

CRA-D-406-DB-2003
CRA-D-414-DB-2003
CRA-D-431-DB-2003
CRA-D-441-DB-2003
CRA-D-450-DB-2003
CRA-D-493-DB-2003

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Date of decision : 27.09.2019

(I) CRA-D-406-DB-2003 (O&M)

Gharsi Ram ...Appellant

Versus

State of Haryana ...Respondent

(II) CRA-D-414-DB-2003 (O&M)

Bishan Singh ...Appellant

Versus

The State of Haryana ...Respondent

(III) CRA-D-431-DB-2003 (O&M)

Bajrang ...Appellant

Versus

The State of Haryana ...Respondent

(IV) CRA-D-441-DB-2003 (O&M)

Hanuman Singh ...Appellant

Versus

The State of Haryana ...Respondent

CRA-D-406-DB-2003
CRA-D-414-DB-2003
CRA-D-431-DB-2003
CRA-D-441-DB-2003
CRA-D-450-DB-2003
CRA-D-493-DB-2003

(V) CRA-D-450-DB-2003 (O&M)

Shishpal **...Appellant**

Versus

State of Haryana **...Respondent**

(VI) CRA-D-493-DB-2003 (O&M)

Rajinder **...Appellant**

Versus

The State of Haryana **...Respondent**

CORAM:- HON'BLE MR. JUSTICE JITENDRA CHAUHAN
HON'BLE MR. JUSTICE H.S. MADAAN

Present: None for the appellant(s) in CRA-D-406-DB-2003.

Mr. B.S. Saroha, Advocate for the appellant(s)
in CRA-D-414-DB-2003 & CRA-D-441-DB-2003.

Mr. Sudhir Rana, Advocate for the appellant(s)
in CRA-D-431-2003.

Mr. K.D.S. Hooda, Advocate for the appellant(s)
in CRA-D-450-DB-2003.

None for the appellant(s) in CRA-D-493-DB-2003.

Mr. Vikrant Pamboo, DAG, Haryana

JITENDRA CHAUHAN, J.

The captioned six criminal appeals are being disposed of by this single judgment, having arisen out of the common impugned judgment and order dated 07/09.04.2003, passed by learned Additional Sessions Judge, Fatehabad, (hereinafter referred to as 'the trial Court') whereby, all the appellants were convicted under Section 18(b) of Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act') and sentenced to undergo rigorous imprisonment for twelve years and fine of ₹100,000/- each with default stipulation.

Brief facts of the present case as noticed in para No.2 of the judgment passed by the trial Court are as under:-

“2. *Brief facts of the prosecution case are that on 1.10.2000 Rajinder Singh Inspector, CIA Staff Fatehabad alongwith other police employees was present at T-Point Pilimandori on Fatehabad-Bhattu Kalan road in the area of village Bhattu Kalan. Kanhi Ram son of Ranjit Singh met them by chance. They were talking. In the meantime, a jeep bearing registration No.RJ-23C-1145 came from the side of village Pilimandori. Investigating Officer Inspector Rajinder Singh gave the signal to stop the jeep. The driver of the jeep stopped the jeep and he got perplexed. The jeep was surrounded by the police officials. Investigating officer checked the jeep. Five persons were sitting in the rear portion of the jeep. They were*

holding a plastic bag. Those persons disclosed their names as accused Shishpal, Bishan Singh, Gharsi Ram, Rajinder @ Raju and Hanuman. The driver of the Jeep disclosed his name as Bajrang Lal. Investigating Officer suspected the narcotic substance in the plastic bag and he served a notice under section 50 N.D.P.S. Act Ex.P-6 upon all the accused informing them that he suspects some narcotic substance in the bag in their possession and he wants to take the search and if they want some gazetted officer or magistrate can be called at the spot for their search in his presence. All the six accused gave reply to the notice is Ex.P.7 that they want their search in the presence of any gazetted officer. Thereafter Investigating Officer sent wireless message to Sh. Ashok Sheoran, Deputy Superintendent of Police, Fatehabad and requested him to reach at the spot. Sh. Ashok Kumar, DSP Fatehabad reached at the spot and on his direction the search of the plastic bag was taken which was found containing liquid opium which was further kept in a rexine bag. Investigating officer separated two samples of 100 grams opium each and remaining opium on weighing came to 11 kgs. 800 grams. Separate parcels of both the samples and residue opium were prepared and were sealed with the seal bearing impression RS by the Investigating Officer, DSP Ashok Sheoran also affixed his seal bearing impression AS on all the parcels. Investigating Officer handed over his seal after use to Mohinder Singh, SI. The entire case property along with jeep No.RJ-23-C-1145, its registration certificate and driving licence of

