Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1393 OF 2010

Mohan Lal ... Appellant

Versus

State of Rajasthan ...Respondent

J U D G M E N T

Dipak Misra, J.

Calling in question the legal pregnability of the judgment and order dated 16.7.09 passed by the learned Single Judge of the High Court of Judicature of Rajasthan at Jodhpur whereby the learned Single Judge has affirmed the conviction and sentence recorded by the learned Additional Sessions Judge, Jodhpur in Sessions Case No. 9 of 1986 convicting the appellant under Section 18 of the Narcotic Drugs and Psychotropic Substances Act 1985 (for short, 'the NDPS Act') and sentencing him to suffer rigorous

imprisonment for 10 years and pay a fine of Rs. 1 lakh, in default, to suffer one year simple imprisonment and also for offence punishable under Sections 457 and 380 of the Indian Penal Code (IPC) and imposing separate sentences for the said offences with a stipulation that all the sentences would run concurrently.

2. The relevant facts giving rise to the prosecution are that on 13.11.1985, at 9.30 a.m., Bhanwarlal, PW-8, posted in the Court of the Magistrate, Osian, lodged an FIR, exhibit P-3, at Police Station, Osian informing that when he went to the Court to meet the night chowkidar, he was absent and it was found by him that locks of the main gate of the malkhana were broken and the goods were scattered. An information was given at the concerned police station, but as the details of the stolen articles could only be provided by the Criminal Clerk after he came from the Diwali holidays, an FIR was lodged for an offence under Section 457 IPC. After the courts reopened, the Presiding Officer, Ummed Singh, PW-6, on being informed, visited the premises, got malkhana articles verified and got an inventory prepared by Narain Singh, Criminal Clerk, in-charge of Malkhana, PW-4, on

16.11.1985, and it was found that 10 kgs. 420 gms opium and some other articles were stolen from several packets. In course of investigation, the accused Mohan Lal was arrested for the offence punishable under Sections 457 and 380 IPC. While in custody, it was informed by him that he had broke open the lock of the malkhana of the Court and stolen the opium and kept it in a white bag and concealed it in a pit dug by him underneath a small bridge situate between Gupal Sariya and Madiyai. His disclosure statement has been brought on record as Exhibit P-14A. The accused-appellant led to discovery in presence of independent witnesses. The bag and cloth were taken out by the accused digging the pit and the bag contained 10 kgs and 200 gms of opium as is reflected from seizure memo, Exhibit P-6. 200 gms of opium was packed separately, sealed and sent for FSL examination. The remaining substance and other items were separately sealed. After receiving the FSL report and completing the investigation, chargesheet under Section 18 of the NDPS act and Sections 457 and 380 of the IPC was filed before the appropriate Court and eventually the matter travelled to the Court of Session. The accused pleaded not

guilty and claimed to be tried.

3. The prosecution, in order to substantiate the charges, examined 14 witnesses. The main witnesses are Ummed Singh, PW-6, the concerned, Magistrate, Narain Singh, PW-4, the Criminal Clerk, in-charge of Malkhana, ASI, Achlu Ram, PW-13, ASI Hanuman Singh, PW-3, Koja Ram, PW-10, Gulab Singh, PW-14, and Su-Inspector-cum-SHO, Bheem Singh, PW-12 are witnesses to the recovery. The FSL report was exhibited as Exhibit P-14. The defence chose not to examine any witness.

4. The learned trial Judge, on the basis of the evidence brought on record, found the accused guilty of the charges and accordingly convicted him, as has been stated hereinbefore. In appeal, it was contended that incident, as per the prosecution, had occurred between 12th/13th November, 1985 on which date the NDPS Act was not in force, for it came into force only on 14.11.1985 and hence, the offence was punishable under the Opium Act, 1878, (for short 'the Opium Act'); that the alleged recovery was on 16.1.1985 while the appellant was in custody in connection with FIR No. 95 of 1986 and not in custody in connection

with this case i.e. FIR No. 96 of 1985; that recovery of disclosure at the instance of the accused-appellant had not been proven and that he was never in possession of the said articles, and that there has been total non-compliance of Section 42 and 57 of the NDPS Act and, therefore, the conviction was vitiated in law. The High Court repelled all the submissions and affirmed the conviction and sentence as recorded by the learned trial Judge.

