PETITIONER:
GAUNTER EDWIN KIRCHER

Vs.

RESPONDENT:
STATE OF GOA, SECRETARIAT, PANAJI, GOA

DATE OF JUDGMENT16/03/1993

BENCH:
REDDY, K. JAYACHANDRA (J)
BENCH:
REDDY, K. JAYACHANDRA (J)
RAY, G.N. (J)

CITATION:
1993 AIR 1456 1993 SCR (2) 337
1993 SCC (3) 145 JT 1993 (2) 285
1993 SCALE (2)28

ACT:
Narcotic Drugs and Psychotropic Substances Act, 1985 : Section 27--Benefit of--When could be extended to the accused--Two pieces of charas seized from accused--Only one piece weighing less than 5 gins. sent for chemical examination--Laboratory report confirming the piece to be containing charas--Accused pleading that it was meant for personal consumption--Whether entitled to benefit of lesser punishment--Procedure for sending substance for chemical analysis indicated

HEADNOTE:
The appellant, a foreign national, was convicted by the trial court under Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced to undergo ten years' rigorous imprisonment and to pay a fine of one lakh rupees, and in default, to further undergo rigorous imprisonment for six months.
According to the prosecution, two cylindrical pieces of charas, weighing 7 gms. and 5 gms. respectively, were seized from the appellant by a Police Patrol Party and on chemical analysis of one of the pieces, it was found that the substance contained charas.
The trial court, relying on the evidence of PW 1, Junior Scientific Officer of the Director of Health Services, who examined the substance, PW 2, a panch witness and PW 3, the Police Inspector, who was heading the Patrol Party, convicted the appellant. The High Court dismissed the appellants appeal.
In the appeal before this Court, on behalf of the appellant it was contended that both the courts below had erred in holding that the accused was found in possession of 12 gins. of Charas; since only a small quantity i.e. less than 5 gms. had been sent for analysis the remaining part of the substance, which had not been sent for analysis, could not be held to be also Charas and, therefore, the quantity proved to have been in the
338
possession of the accused would be small quantity, as provided under Section 27 of the Act and the accused should have been given the benefit of that Section.

On behalf of the State, it was submitted that there was no need to send the entire quantity for chemical analysis, and the fact that one of the pieces which was sent for analysis had been found to contain Charas, the necessary inference would be that the other piece also contained Charas and that, at any rate, since the accused had totally denied, he could not get the benefit of Section 27, as he had not discharged the necessary burden as required under the section.

Disposing of the appeal, this Court,

HELD:1.1. In the absence of positive proof that both the pieces recovered from the accused contained Charas only, it is not safe to hold that 12 gms. of Charas was recovered from the accused. In view of the evidence of P.W. 1, the prosecution has proved positively that Charas weighing about 4.570 gms. was recovered from the accused. [342C]

1.2.In general, possession of any narcotic drug or psychotropic substance has been prohibited by Section 8 of the Narcotic Drugs and Psychotropic Substances Act and any person found in possession of the same contrary to the provisions of the Act or any rule or order made or permit issued thereunder is liable to be punished as provided thereunder to imprisonment for a term not less than 10 years and a fine not less than Rs. 1 lakh. However, Section 27 is an exception, whereby lesser punishment is provided for illegally possessing any 'smaller quantity' for personal consumption of any narcotic drug or psychotropic substance. By virtue of the notification issued on 14.11.85 under Explanation (1) of the Section, 5 gms or less quantity of Charas has been specified by the Central Government to be the small quantity. [343E-F, 344B]

1.3. In the instance case, the prosecution has proved that the quantity seized from the accused was less than 5 gms. Therefore, it is within the meaning of"small quantity' for the purpose of Section 27. [344C]

1.4. No doubt, as Section 27 lays down, the burden is on the appellant to prove that the substance was intended for his personal consumption As to the nature of burden of proof that has to be discharged

339

depends upon the facts and circumstances of each case. Whether the substance was intended for personal consumption or not has to be examined in the context in which this exception is made. [344D]

1.5. The accused though in general has taken a plea of denial,but his examination under Section 313 Cr. P.C. by the Magistrate reveals that there was a plea that it was meant for his personal consumption. The trial court has also noted in its judgment that the accused had made an application stating that the piece said to have been recovered from him was less than 5 gms., and not 12 gms. as alleged. The prosecution case itself shows that he was having this substance in a pouch alongwith a chillum (smoking pipe) and smoking material. The averments made by the appellant in the application and as extracted by the trial court would themselves show that it was meant for his personal consumption. The surrounding circumstances under which it was seized also confirm the same. [344E-G]

1.6.The appellant is a foreigner and as a tourist appears to have carried this substance for his personal consumption. No doubt, the menace of trafficking in narcotic drugs and psychotropic substance has to be dealt with severely, but in view of the provisions of Section 27, it cannot be held that the small quantity found with the appellant was not meant for his personal consumption. Therefore, the appellant is

liable to be punished as provided under Section 27 of the Act. [344G-H, 345A]
1.7.Accordingly, the conviction of the appellant under Section 20(b)(ii) of the Act and sentence of 10 years' R.I. are set aside, and he is convicted under Section 27 of the Act and sentenced to undergo 6, months' R.I. and to pay a fine of Rs. 1 lakh, in default of payment of which to further undergo 6 months' R.I. [345C]

