

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 18 of 2005

**Golok Pati Mondal & Ors.
-Vs-
The State of West Bengal**

For the Appellants : Mr. Pradip Kumar Roy
(Amicus Curiae)

For the State : Ms. Faria Hossain
Ms. Sujata Das

Heard on : 27.09.2023, 09.02.2024, 10.04.2024,
17.05.2024, 25.09.2024

Judgment on : 06.05.2025

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the order dated 17th December, 2004 passed in Case No. C-2 of 2000 by the Learned Additional Sessions Judge, 1st Court and Special Court under N.D.P.S. Act, Suri, Birbhum, convicting the appellants under Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act, sentencing them thereunder to suffer rigorous imprisonment for five year each and to pay a fine of Rs.10,000/- each, in default, to suffer further rigorous imprisonment for 6 (six) months each.
2. The prosecution case precisely stated on 11.02.2000 at about 11:00 hours C.I. Sadar Sri D.N. Ghosh came to Suri P.S. and informed by O.C. Sri A.K.

Mondal that he received secret information that some person will bring Ganja from Mallarpur Side. On receipt of such information O.C. Suri P.S. diarized the matter in G.D. Entry No.598 dated 11.02.2000 and went to Suri Bus Stand with officer and force to work out the secret information. While waiting in the Suri Bus Stand the source pointed out three persons from a distance of whom one was female and two were male. Being pointed out by source those three appellant persons were detained at Nandagopal More near Suri Bus Stand with three bags in their hand. On search of those bags huge quantity of Ganja were recovered. The appellants failed to produce any paper in support of their possession. O.C., Suri P.S. seized the Ganja in presence of the witnesses under a seizure list. Thereafter, those appellants were brought to P.S. along with the seized alamat. The samples were sent for chemical analysis and the analyst opined that the sample packet contained '*ganja*'.

3. Based on the aforesaid complaint, the police investigated the case and submitted charge-sheet against those appellant persons under Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act to which they pleaded not guilty and claimed to be tried.
4. In order to prove its case, the prosecution examined as many as 10 witnesses while none was examined by the defence.
5. The Learned Advocate representing the appellant submitted the evidence of PW-1, PW-7 and PW-8 were not considered. The process of search and seizure was not conducted according to the relevant provisions under the NDPS Act following Section 51 and 52 of the said Act. The Investigating

Officer failed to explain the absence of any independent witness in a busy area being the place of occurrence at 11:00 hrs. at the time of seizure. Not a single independent witness had been cited by the prosecution.

6. The Learned Advocate representing the State submitted that the prosecution was able to prove its case beyond reasonable doubt and the appeal shall be dismissed.
7. A circumspection of evidence of the prosecution witnesses revealed as follows:-

- i. PW-1, PW-7 and PW-8 were declared hostile by the prosecution.
- ii. PW-2 deposed in his evidence that he was S.I. of Police posted at Suri P.S. since 1994. On 11.02.2000, S.I. Asim Mondal was posted as O.C., Suri P.S. On 11.02.2000 PW-2 accompanied S.I. Asim Mondal to conduct a raid at Nandagopal more. After waiting for a while in the said crossing, they arrested three accused; one female and two male with bag in their hands. O.C. seized those bags containing 'ganja' under a seizure list in their presence and PW-2 put his signature there. Sample was collected. PW-2 identified his signature on the seizure list marked as Exhibit-1/2. After seizure and arrest, they came back to P.S. along with the accused and seized materials. PW-2 identified the seized bags and packet containing 'ganja' marked as Mat. Exbt.-I, II and III.
- iii. During cross-examination, PW-2 could not recollect the time when he reached at Nandagopal more on 11.02.2000 with the O.C. S.I. Kasinath Das, O.C. himself and in the force possibly Partha were

present. P.S.I. Swarganit N.V.F. and other force was also there but PW-2 could not say their names. So far, he could remember the accused persons were arrested at about 1:30 p.m. PW-2 could not say whether the accused persons came there by bus or by car or by walk.

- iv. PW-3 Constable No.177 in his examination-in-chief stated that on 11.02.2000 he was posted at Suri P.S. At that time S.I. Asim Kr. Mondal was the O.C. of Suri P.S. Besides O.C. S.I. Kasinath Das, Sargajit Bose, Sampad Mukherjee were posted at Suri P.S. At that time, S.I. AsalataGoswami was in-charge of Women Cell at Suri P.S. On 11.02.2000 they had been to Nandagopal more at Suri bus stand with O.C., S.I. Kasinath Das, Lady S.I. AsalataGoswami, PW-3 himself, one N.V.F., S.I. Sargajit Bose were present to conduct a raid. They detained one lady and two male accused with bag in their possession containing 'ganja'. Those bags were seized under a seizure list by O.C. and PW-3 put his signature which was marked as Exbt.-1/3. The two gunny bags and the plastic packet were recovered from the possession of the accused marked as Exbt.-I, II and III.
- v. During cross-examination, PW-3 stated that he put his signature in this case in the seizure list only. As O.C. disclosed that the material was ganja, PW-3 confirmed the same '*ganja*'. Samples were collected at the spot and it was sealed. The weight was taken at the P.S. All samples and packets were weighed at the P.S. PW-3

was present when the materials and samples were weighed. PW-3 could not say that actual weight of each packet containing ganja.

