

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRA-D-No.458-DB OF 2013
DATE OF DECISION : 16th MAY, 2018

Abdul Habib @ Rehan

.... Appellant

Versus

State of Punjab

.... Respondent

**CORAM : HON'BLE MR. JUSTICE A. B. CHAUDHARI
HON'BLE MR. JUSTICE B. S. WALIA**

* * * *

Present : Mr. Deepinder Brar, Advocate for the appellant.

Mr. H. S. Sullar, Deputy Advocate General, Punjab.

* * * *

A. B. CHAUDHARI, J.

1. Being aggrieved by the judgment and order dated 19.12.2012 in case SC No.82 of 26.05.2010 passed by the Special Court, Ludhiana in FIR No. 119 dated 19.11.2009 registered under Section 21/61 of Narcotic Psychotropic Substances Act (in short, NDPS Act) at Police Station Division No.8, Ludhiana, by which the appellant Abdul Habib @ Rehan son of Gulam Hajrat resident of Part-III, Guard Base, Kabul, Afghanistan, was convicted for offence under Section 21 of the NDPS Act and was sentenced to undergo rigorous imprisonment for a period of 12 years and to pay a fine of ₹1,20,000/- and in default of payment of fine, to undergo rigorous imprisonment for 1 ½ years, the present appeal was filed by him in this Court.

FACTS:

2. On 19.11.2009, SI Gurpreet Singh along with ASI Sarabjit Singh and other police staff members were present at Old Court Chowk

in connection with patrolling and checking, when they received secret information that Ravinder Singh son of Manjit Singh had brought a wooden box of Kandhari pomegranate from *Sabji Mandi* Ludhiana. The box was opened and two small concealed wooden boxes under the pomegranate were found therein, in which heroin packed in polythene bags was found. Ravinder Singh stated that he was ignorant about it and the boxes were lying as they were. He had brought those boxes from Rakesh Kumar Brij Lal fruit commission agent who had purchased forty boxes like that from Krishan Lal Girish Kumar, commission agents at Azadpur, Fruit Mandi, New Delhi, who was the importer of pomegranate from Afghanistan. The police party checked the shop of Ravinder Singh and recovered two small wooden boxes in which two polythene bags filled with heroin were lying. Thereafter samples of 10 grams each taken and sent for testing, after following the due procedure about sealing the same. The investigation commenced and the statements of witnesses were recorded. It was revealed during investigation that four Afghanistan merchants also were selling the fruits imported from Afghanistan which had reached Attari border via Pakistan. Thereafter the investigation was completed by SI Gurpreet Singh who had lodged the FIR and challan was filed by him. The prosecution examined as many as eighteen witnesses and thereafter closed its case. The defence was of denial. Learned trial court after hearing the rival parties and going through the evidence, convicted the appellant as stated above.

ARGUMENTS:

3. In support of the appeal learned counsel for the appellant vehemently argued that the appellant was arrested on 28.11.2009. The

trial court has awarded the sentence of twelve years, out of which the appellant has already completed the actual sentence of eight years five months and five days as on 14.05.2018. He submitted that he is a foreign national namely citizen of Afghanistan. The prosecution did not have any evidence about the appellant having been involved in the said alleged crime regarding transport of heroin as allegedly recovered by the police. On the contrary, the documentary evidence which indicated that the present appellant was dealing in the supply of beadana pomegranate and had nothing to do with the import of heroin-the prohibited contraband. In the alternative he submitted that at any rate the appellant has completed almost about nine years of imprisonment and the sentence ought to be reduced to the minimum provided by law, without prejudice to his right for claiming acquittal.

4. Per contra, learned State counsel opposed the appeal and submitted that the appellant had indulged in importing of heavy quantity of heroin by concealing in fruit boxes brought from Afghanistan via Pakistan through Attari border. That is the usual tactic of such smugglers and somehow the appellant was caught. He, therefore, prayed for dismissal of the appeal.

CONSIDERATION:

5. We have heard learned counsel for the rival parties and perused the entire documents along with the evidence tendered by the prosecution. It appears from the record and as then discussed by the trial court that pomegranate used to be imported to Delhi from Afghanistan merchants and was being sold to Krishan Lal Girish Kumar of Delhi. The boxes of pomegranate sold to Ravinder Singh of Ludhiana and in

particular a box was seen with packets of heroin 1800/1800 grams which was kept concealed.

