
(2016) 03 GUJ CK 0105
In the Gujarat High Court
Case No : Criminal Appeal No. 442 of 2012

Mohanlal Thakraram Vishnoi	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 14-03-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 17, Section 18, Section 29, Section 35, Section 42(2), Section 50

Citation : (2016) 03 GUJ CK 0105

Hon'ble Judges : Rajesh H. Shukla, J.

Bench : Single Bench

Advocate : Pravin Gondaliya, Advocate, for the Appellant; H.L. Jani, Addl. Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Rajesh H. Shukla, J.—1. The present appeal is directed against the judgment and order rendered in Special Case No. 112 of 2008 by the Addl. Sessions Judge, Banaskantha at Deesa dated 24.2.2012 recording conviction of the appellant-original accused for the offences under sec. 17 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "NDPS Act").

2. The facts of the case, briefly summarised, are as follows:

"2.1 On the basis of information received by the P.S.I., Dhanera Police Station, Banaskantha that a white Tata Sumo Car is likely to come from Rajasthan towards Gujarat with opium, he made a report intimating to the higher officer and called 2 panch witnesses and along with his constables proceeded from Dhanera Police Station to Nenava check post waiting for the Tata Sumo car. At that time, the white Tata Sumo car came towards the check post and when the driver of the said Tata Sumo car saw the police, he drove the vehicle instead of stopping it with full speed towards Dhanera and therefore it was chased by the complainant in another police jeep. The Tata Sumo car was stopped in an open

field on the road from Lavara to Khaprol village and both the occupants tried to escape. However, one of the occupants was caught by the complainant and his team and another occupant ran away. The occupant who was caught stated his name in inquiry before the panch who was present and disclosed the name as Mohanlal Vishnoi, the appellant original accused, and the person who escaped as Bhabhutaram Vishnoi belonging to same village Sanchor. Thereupon, on a search of the Tata Sumo car, a white cotton bag tied with string was found from beneath the driver's seat which was verified and it was found to be opium. Thereupon, a jeweller was called for weighing the same and it was found to be 4 kg 540 gms which was then taken as a sample with the panch slip and sealed along with the reserve sample and that Tata Sumo car was also seized for which a panchnama was prepared and the complaint came to be registered as C.R. No. II-3038/2008 with the Dhanera Police Station at exh. 22.

2.2 On the basis of the complaint, the investigation was made and the charge sheet came to be filed and it was registered as Sessions Case No. 112/2008. The learned Addl. Sessions Judge, Deesa proceeded with the trial and recorded the evidence of prosecution witnesses and also the Further Statement of the accused under sec. 313 of Cr.P.C. after the evidence of the prosecution witnesses was over.

2.3 After hearing the learned APP as well as the learned advocate for the defence, the learned Addl. Sessions Judge, Deesa recorded conviction of the accused and sentenced the appellant-original accused as stated in the impugned judgment and order.

2.4 It is this judgment and order which has been assailed in the present appeal, on the grounds stated in the memo of appeal."

3. Heard learned advocate Shri Pravin Gondaliya for the appellant and learned APP Shri HL Jani for the respondent State.

4. Learned advocate Shri Gondaliya referred to the testimony of Mr. Sanjay Joshi who is the jeweller who was called for weighing the contraband article and who has been declared hostile. He has also referred to the testimony of panch witness, PW-2 at exh. 16 who also was declared hostile and the panchnama regarding recovery of the contraband article at exh. 17. Learned advocate Shri Gondaliya referred to the testimony of the complainant PSI, Palanpur, PW-4 at exh. 20 and submitted that his version is not corroborating with other evidence. He also referred to the complaint at exh. 22 and also submitted that the compliance with the mandatory provisions of the NDPS Act has not been made. For that purpose, he referred to the documents exh. 24 which is regarding sec. 50 and also exh. 25. He also referred to exhs. 27 & 28. Learned advocate Shri Gondaliya submitted that there are some discrepancies like in the panchnama it has been stated as 10-5 to 10-40, meaning thereby they would have left after preparing this preliminary panchnama, whereas the complainant in his testimony at exh. 20 has stated otherwise. He further referred to the testimony of other

