

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON : 2nd MARCH, 2016

DECIDED ON : 8th APRIL, 2016

+ CRL.A.1598/2013

MUKESH SINGH Appellant

**Through : Mr.Chetan Lokur, Advocate with
Mr.Nitish Chaudhary, Advocate.**

VERSUS

STATE (NARCOTIC BRANCH OF DELHI) Respondent

Through : Mr.Amit Gupta, APP.

AND

+ CRL.A.1611/2013

HUSNAIL KHAN Appellant

Through : Mr.Dinesh Malik, Advocate.

VERSUS

STATE (NARCOTIC BRANCH OF DELHI) Respondent

Through : Mr.Amit Gupta, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is a judgment dated 15.07.2013 of learned Addl. Sessions Judge / Special Judge (NDPS) in Sessions Case

No. 92/11 arising out of FIR No.152/11 PS Crime Branch by which the appellants – Mukesh Singh (A-1) and Husnail Khan (A-2) were held guilty for committing offence under Section 20(b)(ii)(c) of NDPS Act. A-1 was further convicted under Section 25 of NDPS Act. By an order dated 15.07.2013, both the appellants were sentenced to undergo RI for ten years with fine ₹1 lac each under Section 20(b)(ii)(c) of NDPS Act. A-1 was separately sentenced to undergo RI for ten years with fine ₹1 lac under Section 25 of NDPS Act. Both the sentences were to run concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 03.06.2011 at about 05.30 a.m. on a road near In-gate of Azadpur Mandi, Delhi, the appellants were found in possession of 90 kg of Ganja concealed in the cabin of truck bearing No. HR-55 G-6471.

3. On 03.06.2011 at around 03.50 a.m. a secret information was received by SI Bhagwan Singh at Narcotics Cell PS Crime Branch to the effect that A-1, a truck driver by profession, involved in supply of Ganja would come from Bihar to Delhi to supply Ganja in between 05.00 a.m. to 06.00 a.m. at the In-gate of Azadpur Mandi, Delhi. SI Bhagwan Singh informed Inspector Vivek Pathak about the secret information and produced the secret informer before him. Secret information was

recorded vide Daily Diary (DD) No.3 (Ex.PW-7/A) at 04.10 a.m. A raiding party was constituted and vide Daily Diary (DD) No.4 (Ex.PW-13/A) the raiding party reached Azadpur Mandi at about 05.25 p.m. The secret informer identified A-1 to be driver of the truck when he was standing outside it. Subsequently, A-2 also came to A-1 and both started talking. Thereafter, they boarded the cabin of the truck No. HR-55 G-6471 and were apprehended. SI Bhagwan Singh introduced himself and the raiding party to both the appellants and apprised them about the secret information. Notices under Section 50 NDPS Act (Ex.PW-5/A & Ex.PW-5/B) were served. On search of the cabin of the truck, three plastic 'kattas' kept on the backside of the seat in the cabin were recovered. The total quantity on weighing came to 90 kg of Ganja. Necessary proceedings were conducted during investigation. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation, a charge-sheet was filed against both the appellants in the Court. The prosecution examined fifteen witnesses to substantiate its case. In 313 Cr.P.C. statements, the appellants denied their involvement in the crime and pleaded false implication. The trial resulted in their conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeals have been preferred.

4. I have heard the learned counsel for the parties and have examined the file. Counsel for the appellants urged that the Trial Court did not appreciate the evidence of the prosecution witnesses in its true and proper perspective and committed grave error to base conviction on the uncorroborated testimonies of the police officials. The prosecution was unable to establish if A-1 was driver in the said vehicle. No fair investigation was carried out from PW-4 (Daljeet Singh), owner of the truck and PW-9 (Talwinder Singh) owner of the J.S.Roadlines with which the truck in question was attached. No independent public witness was associated at any stage. The recovery is suspect. Learned Addl. Public Prosecutor urged that there are no sound reasons to disbelieve the testimonies of the police officials in the absence of any material discrepancies or infirmities in their cross-examination.

