principles and on appreciating the evidence, admittedly, conscious possession of the

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accused over the bag containing contraband “Ganja” is not established by the prosecution. Learned Judge of the trial court, after appreciating the evidence on the basis of sifting and weighting of material facts, acquitted the accused. The view taken by learned Judge of the trial court is a possible view and, therefore, no interference in the judgment impugned in the appeal is called for.

42. In the light of the above, as the appeal is devoid of merits and liable to be dismissed, the same is **dismissed**.

The appeal stands **disposed of**.

43. Fees of learned counsel Shri Nikhil Dawda appointed for the accused is quantified and the same be paid to him as per Rules.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!

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