witnesses including the testimony of the I.O., PW-11 at exh. 54 and the report at exh. 55 which is required to be made under sec. 29 of the NDPS Act. Learned advocate Shri Gondaliya also referred to the testimony of three Doctors. He referred to the testimony of Dr. Jayesh, defence witness No. 1, at exh. 68. He has also referred to the testimony of Dr. Agrawal, defence witness No. 2 at exh. 73 and his medical certificate at exh. 74, the testimony of Dr. Seth, defence witness No. 3 at exh. 75, Dr. Pravinbhai Patel, defence witness No. 4 at exh. 77 and also the testimony of Dr. Fulchand Solanki, defence witness No. 5 at exh. 81.

5. Learned advocate Shri Gondaliya submitted that the prosecution has failed to prove that there is compliance with the mandatory provisions of the NDPS Act including compliance with sec. 42(2) of the Act. For that purpose, he referred to the testimony of the complainant, PW-4 at exh. 20 and I.O, PW-11 at exh. 54. He referred to the provisions of sec. 42(2) of the NDPS Act and submitted about the intimation to the superior officer and there is no such intimation sent to the superior officer nor any record is produced suggesting compliance with the provisions of sec. 42(2) of the Act.

6. Learned advocate Shri Gondaliya submitted that though the case of the prosecution is that, as stated by the complainant Shri Chaudhary in his testimony at exh. 20, he had made a report to the superior officer in compliance with the provisions of sec. 42(2) of the Act, in fact the prosecution has not established that any such report was made and the I.O. has not recovered any copy or any material to support the say of the complainant. He submitted that there is no evidence led by the prosecution regarding any such communication by the complainant to his superior officer in compliance with the provisions of sec. 42(2) of the NDPS Act. He also referred to the testimony of I.O. Rajendrasing Pandya, PW-11 at exh. 54 and referred to the cross-examination wherein it has been stated by the witness that no statement of the superior officer was recorded.

7. Learned advocate Shri Gondaliya also submitted that the prosecution has failed to prove "conscious possession" of the contraband article opium. He referred to the testimony of the complainant and other papers and tried to submit that the appellant and other person who escaped belong to the same village. He submitted that as he was knowing the owner of the jeep and he wanted to come to Gujarat for the purpose of his medical consultation with the doctor, he boarded the Tata Sumo car without any knowledge and therefore merely because some article is recovered or found from beneath the seat of the driver, it would not amount to conscious possession. He submitted that he was only travelling as a passenger. In support of his submission, he has referred to and relied upon the judgment of the Hon'ble Apex Court in the case of State of Punjab v. Balkar Singh and anr., reported in , (2004) 3 SCC 582 (para 3), (2004) 13 SCC 608 in the case of Sorabkhan Gandhikhan Pathan and anr. v. State of Gujarat, and in the case of Sohanlal Kasiram Brahmin & anr. v. State of Gujarat & anr., reported in , 2007 (2) GLR 1020 (Head Note B).

8. Learned advocate Shri Gondaliya tried to support the contention with

reference to the testimony of the doctors who have been examined as defence witnesses that the appellant original accused was having depression or other ailments for which he was taking treatment of the psychiatrist doctors which is evident. He pointedly referred to the testimony of Dr. Jayesh, DW-1 at exh. 68 and submitted that he has clearly stated that he had visited and earlier he had visited in 2003. Similarly, he referred to the testimony of Dr. Agrawal, DW-2 at exh. 73 and the certificate at exh. 74. Learned advocate Shri Gondaliya also referred to the testimony of Dr. Fulchand Solanki, DW-5 at exh. 81 and the case papers produced at exh. 83 to support his contention about the psychological problem for which the appellant accused is said to have travelled in the said Tata Sumo car.