5. We have heard Ms. Aishwarya Bhati, learned counsel for the appellant and Mr. Shiv Mangal Sharma, learned Additional Advocate General for the State of Rajasthan.

6. First, we shall deal with the issue of possession. The principal submission of Ms. Bhati, learned counsel for the appellant is that the appellant cannot be convicted and punished under the NDPS Act when admittedly the theft of contraband substance was prior to coming into force of the NDPS Act, for the FIR was lodged prior to coming into force of the NDPS Act. Learned counsel would submit that offence of possession of contraband substance also commenced prior to coming into force of NDPS Act as the FIR would clearly reveal that the theft was committed on the

intervening night of 12th/13th November, 1985, whereas the NDPS Act came into force on 14.11.1985. Learned counsel would submit that the recovery of opium was done on 16.1.1986 pursuant to the disclosure statement made by the accused-appellant who was already under arrest in a different matter and under such circumstances, the appellant could not have been convicted under Section 18 of the NDPS Act, but should have been convicted under Section 9 of the Opium Act. Elaborating the said submission, the learned counsel has contended that the offence of possession of contraband substance was punishable under both the laws but there is a huge difference in the sentence prescribed. Under Section 9 of the Opium Act, the sentence was extendable to one year whereas under Section 18 of the NDPS Act, the prescribed punishment is minimum 10 years apart from imposition of huge fine. Learned counsel would submit that it is the settled principle of criminal jurisprudence that the accused cannot be subject to an offence under a new Act which was not in force on the date of theft and the possession of contraband articles, as a matter of fact, had taken place prior to coming into force of

the NDPS Act. She has commended us to the decision in ***Harjit Singh v. State of Punjab***[1]. Learned counsel would also contend that there can be rationalization of structure of punishment, which is an ameliorative provision, for it reduces the punishment and the same can be made applicable to category of accused persons. In that regard, she has drawn inspiration from ***Rattan Lal v. State of Punjab***[2], ***T. Barai v. Henry Ah Hoe***[3], ***Basheer v. State of Kerala***[4] and ***Pratap Singh v. State of Jharkhand***[5]. Pyramiding the said facet, it is urged by Ms. Bhati that in the instant case, the sentence being higher for the offence of possession under the NDPS Act, such a provision cannot be made retrospectively applicable to him. To appreciate the said submission, it is appropriate to refer to Section 9 of the Opium Act. It reads as follows:-

> "9. Penalty for illegal cultivation poppy, etc.
>
> Any person who, in contravention of this Act, or of rules made and notified under section 5 or Section 8,-
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> (a) possesses opium, or

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1 (2011) 4 SCC 441

2 AIR 1965 SC 444

3 (1983) 1 SCC 177

4 (2004) 3 SCC 609

5 (2005) 3 SCC 551

(b) transports opium, or
(c) imports or exports opium, or
(d) sells opium, or
(e) omits to warehouse opium, or removes or does any act in respect of warehoused opium,

And any person who otherwise contravenes any such rule, shall, on conviction before a Magistrate, be punished for each such offence with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both;

And, where a fine is imposed, the convicting Magistrate shall direct the offender to be imprisoned in default of payment of the fine for a term which may extend to six months, and such imprisonment shall be in excess of any other imprisonment to which he may have been sentenced."

7. On a perusal of the aforesaid provision, the possession of opium is an offence and the sentence is imprisonment for a term which may extend to one year or with fine which may extend to Rs.1,000/- or both. Section 18 of the NDPS Act provides for punishment for contravention in relation to opium poppy and opium. The provision as it stood at the relevant time read as follows:

"**18. Punishment for contravention in relation to opium poppy and opium.**- Whoever, in contravention of any provision of this Act, or any rule or order made or condition of licence granted thereunder cultivates the opium poppy or produces, manufactures, possesses,

> sells, purchases, transports, imports inter-State, exports inter-State or uses opium shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty-years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees :
>
> Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

8. 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.

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:

> "Having control over a thing with the intent to have and to exercise such control. *Oswald v. Weigel*[6]. 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

[6] 219 Kan. 616, 549 p.2d 568, 569

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. 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. *State v. Hornaday*[8]."

