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

% *Judgment reserved on : 08.9.2015*
Judgment delivered on : 10.9.2015

+ CRL.A. 582/2013

JAIPAL SINGH @ THAKUR Appellant

Through Mr.Adarsh Ganesh, Adv.

versus

STATE Respondent

Through Ms. Kusum Dhalla, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1. This appeal is directed against the impugned judgment and order on sentence dated 08.02.2013 and 14.02.2013 respectively wherein the appellant had been convicted under Section 20(b)(ii)(C) of the NDPS Act. He had been sentenced to undergo RI for a period of 10 years and to pay a fine of Rs.1 lakh and in default of payment of fine to undergo SI for 2 years.

2. Version of the prosecution is that on 24.5.2011 when the members

of the police party were on anti snatching picket at Shani Bazar Road, Narela, they noticed a loaded vehicle/tempo coming from the side of Shahpur Garhi. The driver of the vehicle was asked to stop. He was asked to produce the papers of the vehicle. He was unable to do so. From the backside cabin of the vehicle smell of ganja was emanating. The appellant (who was driving the vehicle) was asked to open the cabin which was found to contain 37 packets which on inquiry, the accused revealed it to contain ganja. Notice under Section 50 of the NDPS Act (Ex.PW-2/A) was prepared and served upon the appellant. The appellant was informed of his right to get his search conducted before a Magistrate or a Gazetted Officer. He refused the same. This was recorded at mark B. The aforementioned 37 packets which were wrapped in a pink colour panni wrapped with a yellow colour tape was opened. The ganja was weighed which was found to be 324 kg. Four samples of 1 kg each were drawn by taking out ganja from each katta (19 kattas). Each samples were put in a separate panni and packed separately in a white cloth. The balance contraband and the samples were sealed. FSL form was also filled. The contraband, samples and the FSL form were taken into possession vide memo Ex.PW-2/B. The samples were deposited in

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the malkhana through Inspector Dinesh Kumar Sharma. They were then sent to the FSL and the FSL had tested them positive for ganja. Report under Section 57 of the NDPS Act was also prepared.

3. The prosecution in support of its case had examined 11 witnesses.

4. The statement of the accused was recorded under Section 313 Cr.P.C. He pleaded innocence stating that the ganja had been falsely planted upon him and nothing was recovered from him. No evidence was led in defence.

5. In view of the evidence oral and documentary as aforesaid the appellant was convicted and sentenced as aforesaid.

6. On behalf of the appellant, the main thrust of the argument of the learned counsel for the appellant is that although as per the version of the members of the raiding party the ganja was recovered from the custody of the appellant but it was not being a conscious possession. The conviction of the appellant is ill founded. Submission being that the accused is an illiterate and poor man, he was only an auto driver. He was not aware as to what was contained in his tempo which he was plying for commercial use. The appellant was all along stating that this contraband was being carried for Ajay. Ajay was let off by the
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investigating agency for the reason best known to them. In the absence of the prosecution having failed to show that the contraband was in the conscious possession of the appellant, the conviction of the appellant is liable to be set aside. To support this argument learned counsel for the appellant has placed reliance upon JT 2000 (1) SC 471 Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, 1990 CRI L.J. 1119 Kalekhan Vs. State of M.P. and 1999 CRI L.J. 4190 Pentapati Venkata Stayanarayana Murthy Vs. State of Andhra Pradesh. Submission being that in the absence of the prosecution proving that the accused had active knowledge of the fact that the substance recovered from him was a prohibited drug, presumption under Section 35 of the NDPS Act could not have been invoked. The presumption did not work in favour of the prosecution. The appellant is entitled to an acquittal.

7. Needless to state that these arguments have been refuted.

8. The recovery witnesses examined by the prosecution are PW-2, PW-3, PW-4 and PW-7. PW-2 (Constable Rakesh Kumar) had deposed that on the fateful day while he was in the anti snatching picket along with PW-3, PW-4 and PW-7 at about 1.30 p.m., they noticed that a tempo was coming from Shahpur Garhi, the driver was signaled to

stop. He was behaving suspiciously. He could not show any papers of his vehicle. There was a smell of ganja coming from the rear cabin of the vehicle. On opening the cabin it was found to contain 37 packets wrapped in a panni. The appellant on query revealed that they contained ganja. Notice under Section 50 of the NDPS Act was served upon the appellant informing him of his right to get his search conducted in the presence of a Magistrate or a Gazetted Officer to which he declined. PW-3 was asked to bring a weighing material. On weighing the contraband, it was found to be 324 kg. Four samples of 1 kg. each of ganja were drawn. They were separately packed and sealed. The remaining contraband was also sealed. In his cross-examination this witness had stuck to his stand. Nothing had emanated from his cross-examination which could discredit him. Nothing had been pointed out. Relevant would it be to note that no cross-examination of this witness had been effected on the submission that the substance which was recovered from him was not known by the accused to be ganja or that the accused was merely plying his vehicle for commercial purpose and that he did not know what was contained in the cabin as is the argument now propounded before this Court. PW-3 (Constable Prem Prakash) is

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the second recovery witness. He had deposed on the same lines as PW-2. He had deposed that the accused was asked to show rear cabin of his vehicle where 37 packets wrapped in a separate panni was found. The recovered contraband was ganja. This witness was also subjected to a lengthy cross-examination. He denied the suggestion that no recovery was effected from the accused. This suggestion given to PW-3 is contrary to the defence of the accused which is to the effect that although the contraband was recovered from his custody but it was not in his conscious possession. At the cost of repetition the suggestion given to PW-2 was that recovered ganja was planted upon the appellant. PW-4 (Contable Azad Singh) was another member of the raiding party. He had also deposed on the same lines. In his cross-examination he denied the suggestion that his statement was not recorded. PW-7 (ASI Ved Pal Bhardwaj) had been marked investigation of this case and he had been accompanied by PW-2, PW-3 and PW-4. His deposition is also on the same lines as PW-2. He has categorically stated that 37 packets which were found in the rear cabin of the vehicle of the appellant contained ganja and smell of ganja was emanating from these packets. He admitted that the proceedings lasted up to 7.30 p.m. He

denied the suggestion that he is deposing falsely or that nothing was recovered from the vehicle.

