



CRM-M-28132-2024 and
CRM-30419-2024

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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Reserved on : 21.10.2024
Pronounced on : 29.10.2024

1. CRM-M-28132-2024

Jaspreet Singh @ Jashan	...Petitioner
Versus	
State of Punjab	...Respondent

2. CRM-M-30419-2024

Harmanpreet Singh	...Petitioner
Versus	
State of Punjab	...Respondent

CORAM: HON’BLE MR. JUSTICE KULDEEP TIWARI

Present: Mr. Savreet Singh Brar, Advocate
for the petitioner in CRM-M-28132-2024.

Mr. Arshdeep Singh Brar, Advocate
for the petitioner in CRM-M-30419-2024.

Mr. Pardeep Bajaj, DAG, Punjab.

KULDEEP TIWARI, J.

1. Both the instant petitions are amenable to be decided together, as the common relief of regular bail has been sought, in case FIR No.41, dated 04.04.2024, under Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985, registered at Police Station Sadar Faridkot, District Faridkot, Punjab, therefore, both the instant petitions are taken up together for



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FACTS OF THE CASE

2. The petitioners sought relief of regular bail in the FIR (supra). The instant FIR, was registered on the basis of statement of ASI Chamkaur Singh, wherein, he alleged that on dated 04.04.2024, when he along with other police officials were going towards the village Chandbaja, in connection with patrolling and checking the suspects, they saw six persons, who were sitting under the shed of grain market, and upon seeing the police party, one of them whose name later on revealed as Mandeep Singh, threw away a polythene bag. All the six persons were apprehended by ASI Chakaur Singh, with the help of other police officials, which includes the present petitioners also. On checking of polythene bag, which was thrown by the co-accused Mandeep Singh, after making compliance of the provisions of the NDPS Act, 145 strips (each strip containing 10 tablets), i.e. 1450 tablets of intoxicant mark Tramadol Hydrochloride were recovered from it. On the personal search of the petitioner-Jaspreet Singh @ Jashan, the recovery effected from him was only Rs.110/-, whereas from Harmanpreet Singh, only Rs.200/-, were recovered. No contraband was recovered from them.

SUBMISSION OF LEARNED COUNSEL FOR THE PETITIONERS

3. On asking for the relief (supra), learned counsel for the petitioners submits that there is no recovery effected from the present petitioners, and the petitioners cannot be held liable, having conscious possession of the recovery effected from the co-accused Mandeep Singh. Learned counsel for the petitioners further submits that as per the prosecution, the petitioners were found sitting in the grain market under the shed, where, the co-accused Mandeep Singh, was also sitting there, and on seeing the police party, he threw the polythene bag, from which, the recovery of contraband



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was effected. It is further submitted by the learned counsel for the petitioners that the present petitioners have clean antecedents and they are not involved in any other case, and they have suffered incarceration of more than 06 months, as on date. In the given facts and circumstances of the case, the petitioners cannot be held to be in conscious possession of the contraband.

4. To vigour their submissions, learned counsel for the petitioners has placed reliance upon the judgments passed by Hon'ble Supreme Court in '*Madan Lal and another vs. State of Himachal Pradesh*' 2003(7) SCC 465, '*Mohan Lal vs. State of Rajasthan*' 2015(3) SCC (Cri) 881 and '*Sorabkhan Gandkhan Pathan and another vs. State of Gujarat*' 2004(13) SCC 608. Learned counsel for the petitioners submits that there is no evidence with the prosecution, to connect that the present petitioners have any pre association with the co-accused Mandeep Singh. There is no incriminating material available on record, in this regard.

SUBMISSIONS OF LEARNED STATE COUNSEL

5. On the other hand, learned State counsel on instructions imparted to him by the investigating officer concerned, has opposed the grant of relief of regular bail to the petitioners. Learned State counsel submits that all the six persons were sitting together under the tin shed in the grain market, therefore, with the aid of Section 35 of the NDPS Act, the petitioners can be held liable for conscious possession. He further submits that merely, because the recovery was not effected from the present petitioners, even then, they are not entitled for the relief of regular bail, as it is a case of 'conscious possession'. He further submits that final report has been submitted and the trial is yet to begin, therefore, the petitioners are not entitled for the relief asked for.



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6. Learned State counsel has also placed on record the custody certificates dated 20.10.2024, qua the petitioners, in both the instant petitions, today in the Court. The same are taken on the record. Copies thereof, supplied to learned counsel for the petitioners.

ANALYSIS

7. Before embarking upon the process of evaluating the arguments addressed by the learned counsels for the parties concerned, and penning down any opinion upon the instant petitions, it is deemed imperative to capture an overview of some significant legal propositions.

