

IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR

Reserved on: 23.08.2022
Pronounced on:29.08.2022

Bail App No.56/2022

WAQAR AHMAD DAR ... PETITIONER(S)

Through: - Mr. Wajid Haseeb, Advocate.

Vs.

UNION TERRITORY OF J&K ...RESPONDENT(S)

Through: - Mr. Usman Gani, GA.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has invoked the jurisdiction of this Court under Section 439 of the Cr. P. C seeking bail in a case arising out of FIR No.21/2021 for offences under Section 8/20, 8/22 and 29 of the NDPS Act registered with Police Station, Yaripora.

2) As per the prosecution story, on 26.04.2021, the police personnel of Police Station, Yaripora, intercepted a private vehicle (Wagon R) bearing No.DL9CP-2664 during a police Naka at Village Kharpora. Four persons including the driver were found traveling in the said vehicle that was proceeding towards Nowbal. During checking of the vehicle, 36 unlabeled bottles with 100 ml contents in each bottle

and 06 bottles labelled as COCAS-DX of 100 ml each as well as two nylon packets, one containing charas like substance and the other containing powdered charas like substance, were recovered from the space below the back seat of the vehicle. The persons who were travelling in the vehicle were identified as Mohammad Aslam War, Mehraj-ud-din Wani, Waqar Ahmad Dar (the petitioner herein) and Bilal Ahmad Hanji. The occupants of the vehicle could not furnish any explanation with regard to possession of the aforesaid recovered items and, accordingly, the recovered articles were seized and the occupants of the car were taken into custody. The samples of the recovered items were prepared and sealed whereafter the same were sent to the FSL for chemical examination. Upon receipt of the report of the FSL, the unlabeled 36 bottles of 100 ml each were found to contain Codeine Phosphate, which is a narcotic drug. The labelled bottles were found to contain substance called Dextromethorphan hydrobromide and chlorpheniramine maleate whereas charas was detected in the two packets that were recovered from the vehicle. Thus, after investigation of the case, offences under Section 8/20, 8/22 and 29 of the NDPS Act were found established against the accused including the petitioner herein and the challan was laid before the trial court.

3) It seems that vide order dated 30.12.2012, charges for offences under Section 8/20, 8/22 and 29 of the NDPS Act were framed against

all the accused including the petitioner herein. The trial of the case is going on.

4) It appears that the petitioner had approached the trial court for grant of bail on health grounds but while dismissing the said application, the learned trial court has also observed that even on merits, the petitioner is not entitled to grant of bail.

5) I have heard learned counsel for the parties and perused the material on record including the trial court record.

6) The primary contention raised by learned counsel for the petitioner is that nothing has been recovered from the possession of the petitioner and whatever is alleged to have been recovered has been recovered from the vehicle in which the petitioner was travelling. According to the learned counsel, the petitioner has nothing to do with the recovered articles and it can, by no stretch of imagination, be stated that he was in conscious possession of the recovered items. On this ground, it is urged that even though the quantity of contraband substance recovered from the vehicle in question qualifies to be the commercial quantity, still then there are grounds to believe that the petitioner is not involved in the offence relating to possession of commercial quantity of contraband substance.

7) On the other hand, learned counsel for the respondents has argued that there is enough material on record of the challan to show that the petitioner was found to be in conscious possession of the

recovered contraband substances and because the quantity recovered falls within the category of commercial quantity, as such, rigour of Section 37 of the NDPS Act would get attracted to the case of the petitioner.

8) The petitioner has been charged for offences under Section 8/20, 8/22 and 29 of the NDPS Act. Section 20 of the NDPS Act makes the possession of cannabis punishable whereas Section 22 of the said Act makes the possession of a psychotropic substance punishable. Term “possession” appearing in various provisions of the NDPS Act has been interpreted by the Supreme Court in its various judgments. In order to understand the meaning of the said term, it would be apt to notice some of these judgments.