9. Learned advocate Shri Gondaliya further submitted that the sealing and sampling process has not been done as required and it raises doubts about the whole procedure. For that purpose, he referred to the testimony of the complainant at exh. 20 and the I.O. at exh. 54 and submitted that the contraband article is said to have been recovered from the cotton bag from which the samples are taken and tied with the string with the seal and the panch slips are not affixed with the slips but are loosely kept. He submitted, therefore, that there is a scope for manipulation or tampering. He has referred to and relied upon the judgment of this High Court in the case of Sohanlal Kasiram Brahmin & anr. v. State of Gujarat & anr [, 2007 (2) GLR 1020 (para 32 to 37)]. Similarly, he has referred to the judgment of this High Court in Criminal Appeal No. 1111 of 1994.

10. Learned advocate Shri Gondaliya further submitted that the muddamal which was seized and recovered was sealed in cotton cloth bag with the strings and sealed, whereas as it is revealed from the FSL report, it was in a plastic bag and there is no explanation how come the plastic bag was mentioned and it raises doubt that it is not the same muddamal. Learned advocate Shri Gondaliya, therefore, submitted that there is also a doubt as to the fairness of investigation. He submitted that the complainant has carried out himself the investigation and therefore the complainant and the I.O. are one and the same person which would cause prejudice to the defence. He also referred to the testimony of the I.O. at exh. 21 and emphasised that as stated in exh. 21 he has called for the papers for further investigation by himself. He has referred to and relied upon the judgment of the Hon"ble Division Bench of this High Court in Criminal Appeal No. 741 of 2007 and emphasised the observations made in para 26. He has therefore submitted that the present appeal may be allowed.

11. Learned APP Shri Jani submitted that in fact, as could be seen from the FIR itself at page 62, it is clearly stated that the plastic bag was used. He referred to the testimony of the complainant, PW-4 at exh. 20. He has stated that he has informed the higher officer and exh. 30 in compliance with the provisions or sec. 42(2) which is the report made to the higher officer. He, therefore, submitted that it cannot be said that there is no compliance with the provisions of sec.

42(2) of the NDPS Act.

12. Learned APP Shri Jani submitted that in fact the provisions of sec. 42(2) would not be attracted at all as the contraband article was recovered from the vehicle on a public road and therefore it does not apply. In support of his submission, he has referred to and relied upon the judgment of the Hon"ble Apex Court reported in , (2015) 6 SCC 222 in the case of Mohan Lal v. State of Rajasthan. He also submitted that the FSL report at exh. 61 & 62 clearly suggest that the sample in the plastic bag was placed in a cotton cloth bag and such plastic bag is taken out. For that purpose, he again referred to the testimony of the complainant and other witnesses to support his contention that the jeweller was called with the box so that the sample can be kept in the plastic box for the purpose of sending it to FSL. He, therefore, submitted that there is no substance with regard to the contention about tampering with the muddamal.

13. Learned APP Shri Jani also submitted that the submissions regarding conscious possession are also misconceived. He submitted that it is not in dispute that the accused was travelling in the Tata Sumo car from where the contraband article has been recovered. He further emphasised that the conduct is required to be seen that the appellant and other person tried to escape and they had run away, but the appellant original accused was caught by the police. He, therefore, submitted that their conduct itself is indicative of their knowledge that such article is lying in the vehicle and therefore in order to escape from the police they attempted to run away. Learned APP Shri Jani also submitted that the Hon"ble Apex Court in a judgment reported in , (2015) 6 SCC 674 in the case of Kulwinder Singh and anr. v. State of Punjab has also dealt with the aspect of possession. He pointedly referred to the observations in para 16 and submitted that like in that case running away from the spot would reflect about the conduct and the knowledge and therefore conscious possession has to be believed. He has also referred to and relied upon the judgment of the Hon"ble Apex Court reported in , AIR 2016 SC 508 in the case of Surender alias Kala v. State of Haryana. He has also referred to and relied upon the judgment reported in 2015 (0) AIJEL-HC 232785 in the case of Ghaverchand Khetatam Darji v. State of Gujarat.