JUDGMENT:
CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 642 of 1991.
From the Judgment and Order dated 25.4.1991 of the Bombay High Court in Criminal Appeal No. 25 of 1990.
Lalit Chari, Peter D' Souza and Mukul Mudgal for the Appellant.
J.S. Wad, and Ms. A. Subhashini for the Respondent.
340
The Judgment of the Court was delivered by
K. JAYACHANDRA REDDY, J. The appellant, a German National, has been convicted by the trial court under Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('Act' for short) and sentenced to undergo 10 years R.I. and to pay a fine of Rs. 1 lakh, in default of payment of which to further undergo six months' R.I. The appeal filed by the appellant was dismissed by the High Court. Hence the present appeal.
In brief the prosecution case is that on 29.9.89 the Police Sub Inspector Gaonkar, P.W3 alongwith a police party was patrolling at Calangute Beach near Panjim and they came across the accused who was sitting on a wooden log. On suspicion they went near him and noticed a chillum (smoking pipe) in front of him lying on the log. He secured the presence of panch witnesses and searched the accused and recovered a polythene pouch from his pyjama pocket in which there were tobacco, one cigarette paper packet and two cylindrical pieces of 'Charas". The two pieces of Charas were weighed and found to be 7 gms. and 5 gms. respectively. They were seized under a panchnama and were separately sealed in two different envelopes. One of the pieces weighing less than 5 gms. was? sent for chemical analysis and the other piece weighing 7 gms. was not sent nor part of it by way of sample was sent for chemical analysis. Maria Caldeira, P.W.1, the Junior Scientific Officer in the Directorate of Health Services carried out the chemical analysis of the substance weighing 4.570 gms. consisting of three cylindrical pieces sticking together and she deposed that the substance which was examined by her was found to have contained Charas. P.W.2, a panch witness supported the prosecution case. The accused when examined under Section 313 Cr. P.C. denied being in possession of any Charas and said that he had only a pouch containing tobacco and that he was taken to Calangute Police Station and was falsely implicated.
The trial court relying on the evidence of P.Ws 1 to 3 convicted the accused. The submissions on behalf of the accused before the trial court as well as the High Court have been that the search conducted on the person of the accused was in contravention of Section 50 of the Act and that there have been contradictions between the evidence of P.Ws 2 and 3 and that at any rate even if the prosecution case is to be accepted, the
341

accused can be, at the most, held to be in possession of less than 5 gins. of Charas which is a small quantity and, therefore, is entitled to the benefit of Section 27.

Before us more or less the same submissions are made. So far as the contentions in respect of seizure and drafting of panchnama and weight are concerned, the question is whether the accused has been told that if he so desires he would be taken to a Magistrate before the search, as provided under Section 50. Whether this has been complied with or not mostly depends on the evidence and they are only questions of fact. Both the courts below have considered the entire evidence and have rejected these submissions. Though these are questions of fact, yet we have also considered the relevant evidence on these aspects and we agree with the findings of the courts below.

The next and most important submission of Shri Lalit Chari, the leaned senior counsel appearing for the appellant is that both the courts below have erred in holding that the accused was found in possession of 12 gins. of Charas. According to the learned counsel, only a small quantity i.e. less than 5 gms. has been sent for analysis and the evidence of P.W.1, the Junior Scientific Officer would at the most establish that only that much of quantity which was less than 5 gms. of Charas is alleged to have been found with the accused. The remaining part of the substance which has not been sent for analysis can not be held to be also Charas in the absence of any expert evidence and the same could be any other material like tobacco or other intoxicating type which are not covered by the Act. Therefore the submission of the learned counsel is that the quantity proved to have been in the possession of the accused would be small quantity as provided under Section 27 of the Act and the accused should have been given the benefit of that Section. Shri Wad, learned senior counsel appearing for the State submitted that the other piece of 7 gms. also was recovered from the possession of the accussed and there was no need to send the entire quantity for chemical analysis and the fact that one of the pieces which was sent for analysis has been found to contain Charas, the necessary inference would be that the other piece also contained Charas and that at any rate since the accused has totally denied, he can not get the benefit of Section 27 as he has not discharged the necessary burden as required under the said Section. Before examining the scope of this provision, we shall first consider whether the prosecution has established beyond all reasonable

342

doubt that the accused had in his possession two pieces of Charas weighing 7 gms. and 5 gms. respectively. As already mentioned only one piece was sent for chemical analysis and P.W.1, the Junior Scientific Officer who examined the same found it to contain Charas but it was less than 5 gms. From this report alone it can not be presumed or inferred that the substance in the other piece weighing 7 gms. also contained Charas. It has to be borne in mind that the Act applies to certain narcotic drugs and psychotropic substances and not to all other kinds of intoxicating substances. In any event in the absence of positive proof that both the pieces recovered from the accused contained Charas only, it is not safe to hold that 12 gms. of Charas was recovered from the accused. In view of the evidence of P.W.1 it must be held that the prosecution has proved positively that Charas weighing about 4.570 gms. was recovered from the accused. The failure to send the other piece has given rise to this inference. We have to observe that to obviate this difficulty, the concerned authorities would do

better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized. If it is not practicable, in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets or pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law.

