

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA No. S-237-SB of 2003 (O/M)

Date of decision : 29.1.2016

Balwant Singh

..... Appellant

Versus

State of Haryana

..... Respondent

CORAM : HON'BLE MR. JUSTICE KULDIP SINGH

Present:- Mr. R.S. Chahal, Advocate, for the appellant.

Mr. M.S. Sidhu, Additional A.G. Haryana.

1. Whether the Reporters of local newspaper may be allowed to see the judgment ?
2. To be referred to the Reporter or not.
3. Whether the judgment should be reported in the digest ?

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KULDIP SINGH J.

This appeal is directed against the judgment of conviction dated 8.1.2003 and order of sentence dated 10.1.2003, passed by the learned Additional Sessions Judge, Fatehabad, vide which the appellant was convicted under Section 15 (e) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the NDPS Act') and was sentenced to undergo rigorous imprisonment for 10 years and fine of rupees one lac, in default thereof, to further undergo rigorous imprisonment for a period of two years, for allegedly keeping in his possession 200 kilograms of poppy husk.

Facts

On 27.8.1999, ASI Guriya Ram alongwith other police officials was present at Bus Stand Nagpur when he received a secret

information that the accused indulges in the sale of poppy husk and if a raid is conducted, a huge quantity of poppy husk can be recovered from the fields of the accused. The information being credible, intimation was sent to Police Post Madh for summoning Charanjit Singh, DSP (Headquarters) through V.T. Message. When DSP Charanjit Singh reached the Bus Stand Nagpur, a raiding party was constituted. In the meanwhile, one Hans Raj son of Banwari Lal, resident of village Haroli was also joined in the investigation by the Investigating Officer. Thereafter, all of them proceeded to the *Dhani* (Farm House) of the accused Balwant Singh. Accused was sitting in his fields towards Western side of his farm house. When the police party approached him, he was found sitting on a bag. The DSP enquired about his name and identity. The DSP asked the Investigating Officer ASI Guriya Ram to conduct the search of the bags. Five bags were lying there. On checking, poppy husk was recovered from the bags. 100 grams was separated as sample from each bag. Remaining poppy husk in each bag came to 39.900 kilograms. The sample and the bulk case property were sealed and the seal was handed over to DSP. Rough site plan was prepared. The case property was taken into possession. Accused was arrested. On returning to the police station, the case property, accused and the witness were produced before SI/SHO Som Raj, who verified the facts and affixed his seal 'SR' on the sample parcel and residue and directed the Investigating Officer to deposit the case property with MHC.

The accused was chargesheeted under Section 15 of the NDPS Act. In supported of its case, the prosecution examined Charanjit Singh, DSP (PW1), ASI Guriya Ram (PW2), SI Som Raj (PW3), HC Tarsem Singh (PW4) and Constable Ramesh Kumar (PW5). When examined under Section 313 Cr.P.C., accused denied the evidence led against him and pleaded false implication. The accused did not lead any evidence in defence.

After hearing the prosecution, defence and going through the evidence, the learned Additional Sessions Judge, Fatehabad, convicted and sentenced the accused as aforesaid.

Contentions

The learned counsel for the appellant has vehemently contended that conviction of the accused is not sustainable in the eyes of law. He has argued that there are glaring discrepancies and shortcomings in the prosecution case. It has been argued that the sample of the poppy husk was sent after 12 days i.e. on 9.9.1999. Therefore, the possibility of tampering with the same cannot be ruled out.

The report of the chemical examiner shows that the sample was received with the seal intact and there is nothing to show that the parcel of sample was ever tampered with. The mere fact that only one sample was prepared does not mean that the same is not representative sample and cannot be relied upon. However, the fact that only one sample was taken out was never agitated before the lower Court.

The learned counsel for the appellant has further contended that the VT message, through which DSP Charanjit Singh was summoned, was not produced on file. In this regard, he has referred to the statement of DSP Charanjit Singh (PW1).

I am of the view that the facts and circumstances show that DSP Charanjit Singh was summoned and had joined the police party prior to the raid. Therefore, the production of VT message was not necessary.

It has been further argued that the secret information was not reduced into writing. Therefore, it cannot be relied upon.

I am of the view that non recording of secret information into writing is merely an irregularity and not an illegality, so as to cut the root of the prosecution case. The prosecution story shows that immediately, on receiving the secret information, the Investigating Officer ASI Guriya Ram, started the formalities to conduct the raid. He sent a request to DSP to come at the spot. Thereafter, an independent witness was joined and thereafter, without losing any time, the police party proceeded to farm house of the accused where the accused was apprehended. In these circumstances, practically the Investigating Officer had no time to first record the information, so as to lose valuable time, as a result of which, accused might slip away from the said place of recovery. Similarly, non-examination of independent witness is not material. It is of common knowledge that people are scared of deposing against smugglers of the contraband for fear of reprisal.

The learned counsel for the appellant has further argued that there are discrepancies in the statements of prosecution witnesses. According to the statement of DSP Charanjit Singh, they approached the farm house from the Northern side. No family member was found in the farm house. However, ASI Guriya Ram has stated that they approached the farm house from the Eastern side.

The witnesses were examined after the elapse of long time and such discrepancies of the direction 'East' or 'North' is material. The prosecution case is corroborated on all the material particulars. The handing over of seal to DSP is also no ground to doubt the prosecution case.