accused Bajrang Lal were taken into possession vide recovery memo Ex.P8. Investigating Officer sent written information Ex.P2 to the police station, on the basis of which formal FIR Ex.P3 was registered. Instigating Officer prepared site plan of recovery Ex.P13. The accused were arrested.

3. *On reaching the police station Bhattu Kalan, Investigating Officer produced all the six accused, witnesses and the case property before Ved Parkash ASI, SHO Police Station, Bhattu Kalan and also submitted his report under Section 57 NDPS Act Ex.P14. ASI Ved Parkash, SHO Police Station, Bhattu Kalan verified the facts of the case from the accused and the witnesses and affixed his seal bearing impression VP on all the parcels of the case property. He made his endorsement Ex.P5 on the report Ex.P14 and sent the same to D.S.P., Head Quarter, Fatehabad. Case property was deposited in intact condition with the Moharrir Head Constable. The samples were sent to F.S.L. Madhuban for analysis which were identified as opium vide report Ex.P16 and on completion of the investigation, present challan was filed.. ”*

The accused were charge-sheeted for the commission of the offence under Section 18 of the NDPS Act, to which they pleaded not guilty and claimed trial.

In support of its case, the prosecution has examined PW-1, ASI Sadhu Ram, who had recorded statements of MHC Om Parkash and

Constable Satbir Singh under Section 161 Cr.P.C.; PW-2, Constable Sukhbir Singh, a formal witness who has filed his affidavit Ex.P1; PW-3, Ved Parkash, ASI, the then SHO Police Station, Bhattu Kalan, has proved the formal FIR Ex.P3, which was registered by him on receipt of written information Ex.P2, endorsement Ex.P5 on the report under Section 57 of the NDPS Act submitted before him by the Investigating Officer; PW-4, Inspector Mohinder Singh, one of the witnesses of recovery; PW-5, Inspector Rajinder Singh, Investigating Officer; PW-6, HC Om Parkash, the then Moharrir Head Constable, Police Station Bhattu Kalan filed his affidavit Ex.P15; and PW-7, Ashok Sheoran, Deputy Superintendent of Police. The report of the FSL was also tendered in evidence as Ex.P16.

Thereafter, statements of the accused under Section 313 Cr.P.C were recorded and entire incriminating circumstances appearing in the prosecution evidence were put to the accused to which they denied and pleaded false implication. Accused Rajinder, Haunman, Bishan Singh, Gharsi and Bajrang Lal pleaded that the witnesses are police officials and they are interested in this case and thus, deposing falsely. They are innocent. Accused Shishpal pleaded innocence and stated that the jeep was taken into possession from bus-stand Fatehabad and the persons standing near the jeep were detained and were taken to CIA Staff and were tortured. When they protested to lodge a complaint to the higher authorities, they were falsely implicated. In defence, the accused examined DW-I, Kanhi

Ram son of Ranjit Singh, who was joined as a witness of recovery by the prosecution. He has stated that on 01.10.2000 he visited police station Bhattu Kalan in connection with the work relating to his liquor vend. Five to six persons were detained in the police station and the police obtained his signatures on blank papers. The police neither recovered any opium from the possession of the accused persons in his presence at T-point Pilimandori nor they were apprehended there in his presence while travelling in a jeep. He further stated that he has been cited as a witness by the police in several cases prior to this in the same manner.