Section 27 of the Act reads thus:

"27. Punishment for illegal possession in small quantity for personal consumption of any narcotic drug or psychotropic substance or consumption of such drug or substance whoever, in contravention of any provision of this Act, or any rule or order made or permit issued thereunder, possesses in a small quantity any narcotic drug or psychotropic substance, which is proved to have been intended for his personal consumption and not for sale or distribution, or consumes any narcotic drug or psychotropic substance, shall, notwithstanding anything contained in this Chapter, be punishable-

(a) Where the narcotic drug or psychotropic substance possessed or consumed is cocaine, morphine, diacetylmorphine or any other narcotic drug or any psychotropic

343

substance as may be specified in this behalf by the Central Government, by notification in

the Official Gazette, with imprisonment for a term which may extend to one year or with fine or with both; and

(b) Where the narcotic drug or psychotropic substance possessed or consumed is other than those specified in or under clause (a) with imprisonment for a term which may extend to six months or with fine or with both

Explanation (1) For the purposes of this section "small quantity' means such quantity as may be specified by the Central Government by the notification in the Official Gazette.

(2) Where a person is shown to have been in possession of a small quantity of a narcotic drug or psychotropic substance, the burden of proving that it was intended for the personal consumption of such person and not for sale or distribution, shall lie on such person."

In general possession of any narcotic drug or psychotropic substance has been prohibited by Section 8 of the Act and any person found in possession of the same contrary to the provisions of the Act or any rule or order made or permit issued thereunder is liable to be punished as provided thereunder to imprisonment for a term which shall not be less than 10 years and shall also be fined which shall not be less than Rs.1 lakh. Section 27 of the Act, however, is an exception whereby lesser punishment is provided for illegally possessing any "smaller quantity' for personal consumption of any narcotic drug or psychotropic substance, Under this section the following ingredient should be fulfilled:

"(a) The person has been found in possession of any narcotic drug or psychotropic substance in "small quantity';

(b) Such possession should be in

contravention of any provision of the Act or any rule of order made or permit issued thereunder; and

(c) The said possession of any narcotic drug or psycho-

344

tropic substance was intended for his personal consumption and not for sale or distribution."

The first explanation to this Section lays down that the small quantity means such quantity as may be specified by the Central Government by a notification. By virtue of the notification issued on 14.11.85 for the purpose of this Act 5 gms. or less quantity of Charas shall be the small quantity. Explanation 2 further lays down that the burden of proof that the substance was intended for the personal consumption and not for sale or distribution, lies on such person from whose possession the same was recovered. As held above in the instant case the prosecution has proved that the quantity seized from the accused was less than 5 gms. Therefore, it is within the meaning of 'small quantity" for the purpose of Section 27.

Then the other ingredient that has to be satisfied is whether the substance found in possession of the appellant was intended for his personal consumption and not for sale or distribution. No doubt as the Section lays down the burden is on the appellant to prove that the substance was intended for his personal consumption. As to the nature of burden of proof that has to be discharged depends upon the facts and circumstances of each case. Whether the substance was intended for personal consumption or not has to be examined in the context in which this exception is made. In the instant case the accused though in general has taken a plea of denial but his examination under Section 313 Cr. P.C. by the Magistrate reveals that there was such a plea namely that it was meant for his personal consumption. In the judgment of the trial court it is noted that the accused made an, application on 23.3.90 stating that the piece said to have been recovered from him was less than 5 gms. and not 12 gms. as alleged and that the application was written and signed by the appellant himself. The prosecution case itself shows that he was having this substance in a pouch alongwith a chillum (smoking pipe) and smoking material. The averments made by the appellant in the application and as extracted by the trial court would themselves show that it was meant for his personal consumption. The above surrounding circumstances under which it was seized also confirm the same. The appellant is a foreigner and as a tourist appears to have carried this substance for his personal consumption. We are aware that the menace of trafficking in narcotic drugs and psychotropic substance has to be dealt with severely but in view of the provisions of Section 27, we are unable to hold that the small quantity found with the appellant was not

345

meant for his personal consumption and that on the other hand it was meant for sale or distribution. Therefore, the appellant is liable to be punished as provided under Section 27 of the Act.

From the records it appears that the appellant has been in jail for more than three years but that may not be relevant since the sentence prescribed under Section27 is only six months. We are only just mentioning it as a fact.

In the result the conviction of the appellant under Section 20(b)(ii) of the Act and sentence of 10 years R.I. are set aside. Instead he is convicted under. Section 27 of the

Act and is sentenced to undergo 6 monghs' R.I. and to pay a fine of Rs. 1 lac in default of payment of which to further undergo 6 months' R.I. Subject to the above modifications, the appeal is disposed of

N.P.V.

Appeal disposed of.

346

JUDIS