

HIGH COURT OF CHHATTISGARH, BILASPURCriminal Appeal No.501 of 2014Judgment reserved on:1.4.2022Judgment delivered on:4.5.2022

Dhansai S/o Saharam Patel, aged about 41 years, R/o Tundra, Police Staton Bilaigarh, District Raipur, at present R/o Awaspara, Seepat, District Bilaspur (CG)

---- Appellant
(In Jail)

Versus

State of Chhattisgarh Through Station House officer,
Police Station Seepat, District Bilaspur (CG)

---- Respondent

For Appellant: Mr.Shailendra Dubey, Advocate
For Respondent/State: Mr.Sudeep Verma, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal and
Hon'ble Smt. Justice Rajani Dubey

C.A.V. Judgment

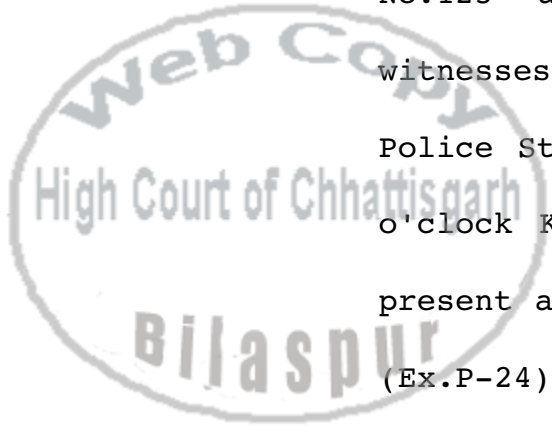
Sanjay K. Agrawal, J.

1. This criminal appeal under Section 374(2) of the CrPC is directed against the impugned judgment dated 21.2.2014 passed by the Special Judge (N.D.P.S.) Bilaspur in Special Case No.32/2011 by which the appellant has been convicted under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called as 'NDPS Act') and sentenced him undergo rigorous imprisonment for 15 years and fine of Rs.2,00,000/-, in default of payment of fine to further undergo rigorous imprisonment for 2 years.
2. Case of the prosecution, in brief, is that on 3.8.2011





the appellant was found in possession of 96.600 kg of ganja unauthorizedly amounting to Rs.4 lacks for sale and thereby committed the offence. It is further case of the prosecution that on 3.8.2011 Rajendra Singh Parihar (PW-11), Station House Officer, Police Station Seepat received secret information from informant that the appellant herein has illegally kept ganja in hut situated at Seepat Awas Mohalla near canal. On receipt of such information, Rajendra Singh Parihar entered that secret information into Rojnamacha Sanha at Serial No.125 and sent notices to call for independent witnesses for preparing mukhbir suchna panchnama of the Police Station (Ex.P-30C) and on the same day at 11.50 o'clock Kirti Kumar (PW-1) and Shiv Kumar (PW-9) were present and in their presence mukhbir suchna panchanama (Ex.P-24) was prepared and that was also entered into Rojnamacha Sanha of Police Station (Ex.P-31C) and thereafter inspector Isidor Khalko (PW-2) was directed to give secret information to the superior officer and the said officer with two sets of Exs.P-24 and P-25 proceeded towards the office of the Sub-Divisional Officer (Police), Bilaspur and later on, delivered the written information to the reader of SDOP, Bilaspur and received acknowledgement of the same. All these proceedings were also entered into Rojnamacha Sanha of the Police Station (Ex.P-32C). It is also the case of the prosecution that investigating officer Rajendra Singh Parihar (PW-11) proceeded towards spot along with





staff members and witnesses, he informed the accused/appellant herein about his right to be searched by Gazetted Officer under Section 50 of the NDPS Act vide Ex.P-5 and consent of the accused was also recorded and thereafter hut was searched and psychotropic substance (later identified as Ganja) was recovered from hut, which were kept in 5 bags and one electronic weighing scale was also found. Search panchnama was prepared vide Ex.P-10 and recovery panchnama was also prepared vide Ex.P-11. After physical verification, it was found that the recovered substance was ganja. Identification panchnama of the substance i.e. ganja was prepared vide Ex.P-12. Following the provisions of law, ganja was weighed and weighed panchnama was prepared vide Ex.P-16 and total 96.600 kg. of ganja was recovered. Prior to that, verification panchnama of scale and weight used for the purpose of weighing the recovered ganja was also prepared vide Ex.P-15. Samras panchnama (Ex.P-13) by taking 2-2 samples of 50-50 grams from each bag of the seized ganja was prepared separately. On the same date at the same place, recovered and seized ganja along with other seized articles have been sealed by using the seal bearing reflection of 'Police Station Seepat' in English and sample seal panchnama was also drawn as Ex.P-17. Seizure memo of seized article has been prepared vide Ex.P-20 and thereafter accused Dhansai was arrested vide Ex.P-23. Thereafter statements of