And again

"Possession as necessary for conviction of offense of possession of controlled substances with intent to distribute may be constructive as well as actual, *U.S. v. Craig*[9]; as well as joint or exclusive, *Garvey v. State*[10]. The defendants must have had dominion and control over the contraband with knowledge of its presence and character. *U.S, v. Morando-Alvarez*[11].

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*[12].

Possession as used in indictment charging possession of stolen mail may mean actual possession or constructive possession. *U.S. v.*

[7] Tex. Cr. App. 487 S.W. 2d 132, 135
[8] 105 Wash. 2d 120, 713 p.2d 71, 74
[9] C.A. Tenn, 522 F.2d 29, 31
[10] 176 Ga. App, 268, 335 S.E.2d 640, 647
[11] C.A. Ariz, 520 F.2d 882, 884
[12] 48 Ala.App. 523, 266 So.2d 328, 333

Ellison[13].

> To constitute "possession" of a concealable weapon under statue 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*[14]."

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*[15]).

11. Dr. Harris, in his essay titled "The Concept of Possession in English Law[16]" 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

[13] C.A. Cal., 469 F.2d 413, 415
[14] 12 Or.APP. 496 507 P.2d 837, 837
[15] [1972] 1 W.L.R. 64
[16] Published in "*Oxford Essays on Jurisprudence*" (Edited by A G Guest, First Series, Clarendon Press, Oxford.

a thing, (b) knowledge of the person claiming possessory rights over a thing, about the attributes and qualities of the thing, (c) the persons' 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. 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, the 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.

12. 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.
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> **Explanation.** – In this section "culpable mental state" includes intention, motive, knowledge, of a fact and belief in, or reason to believe, a fact.
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> (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."

On a perusal of the aforesaid provision, it is plain as day that it includes knowledge of a fact. That apart, Section 35 raises a presumption as to knowledge and culpable mental state from the possession of illicit articles. The

expression "possess or possessed" is often used in connection with statutory offences of being in possession of prohibited drugs and contraband substances. Conscious or mental state of possession is necessary and that is the reason for enacting Section 35 of the NDPS Act.

13. In ***Noor Aga v. State of Punjab and Anr.***[17], the Court noted Section 35 of the NDPS Act which provides for presumption of culpable mental state and further noted that it also provides that the accused may prove that he had no such mental state with respect to the act charged as an offence under the prosecution. The Court also referred to Section 54 of the NDPS Act which places the burden to prove on the accused as regards possession of the contraband articles on account of the same satisfactorily. Dealing with the constitutional validity of Section 35 and 54 of the NDPS Act, the Court ruled thus:-

> "The provisions of Section 35 of the Act as also Section 54 thereof, in view of the decisions of this Court, therefore, cannot be said to be ex facie unconstitutional. We would, however, keeping in view the principles noticed hereinbefore, examine the effect thereof vis-à-vis the question as to whether the prosecution has been able to discharge its burden hereinafter."

[17] (2008) 16 SCC 417

And thereafter proceeded to state that:-

> "58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.
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> 59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt."

14. In ***Bhola Singh v. State of Punjab***[18], the Court, after referring to the pronouncement in ***Noor Aga*** (supra),

[18] (2011) 11 SCC 653

concurred with the observation that only after the prosecution has discharged the initial burden to prove the foundational facts, then only Section 35 would come into play. While dislodging the conviction, the Court stated:-

> " .... it is apparent that the initial burden to prove that the appellant had the knowledge that the vehicle he owned was being used for transporting narcotics still lay on the prosecution, as would be clear from the word "knowingly", and it was only after the evidence proved beyond reasonable doubt that he had the knowledge would the presumption under Section 35 arise. Section 35 also presupposes that the culpable mental state of an accused has to be proved as a fact beyond . reasonable doubt and not merely when its existence is established by a preponderance of probabilities. We are of the opinion that in the absence of any evidence with regard to the mental state of the appellant no presumption under Section 35 can be drawn. The only evidence which the prosecution seeks to rely on is the appellant's conduct in giving his residential address in Rajasthan although he was a resident of Fatehabad in Haryana while registering the offending truck cannot by any stretch of imagination fasten him with the knowledge of its misuse by the driver and others."

