

Vinay Kumar Mishra vs Union Of India Thru. Its Zonal Director, ... on 24 July, 2020

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Author: Jaspreet Singh

Bench: Jaspreet Singh

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

Reserved on 15.07.2020

Delivered on 24.07.2020

AFR

In Chamber

Case :- BAIL No. - 10163 of 2019

Applicant :- Vinay Kumar Mishra

Opposite Party :- Union Of India Thru. Its Zonal Director, Ncb, Lucknow

Counsel for Applicant :- Ayodhya Prasad Mishra

Counsel for Opposite Party :- Akhilesh Kumar Awasthi

Hon'ble Jaspreet Singh,J.

The instant pre-trial bail application has been moved by the applicant who has been charged under Sections 8/20/29/60 (3) of the Narcotic Drugs & Substances Act (hereinafter referred to as NDPS Act), P.S. NCB, Lucknow.

Heard Sri A.P. Mishra, learned counsel for the applicant and Sri Akhilesh Kumar Awasthi, learned counsel for the Narcotics Control Bureau.

The facts giving rise to the instant bail application are that as per the prosecution case, it is alleged that on the basis of information given by the Zonal Director of Narcotics Control Bureau to the

complainant that Ganja in huge quantity is being transported hidden in a concealed cavity in Truck No. UP 44 T 1781 and is moving from Chhatisgarh and would be reaching Faizabad via Akbarpur Road between 4:00 PM to 6:00 PM on 17.11.2019.

On the basis of the aforesaid information a raiding team was constituted. The information was reduced in writing by the complainant and was placed before the superior officer thereafter the complainant along with other departmental officers proceeded in the departmental vehicles and reached the Devkali Chauraha at Faizabad at around 03:30 PM on 17.01.2019. After reaching the aforesaid Devkali Chauraha, Sri Rajesh Singh, Sub Inspector of the U.P. Police was also informed about the information regarding the transportation of Ganja and his assistance was sought in the search and seizure proceedings, which was accepted and he along with raiding team of the NCB positioned themselves.

At around 04:30 PM, the said truck was spotted and was intercepted by the raiding team near the petrol pump on the Akbarpur Faizabad Highway on the Akbarpur side. Upon intercepting the said Truck bearing No. UP 44 T 1781 two person were found traveling therein who identified themselves as Vivek Kumar Mishra (the present applicant) and the other identified himself as Kaleem.

It is also the case of the prosecution that both the persons were briefed about the legal provisions of Sections 50 of the NDPS Act before they were searched. They were informed separately of their rights including the right to be searched before a Magistrate or a Gazetted officer. Upon the request of the applicant and the other co-accused the search was conducted in presence of a Gazetted Officer Sri Mohd. Nawab, Superintendent of NCB, Lucknow and nothing incriminating was found from their possession.

However, while the truck was searched, the hidden cavity was discovered and both the applicant and the co-accused Kaleem, informed that the said cavity was closed with nuts and bolts which could be opened from behind the driver's seat. It was accordingly done and from the hidden cavity 15 jute bags were recovered. Upon opening the said jute bags, 167 small packets were found and upon testing the same, it tested positive for Ganja. From the seized 15 bags containing 167 small packets, a total quantity of 349.250 Kgs of Ganja was recovered.

During the search and seizure proceedings, samples were taken from the said seized contraband which was sealed and sent for inspection to a laboratory and later as per the report it tested positive for Ganja while the remaining packets were sealed and confiscated. The search cum seizure memo was prepared and thereafter the statements of the applicant and the co-accused Kaleem were recorded under Section 67 of the NDPS Act.

As per the statement of the applicant and co-accused Kaleem, it revealed that the seized goods belonged to one Sri Chand Khan, R/o Gonda while the contraband was loaded by one Sri Amaan and the Truck in question belonged to one Sri Sagir Ahmad R/o Gonda. It is in this backdrop that the applicant has been apprehended and has been in Jail since 18.11.2019.