14. Learned APP Shri Jani submitted that the submission with regard to the treatment for depression or psychological problem is raised, but the testimony of the defence witnesses who are doctors clearly suggest that he was in the habit of taking opium. He referred to the testimony of Dr. Jayesh, DW-1 at exh. 68, and submitted that he has stated that thereafter he has not turned up. Similarly, he referred to the testimony of Dr. Agrawal at exh. 73 and the testimony of Dr. Seth at exh. 75. He submitted that Dr. Seth in his testimony at exh. 75 has stated that the accused was addicted to opium and it could lead to such psychological problem for which he had taken the treatment. He also referred to the testimony of Dr. Fulchand Solanki, DW-5 at exh. 81 and submitted that the ailment does not justify his presence at the spot with the contraband article. It is not even the

case of the accused that he had boarded by taking a lift on the way. Learned APP Shri Jani submitted that from the very beginning he had started with the other person and the recovery of the contraband article from the vehicle would establish conscious possession particularly when the accused tried to run away and escape. Learned APP Shri Jani submitted that even in the Further Statement under sec. 313 of Cr.P.C. he has not stated that he was a passenger or he had paid to the driver and therefore the submission about his purpose of travelling innocently without knowledge cannot be readily believed or accepted. He, therefore, submitted that the impugned judgment and order recording conviction is just and proper.

15. Learned APP Shri Jani also referred to the case diary to support his submission regarding the plastic bag and to confirm that there is no question of any tampering with the muddamal which is evident from the case diary.

16. In rejoinder, learned advocate Shri Gondaliya referred to the case diary and submitted that it cannot be said that the accused has not offered any explanation and he has explained about his journey for personal purpose without any knowledge. He submitted that the I.O. has not made any effort to arrest the other person and has not made any investigation for the said person or the main accused and therefore the investigation is not fair. He further submitted that the I.O. has not recorded the statement of the doctors and therefore the present appeal may be allowed.

17. In view of these rival submissions, it is required to be considered whether the present appeal deserves consideration.

18. As it transpires from the material and evidence and the contentions raised, it is required to be considered whether the appellant original accused can be said to be in conscious possession and whether the mandatory provisions including sec. 42(2) of the NDSP Act has been complied with. Further, the submission regarding fair investigation etc. requires a closer scrutiny.

19. As it transpires from the testimony of the complainant, PW-4 at exh. 20 and the complaint at exh. 22, it is evident that the information which was received was communicated to the higher officer and thereafter he proceeded with his staff along with the panchas to the outpost from where the white Tata Sumo car was likely to pass. The report is produced at exh. 30. It is in this background the submission that there is no compliance with the provisions of sec. 42(2) is required to be considered. As rightly submitted, the provisions of sec. 42(2) could not be attributed if the search is made at a public place. Admittedly, the vehicle was on a public road and the search has been made, recovering the contraband article from beneath the seat of the driver.

20. The observations made by the Hon''ble Apex Court in the judgment in the case of Mohan Lal (supra) is a clear answer to such contention. Further, a reference can be made to the judgment of the High Court in the case of Ghaverchand Khetatam Darji v. State of Gujarat [2015 (O) AIJEL-HC 232785].

Therefore, the submission about non-compliance with sec. 42(2) is without any merit.

21. Further, the submissions which have been made with regard to conscious possession with much emphasis that the appellant original accused was merely travelling in the said vehicle as he knew the owner of the said vehicle and since he wanted to come to Gujarat for his treatment which he was taking earlier also and therefore he was only a passenger in the car without any knowledge of the contraband article requires a closer scrutiny.