15. Having noted the approach in the aforesaid two cases, we may take note of the decision in ***Dharampal Singh v. State of Punja***[19], when the Court was referring to the expression "possession" in the context of Section 18 of the

[19] (2010) 9 SCC 608

NDPS Act. In the said case opium was found in the dicky of the car when the appellant was driving himself and the contention was canvassed that the said act would not establish conscious possession. In support of the said submission, reliance was placed on ***Avtar Singh v. State of Punjab***[20] and ***Sorabkhan Gandhkhan Pathan v. State of Gujarat***[21]. The Court, repelling the argument, opined thus:-

> "12. We do not find any substance in this submission of the learned counsel. The appellant Dharampal Singh was found driving the car whereas appellant Major Singh was travelling with him and from the dicky of the car 65 kg of opium was recovered. The vehicle driven by the appellant Dharampal Singh and occupied by the appellant Major Singh is not a public transport vehicle. It is trite that to bring the offence within the mischief of Section 18 of the Act possession has to be conscious possession. The initial burden of proof of possession lies on the prosecution and once it is discharged legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence. Offences under the Act being more serious in nature higher degree of proof is required to convict an accused.

[20] (2002) 7 SCC 419
[21] (2004) 13 SCC 608

13. It needs no emphasis that the expression "possession" is not capable of precise and completely logical definition of universal application in the context of all the statutes. "Possession" is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18 of the Act once possession is established the accused, who claims that it was not a conscious possession has to establish it because it is within his special knowledge.

xxx xxx xxx xxx

15. From a plain reading of the aforesaid it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the appellants have not been able to satisfactorily account for the possession of opium.

16. Once possession is established the court can presume that the accused had culpable mental state and have committed the offence. In somewhat similar facts this Court had the occasion to consider this question in *Madan Lal* v. *State of H.P.*[22], wherein it has been held as follows: (SCC p. 472, paras 26-27)

> *"26*. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is

[22] (2003) 7 SCC 465

> within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.
>
> *27*. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act.""

16. 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. As the factual matrix would exposit, the accused-appellant 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 accused-appellant 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.

17. After dealing with the concept of possession, we think it apt to address the issue raised by the learned counsel for the appellant that he could have convicted and sentenced under the Opium Act, as that was the law in force at the time of commission of an offence and if he is convicted under Section 18 of the NDPS Act, it would tantamount to retrospective operation of law imposing penalty which is prohibited under Article 20(1) of the Constitution of India.

Article 20(1) gets attracted only when any penal law penalises with retrospective effect i.e. when an act was not an offence when it was committed and additionally the persons cannot be subjected to penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence. The Article prohibits application of ex post facto law. In ***Rao Shiv Bahadur Singh and Anr. v. State of Vindhya Pradesh***[23], while dealing with the import under Article 20(1) of the Constitution of India, the Court stated what has been prohibited under the said Article is the conviction and sentence in a criminal proceeding under ex post facto law and not the trial thereof. The Constitution Bench has held that:-

> "…. what is prohibited under Article 20 is only conviction or sentence under an 'ex post facto' law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission of the offence or by a Court different from that which had competence at the time cannot 'ipso facto' be held to be unconstitutional. A person accused of the commission of a particular Court or by a particular procedure, except in so far as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved."

[23] AIR 1953 SC 394

In the instant case, Article 20(1) would have no application. The actus of possession is not punishable with retrospective affect. No offence is created under Section 18 of the NDPS Act with retrospective effect. What is punishable is possession of the prohibited article on or after a particular date when the statute was enacted, creating the offence or enhancing the punishment. Therefore, if a person is in possession of the banned substance on the date when the NDPS Act was enforced, he would commit the offence, for on the said date he would have both the 'corpus' and 'animus' necessary in law.

18. We would be failing in our duty, if we do not analyse the decision in ***Harjit Singh*** (supra). In the said case the Court was dealing with the Notification dated 18.11.2009 that has replaced the part of the Notification dated 19.10.2001. Dealing with the said aspect, the Court held:-

> "13. Notification dated 18-11-2009 has replaced the part of the Notification dated 19-10-2001 and reads as under:

> "In the Table at the end after Note 3, the following Note shall be inserted, namely:
>
> (4) The quantities shown in Column 5 and Column 6 of the Table relating to the respective drugs shown in Column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."