After appraisal of the evidence, learned trial Court convicted the accused-appellant under Section 18(b) of the NDPS Act and sentenced to undergo imprisonment as narrated above.

Feeling aggrieved against the judgement of conviction and the order of sentence passed by learned trial Court, the instant appeals have been filed by the accused/appellants.

It is contended that the appellants have been falsely implicated in the instant case. All the six accused belong to different villages and were not previously known to each other. The prosecution has failed to prove any nexus amongst them. The story propounded by the prosecution is also highly improbable inasmuch as it is unbelievable that five out of the total six accused would be jointly holding on bag containing 12 kgs. of liquid opium. The version has been propounded just to show that all the accused were in

conscious possession. The independent witness cited by the prosecution, Kanhi Ram, has not supported the case of the prosecution. Rather, he was examined in defence after having been given up by the prosecution. This creates a huge doubt in the prosecution story. The defence version and the version put forth by the independent witness appear to be probable and truthful than that of the prosecution. The link evidence is totally missing in this case. There are serious discrepancies in the testimonies of the prosecution witnesses viz. whether the samples were handed over to Constable Sukbhir Singh on 11.10.2000 or on 12.10.2000. Further, as per the prosecution story, two samples of 100 grams each were taken out of the total recovery but in the laboratory, one was found to be weighing 150 grams and other sample was found to be weighing 94 grams. Similarly, HC Om Parkash, PW6, had made improvements in his affidavit regarding the deposit of sample, sample seal with him by the investigating officer, etc. The search and seizure of the contraband was allegedly effected by Inspector Rajinder Singh and the investigation in the case was also done by him. Thus, the search and seizure of the contraband stands vitiated. The alleged notice which was given to the six accused of this case was a joint notice. The alleged reply of all the accused to that notice was also joint reply. Such an action on the part of the prosecution is impermissible under the provisions of Section 50 of the NDPS Act. Arguments on the same lines have been advanced on behalf of the two unrepresented appellants..

On the other hand, learned State counsel submits that there was no motive with the police officials to falsely implicate the accused-appellants. All were arrested on the spot. The contraband cannot be said to have been planted keeping in view its high cost. The minor contradictions/infirmities indicated by learned counsel for the appellants show that the prosecution story is truthful and no witness has suffered parrot-like statement.

Heard learned counsel for the parties and carefully perused the record.

In the instant case, all the appellants were apprehended while travelling in a jeep by the police party headed by PW-5 Inspector Rajinder Singh. Five accused were sitting in the rear portion of the jeep whereas, appellant Bajrang Lal was driving the vehicle. A bag containing 12 kgs. of liquid opium was recovered from the appellants. The argument raised by learned counsel for the appellants with regard to false implication warrants dismissal as huge quantity of 12 kgs. of liquid opium was recovered. There is nothing on record to suggest that accused were known to the police party particularly, when no mala fide has been alleged against the police party and the accused were not known to any member of the police party. Thus, in the absence of any enmity with the members of the police party, there was no motive for the police to falsely implicated the accused in the instant case. Only appellant Shishpal has alleged that all the accused were taken into custody along with the jeep in question from Bus Stand, Fatehabad and were

taken to CIA Staff and tortured in the Police Station. On raising a protest, the accused were implicated in this case. The statement of appellant-Shishpal that the accused were taken into custody along with the jeep in question from the bus-stand also cannot be accepted as a gospel truth as the vehicle in question is not a commercial vehicle.

It has been argued on behalf of the appellants that the story put forth by the prosecution is highly improbable as it is unbelievable that all the five occupants sitting in the rear portion of the jeep were having their hands on the bag. Such a version, at the most, can be said to be an exaggeration but cannot be discarded as a whole keeping in view the fact that a heavy quantity of contraband was recovered from the possession of the accused-appellants. The prosecution version has to be judged keeping in view all the attending circumstances.