- vi. PW-4 deposed in his evidence that he was Sub Inspector of Police posted at Suri P.S. On 16.05.2000 he was posted as Sub Inspector of Police at Suri and took up investigation of this case on transfer of the first Investigating Officer S.I. Kashinath Das. PW-4 collected the report of Analyst State Drugs Control and Research Laboratory during investigation and thereafter he submitted charge-sheet. The report of the analyst with forwarding memo was marked as Exbt.-2 collectively.
- vii. During cross-examination, PW-4 deposed that the forwarding was dated 06.03.2000 and the signature of the analyst was dated 28.02.2000. The letter number of the analyst was also dated 06.03.2000. PW-4 obtained permission from his superior officer and thereafter he submitted charge-sheet.
- viii. PW-5 stated in his examination-in-chief that he was S.I. of Police posted at D.E.B., Suri. On 11.02.2000 he was posted as O.C., Suri P.S. Inspector Dhirendra Nath Ghosh was C.I. Sadar at the relevant time. On 11.02.2000 C.I. Sadar gave him a written instruction to work out a secret information at Suri bus stand to the effect that some persons would arrive there with ganja in their possession. PW-5 identified the written instruction written by C.I. Sadar. The instruction was written by C.I. Sadar in his own handwriting and he knew his handwriting and signature marked

as Exhibit-3. After getting information, he lodged a G.D. at Suri P.S. being G.D. Entry No.598 in his own handwriting and under his signature. The G.D. entry written and signed by him was marked as Exhibit-4. After lodging G.D. Entry, PW-5 along with available officer and force had been to Suri bus stand leaving Suri P.S. at 11:15 hrs. On going there they waited in and around of Nandagopal more in ambush to work out the secret information as per instruction of the source. At about 13:30 hrs. the source pointed out three persons including one female accused who were carrying a bag in their hand. Being pointed out by source they encircled those three persons and interrogated them. On interrogation they confessed that they were carrying ganja in their bags. They called the local witnesses at the spot. One lady S.I. AsalataGoswami was with them. She searched the bag of the female accused and they searched the bag of other two accused in presence of local witnesses. On search of the respective bags of the accused, they recovered ganja wrapped in polythene bag. On interrogation the accused disclosed their names as Golok Mondal, Sonia Bibi and Bakkar Sk. They came back to P.S. with packets of seized ganja. They called local persons and weighed the ganja in presence of the witnesses. They collected sample from each packet and sealed and labeled all the packets including the sampel packets in presence of the witnesses and the accused. On interrogation the accused personsfailed to show any paper in

support of lawful possession of ganja. As O.C. he lodged a complaint against all the accused under Section 20(b) of the N.D.P.S. Act. He prepared seizure list at Nandagopal more. The said seizure list prepared by him in his own handwriting was marked as Exhibit-1. The complaint lodged bearing his signature was marked as Exhibit-5. PW-5 endorsed the case for investigation to S.I. Kashinath Das. PW-5 started Suri P.S. Case No.33 dated 11.02.2000. He described the bag in the seizure list. Out of three bags, two were produced in Court which were marked as Mat. Exbt-II as the said bags. Another seized article from the possession of the accused was identified and marked as Mat. Exbt.-I as the said bag.

- ix. During cross-examination, PW-5 deposed that he was posted as O.C. at Murari, Md. Bazar, Sainthia, Suri. No criminal case was initiated against him while he was posted at Murari. He did not know whether C.I. Dhiren Ghosh was witness in this case. It was a fact that Nandagopal more was a busy place. At about 11:30 a.m. he reached at Nandagopal more. They were there approximately upto 2:30 p.m. He had not asked any Magistrate to be present at the time of seizure. He had not prepared any nil seizure list in respect of themselves before conducting search and seizure to the accused. He could not recollect after lapse of so many years whether there was any Sub-Inspector at Suri P.S. when they came back search, seizure and arrest of the accused. The raid at

Nandagopal more was conducted under his leadership. He did not know Sk. Selim of Heaitnagar. He also did not know Sk. Selim of Rukunpur. He had not personally enquired about the residential house of the accused. The seal and label pasted by them at the time of seizure was not visible at this moment on the seized materials. PW-5 did not know any person named Sk. Selim.