14. Thus, it is evident that under the aforesaid notification, the whole quantity of material recovered in the form of mixture is to be considered for the purpose of imposition of punishment. However, the submission is not acceptable as it is a settled legal proposition that a penal provision providing for enhancing the sentence does not operate retrospectively. This amendment, in fact, provides for a procedure which may enhance the sentence. Thus, its application would be violative of restrictions imposed by Article 20 of the Constitution of India. We are of the view that the said Notification dated 18-11-2009 cannot be applied retrospectively and therefore, has no application so far as the instant case is concerned."

The present fact situation is absolutely different and, therefore, the said decision has no applicability to the case at hand.

19. Learned counsel for the State has contended that the offence in question is a continuing offence, for the offence is basically a possession of the contraband articles. He has commended us to the authority in ***State of Bihar v. Deokaran Nenshi & Anr***.[24], wherein it has been held that:-

> **"**A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and reoccurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

20. Mr. Shiv Mangal Sharma, learned AAG for the State has also drawn inspiration from ***Udai Shankar Awasthi v. State of Uttar Pradesh and Anr***.[25] In the said case, while dealing with the concept of continuing offence, after

[24] (1972) 2 SCC 890
[25] (2013) 2 SCC 435

referring to Section 472 of Criminal Procedure Code, 1973, (CrPC) the Court has stated that the expression "continuing offence" has not been defined in CrPC because it is one of those expressions which does not have a fixed connotation and, therefore, the formula of universal application cannot be formulated in this respect. The court referred to ***Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan***[26], ***Gokak Patel Volkart Ltd. v. Dundayya Gurushiddaiah Hiremath***[27] and eventually held thus:

> "Thus, in view of the above, the law on the issue can be summarised to the effect that, in the case of a continuing offence, the ingredients of the offence continue i.e. endure even after the period of consummation, whereas in an instantaneous offence, the offence takes place once and for all i.e. when the same actually takes place. In such cases, there is no continuing offence, even though the damage resulting from the injury may itself continue."

21. In this context, it would be fruitful to refer to a three-Judge Bench decision in ***Maya Rani Punj v. Commissioner of Income Tax, Delhi***[28]. In the said case, the Court approved what has been said by the High Court of Bombay

[26] AIR 1959 SC 798
[27] (1991) 2 SCC 141
[28] (1986) 1 SCC 445

in ***State v. A.H. Bhiwandhiwalia***[29]**.** For the sake of completeness, we reproduce the relevant paragraph:-

> "In *State* v. *A.H. Bhiwandiwalla* (a decision referred to in CWT v. *Suresh Seth*[30]), Gajendragadkar, J. (as he then was), after quoting the observations of Beaumount, C.J. in an earlier Full Bench decision of that Court observed:
>
> > "Even so, this expression has acquired a well-recognised meaning in criminal law. If an act committed by an accused person constitutes an offence and if that act continues from day to day, then from day to day a fresh offence is committed by the accused so long as the act continues. Normally and in the ordinary course an offence is committed only once. But we may have offences which can be committed from day to day and it is offences falling in this latter category that are described as continuing offences.""

22. We have dwelled upon the said submission, as the learned counsel for the State has seriously addressed that it is a continuing offence. We have already opined that on the date the NDPS Act came into force, the accused-appellant was still in possession of the contraband article. Thus, it was possession in continuum and hence, the principle with regard to continuing offence gets attracted.

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[29] AIR 1955 Bom 161
[30] (1981) 2 SCC 790

23. It is submitted by Ms. Aishwarya Bhati, learned counsel for the appellant that there has been non-compliance of Section 42 of the NDPS Act and hence, the conviction is vitiated. It is urged by her that the Investigating Officer has not reduced the information to writing and has also not led any evidence of having made a full report to his immediate official superior. The High Court has taken note of the fact that information given to Bheem Singh, PW-12, and recovery was made by him who was the Sub-Inspector and SHO at the police station. That apart, in this context, we may refer with profit to the Constitution Bench decision in ***Karnail Singh v. State of Haryana***[31], wherein the issue emerged for consideration is whether Section 42 of the NDPS Act is mandatory and failure to take down the information in writing and forthwith sending a report to his immediate officer superior would cause prejudice to the accused. The Court was required to reconcile the decisions in ***Abdul Rashid Ibrahim Mansuri v. State of Gujarat***[32] and ***Sajan Abraham v. State of Kerala***[33]. The Constitution Bench

[31] (2009) 8 SCC 539
[32] (2000) 2 SCC 513
[33] (2001) 6 SCC 692

explaining the position opined that ***Abdul Rashid*** (supra) did not require about literal compliance with the requirements of Section 42(1) and 42(2) nor did ***Sajan Abraham*** (supra) hold that requirement of Section 42(1) and 42(2) need not be fulfilled at all. The larger Bench summarized the effect of two decisions. The summation is reproduced below:-

> "(*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."