The next argument with regard to the independent witness supporting the defence version is also without force. PW Kanhi Ram was given up by the Public Prosecutor as having been won over by the accused vide his statement dated 19.09.2001 on the police request (Mark X). He has stepped into the witness-box as DW1 and supported the case of the accused. In his cross-examination, this witness has stated that he was previously known to accused Gharsi and Shishpal. He further stated that accused Gharsi was driving the jeep. A relative of accused Shishpal was his partner in a liquor vend at Churu (Rajasthan). Thus, it is clear that Kanhi Ram had

close relations with accused Gharsi and Shishpal. He has also stated in his cross-examination that he cannot tell the name of any case in which he has been cited as witness by the police prior to this. So his version in examination-in-chief that he was cited as a witness by the police in several cases prior to this case in this very manner is belied. So, this witness is not trustworthy and his version cannot be accepted.

Learned counsel for the appellants have tried to point out some discrepancies in the testimonies of the prosecution witnesses. Constable Sukhbir Singh, while appearing as PW-2 has stated that he received sample on 11.10.2000, but as per the prosecution case, the samples were handed over to him on 12.10.2000 as is evident from the affidavit Ex.P15, filed by HC Om Parkash, PW-6. Further, there is discrepancy in the constabulary number of Sukhbir Singh. While appearing as PW-2, Sukhbir Singh has stated his Constable No.730 in his statement, whereas, in the report of the FSL, it is mentioned that the samples were received through Constable Sukhbir Singh No.432. In this regard, it is to be noted that Sukhbir Singh while appearing as PW2 furnished his affidavit Ex.P1 which is also part of his statement. The affidavit Ex.P1 reveals that he had received the samples from HMC Om Parkash on 12.10.2000 and on the same day, samples were deposited by him with the FSL. His version is corroborated from affidavit Ex.P15, furnished by Om Parkash, PW6, wherein also it has been stated that the samples were handed over by him to Constable Sukhbir Singh on

12.10.2000. Report of the FSL Ex.P16 also shows that the samples were received in the laboratory on 12.10.2000. Even otherwise, Constable Sukhbir Singh has stepped into the witness-box and faced lengthy cross-examination. Therefore, a minor defect in his affidavit with regard to the date of receiving the samples by him is inconsequential. As regards the argument with regard to contradiction regarding date of issuance of the docket for dispatch of the samples is concerned, the same is notice to be discarded. In this regard, reference can be made to the FSL report Ex.P16, wherein, the date of forwarding letter of DSP is mentioned as 09.10.2000. In fact, the samples were dispatched to FSL vide road certificate No.426 dated 12.10.2000 and as per the prosecution case also, the samples were despatched to FSL on 12.10.2000. As per the statement of Constable Sukhbir Singh, PW2, road certificate/docket were issued on the same day when the samples were handed over to him. Therefore, his version in the cross-examination that he had received the samples on 11.10.2000 seems to be an inadvertent mistake which is liable to be ignored. There is force in the contention of learned State counsel that the discrepancies pointed out in the statements of the prosecution witnesses are not material, especially after a long passage of time. The witnesses are indeed not expected to repeat a parrot-like version in the witness box.

In this case, the samples had been sealed by three persons i.e. Inspector Rajinder Singh, Investigating Officer; DSP Ashok Kumar Sheoran

and ASI Ved Parkash, SHO, Police Station Bhattu Kalan. There is no ground to disbelieve the version of an officer of the rank of a Deputy Superintendent of Police until and unless it is alleged and proved with cogent evidence that such an officer had acted in a *mala fide* manner or was nursing ill-will against the accused person. Nothing of this sort has been brought on record. The non-handing of sample seals to the independent witness is also of not much significance when the seals are found intact by the FSL. Even otherwise, it is not a mandate of law. It is a settled principle of law that when the seals used in sealing the sample(s) are received by the laboratory in intact condition and tallied with specimen seals sent along with the sample, no prejudice can be said to have occurred with the accused. The delay, if any, in sending the samples to the FSL also cannot be used to brush aside the entire evidence particularly, when the seals are found intact by the laboratory.