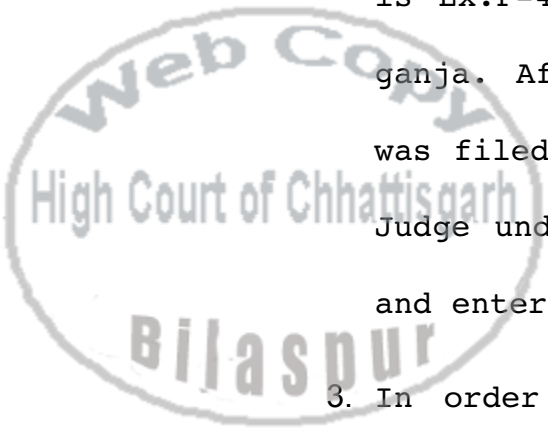




independent witnesses Kirti Kumar (PW-1) and Shiv Kumar (PW-29) were recorded as Exs.P-1 and P-29 and FIR was registered against the appellant herein vide Ex.P-36. Seized ganja and its sample were kept in malkhana of Police Station Seepat and entry has been made in this regard into japt mal register of Police Station Seepat vide Ex.P-48. Action taken report was prepared vide Ex.P-38 and sent to the Superintendent of Police, Bilaspur. Samples of seized ganja were sent to Forensic Science Laboratory vide Ex.P-42 and receipt of the same is Ex.P-44, in which seized substance was found to be ganja. After completion of investigation, charge-sheet was filed against the accused person before the Special Judge under NDPS Act. The appellants abjured the guilt and entered into defence.

3. In order to bring home the offence, the prosecution examined as many as 11 witnesses and exhibited 48 documents Exs.P-1 to P-48 in support of case of the prosecution. The appellant has examined Baharan Lal (DW-1), Sunil Kumar Bharti (DW-2) and Neera Laxmi Patel (DW-3) in his defence and exhibited documents 7 documents Exs.D-1 to 7 in his support.

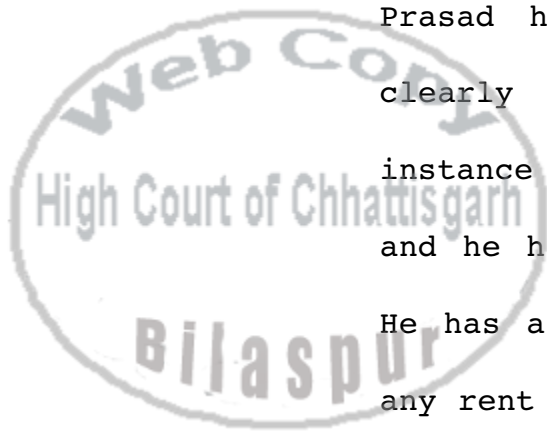
4. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment dated 21.2.2014, convicted the appellant for offence under Section 20(b)(ii)(C) of the NDPS Act and sentenced him as mentioned hereinabove in opening





paragraph of this judgment, against which, this criminal appeal has been preferred.

5. Mr. Shailendra Dubey, learned counsel appearing for the appellant, would submit that the prosecution has failed to prove the essential ingredients of the offence that the appellant was in possession of hut from where ganja is said to have been recovered. He would further submit that the appellant had not taken hut on rent and hut has been constructed in Government land which is said to have been purchased by Sukhdeo Prasad. Sukhdeo Prasad has been examined as PW-5, in which he has clearly stated in his cross-examination that at the instance of police has made statement vide Ex.P-27 and he has not supported the case of the prosecution. He has also stated that the appellant has never given any rent against that hut and Ex.P-27 has been prepared at the instance of police official and as such, it has duly been established that hut from where ganja was seized was never in possession of the appellant herein. However, prosecution witnesses patwari S.R.Jayaswal (PW-4), Sukhdeo Prasad (PW-5) and Rajendra Kumar Parihar (PW-11) have clearly stated that hut from where alleged ganja was recovered was never in possession of the appellant herein and he has falsely been implicated. He would further submit that vide Ex.P-26 the hut in question was found in dilapidated condition, as such, the prosecution has failed to prove the offence beyond reasonable doubt. Even otherwise,