The learned counsel for the appellant has further argued that the presence of DSP at the spot is doubtful. It has been argued that the DSP has merely attested the recovery memo (Ex.PA). Although, the recovery memo Ex.PA shows that it was prepared by ASI Guriya Ram and attested by Hans Raj and Rajender Parsad and in token of recovery being effected in his presence, the DSP attested the same, but it does not mean that the DSP was not present at the spot. The writing on the memo, signatures of the witnesses and that of DSP are with the same ink, which indicates that all of them were present at the same time when the memo was prepared.

The learned counsel for the appellant has further argued that the ownership of farm house is not proved.

I am of the view that it is not required to be proved. The foundation of this case is the recovery of five bags of poppy husk from

the accused. The accused was sitting on one of the bags. It will be immaterial whether the property, from where the recovery was effected, belongs to the accused or not.

I also do not agree with the contention of the learned counsel for the appellant that the provisions of Section 42 of the NDPS Act were required to be complied with in the present case. Here the recovery is from the open fields. Therefore, the provisions of Section 42 of the NDPS Act are not attracted. Similarly, the provisions of Section 50 of the NDPS Act are also not attracted in the present case since it is not a case of personal search. Accused was sitting on a bag and the recovery was not effected from his personal search.

The learned counsel for the appellant has further argued that in this case, the conscious possession of contraband from the accused is not proved. He is alleged to be merely sitting on a bag, from which according to the police version, the poppy husk was recovered. No specific question regarding conscious possession was also put to the accused in his statement under Section 313 Cr.P.C.

Reliance has been placed by the learned counsel for the appellant on the authority of the Hon'ble Supreme Court in State of Punjab Versus Hari Singh and others, 2009 (2) RCE (Criminal) 143. The fact whether the conscious possession was there or not can be made out from the circumstances. Five bags of poppy husk were lying in the open fields of the accused. The accused was sitting on one of them. The poppy husk emits a smell, from which one can easily suspect that it is a contraband. It is for the accused to explain as to

how he came to sit on the said bag. No reliable explanation was furnished by the accused. He simply denied the prosecution evidence. A specific question was put to him that he was apprehended, while he was sitting on one bag, while four other bags were lying nearby. Accused simply denied it as incorrect without giving any explanation.

The learned counsel for the appellant has also relied upon the authority of the Hon'ble Supreme Court in Union of India Versus Bal Mukand and others, 2009 (2) RCR (Criminal) 574.

The matter regarding conscious possession was recently examined by the Apex Court in Gian Chand and others Versus State of Haryana, 2013 (3) RCR (Criminal) 916. The Apex Court examined as to what is the conscious possession and whether the prosecution is required to prove the conscious possession ? The Apex Court observed as under :-

“13. The appellants were found travelling in a jeep at odd hours in the night and the contraband material was found. Therefore, the question arises whether they can be held to have conscious possession of the contraband substances.

This Court dealt with this issue in Madan Lal and Anr. v. State of Himachal Pradesh, 2003 (4) RCR (Criminal) 100, observing that Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences and penalties for possession of such articles. Undoubtedly, in order to bring home the charge of illicit possession, there must be conscious possession. The expression ‘possession’ has been held to be a polymorphous term having different meanings in contextually different backgrounds. Therefore, its definition cannot be put in a straitjacket formula. The word ‘conscious’ means awareness about a particular fact. It is a state of mind which is deliberate or intended. Possession in a given case need not be actual physical possession and may be constructive i.e. having power and control over the article in case in question, while the person to whom physical possession is given holds it subject to that power or control. The Court further held as under:

“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 within his

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special knowledge. Section 35 of the Act gives a statutory recognition of this position because of 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....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.” (Emphasis added)

14. From the conjoint reading of the provisions of Section 35 and 54 of the Act, it becomes clear that if the accused is found to be in possession of the contraband article, he is presumed to have committed the offence under the relevant provisions of the Act until the contrary is proved. According to Section 35 of the Act, the court shall presume the existence of mental state for the commission of an offence and it is for the accused to prove otherwise.

Thus, in view of the above, it is a settled legal proposition that once possession of the contraband articles is established, the burden shifts on the accused to establish that he had no knowledge of the same.

15. Additionally, it can also be held that once the possession of the contraband material with the accused is established, the accused has to establish how he came to be in possession of the same as it is within his special knowledge and therefore, the case falls within the ambit of the provisions of Section 106 of the Evidence Act, 1872 (hereinafter referred to as ‘the Act 1872’).

16. In State of West Bengal v. Mir Mohammad Omar and Ors. etc. etc., 2000 (4) RCR (Criminal) 147, this Court held that if the fact is specifically in the knowledge of any person, then the burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused.”

In a later case, titled as Kulwinder Singh and another Versus State of Punjab, 2015 (2) RCR (Criminal), 918, the Apex Court reiterated the view already taken in Gian Chand's case (supra). The judgment of the Apex Court in Hari Singh's case (supra) was considered in Gian Chand's case (supra). Therefore, if the law laid down by the Apex Court is applied in the facts of the present case, the

prosecution was only required to prove the possession of the accused, which is proved. Then, the burden of proof shifts on the accused to show that he was not in conscious possession or in the alternative explain as to under what circumstances, he came in possession of the contraband. The case of the accused is simple denial.

In these circumstances, the possession of contraband is proved. Therefore, the prosecution has been successful in proving that the accused was found in possession of 200 kilograms of poppy husk, which is a commercial quantity. There is no illegality or infirmity in the judgment of conviction and order of sentence, passed by the Court below. Hence, I do not find any merit in the present appeal and the same is accordingly dismissed.

(KULDIP SINGH)
JUDGE

29.1.2016
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