There is no doubt that as per the prosecution story, two samples of 100 grams each were taken out of the total recovery but in the laboratory, one was found to be weighing 150 grams, whereas, the second weighed just 94 grams. However, such discrepancy stands explained in the FSL report Ex.P6 itself. The sample weighing 94 grams was received in the laboratory in a polythene whereas, the sample weight 150 grams was received in a container and the weight thereof was included. It is also to be noted that the samples were extracted on the spot using a conventional balance which

admittedly is not that accurate. Thus, no benefit can be accorded to the accused-appellants on this count.

The question whether an accused was in conscious possession of the contraband or not, has to be determined on the facts and circumstances of each case. Reliance in this regard can be placed on a decision rendered in ***Madan Lal and Anr. v. State of H.P., 2003 SCC (Cri) 1664***, wherein Hon'ble the apex Court while dealing with the connotation and scope of expression "possession" and "conscious possession" has observed thus:-

"19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record are that all the accused persons were travelling in a vehicle and as noted by the trial Court they were known to each other and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

20. Section 20. makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

21. It is highlighted that unless the possession was coupled with the requisite mental element i.e. conscious possession and not mere custody

without awareness of the nature of such possession, Section 20 is not attracted.

22. The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in **Supdt. and Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja** to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

23. The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended.

24. As noted in **Gunwantlal v. State of M.P.**, possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given holds it subject to that power or control.

25. The word "possession" means the legal right to possession (see: **Heath v. Drown**). In an interesting case it was observed that where a person keeps his fire-arm in his mother's flat which is safer than his own home, he must be

considered to be in possession of the same. (See: Sullivan v. Earl of Caithness).

26. 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.

27. In the factual scenario of the present case, not only possession but conscious possession has been established. 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.

28. In fact, the evidence clearly establishes that they knew about the transportation of Charas, and each had a role in the transportation and possession with conscious knowledge of what they were doing. The accused Appellant Manjit Singh does not stand on a different footing merely because he was the driver of the vehicle. The logic applicable to other accused-Appellants also applies to Manjit Singh."

It is settled proposition of law that the prosecution has to stand on

its own legs and it cannot take the benefit of the weakness of the case of the defence. It is also the settled position that more serious the offence, the stricter is the degree of proof. In the instant case, the investigation conducted instills confidence. Admittedly, a gazetted officer was joined in the investigation who has fully supported the case of the prosecution. There is no evidence on record to show that he had any axe to grind against the appellant. The conscious possession of the contraband from the appellants has been fully established and once, possession of the contraband is proved, statutory presumption starts operating against the accused that they have committed the offence and burden of proof shifts upon the accused to rebut that presumption. Hon'ble the Supreme Court in ***Shivaji Sahobaro Bobade Vs. State of Maharashtra, 1973 Cri.L.J. (SC) 1783*** has held as under:-

“..... Even at this stage we may remind ourselves of a necessary social perspective in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden

thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person lightheartedly as a learned author has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicated 'persons' and more severe punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent.." In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing

enhance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents.....”

Analysed on the touchstone of the aforesaid principles stated and reiterated by Hon'ble the Supreme Court, the Court feels that the prosecution has been able to bring home the guilt of the appellants beyond reasonable doubt.

In the final analysis, this Court finds no merit in the instant appeals and the same are hereby dismissed qua judgment of conviction.

However, keeping in view the facts that the appellants are not the previous convicts and have suffered the agony of protracted trial, this Court is inclined to take a lenient view in the matter of sentence.

Accordingly, the order of sentence of rigorous imprisonment of the appellants is reduced from twelve years to ten years each. The sentence of fine shall remain intact. The appellants are stated to be on bail. They be taken into custody forthwith to suffer the remainder of sentence.

Partly allowed.

(JITENDRA CHAUHAN)
JUDGE

27.09.2019

atulsethi

(H.S. MADAAN)
JUDGE

Whether Speaking/reasoned
Whether Reportable

Yes/No
Yes/No