

(1998) 08 MP CK 0004

In the Madhya Pradesh High Court

Case No : Criminal Revision No. 167 of 1998

Malook Khan

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 11-08-1998

Acts Referred:

Evidence Act, 1872 — Section 3

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 35, 35(1), 35(2)

Citation : (1999) CriLJ 1147 : (1999) 2 MPJR 35

Hon'ble Judges : Jayant Govind Chitre, J

Bench : Single Bench

Advocate : Amit Agrawal, for the Appellant; S. Saleem, for the Respondent

Judgement

J.G. Chitre, J.

The petitioner is praying for the custody of the truck bearing registration No. G.I-I-UU-7587 which has been seized in context with Crime No. 18/98 connected with Police Station Nahargarh, District Mandsaur.

The prosecution case in brief is that on 25-1-98 Shri N. L. Pandya, ASI of Nahargarh Police Station got the information that poppy husk is likely to be transported from the godown of one Prabhulal resident of Soothi by one Afzal in contravention of the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1986 (hereinafter referred to as the Act for convenience). Accordingly a Panchnama was prepared indicating that in the attempt of obtaining the search warrant, the offenders were likely to escape and it would not be possible to obtain the warrant. After that, the Panchanama was drawn and such difficulty was expressed. The panch-witnesses were taken by the raiding party along with it. The party proceeded to effect the raid. While attempting to trace the said truck, the members of the raiding party learnt that the said poppy husk ,was taken through the truck mentioned above towards Mandsaur side. The said truck was, thereafter, traced and it was found in the deserted condition near

Panpur village. Nobody was present, in the said truck and when the said truck was searched, it was noticed by the members of the raiding party that some bags containing lentils were found to have been stored in the said truck at the upper floor. Beneath it, poppy husk was stored in the said truck in the concealed manner. The said poppy husk was seized under the Panchnama in the presence of the Panch-witnesses. The said truck was also seized under the allegation that it was used in contravention of the provisions of the NDPS Act for transporting the said poppy husk illegally.

An application was moved by the owner of the said truck through the General Attorney. After hearing the prosecution, the learned Special Judge dismissed the application of the petitioner for getting the custody of the truck in question and that order is being assailed by the present revision petition.

Shri Amit Agrawal appearing for the petitioner submitted that the owner of the truck is resident of Ahmedabad and he was not knowing as to why this truck was being seized. He further submitted that no narcotic drug has been proved to have been transported by that truck by the prosecution, and therefore, the said truck is not liable to be confiscated much less detained in the custody of the police. He further submitted that the said truck is a valuable property and if it is permitted to be detained in the custody of the police with exposed condition in rains etc., the owner of the truck would be put to lot of loss and hardship. Shri A. Saleem, learned Panel Lawyer appearing for the Respondent-State submitted that the said truck had been involved in the illegal transport of poppy husk in contravention of provisions of the NDPS Act, therefore, the said truck needs to be kept in the custody of the police till the trial is over. He submitted that this petition be dismissed.

Section 35 of the NDPS Act provides in Sub-section (1) that "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." The explanation provided to that sub-section indicates "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe a fact. Sub-section (2) of Section 35 provides that "for the purpose of this section, a fact is said to be proved only when the Court believes it to exist beyond reasonable doubt by a preponderance of probability." These two sentences have to be understood properly and the intention of the legislature in enacting them has to be understood properly. It has been clarified as to what "fact" which has been embodied in explanation to Sub-section (1) of Section 35 of the NDPS Act means. It has been further clarified that "fact" is said to be proved only when the Court believes it, to exist and that too beyond reasonable doubt. It means that the prosecution is obliged to prove it by cogent, reliable and acceptable evidence that the person alleged to have knowledge of the said fact was having that knowledge and that should be proved beyond reasonable doubt.

It means that any other proposition indicating non-existence of knowledge has to be ruled out. That would require a process of adducing evidence, examination of some witnesses, examination of those witnesses and therefore, a process of appreciation of said evidence in coming to the conclusion whether such fact does exist or does not exist and further to the extent whether to the point of preponderance of probability or beyond reasonable doubt. There is lot of difference between "preponderance of probability" and "beyond reasonable doubt." These situations cannot be expected to be near each other or on the approximate distance from each other. It has to cross the stage of "proof. That means it has to be something more than the status of "proved" which has been indicated by the provisions of Section 3 of the Indian Evidence Act.

It has to be kept in mind that the legislature used these two terms while indicating the extent of proof which is required. It is always believed that the words which are used by the legislature in enactment are used with specific intention. Therefore, when these terms have been used in Sub-section (2), it means that the legislature wanted to have specific proof for the purpose of "such knowledge" which was necessary for the Court to draw the inference or the conclusion in respect of the existence of culpable mental state. The words "preponderance of probability" have been deliberately used in Sub-section (2) because the legislature intends to keep the opportunity open to such a person who is facing such allegation to give acceptable explanation or adduce evidence to disprove that he was having such a culpable state of mind. Unless the evidence has been brought on record to that extent, the conclusion cannot be drawn against the person facing such allegation and for that, the prosecution has to collect the material or to adduce evidence to such extent for proving that fact. After that only, person alleged has to produce such material in the Court or adduce evidence which would rebut that presumption. Such presumption which is indicated by the provisions of Section 35 of the NDPS Act is always rebuttable.

Needless to say that such mental state would depend on facts and circumstances of each and every case and the inference or the conclusion will have to be drawn dependant on facts and circumstances of each case. In pre-trial stages, it will have to be understood as to where the pointer indicates reasonably and prudently.

In this case, as the record shows, the owner of the said truck has not been indicted as an accused as the charge-sheet shows. He happens to be residing at Ahmedabad. The driver of the said truck has not been arrested. None was found present in the said truck or in the proximity of that truck when the raid was effected. The petitioner has made the prayer only to this extent that the said truck be handed over to him on Supurdginama. Shri Agrawal submitted that the said truck would be exposed to rains and bad effect of weather and in that case it would be causing hardship and loss to the owner. Thus, the prayer made by the petitioner is allowed. The truck in question is ordered to be handed over to the custody of the petitioner in his Supurdgi upon his furnishing a solvent security to

the extent of Rs. 12,00,000/- (Twelve lacs rupees) before the trial Court.

It is made clear that the petitioner shall not assign, gift, mortgage, sell, transfer or dispose of the said truck in any manner till the trial is over. He shall produce the said truck before the trial Court whenever so directed by it. It is further made clear that the said truck would be liable to be confiscated if the prosecution proves the culpable mental state indicated by Section 35 of the NDPS Act, in the trial which would enable the prosecution to pray for its confiscation under the provisions of Section 35 of the Act.