5. The prosecution examined PW-13 (SI Bhagwan Singh) who proved that secret information received from the secret informer was brought to the notice of Mr.Vivek Pathak at around 04.00 a.m. and thereafter, it was reduced into writing vide DD No.3 (Ex.PW-7/A) at 04.10 a.m. A raiding party was constituted and the raiding team left the spot by recording DD No.4 (Ex.PW-13/A). He also deposed about the apprehension of the appellants and the recovery of contraband i.e. Ganja

weighing 90 kg from the three plastic kattas recovered from the cabin of the truck. His statement has been corroborated in material particulars by PW-5 (HC Kanwal Singh), other member of the raiding team. PW-3 (SI Paramjeet Singh), who along with HC Sanjeev left the office in car at about 02.45 p.m. took over the custody of the appellants. He prepared site-plan (Ex.PW-3/A). The appellants were interrogated and their disclosure statements (Ex.PW-3/D & Ex.PW-3/G) were recorded. The truck bearing registration No. HR-55 G-6471 was seized vide seizure memo (Ex.PW-3/H). Report (Ex.PW-3/K) under Section 57 NDPS Act was forwarded by him to the senior officer. These witnesses were cross-examined at length. However, no material infirmities or discrepancies could be elicited in their cross-examination to disbelieve their version. No oblique motive was assigned to the police officials for falsely implicating the appellants in the crime. Evidence of police witnesses cannot be discarded merely on the ground that they belong to police force.

6. PW-4 (Daljeet Singh) admitted himself to be the registered owner of the truck (Ex.P-1) bearing No. HR-55 G-6471. He explained that the said truck was attached by him with J.S.Khera Transport and they used to manage it; it was their responsibility to engage driver, etc. PW-9 (Talwinder Singh), Transporter, running business under the name and

style of J.S.Khera Roadlines at 61, Transport Centre, Azad Pur Mandi, Delhi, admitted that the truck in question was attached with his transport by its owner Daljeet Singh and he used to manage the driver for the truck. He further informed that A-1 was employed as a driver by him in his transport about one and a half month prior to the incident. He further disclosed that on 29/30.05.2011, the truck loaded with the grocery articles was taken by A-1 to Mujaffarpur (Bihar) and he was asked to bring 'litchi' from Mujaffarpur (Bihar) on return to Delhi. This witness was not cross-examined. PW-10 (Laxman Prasad) disclosed that on 01.06.2011, he had hired the truck in question and got loaded 668 petties of 'litchi' in the said truck. After getting the 'bilty' from the transport, the truck was sent to Delhi. In his presence, no Ganja was loaded in the truck. He identified copies of the said bilty (Ex.PW-8/A & Ex.PW-8/B). This witness was also not cross-examined. No suggestion was put to these witnesses if A-1 was not the driver on the said truck and A-2 was not his helper.

7. In 313 Cr.P.C. statement, A-1 admitted himself to be the driver on the truck bearing No. HR-55 G-6471 on 03.06.2011. He further admitted that he was present between 04.00 p.m. to 05.00 p.m. in the cabin of the truck along with A-2 and both of them were apprehended by

the police officials at the gate of Azadpur Subzi Mandi. He admitted that there were 668 petties of litchis in the said truck. He denied recovery of any contraband from the truck. He admitted that PW-10 (Laxman Prasad) had hired the truck and loaded the 'litchis'. He claimed that he and A-2 were falsely implicated in this case.

8. A-2 in 313 Cr.P.C. statement admitted that he was helper in the truck in question on 03.06.2011 whereas A-1 was the driver. He further admitted that both of them were apprehended by the police outside the gate of Azadpur Subzi Mandi while standing outside the truck at around 03.00 a.m. He admitted recovery of three kattas containing Ganja but claimed that these were recovered not from inside the cabin but from the roof top of the truck which had space to keep material. He expressed ignorance as to how A-1 had brought Ganja in those plastic kattas. He was not aware as to from where A-1 had loaded those 'kattas'. He admitted that the total quantity of the Ganja recovered was 90 kg.

9. From the testimonies of the prosecution witnesses referred above coupled with the admissions of the appellants in their 313 Cr.P.C. statements, it stands established that A-1 was employed as a driver in the truck in question whereas A-2 was a helper thereto on 03.06.2011. It further stands established that the appellants had taken the said truck

loaded with grocery articles to Mujaffarpur (Bihar) and on return, PW-10 (Laxman Prasad) had loaded 668 petties of 'litchis' at Mujaffarpur (Bihar) in the said truck and bilties (Ex.PW-8/A & Ex.PW-8/B) were prepared. It has further come on record that at the time of loading of 'litchis' there was no contraband in the truck. It is further stands proved that in the raid conducted by the police officials at Delhi, three plastic kattas were recovered from the truck which contained 30 kg of Ganja each in the presence of both the appellants.

10. Regarding conscious possession of the contraband with the appellants, the Trial Court has dealt with this aspect minutely. A-1 was admittedly a driver on the truck. Physical possession of the truck was with him from the very inception; he had loaded 668 petties of litchis at Mujaffarpur (Bihar) and at that time, there was no contraband in the truck. However, when the truck reached Azadpur Subzi Mandi, on the basis of secret information, raid was conducted and three kattas containing 90 kg Ganja were recovered from the truck. It was not a small quantity. It was for A-1 to explain as to how and in what manner, the said three kattas containing 30 kg each of Ganja came to be loaded in his truck. It is unbelievable that A-1 being the driver of the truck would not come to know about the huge quantity of Ganja in three kattas loaded in the truck.