- x. PW-6 deposed in his evidence that he was at present posted as Circle Inspector, Uttarpur, Hooghly. On 11.02.2000 he was posted as C.I. Suri Sadar. On that date, he got a secret information that some persons would bring ganja at Suri bus stand from Mallarpur side. He arrived at Suri P.S. and authorized O.C. Suri P.S. in writing to work out the secret information. PW-6 identified the letter of authorization authorizing O.C. Suri P.S. to work out the secret information written by PW-6 which was marked as Exhibit-3 as the said writing.
- xi. During cross-examination, PW-6 deposed that while posted at Suri Sadar, he was in charge of many police stations and he used to maintain tour diary. He came to Suri P.S. on that date at 11:05 hrs. At present, he had not brought the tour diary to show that on that day he had been to Suri P.S. at 11:05 hrs.
- xii. PW-9 stated in his examination-in-chief that he was S.I. of Police then posted as O.C. Parui P.S. On 11.02.2000 he was posted as P.S.I. Suri P.S. At the relevant time S.I. Asim Kr. Mondal was the then O.C. Suri P.S. Inspector Dhirendra Nath Ghosh was C.I.

Sadar at the relevant time. On 11.02.2000 the then O.C. Suri P.S. got a secret information from C.I. Sadar that some persons would appear at Suri bus stand with ganja in their possession. The then O.C. also received an authorization letter from C.I. to work out the secret information. Accordingly O.C. Suri P.S. S.I. Asim Kr. Mondal conducted a raid at Suri bus stand on that date and PW-9 accompanied the O.C. along with others. Three persons namely two male and one female were apprehended near Nandagopal more by O.C. Suri P.S. with bags in their possession being identified by source. On search of those bags ganja was recovered. The accused persons failed to show any paper in support of possession of ganja. At first the recovered ganja was weighed and samples were collected. There were three bags of whom two were gunny bags and one nylon bag. The samples were taken in small envelop separately and were sealed. Ganja was seized under a seizure list. PW-9 put his signature in the seizure list as witness. His signature was marked as Exhibit-1/6. Three seized bags identified by PW-9 were marked as Mat. Exhibit-I, II and III.

- xiii. During cross-examination, PW-9 deposed that so far he could recollect S.I. Kashinath Das, Lady S.I. AsalataGoswamiwere in the raiding party along with them but he could not recollect the names of others. C.I. Sadar was not a member of the raiding party. The authorized letter issued by C.I. to the O.C. Suri P.S. was not shown to PW-9. He could not specifically state the weight of each bag

containing ganja. The weight was taken in his presence and the total weight was about 9.5 kg to 10 kg. He could not recollect the name of the person who weighed the bags. Seal and label were pasted on the seized bags. So far PW-9 could recollect he did not put his signature on the labels. Signatures were put on the labels but who put their signatures he could not recollect. He did not find any label on the seized alamat that day. These types of bags were available in the market. PW-9 could not specifically say which bag was carried by which accused.

- xiv. PW-10 S.I. of Police in his evidence stated that on 11.02.2000 he was posted at Suri P.S. as S.I. On that date, S.I. Asim Kr. Mondal was O.C. Suri P.S. On 11.02.2000 the then O.C. Suri P.S. got a secret information from C.I. Sadar D.N. Ghosh that some persons would arrive at Suri bus stand with ganja in their possession. On the basis of secret information the then O.C. Suri P.S., PW-10 himself and other officer and force had been to Suri bus stand and they apprehended three persons with three gunny bags in their possession at the crossing near the bus stand and PW-10 could not exactly remember the name of the said crossing after lapse of so many years. The three bags recovered from the possession of the accused persons were identified as Mat. Exbt.-I to III. After search ganja was recovered from their possession. After recovery of ganja the same was weighed by a person and three samples were collected and those were labelled. The recovered ganja was seized

under a seizure list. The three sample packets prepared by S.I. Asim Mondal were marked as Mat. Exbt.-IV, V and VI. PW-10 put his signature on the seizure list which was marked as Exbt.-1/7. After recovery of ganja the accused persons were brought to P.S. along with alamat. Thereafter S.I. Asim Kr. Mondal lodged the complaint and endorsed the case to PW-10 for investigation. He took up the investigation. During investigation, he visited the place of occurrence and prepared a rough sketch map which was marked as Exbt.-6. He examined the available witnesses and recorded their statements, sent the sample for chemical examination. On transfer, he made over the case to the then Officer-in-Charge S.I. Sampad Mukherjee on 10.05.2000 and thereafter collected the report of chemical examiner and submitted the charge-sheet. PW-1 Gour Chandra Mondal stated before him that ganja was seized from the possession of the accused under a seizure list and he put his signature there. He stated before PW-10 that he came to know the names of the accused persons. PW-7 Arijit Majumdar stated before PW-10 that on 11.02.2000 while he was returning home at about 2 p.m. he found that O.C. Suri P.S. detained two male and a female at Nandagopal more with bags in their possession and they were interrogated by O.C. He also stated before PW-10 that seeing the same he stopped there and found that inside the bags of those three persons there was ganja and O.C. seized the same under a seizure list and put his signature. He