mandatory provisions contained in Sections 42, 52A and 55 of the NDPS Act have not been complied with by the prosecution, as such, the impugned judgment deserves to be set aside and the appellant be acquitted of all the charges.

6. On the other hand, Mr. Sudeep Verma, learned Deputy Government Advocate appearing for the respondent/State, would support the impugned judgment and submit that the prosecution has proved its case beyond reasonable doubt and possession of the appellant over hut from where ganja has been seized is also proved and as such, the appeal deserves to be dismissed.

7. We have heard the learned appearing for the parties, considered their rival submissions made herein-above and also went through the records with utmost circumspection.

8. Section 20 of the NDPS Act provides that whoever in contravention of any provisions of this Act or any rule made thereunder possesses cannabis shall be punished in accordance with the said provisions. Section 20(b) uses the word "possesses".

9. 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. Weigel¹. 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 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 law means:-

"Term 'possess', under narcotic drug laws, means actual control, care and management of the drug. Collini v. State². 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. Hornaday³."

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. Craig⁴; as well as joint or exclusive, Garvey v. State⁵. The defendants must have had dominion and

1 219 Kan 616 : 549 P 2d 568 at p. 569 (1976)
 2 487 SW 2d 132 at p. 135 (Tex Cr App 1972)
 3 105 Wash 2d 120 : 713 P 2d 71 at p. 74 (Wash 1986)
 4 522 F 2d 29 at p. 31 (6th Cir 1975)
 5 176 Ga App 268 : 335 SE 2d 640 at p. 647 (1985)



control over the contraband with knowledge of its presence and character. *United States v. Morando-Alvarez*⁶.

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*⁷.

Possession as used in indictment charging possession of stolen mail may mean actual possession or constructive possession. *United States v. Ellison*⁸.

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*⁹."

10. 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 (*R. v. Buswell*¹⁰).

11.

12. The Supreme Court in the matter of **Mohan Lal v. State of Rajasthan**¹¹ with reference to Section 18 of the NDPS Act, which is punishable for contravention in relation to opium poppy and opium, considered the meaning of word "possesses" and relying upon its earlier decisions held as under:-

"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

6 520 F 2d 882 at p. 884 (9th Cir 1975)
7 48 Ala App 523 : 266 So 2d 328 at p. 333 (1972)
8 469 F 2d 413 at p. 415 (9th Cir 1972)
9 12 Or App 496 : 507 P 2d 837 at p. 837 (1973)
10 (1972) 1 WLR 64 : (1972) 1 All ER 75 (CA)
11 (2015) 6 SCC 222



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.

22. 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. As the factual matrix would exposit, the appellant-accused was in possession of the prohibited or contraband substance which was an offence when the NDPS Act came into force. Hence, he remained in possession of the prohibited substance and as such offence under Section 18 of the NDPS Act is made out. The possessory right would continue unless there is something to show that he had been divested of it. On the contrary, as we find, he led to discovery of the substance which was within his special knowledge, and, therefore, there can be no scintilla of doubt that he was in possession of the contraband article when the NDPS Act came into force. To clarify the situation, we may give an example. A person had stored 100 bags of opium prior to the NDPS Act coming into force and after coming into force, the recovery of the possessed article takes place. Certainly, on the date of recovery, he is in possession of the contraband article and possession itself is an offence. In such a situation, the appellant-accused cannot take





the plea that he had committed an offence under Section 9 of the Opium Act and not under Section 18 of the NDPS Act."