The first submission of Sri A.P. Mishra, learned counsel for the applicant, is that there has been a complete violation of Section 42 of the NDPS Act. It has been submitted that in paragraph 17 of the bail application there has been a clear averment that there is non-compliance of Section 42 of the NDPS Act, inasmuch as, the information received and reduced in writing was not done by the officer who received it nor there is any material to indicate that the aforesaid provision has been complied with. It has also been urged that Sub Section 2 of Section 42 of the NDPS Act has also not been complied with. It has been submitted that the information conveyed by the Zonal Director Sri Birendra Kumar, NCB does not speak regarding the source of such information having been received by him and he admittedly did not reduce the said information in writing.

The second submission of Sri Mishra is that there is non-compliance of Section 50 of the NDPS Act, inasmuch as, the search was conducted without the rights being informed to the applicant and the other co-accused before conducting the search. He has further submitted that the consent memo does not bear the place and time of its preparation nor does it bear the signatures of other members of the team.

The third submission of Sri Mishra is, that there is no material to indicate that the applicant had the conscious possession over the contraband so recovered and consequently in absence of the conscious possession, the applicant cannot be charged especially when he had already disclosed who the owner of the contraband was rather the said owner has not been charge-sheeted but the applicant who is a poor truck driver and otherwise having no nexus with the alleged crime has been apprehended and has been languishing in Jail since 18.01.2019.

Sri Mishra in support of his submission has relied upon the decision of the Apex Court in the case of Sarija Bano Vs. State through Inspector of Police reported in 2004 (12) SCC 266. Sri Mishra while heavily relying upon the aforesaid decision of Sarija Bano (Supra) has submitted that now it is a well settled that the compliance of Section 42 of the NDPS Act is mandatory and the same is also a relevant consideration for the Court while considering a bail application. Sri Mishra has also relied on the decision of the Apex Court in the case of Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat reported in 2000 (2) SCC 513 and State of Rajasthan Vs. Jag Raj Singh reported in 2016 (11) SCC 687 to buttress his submissions.

Sri Akhilesh Awasthi, learned counsel for the NCB while refuting the aforesaid submission has submitted that the record would indicate that there is an adequate legal compliance of Section 42 of the NDPS Act, inasmuch as, the information received was duly reduced in writing and it was also reported to the Senior Officer within the time prescribed under Section 42 (2) of the NDPS Act. It has also been submitted that it is not the case where Section 42 of the NDPS Act has not been complied with, rather the material apparently indicates that there has been a complete compliance of Section 42 of the NDPS Act. Sri Awasthi has further urged that even otherwise the aforesaid plea regarding the compliance of Section 42 of the NDPS Act is a matter which is to be considered during the trial and may not be very relevant at the stage of consideration of the bail application.

Sri Awasthi has further urged that similarly the record would indicate that there has been complete compliance of Section 50 of the NDPS Act and even the aforesaid plea is a matter which is to be

considered during the trial. Thus, it is urged that there has been complete compliance of both Section 42 and Section 50 of the NDPS Act, however, only hyper-technical plea is being raised by the learned counsel for the applicant which does not merit consideration. Apart from the fact that what is important to be considered by the Court while considering an application for bail is the mandate which has been provided under Section 37 of the NDPS Act.

Sri Awasthi has vehemently urged that it would indicate that the applicant was clearly in the knowledge of the presence of the contraband in the Truck which was being transported being hidden in a special cavity. The applicant was also aware that it was loaded by one Sri Amaan and it belonged to Sri Chand Khan resident of Gonda. The Truck also belonged to one Sri Sagir Ahmad and the fact remains that both the applicant and the co-accused Kaleem were found in the truck transporting the aforesaid contraband which was apprehended on the highway.

Sri Awasthi has also urged that Section 35 of the NDPS Act permits the presumption of culpable mental state to be drawn, therefore, since the contraband was found from the truck which was being driven by the applicant, hence, it cannot be said that he did not have the conscious possession. Moreover, in view of the presumption so made, it was for the applicant to disclose and rebut by cogent material to indicate that he did not have the conscious possession.

Sri Awasthi has also submitted that efforts were made to trace out the other offenders namely Sri Chand Khan, Sri Amaan and Sri Saghir Ahmad, however, they are not traceable and while keeping the option open to proceed against the said offenders, the complaint was filed against the applicant and the co-accused Kaleem. Merely because the other offenders are not parties in the complaint as they were not traceable till the time of filing of the complaint, it cannot be said that they have been left out. Thus, the submissions raised by the learned counsel for the applicant do not warrant any merit and the bail application of the applicant deserves to be rejected.