A-1's post-event conduct is unreasonable. In 313 Cr.P.C. statement he denied the recovery of the Ganja from the truck whereas A-2 was fair enough to state and admit that three plastic kattas containing 90 kg of Ganja were recovered from the roof top of the truck. Apparently, A-1 being the driver of the truck by all probabilities was in conscious possession of the three bags of Ganja loaded in the truck. A-1 did not assign any oblique motive to the police officials with whom he had no prior animosity or acquaintance as to why they would file a false case against him. A-1's employer did not give clean chit to him. Mere denial of recovery of the Ganja from the truck is not enough to exonerate A-1. Once physical possession of the contraband has been proved, Section 35 of the NDPS Act comes into play and the burden shifts on the appellant to prove that he was in conscious possession of it. In such a situation, the accused is presumed to be in conscious possession as has been held in '*Ram Singh v. Central Bureau of Narcotics*', (2011) 11 SCC 347. If the accused takes a stand that he was not in conscious possession, he has to establish the same. As has been held in '*Dharampal Singh v. State of Punjab*', (2010) 9 SCC 608. As the materials brought on record would show, A-1 was found sitting in the truck, his presence in the truck has been clearly established. It is proven that A-1 was in control of the

articles in the truck. Possession in a given case need not be physical possession but can be constructive, having power and control over the articles. Therefore, there can be no iota of doubt that he was in conscious possession of the same.

11. So far as A-2 is concerned, in his 313 Cr.P.C. statement, he fairly admitted that on the day of recovery of Ganja from the truck in question, he was employed as a helper. He, however, expressed ignorance as to from where the Ganja was loaded on the truck and who had done so. It was imperative for the prosecution to establish that A-2 had conscious possession of the contraband at the time of its recovery. The Investigating Agency did not collect any evidence as to when A-2 was employed as a helper in the truck; who had employed him and what were his duties. No evidence surfaced on record if A-1 and A-2 were hand in glove and had conspired to transport narcotics from Bihar to Delhi in the truck. It did not emerge if prior to the incident A-2 had accompanied A-1 to Bihar and had transported any such contraband and shared the booty. The secret information recorded by Daily Diary (DD) No.3 (Ex.PW-7/A) was only to the effect that A-1 (driver in the truck) was engaged in transportation of contraband from Bihar and he used to supply it in Delhi. A-2's name did not figure in the secret information. A-2's presence along with A-1 in the

truck is of no consequence as admittedly, he was a helper therein. PW-4 (Daljeet Singh) or PW-9 (Talwinder Singh) did not assign any specific role to A-2. Being a helper, it cannot be inferred that he was in conscious possession of the contraband loaded on the truck for which A-1 has been found guilty. No nexus between the two has been established. In the personal search memo (Ex.PW-3/F), recovery of meagre cash of ₹60 from his possession, rules out if A-2 used to transport contraband along with A-1. A-2's conviction is primarily based only upon his disclosure statement (Ex.PW-3/G). He disclosed that when they were taking tea at Peepra Kothi, an individual Lallan met A-1 and informed that he had loaded three plastic kattas containing Ganja in the truck and it would be collected by someone at Delhi. He further disclosed that Lallan had assured to pay ₹8,000/- for the deal. The Investigating Agency did not examine any tea shopkeeper from where the appellants had taken tea or the plastic kattas were allegedly loaded. Nothing has come on record to show if A-2 was acquainted with the said Lallan or the individual to whom the Ganja was to be delivered at Delhi. The prosecution has thus failed to prove if A-2 was in exclusive and conscious possession of the contraband. He deserves benefit of doubt. Conviction and sentence recorded by the Trial Court qua him cannot be sustained.

12. In the light of above discussion, A-2's appeal is allowed and conviction and sentence recorded by the Trial Court are set aside. He shall be released forthwith if not required to be detained in any other case.

13. Since the minimum sentence of ten years as mandated under Sections 20 & 25 of NDPS Act has been awarded by the Trial Court, it cannot be altered or modified. Sentence Order is modified to the extent that the default sentence for non-payment of fine under both the heads would be one month each instead of six months each. Other terms and conditions of the Sentence Order qua A-1 are left undisturbed.

14. A-1's appeal stand disposed of in the above terms. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information / compliance.

(S.P.GARG)
JUDGE

APRIL 08, 2016 / tr