6. Insofar as the present appellant is concerned, the trial court has given cogent reasons in para 29 of its judgment, which are based on evidence. We quote paragraph 29 as under:

“29. There is sufficient cogent evidence on the file which connect the accused in the present case. The heroin weighing 3K-600gm was recovered from the box containing pomegranates from the fruit shop of Ravinder Singh who stated that he purchased the said pomegranate box from the firm M/s Rakesh Kumar Brij Lal, Commission agent Ludhiana. PW9 Rakesh Kumar stated that he had purchased the said box along with other 69 boxes from the firm KLG import and export, Sabzi Mandi, New Delhi and the partner Girish Kumar of KLG import and Export stated that the pomegranate imported through their firm M/s KLG import and export by the accused on the basis of 6% commission. Girish Kumar PW2 specifically stated in his statement that accused used to import the pomegranates through their firm on the basis of 6% commission. Further he specifically stated that the wooden box of pomegranate in which the heroin was found, was imported to their firm by Abdul Habib @ Rehman present in the court. He further stated that on 13.11.2009 he received a phone call from accused that he had sent 500 boxes containing pomegranates and out of those boxes, 4 boxes containing beadana

pomegranates which are marked “bey” in Urdu language. Accused asked him to bring these boxes at Delhi and he asked Ashok Kumar PW16 on telephone to send these boxes at Delhi as per directions of accused but Ashok Kumar forget his instructions and those boxes got mixed up with the other boxes. PW16 Ashok Kumar admitted these facts while appearing into the witness box and stated that he does not know the Urdu Language, so these boxes were mixed with the other boxes and the same reached on different places. Out of which one box of pomegranate containing Beadana pomegranates got purchased by Ravinder Singh PW3 from the shop of PW9 Rakesh Kumar. It has been proved on the file through the statement of PW3 and PW9 that the box of pomegranate from which the heroin was recovered was the quality of Beadana pomegranates. The evidence produced by the prosecution has fully connected the accused with the recovered contraband since it has been proved on file that four boxes containing beadana pomegranates were imported by the accused Abdul Habib through the firm KLG Import and Export, from Afghanistan via Pakistan. It is also established on the file that the accused was following the above said boxes of beadana pomegranates and verified regarding them through Girish Kumar partner of M/s KLG Import and Export and on his direction Girish Kumar told to Ashok

Kumar through telephone to sent these boxes to Delhi. So, the recovered heroin in this case is in conscious possession of accused who was having full knowledge that the heroin has been kept concealed in the box containing beadana pomegranates and the followed the same by contacting PW2 Girish Kumar through phone. Meaning thereby the accused has fully aware regarding the heroin which has been kept concealed in the box of beadana pomegranates. It is settled law by Hon'ble Supreme Court cited as **'Madan Lal and another vs. State of H.P.' 2003 SCC (CrI.) 1664** that **The word "conscious" means awareness about a particular fact. It is a state of mine (sic) which is deliberate or intended'. 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 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. So once the accused is found to be in possession of contraband, it is presumed that he has committed the offence until contrary is proved. As per Section 35 of the Act, it is the accused who has to prove that he was not in conscious possession of the contraband,**

failing which the Court is to presume that he was found in conscious possession of the contraband.”

7. The above evidence discussed by the trial court in para 29 clear-cut shows the complicity of the appellant in the crime in question. We have checked up the findings and reasons recorded by the trial Court by comparing with the evidence on record and we found that same has correctly been recorded in the judgment. The finding and fact recorded by the trial court is based on evidence and there is no reason whatsoever even to take any other view. We thus agree with the finding of fact recorded by the trial court that the appellant was found guilty of the offence for which he was charged.

8. We then find that the appellant was sentenced by the trial court for rigorous imprisonment for a period of twelve years and fine in the sum of ₹1,20,000/-. The custody certificate shows that there is no other offence against the appellant much less under NDPS Act. He was awarded sentence of twelve (12) years and has undergone sentence of almost nine (9) years but then this court cannot award the sentence below the minimum sentence provided by law namely ten (10) years. We, however, find that the appellant being Afghanistan national and there being no other offence to his credit, the sentence of twelve (12) years deserves to be reduced to the minimum sentence provided by law, namely ten (10) years and the fine in the sum of ₹1,20,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of three (3) months.

9. To sum up, we find that the conviction of the appellant will have to be maintained and we accordingly do so.

10. However, insofar as the sentence is concerned, we are inclined to modify the same by reducing the same to the minimum of ten (10) years prescribed by law and by modifying the sentence in default of payment of fine namely to bring down the default sentence to three months. In the result we make the following order:

ORDER

- (i) The CRA-D-No.458-DB OF 2013 is partly allowed.
- (ii) The judgment and order of conviction dated 19.12.2012 convicting the appellant for the offence under Section 21 of the NDPS Act, is upheld.
- (iii) The judgment and order of sentence dated 19.12.2012 awarded to the appellant is set aside and modified and the appellant is sentenced to undergo rigorous imprisonment for a period of ten (10) years in place of twelve (12) years and to pay fine in the sum of ₹1,20,000/- and in default of payment of fine the appellant has to further undergo rigorous imprisonment for a period of three months.
- (iv) The appellant, being citizen of Afghanistan, shall be deported by the authorities concerned, in accordance with law, from the jail after serving out the sentence.

16TH MAY, 2018
'raj'

(A. B. CHAUDHARI)
JUDGE

(B. S. WALIA)
JUDGE

Whether speaking/reasoned : *Yes* *No*

Whether Reportable : *Yes* *No*