24. In ***Rajinder Singh v. State of Haryana***[34], placing

[34] (2011) 8 SCC 130

reliance on the Constitution Bench, it has been opined that total non-compliance with the provisions of sub-sections (1) and (2) of Section 42 of the Act is impermissible but delayed compliance with satisfactory explanation for the delay can, however, be countenanced.

25. In the present case, the High Court has noted that the information was given to the competent authority. That apart, the High Court has further opined that in the case at hand Section 43 applies. Section 43 of the NDPS Act contemplates seizure made in the public place. There is a distinction between Section 42 and Section 43 of the NDPS Act. If a search is made in a public place, the officer taking the search is not required to comply with sub Sections (1) and (2) of Section 42 of the NDPS Act. As has been stated earlier, the seizure has taken place beneath a bridge of public road accessible to public. The officer, Sub-Inspector is an empowered officer under Section 42 of the Act. As the place is a public place and Section 43 comes into play, the question of non-compliance of Section 42(2) does not arise. The aforesaid view gets support from the decisions in ***Directorate of Revenue and Anr. v. Mohammed Nisar***

Holia[35] and ***State, NCT of Delhi v. Malvinder Singh***[36].

26. Learned counsel for the appellant has also contended that there has been non-compliance of Section 57 of the NDPS Act, which reads as follows:-

> "Report of arrest and seizure – Whenever any person makes any arrest or seizure under this Act, he shall, within fortyeight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior."

27. A three-Judge Bench in ***Sajan Abraham*** (supra), placing reliance on ***State of Punjab v. Balbir Singh***[37], has held that Section 57 is not mandatory in nature and when substantial compliance is made, it would not vitiate the prosecution case. In ***Karnail Singh*** (supra), the Constitution Bench, while explaining the ratio laid down in ***Sajan Abraham*** (supra), analysed the requirement of Section 42(1) and 42(2) and opined that the said pronouncement never meant that those provisions need not be fulfilled at all. However, the Constitution Bench has not delved into the facet of Section 57 of the NDPS Act.

28. In ***Kishan Chand v. State of Haryana***[38], the Court

[35] (2008) 2 SCC 370
[36] (2007) 11 SCC 314
[37] (1994) 3 SCC 299
[38] (2013) 2 SCC 502

while dealing with the compliance of Sections 42, 50 and 57, has opined thus:-

> "21**.** When there is total and definite non-compliance with such statutory provisions, the question of prejudice loses its significance. It will per se amount to prejudice. These are indefeasible, protective rights vested in a suspect and are incapable of being shadowed on the strength of substantial compliance.
>
> 22. The purpose of these provisions is to provide due protection to a suspect against false implication and ensure that these provisions are strictly complied with to further the legislative mandate of fair investigation and trial. It will be opposed to the very essence of criminal jurisprudence, if upon apparent and admitted non-compliance with these provisions in their entirety, the court has to examine the element of prejudice. The element of prejudice is of some significance where provisions are directory or are of the nature admitting substantial compliance. Where the duty is absolute, the element of prejudice would be of least relevance. Absolute duty coupled with strict compliance would rule out the element of prejudice where there is total non-compliance with the provision."