Sri Awasthi in support of his submissions has relied upon the decision of the Apex Court in the case of Union of India Vs. Ramsamujh reported in 1999 (9) SCC 429, Union of India Vs. Ratan Malik reported in 2009 (2) SCC 264 and State of Kerala Vs. Rajesh reported in 2020 SCC Online SC 81.

The Court has considered the rival submissions and has also perused the material available on record and the case laws cited by the both parties.

The primary submission of Sri A.P. Mishra revolves around the non-compliance of Section 42 and Section 50 of the NDPS Act. While advancing his submissions, Sri Mishra has urged that the record does not indicate that there has been any compliance of Section 42 (1) or 42 (2) of the NDPS Act. It has been submitted that the applicant has taken a specific plea in paragraph 17 of the bail application in respect of non-compliance of Section 42 of the NDPS Act. It has been submitted by Sri Mishra that in paragraph 19 of the counter affidavit a reply to the paragraph 17 of the Bail Application has been given and it has been alleged and stated that the information available with the Officer in-charge was passed to Sri Narendra Kumar, Intelligence Officer empowered under Section 42 (1) of the NDPS Act and who reduced the same in writing and put up the same before the Zonal Director to proceed further, thus, the provision of both Section 41 (1) and 42 (2) of the NDPS Act

have been duly complied with, while no document has been annexed indicating the recording of the information and forwarding the same to the superior officer, as required in law.

Sri Mishra has further urged that the officer before whom the search had taken place namely Sri Mohd. Nawab was a member of the raiding party, hence, he could not be treated to be an independent person. There is nothing to indicate that there was any difficulty in getting the search of the applicant conducted before a Magistrate or a gazetted officer. It has also been urged that in paragraph 20 of the counter affidavit, while giving a reply to the paragraph 18 of the bail application, the prosecution could not establish the compliance of Section 50 of the NDPS Act, hence, for the aforesaid reasons, there is non-compliance of the mandatory provisions, hence, the applicant is entitled to be enlarged on bail.

In order to test the submissions of Sri Mishra, it will be gainful to consider Section 42 of the NDPS Act which reads as under:-

"42. Power of entry, search, seizure and arrest without warrant or authorisation.

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this

Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.]"

Upon plain reading of the aforesaid Section, it would indicate that Sub section (1) of Section 42 of the NDPS Act requires an officer not below the rank of a Peon/Sepoy or constable of the Departments as mentioned in the said section therein and where he has reason to believe from person's knowledge or information given by any person, to be taken down in writing that any narcotic drug or psychotropic substance or controlled substance in respect of which an offence is punishable under the Act has been committed or any document or other article which may furnish evidence of the commission of such offence or the illegally acquired property or any other documents which is liable for seizure or forfeiture is kept or concealed in any building, conveyance or enclosed place and further Sub section (2) provides that where the officer takes down the information in writing under Sub section (1) or records the grounds for his belief under the proviso mentioned in the sub Section (1) above, he shall within 72 hours, send a copy thereof to his immediate official superior.

The compliance of this Section has been disputed by the learned counsel for the applicant. The counter affidavit filed on behalf of the NCB in paragraph 19 states that the information available with the officer in-charge i.e. Sri Birendra Kumar, Zonal Director was passed to Narendra Kumar, the Intelligence Officer who recorded the same in writing and put it before the Zonal Director for further action.

The record further indicates that the applicant along with his bail application has annexed a typed copy of the information having been reduced in writing by the complainant as Annexure No. 3. From the perusal of the aforesaid document, the submission of the learned counsel for the NCB gets credence that the information was received from Sri Birendra Kumar, Zonal Director, NCB which was reduced in writing by Sri Narendra Kumar, the Intelligence Officer and the same was also placed before the officer concerned within the prescribed time as provided under Sub Section 2 of Section 42 of the NDPS Act. Sri Mishra could not indicate as to in what manner the aforesaid information was wanting of the requisites mentioned in Section 42 of the NDPS Act.

Another aspect to be considered is that apparently the compliance has been made by the NCB in respect of Section 42 and it is for the aforesaid reason that the applicant has also brought on record the typed copy of information reduced in writing as Annexure No. 3 with the bail application. Now, in case if the applicant disputes that the compliance is not in accordance with the strict provisions of the law then that aspect becomes a factual issue which is to be considered during the trial.