22. In the first blush, it may sound appealing particularly in light of the testimony of the four doctors who have been examined as defence witnesses particularly the testimony of Dr. Agrawal, DW-2 at exh. 73 in his certificate at exh. 74 read with the testimony of Dr. Seth, DW-3, exh. 75 who has stated that the accused was addicted to opium. As it is revealed, some of the symptoms of depression could be found with the addiction of the opium. He has not produced any material and evidence with regard to the specific appointment or any specific treatment. Whatever has been produced is with regard to his treatment in the past but the appellant accused has not been able to bring on record any material which would inspire confidence with regard to the ground of his treatment that he was coming to Gujarat for treatment. at the same time, it is required to be noted that he has not boarded the vehicle by taking a lift but he had accompanied the other occupier owner of the vehicle from Rajasthan to Gujarat. So, it is not that during the journey he has joined but he was there from the very beginning coupled with the fact that when the police was there at the outpost at Nenava the vehicle was driven by the driver of the Tata Sumo car towards the other road and left the vehicle in the field and tried to escape and run away. The appellant-original accused also tried to escape and run away which also reflect about the conduct. There was no reason to escape and it would imply about his knowledge that the contraband article was being carried.

23. The reliance placed on the judgment of the Hon"ble Apex Court in the case of Kulwinder Singh and anr. (supra) has considered a similar situation where an attempt was made to run away from the spot suggesting conscious possession and it was believed. Moreover, a reference can be made to the judgment of the Hon"ble Apex Court reported in , (2008) 8 SCC 313 in the case of Union of India v. Satrohan and also the observations made in a judgment reported in , AIR 2016 SC 508 in the case of Surender alias Kala (supra).

24. It is also required to be mentioned that the appellant accused in his Further Statement under sec. 313 has not stated or clarified and it is not even his case that he boarded the vehicle by taking a lift on the way.

25. Moreover, on the aspect of conscious possession, as observed and considered in judicial pronouncements by the Hon"ble Apex Court, it has to be gathered through the overall material and evidence on record. The Hon"ble Apex Court in the judgment in the case of Mohan Lal (supra) has considered the aspect of

possession. It has been observed,

"When one conceives of possession, it appears in the strict sense that the concept of possession is basically connected to "actus of physical control and custody". Attributing this meaning in the strict sense would be understanding the factum of possession in a narrow sense. With the passage of time there has been a gradual widening of the concept and the quintessential meaning of the word possession. The classical theory of English law on the term "possession" is fundamentally dominated by Savigny-ian "corpus" and "animus" doctrine. Distinction has also been made in "possession in fact" and "possession in law" and sometimes between "corporeal possession" and "possession of right" which is called "incorporeal possession". Thus, there is a degree of flexibility in the use of the said term and that is why the word possession can be usefully defined and understood with reference to the contextual purpose for the said expression. The word possession may have one meaning in one connection and another meaning in another."

Further, again referring to the term possession with reference to Black's Law Dictionary, it has been observed,

"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 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."

It has been quoted from the Black's Law Dictionary,

"Term "possess." Under narcotic drug laws, means actual control, care and management of the drug. *Collini v. State*[7]. Defendant "possesses" controlled substance when defendant knows of substance's presence, substance is immediately accessible, and defendant exercises "dominion or control" over substance."

In Stroud's dictionary, the term possession has been defined as follows:

""Possession" (Drugs (Prevention of Misuse) Act 1964 (c. 64), s.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."

26. Moreover, in this judgment, referring to the provisions of sec. 18 of NDPS Act while referring to the concept of conscious possession it has been discussed that 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 provisions of sec. 35 providing for presumption reads as follows:

"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."

27. Thus, sec. 35 enables the court to raise the presumption as to the knowledge and culpable mental state from possession of illicit articles. Again, it is required to be noted at this stage that for the purpose of presumption under sec. 35 with regard to the aspect of conscious possession under sec. 18 of the NDPS Act the conduct or the act would be relevant. The fact that the appellant original accused tried to run away and escape itself was indicative of the knowledge and conscious possession.

28. Therefore, from the aforesaid discussion, the submission the appellant was not having any knowledge about the contraband article in the Tata Sumo car and he was travelling as a passenger without knowledge cannot be readily accepted.