9. PW-9 (SI Bharat Bhushan) was the second Investigating Officer. He had also recorded the statement of the witnesses and had obtained a report of the FSL which had tested the samples positive for ganja. He was subjected to a cross-examination wherein he had stated that on the interrogation of the accused it was revealed that the source person was Ajay and the contraband was given to a person at Shakarpur. The accused was carrying this contraband for Ajay. PW-9 had gone to the house of Ajay. Ajay was found to be absconding from the house. In spite of efforts being made, he could not be traced. PW-9 denied the suggestion that Ajay was main culprit and he has been deliberately let off. This version of PW-9 in his cross-examination has also been highlighted by the learned defence counsel substantiating his argument that it was at the behest of Ajay that the appellant was carrying this contraband. He had to deliver it to Ajay. Ajay was deliberately not arrested by the investigating agency for the reasons best known to them.

10. It is an admitted fact and it is clear from the versions of PW-2, PW-3, PW-4 and PW-7 that the accused was found to be in possession

of ganja which was contained in 37 individual packets which were recovered from the rear cabin of his tempo which he was driving. All these facts stand admitted by the appellant. The only argument raised by the appellant before this Court is that there was a mere custody of substance and the appellant did not have the knowledge that it was a drug. Provision of Section 35 of the NDPS Act was not attracted.

11. This submission of the learned counsel for the appellant is wholly negated by the evidence which had been brought on record. The appellant was the only person in the tempo which had been apprehended at the time when the members of the raiding party signalled him to stop. His submission that he was carrying these goods for Ajay did not find mention in the first defence which was raised by him which was at the time of cross-examination of the witnesses of the prosecution. In fact, (as noted supra) the defence of the accused was conflicting. The suggestion given to PW-2 was that the accused was made to sign on blank papers which were later on converted into documents to substantiate the version of the prosecution. The suggestion given to PW-3 was that the recovery was planted upon the appellant. Both these defences are contrary to the arguments now raised before this Court.

The argument now raised before this Court is that although admittedly the recovery of the substance was made from the appellant but the fact that this was contraband was not known to him. This is also not the defence of the appellant in his statement recorded under Section 313 Cr.P.C. wherein also his only defence was that the recovery had been planted upon him. The appellant is clearly blowing hot and cold. He is confused.

12. The fact that the custody of this substance which was later on revealed to be ganja was recovered from the appellant persuades this Court to hold that prima facie it had been established by the prosecution that the accused was in possession of the same. The prosecution in these circumstances can validly rely upon the presumption contained in Section 35 and Section 54 of the NDPS Act which read 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.

Explanation. -In this section “culpable mental state” includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(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.

“54. Presumption from possession of illicit articles

In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of-

(a) Any narcotic drug or psychotropic substance or controlled substance;

(b) Any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) Any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(d) Any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily.]”

13. These provisions speak of the culpable mental state of the accused and presumption of possession of illicit articles. These presumptions come into play.

14. There is no doubt to the proposition that these presumptions may be rebutted but it was for the accused to have rebutted these presumptions and to lead evidence either in the form of the defence emanating at the time of the cross-examination of the witnesses of the prosecution or at the time when the statement of the accused under Section 313 Cr.P.C. was recorded or again when he was granted opportunity to lead evidence in defence; none of these stages had been availed of by the appellant. He having failed to rebut these presumptions, the prosecution is rightly entitled to avail the same.

15. In this case the vehicle in which these goods were being transported was admittedly being driven by the accused and in spite of asking him to show the papers of the vehicle he could not produce the same. The accused did not deny the fact that the tempo in which the recovered contraband was recovered was being driven by him. The appellant had failed to satisfactorily account for the possession of this contraband which was a huge quantity of 324 kg which was recovered. The fact that this contraband was contained in 37 different packets each individually packed and wrapped and even on a bare look at the articles a strong smell of ganja was emanating (as is the cogent version of PW-2,

PW-3, PW-4 and PW-7), the presumptions as aforementioned were rightly attracted and the accused having failed to rebut these presumptions it can safely be said that the prosecution has been able to establish that the appellant had full knowledge that what he was transporting was in fact ganja. This is also supported by his statement recorded under Section 67 of the NDPS Act (Ex.PW-9/B) which was recorded by PW-9 and which can be used for the purposes of corroboration. PW-9 has also elaborately explained that efforts to trace Ajay (to whom the appellant had to deliver the contraband) had failed. The Investigating Agency not having able to nab Ajay would not entitle the appellant to a benefit on this score; this would not work as a defence for him.

16. The judgments relied upon by learned counsel for the appellant are all distinguishable. They were passed on their own factual matrix.

17. The prosecution has been able to successfully establish that the accused was in conscious possession of the contraband. It was not only the corpus but the animus to possess which has also been established. The presumptions under Sections 35 and 54 of the NDPS Act which mandatorily accrue in favour of the prosecution not having been rebutted, the appellant has failed to make out any case in his favour.

18. Appeal is without any merit. Dismissed.

INDERMEET KAUR, J

SEPTEMBER 10, 2015

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