After so stating, the Court proceeded to address the separate rights and protection under the said provisions and in that context ruled:-

> "Reliance placed by the learned counsel appearing for the State on *Sajan Abraham* is entirely misplaced, firstly in view of the Constitution Bench judgment of this Court in

> *Karnail Singh*. Secondly, in that case the Court was also dealing with the application of the provisions of Section 57 of the Act which are worded differently and have different requirements, as opposed to Sections 42 and 50 of the Act. It is not a case where any reason has come in evidence as to why the secret information was not reduced to .writing and sent to the higher officer, which is the requirement to be adhered to "pre-search". The question of sending it immediately thereafter does not arise in the present case, as it is an admitted position that there is total non-compliance with Section 42 of the Act. The sending of report as required under Section 57 of the Act on 20-7-2000 will be no compliance, factually and/or in the eye of the law to the provisions of Section 42 of the Act. These are separate rights and protections available to an accused and their compliance has to be done in accordance with the provisions of Sections 42, 50 and 57 of the Act. They are neither interlinked nor interdependent so as to dispense compliance of one with the compliance of another. In fact, they operate in different fields and at different stages. That distinction has to be kept in mind by the courts while deciding such cases."

29. In the instant case, on perusal of the evidence, it is clear that there has been substantial compliance of Section 57 of the NDPS Act and, therefore, the question of prejudice does not arise.

30. Ms. Bhati, learned counsel for the appellant has also contended that the appellant was in custody in connection with FIR no. 95 of 1985 and while in custody, he suffered a

disclosure statement and led to discovery of the contraband articles. Submission of the learned counsel for the appellant is that the said statement cannot be taken aid of for the purpose of discovery in connection with the present case. It is demonstrable from the factual matrix that in connection with FIR No. 95 of 1985, he was arrested and while he was interrogated, he led to discovery in connection with the stolen contraband articles from the malkhana which was the matter of investigation in FIR no. 96 of 1985. There is no shadow of doubt that the accused-appellant was in police custody. Section 27 of the Indian Evidence Act, 1872 provides that when any fact is deposed to as discovery in consequence of the information received from a person accused of any offence in custody of a police officer, so much of such information whether it amounts to confession or not as relates distinctly to the fact thereby discovered may be proved. It is well settled in law that the components or portion which was the immediate cause of the discovery could be acceptable legal evidence [See ***A.K. Subraman and Others v. Union of India and Others***[39]].

[39] AIR 1976 SC 483

The words employed in Section 27 does not restrict that the accused must be arrested in connection with the same offence. In fact, the emphasis is on receipt of information from a person accused of any offence. Therefore, when the accused-appellant was already in custody in connection with FIR no. 95 of 1985 and he led to the discovery of the contraband articles, the plea that it was not done in connection with FIR no. 96 of 1985, is absolutely unsustainable. Be it stated here, that the recovery has been proven to the hilt. The accused, accompanied by the witnesses, had gone beneath the bridge built between Gupal Sariya and Madiyai and he himself had removed the big stone and dug the earth and took out the packet which was bound in a long cloth from which a packet was discovered and the said packet contained 10 kg and 200 gms of opium. The learned trial Judge as well as the High Court has, by cogent and coherent reasons, accepted the recovery. On a scrutiny of the same, we also find that there is nothing on record to differ with the factum of recovery of the contraband articles.

31. Another submission that has been advanced by the

learned counsel for the appellant is that the seized articles were not sent immediately for chemical examination. The FSL report, Ex. P-14, dated 15.9.1986 states that a letter along with a sealed packet was received with seals intact. The said report further mentions that packet was covered in white cloth and on opening of the packet, the examiner found a cylindrical tin and the substance on examination was found to be an opium having 1.44% morphine. The seal being intact, the description of the case number and the impression of seal having been fixed on memo of recovery, there is no reason or justification to discard the prosecution case on the ground of delay on this score. In ***Hardip Singh v. State of Punjab***[40], a two-Judge Bench while dealing with the question of delay in sending the samples of opium to the FSL, opined that it was of no consequence, for the fact of the recovery of the said sample from the possession of the appellant had been proven and established by cogent and reliable evidence and that apart, it had also come in evidence that till the date of parcels of samples were received by the Chemical Examiner, the seal

[40] (2008) 8 SCC 557

put on that parcel was intact. Under these circumstances, the Court ruled that the said facts clearly proves and establishes that there was no tampering with the aforesaid seal in the sample at any stage and the sample received by the analyst for chemical examination contained the same opium which was recovered from the possession of the appellant. The plea that there was 40 days delay was immaterial and would not dent the prosecution case.

32. In view of the aforesaid analysis, we do not perceive any substance in this appeal and accordingly, the same is dismissed.

.....J.
[Dipak Misra]

.....J.
[S.A. BOBDE]

New Delhi
April 17, 2015