29. One more aspect which has been much pressed is with regard to tampering of muddamal on the ground that in the panchnama what has been referred to is the cotton cloth bag and the FSL report at exh. 60 refers to a plastic box received as a sample and therefore learned advocate Shri Gondaliya tried to submit that it raises doubt about the muddamal and sealing and sampling procedure. He also referred to the testimony of the jeweller, PW-1 at exh. 13 who has turned hostile. He submitted that he has not corroborated the prosecution case and he is an independent witness. He pointedly referred to the cross-examination and submitted that he has not stated that any such procedure for sealing and sampling was carried out.

30. Though this aspect has been emphasised, a close look at the panchnama, exh. 17, would make the position clear. It has a reference to the plastic bag and it has been clearly stated that after weighing the sample and the reserve sample were placed and sealed in a plastic bag. The communication from the FSL at exh. 61 also refers to the parcel with C.R. No. II-3038/2008 with the seal of Dhanera Police Station and it is clearly stated that one cloth bag was received and while describing the muddamal it is clearly stated that the cloth bag was there on opening of which the plastic bag was there placed in a plastic box. In other

words, it refers to the fact that the muddamal placed in a cloth bag with the seal on it could not be tampered with keeping the seal intact and after it is opened there is a plastic bag in which the sample is placed and that plastic bag is again put in a plastic box. It is nobody's case that there was any tampering with the seal of muddamal. Therefore, a close look at exh. 61 and 62 would reveal that merely because there is a detailed reference to the bag of the muddamal which in turn also contain the plastic bag in which the muddamal opium was placed does not raise any doubt as regards the identity of the muddamal when the seals are intact.

31. Therefore, the submissions which have been made with emphasis on this aspect of sealing and sampling of the muddamal are misconceived and it cannot be said that there is any tampering with the muddamal or at least it raises any doubt for possible tampering of muddamal. Assuming that there is a difference in the description while referring to the plastic bag and plastic box and the ziplock bag which has been referred to in the FSL report and the panchnama, exh. 17 does not specifically state any detail would not make it a ground or justification for any doubt. It is required to be stated that it is not even the case that there was any tampering with the seal. FSL has received in the same sealed condition the cloth bag on which seal of Dhanera Police Station was applied which was opened in a sealed condition from where the muddamal article was found from the plastic bag. Again, there is no contention raised with regard to the safe custody or movement of muddamal meaning thereby it was kept with the PSO and it was sent to the FSL. It is required to be stated at this stage that mere submission raising the doubt by itself may not be sufficient and the doubt has to be "reasonable" which could be considered objectively with some material or where the doubt could be apparently said to be reasonably borne out from the material and evidence on record. Therefore, the submissions which have been made with much emphasis cannot be accepted.

32. Further, the submission made suggesting as a probable justification for presence of the accused travelling in the car also cannot be accepted as discussed hereinabove while dealing with the aspect of conscious possession. In other words, the submissions made that he was traveling for the purpose of his treatment and had proceeded to consult the doctor does not inspire any confidence as there is no material and evidence placed on record with regard to any recent treatment and whatever the reference is made is with regard to the period much earlier and there is no material or evidence that he was under constant treatment or regular treatment for which he had proceeded to consult the doctors in Gujarat. The case papers or the prescription produced at exh. 78 and 79 are of the year 2008 and there is nothing on record that he was constantly in touch with the doctor or under his regular treatment. Therefore, the submission made that the accused was proceeding towards Gujarat to consult the doctor for treatment cannot be readily accepted and it is a vague statement raised as a defence without reference to any material. As stated above, even in the Further Statement under sec. 313, it is vaguely stated without reference to

any specific details including even the name of the doctor and if he was under regular treatment he could have produced some material. Therefore, the same has not been accepted and cannot be believed.

33. In the circumstances, the impugned judgment and order does not call for any interference and the present appeal deserves to be dismissed and accordingly stands dismissed.