9) The Supreme Court has, in the case of **Mohan Lal vs. State of Rajasthan**, (2015) 6 SCC 222, interpreted the term “possession” appearing in Section 18 of the NDPS Act in the following manner:

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. In the case at hand, the appellant, we hold, had the requisite degree of control when, even if the

said narcotic substance was not within his physical control at that moment. To give an example, a person can conceal prohibited narcotic substance in a property and move out thereafter. The said person because of necessary animus would be in possession of the said substance even if he is not, at the moment, in physical control. The situation cannot be viewed differently when a person conceals and hides the prohibited narcotic substance in a public space. In the second category of cases, the person would be in possession because he has the necessary animus and the intention to retain control and dominion.

10) Again, in **Dharampal Singh v. State of Punjab**, (2010) 9 SCC 608, the Supreme Court observed that the term “conscious possession” is not capable of precise and complete logical definition of universal application in the context of all the statutes. It was held that the knowledge of possession of contraband has to be ascertained from the facts and circumstances of the case. The Court further observed that the standard of conscious possession would be different in case of public transport as opposed to a private vehicle with few persons known to one another.

11) Again, in the case of **Madan Lal vs. State of Himachal Pradesh**, (2003) 7 SCC 465, the Supreme Court has, while explaining the meaning of the term “conscious possession” observed as under:

20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in chapter IV of the Act which relates to offence 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 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 Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors. (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. The State of M.P. (AIR 1972 SC 1756) possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.*

25. *The word 'possession' means the legal right to possession (See Health v. Drown (1972) (2) All ER 561 (HL). In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See Sullivan v. Earl of Caithness (1976 (1) All ER 844.*

12) From the analysis of the foregoing legal position enunciated by the Supreme Court, it is clear that the expression “possession” used in the provisions contained in Section 20 and 22 of the NDPS Act means conscious possession and whether in a particular case, an accused can be stated to be in conscious possession of a contraband substance, would depend upon the facts and circumstance peculiar to that case.

13) In the instant case, the petitioner along with the co-accused were travelling in a private car. As per the evidence collected by the prosecution during investigation of the case, the accused persons who were proceeding together in the vehicle in question, were known to

each other. Their destination, as per the material collected by the investigating agency, was also the same. The fact that the accused persons were travelling in a private vehicle and were known to each other clearly indicates that they were in conscious possession of the contraband substance recovered from the vehicle in question. It has not been explained or shown as to how the accused were travelling together in a vehicle which was not a public vehicle. Therefore, it can safely be stated that the petitioner was found to be in conscious possession of the contraband substances.

14) Once it is shown that the petitioner and co-accused were in conscious possession of contraband substance recovered from the vehicle in question, presumption under Sections 35 and 54 of the NDPS Act would come into play. As per Section 35 of the NDPS Act, the Court has to presume existence of culpable mental state in any prosecution for an offence under the aforesaid Act. Thus, it has to be presumed that possession of contraband substance recovered from the vehicle in question was conscious in nature unless the said presumption is dislodged by the accused. Similarly, as per Section 54 of the NDPS Act, the court has to presume that the accused has committed an offence under the said Act in respect of a contraband substance for the possession of which he fails to account satisfactorily.

15) When we read the provisions contained in Section 35 and 54 of the NDPS Act together with the fact that the petitioner has been found to be in possession of the contraband substances, unless contrary is

proved by him, it has to be presumed that he has committed an offence of possession of commercial quantity of contraband substance. Thus, there is no scope for this Court to hold at this stage that there are reasonable grounds for believing that the petitioner is not involved in the alleged crime.

16) Thus, the material on record shows prima facie involvement of the petitioner in the possession of commercial quantity of contraband substance, which means that he has failed to establish the conditions necessary for grant of bail as contained in Section 37 of the NDPS Act.

17) For the foregoing reasons, I do not find any merit in this petition. The same is, accordingly, dismissed.

(SANJAYDHAR)
JUDGE

Srinagar,
29.08.2022
"Bhat Altaf, PS"

Whether the order is speaking: *Yes/No*
Whether the order is reportable: *Yes/No*