This Court gainfully relies upon the Constitution Bench decision of the Apex Court in the case of Karnail Singh Vs. State of Haryana reported in 2009 (8) SCC 39 wherein the Apex Court while looking into the mandate of Section 42 of the NDPS Act has observed as under:-

"35. In conclusion, what is to be noticed is that Abdul Rashid [(2000) 2 SCC 513: 2000 SCC (Cri) 496] did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajjan Abraham [(2001) 6 SCC 692: 2001 SCC (Cri) 1217] hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may

not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

Thus, it would be seen that the compliance of Section 42 being a question of fact may not be looked into by the Court for considering the bail application though may be relevant and to be considered by the Court during the trial.

It would be relevant to notice that the decision of the Apex Court in the case of Sarija Bano (supra) which has been heavily relied upon by the learned counsel for the applicant, upon its perusal indicates that the Apex Court while making the observations that the compliance of Section 42 is mandatory and is a relevant fact which should have engaged the attention of the Court while considering the bail application is to be read in context with the facts of the case before the Apex Court.

In the case of Sarija Bano (supra) it was the specific case that the applicant no. 1 was arrested at 11:15 PM on 10.07.2003 and on the basis of the confessional statement, a search was made in the building at about 01:15 AM on 11.07.2003 where the second applicant was found staying and she was also taken into the custody at 01:15 AM. It was the case that in the aforesaid house the contraband was found and accordingly a case was registered. The redeeming feature of the aforesaid case was that on 10.07.2003 at 01:14 PM a telegram had also been sent to the Home Secretary, to the Governor of State of Tamilnadu, to the Police Commissioner of Chennai as well as to the Police Inspector of Ambunagar, Madurai wherein it was alleged that the applicants have already been detained and their lives were in danger and their whereabouts were not known. The fact that the telegram was sent and received was not disputed.

It is in these circumstances where the allegations were ex-facie made that the applicants before the Apex Court were illegally detained for which a telegram had already been sent much prior in time at 01:15 PM whereas the search was made at a subsequent time and the factum regarding the telegram was also not disputed, hence, the Court recorded the observations and further it specifically noted that the decision of Sarija Bano (supra) was rendered in special facts.

Thus, the said case is distinguishable from the facts of the instant case, coupled with the mandate as discernable from the constitution bench decision of the Apex Court in the case of Karnail Singh (Supra) and also for the aforesaid reason that prima facie there does not appear to be an ex-facie violation of Section 42 of the NDPS Act and even though if some infraction has been made as per the applicant then he is free to raise the said the ground during trial, hence, this Court does not find any merit in the submission of the learned counsel for the applicant regarding non-compliance of

Section 42 of the NDPS Act at this stage, while considering the bail application.

In so far as the violation of Section 50 of the NDPS Act is concerned, the same also does not find favour with this Court for the reason that the applicant himself has brought on record the copy of the memo issued to the applicant which was duly received by him and also signed by him as Annexure No. 4 clearly indicating the option exercised by the applicant regarding the search.

From the perusal of the Annexure No. 4, it would indicate that the applicant was informed that he had an option to be searched before a Magistrate or a gazetted officer. The applicant has mentioned under his signatures that he would like to get himself searched before a gazetted officer and once the applicant exercised his option thereafter his search was conducted in the presence of a Gazetted Officer Sri Mohd. Nawab, the Superintendent of NCB, Lucknow.

Again, it will be relevant to mention that the option was given to the applicant and he exercised the same and accordingly, his search was conducted before a gazetted officer now in case if this fact is disputed by the applicant it also becomes a question of fact which can be adjudicated at the time of trial and may not be looked into by this Court at the time of consideration of the bail application.

The other limb of the submission of Sri Mishra, that the gazetted officer Mohd. Nawab was also a member of the raiding team and that he not being an independent officer, hence, the compliance is sham again for the reasons as mentioned above this too is a question of fact which can be seen and considered by the Court during trial.