8. *“Bail is the Rule and Jail is an Exception”*. This basic principle of criminal jurisprudence was laid down by the Hon’ble Supreme Court, way back in 1978, in its landmark judgment titled ***‘State of Rajasthan vs. Balchand alias Baliay’, 1977 AIR 2447, 1978 SCR (1) 535***. This principle finds its roots in one of the most distinguished fundamental rights, as enshrined in Article 21 of the Constitution of India. Though the underlying objective behind detention of a person is to ensure easy availability of an accused for trial, without any inconvenience, however, in case the presence of an accused can be secured otherwise, then detention is not compulsory.

9. This Court, has considered the submissions made by the learned counsel for the parties concerned.

10. In the NDPS Act, the term ‘conscious possession’ has not been used, only the term ‘possession’ has been used in the Act, without there being any reference to conscious, preceding the word possession anywhere. However, the term find its origin in the precedent law, as held by Hon’ble the Supreme Court, in which it has been held that the term possession under the



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merely physical possession. Hon'ble the Supreme Court in ***Mohan Lal and another (supra)***, by defining the word 'possession' laid down that the possession consists of two elements i.e. one is physical control, and the another is intent. The word 'possession' is a mental state and Section 35 of the NDPS Act, gives statutory recognition to the culpable mental state, and it includes knowledge of fact. The relevant paragraphs of the said judgment is extracted hereunder :-

“20. 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 is that all the accused persons were travelling 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.

*23. 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 ***Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors. (AIR 1980 Supreme Court 52)***, to work out a completely logical and precise definition of "possession uniformly applicable to all situation in the context of all statutes.*

24. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

*25. As noted in ***Gunwantlal v. The State of M.P. (AIR 1972 Supreme Court 1756)*** possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in*



question, while the person whom physical possession is given holds it subject to that power.

*26. The word 'possession' means the legal right to possession (See **Health v. Drown (1972) (2) All ER 561 (HL)**). In an interesting case it was observed that where a person keeps his fire arm 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 (QBD)**).*

27. 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 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.”

11. Further, the ratio laid down in **Madan Lal and another (supra)**, was followed by the Supreme Court in **Mohan Lal (supra)**, and the Supreme Court has laid down that unless possession is coupled with requisite mental element, i.e. conscious possession, one cannot be held guilty for recovery of any contraband. The relevant extract reads as under :-

*“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., 2003(4) RCR (Criminal) 100 (2003) 7 SCC 465**, 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.”

16. 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" Le. 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. In the case at hand, the appellant, we hold, had the requisite degree of control when, even if the said narcotic substance was not within his physical control at that moment. To give an example, a person can conceal prohibited narcotic substance in a property and move out thereafter. The said person because of necessary animus would be in possession of the said substance even if he is not, at the



moment, in physical control. The situation cannot be viewed differently when a person conceals and hides the prohibited narcotic substance in a public space. In the second category of cases, the person would be in possession because he has the necessary animus and the intention to retain control and dominion. As the factual matrix would exposit, the accused-appellant was in possession of the prohibited or contraband substance which was an offence when the NDPS Act came into force. Hence, he remained in possession of the prohibited substance and as such offence under section 18 of the NDPS Act is made out. The possessory right would continue unless there is something to show that he had been divested of it. On the contrary, as we find, he led to discovery of the substance which was within his special knowledge, and, therefore, there can be no scintilla of doubt that he was in possession of the contraband article when the NDPS Act came into force. To clarify the situation, we may give an example. A person had stored 100 bags of opium prior to the NDPS Act coming into force and after coming into force, the recovery of the possessed article takes place. Certainly, on the date of recovery, he is in possession of the contraband article and possession itself is an offence. In such a situation, the accused-appellant cannot take the plea that he had committed an offence under Section 9 of the Opium Act and not under section 18 of the NDPS Act.

17. After dealing with the concept of possession, we think it apt to address the issue raised by the learned counsel for the appellant that he could have convicted and sentenced under the Opium Act, as that was the law in force at the time of commission of an offence and if he is convicted under section 18 of the NDPS Act, it would tantamount to retrospective operation of law imposing



*penalty which is prohibited under Article 20(1) of the Constitution of India. Article 20(1) gets attracted only when any penal law penalises with retrospective effect. Le. when an act was not an offence when it was committed and additionally the persons cannot be subjected to penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence. The Article prohibits application of ex post facto law. In **Rao Shiv Bahadur Singh and Anr. v. State of Vindhya Pradesh, AIR 1953 Supreme Court 394**, while dealing with the import under Article 20(1) of the Constitution of India, the Court stated what has been prohibited under the said Article is the conviction and sentence in a criminal proceeding under ex post facto law and not the trial thereof. The Constitution Bench has held that:-*

“.....what is prohibited under Article 20 is only conviction or sentence under an ex post facto law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission of the offence or by a Court different from that which had competence at the time cannot ipso facto be held to be unconstitutional. A person accused of the commission of a particular Court or by a particular procedure, except in so far as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved.”