13. The principle of law laid down in Mohan Lal (supra) has further been followed by the Supreme Court in the matter of Union of India through Narcotics Control Bureau, Lucknow v. Md. Nawaz Khan¹² and it has been held as under:-

"26. What amounts to "conscious possession" was also considered in Dharampal Singh v. State of Punjab¹³, where it was held that the knowledge of possession of contraband has to be gleaned from the facts and circumstances of a case. The standard of conscious possession would be different in case of a public transport vehicle with several persons as opposed to a private vehicle with a few persons known to one another. In Mohan Lal v. State of Rajasthan (supra), this Court also observed that the term "possession" could mean physical possession with animus; custody over the prohibited substances with animus; exercise of dominion and control as a result of concealment; or personal knowledge as to the existence of the contraband and the intention based on this knowledge."

14. After having considered the meaning of "possesses", it would be appropriate to notice the evidence available on record to find out whether the learned Special Judge was justified in holding that the accused was found in possession of 96.600 kg. of ganja from his house. It is the case of the prosecution that the appellant had kept the aforesaid ganja in the premises in question of which he was tenant.

15. In order to prove the said fact that the appellant was tenant, rent certificate (Ex.P-27) has been produced,

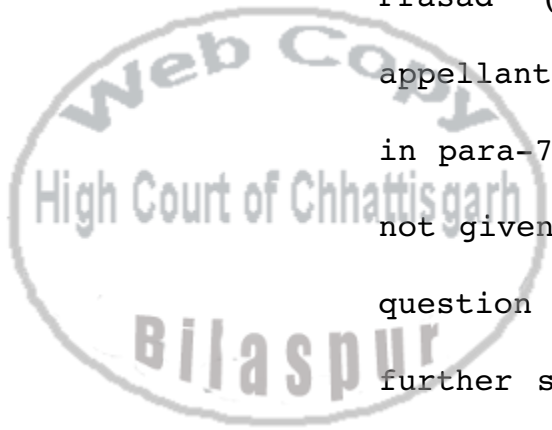
12 (2021) 10 SCC 100

13 (2010) 9 SCC 608





which is said to have been proved by Sukhdev Prasad. Sukhdev Prasad has been examined as PW-5. Sukhdev Prasad has stated in his statement before the Court that hut in question was constructed by his father, which remained unoccupied for 5-6 months and thereafter it was given on rent of Rs.300/- to Dhansai / appellant herein. He has marked rent certificate as Ex.P-27, but in para-4 of his cross-examination, he has stated that in Ex.P-27 he has signed at the instance of police personnels and he had signed in blank paper. Sukhdev Prasad (PW-5) has also refused to identify the appellant herein in para-4 of his statement. Similarly, in para-7, he has clearly stated that the appellant has not given any rent to him as tenant against the hut in question from where the alleged ganja was seized and further stated that the hut in question is dilapidated condition having no doors and situated in one kilometer from his village. He has also accepted the suggestion that the hut was lying abandoned and any person can come and keep his luggage in the said premises/hut. As such, he has neither supported the case of the prosecution that any point of time he had inducted the appellant as tenant nor the appellant at any point of time had given rent of the said house to him and further that the said accommodation from where ganja was seized was lying abandoned. Furthermore, Rajendra Singh Parihar (PW-11), who is investigating officer, in para-26 has stated that when he reached to the spot the





appellant was standing outside the hut and further stated in para-27 that the hut in question was in lonely place and he was informed by the villagers that for a fairly long time it was lying vacant and in dilapidated condition and it was closed only with wooden plank.

16. From the statements of Sukhdev Prasad (PW-5) and investigating officer Rajendra Singh Parihar (PW-11), two facts are established that firstly, the subject hut was constructed in Government land and hut was constructed by Manohar Prasad, father of Sukhdev Prasad (PW-5) and the appellant was not tenant of the premises/hut in question from where ganja was seized and secondly, it was secluded place and was lying vacant for a fairly long time having no doors and it was open for any person to put any objectionable material on the said premises. It was not in actual/conscious possession of the appellant.