This Court is also strengthened in its view from the decision of the Constitution Bench of the Apex Court in the case of Vijay Sinh Chandubha Jadeja Vs. State of Gujrat reported in 2011 (1) SCC 609. The relevant extract from para 31 of the said report is quoted hereinunder:-

"Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf."

The last submission of Sri Mishra regarding the applicant not having the conscious possession of the articles of contraband seized also does not sound convincing.

It will be relevant to notice that Section 2 (viii) and Section 2 (viii b), Section 2 (xxiv), Section 2 (xxviii) of the NDPS Act define the words 'conveyance', 'illicit traffic', 'to import inter-State' and 'to transport' as under:-

"Section 2 (viii):- 'Conveyance' means a conveyance of any description whatsoever and includes any aircraft, vehicle or vessel;

Section 2 (viii b):- 'illicit traffic', in relation to narcotic drugs and psychotropic substances, means -

(i) cultivating any coca plant or gathering any portion of coca plant;

(ii) cultivating the opium poppy or any cannabis plant;

(iii) engaging in the production, manufacture, possession, sale, purchase, transportation, warehousing, concealment, use or consumption, import inter-State, export inter-State, import into India, export from India or transshipment, of narcotic drugs or psychotropic substances;

(iv) dealing in any activities in narcotic drugs or psychotropic substances other than those referred to in sub-clauses (i) to (iii); or

(v) handling or letting out any premises for the carrying on of any of the activities referred to in sub-clauses (i) to (iv); other than those permitted under this Act, or any rule or order made, or any condition of any licence, term or authorisation issued, thereunder, and includes (1) financing, directly or indirectly, any of the aforementioned activities;

(2) abetting or conspiring in the furtherance of or in support of doing any of the aforementioned activities; and (3) harbouring persons engaged in any of the aforementioned activities;] Section 2 (xxiv):- "to import inter-State" means to bring into a State or Union territory in India from another State or Union territory in India;"

Section 2 (xviii):- "to transport" means to take from one place to another within the same State or Union Territory;

Significantly, Section 35 of the NDPS Act provides for presumption of culpable mental state and Section 8 (c) of the NDPS Act prohibits the possession, sale, purchase and transport of any contraband.

This Court gainfully refers to the decision of the Apex Court in the case of Mohan Lal Vs. State of Rajasthan reported in 2015 (6) SCC 222 wherein the concept of possession has been explained by the Apex Court and the relevant part thereof reads as under:-

12. The term "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. One of the definitions of "possession" given in Black's Law Dictionary is as follows:

"Possession.--Having control over a thing with the intent to have and to exercise such control. *Oswald v. Weigel* [219 Kan 616 : 549 P 2d 568 at p. 569 (1976)] . The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor

of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Act or state of possessing. That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons.

The law, in general, recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint."

In the said Dictionary, the term "possess" in the context of narcotic drug laws means:

"Term 'possess', under narcotic drug laws, means actual control, care and management of the drug. *Collini v. State* [487 SW 2d 132 at p. 135 (Tex Cr App 1972)] . Defendant 'possesses' controlled substance when defendant knows of substance's presence, substance is immediately accessible, and defendant exercises 'dominion or control' over substance. *State v. Hornaday* [105 Wash 2d 120 : 713 P 2d 71 at p. 74 (Wash 1986)] ."

And again:

"Criminal law.--Possession as necessary for conviction of offense of possession of controlled substances with intent to distribute may be constructive as well as actual, *United States v. Craig* [522 F 2d 29 at p. 31 (6th Cir 1975)] ; as well as joint or exclusive, *Garvey v. State* [176 Ga App 268 : 335 SE 2d 640 at p. 647 (1985)] . The defendants must have had dominion and control over the contraband with knowledge of its presence and character. *United States v. Morando-Alvarez* [520 F 2d 882 at p. 884 (9th Cir 1975)] .

Possession, as an element of offense of stolen goods, is not limited to actual manual control upon or about the person, but extends to things under one's power and dominion. *McConnell v. State* [48 Ala App 523 : 266 So 2d 328 at p. 333 (1972)] .

Possession as used in indictment charging possession of stolen mail may mean actual possession or constructive possession. *United States v. Ellison* [469 F 2d 413 at p. 415 (9th Cir 1972)] .