In the instant case, Article 20(1) would have no application. The actus of possession is not punishable with retrospective affect. No offence is created under section 18 of the NDPS Act with retrospective effect. What is punishable is possession of the prohibited article on or after a particular date when the statute was enacted, creating the offence or enhancing the punishment.



Therefore, if a person is in possession of the banned substance on the date when the NDPS Act was enforced, he would commit the offence, for on the said date he would have both the corpus' and "animus necessary in law."

12. Hon'ble Supreme Court in '***Union of India through Narcotics Control Bureau, Lucknow vs. Mohd. Nawaj Khan***' (2021) 10 Supreme Court Cases 100, has held that mere absence of the possession of contraband on the person of the accused, does not *ipso facto* means that the accused was not in possession of the contraband, rather, the knowledge of possession of the contraband has to be gleaned from the facts and circumstances of the case. The relevant extract of the judgment, is reads as under :-

"25. We shall deal with each of these circumstances in turn. The respondent has been accused of an offence under Section 8 of the NDPS Act, which is punishable under Sections 21, 27-A, 29, 60(3) of the said Act. Section 8 of the Act prohibits a person from possessing any narcotic drug or psychotropic substance. The concept of possession recurs in Sections 20 to 22, which provide for punishment for offences under the Act. In Madan Lal v. State of H.P. this Court held that: (SCC p. 472, paras 19-23 & 26)

"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 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 Supt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja 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. It is a state of mind which is deliberate or intended.

xxx xxx xxx xxx

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.”

26. What amounts to “conscious possession” was also considered in Dharampal Singh v. State of Punjab, where it was held that the knowledge of possession of contraband has to be gleaned from the facts and circumstances of a case. The standard of conscious



possession would be different in case of a public transport vehicle with several persons as opposed to a private vehicle with a few persons known to one another. In Mohan Lal v. State of Rajasthan, this Court also observed that the term "possession" could mean physical possession with animus; custody over the prohibited substances with animus; exercise of dominion and control as a result of concealment; or personal knowledge as to the existence of the contraband and the intention based on this knowledge.

27. We have referred to the above precedents to reiterate the governing principles. At this stage of the proceedings, it needs only to be clarified that the trial is to take place this Court (sic) where evidence will be adduced.

28. As regards the finding of the High Court regarding absence of recovery of the contraband from the possession of the respondent, we note that in Union of India v. Rattan Mallik, a two-Judge Bench of this Court cancelled the bail of an accused and reversed the finding of the High Court, which had held that as the contraband (heroin) was recovered from a specially made cavity above the cabin of a truck, no contraband was found in the "possession" of the accused. The Court observed that merely making a finding on the possession of the contraband did not fulfil the parameters of Section 37(1)(b) and there was non-application of mind by the High Court."

13. In view of the above, the issue of conscious possession becomes a subjective test to be determined with reference to the facts and circumstances of each case.

14. On the touchstone of the above law laid down by the Supreme

Court, this Court has examined the facts of the instant FIR. In the instant FIR

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(supra), six persons were found sitting during the harvest season of wheat, in the grain market under the tin shed. It is not the case of the prosecution that all six persons were having any previous connection with each other. There is no other evidence except, the disclosure statement suffered by the co-accused Mandeep Singh, to connect and establish that they were previously known to each other. Only one person i.e. co-accused Mandeep Singh was in possession of a polythene bag, which he threw, after seeing the police officials. None of the other five accused persons made an attempt, to run away from the spot, after seeing the police party. It is an admitted case of the prosecution that the accused persons were not carrying any mobile phone, therefore, in the absence of any call details record (CDR), no connection can be established amongst the accused persons.

15. In view of the above facts, that the present petitioners were sitting on a public platform, that too when they were working as a casual labourer, at the time of wheat harvest season, whether, the present petitioners can be held liable for the conscious possession, or not, is a debatable issue, and is to be considered by the learned trial Court concerned, upon leading the cogent evidence by the prosecution. Therefore, this Court refrains itself from making any observation in this regard.

DECISION

16. However, considering the above facts, the period of incarceration and the fact that both the present petitioners are not previously involved in any other criminal case, this Court deems it fit and appropriate to enlarge the present petitioners on regular bail.

17. Accordingly, both the instant petitions are **allowed**. The petitioners-Jaspreet Singh @ Jashan and Harmanpreet Singh, are ordered to

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be released on bail, on furnishing of bail bonds and surety bonds to the satisfaction of Chief Judicial Magistrate/trial Court/Duty Magistrate, concerned.

18. However, anything observed hereinabove shall have no effect on the merits of the case and is meant for deciding the present petitions only.

19. Photocopy of this order be placed on the connected case file.

(KULDEEP TIWARI)
JUDGE

Pronounced on : October 29th, 2024
Manpreet

Whether speaking/reasoned	:	Yes/No
Whether reportable	:	Yes/No