also stated before PW-10 that those three persons were arrested by police for having unlawful possession of ganja. He had stated before PW-10 that those three accused persons disclosed their names and addresses as Golok Mondal of Kalisara, Sonia Bibi alias Sania Mondal of Mollarpur highway and Bakkar Sk. of Rukshinipur. They were arrested and brought to Suri P.S. PW-8 had stated before PW-10 that on 11.02.2000 at 13:45 hrs. police apprehended two male and one female along with bags in their hands at Nandagopal more. He stated before PW-10 out of curiosity he got down from the ship and found that there was ganja inside the bag in the possession of three accused persons. He stated before PW-10 that police seized three bags from the possession of the accuseds containing ganja in his presence under a seizure list and he put his signature as a witness.

- xv. During cross-examination PW-10 deposed that besides himself and S.I. Asim Kr. Mondal, P.S.I. Sargajit Bose, Lady S.I. Asalata Goswami and other police personnel accompanied them whose names he could not recollect. PW-10 could not recollect the name of the person who weighed the ganja. No label was pasted on the bags. Mat Exhibit-I was not a gunny bag. Mat Exhibit-IV was a sealed packet. There was no signature of the accused and the witnesses on Mat Exhibit-IV. PW-10 had not seized any authorized letter issued by C.I. to the then O.C. PW-10 had not examined C.I. or recorded his statement.

8. The Hon'ble Supreme Court held the following in **State of Punjab v. Balbir Singh**¹:-

10. It is thus clear that by a combined reading of Sections 41, 42, 43 and 51 of the NDPS Act and Section 4 CrPC regarding arrest and search under Sections 41, 42 and 43, the provisions of CrPC namely Sections 100 and 165 would be applicable to such arrest and search. Consequently the principles laid down by various courts as discussed above regarding the irregularities and illegalities in respect of arrest and search would equally be applicable to the arrest and search under the NDPS Act also depending upon the facts and circumstances of each case.

9. The Hon'ble Supreme Court in the case of **Naresh Kumar v. State of H.P.**² 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

¹1994) 3 SCC 299

²(2017) 15 SCC 684

a case where independent witnesses were available. 1 (2017) 15 SCC 684 5

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 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.”

10. The following was observed by the Hon'ble Supreme Court in the case of ***Madan Lal v. State of H.P.***³:-

“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 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

³(2003) 7 SCC 465

power and control over 2 (2003) 7 SCC 465 7 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.”

11. The evidence of PW-2 reflected dearth of recollection of the sequence of events relating to incriminating circumstances of the appellants. PW-3 recounted the samples of ‘ganja’ to be weighed without their actual measurement only to be identified based on the accounted disclosure of the Officer-in-Charge. The samples and the packets were weighed at the police station. The other prosecution witnesses being members of the raiding party evaded to state the sequence of events due to lapse of time affecting their memory.
12. The prosecution did not cite any independent witness. The search and seizure was conducted in the presence of the local witnesses without complying the provisions of the NDPS Act. The confession of the appellants

at the time of interrogation relating to the contraband articles cannot be accepted. PW-5 did not seek for the presence of the Magistrate at the time of seizure. The samples of seized materials did not bear the seal and label to endorse the time and validity of seizure.

13. There had been lapses on the part of the investigation with regard to search and seizure, the absence of independent witnesses and the conscious possession of the contraband by the appellant. The prosecution failed to prove the appellants being conscious of the possession of the contraband to make the same illicit possession.
14. In view of the observation and the facts and circumstances of the case and the decisions cited above, the prosecution cannot be said to have proved its case beyond reasonable doubt and as such the instant criminal appeal being CRA 18 of 2005 is allowed.
15. Under such facts and circumstances, the order dated 17th December, 2004 passed in Case No. C-2 of 2000 by the Learned Additional Sessions Judge, 1st Court and Special Court under N.D.P.S. Act, Suri, Birbhum, is set aside.
16. There is no order as to costs.
17. I record my appreciation for the able assistance rendered by the Learned Advocate Mr. Pradip Kumar Roy as *Amicus Curiae* in disposing of this appeal.
18. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

19. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)