To constitute 'possession' of a concealable weapon under statute proscribing possession of a concealable weapon by a felon, it is sufficient that defendant have

constructive possession and immediate access to the weapon. State v. Kelley [12 Or App 496 : 507 P 2d 837 at p. 837 (1973)] ."

13. In Stroud's Dictionary, the term "possession" has been defined as follows:

""Possession' [Drugs (Prevention of Misuse) Act, 1964 (c. 64), Section 1(1)]. A person does not lose 'possession' of an article which is mislaid or thought erroneously to have been destroyed or disposed of, if, in fact, it remains in his care and control (R. v. Buswell [(1972) 1 WLR 64 : (1972) 1 All ER 75 (CA)]).

14. Dr Harris, in his essay titled "The Concept of Possession in English Law" [Published in Oxford Essays in Jurisprudence (Edited by A.G. Guest, First Series, Clarendon Press, Oxford, 1968).] while discussing the various rules relating to possession has stated that "possession" is a functional and relative concept, which gives the Judges some discretion in applying abstract rule to a concrete set of facts. The learned author has suggested certain factors which have been held to be relevant to conclude whether a person has acquired possession for the purposes of a particular rule of law. Some of the factors enlisted by him are: (a) degree of physical control exercised by person over a thing, (b) knowledge of the person claiming possessory rights over a thing, about the attributes and qualities of the thing, (c) the person's intention in regard to the thing, that is, "animus possessionis" and "animus domini", (d) possession of land on which the thing is claimed is lying, also the relevant intention of the occupier of a premises on which the thing is lying thereon to exclude others from enjoying the land and anything which happens to be lying there; and Judges' concept of the social purpose of the particular rule relied upon by the plaintiff.

15. The learned author has further proceeded to state that quite naturally the policies behind different possessory rules will vary and it would justify the courts giving varying weight to different factors relevant to possession according to the particular rule in question. According to Harris, Judges have at the back of their mind a perfect pattern in which the possessor has complete, exclusive and unchallenged physical control over the subject; full knowledge of its existence; attributes and location, and a manifest intention to act as its owner and exclude all others from it. As a further statement he elucidates that courts realise that justice and expediency compel constant modification of the ideal pattern. The person claiming possessory rights over a thing may have a very limited degree of physical control over the object or he may have no intention in regard to an object of whose existence he is unaware of, though he exercises control over the same or he may have clear intention to exclude other people from the object, though he has no physical control over the same. In all this variegated situation, states Harris, the person concerned may still be conferred the possessory rights. The purpose of referring to the aforesaid principles and passages is that over the years, it has been seen that courts have refrained from adopting a doctrinaire approach towards defining possession. A functional and flexible approach in defining and understanding the possession as a concept is acceptable and thereby emphasis has been laid on different possessory rights according to the commands and justice of the social policy. Thus, the word "possession" in the context of any enactment would depend upon the object and purpose of the enactment and an appropriate meaning has to be assigned to the word to effectuate the said object.

16. 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. The said provision reads as follows:

"35. Presumption of culpable mental state.--(1) In any prosecution for an offence under this Act, which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.--In this section 'culpable mental state' includes intention, motive, knowledge, of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."

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 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."

From the facts available on record, it is the case that the private truck bearing No. UP 44 T 1781 was being driven by the applicant and another person namely Kaleem was riding in the said truck. Both were apprehended and from the hidden cavity of the truck 15 jute boxes containing 167 packets with a total quantity of 249.250 Kgs. of Ganja, which is a prohibited article as provided under Section 2 (iii) (b) of the NDPS Act and also being a commercial quantity, was seized.

From the statement which was given by the applicant and the other co-accused indicated that they had taken the truck to Chhatisgarh where one Sri Amaan had loaded the aforesaid bags in the truck and had also informed the applicant that it contained the contraband. The statement also indicates that the applicant was knowing the aforesaid fact that he along with the co-accused were transporting the contraband interstate and were apprehended at the Akbarpur Faizabad Highway in the State of U.P. Hence, the applicant prima facie did have the possession with dominion over the same as explained by the Apex Court in the decision of Mohan Lal (Supra) and there not being any cogent material on the record to rebut the same. Accordingly, at this stage the plea of the learned counsel for the applicant regarding the applicant not having conscious possession does not have force and it is turned down.