17. The Supreme Court in the matter of Ram Rattan v. State of Punjab¹⁴ with reference to Section 9(a) of the Opium Act, 1878 has held that conscious possession of opium with the accused has to be proved and furthermore that the accused was tenant has also to be established. While failure to do so, their Lordships of the Supreme Court set aside the conviction and acquitted the appellant therein. It was observed as under:-

"2. A raid was conducted on the premises



bearing No. F 16, Sarafa Nagar, Ludhiana. The prosecution case is that six packets containing 48½ kilograms of opium were recovered from the store-room of the house. The recovery made in the raid is not challenged. What was argued on behalf of the appellant and reiterated before us was that the prosecution has not proved that the appellant was in conscious possession of the opium recovered from the house. The raid was conducted when the appellant was not there in the house. The only person present than was Janardhan Shankar, PW 1. According to his evidence, the appellant had gone to Vaishno Devi five or six days before the raid and he was not present in the house when the recovery was made. According to his evidence, the appellant was the tenant of the house. But other witnesses did not support him on this point. According to the evidence of the landlord PW 6 the appellant was not the tenant. PW 6 was allowed to be cross examined by the State counsel, as, apparently there was some contradiction in his testimony before the Court and his statement before the police. Even so his evidence in Court, as it is, does not support the prosecution allegation that the appellant was a tenant of the house. On the other hand, according to PW 6, the house at the time of its construction was let out by his servant Som Nath to a tenant. Som Nath was examined as DW 2. According to his evidence, the house was let out to one Bawa Ram. This Bawa Ram is the uncle of the appellant. There are some materials in the records of this case to cause suspicion against the appellant that probably he was aware of the nefarious activities which were going on in this house by storing such huge quantity of opium. But then on mere suspicion no conviction could be maintained. There is nothing to indicate that the quantity of opium recovered from the house was in the conscious possession of the appellant or that even the house was in his possession as a tenant. As we have already stated, the opium was recovered when the appellant was not present even in the vicinity of the house muchless in the house itself. We are, therefore, of the opinion that the High Court committed an error of law in maintaining the conviction of the appellant. He deserves to be acquitted. We, accordingly, allow the appeal, set aside his conviction and sentence. He is discharged from the bail bonds. Fine if paid may be refunded."





18. Reverting to the facts of the present case, in light of principle of law laid down by the Supreme Court in Mohan Lal (supra) and Ram Rattan (supra), it is quite vivid that though the case of the prosecution is that the appellant was tenant of the hut in question and Sukhdev Prasad (owner/landlord) has been examined by the prosecution as prosecution witness (PW-5), but he has clearly stated that he / his father has constructed hut on Government land after encroaching the said land and further said that Dhansai / appellant herein has never paid any rent to him against the hut in question and he has further failed to identify the appellant herein and the prosecution has failed to prove rent certificate (Ex.P-27) as the said certificate was signed by Sukhdev Prasad (PW-5) at the instance of police personnels on their pressure that too on blank paper. As such, the appellant was tenant of the hut in question by the prosecution from where ganja was seized is not established by the prosecution. Furthermore, the fact that the hut in question from where ganja was seized was located outside the village Seepat and was lying abandoned and vacant for a fairly long time as stated by Sukhdev Prasad (PW-5) and investigating officer Rajendra Singh Parihar (PW-11) and it was having no doors and only it was closed by wooden plank. As such, it cannot be held that ganja seized was in conscious possession of the appellant herein.

19. Accordingly, we are of the considered opinion that





there is nothing to indicate that quantity of ganja recovered from the house/hut in question was in conscious possession of the appellant herein or the house was in possession of the appellant as a tenant. As such, the prosecution has failed to establish that the appellant was tenant of the premises/hut from where ganja was recovered and further failed to prove that ganja recovered was in conscious possession of the appellant herein and the accused/appellant is entitled for acquittal on the principle of benefit of doubt.

20. For the foregoing reasons, the criminal appeal is allowed and the impugned judgment dated 21.2.2014 passed by the Special Judge (NDPS Act), Bilaspur in Special Case No.32/2011 is set-aside. The appellant is acquitted of the charge under Section 20(b)(2)(C) of the NDPS Act. He is in jail. He be released forthwith, if not required in any other case.

Sd/-

(Sanjay K. Agrawal)
Judge

Sd/-

(Rajani Dubey)
Judge

B/-



HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.501 of 2014

Appellant

Dhansai

Versus

Respondent

State of Chhattisgarh

(Head-note)

(English)

For conviction under Section Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985, the accused must be in conscious possession of psychotropic substance (ganja).

(हिन्दी)

स्वापक औषधि और मनः प्रभावी पदार्थ अधिनियम, 1985 की धारा 20 (ख) (ii) (इ) के तहत दोषसिद्धि हेतु मनः प्रभावी पदार्थ (गांजा) आरोपी के सचेत कब्जे में होना आवश्यक है।