Now, at this stage, this Court relegates itself to Section 37 of the NDPS Act to ascertain its mandate while considering an application for bail. Section 37 of the NDPS Act, as substituted by Act 2 of 1989 with effect from 29-5-1989 with further amendment by Act 9 of 2001 reads as follows:

"37. Offences to be cognizable and non-bailable.--(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless--

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail."

Thus, from the perusal of the aforesaid provision, it would be clear that no person who is accused of an offence punishable under Section 19, 24 or 27 A and also for offences involving commercial quantity shall be released on bail or his own bond unless the Public Prosecutor had been given an opportunity to oppose the bail application and where the Public Prosecutor opposes the bail application, the Court is required to satisfy itself that it has reason to believe that the applicant is not guilty of such offence and that he is not likely to commit the offence while on bail.

This legislative mandate is required to be considered by the Court while considering an application for bail under the NDPS Act. The aforesaid provision has been the subject matter of interpretation and consideration in large number of cases and is very well settled.

In the case of Union of India Vs. Ram Samujh and Another reported in 1999 (9) SCC 429, the Apex Court in paras 6 to 8 has held as under:-

6. The aforesaid section is incorporated to achieve the object as mentioned in the Statement of Objects and Reasons for introducing Bill No. 125 of 1988 thus:

"Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and

Psychotropic Substances Act, 1985, the need to amend the law to further strengthen it, has been felt. (emphasis supplied)

7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in *Durand Didier v. Chief Secy., Union Territory of Goa* [(1990) 1 SCC 95 : 1990 SCC (Cri) 65] as under: (SCC p. 104, para 24) "24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine."

8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

- (i) there are reasonable grounds for believing that the accused is not guilty of such offence; and
- (ii) that he is not likely to commit any offence while on bail are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent-accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended.

Similarly, The Apex Court in the case of *Union of India Vs. Shiv Shanker Kesari* reported in 2007 (7) SCC 798 has held as under:- The relevant extract of the said report is quoted hereinunder:-

"6. As the provision itself provides no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and that he is not

likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

7. The expression used in Section 37 (1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

.....

11. The Court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the Court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.

12. Additionally, the Court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion."

The Apex Court in the case of Union of India Vs. Rattan Malik Alias Habul reported in 2009 (2) SCC 624 in paras 12 to 15 has held as under:-

"12. It is plain from a bare reading of the non obstante clause in Section 37 of the NDPS Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz. (i) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".

13. The expression "reasonable grounds" has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn,

points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence (vide Union of India v. Shiv Shanker Kesari [(2007) 7 SCC 798 : (2007) 3 SCC (Cri) 505]). Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the court is not called upon to record a finding of "not guilty". At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.

15. Bearing in mind the above broad principles, we may now consider the merits of the present appeal. It is evident from the afore-extracted paragraph that the circumstances which have weighed with the learned Judge to conclude that it was a fit case for grant of bail are: (i) that nothing has been found from the possession of the respondent; (ii) he is in jail for the last three years, and (iii) that there is no chance of his appeal being heard within a period of seven years. In our opinion, the stated circumstances may be relevant for grant of bail in matters arising out of conviction under the Penal Code, 1860, etc. but are not sufficient to satisfy the mandatory requirements as stipulated in clause (b) of sub-section (1) of Section 37 of the NDPS Act."

Lately, the Apex Court in the case of State of Kerala Vs. Rajesh reported in 2020 SCC OnLine SC 81 after noticing the earlier decisions on the aforesaid point regarding grant of bail has held as under:-

"20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

21. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other

law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for."

In light of the facts of the instant case as well as in view of the legal exposition considered and discussed hereinabove, this court at this stage prima facie for the purpose of this bail application is unable to form the required satisfaction that there are reasonable grounds for believing that the applicant is not guilty of the offence and hence this Court cannot persuade itself to accede to the prayer of the applicant for being enlarged on bail.

Accordingly, the application for bail is rejected. It is clarified that any observation made in this judgment may not be construed as an expression on the merits of case and is solely for the purpose of this bail application and shall not affect the trial. Since the applicant has been in Jail since 18.01.2019, accordingly, the Trial Court is directed to expedite the trial.

[Jaspreet Singh, J.]

Order Date: 24.07.2020

Asheesh